Duty to comply with lawful and reasonable directions

Last reviewed: March 2020

Authored by Joanna Morgan, Associate, and Alannah Hogan, Lawyer, Corrs Chambers Westgarth. Updated by the LexisNexis Legal Writer team.

What is the duty to comply with lawful and reasonable directions?

There is a term implied in law in every contract of employment requiring an employee to obey the lawful and reasonable directions of their employer. This term goes to the root of the employment contract, and gives effect to the right of employers to exert “control” over employees — which is a key determinant of the existence of a contract of employment. See *Employer/ independent contractor distinction*.

The ability to issue directions enables the employer to manage the performance of work, as well as the employment relationship by determining:

- what the employee is required to do in the course of their employment;
- how the employee is to perform work under the contract;
- when the employee is required to perform work under the contract; and
- where work is performed under the contract.

Some examples of the types of directions that might be given by an employer to an employee include a direction to:

- participate in a workplace investigation;
- undertake a medical examination for the purpose of assessing fitness for work;
- comply with work health and safety laws;
- stay away from work or work from home to prevent the risk of exposure to, or spread of a contagious illness;
- report misconduct;
- prioritise projects in a particular way; and
- adhere to a dress code.

The implied duty imposed on employees to obey lawful and reasonable directions is subject to any express terms of the employment contract relating to the scope, nature and content of the contract; and is also subject to the effect of any applicable workplace instrument (such as a modern award, enterprise agreement or workplace determination), or statute.

Breach of the implied duty will constitute a breach of contract. Such breach is commonly characterised as "misconduct". Depending on the nature of the breach, it may provide a valid reason for dismissal of the employee under the *Fair Work Act 2009 (Cth)* (FW Act), or summary dismissal if the breach amounts to ‘serious misconduct’. Alternatively, the employer may decide to discipline the employee or take no action at all in relation to a breach.

Can employer policies constitute a lawful and reasonable direction by the employer?

Employer policies can constitute a lawful and reasonable direction to employees as to the manner in which they are

to perform their obligations under the contract. Failure to comply with employer policies may be regarded as a breach of the implied duty of obedience.

Employers frequently try to give substance to the duty to follow lawful and reasonable directions by requiring that employees observe the terms of the employer's policies and procedures as varied from time to time. This can be legally problematic in some instances, but can also be a useful way of introducing flexibility into the employment relationship, provided that the relevant contractual provision is worded in such a way as to avoid the impression that the employer is being given the capacity unilaterally to vary the terms of the contract. See *Employer policies*.

The taking of disciplinary action against an employee for non-compliance with a policy will be easier to defend if the employer can demonstrate that it has communicated the policy to the employee and the employee is aware of the potential sanctions for breaches of the policy.
References: *Kolodjashnij v Lion Nathan T/A J Boag and Son Brewing Pty Ltd [2009] AIRC 893*

What is a "lawful and reasonable" direction?

The general view is that employees are only obliged to follow directions that are both lawful and reasonable. Refusal by an employee to comply with an unlawful or unreasonable direction will not justify the employer taking disciplinary action and less still provide a valid reason for dismissal: *Austal Ships Pty Ltd (unreported, AIRCFB, Ross VP, Drake DP, Dight C, 13 August 1997)*.

What is required for a direction to be 'lawful?'

The 'lawfulness' of a direction does not depend upon the existence of a discernible, positive rule of law supporting the direction. A direction will be lawful to the extent that it falls within the scope of the contract of service and involves no illegality.
References: *Grant v BHP Coal Pty Ltd (No 2) [2015] FCA 1374*

The scope of an employee's employment is determined by the nature of the work the employee is engaged to do, the terms of the contract, and customary practices or the course of dealings between the parties. Only in exceptional circumstances will directions concerning the out-of-hours activities of employees fall within the scope of employment. See Limits on the obligation to comply with directions below.
References: *King v Catholic Education Office Diocese of Parramatta [2014] FWCFB 2194 , [27]*

A corollary of the duty upon employees to obey lawful and reasonable directions is the ability to refuse to carry out directions that are unlawful (or unreasonable). This would include a direction to:

- engage in unlawful behaviour, such as anti-competitive conduct, tax evasion or breach of occupational health and safety legislation;
- do something dangerous that would create a risk to their health and safety (eg exposure to a contagious illness) or that falls outside the scope of the employment;
- do something contrary to a workplace instrument (eg to work a pattern of shifts that is different from that set out in, or fixed in accordance with, an applicable enterprise agreement, or to provide a medical certificate other than in circumstances specified in an agreement); and
- act in a discriminatory manner (eg in breach of anti-discrimination legislation or the "general protection" provisions in *Pt 3-1* of the Fair Work Act 2009 (Cth) (FW Act)). See *Introduction to anti-discrimination laws* and *Introduction to the general protections*.

What is required for a direction to be 'reasonable'?

The question of reasonableness does not demand an assessment of the merits of the direction per se. The employer does not need to demonstrate that the relevant direction was the preferable or most appropriate course of action or in the best interests of the parties.
References: *Briggs v AWH (2013) IR 231 159; [2013] FWCFB 3316*

Rather, what is reasonable in the circumstances is essentially a question of fact and balance and there may be a range of factors that are relevant including:
References: *CFMEU v Glencore Mt Owen Pty Ltd [2015] FWC 7752*
R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and O'Sullivan (1938) 60 CLR 601; *BC3890103*

- the express and implied terms of the contract;
- the nature of the employment;
- established custom and practice in the workplace, trade or industry; and
- the terms of relevant instruments (eg a modern award and enterprise agreement), and any applicable legislation.

Case example *— Grant v BHP Coal Pty Ltd [2017] FCAFC 42*

The Full Federal Court held that an employer acted reasonably in directing an employee (a boilermaker) to submit to an assessment by a specific medical practitioner after a prolonged absence from work with a shoulder injury.

The employer identified a potential risk arising from the employee's return to work – namely the potential harm to the safety and health of the employee and others because of his injury. The court found that in these circumstances the employer was authorised to direct the employee to attend a medical assessment by the relevant work health and safety laws which required the employer to take any reasonable and necessary course of action to ensure than no one was exposed to an unaccepted level of risk.

Are there limits on the obligation to comply with directions?

Directions must be within scope of contract

Employees are not obliged to comply with a direction to perform work or carry out duties or activities that are outside the scope of their employment, notwithstanding that the direction might otherwise be reasonable.
References: *Commissioner for Government Transport v Royall* (1966) 116 CLR 314; *BC6600780*

However, an employee will be obliged to comply with a direction to perform work or engage in activities that are incidental to the work to be performed under the contract and will be obliged to perform work using new technology (subject to any contrary instrument or obligations to consult in relation to workplace change).
References: *Creswell v Board of Inland Revenue* [1984] 2 All ER 713

The question of whether a particular direction will be regarded as falling with the scope of the contract is one of fact and degree. There are no hard and fast rules.

Practice Tip: Where there is a perceived need for flexibility in a business, job descriptions and contracts of employment should include an express obligation on the employee to perform such other duties as the employer may reasonably direct from time to time. This helps limit the possibility that a direction to perform other duties would be regarded as falling outside the scope of the implied obligation.

Practice Tip: Where it is anticipated that certain changes are likely to occur in the course of an employment relationship, it is prudent to expressly refer to these in the contract of employment. For example, where it is anticipated that an employee will be required to work at alternative locations, it is better to include express provision to that effect in the employment contract rather than relying on the implied duty of obedience to directions.

Implied obligations will operate subject to express terms

An employee's duty to obey directions of the employer is limited by the express terms of the employee's contract and any other relevant workplace instrument (such as a modern award, enterprise agreement or workplace determination). This means that, for example, where an employee's contract of employment states that the employee will be required to work Monday to Friday, it would not be lawful or reasonable for the employer to direct the employee to work on Sunday; although, the employer could, of course, request the employee to do so (see the discussion on requests to perform reasonable additional hours in *Maximum hours of work under the national system*).
References: *Honeyman v Nhill Hospital [1994] 1 VR 138*

Similarly, if a contract of employment contemplates that work will be performed at a particular location, then absent any express provision in the contract or an applicable industrial instrument, it is unlikely that the employer will be able to direct that employee to work from another location.
References: *Re Rubber, Plastic and Cable Making (Consolidated) Award 1983* (1989) 31 IR 35, 48-50
Australian Colliery Staff Association v Queensland Mines Rescue Service (1999) 88 IR 78; *[1999] FCA 395*

Practice Tip: When issuing a direction to an employee it is important to ensure that the direction does not misrepresent the employee's rights and duties under their contract of employment or a modern award or an enterprise agreement. Failure to do so can create exposures to actions for breach of contract, and under statutory provisions relating to unfair dismissal and general protections.

Employers have limited powers to regulate conduct outside of working hours

The law is generally reluctant to permit employers to regulate the conduct of employees outside working hours — whether through express direction, or impliedly (eg by treating behaviour outside working hours as constituting "misconduct").

Nevertheless, courts and tribunals may extend the reach of the employer's control in circumstances where the employer can be seen to be protecting legitimate interests, such as:

- promoting and maintaining harmony, productivity and safety in the workplace;
- ensuring that staff are not exposed to bullying, harassment or other forms of inappropriate behaviour in the context of work-related activities (even though they occur outside working hours);

  References: *GrainCorp Operations Ltd v Markham* (2002) 120 IR 253

  Farquharson v Qantas Airways Ltd (2006) 155 IR 22

  Rose v Telstra Corporation Ltd (1998) 45 AILR 3

  Streeter v Telstra Corporation Ltd (2008) 170 IR 1

- protecting the reputation of the employer, or an organisation (such as the public service) of which the employer is a part;

References: *McManus v Scott-Charlton* (1996) 70 FCR 16; *140 ALR 625*

- ensuring the effective conduct of the business; and
- ensuring the lawful use of company property.

As with directions issued during working hours, the question of whether an employer's control over employees extends beyond working hours and/or the workplace will be one of fact and degree. This includes the nature of the employer's business. For example, it appears that public sector employers will more readily establish a right to control after-hours conduct of their employees than most private sector employees because of the reputational issues involved.
References: *McManus v Scott-Charlton* (1996) 70 FCR 16; *140 ALR 625*

The capacity of the employer to issue directions in respect of out-of-work activity will also depend on any legal obligations applicable to the employment. Schools, for example, have a duty of care to protect students from wrongful behaviour by teachers (among others), which is not confined to school hours or the school premises. Further, a school may be held vicariously liable for the conduct of a teacher in the course of their employment. Therefore, it may be regarded as reasonable for a school to issue teachers with directions vis-a-vis their interactions with students outside school hours: see for example, *King v Catholic Education Office Diocese of Parramatta*.
References: *King v Catholic Education Office Diocese of Parramatta [2014] FWCFB 219*

Practice Tip: When contemplating disciplinary action against an employee for failure to comply with a direction in relation to after-hours conduct, it is important to ensure that the direction was appropriately tailored to the employer's legitimate interests.

Case example — *King v Catholic Education Office Diocese of Parramatta [2014] FWCFB 219*

A Full Bench of the Fair Work Commission upheld a school authority's decision to dismiss a teacher for wilfully disobeying an order not to transport students in his car outside school hours. The Full Bench was satisfied that the school had a legitimate interest in preventing teachers from finding themselves in uncompromising situations with students. This was especially so at the time given that the school was dealing with allegations of sexual abuse, including unfounded allegations against the particular teacher. Also operating to broaden the scope of the employment was the fact that the school had a non-delegable duty of care to protect students from wrongful behaviour by third parties, including teachers, which extended to conduct outside of school hours. In these circumstances, it was lawful and reasonable to issue the particular direction.

Employers can direct an employee during a period of personal/carer's leave

The terms of an employee's contract continue while they are on personal/carer's leave, including the obligation to comply with the employer's lawful and reasonable directions. In situations involving an employee's prolonged absence from work due to illness or injury, the employer may be able to direct the employee to attend a medical assessment to determine whether they are fit to work. The direction would be lawful per the employer's duty to provide a safe place of work, but whether the direction was also reasonable would depend upon the facts of the case.

Failure to attend a medical examination may be grounds for disciplinary action. However, the employer must be clear that the reason for the disciplinary action is the failure to follow a reasonable and lawful direction and not the exercise of a workplace right (ie taking personal leave) or else allegations of adverse action may arise.
References: *Swanson v Monash Health* [2018] FCCA 538; *BC201801730*

What are the consequences for an employee who fails to obey directions?

Breach of the implied duty of obedience is by its very nature a breach of the contract of employment, and in principle will attract the normal remedies for breach of contract.

This means that the employer could seek damages for any loss they have suffered in consequence of the breach. This rarely happens in practice because the employer may experience considerable difficulty in establishing that they have suffered significant compensable loss (*National Coal Board v Galley*); and even if the employer could establish significant loss, employees would rarely have the resources to pay substantial damages and associated costs (*Dinte v Hales*).
References: *National Coal Board v Galley* [1958] 1 All ER 91
Dinte v Hales [2009] QSC 63

More often, the employer will respond to a breach by either:

- declining to take action;
- disciplining the employee; or
- bringing the contract to an end by dismissing the employee.

The employer may decline to take action

Failure to take action in relation to an employee's disobedience of a direction risks giving the impression that the particular misconduct is condoned or tolerated in the workplace. Similarly, being slow to respond to an employee's breach may be seen as a form of acquiescence. If the employee is subsequently dismissed for the same or related misconduct, the employee may argue that their behaviour was acceptable practice in the workplace as evidenced by the employer's (historical) tolerance towards it, such that it was unfair to dismiss the employee in the circumstances (see *Pt 3-2* of the FW Act).

The employer may discipline the employee

If the employer decides to discipline an employee who has breached their duty of obedience — eg by imposing a fine or some other financial penalty, or by demoting them — the taking of such action will be lawful only if the contract of employment or an applicable industrial instrument permits the imposition of the sanction in question. Otherwise, the employer may find themselves exposed to a claim of adverse action (*Pt 3-1*, FW Act), breach of contract, or even unfair dismissal.

The employer may dismiss the employee

An employee's failure to follow a lawful and reasonable direction may provide a valid reason for dismissal. To warrant this course of action the particular direction must generally be shown to be fundamental to the contract of employment. However, a persistent refusal to follow lawful and reasonable directions may justify termination of employment even though each direction is not, of itself, significant.

An act of serious misconduct will, in principle, provide justification for summary dismissal. *Regulation 1.07* of the Fair Work Regulations defines 'serious misconduct' for the purposes of the FW Act as including an employee's refusal "to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment". A single act of disobedience can be sufficient to justify summary dismissal only if it is of a nature

which demonstrates that the employee was repudiating the contract or one of its essential conditions. In this regard, the employer's disobedience must be shown to have been wilful or deliberate. See *Summary dismissal*.
References: *Laws v London Chronicle Ltd* [1959] 2 All ER 285

It is important to appreciate that while an employer may have justification for dismissing an employee, if the employer acts harshly, unjustly or unreasonably in effecting the dismissal this may give rise to unfair dismissal under *Pt 3-2* of the FW Act. Two common scenarios in which an otherwise valid dismissal is rendered unfair is where the employer denies the employee procedural fairness in its investigation of the matter and where the method of dismissal is disproportionate to the misconduct. See *Unfair dismissal — Valid reason for dismissal* and *Unfair dismissal — Procedural fairness*.

Practice Tip: Where an employer wishes to take disciplinary action against an employee for failure to comply with a direction, it is a good idea to ensure that the direction has first been formally issued in writing.

Best practice

Before taking disciplinary action against an employee for disobeying a direction, the employer should consider the following:

- Was the direction lawful and reasonable?
- For directions contained in a workplace policy, was the employee required to read and acknowledge the policy?
- Was the employee made aware of the consequences of failing to comply with the direction?
- Has there been any inconsistency in the employer's implementation of directions/policies in the past?
- Would the proposed disciplinary action be proportionate in the circumstances?