INDUSTRIAL RELATIONS UPDATE

May 2016

REMINDER! Employment Training Seminar

First IR Consultancy will be conducting a two and half hour seminar in Dubbo on the rights and responsibilities in the employment relationship under the current workplace relations framework.

The seminar will cover the following employment matters:

Employment basics

- Hiring/Firing
- NES/Awards/Enterprise Agreements
- Contract of Employment

Dealing with change

- Varying rates of pay
- Varying hours of work
- Enterprise Bargaining

Avoiding common traps

- Unfair Dismissal
- Employee complaints about treatment
- Employee complaints about entitlements

WHEN: 15 June 2016

TIME: 9:30am—12pm

WHERE: Dubbo Railway Bowling Club (Sporties Dubbo) 101-103 Erskine Street, Dubbo 2830

COST: $55 pp including GST

Register on our website www.firstir.com.au/seminar

You will receive an invoice for payment upon registration.

Please contact us if you want more information about this seminar or have any questions/queries.

Procedural fairness trumps 'old c**t' comment

Once again an employee, whose use of abusive language towards his employer got him the sack, has been found unfairly dismissed by the FWC.

When an employee raised his concerns with his employer about unpaid overtime, a verbal altercation ensued. It was alleged that the employer said something to the effect of "I cant afford to put food on the f—king table for my family" in which the employee responded "that's not my f—king problem you owe me money you old c—t."

The employer dismissed the employee shortly after via a text message stating "old man here. Do not come back tomorrow thanks."

Deputy President Asbury said that the employer had a valid reason to dismiss the employee because the "old c—t" comment directed at the employer was offensive, not justified and indicative of a breakdown in the employment relationship.

This was despite the employer using "inappropriate language and [behaving] in a manner which [was] neither reasonable nor appropriate."

Turning to the employer's method of dismissal, DP Asbury found the dismissal to be procedurally unfair. She said that notifying the employee of their immediate dismissal by text message was inappropriate and did not give them an opportunity to respond to the reason for dismissal.

She also said that in the context of the overall tone of the verbal altercation between the employee and employer, the employee's conduct did not warrant summary dismissal.

DP Asbury ordered the employer to pay compensation of $828 to the employee. The only reason this figure was so low was because the employee found employment the day after his dismissal. Those earnings were deducted from the five weeks pay she awarded.

There are two noteworthy points that arise from this case.

Firstly, the employer response in defence of the unfair dismissal (UD) claim was very poor. It did not put any evidence or submissions about the claim in advance of the hearing and sent a new employee to the hearing, who knew relatively nothing about the verbal altercation. This meant that the FWC had very little information from the employer that it could rely on when making it's decision.

Secondly, with UD claims increasingly becoming the main task of the FWC, it is important for employers to be mindful of the methods used to terminate employees and ensure these are not contrary to workplace law. In UD claims, it is all well and good to have a valid reason for dismissal, but if this reason can't be supported by "procedural fairness" then prepare for a hefty compensation bill courtesy of the FWC.

Hain v Ace Recycling Pty Ltd [2016] FWC 1690 (16 May 2016)

Watchdog to assess EAs for code compliance

From Wednesday 18 May 2016, any new EA made by a building contractor or building industry participant must be compliant with the current Building Code 2013 (the Code) in order to be eligible for work on future Commonwealth funded construction projects.

Fair Work Building and Construction (FWBC) is now responsible for the assessment of new EA compliance against the requirements of the Code. This compliance role is in addition to monitoring compliance with the Code.

These changes only apply to EAs made on or after 18 May. Building contractors and building industry participants who are covered by existing EAs, awards and other workplace arrangements can continue to bid for Commonwealth funded work.

Third Party Contracting and section 550

In our April Newsletter, we touched briefly on the trolley collectors' case, where Coles Supermarkets became embroiled in a serious underpayment prosecution launched by the Fair Work Ombudsman. In this article we discuss the background, the resolution and the lessons to be learned.

In 2009, Coles awarded contracts for trolley collection to various contractors around the nation and included in the contract, requirements for all relevant workplace laws to be observed by the contractors. Some of these contractors in turn sub-contracted the work further. Some of them did not meet the requisite standard, and were prosecuted by the FWO in the federal court, and initially, Coles was joined to those proceedings.

This was because, during its investigation, the FWO effectively formed the view that Coles either knew, or should have known, that something was amiss. It relied on s.550 of the Fair Work Act to probe Coles about what it did, and did not do, to ensure its contractors were in fact abiding by their contracts. What s.550 does is allow the FWO and the courts to treat a person (which can include a corporation) who aids, abets, counsels or procures, or induces, by act or omission or is knowingly concerned or party to, a contravention, in the same way as an actual perpetrator. It is analogous to the well-known expression "accessory to the crime".

Coles denied the FWO's allegations but did admit its audit processes and procedures were inadequate, which in turn made the underpayment of the sub-contractors' employees easier. Essentially, without admitting liability, Coles committed to ensure the employees of the delinquent sub-contractor were paid properly, making over $220,000 in total ex gratia payments to the underpaid employees. Further, over time, it committed to bringing its trolley collection function in-house.

All of the processes, including the commitments, formed part of an enforceable undertaking which Coles and the FWO executed. In that undertaking, Coles accepts responsibility for the behaviour of its contractors in respect of their employment obligations.

This episode serves as a warning to those who would see contracting-out as a way out of the compliance burden inherent in Australia's workplace relations laws. In this case, the FWO would most likely have formed the view that Coles must have known the true labour cost of the service, given the particularity of trolley collection. If the cost of it via contracting was substantially less, then the FWO would take the view that Coles ought to have known and acted.

Basically, if it sounds too good to be true, then it probably is. The FWO won't accept ignorance or arm's length arguments. And with s.550 of the Act in its armoury, it doesn't have to.

Coles Supermarket Australia Pty Ltd Enforceable Undertaking

Taking notice of all EA procedural requirements

There's no bending the rules when it comes to the approval of an EA, as seen in a recent FWC case where failure to comply with notice requirements under the Act once again saw an EA rendered invalid.

The FWC refused to approve an EA because the employer did not issue a notice of representational rights to its employees within 14 days of it agreeing to bargain.

The Commissioner said that he could not be satisfied that that the employees genuinely agreed to the EA and that the notice met the requirements of s.173(3) of the Act.

Employers making an EA must strictly follow **each and every** procedural requirement set out in the Act in order for it to be approved. This is regardless of the fact that it may have met the majority of these requirements and the content of the EA is well above board.

Outsource your HR to First IR

Don't like conducting disciplinary meetings? Sick of dealing with employee complaints and disputes? Wish someone else could performance manage your employees?

Let us do the hard work for you and outsource some of your HR functions to us.

Give us a call if you would like to know more information about the HR services we can provide for you.

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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