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SOLUTIONS *for the* WORKPLACE

JOHN TAMPLIN

INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER — 9-07-12/5

Remember to call us if you need some help, we do not normally charge for phone advice.

IN THIS ISSUE:

- Significant increase in unfair dismissal and other employment applications lodged with Fair Work Australia to March 2012.

FREQUENT QUESTIONS WE GET ASKED:

- What award covers an employee who solicits work by using the company telephone?
- Can I reach individual agreements with my employees regarding hours and days of work?

Increase in claims and applications lodged with Fair Work Australia in 2012

Latest figures from Fair Work Australia's quarterly report from January 2012 to 31 March 2012 show 706 applications were lodged in relation to employment issues such as general protection applications and related disputes while a staggering 3,574 unfair dismissal claims were lodged making it the highest ever March quarter since the Tribunal came into operation in July 2009.

Employers must take these issues and numbers seriously and it only costs a dismissed employee approximately $65.00 to file an unfair dismissal application. Due to this low cost, it's imperative that you seek advice before you proceed with the ending of the employment of an employee as the costs for the employer are far greater.

What award covers an employee who solicits work by using our telephone?

The primary test used in relation to award coverage is what is the "major and substantial work or role" of the employee rather than the title given to the position.

This is because awards cover the work performed by the employee and the award specifies that work coverage.

While it may appear that someone who performs inbound or outbound work which involves using a telephone to make sales calls may be classified under a call centre award, there is sufficient scope in the Clerks – Private Sector Award 2010 for the performance of this work.

Schedule B of that award refers to work an employee can undertake in a call centre capacity where the workplace is not a call centre provided there is not an award already in place that could bind that employer and which contains clerical classifications for example the Hospitality Industry General Award 2010 contains classifications for office/clerical workers.

Can I reach individual agreements with my employees regarding changes to hours and days of work?

Awards and agreements set out provisions for reaching "individual flexibility agreements" with employees provided that the terms "result in the employee being better off overall than the employee would have been if no flexibility agreement had been agreed to."

Employers can enter into individual flexibility arrangements (IFA's) with individual employees. IFA's can be used to vary certain terms of an applicable modern award or enterprise agreement to suit the particular employee that will be covered by the agreement.

For example, an employee commutes to Sydney from the Central Coast and back by train each day and they want to start work early and finish early outside of the spread of the ordinary hours of work as set out in the award.

The employee has advised the company that if they can start early and finish early there is a significant saving in travel time and in costs associated with the travel and also in child care arrangements.

An IFA can be entered into for that employee regarding their hours and days of work while the rest of the terms of the applicable modern award or enterprise agreement continue to apply.

IFA's do not need to be approved by Fair Work Australia or another statutory body the way an enterprise agreement has to however it is the responsibility of the employer to ensure that the IFA is made correctly and consistent with the Act and the terms of the award or agreement.

Despite an IFA failing to comply with the Fair Work Act, its terms still continue if they benefit the employee however the employee can terminate the IFA if they believe they are being disadvantaged by it.

If a modern award applies to the work of the employee the following terms of the award can be varied under an IFA:

- Hours of work
- Overtime rates
- Penalty rates
- Allowances
- Leave loading

Employer's obligations in relation to IFAs

It is the employer's responsibility to ensure that the particular employee is "better off overall than" if there was no IFA in place. An assessment of this will usually involve comparing financial benefits/losses under the proposed IFA with financial benefits/losses under the applicable modern award or enterprise agreement.

Non-financial benefits which are significant to the employee can also be considered however it is a defence only for the employer to establish that the employee either initiated wanting to enter into an IFA with the employer or that there was genuine agreement in entering this arrangement.

An employer cannot make an IFA a condition of employment to a prospective employee. That is, an IFA can only be made after the employee has commenced employment and is covered by the applicable modern award or enterprise agreement.

The employer must be able to demonstrate genuine agreement in entering an IFA. That is an employee cannot be forced to enter into an IFA nor can an employee be discriminated or adversely treated for refusing to agree to enter an IFA.

An employer must be able to demonstrate that the employee has been given the opportunity to make an informed decision about entering into an IFA.

This may include giving the employee a period of time to consider the impact of the IFA's terms on their employment and seeking their own independent legal advice.

Employers should also consider any language or cultural differences that could impact of the employee's understanding or the terms of the IFA and its impact on them and their choice in agreeing to it.

The employer must ensure that the IFA is in writing and signed by both parties.

Where the employee is under 18 years of age it must also be signed by their parent or guardian.

The employer must also ensure that they keep a copy of the IFA as a record and that they give a copy to the employee.

Terminating an IFA

Unless expressed otherwise in the IFA or the flexibility term of the applicable modern award or enterprise agreement, IFAs are usually terminated by agreement or either party giving 28 days' notice in writing to the other party.

If a new enterprise agreement begins to operate in that workplace, the IFA will end because it was entered into when the previous enterprise agreement was in place.

As always the evidentiary trail is critical.

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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