Employee Relations Law
LAWS8555/8755
6 credit points

Unit Outline

Semester 2 – 2011

Unit Coordinator: Winthrop Professor Bill Ford of the Faculty of Law
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www.law.uwa.edu.au
This unit is designed to assist students to acquire a broad foundation for understanding the law governing employer/employee relations. It explores both individual and collective aspects of employment in Australia (including of course Western Australia) and falls into three main parts. The first part involves an examination of the common law contract of employment and the individual employment relationship. It focuses on the formation, operation and termination of employment contracts (i.e. contracts of service – as distinct from contracts for services which create principal/independent contractor relationships). Particular attention is given to the various common law and selected statutory duties of employers and employees and to statutory arrangements and remedies governing unfair dismissal.

Part two outlines the federal and state legal systems of industrial relations that provide statute based arrangements for the regulation of conditions of work. This includes a discussion of the major industrial instruments (arbitrated awards and collective agreements) and an examination of how these industrial instruments affect and relate to common law contracts of employment.

Part three involves an examination of processes of negotiating industrial agreements, including the phenomenon of industrial conflict. Particular attention is given to so-called “good faith bargaining” requirements and also the way in which the law endeavours to regulate and deal with industrial action undertaken for the purposes of determining the content of collective agreements (called “enterprise agreements” under the federal statute, and “industrial agreement” under the state statute). Emphasis is placed therefore on the Federal statutory provisions governing collective bargaining and especially “good faith bargaining” and “protected industrial action” under the relatively recently enacted *Fair Work Act* 2009 (“FW Act 2009”). The FW Act 2009 introduces a statutory regime that replaces the previous Federal legal framework of employee relations enacted by the Howard government in December 2005 and June 2007 (i.e. the *Workplace Relations Act* 2005 (Cth)). The 2009 Federal regime is designed to reduce the complexity that has for some time been a feature of the relevant Federal legislation. In short, Parts 2 and 3 of the unit will largely be devoted to a selective examination of the most significant aspects of the Federal legislation (the FW Act 2009) implementing Labor’s industrial relations policy platform outlined in *Forward with Fairness* [http://www.alp.org.au/download/fwf_finala.pdf](http://www.alp.org.au/download/fwf_finala.pdf)

**CONTACT**
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UNIT DESCRIPTION

GENERAL AIMS AND OBJECTIVES

The objective of this unit is to introduce and explain a number of the legal concepts central to employee relations law, and in particular to:

(i) encourage and assist students to explore how some of the legal concepts central to employee relations are interpreted and applied in industrial tribunals and courts;
(ii) encourage and assist students to consider critically the evolving principles of employee relations law and in particular how those principles attempt to accommodate changing social practices and values;
(iii) encourage and assist students to consider critically the strengths and weaknesses of various approaches to the analysis and regulation of work relationships and conditions of employment.

OUTCOMES (knowledge and skills)

On completion of this unit students should be able to identify and explain:

- the legal nature and importance of the individual employment relationship
- the way in which the law classifies the various arrangements used for the provision of paid work
- the prohibitions on discrimination in employment
- the relationship between the common law and the various (statutory) industrial instruments regulating conditions of employment (“rights and obligations”)
- the foundation principles governing the termination of employment contracts/relationships and the common law remedies associated with wrongful termination
- the statutory concepts of unfair and unlawful dismissal (and the distinction between these concepts)
- the different categories of industrial instruments, including collective agreements (State and Federal)
- the processes which govern the making of different forms of industrial instruments (State and Federal)
- the obligations of employers concerning occupational safety and health

“Law is not a mystery; it only uses long words. Some understanding of its technical structure is necessary, however, for an understanding of its development and its place in our lives …

[We] can understand the social significance of the legal doctrines only by resolutely entering the muddy waters of law itself and emerging on the other side, not by skirting round them. Technical law by itself is of limited use, at best an arid game played by keen minds in court rooms and ivory towers. For its significance we need to look at the historical and social setting, to question the values and policies enshrined in the judgments and the legal rules, and to inquire into what is done in other countries about the problems revealed.”

TEACHING AND LEARNING STRATEGIES

Expected Fundamentals Skills

This unit assumes that students have already developed certain basic skills. It is expected that students have an adequate command of:

- English and related communication skills – students are expected to have very high English language skills and to be able to understand and follow the principles of accepted expression and style.
- Information literacy skills – work with computers, whether for word processing or for legal research, are an important aspect of studying law; students are expected to have and to further develop the relevant skills.

If you are not well prepared in any of the above areas you should make every effort to remedy the situation through undertaking additional reading and/or practice. Do not hesitate to ask for advice from your teacher.

The University’s Student Learning, Research and Language Skills Service offers assistance in a variety of areas, including writing skills, study skills, examination preparation and stress management. The Service is located on the second floor of the Guild Village, south entrance/exit, and can be contacted

- by telephoning 6488 2423 or 6488 2258

The Law Library offers regular classes to improve legal research skills.

Charter of student rights and responsibilities

The Charter of Student Rights and Responsibilities sets out the fundamental rights and responsibilities of students and their organisations at UWA. It recognises that excellence in teaching and learning requires students to be active participants in their educational experience. It upholds the ethos that in addition to the University's role of awarding formal academic qualifications to students, the University must strive to instil in all students independent scholarly learning, critical judgement, academic integrity and ethical sensitivity. The Charter also recognises that students are central to a dynamic University community. In doing so, the University recognises the importance of student rights, responsibilities and opinion and encourages diversity within the student body.

For the full text of the charter, please refer to http://www.secretariat.uwa.edu.au/home/policies/charter

Student Guild contact details

The University of Western Australia Student Guild
35 Stirling Highway
Crawley WA 6009
Phone: (+61 8) 6488 2295
Facsimile: (+61 8) 6488 1041
E-mail: enquiries@guild.uwa.edu.au
Website: http://www.guild.uwa.edu.au
UNIT STRUCTURE

Teaching Venue for Classes
Thursdays 5.15 – 8.00 p.m.
Old Moot Court, (Law School Courtyard)

1. Introduction
   - outline of course; class arrangements; assessment; essay requirement
   - sources of employment law
   - relationship between analysis and beliefs/values/bias/prejudice
   - the role of law in regulating employer-employee relations
   - industrial relations/human resource management and labour law

2. Engaging Labour
   - wage/work bargains; the importance of contract law; some fundamental concepts in contract;
     arrangements for the performance of work (permanent, fractional, part-time, casual etc.)
   - characterising work relationships (employer/employee, principal/independent contractors
     etc); why differences in the nature of work relationships are important; distinguishing
     between contracts of service (employees) and contracts for services (independent
     contractors)
   - unlawful discrimination in employment (particularly on grounds of sex or age)

3. Regulating employment by means of contract
   The content of employment contracts: express terms; implied terms; common law rights and
   duties of employers and employees, including the importance of statutory protections; health and
   safety at the workplace.

4. Ending the employment relationship (including remedies)
   - terminating contracts by giving notice or by rejecting performance on the basis that the
     performance by the employee (or employees) is inconsistent with contractual obligations
   - unfair and unlawful dismissal under State and Federal industrial legislation (Industrial
     Relations Act 1979 (WA) and the FairWork  Act 2009 (Cth))

5. Regulating employment by means of industrial instruments
   - Awards; the nature and significance of awards (including so-called “modern awards” under
     the FW Act 2009) and the powers of the State and Federal industrial tribunals
   - Collectively bargained agreements; enterprise bargaining and the different models of
     collective agreements at the State and Federal levels (called, respectively, “Industrial
     Agreements” and “Enterprise Agreements”)
o Individual agreements; the debate about the desirability of different forms of individual agreements that have been available under State and Federal statutes (and their relationship to strategies of improved HRM and/or de-unionisation)

6. **Negotiating industrial instruments: Taking Industrial action**
   o Negotiation (contrasted with conciliation/arbitration)
   o Good faith bargaining under the IR Act 1979 (WA) and the FW Act 2009 (Cth)
   o Protected industrial action under the FW Act 2009 (Cth)
   o Remedies for breach of the various State and Federal industrial instruments (awards, collective agreements and individual agreements)

**TEXTBOOKS AND RESOURCES**

**Notices**

The course proceeds on the basis that all students have activated their (free) student email accounts and routinely access their email for official notices from the Law School, the Business School and the UWA Administration. The unit is available on WebCT at

http://webct.uwa.edu.au

Please ensure that you check regularly (and especially prior to class meetings) for information and announcements concerning classes and recent developments in the subject (such as new cases, new publications and statutory changes etc.)

**Important websites:**

Most of the important case law (and statute law) is now available electronically. You will be expected to be able to access at least the following websites for this purpose:


**Reading Materials (general)**

**Introductory Textbooks**

Advanced Reference Books

- M Pittard and R Naughton, Australian Labour Law 5th edition (Lexis Nexis, 2010) ('PN')

Other Materials

- Cases and articles (and other monographs) as referred to and/or distributed during the course

Many of the reports of relevant Australian cases decided in the courts and the State and Federal industrial tribunals are published in the series published by Thomson Reuters Industrial Reports ('IR'). These are also usually available electronically in one or more of the databases referred to above.
ASSESSMENT (Provisional)

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<tr>
<th>Item</th>
<th>Weight</th>
<th>Due date</th>
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<tbody>
<tr>
<td>Attendance/Participation/</td>
<td>17%</td>
<td>Throughout the semester</td>
</tr>
<tr>
<td>Presentation</td>
<td></td>
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<tr>
<td>Essay</td>
<td>33%</td>
<td>TBA</td>
</tr>
<tr>
<td>Take Home Exam</td>
<td>50%</td>
<td>TBA</td>
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</tbody>
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Assessment Details

1. Attendance/ participation /presentation 17%
2. Essay 33% (2,500 words max.; submission date to be announced)
3. Unsupervised (take-home) examination 50%

POLICIES

All students should familiarise themselves with the Business School policy and the University regulations dealing with plagiarism and collusion.

Submission of assignments

Please remember to attach an Assignment Cover Sheet to the front of your assignment and place the assignment in the assignment box in front of the Law School reception office.

You can download and print your Assignment Cover Sheet from the StudentNet web page http://www.business.uwa.edu.au/studentnet/assessments

Standard of Assessment

The Business School must ensure that the processes of assessment are fair and are designed to maintain the standards of the School and its students. The School follows the University of Western Australia’s grading system:

<table>
<thead>
<tr>
<th>Grade</th>
<th>Description</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>HD</td>
<td>(Higher distinction)</td>
<td>80-100%</td>
</tr>
<tr>
<td>D</td>
<td>(Distinction)</td>
<td>70-79%</td>
</tr>
<tr>
<td>CR</td>
<td>(Credit pass)</td>
<td>60-69%</td>
</tr>
<tr>
<td>P</td>
<td>(Pass)</td>
<td>50-59%</td>
</tr>
<tr>
<td>N+</td>
<td>(Fail)</td>
<td>45-49%</td>
</tr>
<tr>
<td>N</td>
<td>(Fail)</td>
<td>0-44%</td>
</tr>
<tr>
<td>FC</td>
<td>(Failed component)</td>
<td></td>
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</tbody>
</table>

The School awards marks leading to these grades by using the following general criteria which are presented here as a clear indication of the School’s expectations. These general criteria may be supplemented by specific standards with regard to a particular assignment.

HD    The student has a clear understanding of theory, concepts and issues relating to the subject and is able to adopt a critical perspective. The student is able to clearly identify the most critical aspects of the task and is able to offer a logically consistent and well articulated analysis within
the analytic framework presented in the unit. The student is able to draw widely from the academic literature and elsewhere but maintains relevance.

D  The student has a clear understanding of theory, concepts and issues relating to the subject. The student is able to develop an analysis of an issue using the analytic framework presented in the unit and is able to identify and evaluate the critical issues. The student is able to draw upon relevant academic and other material.

CR  The student demonstrates an understanding of the analytic framework developed in the unit and a partial understanding of concepts and issues. The student is able to identify some key issues and is able to present a logical discussion, but with some conceptual errors or gaps between analysis and conclusions. The student is able to draw upon an adequate range of references and other materials.

P  The student generally takes a descriptive rather than analytic approach to the subject. The student is able to demonstrate some understanding of the issues involved but does not demonstrate the ability to apply the analytic framework which had been developed in the unit. Draws primarily upon unit materials for referencing.

N+  The student is unable to demonstrate that he or she understands the core elements of the subject matter. The student is able to provide some insight into issues but misapplies analytic framework developed in the unit, omitting key factors and, for example, drawing conclusions which are not related to the preceding discussion.

N  The student is unable to demonstrate any understanding of the subject matter. Material presented for assessment is unrelated to unit framework and shows no effort to identify or address critical aspects of the topic.

FC  Failure of the unit due to failure to complete an identified essential assessment component.

The scaling of marks to ensure comparability between classes is an acceptable academic practice. The School and Board of Examiners have the right to scale marks where it is considered necessary to maintain consistency and fairness.

Special Consideration and Deferred Exams

If something exceptional and beyond your control has interfered with your ability to study in the normal way you should consider completing an application for special consideration. The forms can be obtained at the Undergraduate Student Centre or Postgraduate Student Centre, or from the Student Administration website http://www.studentadmin.uwa.edu.au/welcome/forms

In exceptional circumstances you can also apply for a deferred mid-semester/trimester exam or a deferred end of semester/trimester exam within three (3) university working days from the date of the exam. Application forms can be obtained at the Undergraduate Student Centre or Postgraduate Student Centre.

A student may be granted a deferred examination in one or more of their units if the Sub-Dean of the Business School is satisfied that on the basis of medical or other exceptional reasons the candidate was either:

- substantially and unusually hindered in their preparation for an examination; or
- unavoidably absent from or unable to complete an examination.

Further information concerning Special Consideration and Deferred Examinations is available on the Business School website http://www.business.uwa.edu.au/studentnet/assessments
Supplementary Assessment

Supplementary Assessment is not offered by the Business School, however, students who achieve a grade between 45-49 in the last unit for their undergraduate degree taken in the last semester of study, will be eligible for a supplementary assessment.

Ethical Scholarship, Academic Literacy and Academic Misconduct

Ethical scholarship is the pursuit of scholarly enquiry marked by honesty and integrity.

Academic Literacy is the capacity to undertake study and research, and to communicate findings and knowledge, in a manner appropriate to the particular disciplinary conventions and scholarly standards expected at university level.

Academic misconduct is any activity or practice engaged in by a student that breaches explicit guidelines relating to the production of work for assessment, in a manner that compromises or defeats the purpose of that assessment. Students must not engage in academic misconduct. Any such activity undermines an ethos of ethical scholarship. Academic misconduct includes, but is not limited to cheating, or attempting to cheat, through:

- Collusion
- Impermissible or otherwise inappropriate collaboration
- Plagiarism
- Misrepresenting or fabricating data or results or other assessable work
- Inappropriate electronic data sourcing/collection
- Breaching rules specified for the conduct of examinations in a way that may compromise or defeat the purposes of assessment.

Penalties for academic misconduct vary according to seriousness of the case, and may include the requirement to do further work or repeat work; deduction of marks; the award of zero marks for the assessment; failure of one or more units; suspension from a course of study; exclusion from the University, non-conferral of a degree, diploma or other award to which the student would otherwise have been entitled. Refer to the Ethical Scholarship, Academic Literacy and Academic Misconduct located on the University’s website at:
http://www.teachingandlearning.uwa.edu.au/tl4/for_uwa_staff/policies/student_related_policies/academic_conduct

Academic Conduct Essentials (ACE)

All newly enrolled students are required to complete a short compulsory online unit called Academic Conduct Essentials (ACE) within the first 10 weeks of semester. ACE introduces students to essential knowledge regarding ethical scholarship, it helps prepare them for the expectations they will need to meet during their university career and it informs them of correct academic conduct.

ACE can be accessed via WebCT (http://webct6.uwa.edu.au). In order to pass the unit, the unit quiz must be completed with a mark of 80% or greater. To gain the required pass mark students may attempt the quiz as many times as they wish. Completion of the unit will be recorded as an Ungraded Pass (UP) on the student’s academic record. Non-completion (NC) within the required timeframe will also be documented on formal academic records (ie, in either case the grade will appear on transcripts). More information on ACE is available at http://ace.uwa.edu.au

Acknowledging sources of information

In the course of your individual and team work assignments, you will encounter ideas from many sources. These will include journal and newspaper articles, commentaries, books, web sites and other electronic
sources, original case sources, lecture materials. All assignments that you submit must acknowledge all the different sources you have used. Not to acknowledge your sources is plagiarism, a form of dishonesty. Plagiarism is the misappropriation of the work or ideas of others and presenting them as your own. This is reprehensible from both an ethical and legal viewpoint. Neither the School nor the University accepts ignorance or the fact that a student’s previous acts of plagiarism had been undetected as a defence.

In order to avoid engaging in plagiarism it is your responsibility to acknowledge all of your sources in any work submitted for assessment and it is essential that you reference the work of others correctly. Where you quote directly from a source, you must ensure that any direct quotations are placed in quotation marks and are fully referenced. Even when you do not quote directly and are just referring to or expanding on the work of others, you must still acknowledge the sources of your information and ideas. Close paraphrasing in which you change a few phrases around, leave a clause out of a long sentence or put the original sentences in a different order is still plagiarism. To mark words as a quotation the entire text that has been copied should be enclosed within the quotation marks. If the copied text is four or more lines in length, it may be more appropriate to set it as a separate and indented paragraph. Each time that text is copied, the source must be acknowledged with a reference citation, including the page number.

If you have any doubts concerning appropriate referencing formats or how to acknowledge the work of others correctly, you should seek the advice of your lecturer.

The Business School has the following regulation on Plagiarism:

“The Faculty will promote the highest levels of probity and honesty amongst students and will provide instruction on ethical conduct. By submitting assignments and other work for assessment, students acknowledge Faculty's duty to guard against plagiarism, including by electronic means such as Turnitin or Mydropbox. A lecturer may require students submitting written or electronic work to sign a Plagiarism Declaration Form indicating that the work is original.”

Referencing

It is important that the referencing of any sources used in your written work is done properly, if only to substantiate the points you are making in your assignment or project. The Harvard style is one such system and there are some notes for guidance which have been prepared by the library staff: ‘Citing your Sources Harvard Style’ www.library.uwa.edu.au/education_training_and_support/guides/how_to_cite_your_sources/citing_your_sources_-_harvard_style. Other recognised referencing systems are equally acceptable.

EndNote is a very good system for building up a database of references. Not everyone will want to invest the time in using this system but you should consider it if you intend to build up resource materials or plan to undertake extensive research in a particular area. The library staff have also developed a tutoring package: ‘A Quick Guide to Using EndNote’ which provides the basics for using EndNote with an essay http://libguides.library.uwa.edu.au/endnote

Appeals against academic assessment

In the first instance, students are strongly advised to talk informally to the lecturer about the grade awarded. The University provides the opportunity for students to lodge an appeal against any mark which he or she feels is unfair. Any student making an appeal is under an obligation to establish a prima facie case by providing particular and substantial reasons for the appeal. It is recommended that students contact the Guild Education Officers to aid them in the appeals process.

There is a 20 day time limit for making any such appeal. An appeal against academic assessment may result, as appropriate, in an increase or decrease in the mark originally awarded. The University regulations relating to appeals and the form on which the appeal should be lodged can be found at http://www.secretariat.uwa.edu.au/home/policies/appeals