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MAY 2018

A VISION IN THE WORKPLACE

In our May 2018 edition of *Vision in the Workplace* we examine:

- a Fair Work Commission ruling on whether entitlements are calculated cumulatively in multi-hiring arrangements;
- the rare instance of a security of costs order made by the Fair Work Commission Full Bench; and
- whether an imbalance in legal representation gives rise to a consideration of "fairness" in the Fair Work Commission.

ENTITLEMENT TO TWO JOBS IS NOT CUMULATIVE

The Fair Work Commission (**the Commission**) has recently rejected a postal worker's (**the Applicant**) claim for over $200,000 in alleged underpayments relating to overtime, rest relief and meal allowances (**the Entitlements**) throughout the course of his employment with Australia Post (**the Respondent**).

The Applicant worked as both a Postal Delivery Officer (**PDO**) and Postal Services Officer (**PSO**) for the Respondent (**the Roles**). The issue before the court was whether the Respondent correctly treated the two roles as separate when calculating the Entitlements owed to the Applicant.

In its submission, the Applicant argued that the Roles should be combined and the Entitlements calculated cumulatively as neither agreement provided for multi-hiring arrangements. The Respondent contended that the Roles were distinct, with separate agreements under separate employment contracts which therefore warrants separate treatment of the Entitlements.

Court's decision on multi-hiring

In its decision the Commission relied upon *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* [2017] HCA 53 (***ALDI Foods Pty Limited***) in which the High Court's analysis of Section 52(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) led to the interpretation that enterprise agreements apply to an employee's *"particular employment"* under a particular enterprise agreement.

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This interpretation was supported by the explanatory memorandum of the *Fair Work Bill 2009* which reads:

> "[i]*f a national system employee has more than one job, each job is treated separately in determining the effect of an award or agreement on the employees' entitlements in relation to each job*."

Adopting this construction of "*particular employment*" the Commission found that the Applicant had two separate and distinct part-time positions with the Respondent. The Respondent was found to have correctly calculated the Entitlements on the basis that there were two distinct employments, which is authorised by section 52(2) of the FW Act.

Subsequently, Judge McNab concluded:

> "*The respondent is not in breach of the enterprise agreement in failing to aggregate the hours worked in each position occupied by the applicant. Accordingly, I dismiss the application."*

This case offers an important distinction for employers when calculating entitlements for employees who are engaged in multiple and/or separate roles. Misclassification in this instance would have cost the employer over $200,000 in overpayment. If you have any questions relating to multi-hiring arrangements, please contact Nick Stevens or Isabella Paganin.

SOCIAL WORKER TO STUMP UP $10,000 BEFORE APPEAL CAN CONTINUE

The Fair Work Commission Full Bench (**Full Bench**) has made an order for a security of costs against a social worker (**the Appellant**) who must produce $10,000 before the case will proceed. This decision was made after the Appellant appealed a rejected unfair dismissal claim which the Full Bench found had "*little prospects of success*".

Cabrini Heath Limited (**the Respondent**) applied for the security of costs order claiming that the appeal was without merit and that the Appellant was treating the appeal process as part of a "*larger war*" against the Respondent. The Respondent provided uncontested evidence that the Appellant had no intention of dropping his case against the Respondent and its decision to dismiss him, irrespective of the appeal he lodged.

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The Full Bench noted that applications for the security of costs are rare in the Fair Work Commission (**the Commission**). The Full Bench held that as the Appellant had failed to identify any error of fact or law in Deputy President Gostencnik's original finding that his dismissal was a genuine redundancy and, rather, he merely "*strongly disagrees with the outcome*". The Commission found merit in the Respondent's argument that the Appellant was pursuing his case vexatiously.

The Full Bench made an order for the security of costs to be set at $10,000 whilst taking into account the Appellant's limited financial resources. The Full Bench held that Appellant should not be given a 'free hit' after already having his matter heard, especially considering that the Applicant had not yet paid costs from the initial proceeding.

The Full Bench clarified that the purpose of security for costs is not to 'lock out' impecunious litigants but rather to ensure that if a party brings an appeal and loses, an order for costs can be made for the right that has been exercised by that party. If you have any questions regarding certain dismissal claims, please contact Nick Stevens or Isabella Paganin.

'UNFAIRNESS' IN LEGAL REPRESENTATION IRRELEVANT - FAIR WORK COMMISSION

A recent case before the Fair Work Commission (**the Commission**) has clarified that a consideration of unfairness between parties is "not necessary" when deciding whether to approve an application for permission to be represented by a lawyer or paid agent pursuant to section 596(2)(a) and (b) of the *FairWork Act 2009* (**FW Act**).

Valco Group Australia Pty Ltd (**the Respondent**) applied for representation to defend against an unfair dismissal claim against Mr Monteiro (**the Applicant**). In its submission the Respondent argued that its French manager was not properly equipped to represent the company in court as English was his second language and he was unfamiliar with the Australian legal system and

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the Commission. It also argued that the court process would be expedited by legal representation due to the complex nature of the documentation involved in the case and the significant potential for miscomprehension on the manager's behalf.

Mr Monteiro (**the Applicant**) objected to permission being granted to the Respondent. The Applicant asserted that the unfair dismissal claim did not raise additional complexity as such material had already been addressed by the parties. Furthermore, the Applicant argued that the Respondent has two employees located in Western Australia who could represent the Respondent in the proceeding and stated that he is also French speaking with English as his second language.

In his submission the Applicant claimed that granting permission to the Respondent would result in an "*unfair hearing*" contrary to the Commission practice note and that he would be willing for the hearing to be adjourned to allow the Respondent to be represented by an employee.

Commissioner Bisset held that permission should be granted to the Respondent to be represented by a lawyer or paid agent. In his decision, Commissioner Bisset upheld the Respondent's argument regarding the inherent complexity of the matter and recognised that there were no suitable representatives for the Respondent.

Importantly, Commissioner Bisset held that it was unnecessary to consider whether representation would create *unfairness* between the parties. The Commissioner noted that it is never the case that there is a "*true balance in skills, knowledge and/or ability in representation*", and that from the documents filed to the court it was clear the Applicant had an "*excellent grasp of the matter… and Commission processes*".

If you have any questions pertaining to seeking legal representation in the Commission matters or the unfair dismissal jurisdiction more generally, please do not hesitate to contact Nick Stevens or Isabella Paganin.