

## TOPIC 3: FORMING AN EMPLOYMENT CONTRACT:

### KEY TERMS / OPTIONAL TERMS

#### Key terms

- Remuneration
- Notice of termination (above NES)
- Ongoing / fixed term / maximum term
- Scope of work
- Supervisor [within which function]
- Reports
- Post-employment restraints
- Covered by award/enterprise agreement
- Redundancy (above NES)

#### Terms and Conditions essential to *contract of employment*

- Identity of employer
- Title / Duties ("flexibility"?)
- Commencement date
- Ongoing/casual/fixed term/maximum term
- Pay (period)
- Benefits - Wages
- Hours of work [days of work incl weekends?]
- Place of work [mobile, relocation] [reasonable travel] [from home]
- Supervisor – reporting lines
- Reports
- Applicable modern award and/or enterprise agreement
- Fitness for work

#### The National Employment Standards (→ Topic 3)

- The minimum conditions prescribed by the NES **cannot** be excluded by an employment contract, even if an employee agrees.
- However, an employment contract can provide for conditions over and above those set out in the NES.

#### Optional terms and conditions

- Leave (above minimums prescribed by NES)
- Parental leave (policy applies in addition to Fed scheme?)
- Redundancy (above NES)
- Termination (above NES)
  - Period of notice, often above NES
  - If the employer prescribes a period of notice below (?) the NES, then they revert to what is 'reasonable' under common law.
- Probation (note minimum employment period specified in the FW Act – minimum period an employee needs to serve in order to bring an unfair dismissal claim)
- Complete job description
- Code of conduct
- Confidential information (Is this relevant to business?)
- Post-employment restraint (enforceable?)
- Intellectual Property / Moral Rights ownership
- Licence requirement
- Sales commission – highly litigated
- Piece rates – eg. Agricultural or textile industries
- Criminal record check / security clearance
- Weekend work
- Outside Interests
- Share / Option plan
- Credit card and reimbursement of expenses (whether corporate credit card is provided)
- Drugs and alcohol (testing)
- Security / Security searches
- Media
- Tools (phone, laptop)

What is critical in an employment contract for a...?

- **Construction worker**
  - WorkSafe insurance, tools, days of the week – note highly unionized industry
- **Agricultural worker**
  - Regional/rural locations – that worker can reach the location, seasonal (fixed term?), seasonal work is an exception to the entitlement to be paid on redundancy
- **Police officer**
  - Drivers licence (employer may say they have frustrated the contract if they no longer have a licence), concept of 'constable' – further obligations/rights under police legislation, criminal record check
- **Hospitality**
  - Availability, weekend work (penalties are reducing for weekend work), certification (food handling, barista, etc), probation
- **Military**
  - Accommodation (of families also), drug and alcohol testing
- **Retail**
  - Sales commission, sales/customer lists (confidential information), post-employment restrictions, termination
- **Executive**
  - Usually long/complex contracts, long-term and short-term incentives, share options, reports up and down to whom, restraint of trade, confidential information, ability to speak to media

## Contractual concepts:

1. **Agreement** – no requirement for E contracts to be in writing
2. **Intention to create legal relations (Ermogenous)** – especially re internships/voluntary work.
  - a. An agreement will only be regarded as contractual if the parties intend for it to be legally binding
  - b. **How to determine if the intention exists?** Each case to be determined on its own facts.
    - i. Whether this intention exists is generally determined by reference to an objective assessment of what the parties have said and done, rather than what each person may subjectively have in mind (**Ermogenous**)
      1. There is NO presumption in non-commercial contexts, such as religious environments, that there exists an intention to create legal relations (onus = person claiming that there is such an intention). In commercial contexts

= there is a presumption that an intention to create legal relations exists  
(onus = person claiming no intention). (**HC in Ermogenous**)

3. **Consideration (Dietrich v Dare: Trial basis for P to paint D's house. If successful, would be able to continue. Held: no employment contract. It was unilateral in nature, employer promising to pay for any work done, but employee under no obligation to do that work).**

- a. Must be a work-wages bargain = mutual obligation for employer to provide work required and employer to pay for work performed (**Kaseris v Rasier Pacific – lack of work-wages bargain because driver was free to perform as much or as little work as liked + receive a percentage of the fee charged = IC**)

4. **Certainty and completeness of terms:**

- a. Agreement will not be enforced if the parties not agreed on certain and complete terms.
  - i. If term is involved, and it is not certain, court won't speculate nor enforce the term since the essential terms have not been agreed upon.
- b. Where no remuneration has been agreed, there will be minimum rates at law and it may be implied there would be a reasonable payment by prevailing market rates.
- c. Employment contract will rarely be deemed incomplete – where no remuneration is agreed, a 'reasonable payment' can be implied, also an implied right to bring the agreement to an end by giving 'reasonable notice'.

5. **Illegality**

- a. Eg. worker driving illegally using a company car, working without a required licence, employer underpaying a worker or failing to deduct the right amount of tax from wages, or restraint clauses if they go beyond protecting employer's legitimate business interests.
- b. The contract continues despite that illegality but there are consequences for the parties.
- c. The illegal clause will be void.

6. **Vitiating Factors**

7. **Lack of Capacity**

- a. Eg. child employment law (minors need parent signature) + mentally disabled + drunk.

**Ermogenous v Greek Orthodox Community - Intention to create legal relations:**

**FACTS:** Who has the onus of proof regarding intention to create legal relations? AND did the parties intend to create legal relations? Archbishop made a claim for payments he believed were due at the end of 20-year arrangement. He was induced to move to Aus etc + was paid a stipend throughout and provided with accommodation. He succeeded at first instance and was paid annual/long- service leave. Full Ct of SC held that there was no intention to create legal relations – it was a calling he was involved in (overturned). Appealed to HC

**HELD:** Annual and long service leave should be paid.

- The rule was that in a commercial context, there exists a presumption that agreements are made with an intention to create legal relations. In these cases, the burden falls on the person denying the enforceability to disprove the intention. Hence, the burden (if a commercial context) would fall on the orthodox community.
- In those case though, as it was for a religious context (non-commercial context), the presumption is that there was

## Internships:

- Question arises as to whether 'interns' are true 'interns' / 'volunteer' labourers with no bargaining power to resist classifications as an intern **OR** are they in reality employees who are not paid and the employer is thereby in breach of the FW Act (as no ability to have unpaid employment)?

## For internships/unpaid work experience to be lawful:

- As per the FWO regulatory approach on internships and unpaid work experience, an **unpaid** work experience arrangement or **unpaid** internship can be lawful provided:
  1. It is a vocational placement, **and**
  2. If there is no employment relationship found to exist.

### 1. It is a vocational placement?

- For the vocational placement to be lawfully unpaid, the **placement must be done/approved as a requirement of an education or training course (s 12)**
- If the position **doesn't** meet the requirements, it won't be a vocational placement under FW Act.
- **However**, this doesn't automatically mean that the person is an employee and entitled to payment = must then determine whether or not the person is in an employment relationship.

### 2. Is there an employment relationship?

- The main question is whether the worker is in an employment relationship with the business or organisation they are doing the unpaid work for.
  - If so = unlawful not to pay the worker as they are an employee of the business.
- To work out whether or not a person is an employee each case must be considered on its own facts.
- It is a matter of working out whether the arrangement involves the creation of an employment contract.
- There are a range of indicators that an employment relationship exists, and it needs to be assessed on a case by case basis. Key indicators are:
  - **Purpose for the working arrangement:**
    - If purpose = give the person work experience = no employment relationship.
    - If purpose = doing work to held with ordinary operation of the business = may be employment relationship.
      - More productive the work (rather than just observing, learning, training or skill development) = employment.
  - **Significance of worker's work to business and the nature of the work:**
    - If work normally done by paid employees and/or business needs work to be done (i.e. nature of the work is important) = employee.
  - **Who's getting the benefit:**
    - Worker is getting the main benefit from arrangement = no employment
    - If business is getting main benefit from engaging the worker = likely employment.
  - **Length of arrangement** = the longer the period of the arrangement = employee

## If they are characterised as interns, what rights do they have

- Treatment as employees for general law purposes:
  - Discrimination protection
  - Breaks (can't work for more than 5 hours without break)
  - Leave
  - Insurance: WorkCover (everyone covered by workover insurance)
  - Safety: WorkSafe (everyone entitled to workplace health and safety)

## Voluntary Work:

- i.e. Not-for-profit Boards, Charitable work, Volunteer work
- The FWC considers volunteerism as an arrangement generally **motivated by altruism**, rather than for remuneration or private gain. Hence, commitments shared between the parties are usually considered moral in nature, rather than legal.
- **What is key to lawful unpaid status?**
  - Lack of intention to create legal relations = hence no contract of E as no empl relationship (**Broken Hill Musicians Club**)
  - Lack of 'consideration' – if payment occurs, this does not mean that it will be an employment relationship. They can still happen = called 'honorariums'/gifts (not wages)
- **What rights/entitlements do volunteers have?**
  - Workplace health and safety,
  - In some cases (deeming), WorkCover
  - Bullying + Anti-discrimination

## Types of employment:

- **casual versus permanent:**
  - Perm employees are typically entitled to leave (part-time or full-time), but NOT casual.
  - Casual loading of 20-25%. 2 days unpaid carer's leave + 2 days unpaid compassionate leave.
- **Outworkers** (textile clothing, footwear)
  - People who do not work from the employer's offices – maybe from home – and typically paid on piece rates (paid per garment/per recruitment or research item completed).
  - Basically disappeared as a lawful way of working since MAs introduced + min legal wage rate)
  - Don't get many people employed as outworkers, but maybe ICs.
- **trainees and apprentices:**
  - They are not paid the same rate of pay compared to someone who is on an Award level – either the *Trainees and Apprentices Award* or the Award specific to their industry.
- **public sector employment:**
  - Statutory office eg. office of constable? There are statutory elements to their duties and responsibilities.
  - They are entitled to the same remedies generally as private sector employees.
- **fixed-term (including maternity leave replacement):**
  - parties cannot give notice during term, must continue for the entirety of the term
    - if employer doesn't want workers services anymore, must pay out remaining wages under the K.
  - If one party brings it to an end, they will be liable for breaching the fixed term period.
- **maximum term (can be terminated on notice during term, but can't go beyond the max)**
  - Either party can terminate during the term (c.f. fixed-term).
  - The term is specified to come to an end when you reach the end of the term.
- **full time vs part-time:**
  - FT = average of 38 hours per week
  - PT = average of < 38 hours per week. Same benefits as FT but on pro rata basis.
- **standard hours/location versus flexible work agreement.**
- **Probation** (Assess if employee suitable for role)
  - Same entitlements as someone who isn't on prob (paid leave etc).
  - If employee doesn't pass prob, still entitled to receive notice when employment ends and have unused annual leave paid out.

## Casual Employment:

- **Casual vs permanent:**

- Casual employees excluded from a number of minimum conditions in exchange for a loading of 20-25% of the normal hourly rate for work.
- **Excluded from:**
  - Annual leave / personal or carer's leave / notice of termination and severance benefits on redundancy.
- Casual employee **cannot** raise **unfair dismissal claim** UNLESS:
  - they have been working for the minimum employment period:
    - 12 months for someone who is in a small business, or 6 months for a business with 15 employees or more.
  - They have undertaken regular and systematic employment; AND They have a reasonable expectation of continuing the casual engagement (**Ponce**)

### Ponce v DJT Staff Management Services Pty Ltd:

**FACTS:** Unfair dismissal claim. The employer took a jurisdictional objection and argued varying hours, different starting and finishing times, unpredictable but frequent work.

**HELD:** Annual and long service leave should be paid.

- In situations where there is no clear pattern or roster of days or hours workers (i.e. no clear arrangement), there might still be evidence of regular and systematic employment where the employee receives work and the employer knows that the employee generally makes themselves available.
  - i.e. reg + systematic employment can be established where **work was offered and accepted regularly** enough that it **could no longer be regarded as occasional or irregular**

- **Parental Leave:** Since **MCG 'sticky wicket' controversy** the Victorian **LSL Act** permits LSL for casuals

- **CASUAL CLASFIICATION:**

- **PREVIOUS meaning of 'casual workers' for the purposes of a fed instrument (MA) that applies to an employee:**
  - An employee who is 'paid and engaged' as a casual pursuant to an industrial instrument (that is, described as a 'casual' and paid the casual loading) can be treated as a casual employee even where the pattern of work might, applying CL principles suggest otherwise (**Telum Civil v CFMEU**)
  - The meaning of a casual employee for the purpose of a fed instrument (MA) that applies to the employee is where (**Telum Civil v CFMEU**):
    - The employee is engaged as a casual (specifically, the label of 'casual' being applied at the time of the engagement); and
    - The employee is paid as a casual (specifically paid a casual loading)
- **POSITION NOW:**
  - In **Workpac v Skene**, the Fed Court rejected the approach in **Telum Civil** and had regard to the broader CL tests of casual employment to determine whether an employee was in fact a 'casual' for the purpose of an applicable industrial instrument.
  - The Fed Court held that '**the essence of casualness is an absence of a firm advance commitment**' from the employer for continuing and indefinite work according to an agreed pattern (**Workpac v Skene**).
  - The usual manifestations of an absence of a firm advance commitment to work on a continuing and indefinite basis are (**Workpac v Skene**):
    - irregular work patterns – no certainty about period over which employment is to be offered

- uncertainty of duration;
- intermittency of work / lack of regularity
- lack of systematic hours
- unpredictability

#### Workpac v Skene:

**FACTS:** employee employed as dump truck operator on a 7 day on, 7 day off continuous roster arrangement of 12.5 hours per shift. His roster for each year was set in advance. After working from 2010-2012, employee stood down and subsequently dismissed. Under his employment K, he was characterised as a casual employee which meant he had no annual leave entitlements under the relevant EA. Following his termination, he claimed he was improperly characterised as a casual employee – the way he had worked meant = permanent full-time employee = entitlement to annual leave.

**HELD:** Annual and long service leave should be paid.

as a casual employee – the way he had worked meant = permanent full-time employee = entitlement to annual leave.

**HELD (at first instance):** worker's regular and predictable working arrangements = employee entitled to annual leave. Employer appealed – heart of appeal was in circumstances where FW Act does not define casual employment, should the definition of casual employment for purposes of NES come from the CL (as held here) or MA/EAs (as employer argued)

**HELD (Full Court):** As occurred here, the 'absence of a firm advance commitment as to the duration of the employee's employment or the days or hours the employee will work is the essence of casualness'.

- There is a uniformly understood specialised meaning of 'casual employee' referable to the use of that term in federal industrial instruments. However, the employer's enterprise agreement did not designate the employee to be a casual. Even if the employee received a casual loading under an industrial instrument, it will not be determinative about whether an employee is entitled to annual leave.
- The 'absence of a firm advance commitment (or schedule) as to the duration of the employee's employment or the days or hours the employee will work is the essence of casualness'.
- In Mr Skene's case, the indicators of casualness were not apparent: his roster was set 6 months in advance, he had a flexible roster, variable timesheets, it was not specified in his contract the amount and purpose of the casual loading, nor was it clear that his supposed casual employment was to replace permanent employment.

#### ○ Consequence of Skene:

- Putting in Post-Skene casual employment remuneration clauses to ensure that casuals are not claiming that they have been employed on a permanent basis to have the benefit of entitlements under the NES:

*You will be paid the hourly rate listed in Item X of the Schedule (exclusive of superannuation). The hourly rate is inclusive of a casual loading, which is paid instead of entitlements to annual leave, redundancy and other matters from which casuals are excluded. Your pay for each casual engagement you work will be paid in a fortnightly pay cycle directly into a bank account nominated by you. The Company will deduct tax and other amounts it is required to deduct from all payments made to you, as required by law.*

#### **Potential Post-Skene provision:**

*If you later assert that you were not engaged as a casual employee and seek payment of accrued annual leave, you agree that [insert e.g. 50%] of the gross casual loading (reflecting the value of annual leave in that loading) paid to you will be immediately repayable to the Company, and you authorise this to be offset against payments owed to you on the basis that this is for your benefit in avoiding recovery proceedings. If you later assert that you were not engaged as a casual employee and seek payment of redundancy benefits, you agree that [insert e.g. 20%] of the gross casual loading (reflecting the value of redundancy benefits in that loading) paid to you will be immediately repayable to the Company, and you authorise this to be offset against payments owed to you on the basis that this deduction is for your benefit in avoiding recovery proceedings.*

#### **Misleading conduct relating to employment (Australian Consumer Law):**

- [X] must not, in relation to employment that is to be, or may be, offered by [X] or [by another person] engage in conduct that is liable to mislead [Y] who is seeking the employment as to (s 31 ACL (Cth))
  - (a) the availability, nature, terms or conditions of the employment (C.f. Maxutova); or
    - High bar to meet (Maxutova)
  - (b) any other matter relating to the employment.

### Maxutova v Nunn Media Pty Ltd:

**FACTS:** A recruiter engaged by Nunn Media approached a prospective employee (Maxutova) in late 2015 about the position of Head of Strategy at Nunn. Maxutova became an employee in 2016. However, employment terminated by Nunn during the probationary period, due to performance concerns. Maxutova claimed that Nunn engaged in misleading/deceptive conduct when the recruiter stated that the role was for an individual seeking a 'long-term position'.

**HELD:** The representations by the recruiter were not sufficiently specific to be relied upon, and the fact that Nunn was seeking a long-term recruit did not mean Maxutova was immune from termination during her probationary period.

- The statements by senior management were found to be aspirational in nature and not misleading.
- Also there existed evidence that Maxutova did not rely on the statements in accepting the position at Nunn.

### **Protective Clauses to maximise compliance: The Doctrine of Set-Off**

- **Can an employer set-off an amount it owes you against amount it has already paid you?**
  - i.e. Employer has been paying employee more than the applicable award rate for wages and employer is then found to owe the employee an award entitlement (i.e. penalty rates), the employer sets off the amount owed with the excess amount already paid to the employee. This practice is called a set-off but only permitted in certain circumstances.
  - At Common Law, whether a set-off is permitted will depend on the purpose for which the sum already paid was made and the nature of the amount the employer owes the employer.
    - Where there is a contractual arrangement that the employer will pay the employee sums over and above or extraneous to award entitlements, the contract prevents the employer from relying on these additional payments to satisfy award entitlements **outside** the agreed purpose of the payments ([James Turner; Poletti v Ecob \(No 2\)](#))
    - Where there are outstanding award entitlements, a sum that had already been paid to the employee designated for a purpose other than the satisfaction of the award entitlement **cannot** afterwards be said to have satisfied the award entitlement – ([Poletti v Ecob \(No 2\)](#); confirmed in [Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia](#))
      - This includes where it is described as an 'all-inclusive' rate = no set off can apply ([James Turner Roofing](#)) – must be more specific in clause.
    - The above principles may not apply to situations where parties did not intend to provide for award entitlements at all. For example, in situations where the employer believed the employee to be an independent contractor, and a court later determines that an employment relationship existed – ([Linkhill v Director, Office of the Fair Work Building Industry Inspectorate](#)).
- **Drafting of Set-off Clauses:**
  - Under an employment K, employer + employee may agree that the salary payable under the K has the purpose of satisfying the obligation to pay **identified** award financial entitlements (e.g. overtime rates, penalty rates, shift allowances + annual leave loading).

### **Flexible Work Arrangements:**

- **When can an employee request change in working arrangements? ([s 65\(1\) FWA](#))**
    - If:
      - (a) any of the **circumstances** referred to in [subsection \(1A\)](#) apply to an employee; **and**
      - (b) the **employee would like to change** his or her **working arrangements** because of those circumstances;
- then the **employee may request** the **employer** for a **change in working arrangements** relating to those circumstances.
- [Subsection 1A](#) **circumstances:**

- (a) **parent**, or carer of a **child** who is of **school age or younger**;
- (b) **carer** (within the meaning of the Carer Recognition Act 2010);
- (c) has a **disability**;
- (d) 55 or older;
- (e) Is experiencing **violence** from a **member** of the employee's **family**;
- (f) the employee **provides care or support** to a member of the **employee's immediate family**, or a member of the **employee's household**, who requires care or support because the member is **experiencing violence from the member's family**.
- **OR** (1B) parent or carer returning to work after taking leave regarding: birth or adoption fo a child, may request to work part-time to care
- **Employee is not entitled to make the request unless: (s 65(2) FWA)**
  - (a) for an **employee OTHER THAN a casual employee**- the employee has completed **at least 12 months of continuous service** with the employer **immediately before making the request**; **OR**
  - (b) for a **casual employee**--the employee:
    - (i) is a **long term casual** employee of the employer immediately before making the request; **and**
    - (ii) has a **reasonable expectation** of continuing employment by the employer on a **regular and systematic basis**.
- **Examples of changes in working arrangements?**
  - Changes in hours of work, changes in patterns of work, changes in location of work.
  - Main one is working from home for a certain number of days per week
- **Formalities (s 65(3) FWA) - The request must:**
  - (a) be in writing; **and**
  - (b) set out details of the change sought and of the reasons for the change.
- **Agreeing to the request:**
  - Employer must give the employee a **written response** to the request within 21 days, stating whether the employer grants or refuses the request (**s 65(4) FWA**)
    - If employer refuses the request, must include the details of the reason for refusal (**s 65(6) FWA**)
- **When can the employer refuse?**
  - The employer may refuse the request only on **reasonable business** grounds (**s 65(5) FWA**)
  - Reasonable business grounds includes the following (**s 65(5A) FWA**)
    - (a) that the new working arrangements requested by the employee would be **too costly** for the employer;
    - (b) that there is **no capacity** to change the working arrangements **of other employees** to **accommodate the new working arrangements** requested by the employee;
    - (c) that it would be **impractical** to change the working arrangements of **other employees**, or **recruit new employees**, to **accommodate** the new working arrangements requested by the employee;
    - (d) that the new working arrangements requested by the employee would be likely to **result in a significant loss in efficiency or productivity**;
    - (e) that the new working arrangements requested by the employee would be likely to have a **significant negative impact on customer service**.
- **ALTERNATIVE:**
  - Discrimination legislation – failure to provide reasonable adjustments.
  - C.f. employer may argue failure to meet the inherent requirements of the job etc.