

“VISION IN THE WORKPLACE”

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In this edition of “Vision in the Workplace” we look at the early introduction of Labor’s Unfair Dismissal Laws, note the commencement of the Australian Fair Pay Commission Third Minimum Wage Decision and the Human Rights and Equal Opportunity Commission’s change of name. We also look at the exposure drafts of the fourteen Priority Awards, one of the first corporate entity decisions made under the *Independent Contractors Act 2006* (Cth) by the Federal Magistrates Court of Australia and a New South Wales Supreme Court judgment regarding restraints and garden leave.

Unfair Dismissal Law Amendments to Commence Early

Labor’s Unfair Dismissal Reforms will be introduced on 1 July 2009, six months before Labor’s other Forward with Fairness Reforms. Julia Gillard, Deputy Prime Minister and Minister for Employment and Workplace Relations, Education, and Social Inclusion reasoned this early introduction as giving “*Australians relief from the harshest aspects of Work Choices as quickly as possible.*”

The proposed Fair Dismissal Code for small businesses - employing less than fifteen workers (“**the Code**”) acts as a checklist for employers when dismissing employees who have worked for longer than twelve months. Ms. Gillard confirmed that employees in small businesses having worked less than twelve months can be dismissed at any time without consequence for the employer.

Ms Gillard stated if an employee having worked over twelve months initiates an unfair dismissal claim to Fair Work Australia (“**FWA**”), the claim is dismissed if during the informal dispute resolution process FWA finds that the Code has been complied with.

The Code obliges employers to give employees a reason for dismissal. This reason must be preceded by one warning (written or oral) and a period where the worker is granted an opportunity to improve their performance. “*Multiple warnings are not required*” Ms Gillard stated.

Ms. Gillard has also revealed that in the event that FWA finds that an employer has not complied with the Code, the employer must pay the employee compensation capped at a maximum of six months wages, with the maximum compensation only payable in “*serious*” cases.

For more information on the Code or managing your employees please contact Nick Stevens or Alicia Mataere.

Points of interest

- The Australian Fair Pay Commission’s third Wage-Setting Decision (“**the Decision**”) will take effect from the first pay period on or after 1 October 2008. The Workplace Authority has prepared Pay Scale Summaries to reflect the Decision.
- Effective on 4 September 2008, the Human Rights and Equal Opportunity Commission (“**HREOC**”) has changed its name and is now known as the Australian Human Rights Commission (“**AHRC**”).

Exposure Drafts of Priority Awards Released

A Full Bench of the Australian Industrial Relations Commission (“**the Full Bench**”) has published exposure drafts of the fourteen Priority Awards. The Priority Awards cover the following industries; coal mining, higher education, hospitality, manufacturing and associated industries and occupations, mining, private sector clerical occupation, racing, rail, retail, security services and, textile, clothing, footwear and associated industries.

The Application Clauses of the Priority Awards have been expressed to apply to an employer industry for industry Awards and to an employee occupation in Modern Occupational Awards. Additionally, such Awards will not bind an employer where they are covered by an Enterprise Award.

The Full Bench has drafted a model Redundancy Clause, which provides for transfers to lower paid duties, employees leaving during notice periods, and job search leave entitlements. Severance pay has also been included, at reduced levels for small business employees which applies to an employee’s service after 1 January 2010. Julia Gillard, Deputy Prime Minister and Minister for Employment and Workplace Relations, Education, and Social Inclusion has aired concern that the severance obligation on

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small businesses “*would be a new liability... and we are concerned about the cost impact on small businesses.*”

The Full Bench also drafted model clauses in relation to casual loading, termination of employment, redundancy, and superannuation. Additionally, the Full Bench stated that annualised wage and salary arrangements should not be included in modern Awards. The Full Bench also chose not to include annual leave, stand-down provisions and anti-discrimination clauses in the draft Priority Awards.

Company Liable to Contractors

In one of the first decisions for corporate independent contractors under the unfair contract provisions of the *Independent Contractors Act 2006* (Cth) (“**the Act**”), three corporate independent contractors (“**the Contractors**”) have had their contracts amended to remove unfair provisions.

The Contractors provided trucking services (between Melbourne and Sydney) to a Company. They did not have written contracts, but the terms of their commercial contracts were taken to be the terms of the agreements between the Company and the Union (“**the Contract**”).

In 2007, the Company informed the Contractors that their trailers needed upgrading, failure to do so would amount to a termination. The Contractors were prepared to upgrade but requested that they be paid \$1500 for the Melbourne to Sydney run. The Company indicated it was only willing to pay \$1412 for the Melbourne to Sydney run.

Pursuant to the Act, the Contractors commenced an unfair contract action against the Company, claiming that the Contracts were held to be unfair as they permitted the Company to require the Contractors to renew their vehicles with replacements which were materially different from the vehicles which had previously completed the work.

The Federal Magistrates Court of Australia (“**the Court**”) varied the Contract to remove the unfairness providing that any replacement trucks had to have “*specifications reasonably equivalent to the vehicle being replaced.*” The Court also stood the matter over to a future date for consideration of the Contractors’ claims for damages and injunctions.

The Court stated that a commercial contract must demonstrate a balance between advantage and disadvantage to each party. Where this balance is deficient, the Act provides an avenue for redress.

For further information or assistance in managing your contractors please contact Nick Stevens or Alicia Mataere.

Garden Leave Will Not Save a Restraint

The Supreme Court of New South Wales (“**the Court**”) has determined that restraints in a high-paid broker’s (“**the Employee**”) three year Fixed Term Employment Contract (“**the Contract**”) were only binding for six months. This is despite the fact that the Employer sought to restrain the Employee from starting work with a competitor and remaining on garden leave for the fourteen month term the Contract had left to serve.

The Employee had not given notice of termination pursuant to the Contract, but sought to unilaterally resign, amounting to a repudiation, not termination of the Contract. Justice Brereton commented that whilst repudiations do not end fixed term employment contracts, “*they sever the relationship of employer and employee.*”

Justice Brereton reiterated that a restraint of trade must always satisfy a test of reasonableness to be enforceable. Where the employment relationship is continuing, this condition will almost always be satisfied. However, when the employment relationship is absent, other factors will be considered to determine the validity of the restraint.

The fact that the Employee would continue to be paid over \$300,000 a year while on garden leave, would not validate the restraint. Justice Brereton stated that “*compensation for remaining out of the market, however generous, does not create a legitimate protectable interest where none otherwise exists.*”

Justice Brereton granted an injunction for a period of six months, as he stated it was sufficient time for the Employer to recruit new staff to take over the Employee’s role and give them time to establish connections with the clients the Employee was responsible for. This period was also reasonable to protect the legitimate interests of the parties. Any period beyond that would keep the Employee out of the workforce without protecting any legitimate interests. Additionally, the Employee was ordered to pay the Employer’s cost of the proceedings.

For more information or advice on valid restraints and the effective use of garden leave provisions in your contracts please contact Nick Stevens or Alicia Mataere.

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