

## TOPIC 4: EMPLOYEE'S IMPLIED DUTIES

### Terms implied in law for employees:

- Duty to obey lawful and reasonable directions
- Duty to exercise reasonable care and skill
- Duty of fidelity and good faith
- Out-of-hour conducts
- Duty to hold inventions on trust in the course of employment
- Duty not to misuse or disclose confidential information
- Post-employment restraints

### → Duty to obey lawful and reasonable directions

### Background

- Different values of society change the nature of what is considered reasonable
- Reasonableness is an elastic term
- Cases are guidance but not definitive
- Generally, where dishonesty is involved particularly if there are workplace investigations on foot this will be a breach of the implied duty of obedience.

### STEP 1: INTRODUCTION

[Employee] has a duty to obey any lawful and reasonable direction given by [employer] that falls within the scope of their employment contract (*Stevedore at 621-622*).

- employer direction to an employee who deals with the public on their dress standards (Australian Telecommunications *Commission v Hart (1982) 43 ALR 165 - no kaftan and thongs; Woolworths Ltd v Brown (2005) 145 IR 285 - remove eyebrow ring*)
- employer direction to an employee to undertake a medical examination to determine their fitness for work (*Blackadder v Ramsey Butchering Services Pty Ltd (2002) 221 CLR 539*)

### This has three separate requirements (elements):

- The direction must be lawful
- The direction must be reasonable
- The direction falls within the scope of the employment contract

### STEP 2: IS THE DIRECTION LAWFUL?

[Employee] is not obliged to obey orders by [employer] to perform unlawful acts (*Kelly v Alford*). \*Usually not contentious\*

### Questions to ask:

- Does it place the employee in physical danger?
- Does it contravene any obvious laws?
- Would the direction breach any obligations owed under MAs, EAs or the NES?

### STEP 3: IS THE DIRECTION REASONABLE?

[Employee] bears the onus that [employer's] direction was unreasonable. When considering reasonableness, include reference to (*Alford*):

- the nature of employment
- its established usages;
- common practices;
- standard managerial authority
- if covid: availability of vaccine
- medical reasons, danger to community etc. **Analogise to case law as much as possible:**

Need to distinguish from managerial authority: if the direction is what a reasonable owner or manager would do, it will be considered a reasonable direction (*Barker*)

#### **STEP 4: IS THE DIRECTION WITHIN THE SCOPE OF THE EMPLOYMENT CONTRACT?**

The duty only arises in respect of lawful commands by the employer which falls within the scope of the employment contract. That is, it must relate in some way to the work the employee is performing. **\*Element is generally not contentious**

##### ***Woolworths v Brown***

- Mr Brown was employed by Woolworths as a butcher
- Woolworths had a policy that exposed jewellery (including body piercings) were not permitted as a threat to hygiene
- Mr Brown was given permission by the store manager to wear an eyebrow ring at work, provided he covered it with a blue band aid while working
- Later, a new store manager gave an order to remove the piercing completely
- Mr Brown refused and his employment was terminated

##### **HELD**

- While there was initial permission to wear the ring, the permission was not a contractual term; it did not have the language of offer and acceptance and did not accord with the dress policy
- Refusal to take off the ring was unlawful
- **Brown's repeated refusal to comply with the requests and warnings to remove his eyebrow ring whilst at work involved a breach of the implied term to obey lawful orders sufficient to justify his dismissal at common law. Accordingly, there was a valid reason for the termination of Brown's employment.**
- **The store manager's initial permission for Brown to wear his eyebrow ring, covered by a blue bandaid, whilst at work did not disentitle Woolworths from subsequently seeking to have Brown observe the dress policy. The permission was not a contractual term, as "the language of the [store manager's] permission was not the language of offer and acceptance or the language of promise." The permission did not accord with the dress policy and Woolworths was entitled to take lawful and reasonable steps to ensure Brown conformed with the policy.**

##### ***R v Darling Island Stevedore and Lighterage Co Ltd***

- Workers on a ship refused employer's direction to load 35 bars in a sling on a ship
- Court agreed that this was too onerous

**→ Duty to exercise reasonable care and skill**

#### **STEP 1: INTRODUCTION**

As an implied warranty, an employee is under a duty to exercise reasonable ability, skill and care in the performance of tasks for which they are employed (*X v Cth per Gleeson CJ at [31]*). Carrying out the employment without endangering the safety of other employees is an application of the warranty (*X v The Commonwealth (1999) 200 CLR 177*).

- “It is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment” (*X v The Commonwealth (1999) 200 CLR 177*)
  - carrying out the employment without endangering the safety of other employees is an application of the warranty (*X v The Commonwealth (1999) 200 CLR 177*)
- The duty does not apply where an employer knowingly instructs an employee to perform work for which they lack expertise, or have made no claim in respect of possessing such expertise (*Printing Industry Employees Union v Jackson and O’Sullivan Pty Ltd (1957) 1 FLR 175*)

## STEP 2: OUTLINE EXCEPTION

### Exception:

[employee] will argue that they are not bound by the duty alike the Applicant in *Printing Industry (Spicer J; Dunphy J* agreeing in a separate judgment), as the employer has knowingly instructed [employee] to perform work for which they lack expertise or made no claim in possessing expertise.

## STEP 3: DID THE EMPLOYEE LACK EXPERTISE OR MAKE NO CLAIM IN POSSESSING SUCH EXPERTISE?

So, if employee lacks expertise, makes no claims to having said expertise, and employer looks about this and still directs the employee to work, the duty will not be breached.

- Expertise can be implied via the mere fact that they hold themselves out to be a professional (e.g. an attorney)
- *Wills J in Printing Industry*: ‘If an [employer] employs a man who is known to have never done anything but sweep a crossing to clean or mend a watch, the [employer] probably would have incurred the risks himself’.

## STEP 3: CONCLUDE/WHAT ARE THE CONSEQUENCES?

Under the common law, an employee who breached this duty would be liable to indemnify their employer if they were sued vicariously (Lister). However, legislation (e.g. *Employee’s Liability Act 1991 (NSW)*) and some instruments (e.g. *Hospitality Industry (General) Award 2020*) have changed this position so that employee’s are only liable in cases of serious misconduct

### → Duty of fidelity and good faith

## STEP 1: INTRODUCTION

The duty of fidelity/good faith obliges [employee] to render faithful and legal service to [employer] ‘avoiding conduct incompatible with the continuing trust between them’ (*Barker*).

- An employee has an implied duty of fidelity to the employer not to engage in conduct which, “impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee” (*Commonwealth Bank of Australia v Barker (2014) 253 CLR 169*)

The courts regard such a duty as importing equitable obligations within implied contractual terms (*Concut*) and as such, will often cross over with the equitable duties of no profits and duty not to misuse position or information (as well as its statutory equivalent in *ss182 and ss183 Corporations Act 2001 (Cth)*).

An employee has an implied duty of fidelity to the employer not to engage in conduct which "impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee" (*Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169)

**Overlap with duty of obedience** - There is a clear overlap with the duty of obedience. However, be careful if a direction is not involved then it is not a breach of obedience.

## STEP 2: OUTLINE

[Employer] will argue that the [employee's actions] amounts to severe incompatibility under one of the heads provided in *Blyth*. In this instance, employer will argue that the conduct fits under the head of [insert from below] because [explain]:

- affecting the fulfilment of an employee's duty
- is in opposition or conflict with the interest of the employer
- impedes faithful performance of the employee's obligation to the employer
- is destructive of the necessary confidence between employer and employee

**Note:** Must be 'actual repugnance' between employee's acts and relationship with employer, not just uneasiness to its future conduct (*Blyth*). The scope and content of the duty varies according to the nature and circumstances of the employment contract, thus will turn on the facts (*Colour Control per Santow J*).

### Case examples:

<i>Spotless Group</i>	Assisting a rival business that the employee has plans to join
<i>Eisdell</i>	Soliciting clients to switch to a new business
<i>Digital Pulse</i>	Running a competing business while still employed
<i>Green</i>	Deliberately removing the employer's valuable information
<i>Debelak</i>	Recruiting other employees working for the employer
<i>Hivac v Park Royal Scientific Instruments</i>	Working also for another rival employer, particularly where the employee is more senior or highly skilled

... The rest of topic 4 continued in notes

## TOPIC 7: UNFAIR DISMISSAL

### General notes

- Heavily examinable and often crosses over with other statutory causes of action (particularly general protections) as well as common law (wrongful dismissal)

### General structure for moving through an Unfair Dismissal Claim

- ▶ Eligibility
- ▶ 21 days time limit –strictly applied (extensions allowed in limited circumstances) - S 394
- ▶ If can apply then consider if small business fair dismissal code applies
- ▶ If not go straight to s 387
- ▶ Remedies ss 390-393

### TO NOTE

- Unfair dismissal does not apply to independent contractors (s382(a))
- Per s381(2), the unfair dismissal regime intends to ensure a 'fair go all round' for both employees and employers in the context of termination of employment – quote and reference in introduction – the expression 'fair go all round' was used by Sheldon J in re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95
- s381 exists to establish a framework for dealing with unfair dismissal claims that balances the needs of business, the needs of employees and to establish procedures for dealing with unfair dismissal that are quick, flexible and informal
- In order for an employee to bring a claim for an unfair dismissal, the jurisdictional requirements must be considered before a claim can be analysed as unfair

### Unfair Dismissal Part 3 -2 FWAct

- Who is excluded? – ss382 - 384, 386, 388, 389
- What is an unfair dismissal – s385, s 387 (main section)
- Procedure and remedies – ss390-405

### STEP LAYOUT

#### (1) Is the person protected from unfair dismissal?

- Minimum period of employment (s 382(a))
- An EA/MA applies/under high income threshold (s 382(b))

#### (2) Is the unfair dismissal remedy lodged in time?

- 21 days (s 394(2))

#### (3) Has the person been unfairly dismissed?

- Dismissed (s 385(a)); harsh, unjust or unreasonable (s 385(b)), not consistent with the small business fair dismissal code (s 385(c)); not a case of genuine redundancy (s 385(d))

### (1) Is the person protected from unfair dismissal?

#### JURISDICTIONAL REQUIREMENT 1 – Minimum employment period

Per s 382(a), depending on the size of the employer's business (small or non-small business), the employee must have served the statutory minimum period of employment to be eligible to make an unfair dismissal claim.

**Small business employers** (less than 15 employees (permanent employees, regular casuals and associated entity employees of this nature are counted) s 23

**Associated entities** are businesses or bodies connected to each other in some way (e.g. one business owns and operates another) – s 12 tells us it has the same meaning as s50AAA of the Corporations Act

**Regular casuals:** s 12

- (a). The employee is a casual employee; and
- (b). The employee has been employed by the employer on a regular and systematic basis

**Non-small business employers** (15 or more employees (permanent employees, regular casuals and associated entity employees of this nature are counted) s 23

### Definitions – Regular and systematic basis

- ‘sufficient pattern of engagement’ (*Yaraka*)
- Does not matter if casual was hired under a series of separate contracts, provided they were part of a ‘contiguous series’ of engagements (*Shortland v Smiths*)
- **DOES NOT:**
  - ‘require the worker to be able to foresee or predict when his or her services may be required’ (*Yaraka*)

### Examples

#### Roster of hours

- *Comm Roe in Ponce (at [76])* also indicated that where the hours and days are not clearly agreed, regular and systemic employment can still be found if:
  - The employer regularly offers work when available at times when the employee has generally made themselves available; and
  - Work is offered and accepted sufficiently often that it could no longer be regarded as simply occasional or irregular

#### Similar or exceeding full-time ordinary hours (*Ponce*)

- Having something ‘in common that their employment is regular and systematic’ (*Comm Roe in Ponce at [65]*)

### Minimum Employment Period – What counts?

Needs to be continuous service (s 384(1))

A permanent employee will work on a continuous basis.

- If for some of the period, the person is a short-term casual then it does not count
- If long term casual on a regular systematic roster it does count – see s 384(2)(a)

If there is a casual employment, this period is not counted, unless per s384(2)(a):

- (i). The casual was a regular casual employee
- (ii). During this period the employee had a reasonable expectation of continuing employment on a regular and systematic basis

## JURISDICTIONAL REQUIREMENT 2 – DOES AN EA OR MA APPLY? OR UNDER THE HIGH-INCOME THRESHOLD

Per s 382, one or more of the following requirements must be met:

- (a). A modern award applies to the persons
- (b). An enterprise agreement applies to the person
- (c). The sum of the person’s annual earnings (not including superannuation contributions or contingent bonuses but including car allowance portion used for private use) is less than the high-income threshold of \$183,100

## (2) Is the unfair dismissal remedy lodged in time?

### JURISDICTION REQUIREMENT – TIME LIMITS

- An employee only has 21 days to lodge an unfair dismissal application (s 394(2)(a))
- The 1<sup>st</sup> day is the day after the dismissal takes effect (c.f. to notice)
- This can include up to 11:59pm on the 21<sup>st</sup> day
- If a dismissal is outside of the 21-day time period, the FWC may allow a further period of time if it is satisfied there are exceptional circumstances, taking into account the following matters of s394(3):
  - (a). The reason for the delay; and
  - (b). Whether the person first became aware of the dismissal after it had taken effect; and
  - (c). Any action taken by the person to dispute the dismissal; and
  - (d). Prejudice to the employer (including prejudice caused by the delay); and
  - (e). The merits of the application; and
  - (f). Fairness as between the person and other persons in a similar position

### Time limits – exceptional circumstances

The common law has also understood ‘exceptional circumstances’ to mean something out of the ordinary course, unusual, special or uncommon (*Ho v Professional Services at [25] citing R v Kelly UK, cited in Nulty v Blue Star at [13] per Lawler VP*)

The individual circumstances may not be exceptional, but when viewed as a whole, it becomes exceptional (*Tricare Labrador Aged Care*).

## (3) Has the person been unfairly dismissed?

What is an unfair dismissal? – s 385

A person has been unfairly dismissed if the FWC is satisfied that:

- (a). The person has been dismissed; and
  - (b). The dismissal was harsh, unjust or unreasonable; and
  - (c). The dismissal was not consistent with the Small Business Fair Dismissal Code; and
  - (d). The dismissal was not a case of genuine redundancy
- Need to ensure that the employee has been dismissed as opposed to other forms of the employment relationship ending, such as through a resignation
  - Note: casual employees can bring an unfair dismissal claim if they are regular casuals per above
  - s 386 provides guidance as to what constitutes a dismissal

Includes (s 386)	A person is not dismissed if:
A person’s employment has been terminated at the employers initiative (s 386(1)(a))  Termination of the employer’s initiative requires the termination of the employment relationship, not the contract of employment	s 386(2)(c) a person is demoted in his or her employment <ol style="list-style-type: none"><li>(i). without a significant reduction in duties or remuneration; and</li><li>(ii). remains employed by the employer (i.e. accepts the demotion)</li></ol>

- you can terminate the contract, but this does not necessarily terminate the employment relationship
- the termination of the relationship is a unilateral act

- look at the totality of employment relationship
- whether K was varied or replaced or abandoned
- whether K was just limited to a written document or was it a series of agreements
- whether employer made representations

If there is a significant reduction/the demotion is not accepted, this will give rise to an unauthorised demotion that can be regarded as a dismissal, even if the employee did not resign (*Advertiser Newspaper*)

... The rest of topic 7 continued in notes

## TOPIC 10: GENERAL PROTECTIONS (ADVERSE ACTION CLAIM)

General protections (adverse action) provisions are located in **Part 3-1 of the Fair Work Act 2009 (Cth)**. In essence, the General Protections provisions of the FWA make it unlawful for [employer] to take adverse action against a [person with standing] because of a protected reason under the Act.

### Protected reasons:

- Workplace right (*ss 340, 341*)
- Protected attribute
- Industrial activities (*ss 346, 347*)
- Temporary absence (*s 352*)
- Ancillary protections

### General Steps

**STEP 1: Ensure the worker has standing**

**STEP 2: Identify the protected reason(s)**

**STEP 3: Identify the type of adverse action**

**STEP 4: Satisfy the causation requirement**

**STEP 5: Advise as to remedies**

**STEP 6: Suggest alternative causes of action (UD, common law, etc)**

### STEP 1: Is there standing?

[Employee] will have standing to bring a claim under **s 340/351/346/352 FWA** as they are [select most appropriate from below]:

- Employee
- Any – no maximum earning threshold
- Job applicant
- Independent contractor
- Employer
- Union Employee (Recruiter, Collector of Union Duties, Shop Steward)
- Large corporation providing services under contract (*Victoria v CFMEU*)

### STEP 2: What is the protected reason?

- Workplace right
- Protected attribute
- Industrial activities
- Temporary absence
- Ancillary protections

... The rest of topic 10 continued in notes