CASE STUDY #1

Audits mitigate risk of breaches and penalties

Following a Fair Work Ombudsman (FWO) investigation of an individual's complaint, the employer called First IR for assistance with checking their observance of their agreement and the Act. After we assisted them with the FWO issue, First IR conducted an audit of the employer's EA obligations to make sure there weren't any other issues.

We discovered three problems;

Firstly, the audit revealed a wage escalation mechanism in the EA had not been applied correctly in all cases. This mechanism provided increases, which had to be a fixed percentage or what the FWC awarded each July, whichever was the greater. Unfortunately, the employer only applied the fixed increase. Over the life of the agreement, FWC awarded more than this on a couple of occasions. As such, the employer had misapplied the mechanism. Fortunately though, they were not in breach because their actual rates of pay were higher overall than prescribed by the EA.

The second problem arose because unlike some agreements, which prescribe increases for the life of the agreement only, this agreement didn't say that. Instead, it provided for increases on **each anniversary of the approval of the agreement**. This meant the employer was obliged to continue paying increases in accordance with the provision **after** the expiry of the agreement.

Finally, the employer assumed that once their agreement had expired, they automatically reverted to observing the terms of the Award.

First IR's role was to report on these deficiencies and advise on ways to ensure ongoing compliance.

Once this was completed, we conducted a series of audits across the industry, for employers with very similar agreements. In some instances, we identified potential shortcomings due to similar problems and advised the clients to check back over their records to ensure they were not in breach of their EA and the Act.

If these audits hadn't been conducted, then many of the employers in the industry would sooner or later have been in breach of their agreements. They would have had the liability for back-pay and potentially faced heavy penalties if prosecuted by the FWO.

Comment

It became evident throughout this case that many employers believe that they are immune from breaches in workplace law because they have an agreement in place. This perception is just plain wrong.

Employers should ensure that they are observing their obligations under both their agreement and law, regardless of the fact that they have an EA. They can do this by following and rechecking what is contained in their agreement from time to time.

If you are unsure of your obligations under your agreement, especially if it has expired, we suggest that you seek assistance to avoid receiving a complaint from an employee and the FWO comes knocking on your door.

CASE STUDY #2

Enterprise Agreements Overcome Minimum Start Cost Barrier

When a disability services provider approached First IR seeking assistance with overcoming a misalignment between government funding and modern award obligations, there were no easy answers. The solution lay in not waiting for 'someone' to change the modern award and the law, but to take the matter head on and fix it through bargaining and advocacy.

The problem arose due to the retention of minimum starts for casuals and part-timers, regardless of the circumstances, in modern awards. This issue has been a major impediment to employers and employees alike in a variety of circumstances. In this case, it was threatening the viability of a company engaged in providing essential services to some of society's most disadvantaged citizens.

The funding models used by governments and the particular circumstances of the end-users, meant that the employee's task had to be completed within a 90 minute envelope. There literally could not be any more work than that hour and a half. Yet the modern awards requires that the employees be paid for double that length of time. The disconnection between funding and cost threatened the continuation of the services.

To add to the unsuitability of the award provision, the employees themselves were mainly semi-retired people, and many of them were not always available to work more hours in any case. This reduced the capacity of the employer to give them other tasks to fill out the minimum engagement period.

First IR identified the potential of using the public interest test which forms part of the enterprise agreement approval process. In essence, First IR argued that the assistance to the disabled persons trumped the arbitrariness of the minimum start. With the competing interests at stake, the proposed agreement with a much reduced minimum start provision was not contrary to the public interest and in fact served it admirably.

Comment

Historically, minimum starts were mainly used for employees in larger cities, where travel times to and from work can be excessive. There has to be sufficient work on offer to make the journey worthwhile. But this is not necessarily the case outside of congested cities, or where the employment is nearby, even in a large city. Nor is it relevant if the employees themselves are not really interested in the number of hours set as the minimum (in some cases up to a day, or at least half a day).

In this case, all the stars were aligned, except the modern award. If you want workplace regulation that actually works for your business, then bargaining, coupled with resolute advocacy, is still the best way to go.