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Common Law – Contract of employment (Seminar 7)

Common law concept of "employment" (topic 5)	
Common Law Before February 2022	**Common Law After February 2022** ***CFMMEU v Personnel Contracting & ZG v Jamsek***, both HCA Feb 2022 MAJORITY
Test: assess the "totality of the relationship", as it has evolved over the years of the relationship (i.e. actual work practices) Multi-factor / indicia: • Who has **control** over manner of performance of work? • Does worker supply their own expensive specialized equipment? The more expensive and specialised the equipment, more likely to be an IC. • Is worker **integrated** into business (core functions) of hirer? • Can the worker delegate? Generally employees cannot delegate the work. Some judges: Main question is 'Whose business is it?' Is it the hirer's business or the worker's business?	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: *you cannot look at conduct that took place after contract formation in order to interpret the contract.*

Common law contract –(express and implied) terms
A. Common law contract – Incorporation (as express terms)
1. Statute and awards
• Contract document/s might explicitly incorporate the policy/ parts of it as terms of the contract, such as: statute; an award (***Pittard and Moore***). • There is no automatic incorporation of award terms into the employment contract.
2. Pre-contractual representations (subject to parol evidence rule)
In determining whether pre-contractual representations form part of the contract, the intention of the parties is the critical factor and this has to be determined according to a reasonable bystander (***Saad v TWT***).
CASE - ***Saad v TWT [1998] NSWSC 282***
Issue: whether the telephone conversation (that the appellant would have the job and client list of Ms. Matthews) gives rise to express terms of the contract.
Reasoning: • Whether it was promissory in nature? – The statement that Ms. Mattews had resigned was representational, but the statements that the appellant could have her job back with her old client list related to the future and were promissory in substance. As a matter of commonsense, fair dealing and business efficacy, the statements were contractual in nature. • Whether it could survive the PER (i.e. whether it forms express term of the contract)?

- The contract could be partly written and partly oral and evidence must be received to establish that a written document is not a binding record of the whole contract but there were also oral terms.
- In determining whether pre-contractual representations form part of the contract, the intention of the parties is the critical factor and this has to be determined according to a reasonable bystander.
- The letter was not inconsistent with a further oral agreement that she would have a particular job and client list. I therefore disagree with the conclusion that the letter was a written contract and as such a binding record of its terms. Even if it had been a written contract, oral evidence would still have been admissible to identify the "existing clients", as it amounts to the "subject matter" of the agreement (***Saad, citing Macdonald***).

• Whether the term could be interpreted as conferring power on the employer to take away the client list?

- The court rejected this arguments as it would be an "illusory contract. I am satisfied that the law conferred no such unfettered discretion on WIN. The implied power of employer is that of giving lawful and reasonable directions to an employee. WIN made no attempt to justify the substitution for Ms. Matthews' client list as being "reasonable".

3. Workplace policies and other documents

a. explicit incorporation

Policies may be incorporated as terms of the contract by express agreement (Pittard and Moore).

Employee may have signed a receipt of the policy indicating agreement to the policy (i.e. incorporation by signature).

b. inferred incorporation (by notice)

This might arise where an employee continues to work without protesting a new policy that the employee has **proper notice** of.

The significant issue is whether particular aspects of the employment policy are simply "aspirational", or whether they form terms of the contract of employment.

The test: It is well established that if a reasonable person in the position of a promisee would conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound (Nikolich [23]). It is an objective test, considering not only text, but also the surrounding circumstances known to the parties, and the purpose and object of the transaction (Nikolich, citing Toll v Alphapharm). The issue is "a vexed one and depends largely on the circumstances of any given case" (Pittard and Moore [5.16]).

CASE - ***Nikolich***
Facts: N was an investment advisor. N was being bullied by direct supervisor. Reported that. But in 2007, the HR people did not handle it well. left him in the same office with that offender. Investigation went on for five months and N became more depressed.
Arguments: That 3 clauses in the "Working With Us" document formed express terms of the contract→ employer breached those terms → breach of contract action → damages to N
Issue: Three clauses (Harassment [36]; Grievance procedures [39]; Health and safety clause [25]) in the "Working With Us" document: Do they contain contractual promises by JBWere?
Reasoning: The Harassment clause [36] *The JBWere culture and 'family' approach means each person is able to work positively and is treated with respect and courtesy. It is within the context of our culture that all people within the*

JBWere team will work together to prevent any unwelcome, uninvited and unwanted conduct which makes another team member feel offended, humiliated or intimidated in any work related situation and where that reaction is reasonable in the circumstances.

The professional behaviour and conduct of each team member is important. It is a reflection of the person, the firm and our client service attitude. Further information may be obtained by Human Resources.

Overturned the primary judge's conclusion: Although it uses the language "all people…will…", it is essentially descriptive and not promissory. It describes the culture of the firm, its perceived benefits and the firm's aspirations. It is not reasonably to be taken as a contractual promise.

The Grievance procedures clause [39]

We [JBWere] are ***committed to make sure that anyone who has a genuine concern*** *will be supported, and the issue will be handled with discretion.*

"The door is wide open at all times for people to discuss any issue, not only with Department Heads, Directors, and Human Resources, but also with the Chairman. Such discussions are welcome as the firm has been built on the principle that it is a team with common interests and ideals. This interest extends beyond the range of career and business issues to more personal concerns.

We are committed to make sure that anyone who makes a genuine complaint will be able to discuss his [sic] concern confidentially, will be supported by the firm and is not penalised in any way.

Overturned the primary judge's conclusion:

Although it uses the language of "[the firm was] committed to make sure that anyone… will be…", the clause do no more than describe a policy, and are not promissory in nature.

The essentially advisory character of this section is also reinforced by its opening "feeling uncomfortable?" and "where to go for assistance".

Health and safety clause [25]

JBWere will take every practicable step to provide and maintain a safe and healthy work environment for all people.

The test is objective: what matters is what the language used, in context, would have a reasonable person in Nikolich's position to believe.

Language: The language involves "[the firm] *will* take *every practicable step* to…". The court acknowledges that the language is not explicitly contractual and could be seen as merely aspirational.

Purpose: it appears in a document of mixed content and purposes, both contractual and aspirational.

Context: the context is however, decisive.

It is plain that that the firm is holding itself out as having a commitment, to provide a caring and safe working environment. The statement is central to the firm's expression of the "culture" of the firm and its approach.

It would be hypocritical if the statement were merely aspirational and imposing no obligation on the maker.

It is also consistent with commonly imposed statutory duties in WHS legislations, and the implied term in a contract of employment that the employer will take reasonable care to provide a safe system of work.

Rebuttal of the firm's argument that it is impossibly wide: "practicable" is not synonymous with "possible". There is an implicit qualification of "reasonableness".

Conclusion: the language used, taken in the context as a whole, embodies a contractual obligation.

B. Common law contract – Implied Term