



Employee Personal Liability

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June 2011

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MEMBERSHIP SERVICES

Employee Personal Liability



Two Areas

1. Where employee commits a breach of contract of Employment
2. Where Employee negligent

General Duties



Employees duties in Contract can be found in:

1. Express Contractual Terms
2. Implied terms
 - To carry out the employment with due care and skill
 - To obey lawful and reasonable command
 - Honesty
 - Duty to provide faithful service/act in good faith
 - Comply with statutory obligations
 - Not to cause injury to himself or others
 - Mutual trust and confidence

Due Care and Skill



To carry out the employment with due care and skill

- An employee must exercise reasonable care and skill in the performance of her/his work. If the employee is negligent he/she may be liable to indemnify the employer (or contribute) for losses sustained by the employer.
- This duty only applies to work for which the employee has been hired to do and which he/she has claimed he/she is competent to do. *For example, a Painter breaks valuable artwork which he was told to move, is not liable because he only warrants to be a skilful and competent painter and not a furniture mover!*
- This duty can be superseded by insurance, especially in the case of accidents. It is uncommon, but not impossible, for an employer to sue an employee for breach of this duty as most work risks have been covered by insurance

Lawful and reasonable command



To obey lawful and reasonable command.

- An employee has a duty to obey lawful and reasonable orders relating to the performance of duties relative to the scope of employment
- Wilful failure to obey such commands can render an employee liable to summary dismissal. However, this depends on the nature of the order/command and the degree of refusal.
- Where the failure to obey a lawful and reasonable order results in loss and damage to the Employer, the Employee may be liable.

Faithful service/good faith



Faithful service/act in good faith

This duty covers a broad scope and depends on the facts. Some of the most common are as follows:

- an employee must not use her/his position to *derive secret profits/benefits*
- an employee must *account* to employer for all moneys and property received in the course of employment
- an employee must not *solicit the employer's customers* whilst she/he is employed (eg. with a view to setting up a business in competition)
- an employee would normally be required to *disclose information* relevant to the employer's business (such as the dishonesty of fellow employees) to the employer. This is so especially if the employee is in a management/supervisory role
- An Employee who has caused loss and damage to the Employer may be liable in damages-and may include exemplary damages.

Ownership of IP



Ownership of IP

- an employee must not divulge or abuse *trade secrets* of an employer (eg. engaging in work in spare time for a commercial rival)
- an employee has a duty to make available to the employer *inventions* made in the course of employment. This is so even if the employee has not been particularly employed for the purpose of the invention
- Contrast IP ownership with contractor

Remedies include damages and declarations of trust

See: **Victoria University of Technology v Wilson**
University of WA v Gray

Statutory obligations



Comply with Statutory obligations

An employee must comply with all relevant legislation, particularly in the area of occupational, health and safety and depending upon their role and responsibility, must be able to act with authority to prevent hazards or risks from occurring in circumstances where harm or injury is likely.

Statutory liabilities



Increasing statutory obligations upon "persons"

Australian Consumer Law

Unfair Business Practices

- In trade and commerce
- Misleading and deceptive conduct
- False and misleading representations
- Unconscionable conduct
- Representations about country of origin
- Consumer guarantees

Statutory liabilities



Australian Consumer Law

Consumer Guarantees

- Goods and services
- Acceptable quality
- Fit for specified purpose
- Match description
- Match samples
- Services to be supplied with due care and skill
- Services supplied to be fit for the particular purpose
- Services to be supplied in a reasonable time

Statutory liabilities



Australian Consumer Law

Penalties

\$1.1M for a Corporation

\$220K for an individual

Statutory liabilities



Australian Consumer Law

Recommendations for Employees

- Review and consider current and future employment contracts
- Ensure appropriate indemnities in place for Australian Consumer Law
- Exercise caution in making representations in the course of business activity

Statutory liabilities



Workplace Health and Safety

S.23 Obligations for workplace health and safety

Includes:

- persons in control of workplaces
- persons in control of relevant workplace areas
- persons in control of fixtures, fittings or plant included in relevant workplace areas.
- Workers and other persons at workplaces have obligations under division 3 to ensure workplace health and safety.

34C Obligation of person in control of relevant workplace area

- (1) The person in control of a relevant workplace area has an obligation to ensure the relevant workplace area is safe and without risk to health.

34D Obligation of person in control of fixtures, fittings or plant included in relevant workplace area

- (1) The person in control of fixtures, fittings or plant included in a relevant workplace area has an obligation to ensure the fixtures, fittings or plant are safe and without risk to health.

Statutory liabilities



Workplace Health and Safety

S.30 Obligations of persons in control of workplaces

- (1) A person in control of a workplace has the following obligations--
- (a) to ensure the risk of injury or illness from a workplace is minimised for persons coming onto the workplace to work;
 - (b) to ensure the risk of injury or illness from any plant or substance provided by the person for the performance of work by someone other than the person's workers is minimised when used properly;
 - (c) to ensure there is appropriate, safe access to and from the workplace for persons other than the person's workers.

Statutory liabilities



Workplace Health and Safety

36 Obligations of workers and other persons at a workplace

A worker or anyone else at a workplace has the following obligations at a workplace--

- (a) to comply with the instructions given for workplace health and safety at the workplace by the employer at the workplace and any principal contractor for construction work at the workplace;
- (b) for a worker--to use personal protective equipment if the equipment is provided by the worker's employer and the worker is properly instructed in its use;
- (c) not to wilfully or recklessly interfere with or misuse anything provided for workplace health and safety at the workplace;
- (d) not to wilfully place at risk the workplace health and safety of any person at the workplace;
- (e) not to wilfully injure himself or herself.

Defamation



In the workplace

- Increasing difficulty in policing workplace communications
- Internet and e-mail communications and Texting
- Publication –orally or in writing- of defamatory material to one or more persons
- Complex range of defences are available depending on facts and circumstances
- Employee liability will depend on whether material published in the course of and within the scope of employment duties
- Generally Employer will be prima facie liable for publication of defamatory matter by an employee in the course of , and within the scope of employment.
- An employee who publishes defamatory material in breach of a clear contractual term of employment, or workplace policy may be personally liable where the publication falls outside of the scope or authorisation of employment

Defamation



"Authorisation"

- Although the primary responsibility for a defamatory publication falls on the publisher, a party who authorises the publication is also liable.
- An employer can be held vicariously liable for the defamatory publication of its employees where it is held to have authorised the publication or where the publication was made in the normal course of employment.
- Knowingly allowing employees to regularly send "joke" emails of an offensive or defamatory nature could be interpreted by a court as authorising such emails, leaving employers open to vicarious liability suits for defamation

Defamation



Recommendations:

- Review workplace policies for communications
- Review Employment contracts
- Establish clear guidelines and procedures
- Expressly a term of employment that business monitor the on-line activities of employees for a number of reasons, for example:
 - to keep a log of emails sent and Internet sites viewed by employees
 - to detect employees sending offensive, defamatory, confidential or copyright material via company networks
 - to deter employees from accessing and downloading inappropriate material from the Internet

Vicarious Liability



General Rule:

Employers may be held vicariously liable for the unauthorised acts of an employee, as long as the acts can be regarded as a mode (although an improper one) of performing the normal tasks of the employment.

Within the scope of employment

- Temporal
- Functional
- Geographical

See Starks v RSM Securities Pty Ltd and Ors

Vicarious Liability



Exceptions to the General Rule

- Gross negligence
- Acts beyond the scope of employment
- Serious or wilful misconduct

- Grounds for dismissal-but may also be basis for denying vicarious liability or seeking a joinder of an employee to apportion liability.

Employee Protection Legislation



To overcome Lister v Romford Ice
some States have specific employee protection legislation
NSW-Employees Liability Act

S.3 **Employee not liable where employer also liable**

- (1) If an employee commits a tort for which his or her employer is also liable:
- the employee is not liable to indemnify, or to pay any contribution to, the employer in respect of the liability incurred by the employer, and
 - the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability).

- (2) Contribution under this section includes contribution as joint tortfeasor or otherwise.

S5 Act not to apply to serious misconduct of employee or to conduct not related to employment

This Act does not apply to a tort committed by an employee if the conduct constituting the tort:

- was serious and wilful misconduct, or
- did not occur in the course of, and did not arise out of, the employment of the employee

Employee Protection Legislation



LAW REFORM (VICARIOUS LIABILITY) ACT 1983 – NSW

SECT 7

Vicarious liability of masters

Notwithstanding any law to the contrary, a master is vicariously liable in respect of a tort committed by the master's servant in the performance or purported performance by the servant of an independent function where the performance or purported performance of the function:

- is in the course of the servant's service for his or her master or is an incident of the servant's service (whether or not it was a term of his or her contract of service that the servant perform the function), or
- is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the servant's master.

Employee Protection Legislation



INSURANCE CONTRACTS ACT 1984 – Cwth

SECT 66

Subrogation to rights against employees

Where:

(a) the rights of an insured under a contract of general insurance in respect of a loss are exercisable against a person who is the insured's employee; and

(b) the conduct of the employee that gave rise to the loss occurred in the course of or arose out of the employment and was not serious or wilful misconduct;

the insurer does not have the right to be subrogated to the rights of the insured against the employee.

An insurer can pursue an employee where the conduct of the employee giving rise to the loss was serious or wilful misconduct.

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