STEVENS & ASSOCIATES LAWYERS

July 2024

A VISION IN THE WORKPLACE

Our July edition of Vision includes:

- The Fair Work Commission Rules Employees Cannot Retrospectively Resign;
- Same Job, Same Pay: Ensuring Workers Receive Comparable Wages to their Directly Employed Counterparts; and
- Flexible Working Arrangements: The Fair Work Commission Exercises New Arbitration Powers.

The Fair Work Commission Rules Employees Cannot Retrospectively Resign

In the recent decision of *Jonathan Stay v R. & K.M. Jordin Pty. Ltd.* [2024] FWC 1799, the Fair Work Commission (**the FWC**) ruled that an employee cannot resign retrospectively which means that an employee's resignation will only take effect from the date that it is communicated to an employer (**the Decision**).

Background

Following alleged difficulties between the parties, the employee emailed his employer, R. & K.M. Jordin Pty. Ltd. (**R & KM Jordin**), on 22 March 2024 with an attached letter of resignation. The letter stated that he had been forced to resign due to the conduct of R & KM Jordin, effective from 18 March 2024. In his subsequent unfair dismissal application to the FWC, the employee identified that the resignation was notified to R & KM Jordin on 22 March 2024 notwithstanding the contents of his letter.

In response, R & KM Jordin raised a jurisdictional objection on the basis that the employee's resignation took effect from 18 March 2024, as nominated by the employee in his letter of resignation.

The FWC was therefore required to determine the date the upon which the employee's resignation took effect. If the effective date was deemed to be the earlier date of 18 March 2024 as stated in the letter of resignation, then the employee's application for unfair dismissal would have been filed outside of the statutory 21 day period as

required by section 394(2) of the *Fair Work Act 2009* (Cth).

Summary of the Decision

In reaching a decision, Commissioner Crawford referred to the authority of *Mohammed Ayub v NSW Trains* [2016] FWCFB 5500 (***Ayub v NSW Trains***) which provides that termination by an employer is only effective when communicated to an employee, meaning that an employment contract cannot be terminated retrospectively by an employer.

The Commissioner accepted there may be a difference in this instance, being that *"a retrospective dismissal date deprives an employee of time to file an application contesting their dismissal, and that may result in them missing the filing deadline"*, whereas, "*that is not necessarily the case in terms of a retrospective resignation date because the employee is the one selecting the retrospective date*".

The Commissioner, however, did not believe this difference justified departing from the authority in *Ayub v NSW Trains*, stating the principle would apply equally to the date of resignation by an employee.

The Commissioner also noted several practical problems arising from a retrospective resignation, being that *"it would be odd, for example, if an employee is able to potentially circumvent actions for breaching the employment contract or implied duties during a period of employment by retrospectively resigning, effective from a date that preceded the relevant breach."*

It was consequently found the employee's resignation took effect from the date it was communicated to the employer, being 22 March 2024, which meant that the employee's claim for unfair dismissal was filed within 21 days, and could therefore proceed.

If you have any questions about this case and what the decision could mean for you or your business, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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Same Job, Same Pay: Ensuring Workers Receive Comparable Wages to their Directly Employed Counterparts

The Fair Work Commission (FWC) decision in Application by the Mining and Energy Union [2024] FWCFB 299 was handed down on 1 July 2024. It addressed the MEU's application for a regulated labour hire arrangement order under section 306E of the Fair Work Act 2009 (Cth) (FW Act). This decision by the FWC examines the criteria and statutory requirements under the amended FW Act to determine the validity and necessity of issuing such an order.

A regulated labour hire arrangement order is a type of order introduced by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth). It empowers the FWC to order that labour hire workers engaged by a host company receive equal pay to the company's direct employees who are doing the same kind of work, provided specific conditions are satisfied. This is referred to as the 'same job, same pay' framework.

This case involved Batchfire Callide Management Pty Ltd, the operator of the Callide Mine in Queensland, and WorkPac Pty Ltd along with WorkPac Mining Pty Ltd, which supply labour hire workers to the mine. The application, aimed at ensuring fair wage conditions for labour hire employees, is set against the backdrop of the recent legislative amendments designed to protect enterprise agreement wages from being undercut by lower-paid labour hire workers.

The Legislative Framework

Under s 306E of the FW Act, the FWC is required to make a regulated labour hire arrangement order if it is satisfied that:

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- An employer supplies or will supply employees to perform work for a regulated host;
- A covered employment instrument applies to the regulated host and would apply to the employees if they were directly employed by the host; and
- The regulated host is not a small business employer (within the meaning of the FW Act).

The FWC must not make an order if:

- The work is for the provision of a service, not for the supply of labour; and
- It is not fair and reasonable in all circumstances.

If an order is made, s 306F of the FW Act provides that employers are under an obligation to pay these employees no less than the 'protected rate of pay' derived from the host's employment instrument.

Summary of the Decision

In this case, the FWC concluded that the conditions for issuing a regulated labour hire arrangement order under section 306E of the FW Act were met. The FWC found that:

- WorkPac supplies employees to Batchfire, who would be covered by the enterprise agreement if directly employed by Batchfire;
- Batchfire is not a small business employer;
- The work performed by the employees is for the supply of labour, not the provision of a service; and
- There was no evidence to suggest that making the order would be unfair or unreasonable.

The FWC determined that the employees supplied by WorkPac to Batchfire at the Callide Mine were indeed performing work under conditions that warranted protection under the enterprise agreement applicable to Batchfire employees. As such, it made a regulated labour hire arrangement order under Part 2-7A of the FW Act.

The Commission's order, effective from 1 November 2024, underscores the legislative intent to close loopholes and safeguard fair employment standards in the labour hire sector. The order will ensure that these workers receive comparable wages and

conditions to their directly employed counterparts.

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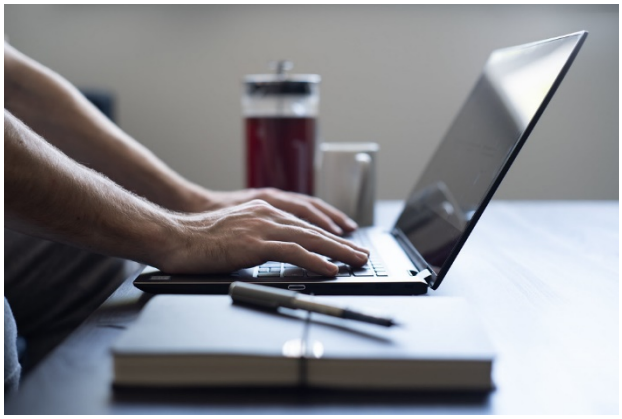

Flexible Working Arrangements: The Fair Work Commission Exercises New Arbitration Powers

In a recent legal development, the Fair Work Commission (the FWC) has made its first orders requiring an employer to implement a flexible work arrangement (a FWA) that allows one of its employees to work from home pursuant to the arbitration powers now available under *the Fair Work Act 2009* (Cth) (the Act).

This decision of *Peter Ridings v Fedex Express Australia Pty Ltd T/A Fedex* [2024] FWC 1845 (the Decision) is the first decision demonstrating the FWC's power to make orders to resolve disputes if an employer refuses an employee's request for a FWA.

The Decision

Deputy President Lake ordered that employer FedEx Express Australia Pty Ltd (FedEx) must make changes to an employee's working arrangements so that the employee may work from home for 3 out of his 4 working days per week due to his ongoing care responsibilities for his wife and children. The employee sought to work from home indefinitely in his application to the FWC.

Under the Act, an employer may refuse a FWA request only if they have satisfied a number of requirements including a genuine attempt to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate certain circumstances and that any refusal is on reasonable business grounds.

Despite the FWC's finding that the employee had a lower output than his colleagues, that his performance could improve through in-person office attendance and that the employee had created considerable tension with his managers by insisting to record calls and to only communicate in writing, the FWC was not satisfied that a *"significant loss in efficiency or productivity"* was a sufficient explanation as to why the FWA request was refused on reasonable business grounds. Further, Deputy President Lake specified that

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"[g]eneric and blanket HR answers are not sufficient alone to establish a reasonable business ground for refusing a request".

The FWC did, however, find that FedEx genuinely attempted to reach agreement in efforts undertaken to understand the employee's circumstances with the information before them.

The order is valid for 3 months to allow the parties to review the employee's circumstances and the operational requirements of FedEx.

Key Takeaways

This decision demonstrates that an employer must be able to sufficiently demonstrate a substantiated, likely detriment to the business if they wish to refuse a FWA on the basis of reasonable business grounds.

It also demonstrates that an employer must take reasonable steps to enquire about an employee's circumstances in order to consider different working arrangements when dealing with a FWA request.

If you have any questions about this case and what the decision could mean for you or your business, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.