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SCAFFOLD

LAWS3446 – LABOUR LAW SCAFFOLD
TOPIC 2 – THE SUBJECT OF LABOUR LAW

- Now law conventionally divides workers in the marketplace into two types:
    - **Employees** – part of personal contract of employment where they are subordinate to the person they work for. Contract of service.
    - **Independent contractors** – operating in business on their own account and contracting their services in freely negotiated commercial agreements. Contract for service.
- Contract, Intention and the Reality of the Work Relationship:
    - The law is concerned with the reality of the work relationship, **form cannot dominate substance**.
    - The contracting parties cannot create something with all the features of a rooster and call it the duck! Per Gray J
    - The *Fair Work Act 2009*, ss 357-359: misrepresenting an employment relationship as an independent contract also attracts civil penalties.
        - **Misrepresenting Employment:** An employer cannot pretend that they are offering a person a job as an independent contractor when the position actually involves entering into an employment contract; s 357
            - Exception: this provision will not apply if the employer can prove that they did not know, and were not reckless, as to whether the engagement is not meant to be as an independent contractor but as an employee
        - **Dismissing to engage as IC:** An employer cannot dismiss an employee so that the former employee can be engaged as an independent contractor; s 358
    - Now have **watch dog** to monitor this type of conduct, do not need to wait for employees to complain through FWO
- An employer **cannot avoid the sham contracting provision in section 357** of the ***Fair Work Act 2009*** *(Cth)* **by introducing a third party** (such as a labour hire company) into the contractual arrangements; *FWO v Quest South Perth Holdings Pty Ltd [2015]*

1. **Multiple Indicia Test;** *Stevens v Brodribb Sawmilling Co Pty Ltd (1986)*

- No factor is determinative; rather all considered together
    - The degree of control exercised over the worker
    - The obligation on the worker to do the work personally (ie, their capacity to delegate to others)
    - The freedom to work for others
    - The place of work
    - The mode of enumeration, especially whether the worker is paid per hour
    - The responsibility for the provision and maintenance of assets and equipment
    - The creation of goodwill and the ownership of this
    - The risks and responsibility for loss or profit
    - The degree of integration of the worker into the organization
    - Who makes payments for sick leave, annual leave and long service leave
    - The arrangements made in relation to payment of taxation and workers compensation
    - The party's own characterisation of their relationship

Hollis v Vabu
Facts: Cyclist for Vabu hit Hollis – is Vabu vicariously liable? – will be if cyclist is an employee

- The **control test** is no longer a conclusive test for a requisite relationship.
- TEST: must consider the system which was operated thereunder and the work practices imposed by employer go to establishing '**the totality of the relationship'** between the parties.

Held: YES
Factors:

- 1. Low level of skill: Couriers not providing skilled labour or labour which required special qualifications.
- 2. Good will: A bicycle courier is unable to make an independent career as a freelancer or to generate any goodwill as a bicycle courier.
- 3. Level of control: The couriers had little control over the manner of performing their work and what they could wear
- 4. Representation to the world: The couriers were presented to the public and to those using the career service as emanations of Vabu. They were to wear uniforms bearing Vabu's logo.
- 5. Vabu superintended the courier's finances: Vabu produced pay summaries and couriers were required to dispute errors with the organisation. There was no scope for the couriers to bargain for the rate of their remuneration.
    - The method of payment, per delivery and not per time period engaged, is a natural means to renew my employees who sold duty is to perform deliveries.
- 5. Apart from providing bicycles and being responsible for the cost of repairs, couriers were required to bear the cost of replacing or repairing any equipment of Vabu that was lost or damaged, including

radios and uniforms
- 6. Refusal to give holidays means that the workers are not independent.
- 7. Workers didn't perform an 'added' or corollary part of the business of the Defendant - they did the main purpose.
- 8. Distribution of work: jobs were supplied by V at start of day, couriers did not find their own jobs → could not choose which jobs too complete → pressure to finish deliveries in a small amount of time
    - If you create the risk, actually puts a risk into the marketplace - risk of people being run down - then acquire responsibility for this - this is how vabu were running their business

Ace Insurance v Trifunovski

Facts: AI engages 5 sales reps as I/Cs to sell insurance policies → engaged for long time (one for over 24 years) → AI terminates, T want unpaid annual leave, long service leave etc. (available only to employees)

Held: YES – AI is required to pay all entitlements

- Factors which indicated that the sales representatives were independent contractors included that:
    - They were described as "independent contractors" in their respective contracts and therefore the sales representatives understood that they were independent contractors;
    - They were paid a commission based on the number of insurance policies sold;
    - No income tax was deducted from their earnings;
    - They were required to use their own vehicles;
    - Some of the sales representatives had employed administrative staff;
    - They had the ability to choose work hours; and
    - They issued invoices to Ace Insurance for their services.
- Factors indicating that the sales representatives were employees:
    - Any goodwill rested with Ace Insurance and not with the sales representatives' own incorporated entity;
    - They were unable to delegate their work
    - Given the long hours involved in providing services to Ace Insurance, the sales representatives were not able to work for anyone else in practice
    - The sales representatives undertook training provided by Ace Insurance;
    - Ace Insurance exercised control over the sales representatives' day-to-day activities; and
    - The sales representatives only sold insurance policies issued by Ace Insurance.

2. **Labour Hire**
    - The most common form of a triangular work arrangement is that involving a labour hire agency.
    - Importantly, modern awards and enterprise agreements may stipulate that contract or labour hire workers are to be accorded at least the same terms and conditions as employees (regardless of whether they are employees of independent contractors). Additionally, statutory protection can be expressed to extend to a wider range of workers and those who are employees → see FWA
    - **Joint Employment (Not used in Australia):** An alternative response to the challenge posed by trying your work relations is to use the concept of joint employment so that both the labour hire firm and its business clients are treated as joint employers.

Costello v Allstaff Industrial Personnel and Bridgestone TG Australia

Facts:

- Allstaff = labour hire agency; Bridgestone = host employer; Costello = labourer in factory
- C had an unrelated work injury which kept him off work – when he return, Allstaff informed C that he had been replaced at Bridgestone (sought replacement employee) HOWEVER, Allstaff could provide C with another job
    - Came back to work after illness/injury within 3 months

Issue: What was C entitled to? Was it unlawful dismissal?

Held: Bridgestone not employer of C

- If C was direct employee of Bridgestone he would have benefit of unlawful dismissal protection
    - One of the grounds was temporary (no more than 3 months) absence from employment due to injury
- C could not access benefit since he was not employed by Bridgestone and could not use this against Allstaff since they offered another job within the confines of their employment K
- On the issue of joint employment – courts decided to leave this deliberation to parliament

Damevski v Giudice

Facts:

- Endoxos (E) = cleaning business → decided to use labour hire company MLC
- The workers had the 'choice' of resigning their employment with E and being rehired immediately **as contractors** through the 'agency' of MLC, or not being given any further work.
- D continued to work under the same arrangement and was provided by E with a van, equipment, and company livery → only difference is submit his timesheets to and receive remuneration from MLC

Held: YES, case emphasises how a court will see through an artifice constructed to evade legal obligations to employees

- Factors: Relationship of mutual dependence
  - He was not able to delegate his shifts to other persons. If he refused work he faced the likelihood of receiving no further work.
  - The equipment he used was owned by E.
  - E retained right of dismissal
  - MLC did not provide D with any services, nor did it put him in touch with other businesses requiring cleaning services. MLC did not control his work: E did.
  - MLC merely acted as an agent for E in paying D, and D submitted timesheets to MLC for that purpose.
  - The fact that E was a principal was further supported by the likelihood that the workers could seek payment from E in the event that MLC did not pay them.
- Wilcox and Marshall J → view that objectively E and D informally re-entered a K on the same terms and conditions as D's previous employment
  - A contract may be implied from the conduct of the parties.
  - The **question is** whether the conduct of the parties, viewed in the light of the surrounding circumstances, shows a **tacit understanding or agreement between them**, and **is capable of proving all the essential elements of an express contract.**

Kaseris v Rasier Pacific VOF [2017] → AUS, NOTE: NOT DECISION BY COURT (FWC ONLY)
Facts:

- K worked as an Uber driver → his service agreement was terminated for poor passenger ratings. He applied to the Fair Work Commission (FWC) seeking an unfair dismissal remedy.

Held: K was not an employee

- Followed the multi-factorial approach → relevant indicia were:
  - K had a significant degree of control over when and how he worked.
  - He did not receive a wage, annual leave, sick leave or long service leave.
  - He supplied his own equipment, namely a vehicle, smartphone and wireless connection. He was prohibited from displaying an Uber logo or wearing an Uber uniform.
  - K was responsible for registering for GST and paying tax liabilities. He received no superannuation.
  - The contract expressly stated that Mr Kaseris was a contractor, not an employee.
- Note: Commissioner said there was no control by Uber since it was entirely up to driver whether to take the business, however all the incentives are designed by Uber to require certain behaviour

Autoclenz Ltd v Belcher [2011] UKSC
Facts:

- B worked as a car valet for A on a piecework basis, buying their own materials and uniforms from A, paying for their own insurance and paying tax and National Insurance as self-employed contractors.
- Contract expressly stated that the relationship, client and I/C BUT need to give adequate notice when not coming to work

Held: YES, the documents did not reflect the true agreement between the parties.

- The **reality of the situation, rather than any express contractual provisions, should prevail** if the latter contain unrealistic demands that do not reflect or are wholly inconsistent with the actual nature of a relationship.
  - This should be effected by examining all of the relevant evidence, including the written terms, evidence of how the parties conducted themselves in practice and what their expectations of one another were.
  - The **relative bargaining power of the parties** must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed

FWO v Metro Northern Enterprises
Facts:

- M sells kitchenware through door to door or by approaching members of public at public venue
- Two plans under which workers can choose:
  - 'Plan A' – commission per sale – labelled I/C's
  - 'Plan B' – payment per demonstration – labelled employees

Held: YES, 'Plan A' workers employees
Factors:

- Metro had failed to clearly distinguish between employee and I/C arrangements at the interview
- Metro's employment structure was an attempt to avoid financial liability by characterising them as I/Cs
- All workers undertook initial compulsory unpaid training with Metro continued to attend meetings and training during the course of their engagement
- The highly prescriptive Metro training manual used terms consistent with an employment relationship.

Payment arrangements suggested an employment relationship.

Tattsbet Limited v Morrow [2015]

Facts:

- M ran Tattsbet for several years – had K with T saying that she was I/C
- Tattsbet maintained tight control over the business, by:
  - owning the premises;
  - holding all contracts for services to the premises (for telephone, electricity, satellite services, etc);
  - dictating the hours of opening, and all the signage;
  - asserting an entitlement to direct the agent in the recruitment and discipline of staff hired to run the agency.

Issues: Was M an I/C?

Held: YES

- 'working in the business of another is not inconsistent with working in a business of one's own'.
- Factors that M, was an independent contractor rather than employee:
  - **The agreement**. The agreement with T provided that Mrs Morrow was an independent contractor by way of acknowledgment by Mrs Morrow and this was consistent with the arrangements Mrs Morrow set up for herself as a business operator;
  - **Remuneration.** Mrs Morrow was renumerated by reference to the value of the business transacted at the premises she operated;
  - **Ability to employ others.** Mrs Morrow was free to employ others to assist her or, on occasion, to work in place of her. She employed the staff working at the agency, and undertook, as principal, the conventional obligations of the employer such as paying the required workers' compensation;
  - **Personal net income.** There was a striking divergence between the gross remuneration received by Mrs Morrow for operating the agency and her personal net income from the arrangement; and
  - **Superannuation and Tax.** The absence of PAYE deductions and the presence of GST collections by Mrs Morrow and her general compliance with the GST regulatory requirements, such as the preparation of the relevant BAS (Business Activity Statements) returns.

FWO v Quest South Perth Holdings Pty Ltd [2015]

Facts:

- **QSP** had engaged Contracting Solutions Pty Ltd (**Contracting Solutions**) to convert two of its housekeeper employees into independent contractors → supplied back to QSP under same terms except payment by CS

Held: YES, employee

- An employer **cannot avoid the sham contracting provision in section 357** of the ***Fair Work Act 2009 (Cth)*** **by introducing a third party** (such as a labour hire company) into the contractual arrangements.
- **Factors:**
  - No indication the housekeepers were operating their own business or were interested in making a profit
  - At all times during the course of their engagement they wore QSP uniforms, used QSP supplies and worked under the complete direction and supervision of QSP.
  - This conclusion was reached even though the housekeepers paid public liability insurance and received payment via Contracting Solutions

AIAPA v Qantas and Jetconnect [2011] FWAFB 3706

Facts:

- AUPA seeking to add JetConnect (NZ subsidiary of Qantus) to Australian Award system (higher pay for pilots and same terms and conditions of employment as Australian pilots)
- J is a wholly owned subsidiary of Q, but is incorporated in NZ. There was a 'wet lease' between the two organisations whereby Q leased planes to J who fly the planes (with staff) on behalf of Q.
  - They have Q flight numbers and operate according to flight schedules determined by Q. J does not control its roots or destinations, but contracts to Q to operate on roots and destinations determined by Q. J pilots wear Q uniforms and are given a Q staff. They are trained by Q.

Issues: Could the same terms and conditions apply?

Held: NO

- On the facts, it is clear that the trans-Tasman operations of JetConnect are closely integrated with Qantas' services. On the other hand, it is noted that:
  - JetConnect is a subsidiary company incorporated and operating under the laws of NZ.
  - JetConnect's officers and management are based in NZ.
  - JetConnect has its own processes for the recruitment of staff and is entered into contracts of employment with pilots and other workers under NZ employment laws.
  - JetConnect has negotiated with NZALPA and is party to a collective agreement for its pilots.
- It is clear therefore that JetConnect is a legal entity and the separate employing entity for the purposes of

NZ laws, even though it is a subsidiary of Qantas and is subject to a considerable degree of control by its parent.

- For the corporate veil to be lifted in the present case, it must be shown that JetConnect was acting as an agent of Qantas or that JetConnect has been created or was operating as a sham.
    - J not agent of Q and not sham since operating agreements and arrangements were not designed to avoid existing liabilities or obligations
- Even though Qantas exercises a considerable degree of control and influence over the operation of its subsidiary, this is not sufficient to disregard the separate legal personality of the subsidiary
- **THUS it is important to identify that we are employee but also who the K is with - only if K is subject to Australian law that we can apply Australian standards to it.**

TOPIC 3 – EMPLOYMENT AS A CONTRACTUAL RELATIONSHIP

- Employment contracts do **not require writing** for enforcement. Can be verbal offer.
- **Freedom to contract for particular terms of employment will be constrained by the existence of:**
    - The National Employment Standards in the Fair Work Act (eg, controlling working hours)
    - Any applicable modern award
    - Any applicable enterprise bargain
    - Other laws – such as anti-discrimination laws or work health and safety laws.

1. **Consequences of Breach**
    - Summary dismissal: dismissal without notice – only available if there is repudiation, breach of a essential term, or a serious breach of an intermediate term
        - Determining essentiality: Depends on the common intention of the parties at the time of the contract, that is, the intended importance of the relevant terms and the intended consequences of failing to comply with them.
            - The promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of strict or substantial performance of the promise; *Tramways Advertising Pty Ltd v Luna Park*
        - Breach of essential term = innocent party can terminate + sue for damages
        - Breach of warranty = right to sue for damages resulting from breach
    - Constructive dismissal: employer's conduct has signalled (manifested intention to not be bound by terms) a repudiation of the employment contract, which the employee has elected to accept by termination (no need to give notice).

Visscher v Giudice

Facts:

- 2000: V permanent basis as third mate
- Sep 2001: V promoted to the position of Chief Officer (or First Mate)
- V's promotion became subject of a dispute with the relevant union. Union wanted length of employment based promotion scheme. → because of this employer rescinded V's promotion → V did not accept
- From September 2001, V carried out the duties of a Chief Officer, and was paid at that rate
- Yet at no time did the employer's records list Visscher as holding the position of Chief Officer.

Issue: Was the demotion effective?

Held: HC upholds election theory of repudiation

- A **unilateral variation by an employer of the terms of an employee's employment will not, in and of itself, end a contract of employment.** Agreement needs to be sought from an employee if the employer wants terms and conditions of employment to be changed. Otherwise, obligations, such as payment of wages at a higher rate, continue.
    - **repudiation = termination is contingent on the innocent party's acceptance of the breach**
    - Not effective since V did not accept the demotion – this ensured that his relationship with his employer continued under the same contract
- **When was Visscher's employment contract ultimately terminated, and why?**
    - When his employer decommissioned ship and there were no other Chief Officer positions available, V had no practical option but to accept the employer's repudiation.
- **What was the relevance of the collective enterprise agreement?**
    - The certified agreement operated from 5 May 2002. It bound V however the collective agreement was a mutable list which bore no intention to be determinative, only descriptive of staff roles
    - Did not contain anything about:
        - Reallocation of individual officiers
        - Intention to deal with reallocation of positions
    - Grading list was basis of future promotions
    - Even though the certified agreement operates with 'statutory force' and the contract of employment cannot derogate from the terms and conditions of an award.

NOTES

LAWS3446 – LABOUR LAW
TOPIC 2 – THE SUBJECT OF LABOUR LAW – EMPLOYEES; INDEPENDENT CONTRACTORS AND OTHER FORMS OF 'DISTANCED' WORK

- A fundamental issue for the bore of work is the identification of its subject- who is included within its realm and who is excluded?
- Now law conventionally **divides workers in the marketplace into two types**:
    - **Employees** – part of personal contract of employment where they are subordinate to the person they work for. Contract of service.
    - **Independent contractors** – operating in business on their own account and contracting their services in freely negotiated commercial agreements. Contract for service.
- **Contract, Intention and the Reality of the Work Relationship:**
    - The law is concerned with the reality of the work relationship, form cannot dominate substance.
    - The parties cannot, with the strokes of the contractual pen, impose their own classification when it is contrary to the reality of their work relation.
    - The contracting parties cannot create something with all the features of a rooster and call it the duck! Per Gray J

1. The Multiple Indicia Test

- At common law, the distinction between an employee and an independent contractor is usually drawn in cases concerning questions of vicarious liability for the negligent acts of a worker. In determining whether a worker is an employee or an independent contractor, judges consider all the circumstances of the work relationship, including:
    - The degree of control exercised over the worker
    - The obligation on the worker to do the work personally (ie, their capacity to delegate to others)
    - The freedom to work for others
    - The place of work
    - The mode of enumeration, especially whether the worker is paid per hour
    - The responsibility for the provision and maintenance of assets and equipment
    - The creation of goodwill and the ownership of this
    - The risks and responsibility for loss or profit
    - The degree of integration of the worker into the organization
    - Who makes payments for sick leave, annual leave and long service leave
    - The arrangements made in relation to payment of taxation and workers compensation
    - The party's own characterisation of their relationship
- No factor is determinative; rather all considered together – some may show one category or the other.
    - This approach is drawn from High Court Stevens v Brodribb Sawmilling Co Pty Ltd (1986) – liability for negligence of a truck driver; and confirmed by the High Court in Hollis v Vabu Pty Limited (2001) – vicarious liability for bicycle couriers.
- **The Control Test:**
    - Control over every aspect of the execution of work – over when, where and how the work was to be done – became in the law's eyes the defining characteristic of the employment relationship.
    - **Modern work relations are problematic** because they don't conform to the traditional work relationship.
        - Specialised skills of many workers mean it is inconceivable that their employers would or could instruct them in any detailed way about how to do their job, yet many of these skilled workers do not function at arms length from those for whom they work.
        - Movement away from the actual day-to-day exercise of control over the work to the notion of ultimate authority, or 'right to control'.
    - Control is insufficient on its own – Zuijs v Wirth Bros Pty Ltd (1955).
    - Control was a residual conception indicating the employer's superintendence over a wide range of organisational arrangements that made up the context in which the work was performed.
- **The 'Organisational Integration' Test:**
    - **Criticism:** impossible to measure the 'economic reality' of the work, but distinction between employee and independent contractor as the independent contractor "is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business and a person who carried on a trade of business on his own" – Marshall v Whittacker's Building Supply Co (1963)
    - The ownership of assets used in the execution of the work is often seen as indicating that the workers are operating in the marketplace on their own account, rather than in the cause of another's enterprise. This is especially so if it can be seen a goodwill is acquired through the performance of the work.
- **Delegation of Work:**
    - The ability of the worker to delegate work is a significant factor.
        - If a contract for work does not require the contracting party to render personal service,

this can be a strong, almost conclusive, indicator that the worker is an independent contractor.
        - However, in cases where an employee has some capacity, albeit usually limited, to delegate the work to another on unknown
- **Dependent Contractor:**
    - In some instances where workers have been characterised as independent contractors, the high level of reliance which this contractors placed on the business has prompted the suggestion that this is a form of 'disguised employment' involving 'dependent contractors'
    - Even where a worker suppliers a substantial asset as part of the work contract, it may be indicative of a high level of economic dependency upon the entity that whom they work rather than their independence in the marketplace.
    - The practical reality may be that unless the workers provide this asset they will not get the offer of work in the first place. For this reason, ownership and contribution of assets to the performance of work should not be distinguished between independent contractors and employees.

Hollis v Vabu
Facts:

- Plaintiff [Hollis] was a cyclist who got hit by an unidentified person, who was working for the Defendant [Vabu] name on it.
- Couriers starting work with Vabu were given instruction and filled out 'employment forms'.
    - the contractual relationship between the Vabu and its bicycle couriers → was partly oral and partly in writing
- At trial, it was held that the accident was caused by the bicycle courier's negligent riding, but that the respondent was not vicariously liable because the bicycle courier was an I/C, not an employee.

Issue: Was Vabu vicariously liable for the cyclist?
Held: V is vicariously liable for their cyclist – employer + employee relationship

- It has long been accepted, as a general rule, that an employer is vicariously liable for the tortious acts of an employee but that a principal is not liable for the tortious acts of an independent contractor."
- The **control test** is no longer a conclusive test for a requisite relationship.
- TEST: must consider the system which was operated thereunder and the work practices imposed by employer go to establishing '**the totality of the relationship'** between the parties.
    - When classifying the status of a worker, courts and tribunals primarily look to the **substance of the relationship rather than the contractual language adopted by parties.** This means that workers and employers cannot agree to characterise their relationship as something that, in substance, it is not.
- COA → fell into error in making too much of the fact that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories.
    - "Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations.
    - A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it i.e. truck drivers
- Factors:
    - 1. Low level of skill: Couriers not providing skilled labour or labour which required special qualifications.
    - 2. Good will: A bicycle courier is unable to make an independent career as a freelancer or to generate any goodwill as a bicycle courier.
    - 3. Level of control: The couriers had little control over the manner of performing their work and what they could wear
    - 4. Representation to the world: The couriers were presented to the public and to those using the career service as emanations of Vabu. They were to wear uniforms bearing Vabu's logo.
    - 5. Vabu superintended the courier's finances: Vabu produced pay summaries and couriers were required to dispute errors with the organisation. There was no scope for the couriers to bargain for the rate of their remuneration.
        - The method of payment, per delivery and not per time period engaged, is a natural means to renew my employees who sold duty is to perform deliveries.
    - 5. Apart from providing bicycles and being responsible for the cost of repairs, couriers were required to bear the cost of replacing or repairing any equipment of Vabu that was lost or damaged, including radios and uniforms
    - 6. Refusal to give holidays means that the workers are not independent.
    - 7. Workers didn't perform an 'added' or corollary part of the business of the Defendant - they did the main purpose.
    - 8. Distribution of work: jobs were supplied by V at start of day, couriers did not find their own jobs

→ could not choose which jobs too complete → pressure to finish deliveries in a small amount of time
    - If you create the risk, actually puts a risk into the marketplace - risk of people being run down - then acquire responsibility for this - this is how vabu were running their business
- Prior case **Vabu Pty Ltd v Federal Commissioner of Taxation**
    - Deemed couriers to be independent contractors for superannuation
    - Judges took into account evidence of truck and motorcycle drivers who generally are I/C.
    - Additionally, taking evidence from blocks of workers who did work differently - whether all of the workers gave rise to make super contributions - not any individual worker who was complaining

Ace Insurance v Trifunovski
Facts:

- AI engages 5 sales reps as I/Cs to sell insurance policies → engaged for long time (one for over 24 years)
- AI terminates their K and T brings proceedings for unpaid annual leave, sick leave and long service leave entitlements available only to employees)
- T had provided services to AI through his incorporated company, Heraclea Pty Ltd.

Issue: Was T an employee?
Held: YES – AI is required to pay all entitlements → although T was contracted through corporate entities, this did not change the fact that T was employed by AI

- The fact that two of the representatives were contracted through a company did not change the reality that the relationship was one of employment.
- Factors which indicated that the sales representatives were independent contractors included that:
    - They were described as "independent contractors" in their respective contracts and therefore the sales representatives understood that they were independent contractors;
    - They were paid a commission based on the number of insurance policies sold;
    - No income tax was deducted from their earnings;
    - They were required to use their own vehicles;
    - Some of the sales representatives had employed administrative staff;
    - They had the ability to choose work hours; and
    - They issued invoices to Ace Insurance for their services.
- Factors indicating that the sales representatives were employees:
    - Any goodwill rested with Ace Insurance and not with the sales representatives' own incorporated entity;
    - They were unable to delegate their work
    - Given the long hours involved in providing services to Ace Insurance, the sales representatives were not able to work for anyone else in practice
    - The sales representatives undertook training provided by Ace Insurance;
    - Ace Insurance exercised control over the sales representatives' day-to-day activities; and
    - The sales representatives only sold insurance policies issued by Ace Insurance.
- In respect of Mr Trifunovski, his Honour said that the following facts reinforced the characterisation of Mr Trifunovski as an employee of Ace Insurance:
    - Although Heraclea, of which Mr Trifunovski was a director, entered into an agreement with Ace Insurance's predecessor and the purpose of such agreement was to divert money to Heraclea, the agreement was not signed under the company seal of Heraclea;
    - Instead, Mr Trifunovski signed the agreement in his personal capacity; and
    - Under the agreement, Mr Trifunovski was required to personally provide his services as the sales representative.

2. Labour Hire

- The most common form of a triangular work arrangement is that involving a labour hire agency.
- Trilateral work relationships involving labour hire agencies can take a variety of forms.
    - a) An agency may merely introduce workers to prospective employee businesses and then leaving it to the business and the worker to determine their own future relationship.
    - b) More commonly, workers who are 'on the books' of the agency and are offered work placements with the agency's business clients, but the agency maintains an ongoing role in the work relation. The employer pays the agency and the agency takes a cut and then pays the employee.
- The triangular relationships do not neatly translate into the law's more familiar bilateral contractual arrangement, courts and tribunal sometimes declared that the worker was neither an employee or an independent contractor, but in a relationship that was sui juris. However, such a conclusion places the worker beyond the protection of the law.

- There have been numerous decisions regarding trilateral work arrangements which involve labour hire firms. In some cases the workers have been found to be self-employed, independent contractors; whilst in others they were employees of the labour hire firm.
- Importantly, modern awards and enterprise agreements may stipulate that contract or labour hire workers are to be accorded at least the same terms and conditions as employees (regardless of whether they are employees of independent contractors). Additionally, statutory protection can be expressed to extend to a wider range of workers and those who are employees.
- **Joint Employment (Not used in Australia):**
    - An alternative response to the challenge posed by trying your work relations is to use the concept of joint employment so that both the labour hire firm and its business clients are treated as joint employers. This concept has developed in the USA in response to the use of labour hire agencies

Costello v Allstaff Industrial Personnel and Bridgestone TG Australia
Facts:

- Allstaff = labour hire agency; Bridgestone = host employer; Costello = labourer in factory
- C had an unrelated work injury which kept him off work – when he return, Allstaff informed C that he had been replaced at Bridgestone (sought replacement employee) HOWEVER, Allstaff could provide C with another job
    - Came back to work after illness/injury within 3 months

Issue: What was C entitled to? Was it unlawful dismissal?
Held: Bridgestone not employer of C

- If C was direct employee of Bridgestone he would have benefit of unlawful dismissal protection
    - One of the grounds was temporary (no more than 3 months) absence from employment due to injury
- C could not access benefit since he was not employed by Bridgestone and could not use this against Allstaff since they offered another job within the confines of their employment K
- On the issue of joint employment – courts decided to leave this deliberation to parliament

Damevski v Giudice
Facts:

- Endoxos (E) = cleaning business → decided to operate business more cost effectively using labour hire arrangements → E engaged MLC
- MLC, acting on behalf of E, purported to make contractual arrangements that interposed MLC between E and its workers.
- The workers had the 'choice' of resigning their employment with E and being rehired immediately as contractors through the 'agency' of MLC, or not being given any further work.
- D did as above, signed documents stating that he understood and agreed to the proposal, and some months later was told that he was being taken off the job.
- Throughout the period during which D was ostensibly engaged as a 'contractor', he continued to work under the same arrangement and was provided by E with a van, equipment, and company livery.
- The only differences were he had to submit his timesheets to MLC instead of to E, and he received his remuneration from MLC.

Issue: Was D an employee of E?
Held: YES, case emphasises how a court will see through an artifice constructed to evade legal obligations to employees

- Factors: Relationship of mutual dependence
    - He was not able to delegate his shifts to other persons. If he refused work he faced the likelihood of receiving no further work.
    - The equipment he used was owned by E.
    - E retained right of dismissal
    - MLC did not provide D with any services, nor did it put him in touch with other businesses requiring cleaning services. MLC did not control his work: E did.
    - MLC merely acted as an agent for E in paying D, and D submitted timesheets to MLC for that purpose.
    - The fact that E was a principal was further supported by the likelihood that the workers could seek payment from E in the event that MLC did not pay them.
- Wilcox and Marshall J → view that objectively E and D informally re-entered a K on the same terms and conditions as D's previous employment
    - A contract may be implied from the conduct of the parties.
    - The **question is** whether the conduct of the parties, viewed in the light of the surrounding circumstances, shows a **tacit understanding or agreement between them**, and **is capable of proving all the essential elements of an express contract.**

Kaseris v Rasier Pacific VOF [2017] → AUS, NOTE: NOT DECISION BY COURT (FWC ONLY)

Facts:

- K worked as an Uber driver → his service agreement was terminated for poor passenger ratings. He applied to the Fair Work Commission (FWC) seeking an unfair dismissal remedy.

Issue: Was K an I/C or employee?

Held: K was not an employee

- Work-Wages Bargain: An employment contract is fundamentally a work-wages bargain. The "minimum mutual obligation necessary" to create an employment relationship is a contract where:
  - the worker has an obligation to perform work or services that may reasonably be demanded under the employment contract, and
  - the employer has an obligation to pay the worker for such work or services.
- Followed the multi-factorial approach → relevant indicia were:
  - K had a significant degree of control over when and how he worked.
  - He did not receive a wage, annual leave, sick leave or long service leave.
  - He supplied his own equipment, namely a vehicle, smartphone and wireless connection. He was prohibited from displaying an Uber logo or wearing an Uber uniform.
  - K was responsible for registering for GST and paying tax liabilities. He received no superannuation.
  - The contract expressly stated that Mr Kaseris was a contractor, not an employee.
- Note: Commissioner said there was no control by Uber since it was entirely up to driver whether to take the business, however all the incentives are designed by Uber to require certain behaviour
- **Consider:** on flip side in equity - under this argument then if Uber becomes insolvent then they hold it on constructive trust for the drivers. However if tried to argue this in court, would this argument uphold based on current law? likely not - Uber definitely would owe a debt but drivers would not have proprietary rights in the money

cf. Aslam, Farrer & Ors v Uber BV, Uber London and Uber Britannia → UK

Held:

- The UK Employment Tribunal (ET) held that an Uber driver was a "worker" for the purposes of the Employment Rights Act 1996 (UK) (ER Act).
- Commissioner explained that although Uber's operations in Australia and the UK are similar, Aslam was based on the UK definition of a "worker". The relevant section of the UK's ER Act, section 230(3), provides a definition of "worker" which is "self-evidently broader than the definition of an employee" and "encapsulates some independent contractors".
  - did not decide they were employees – rather they were extended definition of worker

Autoclenz Ltd v Belcher [2011] UKSC

Facts:

- B worked as a car valet for A on a piecework basis, buying their own materials and uniforms from A, paying for their own insurance and paying tax and National Insurance as self-employed contractors.
- A subsequently required the B to sign contracts containing a substitution clause, allowing them to engage others to work on their behalf, and a 'right to refuse work' clause.
- The contract expressly stated that the relationship between the parties was that of client and independent contractor.
- However, A expected that a valeteer not coming into work should give adequate notice of his absence.

Issue: Was B an employee?

Held: YES, the documents did not reflect the true agreement between the parties.

- The tribunal can disregard the terms of the written documents insofar as they were inconsistent with what was actually agreed between the parties.
  - "In cases . . . where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties . . . the question the court has to answer is: what contractual terms did the parties actually agree?"
- The reality of the situation, rather than any express contractual provisions, should prevail if the latter contain unrealistic demands that do not reflect or are wholly inconsistent with the actual nature of a relationship.
  - This should be effected by examining all of the relevant evidence, including the written terms, evidence of how the parties conducted themselves in practice and what their expectations of one another were.
  - The **relative bargaining power of the parties** must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.
- The court has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties."

FWO v Metro Northern Enterprises

Facts:

- M sells kitchenware through door to door or by approaching members of public at public venue
- Two plans under which workers can choose:
    - 'Plan A' – commission per sale – labelled I/C's
    - 'Plan B' – payment per demonstration – labelled employees

Issue: Were 'Plan A' workers employees?

Held: YES

- Metro had failed to clearly distinguish between employee and independent contractor arrangements at Metro's interviews with sales representatives and to clarify that the workers would be treated as independent contractors.
- Metro's employment structure was an attempt to avoid financial liability to the workers by characterising them as independent contractors;
- **Factors:**
    - All workers undertook initial compulsory unpaid training with Metro, used promotional material provided by Metro, continued to attend meetings and training during the course of their engagement by Metro and followed Metro's detailed guidance.
    - The highly prescriptive Metro training manual used terms consistent with an employment relationship. Payment arrangements suggested an employment relationship.
    - The workers did not invoice Metro for work they performed and did not engage other persons to perform work for Metro.

Tattsbet Limited v Morrow [2015]

Facts:

- M ran Tattsbet for several years – had K with T saying that she was I/C
- Tattsbet maintained tight control over the business, by:
    - owning the premises;
    - holding all contracts for services to the premises (for telephone, electricity, satellite services, etc);
    - dictating the hours of opening, and all the signage;
    - asserting an entitlement to direct the agent in the recruitment and discipline of staff hired to run the agency.

Issues: Was M an I/C?

Held:

- 'working in the business of another is not inconsistent with working in a business of one's own'.
- Factors that M, was an independent contractor rather than employee:
    - **The agreement**. The agreement with T provided that Mrs Morrow was an independent contractor by way of acknowledgment by Mrs Morrow and this was consistent with the arrangements Mrs Morrow set up for herself as a business operator;
    - **Remuneration.** Mrs Morrow was renumerated by reference to the value of the business transacted at the premises she operated;
    - **Ability to employ others.** Mrs Morrow was free to employ others to assist her or, on occasion, to work in place of her. She employed the staff working at the agency, and undertook, as principal, the conventional obligations of the employer such as paying the required workers' compensation;
    - **Personal net income.** There was a striking divergence between the gross remuneration received by Mrs Morrow for operating the agency and her personal net income from the arrangement; and
    - **Superannuation and Tax.** The absence of PAYE deductions and the presence of GST collections by Mrs Morrow and her general compliance with the GST regulatory requirements, such as the preparation of the relevant BAS (Business Activity Statements) returns.

FWO v Quest South Perth Holdings Pty Ltd [2015]

Facts:

- Quest South Perth Holdings Pty Ltd (**QSP**) had engaged Contracting Solutions Pty Ltd (**Contracting Solutions**) to convert two of its housekeeper employees into independent contractors.
- Under the arrangement, independent contractors were be supplied back to QSP by Contracting Solutions. The housekeepers carried on the same work as before with the exception that they would be paid by Contracting Solutions rather than QSP.

Issue:

Held:

- An employer cannot avoid the sham contracting provision in section 357 of the Fair Work Act 2009 (Cth) by introducing a third party (such as a labour hire company) into the contractual arrangements.
- Factors:
    - No indication the housekeepers were operating their own business or were interested in making a profit, despite them signing the 'Hiring Agreement' documentation supplied to them by

Contracting Solutions.
    - At all times during the course of their engagement they wore QSP uniforms, used QSP supplies and worked under the complete direction and supervision of QSP.
    - This conclusion was reached even though the housekeepers paid public liability insurance and received payment via Contracting Solutions (the quantum of which had been determined by Contracting Solutions).
- The primary purpose of the section was to prohibit an employer from misrepresenting the true nature of an individual's employment status and that this should be taken to include circumstances where third parties are involved.

AIAPA v Qantas and Jetconnect [2011] FWAFB 3706
Facts:

- AUPA seeking to add JetConnect (NZ subsidiary of Qantus) to Australian Award system (higher pay for pilots and same terms and conditions of employment as Australian pilots)
- J is a wholly owned subsidiary of Q, but is incorporated in NZ. There was a 'wet lease' between the two organisations whereby Q leased planes to J who fly the planes (with staff) on behalf of Q.
    - The aircraft their Q livery. They have Q flight numbers and operate according to flight schedules determined by Q. J does not control its roots or destinations, but contracts to Q to operate on roots and destinations determined by Q. J pilots wear Q uniforms and are given a Q staff. They are trained by Q.

Issues: Could the same terms and conditions apply?
Held: NO

- On the facts, it is clear that the trans-Tasman operations of JetConnect are closely integrated with Qantas' services. On the other hand, it is noted that:
    - JetConnect is a subsidiary company incorporated and operating under the laws of NZ.
    - JetConnect's officers and management are based in NZ.
    - JetConnect has its own processes for the recruitment of staff and is entered into contracts of employment with pilots and other workers under NZ employment laws.
    - JetConnect has negotiated with NZALPA and is party to a collective agreement for its pilots.
- It is clear therefore that JetConnect is a legal entity and the separate employing entity for the purposes of NZ laws, even though it is a subsidiary of Qantas and is subject to a considerable degree of control by its parent.
- For the corporate veil to be lifted in the present case, it must be shown that JetConnect was acting as an agent of Qantas or that JetConnect has been created or was operating as a sham.
    - J not agent of Q and not sham since operating agreements and arrangements were not designed to avoid existing liabilities or obligations
- Even though Qantas exercises a considerable degree of control and influence over the operation of its subsidiary, this is not sufficient to disregard the separate legal personality of the subsidiary.
- Similar conclusion upheld in FWO v Valuair Ltd → cabin crew K with V (subsidiary of Jetstar, incorporated in Singapore)
    - **THUS it is important to identify that we are employee but also who the K is with - only if K is subject to Australian law that we can apply Australian standards to it.**

- **Note:** The Fair Work Act 2009, ss 357-359: misrepresenting an employment relationship as an independent contract also attracts civil penalties.
    - s357: A person that employs, or proposes to employ, an individual must not represent to the individual that **the contract of employment** […] is a contract for services under which the individual performs, or would perform work as an independent contractor.'
    - now have watch dog to monitor this type of conduct, do not need to wait for employees to complain through FWO

TOPIC 3 – EMPLOYMENT AS A CONTRACTUAL RELATIONSHIP

- Contract is the dominant legal model for work relationships.
- **Freedom to contract for particular terms of employment will be constrained by the existence of:**
    - The National Employment Standards in the Fair Work Act (eg, controlling working hours)
    - Any applicable modern award
    - Any applicable enterprise bargain
    - Other laws – such as anti-discrimination laws or work health and safety laws.
- **Consequences of Breach:** identifying and interpreting the contract.
    - Cannot dismiss employee without incurring costs for serious breach of a term warranting summary dismissal.
    - Employee cannot abandon an intolerable working relationship while still claiming entitlement to severance benefits depends on being able to lay the blame for the destruction of the relationship at the employer's feet.

        - "constructive dismissal" - employer's conduct has signalled (manifested intention to not be bound by terms) a repudiation of the employment contract, which the employee has elected to accept by termination (no need to give notice).
- **Damages** rarely sought while still in relationship. But construing whether you are entitled to them depends upon construction of the contract.

Construction and Interpretation of Employment Contracts

1. **Construction**
    - Contract law premised on notion that parties consent to be bound to mutual benefit.
    - Test is objective - what the parties intended to mean.
    - Principle that parties intend to perform their bargain - Mackay v Dick (1881) 6 App Cas 251, so contract construed to support the benefits of the contract.
    - Employment contracts do **not require writing** for enforcement. Can be verbal offer.
        - Note: there are presumed obligations, particularly on behalf of the worker.
    - Terms implied by the same legal means as other contracts - Byrne v Australian Airlines (1995)
        - Implied in fact for the purpose of business efficacy (Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982)).
        - Implied in law where contract is of a class or type that the law presumes to include certain responsibilities or obligations (Castlemain Toohey's v Carlton and United Breweries Ltd (1987)).
        - Implied by custom if particular trade of industry always expects these obligations to form part of the agreements (Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd (1986)).
    - Implied terms can be oral or in writing, and will only be implied after construing the express terms.

Visscher v Giudice

Facts:

- 2000: V permanent basis as third mate
- Sep 2001: V promoted to the position of Chief Officer (or First Mate) in accordance with the terms of a certified agreement that then applied to the employer – he had relevant qualification
- V's promotion became subject of a dispute with the relevant union. Union wanted length of employment based promotion scheme.
    - So that certain permanent staff members in the role of Deck Officers could gain the necessary qualifications to become eligible for permanent First Mate positions.
- As a result of the industrial dispute and comments made by the AIRC, the employer notified Visscher on 20 September 2001 that his promotion had been rescinded. Visscher claimed that he had not accepted the rescission.
- From September 2001, Visscher carried out the duties of a Chief Officer, and was paid a higher duties allowance – in other words, his remuneration was the same as that of a Chief Officer. Yet at no time did the employer's records list Visscher as holding the position of Chief Officer.

Issue: Was the demotion effective?

Held: HC upholds election theory of repudiation

- A **unilateral variation by an employer of the terms of an employee's employment will not, in and of itself, end a contract of employment.** Agreement needs to be sought from an employee if the employer wants terms and conditions of employment to be changed. Otherwise, obligations, such as payment of wages at a higher rate, continue.
    - **repudiation = termination is contingent on the innocent party's acceptance of the breach**
    - Not effective since V did not accept the demotion – this ensured that his relationship with his employer continued under one contract – V was already on a ship and continued to work on the ship during this period
- **When was Visscher's employment contract ultimately terminated, and why?**
    - When the ship was decommissioned and employer offered redeployment as second mate on another ship – V refused this
    - It was only when he was unable to present to work as first officier (for want of an available ship), that he had no practical option but to accept the employer's repudiation. His employment had been terminated by the emplorer's decision to decommission the ship
- **What was the relevance of the collective enterprise agreement?**
    - The certified agreement operated from 5 May 2002. It bound Teekay's employee who belonged to the Australian Maritime Officers Union.
    - If FC, certified agreement "as having superior force" because of the Workplace Relations Act. HC agreed, stating that "the contract of employment cannot derogate from the terms and conditions of an award, which operates with statutory force. The same may be said of certified agreements."
    - Held that the collective agreement was a mutable list which bore no intention to be

determinative, only descriptive of staff roles
    - The issue, however, was: **what effect did the certified agreement have on Mr Visscher's grading?**
        - Clause 23.4 stated: "The grading (or rank/services) list attached will be the basis for future promotions/transfers, etc.".
        - If under his contract of employment Mr Visscher was employed as Chief Officer, the certified agreement did not alter that term
        - Did not contain anything about:
            - Reallocation of individual officiers
            - Intention to deal with reallocation of positions
        - Grading list was basis of future promotions
        - The only statement about positions was in the grading list annexed to the certified agreement;
- **Why did Gummow J dissent?**
    - Gummow J (in dissent) paid more credence to the industrial law rather than the contract law in this case – interprets the contract differently.
    - Held that the collective agreement, having force of statutory law, prevailed over V's employment contract and determined his position as third mate and therefore he could not maintain his contract claim

2. Express Terms

- Both written and oral terms can form part of the express terms of the contract.
- Oral terms can form part of the agreement and can be grounds for damages in contract by the employee if the employer fails to honour those promises (Saad v TWT Ltd [1998] NSWSC 282).
- Whether oral is a term or merely a representation depends on the general principles of contract law: Oscar Chess Ltd v Williams [1957] 1 WLR 370 and JJ Savage & Sons Pty Ltd v Blakney (1970) 119 CLR 435 – <u>what did the parties objectively intend?</u>

a. Representation

- A mere representation will not form part of the contract and so will not give rise to a right to expectation-based damages. Nevertheless a misrepresentation that has induced entry into the contract may give a person a right to rescind the contract.
    - Representations of important matters (ie potential earning capacity) made close to the acceptance of the job offer are likely to be treated as terms of the contract and give rise to expectation-based damages
- Parties who have been misled or deceived by the bargain cannot be held to have truly consented to participate in it.
- **Damages:** If it is a mere representation and not a term there will be no entitlement to expectation-based damages, but there may be an entitlement to reliance-based damages. - Usually this is in tort.
- **Note:** s18 Australian Consumer Law/s52 Trade Practices Act for misleading/deceptive conduct
    - Important for tort claims whereby compensation is assessed on the basis of reliance [O'Neil v Medical Benefits Fund of Australia (2002) 122 FCR 455]

Saad v TWT Ltd (1995) 38 AILR 4208

Facts:

- S was skilled at selling advertising time for TV networks – TWT approached S and said offered job informing S that she would be given a client list from her predecessor who earned 68K (base salary + commission) + offered company car
- S accepted offer, however predecessor decided not to leave and thus S was given a less profitable list → S gave up new job in Melb which paid 60K
- Sued on 3 grounds:
    - 1. s18 Australian Consumer Law/s52 Trade Practices Act for misleading/deceptive conduct
    - 2. Breach of express contractual terms
    - 3. Breach of implied contractual terms

Held:

- A term about remuneration is very likely to be considered a term not representation, remuneration is central to the contract.
- 1. No breach since the representation made by TWT to S in the phone conversations were not false when made → genuinely believed it was true
- 2. The telephone conversations formed part of the employment contract between appellant and respondent, as well as the letter. The contract was partly oral and partly written.
    - Despite the fact that the employer had a limited discretion to alter the client lists of its employees, the failure to give the appellant the promised list fell outside this discretion and was a breach of

the contract of employment.
    - Term - found in her favour that it was a term upon which she relied. It was an important part of the deal that she was accepting.
- 3. No breach of implied contractual terms, as the terms asserted by S were unreasonable
- The appellant's decision to continue working for the respondent with the substitute list was not an agreed rescission of the contract. Rather it was an acceptance of the respondent's repudiation of the contract and an attempt by the appellant to mitigate her loss.
- The damages awardable to the appellant are the difference between likely earnings under the contract and actual earnings during a period of reasonable notice. What period of notice is "reasonable" is decided in the light of the objective circumstances as they exist at the time the notice is, or should have been, given.
    - In this case the period of reasonable notice was three months.

3. Incorporation of Terms from Other Documents

- Terms can be incorporated into a contract by reference.
- A statement in a letter of appointment asserting that an employee agrees to be bound by the employer's policies and procedures manual will incorporate those policies and procedures into the employment contract, to the extent that the matters contained in the manual create obligations of a promissory nature for the employer or employee.
    - Note: policy manuals – Goldman Sachs JB Were Services Pty Limited v Nikolich.
- However, only those statements in policy documents that a reasonable person would believe to form part of an enforceable contract will give rise to potential damages claims.
    - An expression such as the employer 'will' or 'shall' undertake some 'duty' or 'obligation' suggests a serious intention to be bound, but words that inside nothing more than imprecise 'aims' to achieve certain standards will not.
- In an appropriate case, a number of verbal assurances, documents and consistent practices may be accumulated to find the express terms of employment contract.
- **Accumulated Sources – Oral, written and by Conduct:**
    - A number of verbal assurances, documents and consistent practices may be accumulated to find the express terms of an employment contract.
    - In the Matter of ACN 050 541 047 Ltd [2002]: letters of engagement for staff had not referred to redundancy benefits, however, AQC (the business) had consistently operated a policy of paying 3 weeks pay for each year of service whenever employees were made redundant.
        - Evidenced by many documents, board meetings etc.
        - **Held:** Austin J – together these documents and practices constituted the express terms of employment and ordered the liquidator to pay.
- **Apparently Conflicting Terms:**
    - Problems of contract construction often arise where there is a conflict between different terms in the documentation of an agreement.
    - Where there are clauses of a contract specifically framed with the individual circumstances in mind, together with standard form clauses, it will normally be appropriate to give greater weight to the specifically negotiated clauses.
        - Draws upon the purpose and object of the transaction and considers what business people would have agreed; Walker v Citigroup Global Markets Australia Pty Ltd
- **Awards**: industrial award explicit terms will not be part of an employment contract unless the parties have expressly incorporated it; see Byrne v Australian Airlines (1995).
    - "Terms of an industrial award will not be implied, as a matter of fact, law or custom into a contract of employment."

Riverwood International v McCormick
Facts:

- M was made redundant – his letter of offer states
    - "You agree to abide by all Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced."
- This document provided that "Where terminations of employment are as a result of redundancy the terms and conditions of the company redundancy policy shall apply" → policy set out entitlements of employees in event of redundancy
- M was paid much lower redundancy than set out in policy → R argued that the words 'You agree to abide by' only binds M, not R to follow policies.

Held: FCA held that R was bound by policy

- If employer reserves the right to vary policies, policy based terms can be varied subject to an implied term that the employer gives 1. Notice of such changes to employees and 2. the changes are reasonable (they do not act capriciously).

- 3. Must have reasonable opportunity of object
- If the policies are binding – they are mutually binding on both the employer and employee
- As such, Riverwood was obliged to make a payment under the Redundancy Agreement.
- Riverwood's policies were expressed in the language of obligation. The major part of the manual placed very few burdens upon employees and was therefore concerned principally with laying down employee entitlements. As a result of these circumstances, the agreement to "abide by" the policies meant that Mr McCormick would also receive the benefit of the policies

Goldman Sachs
Facts:

- Nikolich brought an action on the basis the "Working With Us" policy document formed part of his employment contract and that in not following its policies Goldman Sachs had breached the contract and that breach had caused him a psychological injury.

Trial Judge:

- Held that GSJB breached 3 parts of the policy:
  - 1. Safety provision: 'provide and maintain, as far as practicable, working environment that is safe and without risk to health'
  - 2. Harrassment provision: 'each person is able to work positively and be treated with respect and courtesy' and 'all people will work together to prevent any unwelcome, uninvited and unwanted conduct'
  - Grievance provision: GSJBW would carry out an adequate and timely investigation of the merit of any complaint or grievance

Issue: Are the policies part of the employment contract?
Held: FCAFC held yes to 1. and no to 2 and 3.

- No damages available for hurt, distress of disappointment, unless the essence/terms of the contract was indeed your happiness - Baltic Shipping v Dillon; Jarvis v Swan Tours (Wilcox J).
- **A company's employment policy will only contain terms of a contract when the contents of a policy are promissory in nature, and not merely aspirational or puffery – specific wording was crucial in this decision**
- All judges used different reasoning to come to the decision:
  - Black CJ: having regard to all of the circumstances, parts of the Policy were contractual (including the fact that the Policy was apparently given to Mr Nikolich at the time of the offer and also the language of the Policy).
  - Marshall J: applied the decision in Riverwood – seeing no distinction between a requirement that an employee comply with policies (as in Riverwood) and a provision that the employee be 'expected' to comply with 'office memoranda and instructions'.
  - Jessup J: the policy mirrored statutory health and safety responsibilities for employers as well as implied term at common law that an employer will take reasonable care for the safety of employees.
- How important is it that an employee has been asked to sign a policy document?
  - There is no magic in signatures. The fact that the employee was required to sign some, but not all, provisions in the HR manual did not indicate that the signed provisions were terms of the contract
- Does it matter that the employer has reserved a discretion to vary policy documents from time-to-time?
  - The employer's option to vary a policy does not mean that the policy can never be a contractual term. So long as the policy commitment is promissory in nature, any agreed variation to its terms may operate as a term of the contract.

4. Terms implied

a. In Fact

- Where the express terms of an employment contract are silent as to a matter that must necessarily form part of the agreement, a court will imply a term into the contract in fact – BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977).
- The five principles from BP Refinery are that the term to be implied must:
  - 1. Be reasonable and equitable
  - 2. Be necessary to give business **efficacy** to the contract
  - 3. Be so obvious that it 'goes without saying'
  - 4. Be capable of clear expression; and
  - 5. Not contradict any express terms of the contract.
- For more informal contracts, these elements will not necessarily be applied rigidly

Byrne v Australian Airlines
Facts:

- B had been dismissed for pilfering goods from baggage in transit. He applied for a penalty against their employer for breach of the relevant award's TCR (termination, change and redundancy) provision, and sought damages.

Issue: When is something an implied term?

Held: A term will be implied as a matter of fact into employment contracts only where the term is necessary to make sense of the bargain between employer and employee.

- The explicit terms of an industrial award will not form part of the employment contracts unless the parties have expressly incorporated the award into the contract. The terms of an industrial award will not be implied, as a matter of fact, law or custom, into a contract of employment.
- It must be demonstrated that the proposed clause would give efficacy to the contract and that it would have been accepted by the parties to the contract as soon as they discovered the need to address the matter at issue – i.e. the contract would be unworkable without the clause.
- Awards operate independent from employment contracts and secure conditions by virtue of the statute. Accordingly, there was no basis for the employment contract having been varied to include award terms, since the two operate independently.

b. In Law

- Terms are implied by law because of the contract's status as an employment contract.
- Unless the parties have expressly excluded those terms, they are taken to be part of every contract of employment, therefore the party seeking to exclude the term bears the onus of proof; Castlemaine Tooheys v Carlton and United Breweries Ltd (1987).
- Implied terms include:
    - Employee's duty to obey all lawful and reasonable commands of the employer
    - Employee's duty of good faith and fidelity.
    - Employee's duty of obedience to 'lawful and reasonable' orders,
    - Employee's duty of loyalty and fidelity ('trust and confidence'),
    - Employer's and Employee's duty of care,
    - Mutual duty to cooperate,
    - Mutual duty to give reasonable notice of termination.

TOPIC 4 – EMPLOYMENT RIGHTS AND RESPONSIBILITIES UNDER CONTRACT: EMPLOYER OBLIGATIONS

1. The Work Wages Bargain

- **Default rule:** In absence of an industrial instrument or any express contractual term as to the timing of payment, employer's obligation is to pay wages dependent upon the employee first performing the work (even if failure to complete is the employer's fault).
- However, the employee could in these circumstances claim breach of contract with damages calculated using the figures of the wages, but not the recovery of the wages themselves. - Automatic Fire Sprinklers v Watson (1946)

Automatic Fire Sprinklers v Watson (1946)

Facts:

- Dismissal, contrary to wartime employment regulations of a man in an essential industry.
- Wanted to be paid though he wasn't doing work because of the breach of the regulations → wanted to the paid for the time he was hanging around his workplace

Issue: when are you entitled to wages.

Held: He won but this was on a construction point → damages for break of K

- **Principle:** wages follow work.
- Without the performance of work, no wages can be paid, despite the reason for non-performance.
- However wages are relevant to quantifying the amount of damages
- However note this is a breach of duty of cooperate.

- Employees engaging in a 'go slow' or 'work to rule' i.e. limited disobedience, issues may arise as to whether the employer must pay, accepting part-performance.
- If the employer accepts the part performance, they must pay. There is no common law deductions based on underperformance – ABEU v National Australia Bank Ltd (1989) 31 IR 436.
- To avoid this, the employer must issue clear instructions as to the work to be done, and warn employees that performance of other work will neither be accepted or paid for.
    - Must be consistent.
    - Must not have a senior staff member undermine the instruction by issuing other orders or demonstrating by their conduct that they are acting on the edict of the employer – Spotless Catering Services Ltd v Federated Liquor and Allied Industries Employees Union NSW Branch (1988) IR 255.