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NOVEMBER 2018

A VISION IN THE WORKPLACE

In our November 2018 edition of Vision in the Workplace we explore the Fair Work Commission's (**FWC**) recent decision against Foodora that could have significant implications for the Australian 'gig-economy'. We also examine the circumstances involved in the FWC deciding on two dismissal by demotion cases in two days. Lastly, we break down the statistics and look at the trends revealed in the FWC's recently published 2017-18 Annual Report, and provide an update on the 7 day time limit for the payment of termination monies that now affects 89 different Modern Awards.

Could Landmark Decision Spell Trouble for 'Gig-Economy'?

In a recent landmark decision of the Fair Work Commission (**FWC**) which will no doubt have widespread implications for the Australian 'gig-economy', the FWC has held that a former Foodora Australia Pty Ltd (**Foodora**) delivery driver (**the Worker**) was an employee and not an independent contractor, "*despite the attempt to create the existence of an independent contractor arrangement.*" [1]

Commissioner Cambridge implemented a 'multifactorial test' which involved viewing the employment relationship "*from a distance*" to obtain an *"informed, considered, qualitative appreciation of the whole picture."*

The Commissioner held that the dismissal was both a dismissal from employment and that it was harsh, unjust and unreasonable under section 387 of the *Fair Work Act 2009* (Cth) (**the Act**). Foodora were found to have no valid reason for the dismissal as well as an unjust procedure whereby it advised the Worker of his dismissal "*abruptly by way of email communication and without any proper warning".*

Compensation Ordered

The Worker sought reinstatement as a remedy, however, as Foodora is currently in voluntary administration, this remedy was not appropriate. The Worker was compensated $15,559, which was the amount that he would have earned had he continued working for Foodora for 26 weeks, being the period the Commissioner considered the employment of the worker would have continued minus the amount he had earned in alternate employment since his dismissal.

Impact on Uber & Deliveroo?

Andrew Stewart, an Industrial Relations academic and Adelaide University Law School Professor has commented that he considers the decision may not actually have dramatic implications for other major gig economy platforms. Mr Stewart noted *"we can(not) extrapolate anything from the decision in the Foodora case for platforms that operate in a fundamentally*

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different way". Mr Stewart made the distinction that Uber (and similarly UberEats & Deliveroo) characterises their arrangements with drivers as providing a platform or a "*support service"* for drivers to find customers and get paid, rather than drivers working for that platform, and accordingly they do not appear to be employees.

Mr Stewart identified that, by contrast, the Foodora contract accounted for rostering and payment for that work, whereas companies such as Deliveroo and Uber "*have crafted arrangements which they say don't amount at all to the engagement of anyone to provide work*." However, perhaps worryingly for their Australian operations, these arrangements to supply "*support services*" have already been rejected by UK employment tribunals.

The Future?

It remains likely that the Foodora decision will give rise to similar cases in the future, challenging the classification of 'gig-economy' workers. Proposals for legislative amendments may arise to address union concerns in the pre-election period. Certainly, companies with similar arrangements may re-examine such arrangements in the context of the decision to determine the nature of their commercial relationships.

If you have any questions in relation to classification of employees and/or contractors, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

[1] Joshua Klooger v Foodora Australia Pty Ltd (U2018/2625)

Two Dismissal by Demotion Cases in Two Days

Case #1

In a recent decision, the Fair Work Commission (**FWC**) held that the demotion of a service supervisor (**the Employee**) to that of a mechanical service technician constituted dismissal within the meaning of s 386 of the *Fair Work Act 2009* (Cth) (**the Act**). This decision was made despite a clause in the relevant employment contract allowing the employer, FLSmidth P/L (**FLS**) to require the employee to "*perform a different role"* or "*other duties*" in order to meet "*business opportunities*". [1]

Background

FLS made a number of allegations against the Employee, including being responsible for a potential breach of FLS' health and safety regulations and risking FLS' reputation by failing, in his position as supervisor,

to test the blood alcohol level of team members before journeying to enter a client site after a drinking session involving himself and two team members at an Inn the night beforehand. FLS asked the Employee to show cause as to why his employment should not be terminated.

In response, the Employee suggested alternatives to dismissal including the possibility of a demotion, but did not suggest a reduction in pay. FLS provided the Employee with a written warning letter, demoted him and reduced his base hourly rate of pay by 9.3%.

Decision

Commissioner Saunders rejected FLS' argument that the clause in the Employee's contract authorised the demotion and held that it did not authorise FLS to unilaterally decrease the Employee's pay and duties.

It was noted by Commissioner Saunders that the employment contract did not expressly allow for the employer to effectively demote an employee to "*perform a different role*" for disciplinary reasons, but rather to meet "*business opportunities*".

In any event, the Commissioner made it clear that the existence of any clause in an employment contract allowing for a decrease in an employee's pay or an alteration to an employee's duties, regardless of any anticipated or express reason, will not prevent a demotion from constituting dismissal. Such a clause will only be relevant when determining whether the dismissal was fair.

As the Employee was still employed at FLS, albeit in a demoted role, the Commissioner was required to determine whether the demotion involved a significant reduction in his remuneration or duties to constitute dismissal within the meaning of section 386(1) of the Act.

The 9.3% reduction in the Employee's pay was considered significant, especially as this reduction also affected the Employee's overtime and superannuation contributions.

Commissioner Saunders accepted the Employee's evidence that as a result of the demotion: "*he is no longer responsible for the supervision of other FLS employees, he has no direct contact with clients and he does not have an office but is instead based in the FLS workshop working 'on the tools'*".

The Commissioner held that the demotion had caused a significant reduction in both the Employee's pay and his duties. Accordingly, the FWC held that the demotion of the Employee constituted a dismissal within the meaning of s 386 of the Act. The employee was allowed to pursue an unfair dismissal claim which is still before the FWC.

Case #2

In the second recent case, the FWC held the demotion of a leading hand tree lopper (**the Employee**) to ground crew/climber constituted a harsh, unjust, and unreasonable dismissal. This decision was made even though the demotion involved a relatively minor reduction in the Employee's core role and no reduction in his pay. [2]

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Background

The Employee was promoted to the position of leading hand tree lopper in March 2018, working for Master Tree Ninja t/a Tree Ninja/Adelaide Palm Tree Removal (**the Employer**). The promotion included a "*sizeable*" salary increase of $6000 - 10,000 per annum. The offer was made and accepted verbally with no written evidence, however, this was ultimately deemed a lawful variation of contract by Deputy President Anderson of the FWC.

On 26 July 2018, the Employee was invited to a meeting by the owner of the Employer who raised several alleged deficiencies in his work and demoted him from the position of leading hand. The demotion involved no reduction in the Employees pay. During this meeting the Employee left the meeting prematurely, under the belief or misapprehension that he had been fired.

The Employee did not return to work after that date, believing he had been dismissed. Nor did the Employer contact the Employee requesting he return to work, believing the Employee had resigned / abandoned his employment. There was no communication between Employer and Employee for over a week until the Employee sent a text message asking for his annual leave and notice to be paid out.

Decision

In determining whether the Employee was dismissed, given the Employee did not return to work after his demotion, the reduction of remuneration or duties under section 386(2)(c) of the Act was not relevant. Instead, the FWC considered whether the Employee was terminated at the Employer's initiative under section 386(1) of the Act.

Deputy President Anderson found that "*unilaterally removing a contractual right to be employed as a leading hand was the removal of a fundamental right under his contract of employment*" [emphasis added] and constituted repudiation of the contract of employment. Accordingly, Deputy President Anderson held that the Employee was dismissed at the Employer's initiative.

This was despite the fact that the Employer had not intended to terminate the employment relationship, the Employee's pay was not altered, and while his leading hand responsibilities were removed, his other duties and terms and conditions of his employment were otherwise relatively unaltered.

Harsh, Unjust or Unreasonable

Deputy President Anderson found that the employee's dismissal was not consistent with the Small Business Fair Dismissal Code and was 'harsh, unjust or unreasonable' under section 387 of the Act.

The performance issues raised by the Employer did not, on the evidence, constitute a valid reason for dismissal. The Employee was also not provided with advance notice that he was at risk of being demoted, given an opportunity to respond to such notice, nor was he offered the chance to bring a support person to the meeting on 26 July 2018.

Remedy

Deputy President Anderson ordered two weeks' pay as compensation for the Employee. This was calculated as four weeks' pay and superannuation (minus a two

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week discount which was applied for the following reasons):

1. The likelihood that the Employee may have resigned in any event in the period following the meeting (1 week discount); and

2. The Employee failed to fully mitigate his losses because he walked out of the meeting early (1 week discount).

The remedy of reinstatement was considered inappropriate as the employment relationship had *"broken down irretrievably"*.

[1] *Scott Harrison v FLSmidth Pty Limited T/A FLSmidth Pty Limited (U2018/6589).*

[2] *Aaron Whitfield v Master Tree Ninja T/A Tree Ninja/Adelaide Palm Tree Removal (U2018/8279).*

Takeaway

Employers must be aware that making changes to employee roles (particularly unilaterally) can have potentially dire consequences. It is paramount that employment contracts are carefully drafted to afford maximum protection for Employers. However, contracts cannot act as a panacea and employers need to consider the totality of the prospective change and whether it might constitute dismissal.

If you have any questions regarding making changes to employee roles, please contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

Fair Work Commission Annual Report (2017-18)

The Fair Work Commission has released its annual report for 2017-2018. We set out some of the key aspects of the report as follows:

General Protections

- 4,117 general protection applications involving dismissal were lodged (up from 3,729 last year and steadily increasing from 3,270 in 2015-2016).

- Of the finalised applications, 27% were finalised with a certificate issued stating that *"all reasonable attempts to resolve the dispute had been, or were likely to be, unsuccessful"*.

- 902 general protections applications not involving dismissal were lodged. Of these, 857 applications were finalised, of which 39% were resolved through the Commission's conciliation process.

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Unfair Dismissal

- 13,595 unfair dismissal applications were lodged (down from 14,135 last year and steadily decreasing from 14,796 in 2013-2014).
- Consistent with previous years, 18% of unfair dismissal disputes were either resolved or discontinued before conciliation, 62% were resolved at conciliation, 14% were resolved after conciliation but before a formal hearing, and 6% resolved at a formal hearing. Of the applications resolved at formal hearing, the dismissal was found to be harsh, unjust or unreasonable in 20% of cases, compared with 18% in 2016–17.

Enterprise Agreements

- 5,287 applications for approval of an enterprise agreement were lodged and 4,639 agreements were finalised.
- Of the finalised applications, 82% (3,803) were approved, less than 1% (42) were refused and 17% (794) were withdrawn. There was a small increase in withdrawn applications from previous years.
- Of the applications that were approved, 68% (2,568) were approved with an undertaking.
- The 'time to approve' enterprise agreements increased from 32 days last year to 76 days in 2017-2018. The reason for this significant increase is the increase in the amount of agreements requiring undertakings from 22% in 2013 to 65% in 2017-2018. Agreements requiring undertakings generally take longer for the Fair Work Commission to approve. Other reasons for the increase in 'time to approve' include the increase in applications to approve and/or vary agreements.

Final Pay Deadline Update!

Separately, and by way of update, as of **1 November 2018**, 89 different Modern Awards now impose a **7 day time limit** on employers to pay employees their termination monies.

This means that employers engaging employees covered by such awards, who usually make the employee's final payment in the next usual pay cycle can no longer do so (if that is outside the 7 day time limit). Of course, employers must have regard to any specific Modern Award and interactions with any contracts of employment.

If you have any questions regarding the payment of termination monies and/or the new 7 day time limit, please contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.