

2594

FOREWORD

The Modern Contract of Employment

By Ian Neil SC and David Chin

The Hon. Michael Kirby AC CMG

THE MODERN CONTRACT OF EMPLOYMENT
BY IAN NEIL SC AND DAVID CHIN

FOREWORD

THE HON. MICHAEL KIRBY AC CMG^{*}

A well known jest at the expense of lawyers suggests that law sharpens the mind by narrowing its focus. In this very useful and practical work on the modern law of employment contracts in Australia, the authors have unapologetically focused their attention sharply on the laws essential to establish a relationship of employment.

They acknowledge that other areas of the law impinge upon the relationship. But they have chosen to excise such topics from this book. Thus, they have not covered the statute law, which in Australia builds a large edifice of regulation, substantially (but not exclusively) based on the relationship of employment. The large body of industrial relations law, federal, territory and state, is left to specialised texts and the many books and legal services that seek to explain the quickly changing fields of statutory provisions which, in a short time, have travelled from conciliation and arbitration, industrial relations, and now 'fair work' provisions, with designated tribunals to match. There is some incidental reference to this body of law and practice. However, it is a highly specialised field of intricate provisions. It is not the subject of this work. This is so, although many employment disputes in Australia still involve such legislation and end up before courts and tribunals with relevant jurisdiction.

^{*} Justice of the High Court of Australia (1996-2009); Chairman of the Australian Law Reform Commission (1975-84)

Nor is this book generally concerned with the rules of equity or the common law principles of tort as they impinge upon the duties of employers to those who claim they are employees. There are some equitable principles, derived from fiduciary obligations, which occasionally apply to the employment relationship that are mentioned in this book. But neither they, nor the tortious duties and responsibilities of the employment relationship are examined in any detail. This is because the authors have concentrated their attention on the antecedent contract of employment. Those with more precise concerns about elements in the relationship deriving from the common law of tort or the equitable principles and remedies for fiduciary or confidential relationships, must acquaint themselves with other texts and other legal sources.

It may be complained that this narrowing of the focus of enquiry on the part of the authors' risks missing data essential to the modern relationship between putative employers and their employees, which helps to throw light upon whether or not their relationship is that of employment or some other legal category, such as independent contractor, business partner, co-investor, or joint venturer. Once again, special legislation has been enacted in some jurisdictions to distinguish, or assimilate, the old classification that developed when the contract of employment was viewed essentially as one of *status* (one between a "master" and "servant") rather than, as it is now seen, one of *contract*.

It is sometimes awkward to deal with a particular area of the law, without examining the peripheral areas of statute, of common law and equity that throw light on the boundaries of the category in question. In practical terms, the main significance of adopting the classification 'contract of employment' as applicable to a personal and economic association of individuals, is to determine whether a person (generally with superior resources, means and insurance), will be responsible to the other (generally with fewer means, resources and no insurance) when accidents, mistakes and disagreements occur. As the authors demonstrate in these pages, the old test, namely whether the former individual may exercise control over the later, and direct the later as to how to perform the tasks in hand, is less than entirely satisfactory in

the current age of highly skilled subordinates who are the true masters of complex technology, than it was in earlier times when a 'master' was precisely that.

The changing realities of an association of individuals (to use a neutral expression) and whether it should be classified as a 'contract of employment' or some other legal relationship, is thus commonly a disputable task. In consequence of the changing character of work and its performance, cases at the border line tend to find their ways into appellate courts. As this book demonstrates, the result is a series of decisions where judges frequently disagree. Perhaps if we were starting afresh, a book like this would adopt a different stance. It might drop the notion of a contract of employment altogether. It might substitute new classifications for work relationships, more appropriate to the personal interactions and technological skills of the current age. Perhaps Lord Denning's 'organisation test' might finally triumph. Or different questions might be asked relating to the respective economic power and interests of the parties, to mutual advantage.

An overly narrow focus upon the contract of employment, defined by reference to concepts which postulate agreement between parties, who may actually have entirely different bargaining power, runs a risk of non-compliance with the broad principles of global human rights law that now informs international jurisprudence on the more generally stated relationship of "work".

All of the foregoing are themes pertinent to the relationship of work. However, they are not in the authors' sights. Their objective, more modest but still very important, has been to provide a text that will help busy judges and lawyers as they go about their daily work and are confronted by acute problems that need to be solved quickly. The authors' are content to leave the wider questions to others who may have the time and inclination to speculate on what the Australian law should be. And where it might go in relation to employment at some future time. The essential criterion they have adopted is to state the current law as it stands in early 2012; to do so by reference to well known categories; to state the law in simple declaratory

propositions; and to support those statements with references to authority and (only when it helps), with quotations from judicial reasons which cast light on the legal principles in play.

The categories that then follow are those that necessarily and logically result from the contract of employment as a species of the law of contracts. Beneficially, the authors follow the chronological path with which every lawyer, from earliest days, is familiar, in the law of contract more generally. The formation; variation; and terms and conditions of the contract. Some equitable notions of mutual trust and confidence; fiduciary obligations and the handling of confidential information. And then an examination of the limited power to suspend a contract or to terminate it. This is followed by the examination of remedial features governing provisions in restraint of trade; collective agreements and contractual remedies. This structure is logical and clear. Aided by a good index, the busy practitioner, preparing to state arguments, present a mediation or arbitration or to fight a case in court can proceed quickly through the chapters; immediately review the old and recent authorities; and perceive the overarching principles because other details have been excised, in order to fulfil and authors' purpose.

In *Blackadder v Ramsay Butchering Services Pty Ltd*¹ I observed that “the satisfaction of employment, the feeling of self-worth that it can generate and the maintenance of .the skills to which their exercise would contribute” are part and parcel of the employment contract, in at least most cases in Australia today. This remark has been noted by the authors at [6.80]. It recognises the changed social attitude to work and the changing character of much work because of changed human relationships and technology operating today.

¹ (2005) 221 CLR 539 at [32]

Our system of law, particularly as expressed in the common law and in judicial elaborations of statute is highly particular and practical. The binding principles are sharply focused. Those who are raised in different legal systems find ours a messy, discursive and even chaotic system. But it generally works in practice, by the application of analogous reasoning and logic to what has gone before. This book is an excellent guide to reveal such sources.

In recent weeks the Federal Attorney General (the Hon Nicola Roxon MP) has foreshadowed the possibility of a general revision of the Australian law of contracts so as to replace the common law approach with a contracts code. This approach would be more congenial to Australia's trading partners in the region and the world who view our contract law as mysterious and its principles as elusive. If this reform project were to proceed, it might have implications for particular species of contracts, including the employment contract examined in this work. In that event, a future edition to this text would beneficially include a section addressed to topics of law reform and future directions of the law. In the context of the contract of employment, few authors indeed would be better placed to offer such an analysis than the authors of this work.

The best legal practitioners are encouraged, by our legal system, to speculate and to consider issues of legal principle and policy. Especially in the higher courts, such consideration can help in applying past decisions and reasoning in the inevitably different factual circumstances which every new case presents. The nature of the relationship of employment, more than many others, is changing rapidly in Australia. So the mind of the lawyer should occasionally stand above the past law and contemplate the possible directions of the law in the future.

It is because the beginning of this process demands a thorough and accurate understanding of the present law that this book is a most useful companion for contemporary Australian lawyers. When to the knowledge of the past is added logic, intuition, imagination and adaptation, the law will be in safe hands.

Sydney,

Michael Kirby

22 June 2012