

Employment Law Notes

Reading time: 30 minutes	Part A: 8:15 – 8:35am	Part B: 8:35 – 8:45am
Part A – Question 1	15 marks	22 min
Part A – Question 2	45 marks	50 min
Part B – Essay (Choose 1 of 3)	20 marks	35 min
Review and submit	13 min	10:45am submit

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Topic 5 Different legal categories of work arrangements: concepts and definitions

Common law concept of “employment”

Fair Work act depends on common law definition of employment

- Differentiates between “employment” and “independent contractors”
- Considered mutually exclusive legal categories

Checklist	Test: “totality of the relationship”	
⇒ Control	Does the hirer have the <u>right to control</u> the manner of performance of work, or other matters? →	If yes: suggests employment
⇒ Presentation to the public	Is the worker integrated into the organisation of the hirer? Does the worker perform <u>core functions</u> of the hirer? Is the worker presented to the world as an emanation of the hirer? E.g. uniform	If yes: suggests employment
⇒ Economic dependence (ability to generate goodwill)	Does worker supply their own expensive specialised equipment?	If yes: suggests IC
⇒ Integration into the business/organisation	Is the worker permitted to work for others?	If yes: suggests IC
⇒ Business risk	Is the worker paid overtime rates?	
⇒ Provision of equipment	Does the worker receive a periodic wage/salary, or paid a sum upon completion of the task?	Wage based on time suggests employment
⇒ Method of payment	Can the worker delegate/sub-contract the performance of the work to someone else (without restriction)? Note: depends how it is framed	If yes: suggests IC But can be complicated
⇒ Ability to delegate	List is not exhaustive	Depends on circumstances

Feb 2022 – Aug 2024: Effect of HCA decisions (CFMMEU v Personnel Contracting, ZG v Jamsek)

<ul style="list-style-type: none"> - Assessed totality of the relationship - BUT this only looked at the contract document itself <ul style="list-style-type: none"> o Where there was a comprehensive written document o No issue of sham, rectification, waiver or estoppel o Actual work practices is irrelevant o Contract term stating the worker is an IC is NOT determinative 	<ul style="list-style-type: none"> - Brought the test in line with orthodox contract law principles <ul style="list-style-type: none"> o Concern that this gave too much power to employers as they were usually the ones drafting these agreements - Parliament: s15AA inserted into FW Act in Aug 2024 <ul style="list-style-type: none"> o Technically the test is the same o Affects the evidence that can be considered under the test - Test now considers the “real substance, practical reality and true nature” of the work relationship
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Fair Work Act definitions

Alternative definitions of employee → look at specific section to determine what applies

“ordinary meaning” of employee	“national system” employee/employer
<p>S15 Ordinary meanings of employee and employer</p> <p>(1) A reference in this Act to an employee with its ordinary meaning:</p> <p>(a) includes a reference to a person who is usually such an employee; and</p> <p>(b) does not include a person on a vocational placement.</p>	<p>S13 Meaning of national system employee</p> <p>A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement.</p>
<p>S 15AA Determining the ordinary meanings of employee and employer</p> <p>(1) For the purposes of this Act, whether an individual is an employee of a person within the ordinary meaning of that expression, or whether a person is an employer of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.</p> <p>(2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:</p> <p>(a) the totality of the relationship between the individual and the person must be considered; and</p> <p>(b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.</p>	<p>S 14 Meaning of national system employer</p> <p>(1) A national system employer is:</p> <p>(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or</p> <p>(b) the Commonwealth, so far as it employs, or usually employs, an individual; or</p> <p>(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or</p> <p>(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:</p> <p>(i) a flight crew officer; or</p> <p>(ii) a maritime employee; or</p> <p>(iii) a waterside worker; or</p> <p>(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or</p> <p>(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.</p>
<p>S15AA Note: This section was enacted as a response to the decisions of the High Court of Australia in <i>CFMMEU v Personnel Contracting Pty Ltd</i> [2022] HCA 1 and <i>ZG Operations Australia Pty Ltd v Jamsek</i> [2022] HCA 2.</p>	

Murray v 239 Brunswick [2025] FWC 978 (7 April 2025)

Facts	<ul style="list-style-type: none"> - Murray = dancer working at club run by 239 Brunswick - Did not put forward documents/show up to the hearing → went ahead based on employer's ev. - Application argued that M had been unfairly dismissed 		
Issue	Was Murray an employee of 239 Brunswick?	Decision	No.
Reasons	<ul style="list-style-type: none"> - Nature of various fees: reservation fee, door fee, per dance → M was paying 239B - M paid by the clients directly [24] - Significant aspect of the contract: control [25] <ul style="list-style-type: none"> o 239B did not choose the shifts, it was up to the dancers o Could decide not to work a shift and provide minimal notice o Consideration of the licencing → business subject to legal obligations, not that of internal employer control but more of external obligations - Emanation to the world: no uniforms, actually had to provide her own clothes etc - Ability to delegate: able to get other dancers to cover her shift - Would have been free to work for other clubs - No paid sick leave, superannuation, tax arrangements → Commission noted that this is <u>not necessarily determinative</u>, could just indicate a breach of NES obligations etc 		

Dickson v Kovacs and Cespedes [2025] FWC 1218 (2 May 2025)

Facts	<ul style="list-style-type: none"> - Dickson = nanny of children of the respondents - Same substantive application as Murray (unfair dismissal) 		
Issue	Was the applicant an employee?	Decision	Yes.
Reasons	<ul style="list-style-type: none"> - Was not running her own nanny business: only nannied the respondent's children <ul style="list-style-type: none"> o Had another job at a childcare centre o Was not generating goodwill (looking for other business) [33]-[35] - Express term of the contract that D was not an IC → not determinative [28]-[29] - Noted that domestic setting was not relevant to this consideration [32] - K&C's exercise of control over D: [37]-[44] <ul style="list-style-type: none"> o Took children to appointments that were set by the parents o Discussed use of whiteboard --> if it was used to direct her o Considered whether the parents directed her to do work outside of merely nanny work - Working hours were negotiated, changeable [45] – [48] work took place mostly in parents home, but sometimes to D's home (with parent's permission) - Delegation of the work [49] – [50] nature of the work that it cannot be delegated → implied term probably - Payslips, tax obligations and superannuation was not determinative [51] - Determined terms of the contract by looking at the text messages 		

Independent contractors

- Considered to have more bargaining power than regular employees: don't need as much protection → 8% of pop.
- NES, EAs, modern awards does not apply → "independent contractor" and "principal"
- Usually "contract for services" (cf: "contract of service")
- Colloquially
 - o self-employed
 - o entrepreneurs
 - o small business operators
 - o consultant
- other frameworks may apply: adverse action, bullying, sexual harassment

"national system" employee/employer → 2 alternative definitions

<p>S13: a "national system employee" is an individual who is employed or usually employed by a "national system employer" → s11: "employee" means within the "ordinary meaning"</p>	<p>S14: meaning of national system employer → s12: among others includes constitutional corporations</p> <ul style="list-style-type: none"> - "foreign corporations, and trading and financial corporations formed within the limits of the Cth" - All overseas/foreign corporations included - NOT sole traders or partnerships <p>Trading/financial activities must be "significant" or "substantial" as part of their activities: purpose is NOT relevant (e.g. not for profit)</p>
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See state referral definition on next page