INDUSTRIAL RELATIONS UPDATE

November 2018

Labour Hire and Unfair Dismissal

Some recent Fair Work Commission unfair dismissal decisions are making labour hire companies and their clients nervous and for good reason. In each case the client advised that the worker was no longer welcome on the client's worksite. Since there was no alternative position on the labour hire company's books, the worker's employment was terminated.

But the FWC found in these cases that the labour hire company was at fault. In one case the FWC said the labour hire company "*outsourced the decision to dismiss the applicant so that the dismissal could occur for any reason or even for no reason. Consequently the dismissal of the applicant was not for a valid reason.*"

This characterisation of what occurred in these cases strikes at the contractual relationship between user and provider. It is normal that clients advise the labour hire company that a particular worker is unsuitable and has to go. What the FWC is warning labour hire companies (the employers) is that it's not good enough to simply accept the client's demand to exclude the worker and then end the employment.

In one case, the FWC ordered reinstatement of the worker back to the client's site. When that client baulked at being forced to allow someone from another company to work on their premises, the worker's union gained a restraining order from the Federal Court preventing the client from restricting her from their site. While that was a temporary arrangement until the case is heard fully, it is still true that a client can be required to allow the labour hire worker access to the client's site. This is so because the primary remedy of this jurisdiction is *reinstatement* not just re-employment.

These decisions challenge the status quo, namely that the client has a right to decide who, from the labour hire company, comes on their premises and works. The implications for labour hire clients are that in future, the FWC and the courts are likely to look more closely at the decision-making process that led to an exclusion. For labour hire providers, it is increasingly certain that acquiescing to an exclusion, without enquiry into conduct or performance, won't wash as a reason for terminating the employment.

The practical solution would seem to be that before a client of a labour hire company decides it no longer wants a particular worker on their job site, that client needs to have a valid reason, almost as if the client were the direct employer of the worker. At the very least, labour hire providers need to be asking the question: why has this worker been excluded? This is so because in these cases, the FWC was critical of the labour hire company for not establishing, with the client, that the worker's 'termination' on the client's site, was justifiable i.e. was for a valid reason.

If these decisions survive appeal, especially the restraining decision referred to above, then it's a new ball game. Contracts between labour hire companies and clients will have to be clear about how, and under what circumstances, a worker can be excluded. Labour hire users may start to re-think their rationale for using labour hire in the first place, and move to more direct hire of casuals and temporary workers.

With state government level regulation of labour hire and these decisions, it is clear labour hire companies and clients need to be proactive in coming to terms with the implications of these decisions on their business models. They need to monitor these decisions to discern whether they are an aberration, or the beginning of a trend, marginalising labour hire in this country.

Spinifex Recruiting v Tait [2018] FWCFB 6267 (30 October 2018)

Catherine Hocroft v Verifact Pty Ltd [2018] FWC 6115 (5 October 2018)

CFMMEU v BM Alliance Coal Operations Pty Ltd [2018] FCA 1590 (22 October 2018)

Keeping True Records

The Fair Work Act has been amended to beef up the Fair Work Ombudsman's powers. The target of the changes is fake records used to avoid paying award rates and conditions. But like with most laws, there can be unintended consequences.

And these showed up in a case where senior management discovered a supervisor was running an unofficial flexi-time scheme with a group of employees. The time records showed the same start/finish shifts, regular as clockwork, despite the reality being very different. The supervisor's intentions were to provide flexibility to staff, not to avoid legal obligations.

But it left the company vulnerable to the new law, which says *"(A)n employer must not make or keep a record for the purposes of this section that the employer knows is false or misleading*."

In this case, because the practice was sanctioned by a member of the management team, the door was open to the FWO to find that the employer had knowingly kept a false record. While the company could argue the manager had no authority to act as they did, the FWO would nevertheless have a prima facie case since false records existed. From there it would depend on the evidence the FWO uncovered in its discovery of the authorisation path.

The case highlights the need to ensure line management understands the implications of introducing local variations to matters regulated at the highest level that have the potential to put the organisation in breach of legislation.

Are Your Casuals Really Casuals?

The now notorious *Workpac* decision has opened up a can of worms about the true nature of the "casual" employment category and what the casual loading covers, or can cover in case of a dispute.

Workpac essentially ruled that there was nothing casual, in the sense of ad hoc, lacking regularity or predictability, about the employment of the worker concerned. So, despite the higher wage paid and all the evidence in the employment documents of the use of the word "casual", the worker was in fact a 'non-casual' employee.

It followed then, that as a non-casual worker, he was entitled to annual leave. But the court decided that since there was no specific amount in the hourly rate paid to the so-called casual which could be attributed to annual leave compensation, then no amount of his hourly rate could be off-set towards the annual leave liability. So he will effectively get paid twice.

It is not so much the issue of re-categorising someone after the event that has caused concern from those who employ casuals, but the fact that there was no offsetting, that this decision effectively sanctioned double-dipping.

The legislation is at fault. It defines a "long term casual employee" but not a "casual employee" and given the way the clauses about the NES on annual leave are written, the court had little choice but to find as it did. The NES defines annual leave as a period of time for which the employee must be paid at the time the leave is taken, not paid each hour, day or week as they work. So off-setting in a case like this is probably not available even if the employment contract spells out a % attributable to annual leave in a casual's hourly rate.

Employers, employees, their representatives, the tribunals and experienced judges all know what is going on. We all know that for decades and decades, employees have worked as "permanent casuals", an oxymoron elsewhere in the world, but common as grass here.

Given the complexity of Australia's labour regulation, it's not surprising that the search for simplicity and certainty from employers, and desire for more cash in the pay packet for employees, has created this hybrid employment category. However all this is now open to challenge, and literally millions of people are affected by it.

Until the law recognizes the realties on the ground, this problem won't go away. And vulnerability to suffering the same fate as this employer will remain.

Workpac Pty Ltd v Skene [2018] FCAFC 131 (16 August 2018)

Domestic Violence Leave in Modern Awards

The Fair Work Commission has finalised the inclusion of a domestic violence leave provision in all modern awards except enterprise awards. Award dependent employers are obliged to observe this term which became operative from 1st August this year. The key conditions are that the employee cannot deal with an issue arising from domestic violence outside work times, the maximum number of days per year is five non-cumulative, the leave is unpaid and the employer is entitled to see evidence of entitlement to the leave. The federal government is still intending to include this same provision in the National Employment Standards at which time it will apply to all national system employers/employees.