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JULY 2017

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CASUAL CONVERSION CLAUSE TO BE INTRODUCED INTO MODERN AWARDS

As part of the Fair Work Commission's ('**FWC**') modern award review, the FWC Full Bench ('**FWCFB**') has handed down its decision on the union movement's "*Casual and Part-time Employment Case*" and in doing so, it has put forward a draft model casual conversion clause ('**Casual Conversion Clause**'). The decision to include a Casual Conversion Clause into modern awards will have significant implications for employers who engage modern award covered casual employees.

The Casual Conversion Clause will provide casual employees with the right to request, subject to specific rules and restrictions, their employer to convert their employment status to part-time or full-time. These employees will have the option to apply for more permanent employment after 12 months of regular employment, subject to the qualifier that the employee has worked a pattern of hours on an ongoing basis that could continue to be performed as a permanent employee.

Employers will possess the right to refuse requests on "*reasonable grounds*", but they will be unable to avoid the Casual Conversion Clause, with the FWCFB requiring employers to provide casual employees with a copy of the Casual Conversion Clause within the first 12 months of employment.

The Casual Conversion Clause has been labelled as an important "*safeguard*" for casual employees in the modern workforce who miss out on many of the protections contained in the National Employment Standards ('**NES**') in exchange for payment of a casual loading. The FWCFB justified the need for the change by highlighting several "*detriments* [of] *casual employment*" to include:

- Potential sudden loss of employment without payment/notice;
- Lack of career path;
- Poorer health and safety outcomes; and
- Employee concerns that an absence from work will endanger their ongoing employment.

The FWCFB determined the casual conversion clause to be necessary as unrestricted use of casual employment has the potential to undermine the fairness and protection offered by the safety net of modern awards and the NES.

In reaching its decision, the FWCFB had regard to statistics from the "*Household, Income and Labour Dynamics in Australia Survey*". The data for casual employees indicated that:

- 29% of casual employees work full time equivalent hours;
- 60% had worked regular shifts for six or more consecutive months; and

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- 28% had worked for their employer for at least three years.

Despite evidence generally indicating that employers have not exploited their power to indefinitely engage casual workers, the FWCFB also referred to evidence that some employers deny worker requests to be employed on a more permanent basis.

The restrictions contained in the Casual Conversion Clause provide welcome relief to nervous employers, with provision for an employer to reasonably refuse an employee's request on the following proposed grounds:

- The casual employee is not truly a regular casual, so the conversion would require a significant adjustment to the casual employee's hours of work;
- The casual employee's position will (or it is reasonably foreseeable) cease to exist within the next 12 months;
- the hours of work will (or it is reasonably foreseeable) be significantly reduced in the next 12 months; or
- the required work pattern over the next 12 months will (or it is reasonably foreseeable) significantly change to a pattern that will not fit with the employee's availability to work.

The FWCFB has invited interested parties to make further submissions on the terms of the Casual Conversion Clause. We anticipate that casual conversion clauses will be implemented in modern awards in Australia in the near future.

If you would like to make a submission to the FWC or have any queries regarding the potential impact of the Casual Conversion Clause on your business, please contact Nick Stevens, Megan Cant or Jane Murray.

THIRTEEN DAYS BETWEEN CONDUCT AND DISMISSAL RENDERS SUMMARY DISMISSAL "HARSH AND UNREASONABLE"

The Fair Work Commission ('**FWC**') has held Note Printing Australia's ('**the Employer**') summary dismissal of an employee, Mr Hemmingson, "*harsh*" and "*unreasonable*" primarily due to a delay between the conduct warranting dismissal, and the dismissal itself.

On 21 July 2016, Mr Hemmingson sent a series of emails that contained the Employer's confidential and sensitive information pertaining to bank notes from his work email account to a personal email account. As a result, Mr Hemmingson's employment was terminated without notice for serious misconduct on 4 August 2016.

The FWC upheld (in part) the Employer's submission that, in sending confidential and sensitive information, Mr Hemmingson had breached the Employer's Acceptable Use of Technology Policy and consequently breached aspects of both the Employer's Technology Policy and Code of Conduct.

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Mr Hemmingson contended, and the FWC accepted, that Mr Hemmingson sent the relevant emails in order to demonstrate that a colleague had been omitted from the sender list in particular emails, and accordingly did not have sufficient seniority to be promoted to Senior Printer, a position that Mr Hemmingson had been denied.

Given the nature of Mr Hemmingson's breaches of policy, and the sensitive and confidential information that he had left "*susceptible to hacking*", the FWC held that there was a "*valid reason*" for dismissal within the meaning of the *Fair Work Act 2009* (Cth) ('**FW Act**'). Notwithstanding, when assessing each criterion to determine whether the dismissal was harsh, unfair or unreasonable pursuant to section 387 of the FW Act, Commissioner Cribb raised two other relevant matters that rendered Mr Hemmingson's dismissal both "*harsh*" and "*unreasonable*". The first was the Commissioners acceptance that Mr Hemmingson's breaches of policy were an error of judgement rather than a deliberate effort to breach policy.

Secondly, the Commissioner held that the major factor rendering Mr Hemmingson's dismissal "*harsh*" and "*unreasonable*" was the length of time taken between the conduct warranting termination and the termination itself. Accordingly, the Commission held that Mr Hemmingson's breaches could not have been sufficiently serious to warrant summary dismissal, given the time taken for the Employer to decide that summary termination was the appropriate outcome and given that Mr Hemmingson was permitted to continue work as normal during the intervening period.

In considering an appropriate remedy, Commissioner Cribb deemed reinstatement inappropriate in light of Mr Hemmingson's conflict with colleagues. The Commissioner considered compensation appropriate, with the quantum to be decided at a later date pending further information, regarding Mr Hemmingson's weekly pay and evidence of his attempts to gain other employment.

If you have any questions relating to disciplinary or termination processes please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

MEETING MODERN CONSULTATION REQUIREMENTS:

HOW FAR DO YOU HAVE TO GO?

The consultation obligations imposed by modern awards can leave employers confused about when consultation is required and to what extent. In regards to award-covered employees, it is crucial that employers carefully consider and adhere to the relevant modern award provision in order to mitigate the risk of a monetary penalty, or that an otherwise genuine redundancy might be transformed into an unfair dismissal.

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Employers should also consider following the consultation process for award-free employees to ensure processes are procedurally fair and to ameliorate the risk of an adverse action claim.

When does the obligation to consult arise?

The standard consultation provision contained in modern awards requires employers to consult with employees when it has made a "*definite decision*" to introduce a "*major workplace change*" to its enterprise that is likely to have a "*significant effects on employees*".

Employers must consult employees when the major workplace change is likely to result in any of the following:

- changes to composition, operation, size of the workforce
- redundancy
- termination
- change to the skills required by employees
- restructuring of jobs
- elimination of job opportunities (including promotion)
- alteration of hours of work or rosters
- employee retraining
- employee relocation

In order to discharge their consultation obligations, employers must provide in writing, and discuss with employees: the changes to be introduced, the likely effects of such changes and what measures might be considered to mitigate detrimental effects of such changes.

Significantly, employers have a duty to commence discussion as soon as practicable after making a "*definite decision*" to introduce change and it can be difficult to determine when this obligation is invoked. For example, if an employer resolves and minutes at a management meeting that change will be introduced, consult may be invoked.

It is also crucial that employers then give genuine consideration to any matters or views an employee raised during the consultation process. In this regard, at times it may be necessary to hold several meetings with an affected employee to satisfy the modern award consultation obligation.

Need for 'genuine' consultation

In a recent decision, the Fair Work Commission ('**FWC**') ordered the reinstatement of four employees who were made redundant after Staples Australia ('**the Respondent**') failed to consult in accordance with the Staples Enterprise Agreement 2014-2016 ('**EA**'). The EA based its consultation provision on the model modern award clause and imposed an additional obligation to consult a "Joint Consultative Committee" ('**the Committee**') in decision making processes.

On 5 July 2016, the Respondent made a definite decision to reduce warehouse staff in order to minimize its operating costs and announced its decision of the resulting redundancies at a meeting with the Committee on 11 July 2016.

Following the first meeting with the committee, group meetings were held with the affected employees during which they were informed of the decision to implement redundancies.

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Subsequent to the group meetings a number of individual employees attended a one on one meeting with their manager; all permanent warehouse employees were provided with a letter confirming the redundancies; and each was advised that they would be assessed for redundancy against a selection matrix.

On 13 July 2016, 12 employees were advised that they had been selected for redundancy and were provided with a letter confirming the same, along with a list of vacant positions.

During individual meetings with the 12 employees, three communicated that they did not wish to engage in a redeployment process and their employment was terminated with effect the following day. The remaining employees were terminated effective 20 July 2016, two of which had expressed a desire to volunteer for selection, whilst seven of these employees we made redundant on a "non-voluntary" basis.

The FWC was critical of the consultation conducted by the Respondent, labelling it "*unduly hasty and largely tokenistic*", stating that it had made "*disingenuous gestures*" disguised as consultation.

In particular, Commissioner Cambridge was critical of:

- the short time frame between advising employees of potential redundancy and the termination of their employment;
- the failure to discuss measures to mitigate the detrimental effects of potential redundancies;
- the failure to invite employees to give their views about the changes and impact of the changes; and
- the failure to include the Committee in the decision-making process.

The FWC held that the Respondent's "*grossly deficient*" consultation process and failure to adequately consider reasonable redeployment meant that the dismissals were not "*genuine redundancies*" within the meaning of the *Fair Work Act 2009* (Cth). Accordingly, the four employees who filed the application for unfair dismissal were able to access the jurisdiction and the FWC held that the dismissals were harsh, unjust or unreasonable and ordered that the four employees be reinstated.

The decision is a cautionary tale for employers tempted to expedite a consultation process and acts as a timely reminder that each consultation step needs to be carefully followed. If you would like to discuss your consultation obligations in more detail and ensure you are getting it right, please contact Nick Stevens, Megan Cant or Jane Murray.