

The fundamentals of economic necessity and enterprise essay



As the world aligns in becoming a capitalistically oriented international marketplace, the pendulum between the dichotomy of employers and employees is beginning to slow and find its mark. In whose favor the stroke will point remains a great curiosity for all yet to see. What is common to us all is the reality that money is the motive and success is the outcome.

How and to what extent a person achieves this is up to them. What is common however is that all workers need a boss and it is this fact that draws our attention for discussion. The question of do I employ or am I employed¹ is one that finds its roots in the fundamentals of economic necessity and enterprise. If I employ, I take on a risk in the desire to make a profit.

This is done through effectively combining the established sources of production: Land, Labor, Capital and Entrepreneurial skill. Often, success is determined based on the cost of the quality and quantity of labor deployed to combine these other sources. Conversely, if I am employed, I expect to be paid an agreed amount for the services rendered. The distinguishing feature between the two roles is that of the risk/return matrix- the higher the risk, the greater the return.

The simple fact is that as long as employers demand more of their employees, the risk also increases that staff may contribute to learning, developing and potentially exploiting such relationships which are accepted² as fiduciary in nature, thus undermining the objective of the matrix. At Common Law, the relationship between employer and employee originates from the traditional English Master and Servant principle that was essentially “ an extension of the law of family relations” ³ where servants often lived

upon their master's estates and hence were looked upon as part of the extended family unit. It is not surprising that still today, many employers attempt to create this family type environment in order to simulate family bonding characteristics such as feelings of belonging, security, encouragement and growth. However, the days are long gone when most employment contracts involved a personal relationship between the parties.

4It is important to clarify from the onset that the employer/employee relationship is formalized as a contract of employment like any other contract in that it has the same elements. To that extent, a contract of employment needs the existence the following basic elements:- (i) an offer of employment by an employer; (ii) the acceptance of the offer by the employee; (iii) consideration – wages / salary for work done; (iv) an intention to be bound to a legal relationship. However, unlike commercial contracts, an employment contract also contains a large number of implied terms, which are enforceable by the courts. These include duties by an employer to take care, provide work, act with trust and confidence and indemnify negligent acts of employees. Employees have corresponding duties to act with good faith and fidelity to their employer, obey orders, use care and skill, account for property, and answer questions.

The duty of mutual trust and confidence which is emerging in the common law but is still subject to much controversy is considered the extension of the employee's duty of co-operation and fidelity. Accordingly, this essay will explore the fiduciary nature and obligations between employers and employees which is addressed in Part A. Part B will delve into the good faith duty or the duty of fidelity which will address the range of obligations owed

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by an employee to protect the interests of their employer. This section will also canvass the fine line of how the courts assess these obligations both during and post employment with brief consideration to some of the limitations facing employers in their attempt to reinforce these duties through restrictive covenants.

In Part C we will identify the emerging duty of mutual trust and confidence from the United Kingdom that seems to apply the same types of obligations and responsibilities upon employers as a corollary to the employee's duty of fidelity which is slowly gaining acceptance here in Australia.