INDUSTRIAL RELATIONS UPDATE

January 2017

NEW YEAR, NEW YOU

Are you overdue for a clean up of your human resources/workplace relations processes? Want to change how you did things in 2016?

We can help you achieve a fresh start in 2017.

Our services include:

Employment basics

- Your obligations and rights under the law and industrial instruments
- Hiring/Firing
- What documents you need for a new employee
- What to cover in a contract of employment
- What employment records you need to keep
- Employment policies and procedures
- Enterprise bargaining

Dealing with change

- Varying rates of pay and allowances
- Varying hours of work

Preventative actions

- How to deal with employee disputes including complaints about treatment and entitlements
- How to discipline your employees including dismissals
- Workplace compliance checks

Please contact us if you have any questions or queries about the services we provide and how we can help your business in 2017.

Abandonment No Barrier to Unfair Claim

Even where a termination occurs because the employee has been absent without any advice or notification, it is the employer's action of wrapping up the relationship that actually creates the termination – and that means the employee can still claim unfair dismissal.

In what has to be one of the more perverse outcomes of the system, an employee who simply disappeared from work has been given the go ahead to claim unfair dismissal. This is despite the relevant award providing for an abandonment of employment protocol (albeit one which this case now says is invalid), and the employer's multiple efforts to find the employee (including notifying the police).

The employee was unwell during the period his whereabouts remained unknown to the employer, but the evidence revealed that he nevertheless had ample opportunity to inform his employer of the situation. Instead, as he admitted under oath, he "*just didn't care*" that he hadn't done so. Initially, the Fair Work Commission accepted that the employer effectively acted within its rights to take the abandonment of employment route. But on appeal, a full bench said that it was still the employer's action that triggered the end of the employment. Hence the termination was "at the initiative of the employer".

So when an employee disappears without explanation or the courtesy of responding to an employer's efforts to find out what is happening, if the employer terminates the relationship on the grounds of abandonment of employment, an unfair dismissal claim can still be made. Logic suggests the employee's action actually brought the relationship to an end by failing to be ready, willing and available to do the job they were hired to do. But that is not how the appeal bench saw it.

Employers need to carefully word any correspondence sent to employees in this situation. And think carefully about making an termination payments to the employee, because, like in this case, that can be used by the Fair Work Commission against the employer as evidence of the employer terminating the employment.

There are strategies to minimise the risks of blow back in these cases but they depend on the particular circumstances. As a general rule though, if an employee disappears, some attempt needs to be made to find them and if that fails, the employee should be advised in writing that the employer has assumed the employee has resigned without notice. In that correspondence, reference should be made to any contractual (or EBA etc.) obligation the employee has to give notice.

Bienias v Iplex Pipelines Australia Pty Limited [2017] FWCFB 38 (13 January 2017)

Take Care Cashing Out Leave

Some employers are persuaded to agree to personal/carer's leave being cashed out, but there can be a catch. The correct way to cash out unused personal leave where long shifts are worked can deliver an unexpected and unwelcome result – it can cost a lot more than it should.

A mining company operating 12 hour shifts assumed when employees wanted to cash out leave that the actual amount it would have to pay would be based not on a 12 hour day, but a standard day. This was because the entitlement to sick leave is expressed as 10 days a year. It assumed, like most employers, that the entitlement was founded on the standard 38 hour week, or the roughly equivalent, eight hour day. This is where the trouble started – the question then became, what is a "day" for these purposes in this situation.

The union argued employees should be paid at the 12 hour rate and took the matter to court, but at first instance, lost. The original judgment came down on the side of fairness, namely that the intention was for 10 days leave with the assumption that the typical day is around eight hours in most situations. So if the cashing out was based on a 12 hour day, then that wouldn't be fair when compared to the norm.

But on appeal, this was overturned by the Federal Court, which basically said that the typical day for these workers was 12 hours. So that is what they should get when cashing out any of that leave. The company went to the High Court, but could not persuade it there was sufficient merit in the argument to even go to a full hearing. The company's case was dismissed.

The essence of the issue is that leave is expressed in days and hours. The Fair Work Act expresses the entitlement in days, accruing in line with ordinary hours. But the habits and systems of employers and employees, is to keep track of hours - both used and remaining available.

The problem lies in the legislative requirement that a cashing out episode requires the employee to be paid what "*would have been payable to the employee had the employee taken the leave that the employee has forgone*". This means if an employee, who works a long day like these miners, wants to cash out a "day", then the starting point has to be, 'what would the employee have been entitled to if the day was taken as a sick day?'. In that case, it would be the full 12 hours. So it has to be the same when cashed out.

These problems could also be encountered with cashing out annual leave. Wording about the employee being paid the same as if they were taking the leave is in the legislation for cashing annual leave as well. There is a difference between the two areas however: annual leave entitlement is expressed as "*four weeks*" whereas sick leave is expressed as "*10 days*". There is more likelihood of differences between employees on a daily basis than over a week or four weekly cycle, hence the problem tends to be less acute with annual leave.

Employers need to be wary of these arrangements and how they are expressed in industrial instruments. Situations which create a windfall for only some employees ought to be avoided.

Construction, Forestry, Mining and Energy Union v Anglo Coal (Drayton Management) Pty Ltd [2016] FCA 689 (9 June 2016)

2017 IR PREDICTIONS

Changes to awards as a result of the four yearly review of awards including:

- ⇒ Penalty rates
- ⇒ Annual leave
- ⇒ Public holidays
- ⇒ Casual and part-time employment

Stronger Fair Work Ombudsman (FWO) powers and presence across all industries

Changes to union right of entry provisions

Increased scope of accessorial liability provisions for franchisors and parent companies

From August, employees using the right in certain circumstances to set their own annual leave dates

EBA pay rises likely to remain at current lows

CONTACT US

Please contact us if you have any questions or queries about these matters or any other industrial relations matters.

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