
# Employment Law

Exam notes

# Table of contents

# Defining 'employment'

## Terminology

At the outset, it is important to appreciate the distinction between 'contracts of employment' and 'contracts for services'. This distinction is critical to whether the FW Act will apply.

- **Contracts of employment** (or a contract of service) are the main subject of employment law. Under a contract of employment, parties are called 'employee' and 'employer'. Employees ay be full-time, part-time, casual, permanent or fixed-term.
- **Contracts for services** are generally not the subject matter of employment law. Under such a contract, parties are called 'independent contractor' ('IC'), 'self-employed', 'dependent contractor', and 'principal'. Most provisions of the FW Act (including minimum wage, sick leave, paid leave and NES) do not apply to independent contractors, but OH&S and Equal Opportunity Acts do apply.

## Common law definition

**There is no statutory definition of 'employment', 'employee' or 'employer'. As a result, the common law provides the meaning of these terms for the FW Act (s 11).**

At common law, there is no single definition or definitive test for employment. Instead, the courts have developed an impressionistic 'multi-factor' approach to determine whether a worker is an employee (*Stevens v Brodribb*; *Hollis v Vabu*).

The following indicia are relevant to this assessment. Note that no one factor is determinative, and that courts look to the 'totality of the relationship between the parties' (*Hollis v Vabu*).

| Indicia | Emp'e | IC |
|---|---|---|
| **Control exercised over the worker's manner of performance**<br>• ICs are less likely to be under another's control; only required to produce end result; manner is up to them<br>• A mere *right* to control, rather than *actual* control may sufficiently indicate relationship of employment (*Zuijs v Wirth Bros*) | **X** | |
| **Contract terms**<br>• An express contract term stating the status of a worker is not determinative (*ACE*)<br>• Court adopts a form over substance approach, and wary of 'sham contracting'. | | |
| **Degree of integration**<br>• Where a worker performs the core function of or an important role in the employer's business, they are likely to be an employee. | **X** | |

| Indicia | Emp'e | IC |
|---|---|---|
| **Uniform**<br>• Where workers wear their employer's livery this indicates employment relationship (*Hollis v Vabu*) | X | |
| **Supply and maintain their own tools**<br>• ICs are responsible for supplying and maintaining their own tools (*Hollis v Vabu*) | | X |
| **Capacity to delegate**<br>• Where there is an unlimited capacity to delegate work without conditions or qualifications, the worker is an IC (*Qld Stations v FCT*) | | X |
| **Freedom to work for others**<br>• Employees have the implied term of fidelity to their employer<br>• ICs are able to service many different principals simultaneously | | X |
| **Mode of remuneration**<br>• ICs are paid for work completed (commission), rather than wages; responsible for their own work insurance and tax.<br>• Employees generally receive paid leave, sick leave, worker compensation, and tax and superannuation is deducted by the employer. | X | |
| **Goodwill in worker's name**<br>• ICs create goodwill for their work in their own name, and not the name of their principal<br>• Employees create goodwill in their employer's name. | X | |

*Hollis v Vabu* is the most authoritative case on the distinction between employees and independent contractors. It was subsequently applied in *ACE Insurance*.

***Hollis v Vabu*** — a bicycle courier engaged by Vabu injured Hollis; Hollis sued Vabu for vicarious liability as the 'employer' of the courier; court was required to determine whether the courier was an employee of Vabu, or just an independent contractor.

The courier was engaged without entitlements to annual leave or sick leave and no superannuation contributions. The courier was required to provide his own bicycle and maintain it, but required to wear Vabu's 'livery'.

**Court held that the courier was an employee of Vabu.** The court rejected the old 'degree of control' test on the basis that it is no longer determinative because of changing concepts of 'control' in modern employment relationships. Instead, the court adopted the 'totality of relationship test, first proposed by Mason J in *Brodribb*. The court relied on the following:

- Couriers were not running their own business, and they did not have independence in the manner in which they performed their work; they were constantly being direct where to go by Vabu over a radio;
- Couriers were not required to have specific skills;
- Couriers did not generate any goodwill in their own name;
- Couriers were 'inherently integrated' into Vabu's business: without them, there were no deliveries;
- Couriers required to adhere to strict hours schedule: 9am start; would be fired if they refused work;
- Couriers wore uniforms with Vabu's logo; and

# Industrial action

## Industrial action under the FW Act

Part 3-3 of the FW Act governs industrial action (IA) and sets out what is protected and unprotected IA

### Application

The FW Act's provisions on industrial action apply only to national system employees and employers (s 407) Industrial action is defined very broadly.

> ***Section 19***
> *(1) Industrial action means action of any of the following kinds:*
>
> *(a) the performance of work by an employee **in a manner different from that in which it is customarily performed**, or the adoption of a practice in relation to work by an employee, the result of which is a **restriction** or **limitation on**, or a **delay** in, the performance of the work;*
>
> *(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;*
>
> *(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;*
>
> *(d) the lockout of employees from their employment by the employer of the employees.*

For employees: a strike, partial work ban, a go-slow, and bans on overtime constitute **'employee claim action'** (s 409)

For employers: a lock-out by employers in response to employee claim action constitutes **'employer response action'** (s 411).

- However, industrial action does **not** include: employee action authorised by employers (s 19(2)(a)); employer action authorised by employees (s 19(2)(b)); or action taken by an employee based on a reasonable concern of employee health and safety (s 19(2)(c)).

The definition of industrial action is so wide such that it could encompass activities wholly unrelated to industrial action. In response, courts adopt a common sense reading of the provisions because 'the legislature did not intend to include conduct which stands completely outside the area of disputation and bargaining' (*The Age v CEPU*).

# Discrimination and harassment

## Commonwealth legislation

Australia's has no consolidated or unified anti-discrimination Act, rather separate Acts deal with separate types of discrimination. These include:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)

These Act are not limited to discrimination in the workplace and as a result they apply to all people, whether an employee, IC, casual, trainee or volunteer.

**Remedies available include monetary and non-monetary orders.** The onus of proof lies with the claimant for most of the provisions under the Commonwealth scheme, except for some provisions under the *Sex Discrimination Act* where the onus is reversed.

**This is different to actions brought under the FW Act where the onus is on the employer to prove that they did not breach a civil remedy provision. Accordingly, this makes bringing anti-discrimination claims very difficult because it is often hard to prove that the claimant was discriminated against on a particular ground.**

## Victorian legislation

The *Equal Opportunity Act 2010* (Vic) covers all types of discrimination in Victoria.

**The Act generally prohibits discrimination against an employee on certain attributes, unless and exemption or exception applies.**

### Procedure

Claimants can lodge a dispute with the Victorian Equal Opportunity and Human Rights Commission.

Alternatively, claimants might take claims to VCAT where mediation is carried out first, and a hearing is conducted if the problem is not resolved. VCAT can award as remedies non-monetary awards and monetary awards.

# Adverse action and bullying

## Application

In Part 3-1 of the Act, **employee and employer have their ordinary meanings** (s 335), but there must be a 'connecting factor' so that the employer is a constitutional corporation (s 338). Sole traders or partnerships are not covered by these provisions.

- **ICs are also included in these provisions** (s 342(1), item 3)
- Industrial associations are also included: unions must not take adverse action against employers (s 342(1), item 7).

## Procedure

Any affected employee, their union or a Fair Work Inspector can bring a claim for adverse action.

- This procedure can be contrasted with that under the Equal Opportunity Act 200 (Vic): there are no representative complaints under the EO Act.

Claims can be brought in the Federal Court of Federal Circuit Court (s 539), and there is a 6 year limitation period (s 544).

- Note: **if the adverse action claim relates to dismissal, the parties must first apply to the FWC for conciliation** (s 365). Only if the FWC certifies that 'all reasonable attempt to resolve the dispute have failed' can parties to court over a matter relating to dismissal (s 369).
- If the adverse action claim does not relate to dismissal, the parties may seek conciliation with the FWC, but it is an optional step and will only occur where the consent of both parties is given.

## Protections

**In general, the provisions of Part 3-1 of the FW Act prohibit the taking of advise action against a worker (employee or IC) because of a proscribed ground, unless an exception or exemption applies.**

This is a civil remedy provision.

- Protections for adverse action are set out in the table below.