WORKPLACE RELATIONS, HEALTH & SAFETY UPDATE

In our latest update we look at:

- REDUNDANCY: When will a redundancy be genuine where there are issues of relocation?
- SHAM CONTRACTING: Can sham contracting claims be brought as a class action?
- RESTRAINT OF TRADE: Can an employer restrain an employee from using intellectual property where there is little evidence of an employment relationship?
- FITNESS FOR WORK: When will an employer be required to reinstate an employee who was previously stood down because of injury?

UPCOMING EVENT: Workplace Legal Risk and Organisational Change Masterclass

Wednesday, 28 June 2017

GENUINE REDUNDANCY: REDUNDANCY FOUND TO BE GENUINE AFTER REFUSAL OF RELOCATION

The Fair Work Commission has dismissed a part-time employee's unfair dismissal claim, finding that her redundancy was genuine after she refused to relocate from Perth to a full time position in Sydney.

Case Brief: *Laura Wrzoskiewicz v Easy Payroll Perth Pty Ltd* [2017] FWC 2469

The employee was an outsourcing HR coordinator with Easy Payroll. After losing several key contracts and reviewing their operations, Easy Payroll told the employee that her position was no longer required. However, they strongly encouraged her to apply for an HR role in Sydney, and told her that she would be considered 'high priority' for the role, despite not holding the required qualifications. The employee stated that relocation to a full time position in Sydney was not an option. On that basis, she was made redundant. The employee then brought an unfair dismissal application, arguing that her redundancy was not genuine.

Commissioner Williams found the redistribution of payroll duties meant Easy Payroll no longer required the job to be done by anyone. He also found Easy Payroll had adequately consulted with the employee. However, given the employee did not have the required qualifications for the role in Sydney, he stated that it would not be 'reasonable in the circumstances' to redeploy the employee in Sydney and that her redundancy was genuine. The employee's unfair dismissal application was dismissed.

It was irrelevant that the employee had turned down the job in Sydney, because the job would not actually have been suitable for her. The decision raises an interesting question about whether employers must look elsewhere within the organisation, such as interstate or even overseas, to determine whether redeployment of an employee is possible before making their position redundant.

What does this mean for employers?

- Employers must ensure an employee's job is no longer required to be done by anyone before making the position redundant.
- Consulting with an employee before making their position redundant is important.
- Employers should look elsewhere in the organisation before making the employee's position redundant. The employer must do what is reasonable in the circumstances. It is unlikely they would have to explore redeployment options overseas, unless the employee is senior and has international experience.

SHAM CONTRACTING: BRINGING SHAM CONTRACTING CLAIMS AS A CLASS ACTION

The Federal Court has reserved judgment on whether a sham contracting claim involving 900 individuals who were engaged as charity fundraisers can be run as a class action.

Case Brief: *Jacob Cornelius Bywater v Appco Group Australia Pty Ltd* ABN 49 092 605 671 (NSD1857/2016)

Marketing Company, Appco Group Australia (Appco), engaged a large number of fundraisers as independent contractors. One of those former fundraises, Jacob Bywater (Bywater), brought a claim on behalf of himself and 900 others who contend that Appco employed them under sham contracts from 2010 to avoid providing minimum pay and entitlements.

Appco argued that the case cannot proceed as a class action because of significant variations in the individual employment circumstances. Chamberlains, the firm representing the plaintiffs, argued that the Appco contracting system was standardised and prescriptive so any differences were minimal. Therefore, a key issue for the Federal Court is to determine whether the plaintiff's 900 members share the 'same interest' for the purposes of proceeding as a class action claim.

According to Chamberlains' director, Rory Markham, it was conceded that it might be relevant to run up to five test cases of contractors in the system, and then based on the five test cases a commercial reality could then be applied to the other 900 members who currently sit within the group proceedings.

What does this mean for employers?

- If the Federal Court accepts that the claim can be brought as a class action, employers will be significantly more exposed to sham contracting claims being made against them.

- Sham contracting is a topical issue and a current focus of the Fair Work Ombudsman. Employers must ensure they are aware of their obligations including minimum standards of employment.

RESTRAINT OF TRADE: THE IMPORTANCE OF DOCUMENTATION

The South Australian Supreme Court has granted an interlocutory injunction to restrain an employee from using intellectual property in circumstances where no employment agreement or restraint of trade exists.

Case Brief: *Climate Change Technologies P/L v Glynn & ORS* [2017] SASC 60 (1 May 2017)

The employee had invented a thermal energy storage device, assigned a patent and signed an intellectual property agreement with his employer, Climate Change Technologies (CCT) who had spent $5 million on research and development of the device. The employee left his position in 2016.

CCT sought to restrain the employee and his related companies from exploiting opportunities that came to him in his capacity as a director with the company, but stated that it did not want to prevent the employee from working in his chosen field. The employee denied the transferral of intellectual and confidential information to his new role, but stated his life's work and knowledge in thermal technology would be impossible to delineate.

Justice Nicholson found the intellectual property agreement appeared to be the only express written agreement between the parties with no employment contract, deed of confidentiality or deed of restraint regulating post –employment behaviour. However, he was able to confirm that CCT was the holder of the intellectual property and that large files had been transferred from the company. Further, he noted the employee had been in recent contact with connections made during his employment with CCT.

Justice Nicholson held that damages would be unlikely to be an adequate remedy considering the importance of the technology and the position of CCT. He granted an interlocutory injunction on the premise that CCT would be

required to submit further submissions relating to the adequacy of damages.

The injunction prohibits the employee and his two related companies from using the intellectual property in any way including the restraint of communications between parties regarding the thermal energy storage device.

What does this mean for employers?

- Although it is possible to restrain an employee without a relevant employment contract, having a suitable restraint in place is more effective and exposes employers to less risk.

- Consider the design and robustness of your post-employment restraint of trade clauses and confidentiality deeds.

FITNESS FOR WORK: REINSTATING A PREVIOUSLY INJURED WORKER

A freight company's appeal against an order to reinstate a driver determined to be unfit for work has been quashed by a Fair Work Commission Full Bench majority decision.

Case Brief: *TNT Australia Pty Ltd T/A TNT v Stephen Martin* [2017] FWCFB 1510

The employer stood down the bulk delivery driver in 2014 after he injured his knee and applied for workers compensation. The employee sought to return to work after a knee construction but the employer determined he was unable to perform the inherent physical requirements of his role. The employee could not lift the required amount of weight to his waist, to his shoulder and above his shoulder due to the company's freight profile.

In January Commissioner Paula Spencer found the driver was fit to continue in his previous role, in part because she was satisfied that lifting very heavy items was not an essential requirement and that the company left it to drivers to decide how to safely perform their work. She ordered TNT to immediately reinstate the employee.

TNT sought leave to appeal the decision. However, a 2-1 majority of the Full Bench refused to grant permission and dismissed the appeal. Deputy President Gooley and Commissioner Bissett were satisfied with Commissioner Spencer's rejection of the lifting requirements being an inherent requirement of his position. They also found Commissioner Spencer did not err in ordering reinstatement. Vice President Catanzariti disagreed. In his view, Commissioner Spencer had relied upon medical evidence that did not establish whether the injured worker could meet the weight lifting requirements of his role.

What does this mean for employers?

- The decision has been met with some disappointment that the Commission has overridden the employer's determination of whether the employee would be fit to return to his duties. The Commission may be setting a dangerous precedent in relying on its members' subjective assessment of the medical evidence provided with limited knowledge of the workplace or having to bear the risk of incorrect assessments.

- Employers should continue to make their own determinations of whether employees are fit to return to their duties based on the advice of medical practitioners, subject to legislative protections.

- It is important to provide substantive evidence in relation to inherent requirements of roles, duties and capabilities when disputes arise over fitness for work.

UPCOMING EVENT

Presentation	Event details	Register
Masterclass – Workplace Legal Risk and Organisational Change This session will cover the latest legal developments to assist you in managing the key workplace legal risks associated with organisational change **Speakers**: Shane Entriken – Partner, Andrew Jonklaas – Solicitor and Lauren Baker – Law Graduate.	Allion Partners – Level 9, 863 Hay Street, Perth Wednesday, 28 June 2017 12.15pm for a 12.30pm start until 2.00pm	As places are limited, please RSVP: by Friday, 23 June 2017 rsvp@allionpartners.com

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