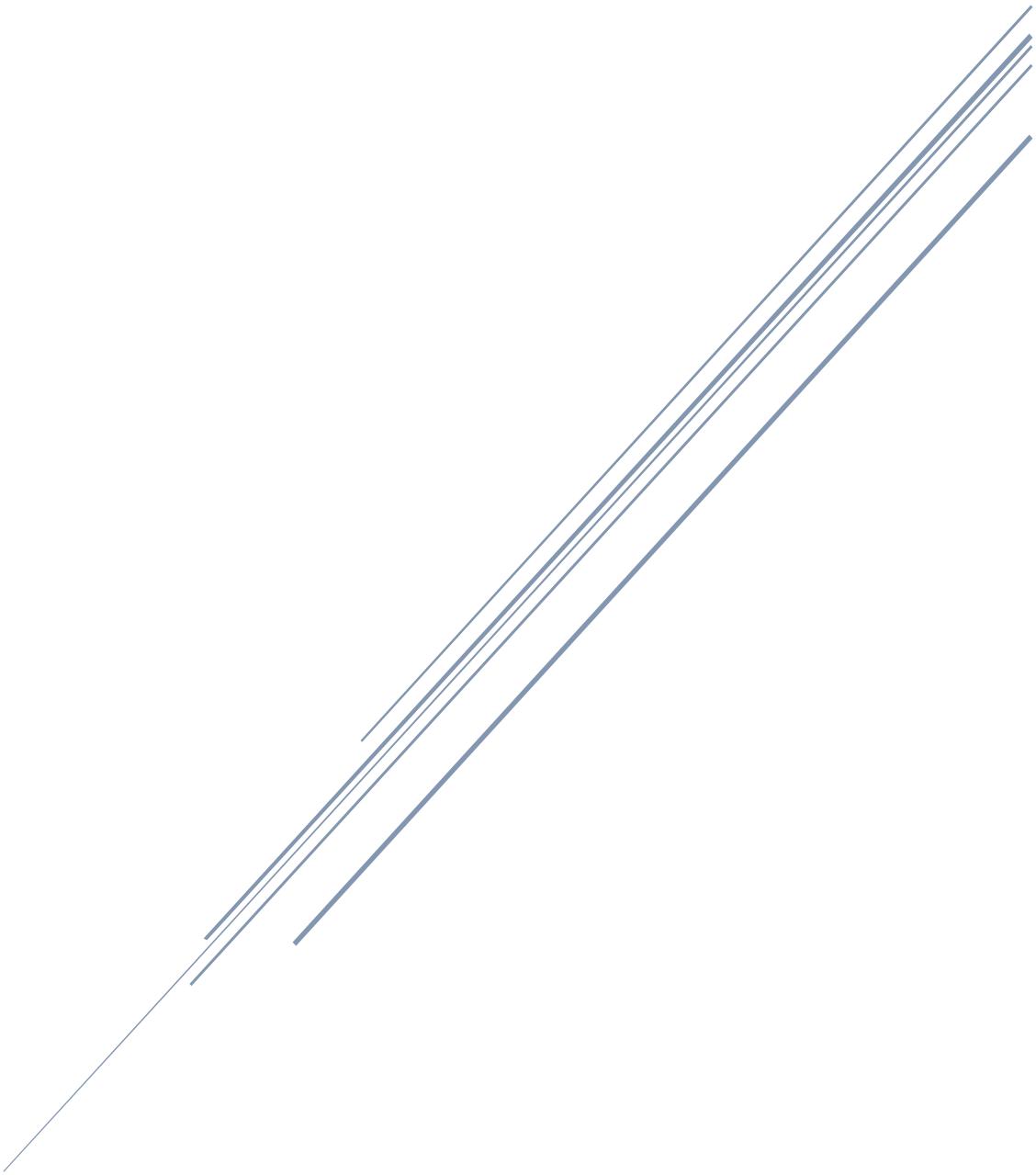
WORKPLACE LAW

Exam Notes



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EXAM ANSWER TEMPLATES

Implied Terms of a Contract

1. **Are there any implied contractual terms by fact?**

   (This does not usually pass)

   Use the 'busines sufficiency test'– *BP Refinery*

   a. Must be a necessary term to give business efficacy to the contract
   b. Must be reasonable and equitable
   c. Must be so obvious it goes without saying
   d. Must be capable of clear expression
   e. Must not contradict any express terms

2. **Are there any implied terms by custom or usage?**

   Is the term so well-known a reasonable person would presumed it is included in the contract? – *Con Stan Industries v Norwich Insurance*

   a. Is it a common industry practice?
   b. Is there evidence it's so well-known it can be reasonably presumed to be imported?
   c. Does it contradict the express terms? If yes, cannot be implied

3. **Are there any implied terms by law?**

   a. Known employed duties of an employer
   b. Implied duties for employees
   c. Mutual duties
   d. For any law terms not listed (necessity test) *Byrne v Australian Airline*

Employment Relationship

1. **Does it fulfil all contractual elements?**

   - Contract law fundamentals – offer, acceptance, certainty, intention, consideration, legality.

2. **Does it outline the relationship?**

TOPIC 7: THE GENERAL PROTECTIONS, SECTION 3-1 OF THE FWA

Relevant parts of the Fair Work Act

Part 3-1 (relevant part of Act)

- **S 336 (objects)**
- **S 340, 341 (workplace rights)**
- **S 342 (adverse action)**
- **S 346, 347 (industrial victimisation, see topic 4)**
- **S 351 (discrimination)**
- **S 352 (temporary absence)**
- **S 360, 361 (onus of proof)**
- **S 366, 369, 371 (miscellaneous provisions)**
- **S 545 (orders to be made by Court)**
- **S 546 (court powers)**
- **S 570 (costs' provisions)**

Adverse Action – Section 342(1)

Adverse action is action that is unlawful if it is taken for particular reasons. The FW Act defines a number of actions as adverse actions.

Further, a prospective employer may commit adverse action against prospective employees if they refuse to offer them employment, see further **section 342(1).**

These actions are very wide and encompass most adverse treatment that can be taken by an employer against an employee. They include not just dismissal from employment but also demotion, suspending on full pay, issuing a warning, commencing a performance improvement process, declining a leave application, and the taking away of privileges enjoyed at work. It also includes any threatened action: **see section 342(2)(a).**

Importantly there is a long judicial history considering the phrases in **section 342(a), (b) and (c) set** out above as they have been part of the federal legislation since 1914. The fourth phrase (d) was included in 2009.

Adverse action taken by a person includes doing, threatening, or organising any of the following:

- an employer dismissing an employee, injuring them in their employment, altering their position to their detriment, or discriminating between them and other employees
- an employer refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers
- a principal terminating a contract with an independent contractor, injuring them or altering their position to their detriment, refusing to use their services or to supply goods and services to them, or discriminating against them in the terms and conditions the principal offers to engage them on
- an employee or independent contractor taking industrial action against their employer or principal
- an industrial association, or an officer or member of an industrial association, organising or taking industrial action against a person, or taking action that is detrimental to an employee or independent contractor
- an industrial association imposing a penalty of any kind on a member.

Multiple Reasons and Reverse Onus – Section 360 and 361

Fair Work Act 2009 – Section 360 Multiple reasons for action
For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

Fair Work Act 2009 – Section 361 Reason for action to be resumed unless proved otherwise
(1) If: (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and (b) taking that action for that reason or with that intent would constitute a contravention of this Part; it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise. (2) Subsection (1) does not apply in relation to orders for an interim injunction.

Section 360 deals with the situation where there are multiple reasons for the taking of adverse action. If one of the reasons for taking adverse action was a proscribed reason, then there will be a breach of the applicable general protections provision (where the provision is a 'because' provision). The proscribed reason does not have to be the sole or dominant reason. However, the reason must be a 'substantial and operative' reason.

Section 361 creates a reverse onus. The onus is on the employer rather than the employee to establish why a person was adversely affected, in the workplace. If this onus is not discharged, it is to be assumed that the action in question was taken for a prohibited purpose. Where an application is made alleging that a person took action for a particular reason or with a particular intent, it is presumed that the person has taken the action for the alleged reason or with the alleged intent unless the person proves otherwise.

For example, if an application is made alleging that an employer dismissed an employee because the employee exercised a workplace right, once it is established that the dismissal took place and that the employee exercised a workplace right, it is presumed that the employer dismissed the employee because the employee exercised a workplace right unless the employer proves otherwise.
Together, these sections make it easier than it otherwise would be to establish that a person took adverse action because the reason for taking adverse action usually lies entirely within the knowledge of the person who took the adverse action.

Sometimes the decision to take adverse action is made by a collective group, such as the partners in a business, the board of a corporation, at a council meeting, or a number of managers and supervisors. In that circumstance, it may be necessary to call all members of the collective group to give evidence in order to rebut the presumption in s 361.

In any event, the court must consider why the adverse action was taken. This involves consideration of the person or decision-maker's particular reason for taking the action and consideration of all the facts of the case at the time the decision was made, including those related to the adverse action.

The person who is seeking to rebut the presumption will need to provide evidence about the reason for taking the adverse action and/or the intention at the time of taking the adverse action. In the case of an organisation or corporation, the reason or reasons motivating the person(s) in the organisation or corporation who effectively made the decision to take the adverse action will be significantly relevant. In that context, it is important to identify the effective decision-maker(s) and their motives

It will ordinarily be difficult to rebut the statutory presumption if no direct evidence by the person or decision-maker(s) who took the adverse action is given. Direct evidence of the decision maker's state of mind, intent or

purpose will be considered, and the credibility of the decision-maker will be examined. It will be up to the Court to consider whether the decision-maker's evidence as to the reasons for taking the action is accepted. It is open to the other party to call evidence to demonstrate that the decision-maker's real reason for taking the action was not what they said it was.

Direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer. However, direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence.

Jones v Queensland Tertiary Admissions Centre Limited (No 2) [2010] FCA 399

Explained the operation of section 361 of the FWA in the following terms:

> *"That the employee is required to first prove the existence of objective facts which are said to provide a basis for the alleged adverse action, before the onus shifts to the employer in respect of the prohibited reason … it is not sufficient for [an applicant] to simply allege that she had a workplace right and that she was the subject of adverse action – rather on the assumption that [an applicant] is able to prove these allegations, the burden is then cast on to [the employer] to prove that adverse action was not taken against [an applicant] because of [her] workplace rights for the purposes of section 340 and 361 of the Act."*

Under this section, where an application is made alleging that a person took action for a particular reason or with a particular intent, it is presumed that the person has taken the action for the alleged reason or with the alleged intent unless the person proves otherwise.

For example, if an application is made alleging that an employer dismissed an employee because the employee exercised a workplace right, once it is established that the dismissal took place and that the employee exercised a workplace right, it is presumed that the employer dismissed the employee because the employee exercised a workplace right unless the employer proves otherwise.

This section makes it easier than it otherwise would be to establish that a person took adverse action because the reason for taking adverse action usually lies entirely within the knowledge of the person who took the adverse action.

If:

- in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
- taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

THIS IS IMPOTANT! Without this, proving a claim would be very difficult. BUT – the presumption can be rebutted. How?

Evidence must be provided bout the reason the adverse action was take. Typically, direct evidence from the person making the decision will be needed.

Testimony from the decision maker may suffice if it is found credible: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 549*

The key principle remains that emphasised by the High Court in *Barclay (2012) 290 ALR 647*

That is, whether the prohibited reason was a 'substantive and operative factor' in the decision to take the adverse action.

Discrimination protection – section 351

State of Victoria v Grant [2014] FCAFC 184 Termination - Mental disability – anxiety and depression	
Facts:	A lawyer employed by the Office of Public Prosecutions was terminated for various disciplinary and performance issues a short time after he had disclosed to a number of managers that he was suffering from serious mental health issues. The high-level sequence of events was: • Between 2007-2010, Mr Grant worked for the OPP without incident • In 2010, he suffered a broken leg which led to complications and sporadic work attendance and diminished performance • Over the course of 2011-2012, Mr Grant's absences gave rise to a number of difficulties relating to the preparation of cases for which Mr Grant was responsible • In February 2012, Mr Grant was directed to take a period of leave and provide a medical report on his condition and the impact of it on his ability to perform his duties • Mr Grant provided a copy of a report from his treating doctor stating that he had a long-term anxiety condition which had been complicated by excessive consumption of alcohol and bouts of depression. • In March 2012, the employer wrote to Mr Grant advising him that it intended to commence an investigation into a number of allegations of misconduct which had been made against him. Four of the allegations related to alleged disobedience of lawful directions regarding his punctuality, preparation for trial and communication. • Mr Grant was provided with an opportunity to respond to the allegations. After considering Mr Grant's responses, the employer terminated his employment on the basis of misconduct and unsatisfactory performance. Mr Grant subsequently brought a section 351 claim on the basis that he was terminated because of his mental disability (anxiety and depression).
Decision:	Justice White said the "existence of a close relationship between the adverse action and a prohibited reason does not mean that the two cannot be disaggregated". Tracey and Buchanan JJ said the evidence did not support a finding that Mr Grant's conduct arose "wholly out of his medical condition" or that his misconduct "was completely interwoven with his medical condition" such that "the misconduct and the ill health could not be disaggregated".

Employer defence – inherent requirements

We note the 'inherent requirement' exception in **section 351(2).** The concept acts as a defence for the employer against allegations of discrimination.

Broadly speaking:

- the expression 'inherent requirements' is to be given its natural and ordinary meaning. That meaning directs attention to the essential features or defining characteristics of the position in question.
- Whether a requirement is an inherent requirement is a matter which should be determined according to common sense and objective fact rather than as a matter of mere speculation or impression.
- A practical method of determining whether or not a requirement is an inherent requirement is to ask whether the position would be essentially the same if that requirement were removed.

SUMMARIES

TOPIC 6 SUMMARY: TERMINATION OF EMPLOYMENT

Legislation

Fair Work Act 2009 (Cth) Part 3-1 & 3-2 especially:

- **Section 117: NES standard for notice of termination**
- **Section 119: NES standard for redundancy pay**
- **Section 123: Exceptions from notice and redundancy pay**
- **Section 382: When a person is protected from unfair dismissal**
- **Sections 383-384: Minimum employment period**
- **Section 385: What is an 'unfair dismissal'**
- **Section 386: Meaning of 'dismissed'**
- **Section 387: Criteria for considering 'harsh, unjust or unreasonable '**
- **Section 389: Genuine redundancy**
- **Sections 390-392: Reinstatement and compensation for unfair dismissal**
- **Sections 340-341: General protection for 'workplace rights'**
- **Section 342: Definition of 'adverse action'**
- **Sections 346-347: General protection for 'industrial activity'**
- **Section 351: General protection for discrimination**
- **Section 352: General protection for 'temporary absences' from work**
- **Sections 360-361: Multiple reasons and reverse onus of proof**
- **Sections 545-546: Court orders for breach of general protections**
- **Section 725: General rule against 'double-dipping'**

Introduction

The main ways in which a dismissal may be 'wrongful' at common law are as follows:

1. The employer refuses or fails to provide the relevant period of notice;
2. The employer demotes the employee or imposes some other significant unilateral change which amounts to a 'repudiation' or 'constructive dismissal';
3. The employer summarily dismisses the employee in circumstances where the employee has not engaged in 'serious misconduct';
4. The employer tries to terminate a fixed-term contract prematurely i.e. before the expiration of the designated term; or
5. The employer does not comply with any procedural requirements which are expressly written into the contract (the common law does not otherwise require procedural fairness).

Termination by the giving of notice

These days, it is not so simple. Firstly, the period of advance notice that must be given is subject to the statutory minimum periods of notice under the NES: **section 117 of the FW Act** discussed below. . Secondly, even if an employer provides the required period of notice, that does not prevent the employee from bringing an unfair dismissal claim or a general protections claim.

Unfair Dismissal

Section 381 of the FW Act aims to balance the needs of employers with those of employees: to give 'a fair go all round.' (*Re Loty and Holl*oway [1971] AR(NSW) 95.)

The aim is to set a balance between there being no proprietary right to a job and the importance of employment to identity and financial stability. Want to provide a fair go all around. A stable work force, need for financial stability, the employers need for performance.

Main Points – When Answering Unfair Dismissal Questions
(i) Who is excluded?– sections 382 - 384
(ii) What is an unfair dismissal – section 385
(iii) Procedure and remedies – section 390-405

Some of the main themes of unfairness cases are:

- job performance;
- workplace behaviour or discipline; and
- after-hours conduct, especially use of social media – what you do in uniform

Think about what sorts of out-of-work behaviour might provide a valid reason for dismissal.

What is an unfair dismissal? Section 385

Must follow these sections!!

1. Dismissal was harsh, unjust or unreasonable, **section 387**, AND
2. Person has been dismissed, **section 386**, AND
3. Dismissal not consistent with small business fair dismissal code, (if applicable), **section 388, (section 23),** AND
4. Dismissal was not a case of genuine redundancy (if there is no redundancy mentioned in a question then just state that it is not applied here – same with small business), **section 389**

Was the employee 'dismissed' – Section 386

The termination must have been at the initiative of the employer. However what happens if the person resigned because they were forced to resign due to action taken by the employer?

Section 386(1)(b) provides that a person is still *dismissed* if they are forced to resign due to conduct of the employer. In common law proceedings this is called constructive dismissal and although the legislation does not use the term constructive dismissal it is still a phrase frequently referred to in unfair dismissal cases where an employee has been forced to resign. For an example of this *Rind v Australian Institute of Superannuation Trustees* [2013] FWC 3144 at [35-64].

Constructive Dismissal

The concept of constructive dismissal relates to situations in which, although there has been no formal or explicit termination initiated by the employer, the employee is entitled to treat the employment contract as being at an end due to a fundamental breach by the employer (or a pattern of conduct amounting to repudiation).

Whether or not this threshold has been reached is assessed on a case by case basis and is subject to interpretation of the contract terms. The concept of constructive dismissal has been picked-up and incorporated into the statutory definition of 'dismissed' in **s 386 of the FW Act**, which is one of the prerequisites for being able to make an unfair dismissal claim.