EMPLOYMENTCONTRACTS: The fundamentals

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A. WHERE TO START?

You may have heard of the terms "common law contract", "modern award", "EBA", "collective agreement", "enterprise agreement", "National Employment Standards" to name a few. You may have also heard of Fair Work Australia, the Fair Work Ombudsman and industrial relations commissions as well as the Federal Court, Federal Magistrates Court and state courts. It's all very confusing.

There is a hierarchy of legal rules and documents to keep in mind when dealing with employment contracts:

Legislative minimum rights
Modern awards/enterprise agreements
Common law contracts and implied terms
Employer policies and procedures

B. LEGISLATIVE MINIMUM RIGHTS

Certain minimum rights and entitlements have been created by parliament to protect all employees, eg the right to annual leave. There is no common law right to annual leave. For private sector employees, these rights and entitlements are contained in the National Employment Standards which are part of the *Fair Work Act* 2009. These standards apply to all employees regardless of income or position. There are 10 standards in the NES relating to:

a. Maximum ordinary weekly hours of work;

b. requests for flexible working arrangements for parents with children under school age or with a disability;

c. parental leave and related entitlements;

d. annual leave;

e. personal/carer's leave and compassionate leave;

f. community service leave;

g. long service leave;

h. public holidays;

i. minimum notice of termination and redundancy pay; and

j. the Fair Work Information statement.

Here is a more detailed summary of the standards.

1. Maximum weekly hours

Maximum ordinary weekly hours of work are 38 standard hours per week for full time employees (which can be averaged over a 6 month period), unless additional hours are reasonable. Employees may refuse to work additional hours if they are unreasonable, taking into account:

a. any risk to employee health and safety from working the additional hours;

b. the employee's personal circumstances, including family responsibilities;

c. the needs of the workplace or enterprise in which the employee is employed;

d. whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

e. any notice given by the employer of any request or requirement to work the additional hours;

f. any notice given by the employee of his or her intention to refuse to work the additional hours;

g. the usual patterns of work in the industry, or the part of an industry, in which the employee works;

h. the nature of the employee's role, and the employee's level of responsibility;

i. whether the additional hours are in accordance with averaging terms included in a modern award or enterprise agreement or an averaging arrangement between the employer and employee under the Act; and

j. any other relevant matter.

Modern awards and enterprise agreements can provide for averaging of hours over a specified period, with the average hours not to exceed 38 for a full time employee. Where there is no modern award or enterprise agreement with application, an employer and employee can agree in writing to an averaging arrangement over a maximum of 26 weeks.

2. Requests for flexible working arrangements

An employee can request a change in working arrangements to assist them to care for a child under school age of which they are a parent or for whom they have responsibility for care or for a child under 18 years with a disability.

Possible types of flexible working arrangements may include a temporary reduction in hours, non-standard start or finish times, working from home, working split shifts or job sharing arrangements.

Full time and part time employees are not entitled to make the request unless they have completed at least 12 months continuous service with the employer. For casual employees to be entitled, they must be a long term casual employee (i.e. with at least 12 months service) and have a reasonable expectation of continuing systematic and regular employment.

Requests must be in writing and set out the details of the change sought and the reasons. The employer must give a written response within 21 days with their decision on the request and if it is a refusal, must state the reasonable business grounds relied on. Fair Work Australia can resolve disputes between an employer and employee about a request but only where both parties consent or there is a specific provision in an employment agreement, enterprise agreement or award.

3. Parental leave

Full time and part time employees must have completed at least 12 months continuous service to be entitled to parental leave. Casual employees must be long term casuals and have a reasonable expectation of systematic and regular continuing employment.

Parental leave can be taken for birth related leave or adoption related leave. To be eligible for adoption related leave, the child must be under 16 and not have lived continuously with the employee for 6 months or more as at the date of placement. Parents and spouses (including adoptive parents) are entitled to up to 12 months unpaid parental leave if they will have a responsibility for the care of the child. Other requirements are that:

- leave must be taken in 1 period;
- birth related leave may be taken up to 6 weeks before the expected date of birth;
- adoption leave must start on the day of placement;
- leave may be taken at any time within 12 months after birth or placement;
- concurrent leave (ie leave by a parent and spouse at the same time) must be for 3 weeks or less.

There are detailed notice requirements in the *Fair Work Act.* An employee can request their employer to agree to an extension of unpaid parental leave of up to a further period of 12 months. A response must be given within 21 days after the request is made and the employer can only refuse such a request on reasonable business grounds. As with the provisions in relation to flexible working arrangements, a dispute can be referred to Fair Work Australia for assistance but only where the employer consents, whether in an enterprise agreement, employment contract or in a specific case.

Where a pregnant employee continues working during the six weeks before the expected birth, the employer can require the employee to produce a medical certificate to evidence her fitness for work. If this is not supplied, and no safe alternative job is available, the employee can be forced to start their leave early.

A female employee is entitled to unpaid special maternity leave if she has a pregnancy-related illness or loses the child within 28 weeks of the expected date of birth. A pregnant employee is entitled to transfer to a safe job in certain circumstances. The employer must consult with an employee absent on parental leave if the employer makes a decision that will have a significant effect on the status, pay or location of the employee's employment.

An employee is entitled to return to their pre parental leave position or, if it no longer exists, an available position for which the employee is qualified and suited nearest the status and pay to the previous position. An employee can take up to 2 days of unpaid pre adoption leave to attend any interviews or examinations required in order to obtain approval for the adoption.

4. Annual leave

Full time and part time employees are entitled to 4 weeks paid annual leave for each year of service (or 5 weeks if they are a shift worker). The entitlement accrues progressively during each year and is cumulative. Service is defined as all periods of employment other than:

- unpaid leave (e.g. leave without pay or unpaid parental leave);
- unpaid absence (other than community service leave); or
- unauthorised absence (e.g. unprotected industrial action).

Annual leave may be taken as agreed between the employee and employer but the employer must not unreasonably refuse a request by the employee. The employer can impose a reasonable requirement for an employee to take paid annual leave if there is provision in an applicable modern award or enterprise agreement or the employee is award/agreement free. Public holidays are not included in annual leave nor sick leave taken during a period of annual leave.

There is no leave loading under the standard (although awards commonly provide for a loading) and the pay rate for the annual leave period is the employee's base rate of pay for their ordinary hours. A modern award or enterprise agreement can contain terms about the cashing out of annual leave and award or agreement free employees can also agree with their employer in writing about this. However:

- the employee must keep a balance of accrued annual leave of 4 weeks; and
- each cashing out must be subject to a separate written agreement.

5. Personal/carer's leave and compassionate leave

Full time and part time employees are entitled to 10 days per year of paid personal/carer's leave. The entitlement accrues progressively during a year and is cumulative. The leave may be taken:

- if the employee is not fit for work because of personal illness or injury; or
- to provide care or support to a member of the employee's immediate family or household who requires care or support because of personal injury or illness or an unexpected emergency.

A modern award or enterprise agreement can provide for cashing out of paid personal/carer's leave but only by separate written agreement on each occasion and only as long as the employee's paid personal/carer's leave balance does not fall below 15 days. The standard does not provide for cashing out for award/enterprise agreement free employees.

In addition to the requirements for paid personal/carer's leave, all employees are entitled to 2 days of unpaid carer's leave for each occasion that a member of the employee's immediate family or household requires care or support because of personal illness or injury affecting that person or an unexpected emergency affecting that person.

Employees are entitled to 2 days of compassionate leave for each occasion when a member of their immediate family or household:

- contracts or develops a personal illness that poses a serious threat to their life;
- sustains a personal injury that poses a serious threat to their life; or
- dies.

This leave can be taken to spend time with the family member or after the death of the member. Full time and part time employees are entitled to payment for compassionate leave. There are notice mechanisms for this leave.

6. Community service leave

Employees are entitled to this leave if taking part in an eligible community service activity, which is defined as:

- jury service;
- a voluntary emergency management activity (which is further defined); or
- otherwise as prescribed by regulation.

The leave covers not only the time engaged in the activity but also reasonable travelling and rest time following the activity (excluding jury service) which is reasonable in all the circumstances.

Employees absent on voluntary emergency management activities do not have to be paid by the employer. However, non casual employees absent on jury duty do have to be paid the difference between their base pay and the amount received for jury duty for the first 10 days of absence.

7. Long service leave

Long service leave remains under the coverage of state law although the intention is to work towards a national scheme. Under the *Industrial Relations Act 1999 (Qld)*, full time employees become entitled to 8.6667 weeks of long service leave after 10 years of service. Part time and long term casual employees are also entitled to accrue a proportional long service leave entitlement, calculated on their actual hours of service.

If an employee's employment is terminated after at least seven years service but before reaching 10 years service, they may be entitled to a pro rata long service leave payment if:

- the employee's service is terminated by their death;
- the employee terminates their service because of their illness or incapacity or because of a domestic or other pressing necessity;
- the employer dismissed the employee for a reason other than the employee's conduct, capacity or performance; or
- the employer unfairly dismisses the employee.

More information on long service leave in Queensland is available at www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/long-service-leave

8. Public holidays

An employee is entitled to paid absence from work on public holidays. Public holidays are listed as:

- 1 January (New Year's Day);
- 26 January (Australia Day);
- Good Friday;
- Easter Monday;
- 25 April (Anzac Day);
- Queen's Birthday holiday;
- 25 December (Christmas Day);
- 26 December (Boxing Day);
- State declared public holidays.

An employer can make a reasonable request for an employee to work on the public holiday which the employee can refuse on reasonable grounds. The legislation sets out certain factors to take into account in deciding what is reasonable:

- the nature of the employer's workplace (including its operational requirements) and the nature of the employee's work;
- the employee's personal circumstances including family responsibilities;
- whether the employee could reasonably expect that the employer might request work on a public holiday;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of work on the public holiday;
- whether the employee is full time, part time or casual or is a shift worker;
- the amount of advance notice given by the employer.

9. Notice of termination and redundancy pay

The standard requires that notice of termination must be given in writing. The standard provides for the provision by employers of minimum periods of notice or payment in lieu of notice on termination of employment which are:

Period of employee's service	*Required period of notice*
Not more than 1 year	At least 1 week

More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

An employee who is over 45 years of age and has worked for the same employer for at least two years is entitled to an extra weeks notice. It is important to note that these are minimum entitlements only and an employee may be entitled to a greater period of notice according to the circumstances of the case.

There is also a requirement for compulsory redundancy or severance pay. Redundancy occurs where an employer no longer requires the person's job to be done by anyone or where the employer becomes insolvent. The scale of redundancy pay is:

Period of employee's *service*	*Redundancy pay period*
1 – 2 years	4 weeks
2 – 3 years	6 weeks
3 – 4 years	7 weeks
4 – 5 years	8 weeks
5 – 6 years	10 weeks
6 – 7 years	11 weeks
7 – 8 years	13 weeks
8 – 9 years	14 weeks
9 – 10 years	16 weeks
More than 10 years	12 weeks

If the employer obtains other acceptable employment for the redundant employee or cannot pay the required redundancy pay, the employer can make application to Fair Work Australia to vary the required amount.

The requirement to pay redundancy does not apply if the employee has less than 12 months continuous service or is a "*small business employer"*. This means an employer with less than 15 employees.

The requirement for redundancy pay applies to permanent full time and part time employees whose employment is not terminated for serious misconduct.

Where a business is sold and the employee's service transfers to the new employer, redundancy entitlements do not have to be recognised by the new employer as long as they are paid out on transfer by the old employer.

It is important to note that this standard only applies to service after 1 January 2010, even if the employee has many years of service beforehand. Award employees in particular will generally find that their redundancy entitlements are contained in the applicable modern award.

10. Fair work information statement

Employers will be required to provide to every new employee a document called a Fair Work Information Statement. It contains details of the NES, awards, agreement-making, the right to freedom of association and the role of Fair Work Australia and the Fair Work Ombudsman.

The *Fair Work Act* creates other rights which may be relevant including the right to belong or not to belong to a union, to take lawful industrial action and protection from discrimination.

In addition, federal and state legislation provide remedies for unfair dismissal and dismissal in breach of workplace rights.

C. MODERN AWARDS/ENTERPRISE AGREEMENTS

Below legislative minimum rights sit industry or occupation specific rules which are given legal force by legislation. These rules provide more detailed protections and regulation of specific industries and occupations. They are contained in modern industrial awards and enterprise agreements. An example of a modern award is the *Clerks – Private Sector Award* which contains specific rules about clerical occupations such as overtime, wage rates and hours of work.

Enterprise agreements (sometimes called "EBAs", "collective agreements" or "certified agreements") are generally business specific agreements which are made between a group of employees and their employer. An enterprise agreement must be approved by Fair Work Australia and must meet certain minimum standards.

It is not possible to contract out of modern award or enterprise agreement provisions, unless specifically allowed by the modern award or enterprise agreement.

Replacing the old individual Australian Workplace Agreement ("AWA") provisions, it is possible to enter into a separate written agreement with an award covered employee (called an Individual Flexibility Agreement) to vary award terms relating to:

a) Arrangements for when work is performed;
b) Overtime rates;
c) Penalty rates;
d) Allowances; and
e) Leave loading.

It is necessary that an employee be better off overall under an individual flexibility arrangement than under the award, which usually means financially better off. The main drawback of this type of arrangement is that it can be terminated by either the employee or employer on at least four (4) weeks notice. Also, given that contractual set off provisions are recognised as effective ways of absorbing award requirements within overaward payments, it is likely that individual award flexibility arrangements will be of limited value, at least for the short term.

D. COMMON LAW CONTRACTS AND IMPLIED TERMS

At its most basic level, an employment relationship between an employer and an employee is a civil contract where the employee agrees to perform work for the employer in exchange for monetary or other payment. In this sense, the employment contract is no different from any other civil contract such as a contract to build a house. This means that the employer and employee are free to agree on whatever terms of employment they like, subject to legislative minimum rights and modern award or enterprise agreement requirements.

The general rule is that courts will uphold contract terms where there is a signed contract and the employer and employee have freely entered into the contract. There are only a small number of cases where this general rule will not be applied. This is important to keep in mind because there are a number of issues not specifically regulated by legislation, such as post employment restraints and intellectual property issues.

A contract does not have to be in writing but it will make it much easier to establish and enforce the terms of a contract where it is in writing.

The courts have also held that a number of implied terms exist in an employment contract even where they are not spelt out. Examples are the requirement to give reasonable notice of the termination of the employment relationship where the contract is silent and also the implied duty of mutual trust and confidence. The implied duty of trust and confidence requires both the employer and employer to act in good faith during the employment relationship, but not in the manner of termination of the employment relationship.

E. EMPLOYER POLICIES AND PROCEDURES

Policies and procedures generally set out an employer's general, or indeed, detailed expectations in particular aspects of the organisation's affairs. They can vary from things as simple as the policy on when mail is to be collected each day to detailed instructions on how to operate a machine. The can include policies relating to things including:

- orientation and induction;
- disciplinary processes;
- email and internet usage;
- grievance dispute procedures;
- performance review and development;
- training;
- confidentiality and privacy;
- different types of leave (including notification and evidence requirements);
- flexible working arrangements;
- motor vehicle usage;
- safety in the workplace;
- drug usage;
- email and internet usage;
- sexual harassment and discrimination.

This is not an exhaustive list. Policies should be reviewed from time to time to analyse their practical application in the workplace and may need change and updating. They are usually dynamic documents, changing to the ever changing needs of the individual workplace. It is desirable that the these detailed expressions of employer expectations and procedures not be expressly incorporated or duplicated in the employment contract itself, given the starting principle that agreements can only be changed by agreement.

Notwithstanding the absence of these provisions in the contract itself, it is possible that an employer may by its conduct, be taken to have bound itself to follow the terms of its policies in respect of employees.

CASE ILLUSTRATION
Nicolich v Goldman Sachs JB Were *[2006] FCA 784 / [2007] FCAFC*
Mr N was an Investment Adviser with GS. He complained to the HR Department about the fact and circumstances of re-allocation of shared clients to financial advisers, which meant that he would not be in a position to share in profits. He also complained that his immediate supervisor had intimidated and harassed him. It took HR 3 months to complete a report and as a result of the delay Mr N took significant leave due to depression and his employment was ultimately terminated as a result. Mr N had received certain policies when he started and his contract of employment provided that it was expected he would comply with these policies. The policies contained procedures for dealing with harassment complaints and also provided that the employer would take every practicable step to maintain a safe and healthy work environment.

The claim included bases of unlawful termination under the Workplace Relations Act for "temporary absence" and disability, misleading or deceptive conduct under the Trade Practices Act and, most relevantly, claims of breach of contract. In a decision which was largely affirmed on appeal, the court:

- *found that the employer's handling of the complaints was "extremely inept";*
- *the contractual terms necessarily included a promise that the employer would comply with its policies and its conduct breached its own promises and procedures concerning OHS, harassment and the grievance procedures;*
- *accepted that Mr N had a psychiatric illness caused by the employer's breach and damages for pain and suffering were part of the consequential loss or alternatively the employer should have reasonably foreseen the likelihood that Mr N would suffer injury due to their breach;*
- *awarded Mr N $515, 869 being $80,000 for general damages and $305,869 for past economic loss and $130,00 for future economic loss.*

It is important, so far as it is possible to do so, to be clear with employees that these policies do not form part of the contract of employment and are not mutually enforceable. This type of contractual provision appears to have been accepted by the courts as a valid means of excluding contractual liability (although it will not affect tortious or other forms of liability).[1]

F. BASIC CONSIDERATIONS IN DRAFTING EMPLOYMENT CONTRACTS

1. <u>The type of employment</u>

The first broad issue to consider is the type of employment the subject of the contract. Employment generally falls into the categories of full time, part time, casual, fixed term, maximum term or seasonal. Apprenticeship and trainee agreements require special consideration because of the relevant government department's requirements.

[1] *Yousif v Commonwealth Bank of Australia [2010] FCAFC 8*

Sometimes, employers will want an agreement prepared on a casual or fixed term basis. It is necessary to make some enquiry about the proposed parameters of the relationship to ensure the employment really is of this nature. This is because there can be important variations in entitlements and conditions (such as overtime, leave and loadings).

CASE ILLUSTRATION
CASUAL EMPLOYMENT – ROOSTERS CANNOT BE CALLED DUCKS
***Yasmin S.B. Cetin AND Ripon Pty Ltd t/as Parkview Hotel**, Australian Industrial Relations Commission, Vice President Ross, Senior Deputy President Duncan, Commissioner Roberts, Melbourne, 25 September 2003*
The issue in this appeal was whether the employee had been engaged on a casual basis for a short period (defined as periods less than 12 months) and therefore excluded from the AIRC's unfair dismissal jurisdiction (similar provisions exist under state legislation). The applicant was employed as a casual waitress, had worked for the employer for less than 12 months and was told that her employment was of a casual nature. The applicant initially worked behind the bar, her hours fluctuated and she had no reasonable expectation of continuing work. However, from 16 October 2002 she began working as a waitress in the hotel restaurant. She worked regular nights for between 4 and 5 hours each night due to fluctuations in the restaurant's closing time. The applicant was paid as a casual and was never paid any annual leave, sick leave or for public holidays.

The Full Bench said that the words "casual employee" have no settled meaning and need to be considered in light of the facts of each case. Informality, uncertainty and irregularity of an engagement are indicative of casual employment. Conversely, regular and systematic engagements with a reasonable expectation of continuing employment are not. Here, the applicant was working 4 shifts per week regularly, she was expected to turn up on each of these shifts and she was obliged to give notice if she could not work. Minor fluctuations in her hours were due to fluctuations in the restaurant's closing time. The Full Bench said that the nature of a position attributed by an award and adopted by the parties was not conclusive evidence but depended on the facts. The Full Bench adopted the statement in a prior case that the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck. The Full Bench allowed the appeal, ruled that the applicant was not denied from claiming unfair dismissal and referred the matter for conciliation.

2. To what extent is the employment the subject of award or enterprise agreement coverage

This is an important factor because any common law contract is subject to the overriding provisions of an award or enterprise agreement. For instance, many employers ask for a provision allowing a flat hourly rate to be included in a contract. This will always be subject to applicable award provisions in relation to overtime and allowances.

3. The agreement cannot cover every aspect of the employment relationship

Keeping in mind that the contract can only be changed by agreement between the parties, employment agreements are best treated as framework documents which set out the basic foundation stones of the employment relationship, leaving more dynamic matters to policies and procedures.

4. Other considerations

Employers often ask for a "one size fits all" employment agreement and to "keep it short". Advisers should do their best to encourage employers to consider their particular contractual needs on a case by case basis or at least a class by class basis (eg junior clerical staff, or particular types of tradesperson) because one size will not generally fit all in practice and may result in overkill or the omission of important provisions.

Similarly, there whilst employers wish to keep agreements short, they are the sometimes the first ones to query why a certain situation wasn't covered in the agreement when something goes wrong. Again, employers should be encouraged to consider their needs in individual situations.

Employers should be advised to have the contract signed before the employee actually starts work. Where there is a delay involved, it can sometimes be problematic to obtain the employee's agreement to a particular contract.

Employers should be advised to review their contracts periodically to make sure that they still reflect their requirements and those of legislation.

G. BASELINE CLAUSES

1. Parties, Definitions, Interpretation

Every contract should of course spell out who are the parties to the agreement. It is also useful to include a set of definitions for terms used in the agreement which saves on repetition and space and to set out the way various grammatical references in the agreement should be interpreted. These clauses help to give contractual certainty in interpreting the agreement.

2. Commencement date

The contract should specify when the employment relationship will commence.

3. Minimum legislative terms and conditions

For the sake of clarity, it is advisable that the agreement is stated to be subject to minimum legislative conditions and, if applicable, award conditions. It should also be stated that these minimum legislative and award conditions are not separately part of the contractually agreed conditions.

4. Position and duties

Two approaches can be taken. The first is that an employee is employed in a specified position with the employer. The second is a more general approach specifying that the employee is employed by the company and for the moment is employed in a certain position. It is desirable for the employer to have a written position description in place for the job in question.

It is also common practice to set out the general common law obligations of an employee to the employer, for example to use their best endeavours to further the

employer's interests, act honestly and not to engage in any other work which may conflict with the employer's interests, unless agreed by the employer.

The provision can also provide the employer with some scope to change the employee's duties so long as the nature of the position is not substantially changed (other than by agreement) and the duties are within the employee's capacity.

The provision can also provide that the agreement will continue to operate even where there are changes in the employee's role and operational issues.

5. Employment status

It is important to confirm the employer's basis of engagement, ie on a full time, part time or casual or other basis.

6. Place of employment

A clause of this nature can enable an employer to direct an employee to work at alternative places, subject to a reasonability requirement.

7. Hours of work

For full time employees, the employee's standard hours of work will normally be 38 hours per week, which can by agreement be averaged over a period of up to 26 weeks, subject to award requirements. In addition to standard hours, the agreement can provide that the employee may need to work additional reasonable hours to fulfil their responsibilities and that their level of remuneration reflects this requirement.

This arrangement reflects the legislative scheme of a standard 38 hour week which can be averaged over a period of up to 26 weeks by agreement, plus reasonable additional hours.

The normal office hours of the employee should also be set out as a baseline for the attendance of the employee.

For part time employees, award requirements generally mean that the schedule MUST specify the:

a) commencing and finishing times of work;
b) the days of the week on which the employee will work; and
c) the number of hours to be worked each day.

Most awards contain a minimum period of engagement for a part time employee.

It is not generally necessary to specify hours of work for a casual employee because their hours of work should be inherently uncertain. It is particularly important to consider the working hours provisions of any applicable award/enterprise agreement when contractual obligations.

8. Employer policies

It is important to set out the status of employer policies as directions by the employer and not contractual terms forming part of the employment agreement which are mutually binding and enforceable. There have been a number of cases where

employers have been held to policy statements that they will act in a certain way, such as investigating any complaints that are made.

In a practical sense, policies should be flexible and may need to be changed from time to time according to circumstances. They are not matters that should be the subject of agreement between the parties.

9. Remuneration

It is common to specify the regularity of payment of remuneration in the agreement, although award requirements should be checked if applicable.

The employee's annual or other periodic salary should be included in the agreement or schedule.

For both award and non award employees, the salary can be stated as an "all up" figure including payment for all hours worked by the employee and in satisfaction of all legislative and contractual obligations but this is subject to award requirements. The provision can give the employer discretion to review an employee's salary in accordance with any policies and its discretion.

For both award and non award employees, it is good practice to include a clause that provides that the payment of over award wages offsets any award obligation to pay overtime or penalty rates or other allowances. Each employer will need to decide for themselves whether, if over award rates are paid, overtime and penalties are absorbed within the overall salary payment, or paid at the standard over award rate or at the award prescribed rate, keeping in mind that the employee must be better off financially than if they were paid at award rates. If a flat salary is paid, it is also still necessary to ensure that the employee is receiving at least as much as they would have if they were paid strictly in accordance with award requirements.

The provision can also set out requirements for payslips and superannuation contributions. Employers should note that awards now set out a limited range of default superannuation funds which employers must use if an employee does not make a choice.

Under certain awards, such as the *Clerks – Private Sector Award 2010*, it is possible to agree on an annualised salary with an employee in certain circumstances. Also, some awards, such as the *Storage Services and Wholesale Award,* contain what are called "facilitative" provisions which allow an employer and employee (or group of employees) to agree to certain changes to award requirements (such as including a Saturday/Sunday in "ordinary hours of work") with those changes recorded in writing. Those provisions may allow an employer to save money in some situations. This should be taken into account when preparing an employment agreement.

It is important that any award or enterprise agreement requirements be taken into account when considering contractual remuneration provisions.

10. Discretionary benefits and bonuses

It is useful to clarify the status of non core salary payments and benefits. These should be specified to be discretionary and capable of being removed by the employer unless the employee is advised in writing that the benefit or bonus forms

part of their remuneration, in which case, it should be spelt out or referred to in the salary provision in the schedule to the agreement.

This is particularly important where employers have commission or other incentive arrangements in place. Issues can arise when an employee has come to expect a certain level of benefit and an employer unilaterally changes the goalposts so that the level of payment is reduced. The issue also commonly arises on termination in the context of whether an employee is entitled to a proportional payment of commission or to payment up to the date of their termination.

11. Confidential information, Intellectual property, Disclosure

Provisions should be included protecting the employer's interests in relation to the use of confidential information by an employee and an employer's intellectual property rights. More detailed provisions should be considered on a case by case basis.

Essentially, an employee can only use information gained through the employment, which can be characterised as confidential, for the employer's purposes. This obligation also applies for a reasonable time after the end of employment so long as the information remains confidential. However, what is regarded as confidential is generally regarded narrowly by the courts in the absence of a more detailed contractual provision.

If, during the employment, the employee creates anything capable of being the subject of intellectual property rights and which is only able to be created because of their employment, then those intellectual property rights will generally belong to the employer. This reflects the legal position that an employee should not gain an unfair or unreasonable advantage because of their employment. In an appropriate case, this position should be confirmed or expanded upon in the contract.

The disclosure provision contains an acknowledgement by the employee of the accuracy and completeness of information provided by them prior to employment. In particular, there is an obligation to disclose any existing medical condition which might significantly affect their ability to do their job (assuming it has not been previously disclosed).

12. Termination of employment

Most termination clauses reflect minimum NES termination requirements and include a contractually reciprocal obligation on the employee to give notice as well as the employer which is generally accepted as a reasonable requirement. There is no statutory obligation on employees to give notice of their resignation.

A provision can also be included enabling an employer to change employment arrangements during a notice period. For instance, an employee may be put on "gardening" leave and not required to attend work or may be redeployed to another area of the business during a notice period. There may be times when this is preferable to paying an employee in lieu of notice.

A provision should be included setting out the circumstances in which employment may be able to be summarily terminated without notice. These are matters which are so serious that it is recognised that notice of termination should not be necessary. This can include a failure to disclose prior conduct which is so serious that, if it

occurred during this employment, would justify the immediate termination of the employment, such as prior fraud or criminal conviction.

A redundancy provision can be included to cover the situation where an employee's position is made redundant and is no longer required. It is common practice to simply refer to the NES requirements which require redundancy pay for all employees with effect from 1 January 2010 (but only for service from that date for non award employees). Award employees may be able to have their whole employment taken into account for redundancy pay purposes.

It is also suggested that clauses be included to put in place obligations for the return of employer property, transitional hand overs and conduct during the notice period and post termination.

Employers sometimes wish to include a provision in the contract allowing them to deduct the amount of any debts said to be owing by the employee from amounts otherwise due to them. As a general rule, this type of provision is undesirable and unenforceable. The *Fair Work Act 2009 (Cth)* (s.324) provides that an amount can only be deducted by amounts payable to an employee in relation to the performance of work if:

a. The deduction is authorised in writing by the employee and is principally for the employee's benefit; or
b. The deduction is authorised by the employee is accordance with an enterprise agreement; or
c. The deduction is authorised by or under a modern award or an FWA order; or
d. The deduction is authorised by or under a law of the Commonwealth, state or territory or a court order.

Further, the authorisation must specify the amount of the deduction and may be withdrawn in writing by the employee at any time.

As an example, an employee may resign and not provide the notice required by their contract of employment. There is no legislative requirement under the *Fair Work Act* for an employee to give notice of termination and an employer should not deduct any amount from wages or leave payments due to the employee unless there is some authority that falls within the above description. Many awards, for instance, provide for employees to give notice of termination and allow a deduction to be made by an employer if the appropriate notice is not given. However, also note that awards often restrict the applicable amount to the award wage rate payable, not the actual rate that may in fact be paid.

H. RECOMMENDED CLAUSES FOR CONSIDERATION

1. Fair Work Information Statement

It is a requirement of the NES that, from 1 January 2010, all new employees be provided with a prescribed Fair Work Information Statement either at or as soon as possible after their employment. A suggested approach is to attach the Fair Work Information Statement to the employment agreement itself to minimise the risk of

failing to provide the document and facing possible prosecution by Fair Work Australia.

2. Probationary/minimum employment period

The word "probation" is no longer of any real legal relevance. However, it is common to retain that term in agreements because it is readily understood by employees as being a trial period during which their employment can be terminated without many of the normal legal consequences.

Under the *Fair Work Act*, an employee is prevented from bringing an unfair dismissal claim to Fair Work Australia where their employment has been terminated during the "minimum employment" period, regardless of the existence of a contractual probation period. For businesses with less than 15 employees, this is 12 months. For businesses with more than 15 employees, it is 6 months.

The effect of the provision is similar to the concept of probation and can be used in a similar manner, ie a decision should be made within the minimum employment period whether to continue to employ the person or not (bearing in mind that prohibitions against unlawful termination and taking adverse action apply regardless of the date of termination).

If employment is terminated during the probationary/minimum employment period there is a standard requirement for 1 weeks written notice to be provided or for payment to be made in lieu of notice. The clause will not apply to continuing employees who have already been employed for longer than the minimum employment period.

3. Personal presentation

A provision can be included giving a contractual basis for an employer to give directions to employees about their presentation and dress.

4. Lawful directions

It can be useful to provide a contractual basis for requiring employees to follow lawful directions, in addition to a standard implied obligation. It is implied that to be lawful, such directions should also be reasonable.

5. Travel

Depending on the particular position, it can be useful to specify the expectation that the employee undertake reasonable travel required for the role. This requirement may be expanded upon in appropriate policies.

6. Business expenses

A provision of this nature can also seek to confirm and clarify the position in relation to the incurring of expenses by the employee. It is common to require that the employer's prior approval be obtained for the particular expense incurred or class of expenses and that the employer may require documentary evidence in support of any expense claim. These requirements may be expanded upon in appropriate policies.

7. Annual and other leave

A long or short approach can be taken to this provision in referring to the legislative leave entitlements of employees. As a general approach though, it is wise not to create a separate contractual entitlement (even though it may be a concurrent one) to the statutory entitlement. Employers should note that different rules apply to forcing award and non award employees to take annual leave but generally employees can only be required to take annual leave in a narrow range of circumstances and the taking of annual leave should generally be by agreement. Process requirements for taking leave can be expanded upon in policies if necessary, subject to legislative requirements.

Employers should be aware of the ability for non award employees to make requests to cash out annual leave accruals where they have an accrued balance of more than four (4) weeks. For instance, an employee with eight (8) weeks accrued annual leave can elect to cash out four (4) of those weeks. A written agreement must be made each time a request is made.

Most awards also include a requirement to pay a 17.5% annual leave loading to award employees.

Conditions and procedural requirements about taking annual and other leave such as making leave applications a month in advance, can be included in the contract or preferably left to policy.

Employers sometimes wish to include particular requirements or restrictions on the taking of personal leave, such as requiring an employee to provide a medical certificate before or after a long weekend.

Section 107(3) of the *Fair Work Act* provides that if required to do so, an employee must give the employer *"*evidence *that would satisfy a reasonable person"* about the reasons for the leave. This would usually be satisfied by a medical certificate if the employee has been absent because of illness but a statutory declaration (particularly for shorter absences) may also be acceptable. The caution is against adopting any blanket policy of "no leave without a medical certificate". Given that medical certificates commonly merely state that the person has suffered from a *"medical condition"* without any further explanation, they are arguably of limited value. The point is that each individual situation will need to be judged on its own merits rather than by the application of an inflexible policy.

8. Flexible working arrangements

Whilst reflecting NES requirements, an employer may choose to include this provision in the agreement (keeping in mind that it may create a contractual obligation which is additional to any statutory obligation). This draws the attention of the parties to the ability of an employee to seek flexible working arrangements where they have the care of a child under school age or the care of a disabled child under 18 years. This can include changes in hours of work, patterns of work or locations of work. To do so, the employee must:

- generally have been employed for at least twelve (12) months before making the request;
- make the request in writing; and
- set out details of the change sought and the reasons for the change.

Under the statutory regime, the employer must give a written response to the request within 21 days and if the request is refused, the response must state the reasonable business grounds relied on. It is possible for the employee to refer the dispute to Fair Work Australia if they are not satisfied with the response and the employer may be called on to explain their reasons to a Commissioner so care should be taken when considering these requests. For example, an employee may wish to work from home for one (1) day a week or may wish to start later or finish earlier than normal. They may also request a reduction in hours for a certain period of time.

9. Investigation and suspension

It is useful to include a provision clarifying the ability of an employer to suspend an employee with or without pay for the purpose of a disciplinary investigation.

10. Immigration requirements

It is increasingly common to see a provision in agreements where employees covenant that they have the right to reside in Australia, subject to visa requirements, and have the right to work.

11. Medical examinations and drug testing

In appropriate cases, it is worth considering the need for an employee to have a periodic medical examination but this needs to be considered against the background of discrimination requirements and the actual requirements of the position.

Similarly, requirements for drug testing may be considered by employers for inclusion in the employment agreement or may be left to policy.

12. Post employment restraints

The employer will commonly want to ensure that an ex employee does not cause any loss or damage to its business for a reasonable time after termination of the employment. Restraints generally take 4 main forms:

a. A restraint from poaching an employee or contractor of the employer;
b. A restraint from poaching or accepting the business of any customer of the employer with whom the employee had dealings;
c. A restraint from misusing confidential information gained during the provision of the service; and
d. More rarely, a restraint from competing with the employer's business generally.

The current commonly accepted form of drafting restraint provisions is to allow for several options for periods of restraint which may vary depending on the particular circumstances of a case. Enforcement of a restraint will depend on its reasonableness and the general approach of the courts is that if only one period of restraint is specified, and it is unreasonable, then the whole restraint provision will become ineffective. However, where there are several options, a court can choose the option that best fits the circumstances of a particular case. It is rare for a restraint period of more than a year to be enforced by a court and it is common practice to allow for periods ranging between 12 months and 1 month in the agreement.

The standard current approach adopts the first 3 restraints outlined above but does not seek to create a general non competition restraint. General restraints are increasingly unlikely to be enforced by a court and often a middle of the road approach stands the best chance of being able to be enforced.

The anti poaching clause is suggested to be restricted to those clients, potential clients and referrers of work with whom the employee has had dealings for a range of alternative periods before termination of the employment. These are effectively those clients who the employee may have some influence with. However, the effect of the restraint is broad and is intended to cover any action by the employee to persuade, solicit or even accept an unsolicited approach by a relevant client, potential client or referrer.

Part of the standard approach is to include a provision enabling any invalid provisions to be cut out of the agreement so that the other valid provisions may still operate. The provision should also include standard clauses recognising that the employee has had the opportunity to obtain legal advice about the clause and acknowledges that the employer may be forced to seek an injunction from a court to enforce the clause, in which case the employee agrees to be responsible for the employer's costs of enforcing the contractual obligation.

13. General provisions

Finally, most contracts have several miscellaneous ending provisions such as:

- to confirm the relationship of employer and employee between the parties;
- provides that the common law of the applicable state will apply to any common law claim relating to the agreement (although this does not affect either party's statutory rights); and
- that the agreement is the sole employment agreement between the parties and that any variation must be in writing to be valid.