INDUSTRIAL RELATIONS UPDATE

July 2017

Casual Conversion Clauses Coming

As part of the four yearly review of modern awards, the FWC has decided to include in almost every modern award, a clause permitting long term regular casuals to apply for conversion to permanent employees. Apart from a couple of exceptions, it is expected the awards will have these provisions in them by year's end.

The FWC's proposed standard clause uses the term "*regular casual employee*" and describes that person as essentially an employee with a discernible regularity about their employment, and a reasonable expectation of on-going employment. In most cases it is likely that the period over which this pattern of working will be measured will be twelve months.

One area of concern is the prohibition on employers engaging and/or re-engaging (which includes a refusal to re-engage), or reducing or varying hours, of casuals in order to avoid any right or obligation under this clause. In some industries, those variations might look like attempts to avoid this new requirement on employers, but in reality be a direct reaction to the ordinary business cycle.

That is a sleeper which could well lead to disputes.

If an employer refuses a conversion request, then that decision can be challenged in the FWC, and possibly, overturned.

Another issue that employers need to come to grips with is the way to manage the service period as a casual with various entitlements that permanent employees accrue based on length of service.

The legislation provides some guidance in this area, for example, in determining service for the purposes of the unfair dismissal regime. But recent cases also indicate that severance pay can be affected by service periods as a casual. So calculating the qualifying employment period for these issues may not be so clear cut and will need to be managed to avoid double-dipping.

This FWC decision is extensive and covers a wide range of matters in relation to casual employment and part time employment. The issues are not all uniformly dealt with and any impact will depend on the modern award covering the employment concerned.

Four yearly review - Casual and Part-time employment [2017] FWCFB 3541 (5 July 2017)

Domestic Violence Leave - Update

A majority full bench decision has formed what it calls a "preliminary view" that all modern awards should have a Domestic Violence Leave provision. The original ACTU claim was for 10 days paid leave per annum, but the FWC has rejected the claim for payment, instead saying there is a case for unpaid leave.

In its decision, FWC indicated in its view domestic violence is a significant issue which requires "a special response". However because the original claim contained such a broad definition of what would constitute an entitlement to the leave, the FWC will convene further hearings to take submissions on the details. No dates have yet been set.

There is a complicating factor in this matter which could see even more delay. The full bench minority judgement (which also rejected paid leave but did not recommend unpaid leave) was handed down separately by a retiring member of the FWC earlier this year, causing concern about the potential for the need to re-hear the whole matter with a new three-member bench. This question has been referred for consideration to the Federal Court.

Money Matters

New High-earner & Compensation Caps

Following the recent Annual Wage Review Decision from the Fair Work Commission, the new high-income threshold for unfair dismissals has reached $142,000 per annum.

This means that the maximum amount of monetary compensation from a claim is now $71,000.

It is important to remember that merely paying this high-income threshold amount does not remove the risk of a claim. It doesn't matter how much a person earns, if their work is covered by a modern award or an enterprise agreement, they are still entitled to claim for unfair dismissal.

Low wage rises phase coming to an end?

It seems the Reserve Bank Governor, Philip Lowe, is keen to see wages rise, consistent with both the May federal Budget forecasts and the recent hefty increase in award wages.

Speaking at a seminar in Canberra, Mr Lowe reportedly said: "At some point, one imagines that's (low wage rises) going to lead to workers being prepared to ask for larger wage rises. If that were to happen it would be a good thing."

The ABS also recently published data showing wages' share of GDP falling and profit share rising. The tea leaves have been saying 'all quiet on the wages front' for a while now, but maybe something new is brewing.

"Customary Turnover of Labour" is not Redundancy

A full bench in the WA Industrial Relations Commission has confirmed that a contractor does not have to pay redundancy because the employee's job loss was part of the ordinary and customary turnover of labour. This is an issue for many companies that provide services on fixed term contracts to their clients. What to do when they lose a contract and can't re-deploy the staff that worked on it?

Right from the beginning of a series of key redundancy decisions in the arbitral tribunals in the early 1980s, it has been accepted that redundancy does not apply where a person was dismissed due to "the ordinary and customary turnover of labour". In fact it has been enshrined in law, with these words, known colloquially as "the exception", forming part of the NES in the Fair Work Act.

In the WA case, the employee claimed his employment contract contemplated he would be paid redundancy on termination. However his employer argued that the reason for the loss of his job was the company's loss of the contract. This meant that even though redundancy pay was included in his contract, what had actually occurred was not redundancy at all – because "the exception" applied.

The facts in this case were focussed on the tension between the employment contract and the legislation, and the employer's argument that no redundancy had in fact occurred was not seen as controversial or tenuous. It wasn't challenged.

While not referred to by this WA bench, a case 18 months ago in the federal jurisdiction traversed the history of "the exception" in an appeal matter where a company had lost a contract.

The FWC full bench in that matter concluded that as the company lost a contract, and an employee who worked on that contract had neither been able to secure work with the new contractor or an alternative position with the existing employer, the employee was not entitled to redundancy. The loss of contract was unremarkable, and a typical or normal business occurrence for that employer.

Like most issues in the employment relationship, each case will have its own characteristics and different outcomes may eventuate. However as a general rule of thumb, redundancy refers to a *job* becoming redundant and not necessarily to *the employee* becoming redundant. In these cases, the work continued, albeit with a different employer and the reason for the employee's termination fell within the purview of "the exception".

Spotless Group v Dennis Buckle [2017] WAIRC 323 (9 June 2017)
Compass Group (Aust) Pty Ltd v NUW; UFU [2015] FWCFB 8040 (1 December 2015)

Happy to hear your feedback, preferences

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