

Index

Topic 2 – Defining the Employment Relationship

- Employees and independent contractors
 - o Types of employment relationships
 - o Multi-factor test

Topic 3 – Rights and Responsibilities Under an Employment Contract

- Express terms
 - o Incorporation of workplace policies
 - o Incorporation of industrial instruments
- Terms implied by fact
 - o *BP Refinery* Test
 - o Meaning of 'necessary to give business efficacy'
- Terms implied by law
 - o Duty to obey
 - o Duty to cooperate
 - o Good faith and fidelity, and confidence
 - o Duty to pay (the 'work-wages bargain')
 - o Duty to provide work?
 - o Duty of reasonable care
 - o Duty of mutual trust and confidence
- Breach of duty and remedies
- Termination at common law
 - o Termination by agreement
 - o Termination by summary dismissal

Topic 4 – Employment Regulation Under the FWA: An Overview

- Introduction
 - o Section 14 and 30D: Meaning of 'national system employer'
 - o Section 26: Subject matter that is excluded from the FWA
- Enforcers of the FWA
 - o The Fair Work Commission
 - Section 591: Immunity from the rules of evidence and procedure
 - Section 576: Functions of the FWA
 - o The FCA and FCC
 - o The Fair Work Ombudsman
 - Section 708: Power of Inspectors to Enter Premises
 - Section 709: Powers of Inspectors While on Premises
 - Section 710: Persons Assisting Inspectors
 - Section 711: Power to Ask for Person's Name and Address
 - Section 712: Power to Require Persons to Produce Records or Documents
 - Section 713: Self-Incrimination
 - Section 714: Power to Keep Records or Documents

Topic 5 – Statutory Employment Standards

- Introduction
 - o Section 55: Interaction between NES and modern awards/enterprise agreements
 - o Section 56: Interaction between modern awards and enterprise agreements
- National Employment Standards
 - o Maximum weekly hours
 - o Requests for flexible working arrangements
 - o Parental leave and related entitlements
 - o Annual leave
 - o Personal/carer's leave and compassionate leave
 - o Community service leave
 - o Long service leave
 - o Public holidays
 - o Notice of termination and redundancy pay
 - o Fair Work Information Statement
- National Minimum Wage
- Modern Awards
 - o Coverage versus application
 - Section 57: Interaction Between Modern Awards and Enterprise Agreements
 - Section 46: The Significance of a Modern Award Applying to a Person
 - Section 47: When a Modern Award APPLIES to an Employer, Employee, Organisation or Outworker Entity
 - Section 48: When a Modern Award COVERS an Employer, Employee, Organisation or Outworker Entity
 - o Modern awards content
 - Terms that MAY be included
 - Terms that MUST be included
 - Terms that MUST NOT be included
 - o Variance of modern awards
- Enterprise agreements
 - o Types of enterprise agreements
 - Section 172(2): Single enterprise agreements
 - Section 172(3): Multi enterprise agreements
 - Section 172(4): Greenfields agreements
 - o Content of enterprise agreements
 - Permitted matters
 - Unlawful terms
 - Mandatory terms
 - o Commencement of enterprise bargaining
 - Agreeance
 - Section 236: Majority support determination
 - Section 238: Scope order
 - Section 243: Low-paid authorisation
 - o Approval of enterprise agreements
 - Section 186: General requirements
 - Section 180-181: Genuine Agreeance
 - Section 55-56: Does not contravene NES
 - Section 136(3A): Employees fairly chosen
 - Section 194-195: No unlawful terms
 - Section 202-205: Has mandatory terms
 - Section 193 and 189: Pass BOOT
 - Section 187: Additional requirements
 - Section 228: Good faith bargaining
 - Section 173: Bargaining representatives
 - o Approval of a non-compliant enterprise agreement

Topic 6 – Freedom of Association and Industrial Action

- Freedom of association
- Industrial action
 - Section 19 and 408: Definition of 'protected industrial action'
 - Section 409: Employee Claim Action
 - Section 410: Employee Response Action
 - Section 411: Employer Response Action
 - Section 417 and 413: Common requirements
 - Section 409: 'Additional requirements' for employee claim actions
 - Protected action ballot
 - Permitted matters
 - Unlawful terms
 - Pattern bargaining
 - Demarcation disputes
 - Immunities
 - Unprotected industrial action
 - Statutory consequences
 - Common law consequences
 - Terminating protected industrial action
- Right of Entry
 - Prohibitions and restrictions
 - Procedural requirements
 - Section 518: Prescribes notice requirements
 - Section 484: Holding discussions
 - Section 481 and 482: Investigating suspected contraventions
 - Section 494: Exercise occupational health and safety rights
- Protection against adverse action
 - Section 342: Definition of adverse action
 - Types of protections against adverse action
 - Section 340-341: Workplace rights
 - Section 346: Industrial activities
 - Section 351: Discrimination
 - Causation
- Protection against other prohibited action
 - Coercion
 - Undue influence or pressure
 - Temporary illness or injury
 - Sham arrangements
- Appeal procedure

Topic 7 – Discrimination and Sexual Harassment

- Discrimination under the EO Act
 - o Section 6 and 7: Attributes
 - o Direct and indirect discrimination
 - o Grounds of discrimination
 - Permitted Grounds
 - Exceptions
 - o Duties to address discrimination
 - o Bringing a claim
 - Victorian jurisdiction
 - Commonwealth jurisdiction
 - o Examples
- Discrimination under the FW Act
 - o Penalties
- Sexual Harassment
 - o Section 92 EO Act: Defines sexual harassment
 - o Section 93 EO Act: Prohibition on sexual harassment by employers and employees
 - o Section 94 EO Act: Prohibition on sexual harassment in a common workplace

Topic 8 – Workplace Health and Safety

- Introduction
- Section 4: Principles of the OHS Act
- OHS Duties of employers and employers
 - o Summary of duties
 - Section 21 OHS Act: Duties of Employers to Employees
 - Section 22 OHS Act: Duties of Employers to monitor Health and Conditions Etc
 - Section 23 OHS Act: Duties of Employers to Other Persons
 - Section 25 OHS Act: Duties of Employees
 - Section 20 OHS Act: 'So far as reasonably practicable'
 - o The effect of compliance codes
 - o Enforcement
 - o Consequences of breach
- Bullying under the FW Act
- Workers' compensation
 - o Definitions
 - Section 3: Worker
 - Section 3: Injury
 - o *WIRC Act* compensation
 - Entitlement to compensation
 - Restrictions to compensation
 - Making a claim flowchart
 - o Common law damages
 - o Return to work obligations

Topic 9 – Termination of Employment

- Termination without breach
- Summary dismissal
 - o Serious misconduct: FWA
 - o Serious misconduct: common law
- Claims arising from termination of employment
 - o Wrongful dismissal
 - o Dismissal for a prohibited reason
 - o Unfair dismissal
 - Eligibility
 - Section 382 and 384: 'Employees'
 - Section 23: 'Small business employers'
 - Section 385: Elements
 - (a) Section 386: Meaning of Dismissed
 - (b) Section 387: Harsh, Unjust or Unreasonable
 - (c) Section 388: Small Business Fair Dismissal Code
 - (d) Section 389: Genuine Redundancy
 - Remedies
 - Formalities
 - Section 391: Reinstatement
 - Section 392: Compensation
 - Examples

Possible Issues

Pre-Employment

- (1) Failure to hire
 - Does the behaviour constitute adverse action?
 - Is it unlawful adverse action?
 - Does the behaviour constitute direct or indirect discrimination?
 - Does the employee possess a protected attribute?
 - Did the conduct take place in an area covered by the EOA?
 - Less favourable treatment OR
 - Requirement, condition or practice which had a disadvantageous effect due to the attribute
- (2) Coercion, undue influence or pressure?
- (3) Misrepresentation about workplace rights?

During the Course of Employment

- (1) Breach of duty by the employee?
 - Obedience
 - Good faith and fidelity
 - Does it constitute misconduct and warrant summary dismissal?
 - If dismissed, unfair dismissal or wrongful dismissal claim
 - What would the employer argue?
- (2) Breach of duty of care by the employer?
 - OH&S Act obligations
 - Right of entry for WorkSafe and an industrial association
 - Compensation available if employee injured
- (3) Failure to be promoted/demotion/change in hours/reduction in pay/failure to receive training/discrimination?
 - Does the behaviour constitute adverse action?
 - Is it unlawful adverse action?
 - Does the behaviour constitute direct or indirect discrimination?
 - Does the employee possess a protected attribute?
 - Did the conduct take place in an area covered by the EOA?
 - Less favourable treatment OR
 - Requirement, condition or practice which had a disadvantageous effect due to the attribute
- (4) Sexual harassment?
- (5) Is the employer vicariously liable?
- (6) Coercion, undue influence or pressure on employee?
- (7) Misrepresentation about workplace rights?
- (8) Right of entry by an industrial association?
 - Why is the representative seeking to enter?
- (9) Industrial action
 - Is it protected?
 - Coercion to engage in industrial action?
- (10) Breach of an enterprise agreement or modern award?
 - Dispute resolution as provided in instrument
- (11) Breach of the NES?
 - Adverse action for exercising a workplace right?
 - Bullying?

Post-Employment

- (1) Summarily dismissed without reason or constructively dismissed
 - Common law claim for wrongful dismissal
 - Was the termination harsh, unjust or unreasonable?
- (2) Was the termination unlawful adverse action?
 - Was it for a prohibited reason?
- (3) Does the termination constitute direct or indirect discrimination?
 - Does the employee possess a protected attribute? Area?
 - Less favourable treatment OR
 - Requirement, condition or practice which had a disadvantageous effect due to the attribute
- (4) Is there a restraint of trade clause operating?

Bargaining Issues

- (1) The employer won't bargain?
 - Majority support determination
 - Scope order
- (2) Bargaining isn't proceeding fairly?
 - Scope order
 - Bargaining order
 - Both require BR to be meeting GFB requirement in s 228
- (3) If bargaining order is breached *and* parties still can't agree
 - Serious breach declaration
 - FWC may then make bargaining related workplace determination
 - Protected industrial action
 - FWC may then make an industrial action related workplace determination

Topic 2 – Defining The Employment Relationship

Template

Employee or Independent Contractor?

- (1) Is the 'employee' really an employee?
- (2) Is the 'independent contractor' really an independent contractor?
- (3) “Multi-factor” test: consider the totality of the relationship between the parties (i.e. was it an employment relationship or a contractor arrangement based on the way in which the relationship functioned?)
 - **No one factor is determinative!**
 - Whether contractor is running its own business
 - Extent of right to exercise control
 - Obligation to work
 - Control over hours of work
 - Ownership and maintenance of equipment
 - Right to work for more than one principal
 - Right to delegate work
 - Level of skill involved in the labour
 - Uniform and labelling
 - Mode of remuneration
 - Tax arrangements
 - Provision for holidays or leave

Introduction

General

- 'Employment' is not really defined in the FWA, **referring to their "ordinary meanings"**
- This is common in other statutes, although some extend the meaning to include contractors
- As such, it is necessary to look to the common law to distinguish between an employee and an independent contractor

Employees and Independent Contractors

General

- An employee performs work for the benefit of their employer, works under the control of their employer, and earns a salary/wages
- An independent contractor is in **BUSINESS** for themselves, engaged to provide a service, and is expected to use their own skill/expertise, and the practical effect of being one includes...
 - o No award or industrial entitlements
 - o No leave entitlements
 - o Simpler remuneration system and record keeping
 - o Reduced likelihood of vicarious liability
 - o No access to unfair dismissal law
 - o Can *sometimes* avoid paying...
 - Superannuation
 - Payroll tax
 - Fringe benefits tax
 - WorkCover insurance

Types of Employment Relationships

General

The types of employment relationships are as follows...

- Full-time
- Part-time
- Casual
- Labour hire and outsourcing
- Working from home

Multi-Factor Test

General

- In order to distinguish between the two, courts have often considered the distinction between a contract *for* services and a contract *of* service, and in doing so, courts have endorsed the **multi-factor test**
- This test considers the totality of the relationship, and emphasises substance over form
- **No one factor is determinative:** *Stevens v Brodribb*
- Accordingly, as per *Stevens v Brodribb*, the test requires consideration into the following factors...
 - Extent of right to exercise control
 - Obligation to work
 - Control over hours of work
 - Ownership and maintenance of equipment
 - Right to work for more than one principal
 - Right to delegate work
 - Level of skill involved in the labour
 - Uniform and labelling
 - Mode of remuneration
 - Tax arrangements
 - Provision for holidays or leave
 - **IMPORTANT:** Whether the contractor is running its own **BUSINESS**; as per *On Call Interpreters*, the indicia of business are as follows...
 - Business risk
 - Repetitive engagement with clients
 - Employing/sub-contracting to perform work
 - Generation of goodwill
 - Promotion through advertising
 - Ownership of business assets
 - Business transactional system/accounts
 - Level of skill involved in labour
 - Compliance with regulatory requirements

Topic 3 – Rights and Responsibilities Under an Employment Contract

Template

Contractual Terms

- (1) What are the express terms?
- (2) Have terms been incorporated?
 - Policies?
 - Awards and industrial instruments?
- (3) Do any implied terms apply to the situation?
 - Any terms implied by fact?
 - Any terms implied by law?
 - Duty to obey?
 - Duty of good faith, fidelity and confidence?
 - Work-wages bargain?
 - Duty to provide work?
 - Duty of reasonable care?
 - Have any of these been expressly excluded?
- (4) If a breach has occurred, contractual breach with contractual remedies

Introduction

The rights and responsibilities arising under an employment contract are dependent upon the contractual terms that form part of the contract; accordingly, the following types of contractual terms will be examined...

- Express terms
- Implied terms

Express Terms

General

- Employment contracts follow the usual rules of contract (i.e. offer, acceptance, consideration etc.)
- **NB:** Parties are largely free to decide on the terms of their contract, however they **cannot contract out of award/agreement or statutory entitlements**; instead, a contract will not be void or unenforceable if its terms undercut statutory or award terms, but the more favourable terms will still be effective
- **NB:** Terms can also be incorporated by reference to other documents such as...
 - o Workplace policies
 - o Industrial instruments

Incorporation of Workplace Policies

- If a workplace policy is incorporated, the breach will be **CONTRACTUAL**: *Goldman Sachs v Nikolich*
- **NB:** Must be promissory in nature
- **NB:** Contrary terms can prevent incorporation: *Yousif v CBA*; *Barker v CBA*

Incorporation of Industrial Instruments

- If an industrial instrument is incorporated, a breach of this will **NOT BE CONTRACTUAL**: (*Bryne v Australian Airlines*)
- **NB:** These can be incorporated by reference
- **NB:** Contrary terms can prevent incorporation: *Yousif v CBA*; *Barker v CBA*

Goldman Sachs v Nikolich

Facts

- HR policy manual contained a term that the employer would “provide and maintain, so far as is practicable, a working environment that is safe and without risks to health”
 - Was held to be promissory • Would it have been if had used aspirational terms such as, the employer “encourages” a safe working environment or “acknowledges the importance of”?
 - Nikolich awarded \$435,896
-

Terms Implied By Fact

General

- These terms will be unique to the individual circumstances of the contract

TEST: According to *BP Refinery v Shire of Hastings*, for a term to be implied by fact, it...

- (1) Must be reasonable and equitable
- (2) Must be **necessary to give business efficacy** to the contract
- (3) Must be so obvious that 'it goes without saying'
- (4) Must be capable of clear expression
- (5) Must not contradict any express term

Meaning of 'Necessary to give Business Efficacy'

- A term will be implied where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or perhaps, be seriously undermined', or the contract would be 'deprived of its substance, seriously undermined or drastically devalued': *Byrne v Australian Airlines Ltd*
- Similarly, if a term is 'so much a part of the common understanding as to be imported into all transactions of the particular description': *Breen v Williams*

Terms Implied By Law

General

- According to *University of WA v Gray...*
 - o Terms implied in law are legal incidents of the particular class of contract to which they respectively relate
 - o They are to be found in many commonly occurring types of contract (sales, employment, landlord and tenant, doctor-patient etc)
 - o They are not based upon the intention of the parties, actual or presumed
 - o They are NOT founded on the need to give efficacy to a contract
 - o The implication of a term in law **yields to the contrary intention** of the parties as expressed in their contract or because of inconsistency with the terms that have been agreed
- To date, several terms have been implied by law with respect to employees and employers...
 - o Duty to obey
 - o Duty to cooperate
 - o Good faith and fidelity, and confidence
 - o Duty to pay (the 'work-wages bargain')
 - o Duty to provide work?
 - o Duty of reasonable care
 - o Duty of mutual trust and confidence