

Industrial Law by topic:

(3) Sources of the Contract of Employment – 1

(a) Individual agreement: express terms; terms implied in fact and law

Terms: Can be express or implied

Implied terms by: Reference Fact Custom Law

REFERENCE:

- Incorporation of policies and procedures
 - Can be expressly incorporated – to degree of promissory terms (not aspirational) when it is a typical clause of an employment contract and a reasonable person would conclude the employer would intend to be bound by it (*Riverwood*)

Cases:

- *Goldman v Nikolick*: 'working with us docs' expressly incorporated was held that the promissory terms were binding notwithstanding there was a clause allowing the employer to amend the policy as they wish.
- *Westpac Banking*: terms were promissory and thus incorporated but the employees did not hit their KPI's to be entitled to a bonus so non-payment of the bonus was not a breach.
- *Remeero v Farstad Shipping*: Bullying policy was not followed when an employer investigated the employee rather than the employer when the employer was the bully. Incorporated because: (i) training on the topic was given when starting work at the company; (ii) copy of policy was given to employees; (iii) employer/employee signed it; and (iv) the benefit was ordinarily inferred into employment contracts (other companies regularly enforced it)

FACT:

- *Byrne and Frew*: implied by fact when:
 - Not covered by express terms
 - Term is so obvious it goes without saying
 - Necessary for the reasonable or effective operation of the contract (this waters down previous test from BP refinery where it had to be that the contract would not operate without it)
 - Reasonable and equitable
 - Capable of clear expression
- *Bp Refinery*: FC held that there should be an implied term to stop preferential rating of an oil refinery when the company stopped being in occupation of the premises even though they had reoccupied it.

CUSTOM

- *Constan Industries*: terms are implied by custom and practice when they are customarily used in an industry and are so well known that a reasonable person would incorporate it into the contract.
- *Byrne v Frew*: **Modern awards operate on their own force, there is no need to incorporate them into an employment contract. It is open to the parties to expressly include them.** (Here, baggage handlers caught for stealing, employer tried to sue in both contract and under FWA. HELD: modern awards are not implied into contracts as they operate on their own. They could only sue under statute)

LAW

- Focuses on CLASSES of contracts not individual circumstances.
- **Barker: Test: Necessary that without the term the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or perhaps be seriously undermined.'**
- **Work wages bargain:**
 - No work no pay! – mutual obligation to pay for work performed.
 - **Being ready willing and able is not enough, the person must actually perform the work** (*Automatic Fire Sprinklers v Watson*: employee fired as CEO – reinstated as CEO through mediation settlement – employer downgraded role to National Sales Manager – he rocked up to work 'prepared' to work as CEO but would not work as National Sales Manager – HELD: he did not perform work so no pay was due)
 - **Work bans:** industrial action where employee's perform all of the role BUT FOR a particular task: payment is only due if employer fails to advise the employee that partial work is NOT ok.
- **Employee Duties – implied by law**
- 1. **Duty to obey lawful and reasonable commands:** (*Aust. TV Commission v Hart*)
 - **Does not extend to lawful orders placing employee at risk of life and limb** (*Ottoman Bank*: Here a man was ordered by his employer to deliver in person a confidential message to another branch in a county where he had been captured in the way and had a death sentence over his head. This was unreasonable.)
 - **It is reasonable to direct employees to use certain methods to do work tasks provided they show the employee how to do it** (*Cresswell*: instructed to use computers rather than manual handwriting)
- 2. **duty to cooperate:**
 - **Employees have a duty to cooperate with employers and do what is 'reasonably. Necessary' to perform their work including a duty to not prevent performance or fulfilment of a contract or prevent the other party from having the benefit of the contract** (*Barker*)
- 3. **Duty to perform work with care and skill:**
 - Lack of reasonable care and skill can be grounds for summary dismissal.
 - An insurer does not have the right of subrogation to recover loss from an employee – unless the employees conduct constituted serious or wilful misconduct and caused damage. (*S66 Insurance Contracts Act*)
 - Loss incurred by an employer for a vicarious liability claim is not recoverable from that employee (*s3 Employees liability Act*)
 - *Lister v Romford*: dad sued son for driving over his foot at work in order to sue the employer vicariously. The employer could not recover this money from the son.
 - **Embellishing skills in an interview is a breach of the implied duty of care and skill. BUT not when you disclose you lack the skills** (*O'Sullivan*: another job was given to a man in an interview and he told them he did not have the skills for it, so he did not breach the duty. His summary dismissal was therefore unlawful)
- 4. **Duty of fidelity and faithful service (competition and confidentiality)**
 - This overlaps with FD but extends to all employees, not just senior employees.

- Essentially means: **employees cannot use their employer to make money on the side.**
- *Redding*: a man wore Army uniform to get drugs over the boarder without being inspected. He used his employer to make the money so the Army was entitled to it)
- The duty of fidelity has been held to extend into an employees own time for example *Hivac* where the duty of fidelity was breached by a set of employees who made hearing aids worked for a competitor in their own time.

5. Duty of good faith and fair dealing

Barker left open the possibility for there to be a duty of good faith