INDUSTRIAL RELATIONS UPDATE

July 2019

What's Redundant—the Job or the Duties?

Many unfair dismissal cases canvas the tricky circumstance where the duties of the dismissed person are still being performed or a new recruit is doing some of those tasks. A recent case has helped set out some useful guiding principles.

Following a downturn in trade, management reorganised the business, re-allocating the duties of the service manager who was dismissed on the basis of redundancy. The tasks were shared among four other employees including a new recruit.

The company demonstrated that it had experienced a significant reduction in service activity and the new employee did not do all of the duties of the dismissed service manager so the job (he had held) no longer existed. That, the company said, was the reason for the dismissal.

And the Fair Work Commission agreed. In the decision, it traced the history of the relevant sections of the Fair Work Act dealing with redundancy and claims of unfair dismissal, making the point that *"there was a change in the operational requirements of the (employer's) enterprise and, as a result, no one was required to perform the (service manager's) job".*

In determining the case the FWC said it has been held that a job involves *"a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employers' organisation, to a particular employee"*. A useful summary of the approach taken to determine the reality of a redundancy, is *"whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant".*

This is not the end of the story however. The law provides that in these situations, the FWC must examine if it would have been reasonable in all the circumstances for the employee to be redeployed within the employer's enterprise. The employer pointed out that the new recruit's position was markedly different in function, remuneration, and seniority from the service manager's role and it was not reasonable to have redeployed. The FWC agreed on this point.

Employers also have a duty to consult an employee about a redundancy in accordance with the rules laid down in awards and agreements, and missing this crucial step usually renders the dismissal unfair, even though the redundancy is real.

The three key questions in this situation are, was the job performed by the employee no longer required to be performed by anyone? did the employer comply with any obligation to consult about the redundancy? would it have been reasonable in all the circumstances for the employee to be redeployed within the employer's enterprise? Deal with those and the FWC may not have to deal with you.

Mr Brian Broudou v Eurolinx Pty Ltd [2019] FWC 4469 (8 July 2019)

Say It, Don't Text It

Twice recently in unfair dismissal cases, senior highly experienced Fair Work Commission members delivered scathing judgments on employers who effected dismissals by text message. In one matter, the FWC said it was likely only in rare circumstances that dismissals should not be conveyed in person. The decisions are replete with strong language condemning the behaviour as "unnecessarily callous", "a repugnant process", "unconscionably undignified" and "disgraceful and grossly unfair". Unless there is genuinely held personal safety fears , or the employee can't be found, employers should avoid modern communication methods and do the business face to face.

Van-Son Thai v Email Ventilation Pty Lt [2019] FWC 4116 (27 June 2019)

Money, Money, Money

The July 2019 Annual Wage Review decision saw award increases set at 3%, effective from the first full pay period commencing on or after July 1st.

Award reliant employers or those with enterprise agreements containing direct linkages to this decision and rates of pay in those agreements, need to check they are compliant.

This decision raises the Federal Minimum Wage to $740.80 per week, or $19.49 an hour for a permanent employee.

The high income earner dismissal cap is also set by this decision and now stands at $148,700, per annum and the maximum amount that the FWC can award in compensation for an unfair dismissal rises to $74,350.

Personal Info Must be Kept Private

An employer has been ordered to pay $60,000 in damages for giving employees' names to a union without the employees' consent. Additionally, it has to engage an independent reviewer of its privacy compliance procedures, policies and processes, issue a written apology to all the employees affected and review its practices in a further six months to ensure it has adopted any recommendations from the review.

During the Royal Commission into Union Corruption it was discovered that the company had handed over employees' names, and a big cheque, to the union, in return for an undertaking from the union to not pursue enterprise bargaining or seek to cancel the existing (old) agreement.

But the employees knew nothing of this. Their personal information was given to the union to enable membership records to be made. When the employees found out, they sued the employer for breaching their privacy.

The matter came before the Australian Information Commissioner and Privacy Commissioner (AIC) which found the employer improperly disclosed personal information contrary to the National Privacy Principles (NPP) and failed to protect the employees' personal information.

The AIC decision makes it clear that the suspect enterprise agreement deal was none of its business. Rather, AIC was concerned solely with the privacy issues.

So even a seemingly beneficial relationship between employee and union is not to be taken for granted when dealing with the issue of privacy and employer obligations. Employers must make themselves aware of the NPP and make sure employees' personal information is properly managed and protected.

This company was hit with damages for giving a union names. For an employer who causes personal information to leak to third parties for commercial or other purposes, the bill could be a lot higher.

'QF' & Others and Spotless Group Limited (Privacy) [2019] AICmr 20 (28 May 2019)

Course of Conduct Defence Faltering?

A cashed-up Fair Work Ombudsman is having more prosecutorial success especially when it comes to penalties for award or other employment law breaches. The federal court often bundles up the offences under the rubric "course of conduct". This term relates to situations where the breaches more or less stem from one source. Multiple breaches are hence treated as one and the same, with the penalties set accordingly.

Lately, the federal court has accepted argument to split up offences under awards on the basis that breaches of different clauses or sub-clauses should be treated one at a time, and not as if it was simply *a breach of the award*.

In one case, an employer had paid a flat rate per hour designed to cover off all the various provisions of the award. But it didn't, it wasn't enough. In determining penalty, the court approached each element of the workers' pay and decided that several relevant clauses had not been observed. So penalties were applied for each separate breach.

The court accepts "course of conduct" where there is clear commonality (e.g. where an employer failed to observe a single term of an award, especially through inadvertence or misapplication). But there are maximum penalties imposed by the legislation, so if the breaches were always bundled, then an employer who breached one term of one award for one employee would be subject to penalties as high as an employer who recklessly ignored numerous award provisions for many employees.

It is available to the courts to compartmentalise the breaches complained of by a litigant such as the Ombudsman and look at the various elements in isolation. It does not mean the court will never find a course of conduct has occurred. But it does mean care needs to be taken to ensure that if employment conditions are set by an award or enterprise agreement, there is sufficient evidence that each term relevant to the entitlement has been considered and complied with.

Fair Work Ombudsman v Safecorp Security Group Pty Ltd & Anor (No.3) [2019] FCCA 1756 (28 June 2019)