

TOPIC 1 - CONTRACT OF EMPLOYMENT

TAB THIS: T1 CONTRACT

Use this topic when: you are asked who is an employee, whether a policy/manual is contractual, what duties are owed in employment, whether dismissal was wrongful at common law, or what restraints/confidentiality remedies exist.

STATUTE / NUMBER CHECKLIST

- **Fair Work Act ss 15A, 15AA, 15L-15P**: Use the statutory definitions and interpretive rules for employee / employer / casual employee questions; do not answer classification as if Personnel Contracting were the only source.
- **Fair Work Act Ch 3A**: Minimum standards for regulated workers. Flag this if the worker is not an employee but looks like an employee-like worker in the gig / platform setting.
- **Fair Work Act ss 333E-333L [2 years max / >1 extension prohibited]**: Fixed term contract limits. Employer cannot enter a fixed term contract longer than 2 years, with more than one extension option, or in prohibited consecutive-contract situations, subject to exceptions.
- **Fixed term high-income exception [\$183,100]**: Exception turns on the high income threshold for the relevant year.
- **Work Health and Safety Act 2011 (NSW)**: Statutory safety framework. Mention alongside common law duty where the fact pattern is about unsafe systems or psychiatric injury.
- **Workers Compensation Act 1987 (NSW)**: Workers compensation overlay; also relevant where the problem asks about workplace injury and statutory rights.
- **Fair Work Act Part 6-4B**: Stop bullying regime - useful where the employee seeks orders rather than damages.

ISSUE ORDER FOR A PROBLEM ANSWER

- Identify the relationship first: employee, contractor, casual employee, or employee-like worker.
 - Identify the source of obligations: express contract terms, implied terms, policies/manuals incorporated into the contract, or statute.
- Identify the precise duty said to be breached: obedience, care/skill, fidelity/confidentiality, provide work, safety, notice, or good faith process under an incorporated policy.
- Identify how employment ended: notice, summary dismissal, fixed term expiry, frustration, constructive dismissal, or purported redundancy.
- Only then move to remedies: notice wages, accrued entitlements, injunction, restraint relief, contractual damages, and possible overlap with Topic 2 statutory claims.

Warning: Do not collapse the common law and the Fair Work Act. In exam answers, deal with the contract and common law first where the facts support it, then separately identify unfair dismissal / general protections / NES rights.

1. ROLE OF THE CONTRACT

- Employment remains centrally contractual even though modern industrial law overlays it. Ask: what was promised, by whom, and with what legal effect?
- **Visscher v Giudice [CORE]**: Repudiation or purported termination does not automatically end the contract; election matters. Useful when the employer changes status or role and the employee says the old contract continues.

- If the case concerns promotion, demotion, changed duties or a purported variation, ask whether the employee accepted the change or instead held the employer to the original contract.

2. WHO IS AN EMPLOYEE?

- Start with the rights and obligations created by the contract if the contract is comprehensive and not challenged as a sham, variation, estoppel or waiver problem.
- Then test the ordinary employee / contractor indicators: control, integration, delegation, who supplies tools, who bears profit/risk, exclusivity, branding, and whether the worker is running their own business.
- **Zuijs v Wirth Bros**: Control is important but not exhaustive; the inquiry is practical.
- **Australian Mutual Provident Society v Chaplin**: Multi-factor reasoning; do not reduce the test to control alone.
- **Stevens v Brodribb** [CORE]: Classic totality approach - ask whether the worker is truly serving the employer's business or conducting their own.
- **Odco (The Troubleshooters' Case)**: Labour-hire or triangular arrangements can support independent contracting, but the contractual structure matters.
- **Hollis v Vabu** [CORE]: Courier workers were employees: strong control, integration into the business, no real independent enterprise.
- **ACE Insurance v Trifunovski**: Long-term integration and dependence can support employment even where the paperwork points the other way.
- **Tattsbet v Morrow**: Classification still turns on the legal relationship viewed as a whole; use it as another multifactor authority.
- **Personnel Contracting** [CORE]: Modern High Court anchor. Where the parties have comprehensively committed their relationship to a valid written contract, characterisation begins with the contractual rights and obligations, not later labels or impressions.
- **Jamsek** [CORE]: Same contractual primacy point. Partnerships / invoicing structures and the contractual deal may point away from employment.
- **Deliveroo v Franco**: Gig-work illustration. Useful as factual support on control and platform features, but remember the post-2022 contractual approach.
- **Exam note**: Exam move: quote Personnel Contracting / Jamsek for method, then still use Hollis-type facts to explain what the contractual rights and obligations actually mean in operation.
 - If the worker is described as casual, ask whether there was no firm advance commitment to continuing and indefinite work; do not let the label do all the work.
 - If the worker is not an employee, ask whether Ch 3A on regulated workers or Pt 3A-5 on services contracts needs to be flagged.

3. SOURCES OF CONTRACT TERMS

- Terms may come from the signed contract, accepted offer letter, incorporated policies, implications in fact, implications in law, custom, or statute.
- **B P Refinery** [CORE]: Five-fold test for implication in fact: reasonable and equitable, necessary for business efficacy, obvious, capable of clear expression, and not inconsistent with express terms.
- **Byrne and Frew** [CORE]: Terms implied in law arise from the class of contract, not just because they seem fair in the particular case.

- **Riverwood v McCormick**: Representations and policy material can be contractual if the language and context are promissory.
- **Nikolich [CORE]**: HR policies and codes may be incorporated and enforceable where the language is promissory and intended to govern the relationship.
- **Barker [CORE]**: No implied term of mutual trust and confidence in Australian employment contracts.
- **Romero**: Policies may be binding where the contract and circumstances show incorporation.
- **McKeith v RBS**: Counterpoint: not every policy or procedure is contractual; read the language and disclaimers carefully.
- **Westpac v Wittenberg**: Same incorporation issue: identify what, if anything, was promised rather than assuming every policy term is contractual.
- **Elisha v Vision Australia [CORE]**: Major modern authority. Breach of a contractual disciplinary process can support substantial damages, including psychiatric injury where not too remote; do not treat Addis as blocking every dismissal-related loss.

Warning: Do not write 'policies are never contractual' or 'policies are always contractual'. The question is always one of language, context and intention.

4. DUTIES OF THE PARTIES

Work / wages bargain: The core exchange is work for wages. But the common law does not generally impose a free-standing duty on either side simply to behave 'reasonably'. Identify the specific implied duty.

- **Automatic Fire Sprinklers v Watson**: Use as the basic work / wages bargain authority.

Obedience: Employee must obey lawful and reasonable directions. A direction may be lawful yet unreasonable, or reasonable yet unlawful.

- **Adami v Maison de Luxe [CORE]**: Refusal to obey a lawful direction may justify summary dismissal.
- **The Ottoman Bank v Chakarian**: Another authority on obedience and disobedience in employment.
- **ATC v Hart [CORE]**: Directions must be lawful and reasonable; focus on the scope of employment and the interests of the enterprise.
- **McManus v Scott-Charlton [CORE]**: Important modern authority on lawful and reasonable directions, managerial power and employee compliance.

Care and skill: Employee owes a duty to exercise reasonable care and skill in performing work. But statutes may qualify the employer's ability to recover over against the employee.

- **Insurance Contracts Act s 66**: Insurer's subrogation rights against employees are limited in certain cases.
- **Employees Liability Act 1991 (NSW) s 3**: Court may take into account specified matters when an employer sues an employee for damages arising from the employee's negligence or other tort.
- **Printing Industry Employees Union v Jackson and O'Sullivan**: Classic authority on the employee's implied duty of care and skill.

Fidelity / confidentiality / competition: During employment the employee must act loyally and not compete. After employment, only enforceable restraints and genuine confidential information / trade secrets remain protected.

- **Restraints of Trade Act 1976 (NSW)**: NSW courts may read down an unreasonable restraint instead of striking it out entirely.

- **Nordenfeldt [CORE]**: A restraint is valid only if reasonable between the parties and consistent with the public interest.
- **Herbert Morris v Saxelby [CORE]**: No restraint merely to suppress ordinary competition; the employer needs a legitimate proprietary interest.
- **Blyth Chemicals v Bushnell**: Employee's duty of fidelity prevents conduct against the employer's interests while employed.
- **Hivac v Park Royal Scientific Instruments [CORE]**: Working for a competitor while still employed can breach fidelity even outside ordinary hours.
- **Faccenda Chicken v Fowler [CORE]**: Post-employment distinction between trade secrets / truly confidential information and the employee's own skill and know-how.
- **Wright v Gasweld**: Customer connections and confidential information can justify restraint/injunction relief.
- **Del Casale v Artedomus**: Illustrates misuse of confidential information and springboard-type relief.
- **Victoria University v Wilson**: IP / confidential information angle in an employment setting.
- **Warman v Dwyer [CORE]**: Account of profits and equitable relief for misuse of confidential opportunities.
- **Ancient Order of Foresters v Lifeplan**: Modern High Court authority on knowing misuse of confidential information and equitable remedies.
- **Anderson v Canaccord Genuity**: Use as the modern extract in restraint/confidentiality analysis; do not overstate it beyond the extract provided.

Employer duty to provide work: General rule: employer need not provide work, only pay wages, unless the contract or context makes the performance opportunity itself valuable.

- **White v Australian and New Zealand Theatres [CORE]**: No general duty to provide work.
- **Mann v Capital Territory Health Commission**: Exceptions may arise where work is needed to maintain skill, reputation or earnings.
- **Curro v Beyond Productions**: Entertainment / reputation-based illustration of the same point.

Employer duty of safety: Employer owes a duty to take reasonable care for employee safety, including psychiatric safety where risk is foreseeable.

- **Patrick Stevedores v Vaughan**: Safety/system of work authority used in employment context.
- **Koehler v Cerebos [CORE]**: Psychiatric injury not established merely because work is stressful; foreseeability depends on what the employer knew or ought to have known.
- **Kozarov v Victoria [CORE]**: Once the risk of psychiatric harm is apparent, the employer may need positive steps such as support, rotation or protective systems.

Vicarious liability: Ask first whether the wrongdoer was an employee; then ask whether the wrongful act was done in the course of employment or was closely connected with the role.

- **Hollis v Vabu**: Useful both for employee status and vicarious liability.
- **Bird v DG**: Modern High Court authority on vicarious liability for intentional wrongdoing; use for the close-connection analysis.

5. TERMINATION AT COMMON LAW

Reasonable notice: If the contract is silent, imply reasonable notice. Length depends on seniority, length of service, remuneration, responsibilities, availability of comparable work and the surrounding circumstances.

- **Quinn v Jack Chia [CORE]**: Leading Australian reasonable notice authority.
- **Roderick v WH Soul Pattinson (No 2)**: Modern NSW illustration on implication and assessment of reasonable notice.

Frustration: Frustration is narrow in employment. Mere illness or interruption is not enough unless the contract has become radically different or impossible to perform.

- **Finch v Sayers**: Illustrates frustration in employment.
- **International Harvester Export Co v International Harvester Aust**: Further frustration illustration.

Summary dismissal: Employer may summarily dismiss for repudiatory breach or serious misconduct. The question is whether the conduct objectively justifies immediate termination.

- **Adami v Maison de Luxe**: Disobedience / misconduct can justify immediate dismissal.
- **Intico v Walmsley [CORE]**: Serious misconduct and summarily dismissal analysis.
- **Bartlett v ANZ**: Modern NSW illustration of summary dismissal principles.

Constructive dismissal: If the employer's conduct leaves the employee no real choice but to resign, treat the resignation as the employer's termination.

- **Western Excavating v Sharp [CORE]**: Classic constructive dismissal authority.
- **Mohazab v Dick Smith (No 2) [CORE]**: Australian authority: pressure or conduct effectively forcing resignation can amount to dismissal.

6. REMEDIES AT COMMON LAW

Employee claims: Ordinary wrongful dismissal damages usually equal notice wages and accrued contractual entitlements. Addis still limits recovery for injured feelings / reputation from the bare fact of dismissal.

- **Addis v Gramophone [CORE]**: No common law damages merely for the manner of dismissal, injured feelings or lost reputation in a simple wrongful dismissal claim.
- **Walker v Citigroup**: Modern Australian authority maintaining the narrow orthodox measure in ordinary wrongful dismissal.
- **Nikolich**: Shows that once a separate contractual term is breached, damages analysis is no longer confined to bare notice wages.
- **Elisha v Vision Australia [CORE]**: Critical exam authority. Separate contractual breaches tied to dismissal procedure can support much broader damages than Addis would allow in a pure notice case.

Injunction / specific performance: Still exceptional because courts avoid supervising ongoing employment relationships, but relief is possible in special cases.

- **Turner v Australian Coal and Shale Employees Federation**: Australian authority on exceptional equitable relief.
- **Hill v Parsons [CORE]**: Classic case on reinstatement-like injunctive relief where supervision problems are not decisive.

Employer claims: Employers may seek injunctions, damages, account of profits and delivery up where the employee breaches restraint/confidentiality obligations.

- **Tradition Australia v Gunson**: Employer relief for post-employment breaches/restraint issues.
- **Purcell v Tullett Prebon**: Modern NSW authority on restraint/confidentiality relief.

TOPIC 1 - CORE PROPOSITIONS TO QUOTE

- After Personnel Contracting and Jamsek, classification begins with the rights and obligations established by the contract, where that contract is comprehensive and valid.
- Directions must be lawful and reasonable; disobedience of a lawful and reasonable direction may justify summary dismissal.
- Australia does not recognise a general implied term of mutual trust and confidence: Barker.
- Policies can be contractual, but only if the language and context show promissory intention: Nikolich, Romero; compare McKeith / Wittenberg.
- Ordinary wrongful dismissal damages remain narrow, but Elisha means separate contractual procedural promises can support broader damages.
- During employment, fidelity prevents competition; after employment, protection narrows to valid restraints and genuine confidential information / trade secrets.