

Workplace Law

The changing nature of workplace law over time

Workplace law regulates the relationship between employees and employers, ensuring the rights of workers are protected.

- In medieval times there was a feudal system with no recognition of workers rights.
- As a result of the industrial revolution people were required as a labour force for the new factories being built
- During this period the conditions of employment were harsh, the hours long and the work was often dangerous.
- The doctrine of **laissez-faire** is that employees and employers should be free to make whatever arrangements they wish without government control. Laissez-faire allowed poor conditions to exist because the government did not intervene.

Tolpuddle martyrs was the first attempt of a trade union. The tolpuddle were sent to Australia as convicts where they then brought these ideas to Australia.

- A number of Factory Acts 1833 were passed to regulate conditions of workers, marking a departure from the doctrine of laissez-faire
- Trade unions began to form and social and community pressures meant that it was no longer accepted that a contract of employment was a bargain between two equal parties.
- From that time the government began to interfere and regulate to promote the welfare of the people.
- Collective bargaining was eventually recognised and the workers' representatives, the trade union, were bargaining with the employers for improved pay and conditions.
- As an outcome of society's recognition of the injustice of the industrial revolution towards the working class, people demanded change.
- As the society evolves the law follows in its wake.
- Consequently, workers' compensation legislation was introduced to make the industry carry the cost of accidents for injured workers (first OHS Law)

James V Price 1773: Lord Mansfield said "the more we look into law, the more it appears founded on equity, reason and good sense"

- Over the 19th and 20th century has been an enormous expansion of the role of Government for the greater good of community. There has been in the late 20th and 21st centuries a turning back of the role of government.
- There is now a view that the government must withdraw from some areas and allow individuals to make decisions without regulation.

Eg. Work Choice Legislation 2005.

- As a result, there is now a greater role for individual contracts between employers and employees.

Shearers Strike

Harvesters Case: Justice Higgins decided what was the basis of the national minimum wage system in Australia.

Workplace Relations Amendment (Work Choices) Act 2005

- New workplace relations system
- Improved employment levels and national economic performance

Fair Work Act 2009

- Replaced the Workplace Relations Act 1996 Cth
- Introduced NES
- Created Fair Work Australia
- Created good faith bargaining and the workplace ombudsman

Caselaw: 7/11

According to 2015 Four Corners episode

- Workers underpaid, blackmailed, paid half the award wage
- Students immigrated from overseas can only work 20 hours a week, but 7/11 was offering them more hours. This is illegal so the workers stayed quiet because it would jeopardise their visa.
- 7/11 management admitted to the court that non-compliance with workplace laws was relatively common among 7/11 franchises.

Response

- Investigation by the FWO found the operators had deliberately falsified information about number of hours being worked and the rate of pay
- Magistrate said "compliance should not be seen as the bastion of the large employers with human resources behind them"
- Reinforces the need for business to understand Australian workplace laws and observe compliance obligations
- Reforms proposed by 7/11
 - Establish a compliance team to detect and report non-compliance
 - Education campaign to ensure franchisees and staff are aware of their obligations and entitlements
 - Harmonisation of two relevant industry codes (the oil code and the franchise code). Varying provisions complicates the rights of the parties.

7/11 Wage Claims Program

- Franchisees may acknowledge a claim and agree to rectify the underpayment
- Equally, they are also within their rights to dispute the claim
- Where a franchisee disputes the claim, 7/11 cannot proceed further.

Contracts

Recent reforms in OHS has meant that the difference between 'of and for' is reduced and employers will be held liable for the actions of anyone on their site.

Of service

- Employer is vicariously liable
- Has entitlements such as sick leave, holidays leave, workers compensation, minimum conditions (wage, hours of work)
- Protected against unfair dismissal

For service

- Independent contractor
- Conditions of an agreement may include:
 - Contractor providing their own tools and services
 - Has agreements with others also
 - Operate through a business name or company
 - Contractors do not have any 'entitlements' listed above
- Are held liable for damage caused during work

Case Law: Uber

(AFR, Jan 2018, Uber wins Fair Work Commission case over drivers' employment rights)

- Kaseis applied under the fair work act 2009 for an unfair dismissal remedy
- Uber argued that the applicant's application should be dismissed on the grounds that he was employed as an independent contractor (contract for service)
- The FWC upheld that Uber's arguments that drivers are not employees, and are independent contractors
- This decision may indicate that other platform-based workers are likely to be considered to be independent contractors
- The development of the 'gig economy' as a result of rapid technology development has led to many companies such as Uber to operate on the basis that its drivers are independent contractors
- This is the first decision in Australia of the employment status of workers in the gig economy. The decision may set a precedent that other platform-based workers are likely to be considered as independent contractors

Express and implied terms

Implied duties

An implied term is a promise that is binding on the parties to the contract, even though the parties have never discussed it.

For an employer:

- Provide work
- Pay wages
- Vicariously liable for actions of workers

Expressed duties

An express term is one that is usually spoken or written into a contract.

- Sick leave
- Holiday leave
- Workers compensation
- Superannuation
- Pay rate

Awards and agreements

Awards are the minimum terms and conditions that must be included in a contract.

- Used to be over 3000 individual awards, now there are 122
- This harmonisation of awards makes award standards more accessible and less convoluted, increasing compliance

The *Fair Work Act 2009* is the basis for the ongoing creation and variation of modern awards

- Determined by a tribunal or commission as FWC can make, vary and revoke modern awards.
- Must be reviewed every four years
- The award has the force of law and must be complied with and enforced.

Statutory conditions

Both state and federal governments have legislated to enforce minimum terms in an employment contract including the hours of work, holiday provisions, leave entitlements and OHS standards

- Over the last decade there has been a political movement to reduce the role of governments in their relationships

10 National Employment Standards (NES)

- Maximum weekly hours