

“VISION IN THE WORKPLACE”

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In this edition of *Vision in the Workplace* we take a look at three (3) recent cases from Fair Work Australia dealing with Individual Flexibility Arrangements; a casual employee's right to initiate unfair dismissal proceedings; and a case which ruled that a twelve (12) month probationary/qualifying period was reasonable. We also look at a recent case from the Federal Court of Australia which deals with protecting Confidential Information. Finally, we are pleased to inform that Stevens & Associates Lawyers will be hosting a Breakfast Seminar on Wednesday, 9 June 2010 to outline various issues arising from the first six (6) months of the new “Fair Work” industrial relations system.

Individual Flexibility Arrangements Ruling

Commissioner John Ryan of Fair Work Australia has ruled that Individual Flexibility Arrangements (“IFAs”) as provided under the *Fair Work Act 2009 (Cth)* (“**the Act**”) may be more limited in their application than first thought.

Section 202 of the Act states that a Flexibility Term “enables an employee and his or her employer to agree to an arrangement...varying the effect of the agreement...to meet the genuine needs of the employee and employer...and complies with section 203.” In turn, section 203 of the Act requires a Flexibility Term to “set out the terms of the enterprise agreement the effect of which may be varied...”

Commissioner Ryan in assessing an Enterprise Agreement (“EA”) for approval, had to determine whether the Agreement’s Workplace Flexibility Clause which stated “...terms in the Agreement may be varied by” an IFA, met section 202 of the Act’s requirement that the IFA deals with “varying the effect of the Agreement”.

Commissioner Ryan noted that the Explanatory Memorandum (“**the EM**”) to the Act states that IFAs can be used “to vary the operation of the award to meet the genuine needs of the employee and employer.” This supported the Company’s Representative’s argument that an IFA “must be able to vary the terms of the enterprise agreement or to “effectively rewrite the Agreement””.

However, Commissioner Ryan stated that the language of section 203 “is different in a very substantial way from the way the provision is described in the EM” in that the EM permitted the re-writing of a term in an EA whereas the Act provides for a “significantly lesser possibility, varying the consequence or result flowing from the operation of a term of an EA but where the varied result or consequence remains within the sphere of operation of the term of the agreement.” He stated that the presence of the phrase “the effect of” could not be ignored because to do so “constitutes a re-writing of each provision.”

Commissioner Ryan further stated that his interpretation of the Act was supported by the Model Flexibility Clause for Modern Awards and EAs (“**the Model Clause**”) which “refer to only subject matters and not specific clauses.”

The EA was approved once the Model Clause replaced the proposed clause.

This case highlights the necessity to properly draft enterprise agreements and letters of appointment/employment contracts to meet the meticulous requirements of the Act in order to take advantage of IFAs. If you have any questions or require assistance in drafting and reviewing any agreements, please contact Nick Stevens or Megan Bowe.

Upcoming Breakfast Seminar!

We are pleased to advise that Stevens & Associates Lawyers will be holding a free Breakfast Seminar on **Thursday, 10 June 2010** at the Grace Hotel Sydney to outline various issues arising from the first six (6) months of the new “Fair Work” industrial relations system. To reserve your place please contact David Wells on (02) 9222 1691 or email dwww@salaw.com.au
More details to come soon!

Protecting Confidential Information

In an urgent hearing earlier this Month, Justice Foster of the Federal Court of Australia heard interlocutory evidence that a former Managing Director of a global company (“**the Global Company**”) passed to his brother, an employee of a competitor of the Global Company (“**the Competing Company**”), “important and sensitive confidential information which is the property” of the Global Company.

Justice Foster agreed that this “very important commercially sensitive material” was significant to the Competing Company as it allowed it to compete with the Global Company by securing service contracts in Papua New Guinea.

The Competing Company undertook to ask its employees to locate and if found, quarantine confidential information belonging to the Global Company, but, the Global Company pointed out that its “legitimate concerns do not merely involve a question of preventing further use of confidential information...but also involves a need to preserve whatever electronic records presently exist in the hands” of the Competing Company

The Global Company sought interim injunctions against the Competing Company and the Managing Director and orders that a Computer Expert access all computers and other electronic storage devices to locate any confidential information on the Competing Company’s network which “belongs or concerns” the Global Company.

Although Justice Foster recognised that the Competing Company and the Managing Director had not yet provided evidence, he chose to make the orders sought by the Global Company but amended the same to allow a “representative or agent” of the Competing Company to “observe the activities of the Computer Expert.” Further, the Competing Company was allowed to review any information located to ensure it did not contain any privileged or confidential information or, information which did not concern the Global Company.

This case highlights that Confidential Information is invaluable and protection of the same crucial to ensure that companies remain competitive. For more information on protecting your confidential information please contact Nick Stevens or Megan Bowe.

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Twelve (12) Months Probation Held Reasonable

Vice President Watson of Fair Work Australia ('FWA') has dismissed an application for unfair dismissal, holding that a twelve (12) month probationary/qualifying period ('the Period') was reasonable.

The Employee applied for a position with the Employer on 10 August 2007 and resided in the Netherlands at the time. Upon being interviewed and succeeding in being offered employment, the Employer emailed an offer of employment to the Employee ('the Offer') stating that "the appointment is subject to the satisfactory completion of a qualifying probationary period of twelve months." The Offer also required the Employee to obtain an appropriate visa which would be sponsored by the Employer ('the Visa').

The Employee accepted the Offer and desired to commence employment in mid 2008 but could not due to a delay in obtaining the Visa. Whilst waiting for the approval of the Visa, the Employee "performed a range of activities relevant to his employment" such as input in applications, staff retreat and drafting of strategic plans. The Employee was paid for these activities as a consultant.

On 8 September 2008, the Employee's employment in the Netherlands ended and he was provided with an amended offer from the Employer ('the Amended Offer'). The Amended Offer was for a September/October 2008 start and again stated that the "appointment is also subject to the satisfactory completion of a qualifying probationary period of twelve months." The Employer terminated the Employee's employment on 23 June 2009 and the Employee applied to FWA for unfair dismissal ('the Application').

The Employer contended that FWA had no jurisdiction to hear the Application as the Employee's employment was terminated "during a 12 month qualifying period of employment which was determined by written agreement" between the parties before employment commenced and which was "a reasonable period having regard to the nature and circumstances of the employment." The Employer also put forward various circumstances which justified the reasonableness of the Period including: the common practice of the Employer including the same within all contracts of other employees of a like-nature; the alignment with an Enterprise Agreement made with the relevant Union ('the Enterprise Agreement'); and key functions of the employment could only be assessed over a 12 month period.

The Employee submitted that the Period was unreasonable due to factors including: 25% of contracts offered at the professional level did not contain a probationary period; unawareness of the legal significance of the Period; and significant amount of paid and unpaid work was performed for a period longer than 12 months.

Vice President Watson concluded that the Period was a "standard probationary period" for the Employer's staff of a like-nature, although it was "waived or shortened in some cases". He also stated that it was "significant" that the Period was expressly stated in the Enterprise Agreement and utilised by other Employers in the same industry. Further, given that much of the work performed by the Employee was outside of Australia, it was "not easy to monitor or supervise" and this suggested that a "longer than normal probationary period may be reasonable". Vice President Watson also stated that the "more complex the accountabilities of a position, the more it is appropriate to consider performance over an extended period."

For more information on the significance of Probationary/Qualifying periods and defending unfair dismissal claims, please contact Nick Stevens or Megan Bowe.

Casual Employee Entitled to Initiate Unfair Dismissal Proceedings

Commissioner Julius Roe of Fair Work Australia ('FWA') has ruled that a casual employee was entitled to claim unfair dismissal after serving the minimum six (6) month engagement and meeting the requirements of "regular and systematic employment" pursuant to the *Fair Work Act 2009 (Cth)* ('the Act') ('the Ruling'). Section 384(2) of the Act states that "regular and systematic" casual employees who, "during the period of service as a casual employee", had a "reasonable expectation of continuing employment" on a "regular and systematic basis", are protected from unfair dismissal.

The Ruling has clarified the circumstances in which a casual employee is entitled to commence unfair dismissal proceedings and highlights the distinctions made between the Act and the former *Workplace Relations Act 1996 (Cth)* ('the WR Act'). For example, Commissioner Roe stated that under the WR Act, the central issue was whether the employee was a "casual" employee. However, under the Act, casual employees are "not excluded and are not subject to different minimum engagement periods" as was the case under the WR Act. Further, Commissioner Roe stated that there is no need to prove that the worker is not a casual.

Another legislative change is that the WR Act required a casual employee to have a "reasonable expectation of continuing employment" at the point of termination. However, the Act provides that the casual employee must have a "reasonable expectation of continuing employment" "during the period of service as a casual employee."

Furthermore, Commissioner Roe noted that the National Employment Standards ('the NES') applied to Full Time, Part Time and Casual Employees who work on a regular and systematic basis. Accordingly, he stated that "for certain leave under the NES, the clear intention is to exclude from jurisdiction, only those employed on an itinerant, occasional, non-systematic, or irregular basis."

Commissioner Roe also clarified that the casual employment must be on a "regular and systematic basis" and this does not mean that the "hours or days of work must be regular and systematic". He verified that the fact that a casual employee works "more hours in one week or one month than another and the fact that an employee might have variable start and finish times is not conclusive evidence" of irregular and unsystematic employment.

Finally, Commissioner Roe considered whether the entire period of casual employment has to meet section 384(2) of the Act and concluded that periods of "complying casual employment could be added to periods of full time or part time employment."

Accordingly, the status of casual employees in your workplace needs to be managed correctly as the fact that a casual employee is engaged as "a casual" is not conclusive. For more information on managing and/or terminating your employees and, any unfair dismissal claims, please contact Nick Stevens or Megan Bowe.

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