INDUSTRIAL RELATIONS UPDATE

February 2018

Repudiation of What Exactly?

When a club became concerned about a casual employee's capacity to perform her duties, it decided to reduce the number of shifts on offer to her and give her more training. However, when the employee was advised of the changes, she baulked at the huge reduction in shifts (around 75%) that she would be offered, and, according to the employer, verbally resigned.

The employee claimed unfair dismissal on the basis she was left no choice by the employer's actions but to "involuntarily resign". The FWC, at first instance, accepted the change proposed by the employer was effectively a repudiation of the contract. In doing that, the FWC identified the existing spread of shifts and the typical weekly hours the employee typically worked, as the employee's employment conditions.

But the employee was a casual, and on appeal, the full bench made the point that as such, each shift the employee performed "*was a separate contract of employment*". The evidence showed that while the employee usually worked many shifts per week and her employment pattern had some regular features, nevertheless there were variations in her work patterns over the course of her tenure.

Importantly, there was no on-going contract stipulating how many shifts the casual would work, when they would be, how long they would be and what work she would do. Nor was there any evidence that such employment conditions were implied terms of the contract.

Under those circumstances, the full bench found that the employee had no entitlement to a particular number of shifts, or hours per shift, or even the type of work she was to perform as a result of any contractual obligation.

For there to be a repudiation of contract by the employer, there had to be explicit, or reasonably implied, terms of employment that the employer changed and the employee was not prepared to accept. Absent those basic preconditions, there was no constructive dismissal in this case.

City of Sydney RSL v Roxana Balgowan [2018] FWCFB 5 (16 January 2018)

Security of Costs Ordered

It is rare for employees to be ordered to pay costs after losing unfair dismissal cases. If it weren't rare, the expression 'go away money' might not have been coined. But it is even rarer still for an employee to be required to stump up a security *before* trial, but that has happened in the Fair Work Commission.

An employee has appealed his unsuccessful dismissal claim and the employer is none too pleased about that. Understandably so, given the decision under appeal involved a case that ran for two days after which the FWC found the employee was genuinely made redundant. The employer argued that the appeal was vexatious and there was uncontested evidence the employee was engaged in a campaign against the employer over the whole affair.

Additionally, the FWC indicated that the appeal grounds the employee was relying on showed little prospects of success. This was especially since that material evinced no suggestion of significant error of fact or law.

The full bench has decided, before it hears his appeal, that the employee must lodge a $10,000 cost surety. There are many appeals in the unfair dismissal regime that merely re-run the case already lost. Given the enormous resources appeals use up this Order is a welcome development.

Bits and Pieces

Bargaining at historic lows

The number of enterprise agreements being approved has fallen to a low not seen since Australia's workforce was about a third smaller than it is now. And on top of that surprising result, the total number of active agreements has also fallen by around 30% in just the last three years.

Logic suggests that as the workforce grows, agreement numbers would likewise increase. But that orthodoxy has been turned on its head, and these latest survey results are not outliers - the trend is obvious.

The number of agreements actively operating is now so low it is estimated less than one in five persons in the workforce is covered by an enterprise agreement.

Pay rises continue to shrink

Pay increases have hit their lowest levels since formalised enterprise bargaining began in the early 1990's. The September 2017 quarter statistics, compiled by the federal department on agreements approved in that period, show that private sector pay rises were 2.4% and public sector rises 2%.

Examples quoted in the survey included companies like QANTAS with 1.8% increase per annum and IKEA with 1%. These are either at, or below, the official inflation rate.

And once again the statistics revealed that non-union deals delivered higher pay rises than union backed deals. There is no end to these strange times in sight either. The IR gods must be crazy.

Out of Hours Porn Post Not So Social

When a wharfie shared a porn film clip with workmates, little did he realise he was headed for the sack. But that's what happened. And despite the fact no one complained to the employer and much of the supporting evidence was gathered *after* the dismissal, the Fair Work Commission upheld the employer's decision. And his union didn't come out of it smelling of roses either.

Late one evening the employee sent the film to 20 colleagues, including three women, using a messenger app. One of the women let him know she was unimpressed and he was not to share such messages with her again. He posted an apology the following day, making the excuse that he had hit 'send all' by mistake.

A week later, the NSW Secretary of the Maritime Union of Australia phoned the employee and during their conversation the employee agreed he had some "issues" and needed time off. The MUA negotiated a period of leave without pay for the employee.

Within days of his departure on leave however, the company became aware of the porn post and started an investigation. It also began to suspect the MUA of a cover-up by orchestrating the leave without pay.

The investigation resulted in adverse findings against the employee based on the company's code of conduct and policies, including sexual harassment. He didn't help his case by at first pretending he didn't know what the company was talking about when it made enquiries of him. Then he contended that it was out of hours so none of the employer's business.

The company claimed the employee had not cooperated and the union hadn't exactly either (the State secretary had received the post so knew what was going on). The disingenuous responses to the company were belied by the fact of the posted apology. And the app used had no 'send all' function, making the apology lame and insincere.

Importantly, the FWC rejected argument the dismissal was harsh because no one complained . On the contrary, it was entirely available to the employer to act in defence of its own standards, ethics and policies, and it did not need a complaint to be made before taking action.

As to the argument the activity was out of hours 'in cyberspace' and therefore not the company's business, the FWC said the nexus of the activity to the workplace was established. The law is well established that the workplace is not confined to a physical location in this context; rather the law is "*directed at the elimination of sexual harassment from the work based relationships and the workplace environment of persons who work together*".

Luke Colwell v Sydney International Container Terminals Pty Limited [2018] FWC 174 (9 February 2018)

Judge Closes Curtain on Litigious Truckie

The curtain has come down on a truckie's claim (nearly $80K) for load/unload allowance. The Federal Circuit Court has found to be entitled to the allowance there must be "a *physical engagement with the loading and unloading of a vehicle.*". The drawing back and forward of side curtains on road transport vehicles does not require the physical effort which the award definitions indicate as a necessary prerequisite to be paid the allowance. The case underlines the importance of reading carefully what an award actually says about an obligation or entitlement.