STEVENS & ASSOCIATES LAWYERS

DECEMBER 2018

A VISION IN THE WORKPLACE

SEASONS GREETINGS!

In our December 2018 edition of Vision in the Workplace we provide a roundup of our recent breakfast seminar. We also examine the Fair Work Commission's (**FWC**) recent decision that an employee's period of service with an old employer should be recognised with the new employer due to a connection between the employers.

Stevens & Associates would like to wish you, our valued clients, and your families a safe and prosperous holiday season.

Our office will be closed from midday on Friday, 21 December 2018 and will re-open on Wednesday, 2 January 2019.

Have a very merry Christmas! We thank you for all your support this year and look forward to working with you again in the new year!

Christmas Breakfast Seminar Roundup

Thank you to everyone who attended our Christmas Breakfast Seminar on Thursday, 29 November 2018. We trust everyone enjoyed the breakfast and opportunity to mingle and network with other clients.

Jane Murray's presentation 'Is UR Workplace OK?' considered the impacts of mental health in the workplace in light of the recent Productivity Commission Inquiry (**the Inquiry**) into mental health. The Inquiry, announced on 7 October 2018, will examine how mental health affects productivity in the workplace and how employers may be worsening the impact on the economy by creating or exacerbating existing mental health conditions. Jane discussed the role that employers are increasingly expected to undertake in supporting and accommodating employees experiencing mental health issues and addressed why it is in a company's economic and legal interest to have adequate policies and procedures upholding this. Jane offered case examples that demonstrate the need to approach the issue in a holistic and sensitive manner that is not tokenistic, which serves to improve mental wellness within a workplace as well as mitigate successful claims.

Angharad Owens-Strauss delivered a timely presentation on 'Unpacking Workpac: *Casually Confused*' which explored the recent WorkPac v Skene decision raising questions on the classification of casual workers and their related entitlements. Angharad examined the facts of the

STEVENS & ASSOCIATES LAWYERS

DECEMBER 2018

A VISION IN THE WORKPLACE

case detailing the Applicant's employment arrangements and unpacked the judgement to explain what potential precedent the decision has set for interpreting the definition of a casual. Angharad explored the contesting views on where the definition is to be sourced; considering WorkPac's arguments that a 'casual employee' is defined by the award or enterprise agreement covering the employee, as well as the Court's contemplation of the relevant common law.

If you have any questions arising out of the Breakfast Seminar, please don't hesitate to contact us.

In-sourced Worker Given 'Green Light' to Pursue Unfair Dismissal Claim

The Fair Work Commission (FWC) has recently held that a labour hire employee transferring 'in house' was protected from unfair dismissal after finding that the transfer constituted a "transfer of business" for the purposes of meeting the minimum employment period required to bring a claim for unfair dismissal, being 6 months, on the basis of an established connection between Toll Personnel P/L (the New Employer) and labour hire company, Staff Australia (the Old Employer).
In April 2016, the Old Employer engaged a casual labour hire employee (the Worker) to work on a regular and systematic basis at the warehouse of Asahi Beverages (Australia) Pty Ltd (Asahi). In January 2017, Asahi engaged the New Employer to provide warehousing services. The New Employer then engaged the Worker directly on 3 April 2018 to perform the same work in the warehouse. On 29 May 2018, the New Employer informed the Worker that he had been removed from the Asahi warehouse due to alleged breaches of timekeeping requirements.

As a result, the worker submitted an unfair dismissal application.

The critical question for the FWC's determination in this matter was whether the Worker's period of employment with the Old Employer ought to be recognised for the purposes of the minimum employment period stipulated in sections 382 and 383 of the *Fair Work Act 2009* (Cth) (the Act). If the Old Employer and the New Employer were sufficiently connected the period of service for both employers would exceed 6 months and the Worker would be able to access the unfair dismissal regime.

It was not in dispute that the Worker was engaged on a regular and systematic basis with the expectation of ongoing employment on the same

STEVENS & ASSOCIATES LAWYERS

DECEMBER 2018

A VISION IN THE WORKPLACE

basis, as required in order for a period of service to be recognised under section 384(2) of the Act. Under the same section, such period may not be recognised if there was a "*transfer of business*" between two non-associated entities and the new employer informed the employee in writing that their previous service would not be recognised.

In this case, the New Employer argued that it had *"no connection*" with the Old Employer which could constitute a 'transfer of business' under section 311 of the Act, which sets out the various circumstances which may constitute such a transfer.

The FWC disagreed, applying section 311(5) of the Act which provides for such a 'transfer' in circumstances in which a new employer ceases to outsource the work of a transferring employee to the old employer.

Commissioner Cambridge continued that section 384(2) of the Act was *"intended to ensure that casual employees who work on a regular and systematic basis and who are transferred to employment with a new employer are not denied access to the beneficial legislation unless the new employer informs them in writing that their period of service with the old employer would not be recognised."*

Relevantly, the FWC found that the New Employer did not inform the Worker that his period of service with the Old Employer would not be recognised.

Consequently, it held the Worker had completed the minimum period of employment in order to bring a claim for unfair dismissal because there was a 'transfer of business' between two non-associated entities and there was no written notification negating the period of service with the Old Employer.

Takeaway

Employers must be wary of where employees have been engaged in any other capacity prior to commencing work directly, including pursuant to labour hire arrangements. Claims for transfer of service may be refuted by well drafted "no recognition of prior service" clauses in employment agreements, which are clearly communicated and accepted.

If you have any further questions relating to transfer of service provisions please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

Read the full decision here: Ricky Taulapapa v Toll Personnel Pty Limited [2018] FWC 6242