

“VISION IN THE WORKPLACE”

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In this edition of “Vision in the Workplace” we look at the significant first stage of the Award Modernisation process which has brought about the reduction of 502 Awards into just 17 Modern Awards. We also highlight some pressing issues for businesses to consider in light of these tough economic conditions. Further, we look at a recent Federal Magistrates decision regarding pre-employment negotiations and representations, and follow up on one of the first independent contractors decisions made under the unfair contract provisions of the *Independent Contractors Act 2006 (Cth)*.

Award Modernisation Begins!

In our September 2008 Vision in the Workplace (“September Edition”) we looked at the award modernisation process and outlined the Priority Industries. In the critical first stage of award modernisation, the Australian Industrial Relations Commission (“AIRC”) reduced 502 Awards into just 17 Awards it regards as being “priority industries.”

The 17 Modern Awards are as follows: Black Coal Mining Industry, Clerks – Private Sector, Fast Food Industry, General Retail Industry, Hair and Beauty Industry, Higher Education Industry – Academic Staff, Higher Education Industry – General Staff, Horse and Greyhound Training, Hospitality Industry (General), Manufacturing and Associates Industries and Occupations Award, Mining Industry, Pharmacy Industry, Racing Clubs Events, Racing Industry Ground Maintenance, Rail Industry, Security Services Industry, and Textile, Clothing, Footwear and Associates Industry Award (“the Modern Awards”).

In publishing the 17 Awards the Full Bench of the AIRC also confirmed that the small business exemption for severance pay would remain, apart from those industries and awards which previously did not have one, such as the clothing sector. Additionally, the Full Bench of the AIRC confirmed in the Modern Awards that the default superannuation funds would remain. If the employee has not made an election, and that parties would not be named. The transitional provisions for Modern Awards will also be finalised after the Fair Work Bill is passed.

In short, watch this space; we will keep you up to date on all developments as they arise. In the meantime, if you would like more information on the Modern Awards and how they may affect your business please contact Nick Stevens or Alicia Mataere.

Preparing your Business for the Economic Times Ahead

Continuing from the severance issue mentioned in the previous article, we note that as of 1 January 2010, employers who employ more than fifteen (15) employees will be obliged to pay their employees severance where they have worked for the employer for over twelve (12) months. Given these tough economic conditions, many Companies are considering re-structuring, and essentially down-sizing their personnel. Accordingly, such severance payments are a pressing issue for many employers and will be payable by employers with more than 15 employees from 1 January 2010.

Furthermore, currently, an exemption applies for unfair dismissal claims to employers who employ less than one hundred (100) employees or if an employer terminates an employee for operational reasons (i.e. redundancy). However, as you may be aware under the *Fair Work Bill 2008 (Cth)*, an employee can commence an unfair dismissal claim where they have worked for six (6) months, or if they have worked for twelve (12) months if employed by a company with fifteen (15) or less employees (“the Exemption”) even if due to ‘operational reasons.’ The Exemption will understandably have ramifications for many employers making employees redundant, especially where considering that the Exemption will come into force on 1 July 2009.

Accordingly, in preparing your Company for the tough economic times ahead, we recommend you give serious consideration to your head count and severance obligations, post 1 January 2010 and exposure to litigation come 1 July 2009.

For more information or assistance in preparing your business for the tough economic times ahead please Contact Nick Stevens or Alicia Mataere.

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Employers pays Employee \$106 000 in Damages

A former employee (“**the Employee**”) of a global HR consultancy company (“**the Company**”) alleged that during pre employment negotiations, the Managing Director of the Company had agreed to pay the Employee three (3) weeks wages for every year of service if made redundant. The Employee also claimed the Company said she would be “well looked after” if made redundant but that it was not the Company’s practice to include redundancy clauses in writing in contracts.

Federal Magistrate Kenneth Raphael accepted the Employee’s claims finding she was “persuasive” and “cogent” compared to the Managing Director who “appeared to suffer from a genuine inability to recollect matters.” A hand-written note on the back of an envelope pertaining to what the Managing Director had said in the pre-employment negotiation added weight to the Employee’s argument.

FM Raphael stated that whilst the individual components of what the Managing Director has said may be “imprecise or vague”, collectively they amounted to a concrete term of her employment contract. Further, FM Raphael stated that “arrangements between an employer and an employee are frequently not committed to writing at all and it is not unusual that some terms of an agreement are left out of a written contract.”

Further, the Company argued that a later contract signed by the Employee superseded any contractual commitments made by the Company’s Managing Director during the negotiations. An ‘Entire Agreement’ clause was included in the later contract stating “this letter sets out the entire agreement with you regarding the terms and conditions of your employment with the company.” However, FM Raphael held the ‘Entire Agreement’ clause did not extinguish the redundancy term of the contract because the Company’s HR Manager had told the Employee that it was only intended to improve her bonus arrangements and not change any other term. This was further strengthened by the fact the Company provided other entitlements such as an all paid costs mobile phone – not included in the written contract. In this regard, the Company was ordered to pay the Employee just over \$106,000 in damages for breach of contract.

This case highlights the importance of Company’s ensuring their written contracts are correctly drafted and reflect the entire agreement and the caution to be exercised in pre-employment statements.

For more information and advice on protecting your business from pre employment representations please contact Nick Stevens or Alicia Mataere.

Independent Contractors Decision Re-visited

You may recall from our September 2008 Vision in the Workplace Newsletter that one of the first corporate independent contractors decisions under the unfair contract provisions of the *Independent Contractors Act 2006 (Cth)* was delivered. Following this decision, Federal Magistrate Robert Cameron has acknowledged that natural justice was denied to the Company in making the order to vary the contracts between three Independent Contractors and the Company, given a further decision the order sought to prevent the Company from forcing the Independent Contractors to greatly improve their truck trailers by purchasing larger ones.

FM Cameron reasoned his decision to restrain the Company’s from requiring upgrades to the truck trailers by varying the Contract between the Company and the Independent Contractors was due to the consideration that such an order “was neither sought by the applicant nor foreshadowed by the Court during the course of the hearing”.

The Independent Contractors desired compensation for the cost of upgrading to larger truck trailers as opposed to variation of the Contract itself. FM Cameron accepted the Company’s argument that it may have made different submissions during the hearing had it known the nature of the order being sought was an amendment and not monetary compensation. The initial finding that the contracts were unfair still stands, however, a new hearing will determine fresh orders regarding damages and redress.

For assistance in managing your contractors and/or drafting or amending your independent contractor agreements please contact Nick Stevens or Alicia Mataere.

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