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INDUSTRIAL RELATIONS NEWSLETTER

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SOME QUESTIONS WE GET ASKED

Question: Why do I have to give my employees a contract of employment?

THE IMPORTANCE OF GIVING YOUR EMPLOYEES A WRITTEN CONTRACT OF EMPLOYMENT

You can call it a "letter of offer", an "employment agreement", a "letter of appointment" or a "contract of employment".

What is more important however is that employers give their employees and prospective employees something in writing in relation to their terms and conditions of being employed with the Company.

In this answer we will refer to it as a "contract of employment" and outline the importance of giving a contract to all your employees.

Note: this article deals with employees and not independent contractors.

- ***So what is a contract of employment?***

As an employer, when you offer someone a job and they accept, you have both entered into a "contract" where that person will work for you and you will pay them for the duties they perform as part of the contract.

It is important that the prospective employee has **completed an application for employment prior** to the offer of employment by the employer and **prior** to any reference checks and any interviews by the company.

It is also important that the prospective employee is given a copy of the contract and its terms some days prior to them starting employment and not when they arrive to commence work as they will assert in any proceedings that they had no

choice but to sign the contract and as result they were in an unequal bargaining position.

- ***Why put a contract of employment in writing?***

Before your soon-to-be new employee starts work with you, a written document setting out at least the minimum terms and conditions of employment should be given to them.

There are several good reasons for giving employees a written contract of employment.

These include but are not limited to:

- information such as salary, start date and (where applicable) leave entitlements award coverage or agreement coverage are clearly set out in writing;
- clarification is given in terms of rights and obligations when terminating the relationship;
- protection of business interests when it comes to confidential information;
- preventing former employees from any competition (including working for competitors, soliciting your employees as well as your customers) through reasonable trade restraints;
- setting out periods of probation as short-term avenues to terminate the employment if it's not working out;
- Setting out that superannuation is not part of the base salary;
- Setting out that there are discretionary benefits supplied by the employer and that they can be withdrawn.

- ***What if I have not given my existing employees any written contracts of employment to date?***

The Company can still give a current employee a written contract of employment although this will be more of a written confirmation of existing working arrangements as prior service is being recognised (the Company cannot state in such a contract that the commencement date is today and or put in a probationary period clause when the employee has been working for the Company for a period of time).

The Company would also need to advise the employee of the intention of the document so they do not draw the conclusion that the Company is considering dismissing them and rehiring them under a new contract.

- ***What else do I need to know?***

i) contracts of employment should be clear and accurate with correct references to the applicable legislation (eg Awards, Acts, etc);

ii) contracts of employment should be given to the employee before the commencement of their first day's work (preferably several days before) and should be signed by both parties

iii) review any contracts you may be currently relying upon and ensure they reflect current employment legislation.

iv) even today, employers are using outdated contracts stating for example sick leave is 5 days per year and eight days thereafter which is no longer the case or employers that are regulated by modern employment laws;

v) identify employees whose status or position has changed within the Company (eg as a result of promotion) and review their contracts to reflect their current position.

- ***Who can I contact for more information and assistance?***

If you would like to discuss any concerns you may have in relation to contracts of employment or any other employment related issues you may have, contact:

John Tamplin on 0417 552 801 or Maria Loutsopoulos on 0416 047 943 or email John johntamplin@iprimus.com.au or Maria tamplin2@gmail.com.au.

REDUNDANCY OR DISMISSAL

After the resignation of a regional manager the company made a decision that it was going to combine the roles of the position with that of another position that already employed another employee.

The existing employee was advised of the redundancy when the financial director arrived and advised him of the decision and offered the employee the option of resigning and receiving a reference or receiving a termination letter which the financial director had with him and had been prepared in advance.

The employee chose the resignation option and left the employment and subsequently filed an unfair dismissal application.

During the hearing the employer argued that it was genuine redundancy and as such was precluded by the legislation from the unfair dismissal process.

The Tribunal took the view that if it was genuine redundancy it was excluded however if it was not a genuine redundancy then the issue became whether the dismissal was harsh, unjust or unreasonable.

The Tribunal considered that the prepared termination letter meant that the employer had made their decision prior to arriving to speak with the employee and that was inconsistent with the award provisions regarding consultation as to significant changes in the workplace and therefore that the redundancy was in fact a dismissal and not a genuine redundancy.

The Tribunal then considered the dismissal against the harsh, unjust and unreasonable provisions of the Act and reached a decision that the failure to notify and consult with the employee prior to the decision being made was a serious defect in the procedure.

The Tribunal also came to the conclusion that the reason for the dismissal was redundancy and that the employee would have been dismissed and that consultation would have been unlikely to negate the operational reasons for the ending of employment.

The Tribunal then came to the conclusion that it was not satisfied that the failure to consult made the dismissal harsh, unjust or unreasonable and the application was dismissed.

Maswan and Escada Textilvertrieb T/A Escada [2011] FWA 4239

The Issues

The failure to follow the award provisions as to consultation is critical to this matter and to make the decision to dismiss the employee prior to the consultation regarding the continued employment meant that nothing the employee could say or do would have changed the decision.

Our View

The making of the decision to end the employment by way of redundancy prior to consulting with the employee is inconsistent with the terms of the award and while the consultation should have taken place it would not have resulted in another outcome but that does not mean that the employer does not have to consult regarding significant change to an employees work or job.

DISMISSAL BY TEXT MESSAGE UNFAIR

The employee had worked for the company for a period of two years as a casual employee and done so on a regular and systematic basis and the business had been recently taken over by a new employer and the employee had worked for the new employer for a period of eight weeks.

The employee arranged a shift swap with another employee for the next day as she got close to the end of a 15 hour shift on December 23 as she was feeling unwell.

While the co-worker was operating the shift on Christmas Eve on her own some thieves stole $5000 of stock from the shop.

The employee arrived at work an hour late for the commencement of the shift and the theft was not detected.

On Boxing Day the owner of the business sent a text message to the employee advising the she should not have swapped the shift without advising the employer and that she should not have been an hour late in getting to work.

The text message advised the employee that her employment had ended and that the employee could pick up their pay the next day.

The employee filed for unfair dismissal and the Tribunal ordered the employer to pay almost $10,000 in compensation because the text message deprived the employee of any opportunity to respond to the accusations as set out within the terms of the Fair Work Act and the Commissioner stated that a text message was generally an inappropriate means of notification of dismissal or for reasons of dismissal.

Sokolovic and Modestie Fashion Australia Pty Ltd [2011] FWA 3063

The Issues

Procedural fairness as set out within the terms of the Fair Work Act must be followed when dismissing an employee and that means the employee must be given the opportunity to respond to the accusations and an opportunity to have somebody accompany them or represent them along with other matters of procedure.

Our View

Irrespective of the issue and its gravity the employee must be given the opportunity as prescribed by the Act to defend the accusations levelled against them and failure to do so will render the dismissal unfair.

MISLEADING RECRUITMENT CLAIMS REJECTED

The Federal Court has rejected an application by a business manager who worked for the company between November 2008 to March 2009 who argued that the position he accepted was profoundly different to the one described during his recruitment and as a result the recruitment company and the employer were in breach of the Trade Practices Act.

The applicant maintained that the employer employed him on the basis that he would be the sole manager of the commercial operations and if successful in the business manager's position he would most likely progress to general manager within two or three years.

The applicant found that after starting his new job there were several other line managers working on commercial arrangements for the company and he was required to report to them rather than directly to the general manager.

The applicant attempted to move himself ahead of other long-term managers and was told that his job had become redundant.

The company advised the Judge that the job of the applicant had not become redundant but that the company had chosen that reason as the easiest way to finish the employment.

The Judge found that none of the alleged misrepresentations over the recruitment process had been made out and that the recruitment consultant repeatedly used the words "opportunity" and "potential" and that there was nothing in the language used that could be construed as inferring the position was for at least three years.

The Judge also noted that none of the allegations made by the applicant were specified or outlined in the contract which the applicant had read, understood and negotiated and signed freely also that the applicant had agreed to a notice period of three months and included that in the term of the contract.

The Judge found the applicant was attracted to the position. He applied for it. He did not seek nor was he granted employment on a fixed term. He was offered the business manager's position and accepted it. He did so on mutually acceptable terms and conditions which had been freely negotiated. He laboured under no disabilities during the negotiations.

The Judge found that the applicant was not entitled to any further compensation for loss of employment than the amount outlined in his contract.

Haros and Linfox [2011] FCA 699 (June 22 2011)

The Issues

The process of recruitment and the terms of the contract were the critical elements in this application and the decision reached.

Our View

The recruitment of any employee must be made with the understanding that the employer is establishing the evidentiary trail and must anticipate that the documents may be used in some form of proceedings.

EMPLOYER GUILTY OF DISCRIMINATION AGAINST 457 VISA HOLDER

Background

A condition of the 457 visa was that the employee work as a supervisor for a period of 4 years but half way through, his employment was made redundant.

Prior to the redundancy, the employee sustained a work-related injury to his back and was advised by his doctor to return to work on light duties. The employer however challenged the WorkCover claim and refused to provide light duties. The employer also raised concerns about the affect of the claim to his insurance premiums.

Disciplinary action was taken against the employee in the form of a suspension with pay following concerns by the employer of unsatisfactory work performance and insubordination. When the employee questioned the allegations, the employer wrote "f—k off" on a white board.

A recommendation came soon after from WorkCover for the employee to take time off work and to participate in a rehabilitation program but the employer advised WorkCover that the employee was going to be dismissed for "gross insubordination and stupidity". The employer then made the employee redundant.

It appeared that at no point had the employer discussed with the employee the possibility that their employment would be affected by the changes to the business the employer had been considering for several months.

The Queensland Civil and Administrative Tribunal found the employer to have discriminated against the employee because of injury and questioned the decision to make the role redundant following the events that had taken place previously.

The Tribunal found the employee had not been given an opportunity to "reasonably discuss" any business decisions that could affect his employment, particularly in such personal circumstances such as his which included his disability and visa work status.

The Tribunal awarded the employee $16,000.

Webb v Lightfoot (QCAT – 233) 30 May 2011.

The Issues

Australian employment laws have broad jurisdiction that cover employees including visa holders. Consequently obligations relating to workers compensation, discrimination and termination must be complied with by employers.

Our View

Employers should be careful when considering ending the employment of visa holders and should be aware of the conditions associated to the particular visa held by an employee. Some visa conditions have an immediate and profound effect on the employee for example a 457 visa imposes the condition that such an employee must secure work within 28 days of the ending of their employment or return overseas.

Employers should ensure they have procedures in place such as disciplinary procedures and apply these procedures consistently across all their employees, regardless of whether they are visa holders or not.

Employers cannot rely on the excuse that because a workers compensation claim has been made that they can dismiss the claim because it will have a financial impact on their insurance premiums.

Carer's responsibilities for children with disabilities find company to have discriminated

Following a merger of different internal departments, the employee's start and finish times were altered to 7am – 7pm from his previous 8.30am – 5pm which he had worked for the past four years.

The employee refused to work the new hours due to his carer's responsibilities of his disabled children.

The employer provided the employee with a development plan for refusing to work the new roster and treated the refusal in the same way it would for any misconduct

issue by following internal performance management procedures which included advising the employee of outcomes, including termination, for non-compliance. The employer continued to instigate the new roster with "100% adherence" required from the employee with little room for compromise or consideration owing to the employee's carer's circumstances.

The Victorian Civil and Administrative Tribunal found against the employer for insisting the employee comply with the new hours of work. It also found "troubling" the requirement of 100% compliance to the new roster and the instigation of a performance plan immediately following the return from sick leave of the employee (who had taken 2 months off due to health affects related to the employer's changes).

The Tribunal expressed concern over the human resources departments' refusal to provide any consideration of alternate times that might accommodate the employee's circumstances and employer's operations.

Capes v Nissan Motor Co (Australia) Pty Ltd VCAT 1162 (17 June 2011)

The Issues

There is federal and state legislation across Australia that prohibits employers from discriminating against employees on the grounds of carer's responsibilities.

Our View

Employers should review their procedures to ensure they do not contain any discriminatory or unlawful elements that could be challenged by employees or scrutinised by courts and tribunals.

Employers should consider how any proposed changes could impact on employees, especially those with carer's responsibilities. Furthermore, employers should demonstrate that they have shown consideration to an employee who has expressed concerns with a particular workplace change and how that impacts upon them. Any discussions with affected employees should be documented with references made to show how the employer has considered the employee's concern and how the employer has addressed it.

EMPLOYER AND SUPERVISOR GUILTY OF RACIST JOKE

The matter concerned a supervisor who asked permission from a worker of aboriginal background to tell a joke and proceeded to do so referring to "a black man" and further references to skin colour.

The matter went to the Federal Magistrates Court who found that while the joke did not specifically refer to the worker's background, it had "clear linkage" to the worker's race. Furthermore, the Court found that by asking for the worker to give permission to tell the joke satisfied the test that the supervisor's behaviour was unlawful, particular as he was senior to the worker and placed him in a difficult position in terms of allowing permission.

The company and the supervisor had to pay $5,000 to the worker in damages for hurt and humiliation.

Trapman v Sydney Water Corporation & Ors (FMCA 398 (2 June 2011)

The Issues

Legislation at federal and state level makes discriminatory conduct unlawful in the workplace. Attributes include race, social origin and extraction.

Our View

Employers should ensure they have clearly set out policies relating to anti-discrimination in the workplace. This includes examples of what constitutes discrimination on the grounds of the different attributes. In order to assist in defending a discrimination claim also employers should be able to demonstrate they have communicated their commitment to anti-discrimination to their employees through training and regular updates.

If you require any clarification please contact:

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