phone (02) 9810 3703 | fax (02) 9810 3685 | mobile 0417 552 801 | johntamplin@iprimus.com.au

INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER – 12-05-11/1

- The number of unfair dismissal applications made before Fair Work Australia for the period of September and November periods
- Some questions we get asked
- Minimum period of employment before making a dismissal application
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- Non compete clause and confidentiality clause in a contract of employment
- Resignation or constructive dismissal
- The employee should have been redeployed rather than made redundant

EVIDENTIARY TRAIL FOR DISMISSALS AND THE NEED TO HAVE THE INFORMATION

Fair Work Australia finalised 9369 unfair dismissal applications for the period 2009-2010 which indicates an average number of 180 applications per week however this is an average and weekly applications may vary significantly.

Since that report Fair Work Australia has for the period of the September and December quarters of 2010 received a further 6279 applications for unfair dismissal which if that is averaged over a 26 week period indicates an increase in number to 241 per week however this is an average and weekly applications may vary significantly.

Employers must treat these numbers as significant and be aware that it costs an employee approximately $70.00 to file an application and the Fair Work Australia Tribunal is not a costs awarded jurisdiction against the applicant if the application for unfair dismissal fails or is dismissed by the Tribunal.

The process and evidentiary trail the employer has or uses will be the critical factor along with the assessment by the Tribunal as to whether the dismissal was either harsh or unjust or unreasonable given all the circumstances.

SOME QUESTIONS WE GET ASKED

Question:

My employees have been working ordinary hours as required for many years and I want to change the hours of work so that they start at 7.00 am and not at 7:30 am can I do this?

Answer:

The hours of work can be changed and the process is set out in the applicable award which usually states that the employees must get one week's notice of the change.

Our position is that the notice of the change of hours of work must be in writing as it has the potential to be presented before a court or tribunal and that must be taken seriously.

The award also sets out the scope of ordinary hours of work for example the Graphic Arts Award is 7.00 am to 6.00 pm Monday to Friday but the span of ordinary hours varies from award to award.

While it is indeed the prerogative of the employer to change the standard hours there are some other factors that have to be taken into consideration such as the impact on the personal lives of the employees affected.

The award also specifies that a change of hours is a change of significant effect and must be discussed with the employees prior to its implementation.

That does not mean that the hours of work cannot be changed by the employer and I suggest that you give them 14 days notice or two weeks notice of the change.

You must stay within the span of ordinary hours as specified in the award or the hours of work will become shiftwork and incur a shift penalty payment.

Question:

I want to change the commission payments that I make to my commercial travellers and decrease the amount of the payment can I do this?

Answer:

The previous commercial travellers award of New South Wales allowed the employer to vary the commission rate by giving the employee three months notice.

The new commercial sales award 2010 from the Fair Work Australia Tribunal that now applies to Companies does not have a provision within the award for the variation of commission payments.

The issue then comes down to the terms of the contract of the individual employee and whether the contract has a clause that allows the employer the discretion to change the commission rate.

If the contract does not then a change to the contract by the employer without the agreement of the employee is a unilateral change that ends the employment of the employee or is a breach of the contract that could be prosecuted against employer.

This issue again demonstrates the necessity for contracts of employment for employees.

Question:

I have employees in the plant who are refusing to wear their high visibility vests even though it is part of the policies and procedures of the company and which they are aware of, what can I do about it?

Answer:

The wearing of high visibility vests is a safety matter and the liability is strictly on the employer to ensure that employees work in a safe manner.

The test is in the employee suffers an injury as a result of the employer not insisting that the vest be worn then the employer will be found to have contributed to the injury.

A general notice should be displayed throughout the site advising that it is company policy that visibility vests must be worn by all employees and visitors and contractors while on the site and when in the production area.

If the employees continue to refuse to wear the vests then they should be warned as to their future employment and this should be formalised and in writing as it establishes an evidentiary trail for the defence of the employer.

MINIMUM PERIOD OF EMPLOYMENT BEFORE MAKING A DISMISSAL APPLICATION

A Full Bench of the Fair Work Australia Tribunal has on appeal overturned a previous decision by a Commissioner and found that a casual employee had worked for the employer since 2006 until 2009.

The casual employee suffered an injury at work and had not worked on a regular and systematic basis for the 6 months prior to the ending of the employment.

However the Full Bench took the view a requirement to work the 6 months immediately prior to the ending of employment was not necessary and once the casual employee had worked a period of 6 months on a regular and systematic basis even before the injury he sustained then the casual employee could make an application for unfair dismissal.

The matter was sent to hearing.

Wayne Shortland v Smiths Snackfood Co [2010] FWAFB 5709 (16 September 2010)

The Issues:

Access to the unfair dismissal jurisdiction is by way of a qualifying period of employment and for an employer with over 15 employees the period is 6 months.

Our View:

The 6 month period can also apply to casual employees who are engaged on a regular and systematic basis of employment which can be one day per week on the same day each week for 6 months and that would allow access to the unfair dismissal provisions

EMPLOYEE NO LONGER REQUIRED TO WORK AT A SITE WAS FOUND TO BE DISMISSED BY THE EMPLOYER

The employee performed work away from the employers' premises and at a clients premises and was employed on a part-time employment basis.

The client contacted the employer and advised that they no longer wanted the part-time employee to perform the work or be assigned to them.

The employer advised the part-time employee that "upon the clients request you are advised that you are no longer to perform the work of the client effective immediately and thank you for your efforts and hard work."

The employee filed for unfair dismissal and the matter went to hearing.

At the hearing the employer submitted that the employment had not been ended at their instruction but was ended by the client and that the employee had abandoned their employment.

However the Tribunal found that in fact the employment had been ended by the employer and that the correspondence made that issue clear in that "it constituted a clear expression that the employment was no longer viable".

The Tribunal then went to the legislation as to the issues of whether the dismissal was "harsh, unjust or unreasonable" and considered the following:

a) whether there was a valid reason for the dismissal related to the person's capacity or conduct; and

b) whether the person was notified of that reason; and

c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

g) the degree to which the absence of a dedicated human resources management specialist or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal and

h) any other matters the Tribunal considers relevant.

The Tribunal awarded the employee 8 weeks pay as compensation.

North v Inhomecarers Pty Ltd (U2009/14263) 10 August 2010

The Issues:

If the employment was ended by the employer and was the procedure as set out in the legislation followed.

Our View:

It does not matter if the employee works off site the employer is the person who controls the work of the employee and the procedure used to end the employment will be put to the tests as set out in this case.

NON COMPETE CLAUSE AND CONFIDENTIALITY CLAUSE IN A CONTRACT OF EMPLOYMENT

A sales manager at a publishing company left their employment to join a direct competitor in the publishing industry after a restructure left them in a less senior position.

The New South Wales Supreme Court heard an application by the previous employer to enforce the terms of a confidentiality clause and a restraint of trade applicable to the employee as a result of a contract they had signed.

The employee commenced their employment with the new employer as a business development manager.

On several occasions the Court referred to the poor wording of the contract and that the clauses were not well drafted in respect of the confidentiality clause and the non compete clause.

The Judge took the view that the previous employer had a legitimate interest in keeping some information that the employee had access to confidential and the Judge ordered that to apply and would apply for 12 months as set out in the contract.

That confidential information and its use was limited to only 1 publication of the new employer that was in direct

competition to publications of the previous employer.

The Judge also took the view that the non compete clause was so wide that it applied throughout Australia and if that interpretation was applied it would make the clause unenforceable as it had no geographical limit and the prohibition was on working in any capacity for a rival company.

The Judge then went to the 12 months period of application of the confidentiality clause and took the view that because advertising contracts by the previous employer were negotiated for a period of between 1 and 4 years that the 12 months should apply but only to the publications in direct competition.

The Judge then also took the view that an injunction restraining the employee from working for the new employer would mean that the employee is effectively unemployed and would cause substantial hardship and the employee lose their home and that it was unlikely that damages could fully compensate for that hardship.

The Judge declined to issue an injunction restraining the employee from working with the new employer.

Reed Business Information v Seymour [2010] NSWSC 790 (23 July 2010)

The Issues:

The wording of contracts of employment and restraint and confidentiality clauses.

Our View:

The wording of contracts and in particular in respect of restraint and confidentiality clauses has to be reasonable and what is reasonable is always analysed or compared to what would be unreasonable.

RESIGNATION OR CONSTRUCTIVE DISMISSAL

Shortly after a new factory manager was promoted in the plant the maintenance manager resigned his employment in writing after 12 months employment with the Company.

The maintenance manager had received significant wage increases in his period of employment as a result of his work.

The new factory manager had complained to the maintenance manager that he was not satisfied with the way the maintenance manager ordered parts for maintenance and shortly after the maintenance manager resigned his employment.

The maintenance manager filed for unfair dismissal and during the hearing there was evidence that the factory manager had stated to the maintenance manager words to the effect that it was not going to work out between them.

The factory manager admitted during the hearing that he had used words to the effect that "if you do not resign then I will go down the path of written warnings and that that is not a pleasant way to go."

The maintenance manager resigned his employment following that discussion.

The Commissioner found that in contrast a number of aspects with regard to the employer's behaviour in this matter disturbing. The facts and other matters revealed in the hearing, lead to the conclusion that the applicant was given the choice of resigning or being put through a series of warnings with the ultimate intention of terminating his employment.

The Commissioner found that the legislation held that being forced to resign is dismissal and that the giving of a month's notice by the maintenance manager who did not have a job to go to was not an action of tolerating or consenting to the employer's behaviour.

The Commissioner found that in fact the maintenance manager had been dismissed and had been unfairly dismissed and awarded him payment from the date of the dismissal to the date of the order which was approximately 4 months pay.

John Little v Petfood Processers (WA) Pty Ltd; [2010] FWA 5753

The Issues:

Dismissals must be based on sound evidence of the work performance of the employee and the process as used by the employer when carrying out the dismissal.

Our View:

The outcome of this case reinforces the need for employers to maintain an evidentiary trail when dealing with dismissals or the alternative is the risk of losing the matter or jeopardising their capacity to settle the matter for a commercial amount at conciliation and avoid the direct and indirect costs associated with running the case and the days of hearing.

THE EMPLOYEE SHOULD HAVE BEEN REDEPLOYED RATHER THAN MADE REDUNDANT

The Fair Work Australia Tribunal has awarded an accountant of a car dealership an amount of $20,000 compensation in addition to the $30,000 already paid as redundancy after the dealership dismissed him as a result of his job being abolished due to a restructure.

The accountant was 62 years old and had worked for the dealership for 24 years.

The accountant was paid a package of $74,000 plus 10% bonus, a company car and a mobile phone.

As a result of the restructure a new position of assistant accountant had been created following the installation of a new computerised accounting system and his position was abolished as a result of the implementation.

The accountant argued that he should have been given or redeployed to the new position even though it paid $55,000 with no additional benefits.

The employer argued that redeployment to the new position would constitute a constructive dismissal because of the difference in pay and that the applicant lacked the communication, interpersonal and computer skills required for the new job.

The Commissioner rejected the submissions from the employer on the basis of section 389(2) of the Fair Work Act which states:

"[Exceptions where redeployment reasonable] A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

1) the employer's enterprise; or

2) the enterprise of an associated entity of the employer."

The Commissioner found that the accountant had not been offered the new position and that the employer had not asked the accountant if they were prepared to take the reduction in pay to perform the new position.

Further the Commissioner found that the employer's claim that the employee lacked the skills to perform the work of the position had not been raised with him and at no time had the employer told him of their concerns in the performance of the new position.

The Commissioner found that the employer had failed to comply with section 389(2) of the Act.

The Issues:

The Fair Work Act applies several conditions on employers and those conditions must be met as is evidenced by this decision.

Our View:

Employers must seek advice as to their operations and do so before they act otherwise the outcome can be adverse to their situation. This hearing was conducted over several days and the evidence that had to be completed and submissions in writing prior to hearing were extensive and also added to the costs.

If you require any clarification please contact:

John Tamplin
0417 552 801
johntamplin@iprimus.com.au

Maria Loutsopoulos
0416 047 943
tamplin2@gmail.com

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