Workplace Relations Update

Covering all things HR, Industrial Relations, Health & Safety, Privacy, Disputes, Investigations & Litigation.

Christmas Edition:

From all of us at Allion Partners we would like to wish you and your families' best wishes for the holiday season!!

The latest legal updates you should know:

- Sham enterprise bargaining in the spotlight;
- Legitimacy of EBAs for projects not yet awarded;
- Trainer contracted whooping cough – employer found liable;
- Payroll service provider fined for knowingly underpaying workers;
- Cleaning Business fined $510,840 for underpayment of wages.

Upcoming Event

21 February 2018

Making and Terminating Enterprise Bargaining Agreements

Get in Touch!

Shane Entriken
D/+61 (8) 9216 7141
sentriken@allionpartners.com

Andrew Jonklaas
D/+61 (8) 9216 7124
ajonklaas@allionpartners.com

Lauren Baker
D / +61 (8) 9216 7131
lbaker@allionpartners.com

SHAM ENTERPRISE AGREEMENT SHAKE UP

The Federal Court has overturned a labour hire deal that was voted on by three employees and which later covered thousands of casuals in the coal mining industry.

Case Brief: ***Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd [2017] FCA 1266***

The Federal Court ruling against One Key Resources (**the company**), a major labour hire provider for companies such as BHP and Glencore, has been dubbed a ruling against 'sham contracting'. The 2015 Enterprise Agreement was voted by three employees who were employed between March – August 2015. It received approval by the Fair Work Commission. The company later increased their staff to 1118 casuals working in the black coal industry by 2017.

The CFMEU contended the agreement was a sham and allowed the company to hire casuals which was prohibited under the agreement, with pay just $1 above the award minimum.

In reaching its decision the Federal Court had difficulty reconciling the limited and confined employment experience of the three workers with their ability to approve an agreement that would cover workers falling under a diverse range of awards.

Justice Flick found the 2015 Enterprise Agreement secured consent from a small number of workers to avoid any genuine bargaining process and industrial action in the agreement.

Further he stated there was no issue with a small number of employees voting for an enterprise agreement that could potentially cover a large number of future employees, instead there was an issue with the diverse range of awards that purported to be covered.

The ruling could have significant implications on One Key Resources employees who may receive back pay for annual and sick leave entitlements back to 2015.

What does this mean for employers?

- Employers need to be very careful, and take advice on the options available to properly achieve Enterprise Agreements.
- The case demonstrates the courts will quash Enterprise Agreements that are not deemed to meet the requirements of the Act and present as a "sham".

THIESS DEAL CHALLENGED

The ongoing challenges to the proposed Thiess Enterprise Agreement for the Mt Pleasant Mine Project has continued with the Federal Court referring the application back to the Full Bench of the Fair Work Commission for determination.

Case Brief: *Construction, Forestry, Mining and Energy Union v Thiess Pty Ltd [2017] FCAFC 179 (9 November 2017)*

Commissioner Julius Roe rejected the proposed enterprise agreement. The Enterprise Agreement stated that its' coverage included workers 'engaged to work at, or in connection with the Mt Pleasant Mine Project.' The agreement was challenged by the CFMEU who contended the agreement was not genuinely agreed, and could not cover the employees as the contract had not yet been awarded. Further, the CFMEU argued the scope of the agreement was not fairly chosen.

Commissioner Roe found in favour of the CFMEU finding the agreement was not genuinely agreed to, and that Thiess had manipulated the group selection process. Commissioner Roe found that the award would likely cover the employees at some date in the future, but as it stood was not enforceable because the employees had voted on it before the contract tender had been successful.

Thiess appealed this decision on 7 grounds. Deputy President Val Gostencnik, Deputy President Richard Clancy and Commissioner Tim Lee made up the Full Bench who heard the appeal. The Full Bench chose to review only the issue of 'coverage' stating that it was the key deciding factor for Commissioner Roe.

The issue in question was whether it was necessary for the Mt Pleasant Mine Contract to have been successfully tendered in order for the award to capture 'work engaged in connection with the project, necessary for and preparatory to the project'.

The Full Bench found work "in connection with the project" included preparatory work readying for the commencement of the project 'in the event of a successful tender', and therefore found that Commissioner Roe was in error and the Enterprise Agreement was valid.

The CFMEU appealed the Full Bench's decision, stating the other separate grounds that were not considered by the Full Bench, should have been considered, particularly the grounds of 'fairly chosen' and 'genuine agreement'.

Federal Court Justices John Gilmour, Mordy Bromberg and David O'Callaghan held that the FWC Full Bench erred in characterising Commissioner Roe's coverage point as the 'end' of the issues to be decided. The Federal Court found that the Full Bench came to the wrong conclusion in finding that the employees were not covered by the agreement. The Federal Court quashed the decision of the Full Bench and referred it back to the Fair Work Commission for determination.

What does this mean for employers?

- Watch this appeal with great interest. Employers should be careful when defining the scope of enterprise agreements.

WHOOPING COUGH EVIDENCE RELIED ON FOUND INAPPROPRIATE

An employer has successfully appealed a decision awarding compensation to an employee who contracted whooping cough and experienced a related stroke.

Case Brief: ***Return to Work SA and Civil Contractors Federation SA v Wanders [2017] SAET 147 (15 November 2017)***

The South Australian Employment Tribunal found an earlier tribunal decision had inappropriately relied on infection rates which led to multiple errors of law.

The earlier decision of the tribunal found an 'unbroken chain of causation' between the trainers' posting in rural Western Australia and contracting whooping cough from two trainees in 2013. The whooping cough caused violent coughing which triggered his stroke.

The employer and ReturnToWork SA appealed the decision arguing causation and stating that there was insufficient evidence connecting the session in remote Western Australia with his contracting of the virus. They argued against Deputy President Mark Calligeros's statement that the high rate of whooping cough in WA had probative value.

SAET Deputy President Gilgrist, Deputy President Lieschke and Deputy President Ardlie found no evidence linking the high Western Australian rates with the particular region/town that the employee was involved with. They raised concerns about information the earlier tribunal decision had drawn particularly the consideration of evidence from an Indigenous workforce development officer who gave evidence of whooping cough in the same town in 2010. They deemed it to be immaterial and not relevant to the issue of causation.

What does this mean for employers?

- For an employer to be liable for an injury suffered to an employee there must be a clear casual link between the employee's injury and the workplace.
- The chain of causation must be relevant and material to the action at hand and cannot be too remote to the injury.

ACCESSORIAL LIABILITY FOUND AGAINST ACCOUNTANCY ADVISORS FOR UNDERPAYMENT OF EMPLOYER'S STAFF

Federal Circuit Court Judge O'Sullivan has imposed a $53,880 fine on an accounting firm involved in the payroll system of an employer.

Case Brief: ***Fair Work Ombudsman v Blue Impression Pty Ltd &Ors (No 2.) [2017] FCCA 2797 (16 November 2017)***

Ezy Accounting (**Ezy**) was ordered to pay the amount after it was found accessorial liable for the underpayments of its client, a popular Japanese restaurant chain.

Justice O'Sullivan found Ezy had knowingly been involved in the illegal actions of its client as its payroll service provider. The Court found that as a service provider Ezy has an obligation to ensure compliance with the Fair Work Act and that they should have actively informed their clients of the obligations under the Fair Work Act. The employer, Blue Impression Pty Ltd was fined a penalty of $116,000.

What does this mean for service providers?

- The case demonstrates the Courts' ability hold service suppliers such as Accountants Liable (accessorily) where they know and activity participate in breaking the law.
- The decision is a useful reminder to employers of the increased maximum penalties that will be imposed under the changes to the Vulnerable Workers Legislation.

REPEAT OFFENDERS GIVEN PENALTY 44 TIMES GREATER THAN UNDERPAYMENT

The Federal Court has fined a cleaning business $510,840 for underpaying working holiday visa holders $11,500.

Case Brief: *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors [2017] FCCA 2838*

In 2013, the company was found to have underpaid six backpackers, three from non-English speaking backgrounds, a total of $22,510.62, while failing to provide pay slips, maintain proper records or cooperate with the FWO. The company was imposed with fines totaling $343,000.

Within six months of the 2013 decision, the company began to make underpayments to three Taiwanese working holiday visa holders in an almost identical fashion. The underpayments eventually amounted to $11,500.

The Court took into account the company's previous actions, the lack of contrition by the directors, and the risk of further contraventions, before handing down a penalty of $510,840. This amount is more than 44 times the amount of the total underpayments, and comprised of a $361,200 penalty for the company and penalties of $77,400 and $72,240 for the two directors of the company.

What does this mean for employers?

- The Courts are getting tough in fining repeat offending employers, especially where the transgressions involve underpayments to vulnerable workers.
- Employers must ensure that they take proper advice, understand and keep their minimum employment obligations.