

Employment law exam

All hypo in Part A

And

One essay in Part B

Exam duration: 120 minutes

Reading time: 30 minutes

Assume 3000 words

Part A: 60 marks

2250 words / 90 minutes, 10:00 – 11:30

Q1: 10 marks

- **375 words / 15 minutes, 10:00 – 10:15**

Q2: 30 marks

- **1125 words / 45 minutes, 10:15 – 11:00**

Q3: 20 marks

- **750 words / 30 minutes, 11:00 – 11:30**

Part B essay: 20 marks

750 words / 30 minutes: 11:30 – 12:00

Hypo structure

1. what type of worker?	<u>1.1 employee (national system or causal? Regular causal?)</u> <u>1.2 independent contractor</u> <u>1.3 regular casual employee</u> Don't need the tests now as Anna will tell you what type. also check for: whether employer is constitutional corporation or by referral.
2. If employee, what remedies are available?	2.0 always remember contractual if the following remedies not available. <u>2.1 Equal opportunity Act, prohibition on discrimination (s16, 18, s7(1)) (Part 4, Div 1)</u> <u>2.2 Equal opportunity Act, sexual harassment (s92) (Part 6)</u> <u>2.3 sex discrimination act 1984 Cth?</u> <u>2.4 FW Act, Adverse Action (General Protections), Part 3-1</u> <u>2.5 FW Act, Application for a stop bullying order (Part 6-4B)</u> <u>2.6 FW Act, Sexual Harassment Application (Part 3-5A)</u> <u>2.7 FW Act, Unfair Dismissal Application (Part 3-2)</u> <u>2.8 Work, health and Safety Law – OHS Act VIC</u>
3. if you are not covered by any of the above, then contract	<u>3.0 contract general ideas</u> <u>3.1 express terms – workplace policies</u> <u>3.2 express terms – non-compete</u> <u>3.3 implied terms</u> <u>3.4 restrictions on terms</u> <u>3.5 contract on termination</u>

1. what type of worker?

1.1 employee (national system or causal? Regular causal?)

Contract of service

(2) * Common Law After February 2022 *******

CFMMEU v Personnel Contracting & ZG v Jamsek, both HCA Feb 2022

MAJORITY

Test: assess the “**totality** of the relationship”

- Look **only to the contract document itself**, at least where there is a comprehensive written document and there is no issue of “sham”, variation, waiver or estoppel.
- Actual work practices / reality is irrelevant.
- Inequality of bargaining power is irrelevant.
- Brings contract of employment law back into line with ordinary contract law.
- *Ordinary (“Orthodox”) contract law: you cannot look at conduct that took place after contract formation in order to interpret the contract.*

1.2 independent contractor

Contract for service

What protection do they have:

EOA discrimination

also sexual harassment

Adverse action

Stop bullying order

also sexual harassment application under FWA

Not unfair dismissal if you are independent contractor

OHS

1.3 regular casual employee? (for the purpose of s384 in Part 3-2 unfair dismissal)

Arbon v Bunnings (FWC, 1 May 2023)

- **Was Mr Arbon a "regular casual employee"** within the meaning of s 12? (this is relevant to s 384 in Part 3-2 on Unfair Dismissal applications, which we look at in topic 11) [49], especially [52]-[69]
 - Yes (he is firstly a casual employee which satisfied s12(a))
 - Then (b): (employed by the employer on **regular and systematic basis**)
 - **Test:** For a casual employee to have worked on a regular and systematic basis it is sufficient for their employment to have been "regular" in the sense of being frequent notwithstanding it being unpredictable, and "systematic" in the sense of it being part of a pattern of engagement occurring as a consequence of businesses reliance on the employee's services notwithstanding that the precise pattern of working may not be foreseeable to the employee.
 - **Interpret the words broadly in favour of the worker.**
 - **regular:**
 - at least one day in 21 weeks. Number of hours vary each week but doesn't negate regularity. (**frequent**), even variation week to week, still regular. Doesn't have to be same hours every week.
 - also **pattern**: evidence of a pattern of work whereby Mr Arbon made himself available to work on weekends and was rostered on alternate weekends and, when his studies permitted, supplemented that by making himself available to work on weekdays and was rostered on weekdays according to his availability and store needs.
 - **systematic:**
 - his employment was part of a pattern of engagement occurring as a consequence of **businesses reliance on his services.**
 - He made his availability known in advance to Bunnings; he received roster from Bunnings at least two weeks in advance.
 - (Mr Arbon was not a casual employee who worked simply when contacted by the employer shortly prior to a shift to ascertain if he was available to work that shift. Whilst that occasionally occurred, it was the exception and not the general position)
 - When Mr Arbon worked on a Saturday or Sunday, he would commonly though **not always be rostered to work in the car park.** Of the twenty-seven Saturdays or Sundays worked
 - in this period, **Mr Aaron worked the car park on twenty of them.**
 - [64] This also suggests some system of routine reliance by Bunnings on Mr Arbon as one its **weekend car park employees.**