

© Copyright Kreisson Legal Pty Ltd 2010 – All rights reserved

EMPLOYMENT & IP – UNDER REVIEW

Risk Managing Your Employee Contracts and Policies

Presenter: Ilona Teremi, Director, Kreisson Legal

31 May 2010



Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 1987
Liability limited by a scheme approved under Professional Standards Legislation

**Chapter
1**

Employment Contracts and Job Descriptions



Fair Work Act

As of 1 January 2010, any new contracts issued must be compliant with the Fair Work Act (Cth) 2009. The Act imposes 10 minimum employment standards:

1. Maximum weekly hours of work is 38 hours
2. An employee is now entitled to request flexible working arrangements
3. Parental leave is still 12 months, but with an optional 12 months now available
4. Annual leave retained at 4 weeks
5. Sick leave rebranded as personal leave, and includes carers leave. 10 leave days per year available
6. Community service leave permitted, but as unpaid leave
7. Long service leave entitlements retained
8. Paid public holidays retained
9. Minimum notice periods for termination and redundancy required
10. A Fair Work Information Statement must now be given to all new employees as soon as practicable after they start

Contracts and Job Descriptions

11. Who has an employment contract? Who has both, a contract and a job description?
 - Are they up to date?
 - Do they reflect the current nature of role?
 - Job Descriptions must be broad enough to cover a range of duties but not too prescriptive so as to prevent you from introducing other duties. Job Descriptions can also affect redundancy/restructure decisions when looking at comparable roles
12. Offer and Acceptance = Agreement
 - You offer to pay, train, keep employee safe
 - Employee accepts payment on basis of fulfilling certain obligations
13. Contracts terms
 - Must be clearly defined - the Court must be able to state the term with certainty
 - If the Court has to supply a term by "guessing", then the contract is likely to be unenforceable
 - Take out the guess work – make it easy for the Court

Forgotten something?

14. Courts may imply terms if you have forgotten...
 - But you have to get past the "oh, of course" test! It must be obvious what was meant to be there
15. Don't make it hard
 - It will only cost you more in legal costs and your risk of losing your Court case will be higher
16. Invest upfront in developing a good set of employee documents

**Chapter
2**

Policies & Procedures

1. Employees need to take care to ensure that the introduction of a company policy is by agreement and is accompanied by consideration. You need:
 - a) Consent
 - b) Consent needs to be freely reached
 - c) Consent must be more than a 'reluctant acceptance of reality'
2. If a company introduces a new policy, it is arguable it will only be binding on an employee if there is fresh consideration. The same applies to the introduction of a new contract of employment to a current employee.
3. For a new policy to be binding, an employee would agree to abide by the new rules and this would be in exchange for the employers promise to pay a higher wage or confer some other benefit on the employee.
4. Employers must not lawfully vary the terms of a contract of employment policy unilaterally.
5. Employers often seek to have their policies regarded as having a contractual force, even though a policy, when introduced, lacks consideration that would make a new contract or a variation to an existing contract enforceable.
6. Many employers argue that they must be able to introduce new directives to improve the efficient and orderly running of their business. If the policy is no more than a directive that an employee needs to follow, than this might be somewhat different than a policy document which purports to introduce new contractual terms. The requirement is that policy changes will not be unreasonable if they do not destroy the trust and confidence between employee and employer.
7. A new company policy, however may be justified on the grounds that it is to be implemented under a change environment or due to changing laws, for example, smoking legislation or other legislative change.

Why are Policies and Procedure important?

8. Set out clear and defined rules - employees expect rules in the workplace
9. Gives structure and clear expectations on both sides and promote transparency



Risks

10. Policies and procedure needs to be applied continuously

eg: risks under occupational health and safety legislation will require strict policy enforcement due to exposure under these laws. Bullying, harassment and victimisation claims can be brought under OH&S legislations.
11. They need to be revised regularly
12. Need to be applied in a uniform fashion
 - if not, risk possible direct or indirect discrimination and other similar claims:
 - Anti-Discrimination Act, Disability Discrimination Act, Age Discrimination Act, Sex-Discrimination Act, Racial Discrimination Act, Equal Opportunity Act
 - you also run the risk of not being able to rely on the Policy
13. Procedural forms save your memory and allow a good personnel file to be built, showing history of the employee. Prevent 'I said, they said' issues.

**Chapter
2****Policies & Procedures (cont.)****Compliance and document management - Onus of proof**

14. Proves acceptance of directives issued
15. Proves awareness of obligations
16. Proves employee has been trained on a particular area
 - Signature on contracts, on policies, listed on meeting attendance sheet, email read receipts are retained

Document destruction policies

17. What are the destruction exemptions?
18. Is there a reason for keeping documents if there is a possibility of a claim?
19. Lack of information leads to no evidence which takes you back to:
 - Guess work for Courts
 - "I said, they said" situations

**Chapter
3**
Workplace Surveillance & Access Issues

1. In Australia, there is no authority which relates to privacy in the workplace.
2. Privacy legislation gives employees some protection as the Privacy Act 1988 (Cth) imposes privacy obligations in relation to the collection use and disclosure of information. Employee records are presently exempt, although the Australian Law Reform Commission has recommended that this exemption be removed.
3. In NSW only, the Workplace Surveillance Act 2005 applies to camera, computer and tracking surveillance, however employees must be notified in advance of the surveillance. Secret surveillance can only occur where authorised by a Magistrate where employees are involved in unlawful activities at work.
4. There is some surveillance legislation in other states, which can be applied in the workplace, but this does not cover computer surveillance.
5. There has been some suggestion that the Telecommunications (Interception) Act may be amended to allow the monitoring of emails and internet communication without employees consent.
6. Outside of legislation, employees may still enforce strict codes in relation to internet and email usage. These rules are incorporated in the contract of employment and operate as a lawful direction to employees.
7. It is common to find a zero tolerance policy in relation to pornographic material such that summary dismissal is often warranted.

Policies on Monitoring

8. What do you monitor?
9. When do you monitor?
10. How do you monitor?
 - Notice to required
 - Must be in writing
 - Must be at least 14 days prior to monitoring commencing
11. What do you monitor and who does the monitoring?
 - Mobile phones/blackberries/iphones
 - Laptop and/or remote access to server (24/7 access?)
 - Working from home, off site = risk of side deals

Why Monitor?

12. Be pro-active, be informed
13. Planning, particularly for small business
14. Building your legal case if needed as proof can be found before it is lost (electronic – possibly may be retrieved)

Monitoring Realities

15. Takes time and money
16. How well do you know your customers?
 - Would they be loyal if tempted?
 - Would they tell you if they are contacted by a former employee?
 - How do you manage employees in a workplace where control is being lost?

**Chapter
3****Workplace Surveillance & Access Issues (cont.)****Access**

17. Access to your premises
 - How secure are your doors – would a credit card do the trick?
 - Does anyone see you enter your access code as you enter?
 - Do other employees know each other's access codes?
 - If keys only, how would you know if an employee entered the premises after hours?
18. Access to information
 - Categories of visitors to premises:
 - a) employees
 - b) external consultants
 - c) contractors
 - d) students
 - e) volunteers
19. Don't let your goodwill walk out the door
 - Examples where business owners have come to work one day and found that one of their entire teams (plus boxes of files) have disappeared. Mystery Team has already started work at a new location with your clients.
 - How could this have happened? How long was it planned for?

Chapter 4

Misconduct and Summary Dismissal

It is lawful to terminate an employee for misconduct where there is a clear intention by the employee to no longer be bound by the contract.

The three questions which must be answered are:

- a) Does the misconduct constitute a breach which goes to the heart of the contract?
- b) Is the misconduct of the employee a reputation of an essential term of the contract?
- c) Has there been a waiver of the relevant conduct in the past?

In Australia, an employer can choose to elect to accept the misconduct of the employee as reputation of the contract. The employer must have valid reason to terminate employment.

Some of the actions which can lead to misconduct, which could make summary dismissal justified are;

- Misuse of the employers property
- Circumstances of dishonesty
- Repeated unpunctuality without reason
- Drunkenness
- Fighting another employee at work
- Verbally abusing an employer
- Wilful and unjustified disobedient of a lawful command
- Given false information regarding work experience or false references at the time of recruitment
- Manifest incompetence
- Careless or neglect
- Disregard of a professional and vocational standard
- Inefficiency
- Unexplained underperformance of duties

The list goes on.....

Summary dismissal overrides all consideration of due notice and pay in lieu of notice. Generally, an employee threatened with summary dismissal has no right to be warned that their work or conduct is unsatisfactory and may result in dismissal.

There is no rule of law, which defines the degree of misconduct which would justify a summary dismissal without notice. It is a matter that needs to be dealt with on the facts and circumstances for each case, but it is preferable to have some listed matter in the contract of employment.

Think about whether the punishment fits the crime.

Scenario

You are the HR manager and you have just had your IT company send you a report of the latest monitoring report. The PA to the CEO is discovered to have sent various confidential emails to her home email address and she has also downloaded the company's most important confidential information onto a USB drive. She does not do any work from home but it would be quite common for her to have to use USB drives, as part of her assisting the CEO.

Would this conduct justify summary dismissal? Why?

**Chapter
5**

The departing employee

Spot the red flags

1. Decreased productivity and motivation
2. Increased absenteeism
3. Employee likely to raise concerns over a variety of topics in the lead up to their resignation
4. Possible increase in work from home
5. Other signs?



Exit Transition

6. Agree on a departure date
7. What work do they do in the interim?
8. What access do they have in this period?
9. Do they need to gradually transition work to someone after they have given their notice
10. What do you need to have returned on or before exit date?
 - Exit checklist

Back up plans in the event of loss of confidential information

11. This is a Priority no. 1
 - Do you have any contingency plans? What are they?
 - What is worst case scenario? How would you guarantee your business still operates with the data stolen or duplicated?
 - Can you insure for these types of losses?

Contact Us

Enquiries

Kreisson Legal can be contacted as follows:

Ph: (02) 8239 6500

Fax: (02) 8239 6501

Website: www.kreissonlegal.com.au

Ilona Teremi – Managing Solicitor Director

Email: ilona.teremi@kreissonlegal.com.au

Ph: (02) 8239 6503

Irena Reiss – Senior Associate

Email: irena.reiss@kreissonlegal.com.au

Ph: (02) 8239 6505

Practice Areas

Kreisson Legal provides commercial law and corporate legal services to clients in the following areas of law:

- Commercial & Business Law
- Commercial Agreements
- Commercial Litigation
- Employment Law
- Corporate Compliance
- Insurance Law
- Risk Management
- Insolvency and Debt Recovery
- Building & Construction Dispute Resolution
- Building and Construction Industry Security of Payment Act 1999
- Trade Practices
- Consumer Law
- Privacy
- Sign Off on Promotional /Marketing Materials
- Procurement Processes & Supplier Relationship Management
- Business Acquisitions & Disposals
- Liquor Licensing