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INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER — 26-04-10/3

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INFORMATION STATEMENT FOR NEW EMPLOYEES

As advised in a previous newsletter all new employees engaged after 1 January 2010 must be given the attached information statement.

UNFAIR DISMISSAL UPDATE

There have been almost 2000 unfair dismissal applications already this year.

It is a fact that the period between when a dismissal takes place and when a hearing occurs can be many months and some of these following matters have taken over 6 months before they went to a hearing by the Fair Work Australia Tribunal.

When the Tribunal considers an application for an unfair dismissal application it considers amongst other matters the following issues:

What is an unfair dismissal?

i) the employee was dismissed; and
ii) the dismissal was harsh, unjust or unreasonable; and
iii) the dismissal was not consistent with Small Business Code of Conduct; and
iv) the dismissal was not a genuine redundancy.

Meaning of dismissed:

i) was the employee dismissed on the employer's initiative; or
ii) if the employee resigned their employment or was forced to do because of the conduct of the employer.

What is harsh, unjust or unreasonable?

i) whether the reason was valid and related to the capacity or conduct of the employee; and
ii) whether the person was notified of that reason; and
iii) whether the person was given an opportunity to respond to that reason; and
iv) any unreasonable refusal by the employer for the person to have a support person at any discussions; and
v) whether the person had been warned about the unsatisfactory performance before the dismissal; and
vi) the size of the employer's enterprise and the likely impact on the above procedures; and
vii) if there are human resources operatives of the employer; and
viii) any other matter considered relevant by the Tribunal.

THE FOLLOWING ITEMS ARE CASES HEARD BY TRIBUNALS AND COURTS

WHAT CONSTITUTES THE REDUNDANCY OF AN EMPLOYEE

Following a restructure of operations the employer determined that the work of four area managers could be performed by three and designated the work of the fourth employee to be performed by the three remaining employees.

The redundant employee made an application for unfair dismissal as the work they had been performing was being carried out by the other three employees and that the work remained to be done.

The Tribunal took the view that it does not matter whether the work has been distributed to other employers and that the test is "whether the previous job still exists" and in this case the employer proved that they had made a decision that they no longer wanted the job of the redundant employee to be performed by anyone anymore.

The application for unfair dismissal was dismissed.

Kerkeris – v - Hartrodt Australia Pty Ltd [2010} FWA 674 (19 February 2009)

The Issues

It was not the work of the applicant that had been made redundant it was the job of the employee that had been made redundant but the employer will be required to be able to substantiate that issue if an application is made and the reasons why the decision was made and will need to do that with evidence to prove the process and the reasons as to why a particular employee was chosen over others.

Our View

The evidentiary trail is imperative in any dismissal proceedings and employers must anticipate an application for an unfair dismissal and by having the evidence the employer is making a commercial decision to defend the matter at the least costs that it will incur.

NO REINSTATEMENT AFTER 33 YEARS OF UNBLEMISHED RECORD

The employee commenced work with the employer as a waitress in 1976 and worked her way up to become catering manager.

The employer conducted an investigation regarding employee involvement in board elections and found that the catering manager had e-mailed confidential documents including department reports, profit and loss figures, stock data, monthly sales comparisons and trading analysis for each venue.

The catering manager had e-mailed the information to her husband. The employer dismissed the employee for her actions.

The Tribunal accepted that the actions of the employee were deliberate and could have harmed the business of the employer but the Tribunal also accepted that the employee was motivated to help her husband.

The employee's representative submitted that there had not been procedural fairness in the dismissal process in that there was no record of a formal investigation into the matter, that there were no records of interviews or discussions and no proper particulars had been put to the employee.

The Tribunal took the view that this was an instance where the employee failed to appreciate the potential consequences of what had been done rather than intentionally attempting to harm the employer.

The Tribunal found that the employer had a valid reason to dismiss the employee but given the length of the employee's service and the unblemished record the dismissal was "harsh".

The employee sought to be reinstated and the Tribunal refused that application as the difficulty of establishing the necessary trust and confidence and the lack of other available positions of work with the employer that reinstatement was not an option.

The Tribunal advised that because the dismissal was harsh that it would have ordered the payment of 18 weeks compensation but as the employee was guilty of misconduct the amount was reduced to 12 weeks pay.

Delaney –v- Parramatta Leagues Club Limited [2010] FWA 1164 (22 February 2010)

The Issues

While the employee was guilty of serious misconduct that was proven the length of employment of the employee for a period of 33 years and no previous warnings had to be taken into account when the employee was dismissed.

One of the principles applied by the Tribunal in these matters is "a fair go all round" test.

Our View

While the misconduct of the employee was serious the employer should have taken into account the period of previous employment of the employee and perhaps a first and final warning may have been appropriate.

However in a practical sense the employer had to act to protect their business and operations and would appear to have been left with only a commercial decision to consider and at the end the employee is no longer employed and the other employees of the employer were put on notice that such behaviour would not be acceptable to the employer.

The evidentiary trail or lack of it is also exposed in this matter and employers are advised that the documentation and evidentiary trail is critical in these matters.

DISMISSED FOR ABUSIVE LANGUAUGE

The employee was dismissed because of abusive actions and threatening behaviour towards a contract cleaner.

The employee filed for an unfair dismissal that the dismissal was harsh, unjust and unreasonable.

The employee was packing and the contract cleaner walked past with the supervisor and a verbal exchange took place and the contractor walked away.

The exchange was not dissimilar to previous conversations between the employee and the contract cleaner however on this occasion it was in front of the supervisor.

The employee then challenged her comments and then followed the contract cleaner and the supervisor and both the employee and the contract cleaner continued swearing and abusing each other.

The employee then left his work area and followed the contract cleaner and supervisor and continued the abusive language and came up to the face of the small woman and some pushing occurred which was viewed by the Tribunal as an act of provocation.

The Tribunal held that standing face to face in front of someone provoked the violence and if the employee had not left his work station and not followed the cleaner then the violence would not have occurred.

The Tribunal took the view that the actions of the employee amounted to workplace violence.

In investigating the procedure the Tribunal found that the applicants dismissal was not harsh unjust or unreasonable and the application of the "fair go all round" principle.

Ghirocian -v- J Blackwood & Sons Limited

The Issues

The act of following the contract cleaner established the moment intent of the employee to engage in the abuse of the contract cleaner.

That abuse lead to some physical altercation that could have been avoided and settled in a number of other methods.

Our View

Abusive language between work colleagues is not a new phenomenon but threats and abuse and abuse are not to be tolerated by an employer as they create a divisive workplace.

An employer must have a process where employees can bring allegations of abuse to the notice of the employer and that it will be dealt with even if it means no further contact between the employees other than for work requirements.

The legal issue is if an employee is threatened with physical harm by another employee and the victim believes the other employee will carry it out it is an assault at criminal law.

The other legal issue is the assailant must take "the victim as they find them" and it is the circumstances of the victim that are at issue.

FAILURE TO REACH BUDGET WAS NOT THE REASON FOR DISMISSAL

The sales representative commenced employment in February 2008 on a base salary and according to the

contract was to achieve sales of $10,000 per week and to receive a 17% commission on those sales.

On 10 September 2009 the sales representative's employment was ended.

The employee filed for unfair dismissal on 7 October 2009.

At the hearing the employer stated that the employment was ended because the employee had failed to reach budget since January 2009 and the employment ended after consecutive months of poor performance.

The employee submitted that her employment was ended as a result of her enquiries of the employer as to the failure of the employer to make superannuation payments.

After the employment was ended the employer made the superannuation payments and advised that they had previously forwarded the payments to the wrong place.

At the hearing the employer and the employee agreed that they had sales staff meetings on a Monday each week and a further review on the following Wednesday.

The employer advised the Tribunal that he had not given the employee a written warning about her performance as in his experience that a written warning to sales staff de-motivates them and they are usually gone in 4 weeks if not earlier.

Further the employer could not produce any documentation or any record of an actual conversation where the employee was advised that the employer was considering the termination of her employment.

The Tribunal in applying the principles outlined at the start of this newsletter as to the process required when dismissing an employee found that the dismissal was harsh, unfair and unreasonable and awarded the employee 4 weeks pay.

Spencer –v- Local Blue Pages FWA [U2009/12351] 23 March 2010

The Issues

The failure to reach budget and sales revenue was a contributing factor the ending of the employment but the lack of an evidentiary trail by the employer in effect lost the case.

Our View

While it can be argued that the amount awarded to the employee was not significant in being 4 weeks pay the fact is the submissions had to be prepared, the evidence had to be prepared and while that is being carried out there is significant time of work lost to the employer. That is a direct cost as a result of not having the evidentiary trail.

Then there is the period of time before the Tribunal as they hear the matter and again the employer is away from their business and that is also a direct cost as a result of not having the evidentiary trail.

The fact is that the employer in completing the evidentiary trail is making a commercial decision to defend themselves and lessen their exposure.

DISMISSED FOR BEING UNION MEMBERS AND BRINGING A COMPLAINT

The employer is a printing and mail-out Company and has been prosecuted under the industrial legislation before the Federal Court.

The basis for the prosecution as brought by the Fair Work Ombudsman arose from the dismissal of 2 employees.

The Fair Work Ombudsman brought the proceedings against the Company on the grounds that the Company had dismissed an employee in 2007 because he was or proposed to be a member of the AMWU.

The reason for his membership was that as a full time employee he had complained about not being paid his annual leave entitlements.

In the second instance the employee was a casual employee and had complained that he was underpaid as to the award provisions.

It was acknowledged by the Company in a statement of facts that it had dismissed an employee for complaining to the Ombudsman.

The production manager admitted to knowing involvement in the dismissal of both employees and the director to also having knowledge in the full time employee.

The Court ordered that the Company pay a penalty of $25,000 and that a fine be imposed on the production manager of $6000 and on the director of $4000.

Fair Work Ombudsman –v- Datasend Australia Pty Ltd [2010] (P) VID637/2009

The Issues

Awards apply to the work that is covered by the award and when an employee performs that work the award provisions apply and that is a matter of law.

It is illegal to attempt to contract out of those award provisions and those provisions of the award must be adhered to.

It is illegal to take action against an employee as a result of union membership or as a result of having brought a complaint against the employer for not meeting award requirement.

Our View

The employer in this matter appears to have recognised the infringement and pleaded guilty early to lessen the amount of the fine.

Employers must get advice regarding award provisions and this case demonstrates that issue.

A CONTRACTOR CANNOT MAKE A CLAIM FOR UNFAIR DISMISSAL

A "Selling Agency Agreement" had been signed by the Company, a real estate agent, and the applicant that they would be employed on a contract basis and contractor where remuneration would be on a commission basis whereby the applicant was to obtain listings of properties that the Company could market and sell.

At the Fair Work Australia (FWA) hearing, the Company confirmed that no property sales had occurred from the listings generated by the applicant and as a result, no commission was ever made to him during his association with the Company.

The Company noted that there was no obligation for the applicant to attend work on a daily basis and could work from home nor during his association with the Company did the applicant seek approval for any absences or ask to take annual leave or any other form of leave. Furthermore the applicant was not exclusive to the Company and could obtain listings for competitors to the Company if he wished to do so.

FWA accepted that the parties had signed an agreement setting out the position of the applicant in terms of any services provided to the Company and accepted that no one had forced the applicant to sign the agreement and during his association with the Company he demonstrated his understanding of his relationship with the Company.

Consequently, the application for unfair dismissal by the applicant was dismissed.

Zhou –v- Aims Real Estate FWA 1135 [2009]

The Issues

For a person to be eligible to make a claim for unfair dismissal they must be "an employee" and this is set out in the Fair Work Act section 382.

Our View

This case highlights the importance of employers distinguishing between a person engaged as a contractor and that of an employee.

While much of the evidence is based on activities characterising whether the relationship is employer-employee or employer-contractor, a significant degree of proof rests in having proper and complete documentation setting out the terms and conditions of the relationship between the parties.

It is paramount that employers document their arrangements with contractors explicitly as these will be relied upon in defending any argument used to claim they are employees.

The main test used to decide whether a person is a "contractor" or an "employee" is the "control test" that is who is in control of the work, is it the contractor or the employer and the facts will stand on their own and the documentation is irrelevant.

The work of a contractor must be the completion of task basis.

If you wish to discuss any of these matters then contact please contact:

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