



JOHN TAMPLIN

INDUSTRIAL RELATIONS NEWSLETTER

Newsletter – 4-11-11/6

- Some questions we get asked: Probationary employment for new employees and how long is the period?
- In general what are the legal issues in regard to a contract of employment?
- The importance of having an application for employment form and the reasons for one?
- Changing the process of dealing with recruitment agencies and suppliers.

SOME QUESTIONS WE GET ASKED

Probationary employment for new employees and how long is the period?

The Fair Work Act specifies that an employee who is employed by an employer with less than 15 employees must be employed by the employer for a period of 12 months before the employee can make an application for unfair dismissal.

The Act also states that if the employer has 15 or more employees then the employee must be employed by the employer for a period of 6 months before the employee can make an application for unfair dismissal.

There needs to be caution in that the period of employment can include a period of casual employment if it is systematic or regular or creates the expectation of ongoing employment,

It follows that employers should use the period of 6 months for probationary periods.

In general what are the legal issues in regard to a contract of employment?

There is no difference between a contract of employment and a contract for the production of work for a client.

The four main conditions of a contract are as follows:

- that there has to be an “offer” that is we will carry out the work or we will contract you to do the work on the basis of supplying product or services for a payment or some other commodity or service;
- that there has to be “consideration” that is something of worth must be exchanged between the parties to the contract and in a contract of employment that is usually perform work for payment;
- that there has to be certainty as to the terms of the contract and in employment that usually means award provisions and other conditions of employment;
- that there has to be “acceptance” that is both parties must in some way formalise the terms and conditions of the employment. This also includes policies and procedures of the Company as referred to in our previous newsletter.

A prudent Company will have kept a record of all these terms and would have them endorsed by the employee and as we have stated previously the evidentiary trail is critical in defending the Company in any application by an employee.

The importance of having an application for employment form and the reasons for one?

As stated previously the laws of contract have 4 major points in that there must be an "offer" for example come and work for xyz Company as a and there must be "consideration" that is something of worth exchange between the parties and in employment that is usually payment for the performance of work, there must also be "certainty" that is the terms and conditions are clear, not vague and certain and there must be "acceptance" that is both parties must agree to the terms of the contract.

When an employer advertises in a newspaper they are making an offer of employment and when the employee applies and if the position is accepted the applicant or employee can rely upon the wording of the advertisement.

What has to occur is that the applicant is put into a position where they are offering their skills and expertise to the employer and the employer can then rely on the advice given by the employee that is they are now making the "offer".

An application for employment form should include such issues as:

- the applicant is applying for the position of;
- personal particulars;
- residency and visa status;
- education, qualifications and courses attended;
- employment history;
- if the applicant is currently employed;
- availability to work shift work or overtime;
- does the applicant have any medical or health condition that may affect their capacity to carry out the work applied for;
- does the applicant have any medical or health condition that may be affected or aggravated by the performance of the work;
- does the applicant require any special equipment or special requirements to carry out the work;
- supply at least 2 business references;
- to comply with all policies and procedures of the Company;
- to work in a safe manner;
- that they are legally entitled to work in Australia;
- that if they make a misleading or omit to supply relevant information in the application it can lead to dismissal;
- that if they commence work that they will not be in breach of any obligation to another employer or third party;
- that they agree to a pre-employment medical;

- that by signing the application form they give authority for the employer to contact previous employers of the applicant.

The effect is that the applicant is now making the "offer" and the position of the employment contract has changed.

This process can be critical in defending claims and applications such as dismissal applications and workers compensation claims by employees and its importance to the employer can be counted in dollars and cents in defending such claims.

Changing the process of dealing with recruitment agencies and suppliers.

In a recent matter with one of our clients they engaged a recruitment agency to interview and select applicants for a position within the Company and after having gone through the process and engaged the applicant the employee resigned their employment after only a short period and because of the terms of the contract imposed on the employer they were being pursued for the complete costs of the recruitment which amounted many thousands of dollars and on the face of the process the employer had complied with the terms of the contract as put forward by the recruitment agency and were liable for the payments.

The employer proposed a new method of dealing with those agencies and we have used this approach before with suppliers and in this matter the employer engages the recruitment agency on their terms of contract and not those of the recruitment agency and employers should consider this approach as a method of overcoming the issues.

WHO CAN I CONTACT FOR MORE INFORMATION AND ASSISTANCE?

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

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