INDUSTRIAL RELATIONS UPDATE

March 2019

Multi-hiring OK Says Federal Court

Having two jobs with the one employer has been a feature of a few enterprise agreements for decades, but it is largely unknown, and thought to be a bit dodgy. But a recent Federal Court decision has well and truly cleared the air on the legality of it, paving the way for more employers to adopt the practice with confidence.

The case concerned a delivery driver who, after being employed in that position for a while, started a second job as a sorter. This dual employment arrangement continued for some time until the employee quit the second job. After that occurred, he filed a claim for overtime and other relevant payments on the basis that he should have been paid as if he were working one job.

The matter proceeded through the lower court which found in the employer's favour and rejected the view that only one contract of employment existed. On appeal to the Federal Court, the employee argued that because the work was covered by an enterprise agreement, the law provides that only one agreement can apply to an employee at one time. And that meant that all the work this employee did for his employer had to be bundled up and treated as one job for the purposes of applying the various terms and conditions of the agreement, i.e. overtime etc.

But the judge disagreed and said the law on the applicability of agreements refers to the "particular employment". Or put another way, to the job. The court said because the agreement applies to the *employment,* that means the work and not the person. The court dismissed the argument that the employer had effectively tried to contract out of the agreement by using this arrangement as a device to avoid overtime and other payments.

Key considerations in arriving at that decision included that the jobs were quite distinct in their duties and pay rates, their locations, and the fact that the employee started the second job long after his initial commencement with the employer. The judge said the arrangement was a "legal and factual reality" and not a device at all, dismissing all the claims.

Multi-hire or dual employment is not new. It has several advantages for both employers and employees and is worthy of consideration in workplaces wherever there is a diversity of roles, especially those that don't have onerous entry requirements. Wherever it has been included in agreements, it has been enthusiastically adopted by the parties, contributing to lower overall costs and enhanced job security.

Lacson v Australian Postal Corporation [2019] FCA 51 (1 February 2019)

Casual Conversion Headed for NES, Mandatory in EAs

The National Employment Standards could be expanded again with a Bill before Parliament to include the right for a regular casual to request conversion to permanent employment. Last year, the Fair Work Commission amended modern awards to include updated provisions concerning this issue, including a requirement that where an employer refused such a request that the employer notify the reason in writing within 21 days of the refusal.

The proposed legislation also contains a provision making it mandatory for enterprise agreements to contain the casual conversion clause. If the Bill passes, employers with casuals will be required to issue updated Fair Work Information Statements. The bill has been referred to a Senate committee which is due to report later this month.

Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

Handy Hints on HR Role from FWC

The Fair Work Commission has helpfully made some observations about important aspects of HR departmental roles and behaviours in the counselling/disciplinary process. In a case where an employee was sacked in circumstances where subsequent enquiries established he shouldn't have been, Deputy President Anderson made the following comments:

● *The proper role of a human resources department is to sit between impulsive managers baying for dismissal and the obligation of an employer to ensure procedural fairness.*

● *These events provide a sobering reminder why human resource departments need to maintain appropriate detachment from operational staff and not jump to conclusions.*

● *Generally speaking, a support person is not an advocate. Support however takes a variety of forms and may include a support person needing to speak to the employee they are supporting or, in appropriate circumstances, to the employer – for example to seek clarification or request a pause to a meeting. In its communication to (the employee), (the employer) risked unreasonably limiting the role of a support person to that of emotional support. Whilst a support person is not a substitute for direct accountability by an employee to an employer, they perform a role beyond that of a shoulder to cry on.*

Annualised Salary Provisions Controversial

The Fair Work Commission has been criticised by employer groups for complicating the award provisions regarding annualised salaries, arguing the FWC has made matters worse, adding unnecessary red-tape to an already overly-complex award system.

The concept of an annualised figure is hardly new; most applications of it going back decades have been designed to avoid the prescriptiveness of the award system; i.e. the red-tape, not the obligations on wages and related benefits. It was always understood there would be peaks and troughs in the flow of work and time spent on it.

Both parties benefit from an annualised salary. For example, the employer gets administrative simplicity and the employee receives a regular, predictable income. Each side understands the give and take rules of the game.

But this recent FWC decision will require employers who enter into an annualised salary arrangement to specify in writing which award entitlements are included in the salary, the method used to calculate the salary identifying each separate component and the outer limit of hours the salary covers off. After that is established, the employer is required to perform an annual check against the award entitlement on the hours, overtime and other benefits the employee would have received had the salary arrangement not been in place.

And to ensure that the employer can do that check calculation, the awards will now require the employer to keep daily start/finish times, unpaid breaks timing and duration and this record must be signed off each pay period by the employee.

This bureaucracy is the antithesis of what employers, SMEs in particular, want in this area. The Clerks (Private Sector) Award is one of the key awards affected by this decision given its widespread use in all industries and the typicality of annualised salaries for many employees covered by that award. If an award applies to the work, simply having a salary and a 'contract' is not a means to get out of award coverage – that is an urban myth. This decision will apply in many situations currently operating on a common sense approach which has underpinned this issue for so long.

The Four Yearly Review of modern awards, which itself has taken four years and counting, included a vast array of applications to vary the modern awards. Ostensibly, these were aimed at 'modernising' the awards. However collectively they have added many pages of conditions which create obligations and requirements on employers who may not fully appreciate the reach of the award system. This latest decision is another in that long line.

4 yearly review of modern awards - Annualised Wage Arrangements [2019] FWCFB 1289 (27 February 2019)

National Labour Hire Registration Scheme Likely

The federal government has committed to establish national registration of labour hire, joining the ALP and unions in the pursuit of greater regulation of the sector. Licensing has already been established in Queensland and Victoria with onerous consequences for failing to register or for breaches of license. Also, using unlicensed labour hire companies is an offence under the existing legislation.

The Commonwealth has indicated it will target the horticulture, meat processing, cleaning and security industries so employers in those industries need to be aware of their obligations and expect close attention from regulatory authorities.