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Risk ON AIR

Episode 53

Employment Law: Unique Risks and Practical Tips

Intro

This is Risk on Air, and today we're talking about employment law.

Julian: Welcome to Risk on Air. I'm Julian Morrow. Today we're talking about employment law and risk management, and I'm very much looking forward to it because back in ancient history, employment law was the area that I practiced in before managing the risks associated with me being a lawyer by leaving the profession and going on to manage risks poorly elsewhere.

But it's a great pleasure to be discussing this subject with Nathan Keats today, not only because Nathan co-chairs the Employment Law Committee of the New South Wales Law Society, but also because he's the principal lawyer at McNally Jones Staff, which is the new name of my old firm. So if I'd stayed, Nathan would probably be my boss now. But Nathan, here we are together on Risk on Air.

Welcome.

Nathan: Thank you very much, Julian.

Julian: Now, employment law. For some people is the bread and butter of their daily work, but for others it only comes up occasionally. What would you say are some of the biggest risks for lawyers to be aware of when approaching a matter that deals with employment?

Nathan: I think the first one would be that timeframes are somewhat shorter than they are in other jurisdictions in other areas of the law, particularly when it comes to matters like a person's employment's come to an end.

Employees only have a very short period of time, like 21 days, to have something lodged in a court or tribunal to address those sort of concerns. Another issue would be getting some proper instructions from the client as to what's happened. Is it a conduct matter? Is it a capacity matter? Is it a performance matter? Is it something else, like an injury matter? There's a myriad of things that can fall into the bucket of employment law. So, getting a good grapple of what that is, and then the usual requirement for good record keeping as to how you've recorded what you've learned from the client in terms of instructions, what advice you've given. And I find that, because the timeframes are so short, if you don't get instructions, then and there on the moment, it's important to send back something like an email to the client so that they know where they stand, what instructions the client gave you, and that they now are fully aware and there's no dispute that you told them about the 21 days.

Julian: What happens if you miss the 21 days?

Nathan: Well, if it's an unfair dismissal or general protections claim, so you're in the Fair Work Commission system, you need to apply for an extension of time. It doesn't matter whether that's you're one minute late or whether you're 100 days late, and you need to establish something called exceptional circumstances. If you're an employee that's in the New South Wales system, for example, you're employed by a government agency, your action goes to the Industrial Relations Commission in New South Wales. Your 21 days is still there. But rather than exceptional circumstances, you have to establish special circumstances, and the difference between the two is it's a slightly higher bar for exceptional than it is for special.

But you need to be aware that if you're late, you're late. So even if you're two minutes late, you still need to run a claim applying for an extension and you need to establish exceptional circumstances. So there was a case some time ago where the person was lodging their claim and the payment system was slow and they had to explain why it took them an extra two minutes to get that lodged. In that case they actually got time extended because it was out of their control. But there's been other times where people have been just 144 minutes late and they had technical difficulties logging onto the system and the commission said that's not an exceptional circumstance. I'm sorry, you're late. Time not extended. Case dismissed.

Julian: So the 21-day deadline for filing an unfair dismissal application, obviously crucial for people to be aware of. Are there important timeframes to consider at the other end of the employment relationship, when you're hiring, not firing?

Nathan: Well, typically when someone hires someone, they'll put them under a probationary period. It gives a contractual reason to bring unemployment to an end, but consideration needs to be given to the fact that that doesn't mean if you get sacked in probation you're necessarily prevented from bringing an unfair dismissal case. If you're employed by a national system employer, you won't find probation sitting in the *Fair Work Act*. You'll find something called minimum employment engagement and depending whether there's less than 15 employees, in which case you've got to have been there 12 months, or you've got the other side, more, in which case you've got to have been there six months, that's the period of time that's relevant that you need to have as your minimum service before you can bring in time.

Julian: And already, Nathan, from what you've said to us, it's also going to be important to be aware of what jurisdiction you might be in. You've talked about the Fair Work Commission, a federal body, and then also there's the state bodies as well. What range of possible jurisdictions do employment matters fall into, and how do you go about getting the right instructions on those sorts of things?

Nathan: Well, there's a very broad range of places employment matters can end up into. So if I could start with a category of termination cases, you've got people employed by someone who's a national system employer. They are the vast majority of employers. A national system employer is one where either the employer is a constitutional corporation so it's a trading, financial or foreign corporation, being the starting foundation block of the *Fair Work Act*, or the state has referred their employment powers to the federal government in relation to their employees for other entities, such as partnerships. On a practical level in New South Wales that means that unless you're employed directly by the New South Wales government, you're employed in local government, you're in the federal system. There's a couple of exceptions where there are orders made that, if you like, specifically say this entity is in this one or that one. It's a different kettle of fish in Victoria, it's a different kettle of fish in Western Australia. So then you can have an unfair dismissal case. You're running that in the Fair Work Commission. You're running a general protections case in the Fair Work Commission, or you might have started one before you were terminated, sought an injunction. You've gone up to the Federal Court of Australia in relation to that termination. Of course you might be just upset that the terms of your contract haven't been complied with. Those are the terms of the termination, and you might be in a common law court depending on how much money is involved. Up to $100,000, local court, a bit more, district court, a bit more. Again Supreme Court. Of course, the termination might be a repudiation Again Supreme Court. Of course, the termination might be a repudiation and the issue for you as an employee might be I want to go run out and be a competitor and I want to then talk about whether or not there's a repudiation, whether I'm bound by restraints and you might end up in the Supreme Court for that. There might be an underpayment claim. You might end up in the Federal Circuit and Family Court of Australia for that. It might be a large amount of money, you'll be in the Federal Court.

It might be a discrimination matter. You could take them federally through the Australian Human Rights Commission and end up in either of the Federal Courts. You could have instead taken your discrimination matter to the Anti-Discrimination Board under this state legislation, the *Anti-Discrimination Act* and end up in the New South Wales Civil and Administrative Tribunal. You could, though, be employed by a New South Wales public sector entity or a local council, and you might be running your case in the Industrial Relations Commission of New South Wales. You might be a type of public servant who's allowed to bring a public sector disciplinary appeal to challenge your termination again in the Industrial Relations Commission of New South Wales, and I, unfortunately, could go on. There are more places that you could also take such employment claims. There's just a variety of places depending on the nature of the claim. We haven't touched on, for example, bullying claims. We haven't touched on cases where you suffer an injury and there's issues about returning you to work, whether that goes to, for example, a different place again.

Julian: That's worth mentioning. I suppose in that context that recent changes to the New South Wales industrial relations laws mean that bullying is now a specific jurisdiction of the Industrial Relations Commission in this state.

Nathan: That's correct. We've had an anti-bullying or stop-bullying jurisdiction federally for some time, since about 2014.

They could only make orders to stop the bullying. One important exception in relation to working out whether the entity that it has engaged you as an employer is a national system employer is in relation to the stop bullying jurisdiction, where the important thing to work out is not whether they're a national system employer, but whether the person is a worker for the purposes of the workers' health and safety legislation, which is a much broader category of category of person, and it even includes volunteers. But now there's new legislation that will give for New South Wales public servants and those other groups that are in the state system, a right to seek compensation up to $100,000, if they have been bullied at work. They've also brought in new jurisdictions to deal with sexual harassment cases and that's where there's a new jurisdiction that industrial disputes could extend to deal with return-to-work issues if you're having an issue with your employer about returning to work after a workers' compensation principal injury.

Julian: Let's talk more about getting instructions from the clients then, because so far we've talked about employment, but it can be the case that the relationship as your client understands it might not be the way a court sees that relationship. The traditional distinction between employees and contractors is pretty hard to define sometimes. What sort of issues do you need to be aware of when taking instructions in terms of identifying exactly what the relationship that's being considered is?

Nathan: Well, the starting point is always to look at what the paperwork looks like.

That typically tells you what the parties thought they were doing. So that would typically give you the entity on one side that's supposed to be engaging the other party and that usually tells you whether they consider the arrangement to be an independent contract arrangement or that of employment. So that's the starting point. The next thing to talk about is how the relationship has worked out, and recent amendments of the *Fair Work Act* have made it clear that we've gone back to the old common law system, that how the contracts actually work out in practice is what the court needs to look at.

We've had a short period of time where there was priority of contract over everything.

That's passed and we're now back to how did things work out and what are we looking for mainly? There's a whole series of indicia, but the most powerful one is control about the how you do the job. Not necessarily the when or what tools you use, but that control about how it's done. So you really need to get clear instructions about what the average day looks like. How does work come to you? How do you know the next day that you've got work to do? Is it just you're given a piece of work, you finish that, you wait for the next one? That's leaning towards being a contractor. Or is it every day? You get paid the same amount each time, get the same rate of pay each time and there's ongoing work and it's always there? Well, that's going to lean towards being an employee.

Notice I'm not saying either of these things are definitive. There's a whole shopping list of things you look at about how people are paid. What happens when they're unwell? Do they get paid some sort of personal carer's leave, or is it unpaid time? Do they get things like annual leave, long service leave? Have they been paid some sort of daily amount that covers everything? Who provides the tools? Do you have to provide your own premises and unfortunately there's a long list and sometimes it's finally balanced.

And there was the High Court case some time ago of *Hollis v Vabu*. It really comes out of an injury where this person was riding a bicycle for a courier company and he got injured quite badly and it appears the thing in terms of the list of indicia that tipped the scales was he was wearing the livery or the uniform of the entity that was saying look, they're just a contractor. And the High Court looked at everything else. Everything was quite finely balanced, in fact the Federal Court, full court else, everything was quite finely balanced. In fact, the Federal Court, full court, had said he was not an employee and the High Court said, no, we're going to find that they are an employee.

Julian: It really does underscore the importance of asking the sorts of questions that will draw out information and getting documents as well, to clarify exactly what the parties understood of the relationship, but also how an independent tribunal looking at it might see things a little bit differently. We've talked so far mainly about, I suppose, situations involving termination of employees. There's a myriad of issues that can arise in a workplace, and sometimes they're while the employment relationship is still on foot. Let's take a scenario of an allegation of misconduct of some kind. I'm sure there'll be many practitioners out there listening who've had a phone call from someone who is ringing the lawyer just to check it's okay to sack someone. If you get a call like that and they want to do it right there, what advice would you give to the lawyer about how to deal with a situation that the client is wanting to deal with urgently and has probably made up their mind on?

Nathan: I'd first tell that person to explain to me how they are satisfied that the misconduct has occurred. And in asking that question I'd ask, have you asked them whether they did it or not? It's a fundamental part of natural justice that I get given an opportunity to give their side of the story. It might appear to you, as the employer, that it's obvious what's happened. You might say I have the CCT footage of someone taking money out of the till. I know they've stolen it and that might be true. But I'd say pause, think about writing a show cause letter first. You might find out that there was a valid reason for that money coming out of the till and you don't know that as an employer until you ask. So it's important that you don't get blindsided after you sack this person. They are aggrieved, they've taken it to a commission to challenge that termination and you find out for the first time, because you didn't ask beforehand, that there was a valid reason and there's a mistake that's been made in terminating that person's employment, because you might wear reinstatement with back pay and continuity of service or you might wear some compensation after 26 weeks.

Julian: So that's a situation where I suppose you've got the advantage of receiving the call or the request for advice before a critical decision has been made. What if the call comes a little bit late and, all of a sudden, the situation which you as a lawyer look at and might think this is problematic, how do you deal with managing a client in that situation? I suppose this is the challenge of giving difficult news to clients and also explaining to them how an Industrial Court might look at things differently from the way an employer might.

Nathan: Well, I believe there's no point sugarcoating it. You give the frank and fearless advice. That's what lawyers are here to do. So if they really don't know, you tell them look, it's your obligation when you get to the commission to prove the misconduct occurred. Nothing you've told me so far establishes that sufficiently, and you might find that in the proceedings there might be a finding that you've unfairly dismissed this person. There might be a remedy imposed on that you don't like, and go through what that might look like. Explain to them, though, that there is a two-stage process. There's a conciliation phase followed by an arbitration phase, and you might think quite strongly about how you might approach conciliation and whether or not you might be prepared to offer some more money than you might otherwise if you'd followed the process, if nothing else to pay for the period of time a proper process might have taken, but maybe, in addition, for the unfairness of that decision.

Julian: When you get a request from a client in a situation of distress, it's natural to want to help, but there can be situations where helping or inserting yourself into that scenario can become a problem for both lawyer and client. Are there circumstances in which you need to actually just step back and think about whether, in fact, you should be acting?

Nathan: Look, you've always got to take care that you're not conflicted, that you feel that you've got sufficient expertise to deal with the issue, and you also need to make sure that you're not so personally invested that you can't see the law for what it is, as opposed to, if you like, siding with your client because you want to be their friend. That's not the role of the lawyer, in my view.

Julian: It can get tricky also when you have been acting for a company, but then the person that you've been dealing with asks you a question more in their capacity as an employee having a problem with their company. What do you do then?

Nathan: Well, it will depend on where they are in the organization and what's happening. So if you are taking instructions from the Chief Executive Officer and otherwise the board on matters, and then the board comes to you and says we'd like to set up a process for disciplining and potentially removing the CEO, you might well have to say look, I can't act for either the CEO or the board because you're so closely interrelated with both those parties.

Julian: So not just one. You've had situations where really you can't act for either.

Nathan: Yes, I've had situations where I've walked away from both. I've also had situations where I've said, look, I act for the business, I've got instructions from the business, I can't act for the individual. That happens quite a lot. For example, I do the employment work for the unions that our firm acts for, and so when the leadership's there and saying to you, we're going to terminate industrial officer Y, who's been giving you instructions for the last few years, well then you help the leadership of the union go through the steps to make that happen.

Julian: Okay. So there are times where it's better, in fact required, not to act, and potentially for both parties, and you've had that yourself, Nathan. Are there particular red flags that listeners should be aware of that lead to that question of whether to act and that can be decisive in deciding how you deal with it?

Nathan: Look, there's a variety of things that might be red flags. For me, things like they've had multiple prior solicitors act for them and not willing to explain why they've left the earlier solicitors. It can be they don't want to talk to you directly, but please talk to my friend or a member of the family on my behalf. I don't take instructions other than from the client directly, because they weren't there. They don't know the full context of what occurred, and you might get a colourisation of the facts. Another big one for me is when they're very cagey about answering direct questions, that for the lawyer it's very seminal to what you're doing. They don't think it's very important, so they're trying to gloss over it, move past it and you come back to it several times and they still haven't answered that question.

It just leaves a sense of unease that there's a story that hasn't yet been told that you need to know and you're going to be blindsided by it if you turn up in a court situation without that information. And in those cases I will say look, I'm not prepared to act for you. And sometimes they'll say to me look, but you're a solicitor, you have to act for me. And I say actually no, I don't. I say I'm not a barrister, I don't have a cab rank rule. I can pick and choose which cases I take and I choose not to take your case.

Julian: What about if you have more than one employee wanting you to act for a group of employees, not a class action, but more than one employee wanting you to act against a particular employer? Does that pose complications for the prudent employment law practitioner.

Nathan: Well, for me, you don't see them all together. That's number one, because there might be contamination of evidence. They might end up being witnesses in each other's case, depending on the commonality between them. I also find that there's always going to be different things for each person, whether it could be just how long they were employed, their level of seniority in the job, precisely what their involvement was in the alleged conduct. So for those people I say yep, happy to see all of you. I'll see you all separately and you all have separate cases. It may be that we run the cases sequentially, so we get a block of time before the same member of a tribunal. In fact, we're talking about that in a series of matters currently where five people have been terminated all for the same conduct. But we're treating them all as separate cases. They're all run on their own terms because those nuances will be what determines which one is successful and which one's different, even though the conduct might otherwise seem the same.

Julian: Nathan, would you say that there are different risks associated with advising employers as opposed to employees?

Nathan: The risks are slightly different. I do work for both the employers and employees. For employees, there's just personal reputational risk. At the end of the process there's going to be a public decision if you don't settle your case along the way. It might say that you're fully vindicated, but the judgment will say also all the things that you've been accused of that have been found not to have been established before the tribunal and anyone can now Google that without too much difficulty.

For organisations, yes, there's the reputational risk, and there it's not just the individual's reputation, it's the organisation's reputation, it's the branding of the organisation, it's how they position themselves in the marketplace as an employer of choice. It can be quite damaging to find that you've allowed a situation to permeate for a while where people have been bullying each other or there's been a sexual harassment that's been condoned in the workplace. Those sort of things can do a lot more than just simple reputational damage. That can really damage brand.

Julian: That's fascinating. So reputational risks in two different types of senses. What are some of the challenges of dealing with a client who is trying to get vindication or some sort of response when they feel that they've been treated poorly, and you're both trying to achieve that result for the person but also have to manage the way they engage with the process?

Nathan: It's important to remind clients that we have a legal system, there's a framework that exists there and that framework is not perfect and there are often situations where people are quite rightly aggrieved.

Something quite unfair and discriminatory has occurred to them but there's no remedy available to them in the law or the remedy is quite inadequate. So if we go to something like discrimination law, if you go back not that long ago, probably, let's say about 15, 20 years, you'd have people being very seriously sexually harassed in the workplace, inappropriate touching of the most severe kind, and they're getting five figures from courts and we have judges saying that's the range that's acceptable for these matters. Now, for that sort of conduct, that's very small money. It's been recognised in more recent time that six figures, with something like a one at the front or higher, is much more appropriate for that sort of conduct and a very clear message needs to be sent that this should not be tolerated in a workplace at all, and we've now even got positive duties in relation to preventing sexual harassment in a workplace. So remedies move at times, but at times they're going to be saying to a client this is the remedy. I'm sorry it's quite inadequate, but that's what you can obtain in these proceedings.

Julian: So that's management of expectations in terms of the reward outcome. What about factoring into that assessment also the way costs work in employment matters?

Nathan: Well, just take a matter I saw someone this morning about. She's been made redundant from a very large multinational. She's not been paid her severance pay. She's entitled to about seven weeks severance pay. So what is her right? Her right is to start proceedings for breach of the national employment standards, claim a contravention of the legislation. She's entitled to both her severance pay, interest and a pecuniary penalty. She can't recover her costs unless she somehow falls into one of the very narrow exceptions in 570 of the legislation. She's on a very small salary. The amount of money involved is going to be, by the time it gets out of the tax man's hands, about $6,000. Her legal fees are going to swamp that. So yes, she has a legal remedy, yes she's entitled to it, but economically she's going to be worse off if she starts those proceedings.

Julian: What's the best way to have a conversation like that with a client?

Nathan: Be upfront and frank about it. Explain this is what the legislation is, this is what your rights are, this is what your costs are going to be. You need to be aware that, yes, you're going to win, yes, you're going to get the money that you asked for and entitled to, but financially, you're going to be worse off. You need to work out whether that's where you want to be.

Julian: Nathan, you mentioned record keeping, obviously crucial for the solicitor to make sure that they've taken good file notes and then confirm these things in writing as well. But I suppose we're all living in a time now where the records that are kept about us are far more prolific than they ever were, whether it's video surveillance or the capacity to review people's conduct on devices, company-owned or individually-owned. What sort of challenges do the technological records pose when you're looking at what material can and can't be used in an employment manner?

Nathan: Well, under the *Workplace Surveillance Act* there's notice requirements that if an employer wishes to conduct surveillance, whether it's by recording footage or recording the email traffic sent by an employee, there will need to be under section 10, notice given about this is what's going to happen, this is how it's going to happen and so that people are on notice of what's happening. That can raise issues about whether evidence is properly obtained or not, because maybe they didn't have a proper basis to either do that audit of email or record that footage. Having said that, if you end up in a commission Fair Work Commission or the Industrial Relations Commission neither are bound by the rules of evidence. So the strictures that might otherwise apply to a court about that's definitely out because it's not properly obtained, don't apply, and it's more of a consideration about its probative value in the proceedings versus how it's been obtained. And that can lead to sometimes improperly obtained material being let into evidence when you otherwise might think, well, they didn't get the right way, it shouldn't have gone in.

The other problem that comes is just the sheer volume of material. You can have a situation where the footage takes six hours to look through because on one occasion, over one day, a person's conduct's in question and that might have to be played before the court or tribunal. It could take up quite a lot of court time. It also could take quite a long time to work out what's on the footage. You might have to go through it frame by frame. That's a lot of time and expense involved in working out what happened.

In terms of emails, we are prolific users of email systems and when a call for discovery comes or a call for a subpoena comes, for all emails in a period of time, you might get more than you bargained for in terms of the sheer volume of material, and that can take a long time to find exactly what it is that you're looking for and give rise to allegations that the request for the material is oppressive. It's going to cost too much to produce it. So there's a number of things that unpack from that, but the starting point usually is if it's on something public, like social media is one of the things that was in the list of items you could look, it's fair game.

I've had a case where a person was a youth officer at a juvenile justice center. They were accused of using inappropriate hold when holding a person in detention to stop them from lashing out physically against the youth officers. The first question asked in cross-examination was "are you a cage fighter?" The answer was yes. The footage showed that the relevant hold that he was accused of and wasn't approved was one in the footage as a cage fighter – not helpful to his case.

Julian: That actually raises another interesting issue. Nathan how clear is the line between conduct that is work-related and conduct that's not? It's a little fuzzy.

Nathan: So the seminal case remains *Telstra v Rose*. It's a decision of the then Vice President Ross back in about '98. And it set out a series of broad principles as to when something is done in the work premises work-related, easy to understand that it's work-related to the office party, the office conference that's held off-site.

Julian: And that was the situation in Rose, wasn't it?

Nathan: Well, it was a conference that was off-site. Two people had consumed a bit of alcohol. There was an altercation between these two people and a decision made to terminate one of them. The question was is that out of work conduct or was that work conduct? And one of the principles that comes out of those cases is how does the conduct reflect upon the business? If it's going to somehow adversely affect the business, well that's an addition that suggests that's work-related conduct. But we've talked about emails a moment ago. Let's say we're late at night, we've had a little bit too much alcohol, we're feeling a bit aggrieved about something that happened in the workplace during the day. We pick up our work phone, we use our work email, and we send an email. It's 2 o'clock in the morning, we've had too much to drink, we're not thinking clearly, but we've just attached ourselves to a work device, we've used the work IT infrastructure, we've said something inappropriate to a work colleague. We've suddenly dragged ourselves back into work even though we're at home, otherwise enjoying ourselves.

Julian: Yes, Nathan, plenty of potential complications, all sorts of grey areas in the realm of employment law. All the more reason to be making sure those instructions are detailed, taking good records and confirming things with clients. Thank you so much for speaking with us on Risk on Air.

Nathan: My pleasure.

Outro

Thanks for listening to Risk on Air by Lawcover and to stay up to date, join us for the next episode on current risks in legal practice.

Resources:

Hollis v Vabu Pty Ltd - [2001] HCA 44
B. Rose v Telstra Corporation Limited - 1444/98 N Print Q9292 [1998] AIRC 1592