INDUSTRIAL RELATIONS UPDATE

September 2017

Are You Legal?

Parliament has passed amendments to the Fair Work Act aimed squarely at employers who do not meet legal obligations to pay according to awards and enterprise agreements. And it has beefed up the Fair Work Ombudsman's powers to investigate and get information to pursue its enforcement responsibilities.

Franchisors were a particular target of these amendments, but holding companies are too. This is a further step down the road of vicarious liability and chain of responsibility actions that legislatures and courts are embracing.

The bottom line? Where a serious contravention is found, apart from having to make up underpayments, fines can now be as high as $126,000. This is major coin, and employers will face a more heavily-armed FWO. This level of fine will also be available to the courts where breaches relating to employee records and payslips are found.

The term *serious contravention* is defined generally as conduct constituting the contravention which was deliberate and part of a systematic pattern. So inadvertence, if it can be proven as such, is not covered by this. But interestingly, there is another concept which courts have entertained in this area, and that's *wilful blindness*.

Essentially, courts will figure out what an owner, board, CEO, accountant, payroll officer or HR manager ought to have known and proceed on that basis. Avid readers of IR Update will recall in the September 2016 edition an article about the increased activity in this area by the FWO. It has had several successes in prosecuting individuals as well as companies for award or National Employment Standards (NES) breaches. If the FWO can convince a court the person responsible knew what they were doing so that the breach falls into the "serious contravention" category, then these new heavy penalties will be available to the court to impose.

Underpayments of wages due under awards or enterprise agreements, or a breach of the NES, are key targets of the new laws. Franchisors and holding companies will be held liable for breaches by franchisees and subsidiaries where they knew, or ought to have known, of breaches and failed to act.

The amendments enhance FWO's toolkit to gather evidence, with powers similar to corporate regulators such as ASIC and the ACCC. They include coercive powers to require answers to the FWO's questions under oath.

None of this recent legislative activity has however made our complex system any simpler to navigate and get right. This means many opportunities for missteps remain, especially where multiple awards and/or agreements apply in an organisation.

Awards change and will probably do so more frequently, but irregularly, if the four yearly review process is abandoned (an almost certain outcome given bipartisan support for it). Independent audits are useful tools to ensure that obligations are being met. These laws will be in effect very soon.

Explanatory Memorandum - Fair Work Amendment (Vulnerable Workers) September 2017

Labour Hire Users Beware

Victoria has become the third state to succumb to union demands for more regulation of labour hire firms, following their colleagues in South Australia and Queensland. Dressed in the cloak of avoiding exploitation, the push has more to do with unions making it as hard as possible to use labour hire companies. Little resistance to regulating this sector from business associations has been forthcoming so in all likelihood, it will get more challenging (and more expensive) to use supplementary labour, even for seasonal industries. Users should start thinking about alternatives.

Trends

More EBAs being cancelled

More employers are successfully applying to the have their old EBAs cancelled and falling back onto a modern award for their safety net.

Some of the cancellations have come during bargaining as well, with the recent Murdoch University case being a high profile example. The FWC is more disposed to cancel EAs past their expiry dates than it was previously.

As a tactic in bargaining, it is fraught, but for employers whose EAs have expired but still operative, there may be unnecessary or out of date layers of regulation that cancelling the EA would remove.

Bargaining in the doldrums

It's not just wage rises that are stagnating, but bargaining itself, according to the Dept of Employment's recent data. Including expired EAs, around two million employees are covered by federal agreements. That leaves a lot of employers and employees outside the bargaining stream.

And the most glaring statistic is the dramatic drop off in the number of new EAs being approved. In the March quarter 2017, less than a thousand were approved. Overall, less than 5,000 a year are going through.

With modern awards getting bigger, and likely to continue to do so, bargaining may come back into vogue especially if wage demands warm up from their current tepid state.

Control Big Determinant of True Relationship

Once again the federal court has found out an employer trying to pass off direct employment of a husband and wife team as a business to business relationship. The consequences are likely to be costly.

The circumstances had a familiar ring; the couple had their own ABN; they split income; they issued tax invoices; they worked from home; they sometimes paid another person to perform work. On the surface, it all looked pretty clear – the couple were operating their own business.

But they weren't and the court found multiple reasons why. The strongest was the control of events the employer had over the couple. There was ample evidence the power ratio in the relationship was heavily tilted towards the company. Written directives were in evidence, which precluded any suggestion of negotiation or enforcement of an existing contractual obligation. On most key aspects, the couple took instructions from the company.

The other major influencing factor was the payments made related almost exclusively to the hours worked, not other measures such as the volume of business the couple dealt with. The couple only ever worked for the one 'client'. There was no evidence this alleged business actually held itself out as such to the general public.

Aside from the control test, as in most cases, any one of the numerous pieces of the puzzle on its own would not be fatal to an argument of genuine independent contractor. But taken collectively, it meant the couple were in fact employees, with all the rights that entailed.

The case underlines that it doesn't matter what people might call a relationship where work is performed. What matters is the objective set of facts. Having a written contract, having an ABN, issuing tax invoices, not wearing a uniform, billing for phone calls – these things and more were present in this case but it was all to no avail.

Anti sham contracting laws can see employers heavily penalised for aiding or abetting fake business to business relationships. Then there's underpayments, including superannuation, that may have to be made. Getting it wrong can really hurt.

If the complexity of workplace regulation is the motivation for employers to venture into this area, then there are other ways to deal with that red tape that are not dubious to start with. These should be explored to the full rather than merely risking getting caught. This employer now has a major headache.

Putland v Royans Wagga Pty Ltd [2017] FCA 910 (9/8/17)

Your blood's worth bottling - but in your own time

Blood donor leave has been around for decades, but it dropped off the agenda with award modernisation. In the current Review of modern awards, an application was made to restore it as an award condition. However the FWC has decided that while donating blood is a worthwhile social benefit, the modern awards aren't the place for pursuing what is in effect no different to any other voluntary charitable activities. Many awards used to include a two hour paid break for the purposes of donating blood and the provision survives in some enterprise agreements. So that level of benefit serves as a useful guide for employers who wish to either retain or introduce it voluntarily in their organisations.