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# Employment 101

This section introduces new employers to the Australian workplace landscape. There is some heavy going by necessity, given the complexity of the regulations in the employment area. The Australian Industrial Relations landscape exists in its present form because of a history rich in confrontation between labour and capital. Relative to past practices, discrimination regarding pay and conditions in the workplace is rare today. Even so, the major political parties view many of their ideological differences through the prism of industrial relations.

### Employment Law

When an employer and an employee agree to an employment relationship, under common law a contract of employment comes into existence. The fact that an employment relationship exists is sufficient for the existence of a contract of employment even if nothing is written down. A contract of employment is a legal arrangement and, if a dispute over entitlements arises, then a court or other relevant tribunal will determine the content of the particular contract of employment. Statute law imposes certain minimum rights in favour of employees. These rights take precedence over anything contained in a contract of employment. The employer cannot override these minimum provisions, even if the employee agrees.

When the contract comes into existence, the employee and the employer become subject to legal obligations:

The first is common law and a number of duties on the parties

are implied by the law. The employer's duties are to pay the agreed remuneration and benefits if the employee is available and willing to perform the work required; to provide suitable work; to take reasonable care for the health and safety of the employee while at work; to reimburse expenses incurred by the employee on behalf of the employer; and to indemnify the employee for losses or liabilities incurred while performing authorised work. The implied duties of the employee are to attend work; depending on the class of work, to agree to work some overtime; to act in the commercial interest of the employer; to act with reasonable care and skill; to respect ownership of industrial property (e.g. patents, innovations, industrial designs etc.); to obey lawful and reasonable orders; to account for all money and property received in the course of employment; to make available to the employer inventions that are made in the course of employment, whether or not the employee is particularly employed for the purpose of that invention.

The second is federal legislation. Tribunals established by federal law (such as Fair Work Australia) make industrial awards and set minimum wage rates and employment standards which impose legally binding obligations upon employers.

### **Does an Applicant Have a "History"?**

The principle of non-discrimination aims to provide people with criminal records with equal opportunities to gain work. It does not prevent employers from 'screening' employees for past faults or derelictions. It does mean that if you exclude a person with a criminal record from employment it must be on an objective and appropriate basis. A prospective employee is not obliged to disclose past fault or dereliction to employers.

Questions intended to 'Screen' an applicant must be included either on an application form or be asked at the interview. Such questions should not be discriminatory in nature. That is, there must be careful consideration about whether a particular person's

criminal record would disqualify him or her from properly meeting the 'inherent requirements' of a particular job. If the prospective employee provides a false answer to these questions, the employer is entitled to dismiss the employee if the answer was material to the employment contract. If the employee refuses to answer the questions, the employer is entitled to draw whatever inferences they like from the omission.

To avoid risk, many employers now require satisfactory police checks as a requirement for employment. This is now prevalent in areas where money will be dealt with e.g. casino staff or where staff may work with children e.g. teachers.

## Equal Opportunity

There is federal and state legislation dealing with equal opportunity or non-discrimination in the workplace.

Under the various state Acts it is generally unlawful for an employer to discriminate against a person on any of the following bases:

- Gender;
- Marital status;
- Race;
- Ethnic origin;
- Colour;
- Political beliefs;
- Religious beliefs;
- Pregnancy;
- Physical impairment;
- Sexuality;
- Age.

## Potential Areas of Discrimination

Areas of employment where discrimination could arise include:

- Terms of employment offer;
- Access to training;
- Denial of transfer or promotion;
- Dismissal; and
- Other detrimental actions.

In particular, the federal legislation provides that for almost all Australian employees, work of equal value must attract equal remuneration.

## Employment Contracts

The terms included in a contract of employment are those which the parties to the contract expressly agree between them. Terms will be agreed orally (in conversation) or in writing (notes or letter of appointment), or a combination of the two.

The minimum terms will cover hours of work, duties and rates of pay. It is a sensible practice to send a letter to employees prior to, or upon engagement. This letter should identify the parties to the contract, the lines of authority and provide a list of the main conditions of employment. In addition, a statement of terms and conditions of employment can be attached.

## Distinction Between Employees and Contractors

In the English legal tradition – and therefore applicable to Australia - the definition of employment is found in common law, not in statutes. The common law definition of employment is based on the medieval master/servant relationship in which the employer has a legal “right to control” the employee.

The distinction between employees and contractors is key to determining whether you are an employer or whether you are re-

taining the services of a contractor.

The following details the factors that indicate that a person is an employee in the ordinary sense of the word - a person is considered an employee if the services are performed in the course of a 'master and servant' relationship. Generally, a 'master and servant' relationship exists if the employer directs and controls how, where, when and who is to perform the work.

Key factors pointing to an employee relationship include:

- The employer controls or has the right to control the manner in which the work is to be performed;
- The employer has to deduct PAYG withholding tax;
- The employer provides the usual benefits for the employee, for example: superannuation, annual leave loading, and sick leave;
- The employee does not have the ability to delegate the performance of work to another person, i.e. could they have someone else do the work?
- The contract expressly characterises the relationship as an employment relationship;
- The manner of payment is in equal instalments over the period of retention and not upon performance of a contract;
- The employee is usually provided with the materials, tools and equipment required for the work to be performed; and
- The employee is not usually responsible for losses occasioned by poor workmanship or negligence. However, the employee may be subject to disciplinary action at the discretion of the employer.

Key factors pointing to an independent contractor include:

- The contractor is able to delegate work to others;

- The contractor advertises his/her services to the public;
- The existence of a written contract which details the particular work as a contractor;
- The contract specifies the location, commencement and termination dates, and the services performed. The contractor has the ability to allow work to be performed by other persons at the contractor's discretion;
- The contract specifies the required quality standards and also specifies the contractor's liability for any breach;
- The remuneration and method of payment of the contractor is specified in the contract, also detailing how the contractor is responsible for all payments of its employees;
- The contract is to produce a given result; i.e. the contractor can choose how the work will be done with discretion over tools, materials and personnel;
- The contractor provides all or most of the necessary materials and equipment etc. to complete the work;
- The contractor provides services to the general public and other businesses;
- The contractor is free to accept or refuse work; and
- The contractor is in a position to make a profit or suffer a loss, i.e. they run the risk or reward.

No single factor will be decisive in its own right. Whether a person is an employee or a contractor is determined after considering all relevant facts.

Federal workplace laws impose costly obligations on employers, though retaining contractors does not impose such requirements. A sham contract occurs when an employer deliberately disguises

an employment relationship as an independent contracting arrangement, instead of engaging the worker as an employee. This is done to avoid responsibility for employee entitlements. Under the sham contracting provisions, an employer cannot misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement. An employer cannot threaten employees with dismissal or mislead an employee about the effect of changing their working arrangements.

An employer cannot dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor or make a knowingly false statement to persuade or influence an employee to become an independent contractor. The law provides serious penalties for contraventions of these provisions.

## Contract of Employment

Employees fall into two broad categories, salaried and hourly paid.

Salaried employees are paid above award rates. An employer negotiates an annual salary with the employee and it is usual practice to prepare a letter of offer for salaried employees. A template for a letter of offer for a salaried employee follows as an example (thanks to the Victorian government's business site for this template). I have included a letter of engagement for hourly paid staff in Chapter 9, Getting Ready to Pay Your Staff.

<Company Name>

### Contract of Employment

**Private and Confidential**

<Insert Date>

<Employee's Name & Address Details>

Dear <Employee's Name>,

**Re: Contract of Employment**

We are pleased to offer you the position of <Insert Position Title> with us here at <Insert Company Name> where we hope you will enjoy your role and make a significant contribution to the success of the business.

**Commencement Date**

Your employment will commence on <Insert Starting Date>.

**Location**

You will be based at <Insert Business Address> but may be required to work at such other locations as reasonably determined by the needs of the business.

**Position**

<Insert Position Title> - reporting to <Insert Manager's Position Title>

The roles and responsibilities of this position will be described separately in an attached Position Description.

**Term**

This is a <Insert either - permanent position/casual position/contract position for # months>.

**Probationary Period**

A three month Probationary Period will apply to this role. During this time you will receive advice, training and guidance to help you become familiar with, and competent in, performing the work you have been appointed to do. The appointment is subject to the satisfactory completion of the Probationary Period which itself is subject to termination during any stage,



by either party, upon <one week's notice in writing>, or by payment in lieu of notice.

## Terms of Employment

This employment contract should be read in conjunction with <insert agreement or award name>.

## Remuneration

Your salary is at a rate of <insert salary amount>.

### ► Payment

- ◆ <Your salary will be paid monthly on the 15th of each month>

### ► Superannuation

- ◆ Superannuation payments will be made on your behalf in accordance with the Superannuation Guarantee into a Superannuation fund of your choice. If you do not choose a fund, your contributions will be placed into the default fund, <insert name of default fund>.

### ► Salary Review

- ◆ Your remuneration package will be reviewed annually on or about the anniversary of your employment or in accordance with workplace laws.

## Leave Entitlements

### ► Annual Leave <Delete if employee is casual>

- ◆ You are entitled to 20 days' (4 weeks') annual leave per year of service <different accrual rates apply to 24 hour/7 day operations shift workers – check your obligations if your business falls into this category>. Leave is accrued in accordance with the Fair Work Act 2009 and

should be taken within one year of falling due, on occasions negotiated with your manager.

► **Personal Leave <Delete if employee is casual>**

- ◆ You are entitled to 10 days paid personal/carer's leave in accordance with the Fair Work Act 2009.
- ◆ You are entitled to a period of two days unpaid carer's leave per occasion in accordance with the Fair Work Act 2009.
- ◆ You are entitled to a period of two days paid compassionate leave per occasion in accordance with the Fair Work Act 2009.
- ◆ <Insert if employee is a casual> You are entitled to a period of two days unpaid carer's or unpaid compassionate leave per occasion in accordance with the Fair Work Act 2009.

► **Long Service Leave**

- ◆ You will be entitled to long service leave in line with the provisions of <insert award or enterprise agreement title, or if there are no long service leave provisions in a relevant award or enterprise agreement, the Long Service Leave Act 1992>.

► **Parental Leave**

- ◆ You may be entitled to parental leave in line with the provisions of the Fair Work Act 2009.

## **Termination**

The minimum period of notice required to be given to the employer by the employee is either:

- That prescribed by the relevant employment

agreement or other contract of employment.

- ▶ If no period of notice is prescribed as above, a period of notice equal to the employee's usual pay period.

<Insert Company name> may terminate your employment by giving <the period of notice> notice (or payment in lieu).

The company may terminate your employment at any time without notice if:

- ▶ You are guilty of serious misconduct; or
- ▶ You are in material breach of a provision of this contract, including confidentiality undertakings.

Following the termination of your employment you will be required to return all company property.

## Hours of Work

<Insert Company name> general hours of business are between <insert operating hours>. It is expected that you will work an average of <38> hours per week during general business hours.

From time to time you will be required to work reasonable additional hours or after hours when necessary to perform your duties. Overtime payments or time in lieu will be calculated in accordance with the <insert name of award or enterprise agreement or how this will be calculated, if overtime or time in lieu will apply>.

## Privacy

You are required to observe and uphold all of the Company's privacy policies and procedures as implemented or varied from time to time.

Collection, storage, access to and dissemination of employee personal information will be in accordance with privacy legislation.

### **Company Policy**

<Insert Company name> has in place a number of company policies and procedures. You are required to comply with company policy. A failure to comply with these policies may result in disciplinary action being taken against you.

These policies are found <insert where policies located i.e. policy manual>. These policies do not form part of this contract of employment.

### **Confidentiality of Information**

During your employment you may become aware of information relating to the business of <insert Company name>, including but not limited to client lists, trade secrets, client details and pricing structures.

Confidential information, including client lists, trade secrets, pricing structures and any and all documents created by you in the course of your employment remain the sole property of <Insert Company name>. You shall not, either during or after your employment, without the prior consent of the <insert Company name>, directly or indirectly divulge to any person or use the confidential information for your own or another's benefit.

### **Jurisdiction**

This contract is made in the State of Victoria.

### **Welcome and Acceptance**

<Insert employee's name>, we would like to take this opportunity to welcome you to <Insert Company

name> and wish you a long and rewarding career with us.

Yours sincerely,

<Manager's name & Position Title>

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I, <Insert Employee's name>, accept the terms and conditions of this contract.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

A copy is provided for your records.

## Be Clear About Your Offer

It is important for the letter of offer to be clear about the salary being offered. The example above refers to a salary in the remuneration clause. Then, in the superannuation clause, it says that payments will be made on the employee's behalf in accordance with the Superannuation Guarantee into a Superannuation fund of the employee's choice. This letter implies that the superannuation will be paid in addition to the annual salary.

To avoid confusion, you need to exercise care about how you represent remuneration to salaried employees particularly where there are several components to the package such as provision of company property, the provision of mobile devices such as phones and the contingent payment of bonuses.

The alternative to the above is, in the remuneration paragraph, to describe the earnings as a total remuneration package including superannuation and all other benefits. Then within the remuneration paragraph, describe each component of the package including the superannuation component, stating the value of each component. In other words you should cover the entire value of the employee's earnings package and the payment of all of the components in a single paragraph or clause.

## Collecting Employee Information

The following forms need to be completed and lodged when an employee first begins employment:

- **Tax File Number (TFN) Declaration Form.** You must provide new employees with a TFN Declaration Form which consists of 2 sections – Section A which the employee, as the ‘Payee’, fills out and Section B which you, as the ‘Payer’, must complete. The form is available from the ATO or alternatively details may be lodged online – see the ATO website at: <http://ato.gov.au/business> . This form is used to determine the amount of tax that must be withheld from the following information:
  - The employee’s Tax File Number. It is not compulsory to provide a Tax File Number however, if it is not provided, you must tax the employee at the top marginal rate (45% plus 1.5% Medicare levy for Australian residents).
  - Whether the employee is an Australian resident for taxation purposes or a foreign resident. Sometimes residency for taxation purposes can be difficult to determine. Contact the Australian Taxation Office if you are unsure. A foreign resident is subject to a different tax scale and is not subject to the Medicare levy.
  - Whether the employee is claiming the tax-free threshold. This means that the first \$18,200 (currently) earned in a financial year is tax-free for most Australians. All amounts in excess of this are taxed. The tax-free threshold can only be claimed if a Tax File Number is provided and the employee is an Australian resident. This tax-free amount can only be claimed once at any one time, meaning that it cannot be claimed again on a second job.

- Whether the employee has a current outstanding student loan debt such as HELP/HECS or SFSS. If there is a debt outstanding, then additional tax amounts will be deducted to repay the debt.
- Whether the employee wishes to claim certain tax offsets (reduction in tax due to certain circumstances) such as a Medicare Levy Adjustment. Only Australian residents can claim tax offsets.  
A Tax File Number declaration must be completed and sent to the Australian Taxation Office within 14 days. The form can only be ordered through the Tax Office (Important: do not use a downloaded PDF version).
- SUPERANNUATION STANDARD CHOICE FORM. You must provide new employees with a Standard Choice Form, which outlines employee options for choosing a superannuation fund. The form is available at the ATO website at <http://www.ato.gov.au/super/content.aspx?>
- You are required to provide every new employee with the Fair Work Information Statement Form. This Statement summarises employees' entitlements under the Fair Work Act 2009 and provides them with contact details of Fair Work Australia.
  - Providing a copy of the relevant information to a new employee is advised at the start of employment.

There are several pieces of information which are also valuable for new employees:

- References to your web site and sales or product material.
- Employee handbook which outlines the organisation's purpose and values, its background and history, and information

relating to expected employee behaviour.

- A position description that clarifies the position title, tasks and responsibilities. It also underpins a common understanding that both employer and employee can be clear on.
- To ensure employees are clear on workplace policies it is advisable to develop a policy document on such areas as information technology security, social media and mobile phone usage.
- An Employee Details Form where the employee provides their address, phone number(s), private email, emergency contact details, preferred superannuation fund details and bank account details.

## Summary

- An employee and an employer will have a contract of employment even if there is no letter of appointment or contract signed by the parties. For award staff, employment contracts are often not formally written documents. This is because the terms and conditions are spelt out in an industrial award.
- The law imposes certain minimum rights in favour of employees. These rights take precedence over anything contained in a contract of employment. The employer cannot override these minimum provisions, even if the employee agrees.
- Many employers now include police checks as a requirement for employment. This is now prevalent in areas where money will be dealt with e.g. casino staff or where staff may work with children.
- There is both federal and state legislation dealing with equal



opportunity or non-discrimination in the workplace. Under the various state Acts it is generally unlawful for an employer to discriminate against a person.

- For an award to apply there must be an employer-employee relationship, not a contractor relationship.
- A sham contracting arrangement occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.
- Salaried employees are paid above award rates and may still be subject to the general conditions of a related award. An employer negotiates an annual salary with the employee and it is usual practice with salaried employees to prepare a letter of offer.
- You need to exercise care about how you represent remuneration to salaried employees, particularly where there are several components to the package such as provision of company property such as phones and the contingent payment of bonuses.
- You must provide new employees with a Tax File Number (TFN) Declaration Form
- You must provide new employees with a Superannuation Standard Choice Form which outlines employee options for choosing a superannuation fund.
- You are required to provide every new employee with the Fair Work Information Statement Form. This Statement summarises employees' entitlements under the Fair Work Act 2009 and provides them with contact details of Fair Work Australia.