

TLFC Breakfast Briefing

Employment Law

**SIMON ABRAHAM: WHEN AN EMPLOYEE TRIES TO STEAL YOUR BUSINESS:
WHAT TO DO WHEN IT HAPPENS TO YOU**

RACHAEL HAMMOND: MODERN AWARDS

YONI UNGAR: COMPANY POLICIES AND PROCEDURES

FELICITY SIMPSON: SALE OF BUSINESS & EMPLOYMENT CONSIDERATIONS

TISHER LINER FC LAW

When an employee tries to steal your business: What to do when it happens to you

SIMON ABRAHAM

PARTNER

First Line of Defence:

Employment Contract



TIPS

1. Make sure you have enforceable restraints of trade in employment contracts
2. Make sure you own the IP / Copyright
3. Monitor employee email traffic
4. Monitor the marketplace and competitors
5. Pay attention to your customers and your employees
6. Try to ensure your business is not dependant upon one employee or group of employees

Ancient Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd [2018] HCA 43



- Two senior employees of Lifeplan (Woff and Corby), a funeral business, who secretly approached a much smaller competitor, Foresters, with a five year business plan to use insider information to 'steal' Lifeplan's clientele.
- The Board of Foresters agreed to the proposal
- Woff and Corby (whilst still Lifeplan employees) approached customers (Funeral Directors) on behalf of Foresters
- Foresters' business skyrocketed in size from \$1.6m revenue to \$24m revenue in two years.
- Lifeplan lost \$23m in revenue in the same period.
- Lifeplan discovered something was amiss when one funeral director sent the new Forester forms back to Lifeplan by accident. The forms were very similar.
- Forensic examination of emails shows Woff sent large amounts of confidential information to himself before leaving Lifeplan

Foresters v Lifeplan cont.



- Woff and Corby were using mailing lists and printing templates originally created for Lifeplan.
- The Federal Court held the employees personally liable (as expected).
- Woff and Corby were ordered by the Federal Court to account for profits of \$24,238 and \$24,198 respectively.
- Foresters did not have to account for profits – in fact, it was ordered that their costs be paid by Lifeplan by the trial judge.
- Lifeplan appealed the verdict to the Full Federal Court.
- An **account of profits** of \$6,558,495 plus interest and costs awarded against Foresters
- This additional liability was on the basis that Foresters knowingly assisted the employees' fraud through engaging in the dishonest business plan.
- Both sides appealed to the High Court.
- Foresters ordered to account for the entire capital value of the business in the amount of \$14,838,063.
- The High Court extrapolated the liability to additionally encompass Foresters' business **in its entirety**.
- Where causation is sufficiently established, the onus is upon the errant fiduciary or participant to show that he or she should not account for the full value of the advantage, whereby by proving his or her entitlement to an allowance for costs incurred and labour and skill employed, or by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account for profits.

Foresters v Lifeplan cont.



- This serves a clear warning to those who engage with or participate in breaches of fiduciary, director or employee duties.
- We live in a competitive world – but a competitor assisting in ‘dishonest and fraudulent’ conduct can be classified as ‘knowingly assisting’ the furtherance of such fraud.
- Employees wishing to engage in commercial competition with their employer must not take any steps towards that endeavour until all association with the employer has ceased.
- The High Court took this reasoning one step further and held that where a competitive business knowingly assists in such dishonest behaviour, they too will be held liable and stand to potentially lose the entire net present value of their business.
- The profits received from the competitor in encouraging the fraudulent acts are one thing; however, the Court emphasised that the business connections made throughout such an endeavour convey far-reaching future benefits on the company.

Fruit of Poison Tree

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- Future commercial benefits must be accounted for too as they would not have been realised but for the direct relationship with the dishonest employees.
- The Court emphasised the need to deter all future persons from facilitating or engaging in such dishonest behaviour as a matter of principle and legal policy.
- The message is clear – if a business is built on foundations of fraud or breach of contract, then the competitor benefiting from the fruit of this poison tree can suffer severe financial consequences.



Tips for Employers

(once they discover the bad news)

1. Obtain immediate legal advice
2. Preserve evidence (especially emails, text messages etc)
3. Engage forensic IT expert
4. Speak to your other staff and customers
5. Consider Legal Options including:
 - Application for Preliminary Discovery
 - Search Order (also known as an Anton Piller Order)
 - Breach of Contract
 - Interference with Contractual Relations
 - Breach of copyright
 - Breach of confidence
 - Breach of fiduciary duty
 - Contravention of Corporations Act
Sections 180, 181, 182, 183

Tips for New Employers

1. Ask any new employee if they have a restraint of trade
2. Have restraints of trade assessed by your lawyer
3. Don't hire new recruits that use confidential information to demonstrate their track record
4. Resist the temptation to try and get a jump start - especially while the employee is still employed by the old employer
5. Beware infringement of copyright

Modern Awards

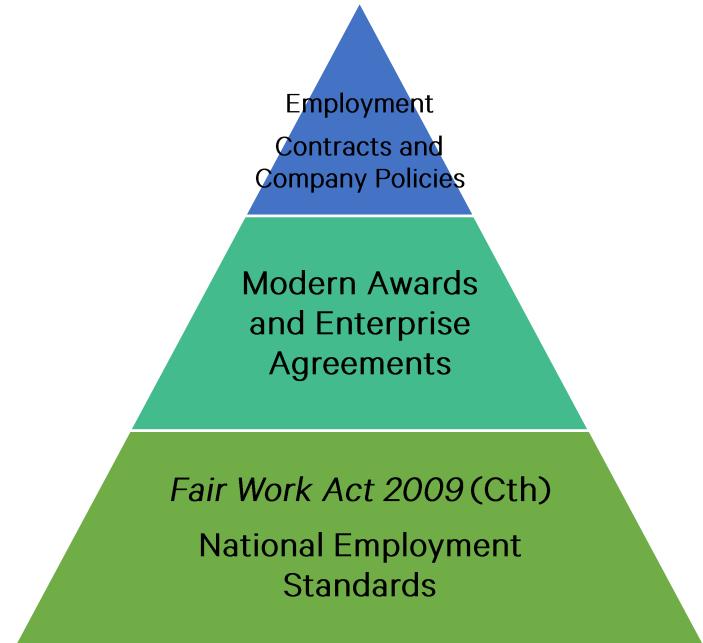
RACHAEL HAMMOND

LAWYER

Pyramid of Employment Entitlements

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- Employment Law in Australia is best thought of as a pyramid
- The *Fair Work Act 2009* (Cth) (the **Act**) specifies the minimum standards that apply to all national-system employees. The National Employment Standards (NES) are minimum standards which include annual leave, personal leave etc.
- Certain industries and occupations are covered by modern awards and some organisations have negotiated their own enterprise agreements
- Employment contracts build upon the Act, but cannot offer any terms or conditions that undermine or are less favourable than the Act
- Policies regulate processes, procedures and standards of behaviour in particular organisations



Overview of Modern Awards



There are over 120 different Modern Awards (Awards) that cover a mix of industries, occupations or a combination of both.

Awards outline the entitlements of employee wages and conditions such as:-

- Type of employment;
- Wages;
- Penalty rates;
- Overtime;
- Allowances;
- Superannuation;
- Leave entitlements (such as annual leave loading)

Modern Award Coverage



When assessing what Award may apply to your employee's as an employer you should:-

- consider what industry your business is in;
- consider what each particular employee has been employed to do

If your business is covered by a Award with industry coverage, this may capture the majority of employees.

If there is no industry award, employees may be covered by an occupational award that captures what they do.

Awards apply to employees and not necessarily your business as a whole. It is therefore possible that your business will be required to comply with several different awards.

How do you classify your employees



- Classifying employees is extremely important, but we see time and time again that employers get this wrong.
- Schedule B- Classifications explains the criteria of classifying employees into different levels which correspond to the wage rate
- To determine whether an employee is employed under a classification, you need to assess the nature of the work and ascertain the principal purpose for which the employee was employed
- In classifying an employee, it is more than a ‘mere quantitative assessment’ of the time the person spends performing certain types of duties

The screenshot shows the Fair Work Commission website. The header features the Australian coat of arms and the text "Fair Work Commission" and "Australia's national workplace relations tribunal". Below the header, there is a sidebar with links to "CLERKS—PRIVATE SECTOR AWARD 2010 [MA000002]", "History of variations", "Download: Current award", and "Information". The main content area displays a list of classification criteria under the heading "(other than shiftworkers)". The listed items include:

- 28. Shiftwork
- 28A. Requests for flexible working arrangements
- Part 6—Leave and Public Holidays**
 - 29. Annual leave
 - 30. Personal/carer's leave and compassionate leave
 - 31. Public holidays
 - 32. Community service leave
 - 33. Leave to deal with Family and Domestic Violence
- Schedule A—Transitional Provisions**
- Schedule B—Classifications**
- Schedule C—Supported Wage System**

Schedule B—Classifications

[Varied by PR988359, PR986427]

The classification criteria in this schedule provides guidelines to determine the a consideration must be given to both the characteristics and typical duties/skills. of issues, problems and procedures required and the level of supervision or acc the essential features of any particular level and the competency required. The a are an indicative guide only and at any particular level employees may be expect such duty/skill, or many of them, depending on the particular work allocated.

Terms that must be included in Modern Awards

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Subdivision C of the Act defines what terms must be included in Modern Awards. The following are therefore standard terms that are contained in all Modern Awards (there are a few more however these are the main ones):-

- **Coverage Terms:** Who the Award does and does not apply to
- **Flexibility Terms:** Commonly known as Individual Flexibility Agreements;
- **Consultation about changes to rosters or hours of work:** Such as how much notice is required to change a shift
- **Terms about settling disputes:** If there is a grievance, what procedure needs to be followed
- **Ordinary hours or work:** Employee's ordinary hours of work are significant in determining the employee's entitlements
- **Term requiring avoidance of liability to pay superannuation guarantee charge:** Subject to the employees hours of work and rate of pay, it is a term requiring that the employer makes superannuation contributions

Ordinary hours of work & Overtime



When does an employee need to be paid overtime? **REMEMBER: THREE (3) WAYS**

In order to explain the interaction of ordinary hours of work and overtime, I've used the Clerks Private Sector Award 2010 as an example:-

- **25.1(a) Maximum Hours in a Week:** The ordinary hours of work for day workers are to be an average of 38 per week but not exceeding 152 hours in 28 days, or an average of 38 over the period of an agreed roster cycle.
- **25.1(b) Span of Hours:** The ordinary hours of work may be worked from 7.00 am to 7.00 pm Monday to Friday and from 7.00 am to 12.30 pm Saturday.
- **25.1(c) Maximum Hours in a Day:** Not more than 10 hours exclusive of meal breaks (except if paid for at overtime rates) are to be worked in any one day

This means that if an employee works more than 38 hours per week, more than 10 hours in a day or outside the span of hour they will be entitled to be paid overtime in accordance with clause 27 of the Award.

Even if you pay your employees an 'annualised salary' that you have factored in the above.

Individual Flexibility Arrangements (IFA)



An employee and employer and an individual employee may agree to vary the application of any of the below terms of an Award in order to meet the genuine need of both the employer and employee:-

- arrangements for when work is performed; or
- overtime rates; or
- penalty rates; or
- allowances; or
- annual leave loading.

IFAs cont.



If both parties to an IFA what is the ‘minimum’ that must be included

Identify the clauses of the Modern Award that are being changed and how they are being changed;

- Include details of how these changes result in the employee being better off;
- Include details about how the IFA can be terminated and what happens in this situation (usually the standard Award terms will apply); and
- Be signed by both the employer and the employee (or the employee’s guardian if the employee is under 18 years old).

What about termination?

An IFA may be terminated:

- a) at any time, by written agreement between the employer and the employee; or
- b) by the employer or employee giving 13 weeks’ written notice to the other party

Employers can be penalised under the Fair Work Act for failing to ensure that an IFA is made properly and copies of the IFA should be kept on the employee’s file and also given to the employee for their records.

What is the significance of a contravention of a Modern Award or failure to pay the correct wage rate?

There are a number of risks associated with incorrectly classifying your business and/or your employee under the correct Modern Award or classification which include:-

- a claim for back pay;
- legal proceedings commenced against the company. For an amount less than \$20,000 this is commonly 'small claims' in the Federal Circuit Court;
- investigations of your workplace with its compliance by the Fair Work Ombudsman;
- the Fair Work Ombudsman can commence legal proceedings against the company for breaches of the Act.

If litigation is successful, a court may impose orders. The current penalty amount for a contravention of the Act is \$12 600 per contravention for an individual and \$63 000 per contravention for companies.

There has now been an **introduction of a higher penalty for 'serious contraventions'** of the Act (up to \$126 000 per contravention for an individual and \$630 000 per contravention for companies).

Recent change to the Act and Award



On 12 December 2018 the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* took effect which we summarise as follows:-

- There is a new entitlement for five (5) days of unpaid family and domestic violence each year;
- It applies to all employees (including casuals);
- Family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful;

Notice of Evidence Requirements

An employee must give their employer notice of taking the leave as soon as practicable (which may be after the leave has started and must advise the employer of period, or expected period of the leave.

The employer can request evidence that would satisfy a reasonable person. Depending on the circumstances this may include a document issued by the police, a court of family violence support service or statutory declaration.

Confidentiality

Employees must take steps to ensure the information is treated confidentially.



Company Policies and Procedures

YONI UNGAR

LAWYER

Presentation Overview



- Why policies are important
- How to implement and enforce policies
- Regulating the private lives of employees
- Social media

The Importance of Policies

- Workplace rules
- Control and consistency
- Are they binding?
- Communication

How to implement and enforce policies



Communication and consent

Alteration and new policies

Australia Post case example

Can I control what employees do outside of work?

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Case examples

- Telstra
- Westpac
- James Boag

Important principles:

- Does the conduct affect their relationship with the employer?
- Does the conduct cause damage to the business?
- Is the policy clear? Is it reasonable and legitimate?

Social Media

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- Social media posts can harm your business reputation
- Importance of clear policies
- Sackable offences?
 - Breach of policy – threats, harassment, bullying
 - Social media during work hours
 - Code of conduct – reputation
 - Confidential information
 - Lies

Israel Folau

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Code of conduct extracts

Players must:

Use Social Media appropriately. By all means share your positive experiences of Rugby but do not use Social Media as a means to breach any of the expectations and requirements of you as a player contained in this Code or in any Union, club or competition rules and regulations.

Do not otherwise act in a way that may adversely affect or reflect on, or bring you, your team, club, Rugby Body or Rugby into disrepute or discredit.



What's next?



- Employees as 24/7 'brand managers'
- Fair work test case?
- 'folau's law'
- Comcare v banjeri

Sale of Business & Employment Considerations

FELICITY SIMPSON

CONSULTANT

Sale or Purchase of Business



- “Transfers” captured by the Fair Work Act
- Employees and Entitlements as part of the Sale process – often forgotten until advice sought.
- Can’t I just offer them new employment?

Legal Position



Generally for the purposes of the Act, a “transfer” of business occurs where:

- The employment of the employee has been terminated by the Vendor;
- Within 3 months of that termination the Purchaser engages the employee;
- The work performed is the same or substantially the same as the work performed for the Vendor; and
- The Purchaser has use of the Vendor’s assets.

Unless the break in employment is greater than 3 months, usually the sale/purchase of a going concern will involve the “transfer” of a business and its employees.

Transferable Instrument

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- If there is a “transfer”, any “transferable instrument” follows the transfer and binds the Purchaser.
- Transferable instrument includes: Awards, Agreements, EBA’s, individual arrangements etc. This can extent to bonus schemes and other employee benefits such as cars and phones.
- The Purchaser becomes liable for all employee entitlements which are outstanding.

Entitlements: What is the Purchaser Liable For?

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- The employee's start date for the purpose of determining entitlements, becomes the start date of their employment with the Vendor (the **Effective Date**).
- Generally notice periods (i.e.. for a redundancy or termination) commence from the Effective Date (unless the Vendor terminates the employment before the transfer).
- Includes superannuation (if not paid up to date by Vendor) annual leave, personal leave, long service leave, bonus, commissions, vehicles etc.

Common Arrangements



- Agreement upon which employees will be offered positions by the Purchaser and the timing for this?
- Any employees who are not offered positions or who do not accept positions, must be made **redundant** by the Vendor.
- To limit Purchaser's liability, the parties might agree the Vendor will pay out all accrued leave entitlements and/or any redundancy. Done correctly, this can change the Effective Date for the Purchaser.
- A common position is that the parties agree upon an adjustment for employee entitlements in favour of the Purchaser.
- Vendor to warrant all superannuation is up to date. The Purchaser may become liable for this if it is not paid.

Adjustment for Employee Entitlements

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- Entitlements can be difficult to value for the purposes of an adjustment. The Vendor's position being, why do I have to make an adjustment for a cost (eg. long service leave and personal leave) which the Purchaser may never have to pay ie. because the employee leaves before the entitlement accrues.
- The commonly used formula is 100% of fixed entitlements (ie. annual leave) and 70% of entitlements which may or may no accrue (ie long service leave).

Summary



- In any Sale/Purchase of business seek legal advise before agreeing upon how the employee entitlements will be addressed.
- Ensure all superannuation of employees is paid up to date.

Any Questions?

SIMON ABRAHAM:

SABRAHAM@TLFC.COM.AU

RACHAEL HAMMOND:

RHAMMOND@TLFC.COM.AU

YONI UNGAR:

YUNGAR@TLFC.COM.AU

FELICITY SIMPSON:

FSIMPSON@TLFC.COM.AU

TISHER LINER FC LAW