CASE STUDY #1

An unlikely case of 'genuine redundancy'

When a company with over 100 employees suffered an unseasonal down turn in trade, which was not spread evenly throughout its interstate operations, its options narrowed to the point where it ultimately decided to reduce the workforce. But there was a hitch; no matter how the management looked at it, the actual size of the problem came down to just one position.

This in turn caused hesitation. If the size of the problem was so relatively small, less than 1% of the workforce, shouldn't there be some other solution? Perhaps leave, or leave without pay, could be examined. However none of these options delivered certainty, and the business volumes in one particular locality continued to decline.

The management knew instinctively that making one employee redundant in a company that size would look suspiciously like a set-up – a ruse to get rid of someone. Redeployment options were examined too, but nothing arose from that either. So FIR was called in to examine the case before any actions were taken, to see if the situation met the pub test – would the company be skewered by an unfair dismissal claim if they went ahead with the redundancy.

FIR asked some key questions. Is there evidence of the downturn in trade? Is that evidence sufficient to convince a tribunal that the response of making a person redundant is justified? Is there evidence of the company exploring alternatives, including redeployment? Is there, or will there be, evidence of consultation in accordance with EBA requirements? Is there, or will there be, evidence of how the company went about selecting the particular employee to be made redundant?

Once FIR was satisfied with the answers from the company, it set out the agenda for the relevant consultation meetings with three employees who were short-listed by the company as the ones from which the final redundant employee would come. This was because the company had identified its lesser performers, acting on the fundamental principle of merit for selection, retention and/or reduction of staff. The company advised the employee to be made redundant using speaking notes FIR provided the management to ensure the process was sound and defensible.

The redundant employee applied for relief from unfair dismissal. He said not only was it a sham because he had been on workers compensation earlier in the year, but that the company had been advertising for new staff. Further, he said he was prepared to relocate. The company countered that the ads were as a result of a time lag and the website involved in running the ads had been tardy in removing the notices. And in relation to redeployment, the company demonstrated that there were simply no vacancies at the time the redundancy occurred.

The FWC examined the material, the evidence and the submissions, effectively following the process put in place from the outset. The FWC dismissed the application, finding the redundancy was genuine, and so there was no unfair dismissal case to answer.

Comment

Seemingly unlikely cases can and do succeed. This company was justifiably concerned that making one person redundant would do more than raise eyebrows, and they were right. Anticipating the action meant being prepared from the outset. It paid off.

CASE STUDY #2

Enterprise Agreement Overcomes Part Time Restrictions

After decades of staunch union opposition, part time work is slowly joining the mainstream as a normal way of working. But it's not there yet. And the biggest single stumbling block (after union intransigence) is the requirement in many modern awards for part time employees to have fixed start and finish times and fixed days of the week on which the part time employee works. These have to be identified on engagement and usually can only be altered by agreement, no other way.

Such an old-fashioned, restrictive award provision faced an employer in the disability sector whose operations needed to come into the 21st century and the new National Disability Insurance Scheme (NDIS). This scheme transforms the way disabled persons and their carers will relate, with the former exercising much greater control over the relationship than the latter.

The award does not impose such restrictions on full time employees or casuals. It provides for 24 hour operations and a rostering regime which means full time and casual employees follow the roster, but part timers can sit pat on their contracted hours/days regardless of the business' needs.

When the employer asked for First IR's help, the focus went to the business need, rather than the inherent unfairness between the different types of employees. It was a given that there would be push back from the union and the Fair Work Commission would need strong persuasion on this point too; after all, the FWC is the institution which makes the awards and it has sided with the unions on this issue over the decades more than with employers seeking more flexibility.

Despite the employees voting in favour of the agreement, the union filed significant submissions arguing the agreement did not meet the better off overall test. High on its list of complaints was the part time issue.

To defend the agreement, submissions were made setting out the new imperatives created by the NDIS, the anomalous provisions of the award and the restrictive nature of it in the way the employer had to manage clients' needs. The upshot of retaining the award provision would be greater casualisation to avoid the restrictions. This, it was argued, was in no one's best interests.

The FWC agreed and despite an enormous amount of bluff and bluster from the union, the agreement was approved.

Comment

Making it hard to employ people part time stems from a time of male domination of workforce participation. Whenever it was raised, the 'full time breadwinner' argument was wheeled out by unions afraid that employers merely wanted to reduce costs by reducing hours. It was always a spurious argument but it worked for a long time.

As more women entered the workforce, on more than just a short term basis prior to marrying, the pressure built. But the unions failed to make the adjustment. The FWC didn't try too hard to move with the times either. An employer that needs part time employees to be just as flexible in attending to clients' needs according to a roster cannot rely on award modernisation just yet, and ought to take comfort from this case, that properly and strenuously argued, the right result can be achieved.