

# EMPLOYMENT LAW

## HYPOTHETICAL NOTES

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## WHAT TYPE OF EMPLOYEE IS X?

**State:** The causes of action and types of relief that X may be entitled to will depend on what kind of employee he/she is. From the facts, X is likely to be a common law/national system/casual employee.

### IS X AN EMPLOYEE AT COMMON LAW?

Please note: the distinction between employee and IC is not directly examinable and will likely be provided on the facts. This is here only in case it is needed.

#### TEST

**State:** It is necessary to determine whether X is an employee or an independent contractor in order to see whether they are entitled to [insert claim type] In order to determine whether x is an employee or an independent contractor, it is necessary to use a multifactorial test. The leading authority is in the common law case of *Hollis v Vabu*, where the court assessed the totality of the relationship between the employer and worker. The case of *Abdalla* contains a well-accepted formula of the indicia approach, which focuses on the particular characteristics of the worker relationship.

Suggesting Employee	Suggesting Independent Contractor
<ul style="list-style-type: none"> <li>▪ Employer has ability to <b>control</b> manner of work, hours of work etc.                             <ul style="list-style-type: none"> <li>○ <i>Hollis</i>- company controlled when couriers would work, how much to charge and which directions to take</li> <li>○ <i>Roy Morgan</i>- Market research interviewers could accept or reject assignments, but were subjected to detailed rules about how they conducted the interviews</li> <li>○ <i>Kaseris</i>- Uber did not control when Kaseris worked or how he worked, aside from some codes of conduct and standards</li> </ul> </li> <li>▪ Required to wear a <b>uniform</b> <ul style="list-style-type: none"> <li>○ <i>Hollis</i>- Had to wear a uniform</li> <li>○ <i>Kaseris</i>- Refused for drivers to wear a uniform or display a logo associating them with Uber</li> </ul> </li> <li>▪ <b>Worker is integrated</b> into the business, such as through livery</li> <li>▪ <b>Provision for paid holidays, sick leave</b></li> <li>▪ <b>Income tax deducted</b></li> <li>▪ <b>Authority to suspend and dismiss</b></li> <li>▪ <b>Worker paid according to time worked (wages)</b>- note; this is not a particularly strong factor</li> <li>▪ <b>Authority to suspend or dismiss the worker</b></li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Worker is running their own business:</b> bears the risk of profit/loss [not strong], goodwill/saleable assets, has separate place of business</li> <li>▪ Worker creates <b>goodwill and assets</b></li> <li>▪ <b>Workers can genuinely delegate or subcontract work</b> (some judges have said that it is decisive/strong, especially if it actually happens or there is actual capacity- indicates that personal services is not required)                             <ul style="list-style-type: none"> <li>○ Unlimited power to delegate or subcontract <i>QLD Stations</i></li> <li>○ Qualified or occasional power can suggest independent contractor also- <i>Langford</i></li> </ul> </li> <li>▪ Worker provides significant tools and equipment                             <ul style="list-style-type: none"> <li>○ <i>Langford</i>- Was very similar to facts of Hollis, but they had to own and supply their own truck so unlikely to be an employee</li> <li>○ <i>Hollis</i>- Having to supply a bike was not a contractual arrangement, its because the company was stingy. Bike could also be used for personal use.</li> </ul> </li> <li>▪ Worker has a <b>distinct profession</b> or calling</li> <li>▪ Worker has <b>own place of work and advertising</b></li> <li>▪ Worker spends <b>significant part of remuneration on business expenses</b></li> <li>▪ Workers paid according to tasks</li> <li>▪ Worker has genuine and practical entitlement to work for others (weak, bc many people work for multiple employers)                             <ul style="list-style-type: none"> <li>○ <i>Elazac</i>- Employed own staff and free to work other jobs</li> </ul> </li> <li>▪ <b>Incorporated</b> as a business entity (has an ABN)</li> </ul>

**Conclude:** On balance, x is likely to be a **Contractor/Employee**

1. A an employee, X will be able to access...
2. As an independent contractor, X will be unable to access... However, anti-discrimination protections under the Anti-Discrimination Acts, work health and safety protections, and the Independent Contractors Act will apply.

#### WHAT IS X ENTITLED TO?

Laws	Covers employees?	Covers independent contractors?
FW Act: minimum standards (NES; modern awards; minimum wages order; unfair dismissal)	yes	no
FW Act: enterprise bargaining; protected industrial action	yes	no
FW Act: General Protections; Anti-Bullying Orders	yes	yes
Anti-discrimination law	yes	yes
Work health and safety law	yes	yes
Independent Contractors Act	no	yes

## IS X A NATIONAL SYSTEM EMPLOYEE FOR THE PURPOSES OF THE FW ACT?

### APPLICATION OF FW PARTS

#### Part 2-2 — NES Minimum Standards

[1] Section 60 – Definition of employee for this part is National System Employee and National System Employer

#### Part 2-3 — Modern Awards

[2] Section 133 – Definition of employee for this part is National System Employee and National System Employer

#### Part 2-4 — Enterprise Agreements

[3] Section 170 – Definition of employee for this part is National System Employee and National System Employer

#### Part 3-1 — General Protections

[4] Section 335 — Definition of employee and employer for this Part are ordinary meanings.

#### Part 3-2 — Unfair Dismissal

[5] Section 380 – Definition of employee for this part is National System Employee and National System Employer

#### Part 3-3 — Industrial Action

[6] Section 407 – Definition of employee for this part is National System Employee and National System Employer

#### Part 6-4B — Anti-Bullying Provisions

[7] Section 789FB – Definition of employee and employer for this part have their ordinary meaning.

### TEST

**EXAM:** Whether the FWA applies to [client] is contingent on whether they are a 'national system employee' (FWA s 13) or 'employee' within the meaning of the common law (See, s 15). As X is likely to seek redress under [insert parts], it is necessary to determine whether he/she is a [National System Employee/common law employee].

### COMMON LAW EMPLOYEE

See above- although note that as that topic is not specifically examinable Anna is likely to say they are 'engaged under a contract for employment' or otherwise make it clear that they are a common law employee. Stewart's Guide [2.20] says that this applies to 'all' employees and is often supported by the external affairs power.

### NATIONAL SYSTEM EMPLOYEE

**Exam:** There are two possible ways that X could be a National System Employee. The first option is that X meets the definition of national system employee under s13 of the FW Act, and the second is that they are of a category of employee that was referred to the FW Act by their State (s30(C) FW Act). I will consider each in turn.

### SECTIONS 13-14 OF THE FW ACT

**State:** X will be a national system employee if he/she is employed by a national system employer (s13 FW Act). From the facts, [employer] is/is not a national system employer because it is a [select option from below]. Please note: someone cannot be a national system employee if they are on vocational placement.

#### [1] NATIONAL SYSTEM EMPLOYERS INCLUDE (S 14)

[1] Constitutional Corporation (S 14(1)(A)):

[a] **State:** A Constitutional Corporation is a corporation includes all foreign corporations, and trading and financial corporations formed in the Cth within the meaning of s 51(xx) of the Constitution.

[b] **Apply:**

[a] **State:** [employer] is a [foreign/trading/financial] corporation, therefore... [apply below].

[b] Foreign Corporation: Automatically covered (SEE S 51(XX)).

[c] Trading Corporation: Apply — Activities test (*Adamson*)

- i. **State:** The court will apply the activities test from *Adamson* in determining whether [employer] is a trading corp. This threshold requirement is difficult to apply (Stewart's Guide, 2.25). This test will look at whether [employer's] trading activities are a substantial or not insubstantial proportion of their activities (*Adamson*).
- ii. Trading activities could include (Stewart's Guide, 2.25)
  - Selling goods (including for fundraising)
  - Charging admission for public performances
  - Providing services for a fee
  - Hiring out equipment
  - Charging for a car park
  - Deriving income from investments

- Renting out property

iii. **Apply**

[d] **Financial Corporation:**

- i. **State:** The same test applies for financial corps as trading corps (*State Superannuation Board*). The court will therefore apply the activities test from *Adamson* in determining whether [employer] is a financial corp. This threshold requirement is difficult to apply. This test will look at whether [employer's] trading activities are a substantial or not insubstantial proportion of their activities (*Adamson*).

ii. **Apply**

[e] **Non for profit:**

- i. A non for profit can apply as a constitutional corporation if incorporated under state or territory legislation (Stewart's Guide, 2.23)

[2] The Commonwealth itself (S 14(1)(B))

[3] A Commonwealth Authority S 14(1)(C)

[4] Person employed in connection with constitutional trade, who is employed as S 14(1)(D):

[a] A flight crew officer S 14(D)(I);

[b] Maritime employee; or S 14(D)(II)

[c] Waterside worker S 14(D)(III)

**EMPLOYERS DECLARED NOT TO BE NATIONAL SYSTEM EMPLOYERS (S 14(2))**

[1] The following employers are not NSE if they are also declared not to be with endorsement from a Minister (s14(2)(b)-(c)).

- [a] is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; (14(1)(i))
- [b] is a body established for a local government purpose by or under a law of a State or Territory (14(1)(ii)); or
- [c] is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies (14(1)(iii))

[1] A sole trader or partnership is not a corporation (Stewarts Guide, 2.23)

REFERRED BY THEIR STATE

**State:** As X also works in [Any state but WA], he/she may also be a national system employee to the extent that [insert state name] has referred to the FW Act (s30C, s30D, s30E (NS employers) FW Act).

[1] NSW, QLD, SA and TAS- all employment referred to Cth except State public sector

[2] NSW, QLD and SA- also exclude local councils

[3] VIC- all employment referred except some matters in the State public sector, judicial officers, senior servants. 30C covers Vic as we referred prior to 2009 (Stewart's Guide, 2.21)

[4] WA = no referral.

GUIDANCE FOR EMPLOYEE AT COMMON LAW OR FW ACT

1. Is a **sole proprietor in Vic** a "national system employer"?
  - a. **Yes because of the referral:** 'employed or usually employed' common law = yes but also constitutional corporation = no (first limb), BUT under the referrals, Vic is a referrer so probably does under the extended meaning (second limb).
2. Is a **sole proprietor or partnership in WA** a "national system employer"?
  - b. **No- because not referred from WA and not incorporated.** Would go to the WA system
3. Is a **Corporation in WA** a "national system employer"?
  - c. **Yes under the first limb- constitutional corporation**
4. Is a **sole proprietor or partnership in WA** an "employer" within the "ordinary meaning"?
  - d. **Yes- assuming they are a common law employer with contracts of employment (will be covered by 3-1)**
5. Are **NSW State public sector employees** "national system employees"?
  - e. **No- been exempt from the referral and not a corporation** BUT be careful with public sector entities
6. Are **NSW State public sector employees** "employees" within the "ordinary meaning"?
  - f. **Yes- as they are common law employees- will be caught by 3-1**
7. Can a **principal – independent contractor** relationship come within "national system" employee/er, or "employee/er" within the "ordinary meaning"?
  - g. **No for ordinary meaning, no for national system as both mean common law.**
8. But are **independent contractors covered by Part 3-1?**
  - h. **Yes- not through employee or employer but named individually**

**State:** X is/is not an employee for the purposes of the common law and FW Act. Therefore, the provisions relating to [insert section] do/do not apply to him/her.