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Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 23 – employment and industrial law

A. Defining the employment relationship

1. There is a difference between an employment relationship (a **contract of service**) and the relationship between a principal and an independent contractor (a **contract for services**). This has important consequences:
    - industrial awards may apply to employment contracts;
    - an employee is entitled to workers' compensation and various kinds of leave; and
    - an employer is vicariously liable for acts of the employee.
2. The early common law test for the employment relationship was the **control test** – an employer could tell an employee not only what to do but how to do it. This test does not always work in today's advanced society.
3. Courts in Australia determine whether there is an employment relationship by looking at the whole of the circumstances of the relationship. Control is a factor but not the only factor. The court should look at all circumstances, including:
    - if there was a written agreement;
    - the nature, frequency and regularity of payments;
    - freedom to choose, within limits, hours of work;
    - who supplied the tools and equipment;
    - deduction of PAYG taxation;
    - power to delegate duties; and
    - the degree of control.

B. Common law duties of an employer

1. At common law, the employer must provide safe working conditions, in particular:
    - competent and qualified employees;
    - a safe system of work; and

- a safe place of work.

2. The employer is vicariously liable at common law for the negligence of employees.

3. These common law duties have been replaced by statutory workers' compensation. The employee now has only a limited right to sue at common law.

C. Workers' compensation

1. An employer must take out workers' compensation insurance for every worker. Failure to do so can result in a fine and personal liability to pay any claim. The scheme that operates in New South Wales is called **WorkCover**. Workcover NSW is the government authority which administers the *Workers Compensation Act 1987* and the new *Work Health and Safety Act 2011* (NSW). (See this chapter for a list of other State and Territorial legislation and administering authority.)

2. A newly established Workers Compensation Commission hears and determines matters under the *Workers Compensation Act 1987* and the *Workplace Injury Management Act 1998.*

3. A worker injured or becoming ill in the course of employment is entitled to workers' compensation payments. The worker does not have to show any breach of duty. It is sufficient to show that he or she was a “worker” and the injury or illness arose in the course of employment.

4. There are limited defences to workers' compensation claims:

   - if the injury is self-inflicted; or

   - if there was serious and wilful misconduct (not available where worker is killed or seriously and permanently disabled).

5. Compensation is the payment of medical expenses, costs of rehabilitation and a weekly sum for as long as the worker cannot work. The legislation also provides for payment of a lump sum in the case of the death of a worker and for a payment of specific sums for specific injuries.

D. Common law duties of employee

1. The employee must be faithful to the employer and, in particular, must not:

   - use or take confidential information;

   - help competitors; or

   - conceal relevant information.

2. The employee must obey all commands of the employer if lawful and reasonable.

E. Termination of employment

1. Generally, the normal rules of contract apply.
2. The employer can terminate:
    - upon reasonable notice; or
    - without notice for breach of a condition of contract, or negligence.
3. The employee can terminate:
    - upon reasonable notice; or
    - without notice, upon breach of a condition of contract, or where the employee is put at risk.
4. Industrial awards may limit an employer's right to terminate. In addition, an employee may seek reinstatement under industrial legislation where termination is “harsh, unreasonable or unjust”.
5. Common law remedies apply to contracts. In addition, an employee may make application to the Industrial Court of New South Wales under the *Industrial Relations Act* in respect of a contract that is:
    - unfair;
    - harsh or unconscionable; or
    - against the public interest.

    The court has a wide variety of remedies available under this section. There is similar Commonwealth legislation.

    The Australian Fair Work Commission deals with dismissal claims. Any unfair dismissal which took place prior to 1 July 2009, will be dealt with under the relevant provisions of the *Workplace Relations Act 1996* (Cth).

F. Long service leave

1. The *Long Service Leave Act 1955* gives every worker, not otherwise provided for in an award or contract, long service leave entitlement.
2. Qualifying period is 10 years, and the entitlement is two months' leave. There is a pro rata entitlement after five years if the employee leaves for reasons other than misconduct or personal convenience, or dies.

3. “Month” means four and one-third weeks.

4. Payment is at ordinary rates of pay at time leave is taken. Employer cannot require the employee to attend during the leave period to collect wages.

G. Annual holidays

1. Every worker, not otherwise entitled under contract or an award, is entitled to four weeks' annual leave for every year of employment.

2. Payment is at ordinary rates of pay.

H. Work health and safety

1. The objectives of the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulations 2011* (NSW) (replaces the former *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation 2001* (NSW)) are to ensure the health, safety and welfare of everyone in the workplace.

2. Employers and self-employed persons must ensure that the objectives of the Act are met and that people in the workplace are not exposed to risks to health and safety. They must take reasonable care. This duty extends to the workplace, entry to and exit from workplace, and to plant and substances.

3. The Act and Regulations impose heavy penalties on offenders.

4. Workcover NSW and other State and Territorial agencies continue to administer local and national OH&S laws.

I. Anti-Discrimination

1. The Commonwealth has passed several statutes that prohibit discrimination in the areas of accommodation, access, provision of goods and services, joining of trade unions, employment and advertising because of:

    - race;
    - sex, marital status, pregnancy or family responsibilities;
    - physical or mental disability; or
    - age.

2. The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination in employment, accommodation, education, and the provision of goods or services on the grounds of:

    - race or membership of an ethnic or racial minority group;

- sex;
- marital status;
- homosexuality;
- age (in limited situations);
- physical or mental impairment;
- transgender;
- HIV/AIDS vilification; or
- ethno-religious background.

3. "Discrimination" means to treat a person differently from others.

4. The legislation emphasises conciliation. A person can complain to the appropriate authority (in New South Wales: the Anti-Discrimination Board). The Board will investigate and, if it believes the complaint is justified, call the parties together for conciliation. If this is unsuccessful, the Board can refer the matter to a quasi-judicial body (in New South Wales: the Administrative Decisions Tribunal).

5. These bodies have wide powers and can generally issue an injunction, award damages, and order reinstatement.

6. Sexual harassment is a form of discrimination.

   Note that a new Act has been added to the federal human rights portfolio: the *Age Discrimination Act 2004*. This Act prohibits both direct and indirect discrimination against a person in respect of his/her age. This legislation is administered by the Australian Human Rights Commission, with an Age Discrimination Commissioner recently appointed.

J. Industrial relations

1. Limits on the Commonwealth power

   (a) The Commonwealth has no power to make laws about working conditions. Its only power under s 51 of the Constitution is to make laws about "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one state". The Commonwealth cannot give any of its instrumentalities any greater power than it has itself.

   (b) These limits have been eased somewhat over the years. What happens now is that a union will contrive a dispute with an association of employers. This gives the Australian Industrial Relations Commission (successor to the Arbitration Court) the power to make an award that binds most employers

and most employees. Industrial reality gives this the effect of a common rule.

(c) The doctrine of **separation of powers** says that no one person or body should exercise more than one power – the **legislative power** (power to make laws), **executive power** (power to administer laws), or **judicial power** (power to interpret and enforce laws).

In Australia, parliaments, and their delegates such as the Arbitration Court, have the legislative power and the judges have the judicial power.

(d) Following the decisions in *Alexander's case* and the *Boilermaker's case*, the Commonwealth divided its industrial system into two parts. The award-making power is held by the Australian Industrial Relations Commission, and the Australian Industrial Relations Court has the power to interpret and enforce awards.

Note: the concept of what constitutes an industry has broadened in recent years: see *Re Coldham; Ex parte Australian Social Welfare Union* (1983) 57 ALJR 575.

2. Commonwealth and State industrial systems

See text for a more detailed description of the new IR laws.