EMPLOYMENT, WORKPLACE, HEALTH & SAFETY LAW

In our July update we look at:

- REDUNDANCY EXCEPTIONS: When will a termination be a customary turnover of labour rather than a redundancy?
- SHAM CONTRACTING: How do you ensure employee protections are not being excluded?
- GENUINE REDUNDANCY: Does a refusal to accept a pay cut amount to genuine redundancy?

The next event is on 1 August 2017: **Redundancy Masterclass** – don't miss this one.

CUSTOMARY TURNOVER OF LABOUR

The Western Australian Industrial Relations Commission (WAIRC) has found that the termination of an employee was the result of ordinary and customary turnover of labour rather than a redundancy.

Case Brief: ***Spotless Group v Dennis Buckle*** **[2017] WAIRC 323**

The employee was a facilities manager for Spotless Management Services Pty Ltd (**Spotless**) and was employed to work on contracts for a specific client as stipulated in his employment contract. Spotless lost its servicing contract with the client and informed the employee that when the servicing contract expired, unless suitable employment was found within the company, his contract would be terminated as an instance of 'ordinary and customary turnover of labour'.

The employee's contract contained a clause that provided retrenchment benefits where employment was terminated as a result of redundancy. Spotless did not make any payment to the employee nor did it have a retrenchment policy.

The manager sought to enforce his contractual benefits claim at the WAIRC and to receive his redundancy payment.

At first instance, Commissioner Matthews held that a reasonable conclusion from reading the retrenchment clause in line with the contract and the National Employment Standards (**NES**) was that the intention was to pay the manager if he was made redundant.

Commissioner Matthews awarded the manager 11 weeks redundancy pay.

However, on appeal the acting president, Jennifer Smith, stated that the exception in s119(2) of the *Fair Work Act 2009* (Cth) (**FWA**) and the NES should have been applied. This exception allows the dismissal of an employee without a redundancy payment if the dismissal was due to the 'ordinary and customary turnover of labour'. She found that Commissioner Matthews had failed to apply the entirety of the NES to the manager's contract, and that the NES standards were clearly intended to be applied as a whole.

President Smith found that the employee's termination was part of the ordinary and customary turnover of labour and therefore denied the employee's right to claim redundancy entitlements.

What does this mean for employers?

- The exception of 'ordinary and customary turnover of labour' only applies in circumstances where there is a close connection between the outsourced contract, the employer and the employee.
- Employers should be mindful that if they want to rely on the 'ordinary and customary turnover' exception, reference to the provision should be explicitly included in the employment contract to avoid uncertainty.

TRIANGULAR SHAM CONTRACTING A 'DELIBERATE AND CONSCIOUS' CIRCUMVENT OF INDUSTRIAL RELATIONS STANDARDS

A referral from the High Court to the Federal Court has resulted in $58,000 worth of penalties in a landmark sham contracting case.

Case Brief: ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 4)*** **[2017] FCA 580.**

Quest South Perth Holdings Pty Ltd (**Quest**) has been handed significant fines for making misrepresentations regarding employment contracts, forcing employees to transfer to independent contracting arrangements and threatening to dismiss an employee for refusing to change her employment status.

Quest contravened s357 (1) and s358 of the FWA after they transferred two housekeepers to independent contracting arrangements and threatened to dismiss a receptionist when she refused to enter such an arrangement. The receptionist ultimately entered into an independent contracting arrangement and suffered severe hardship because this resulted in a dramatic decrease in shifts given to her.

Justice Gilmour found Quest's general manager personally liable for his 'intimate' involvement in the arrangements, including engaging a company to implement a contracting arrangement for housekeeping and reception employees.

Justice Gilmour found that the sham contracting triangle did not allow for basic entitlements to be given including overtime and penalty rates and deprived employees of basic employment protection. He found that the sham contracts were a result of Quest's desire to engage employees as independent contractors so their rights and entitlements would not be protected by industrial awards. He concluded that 'the impact of sham contracting contraventions is that workers believe that they are deprived from the wide ranging entitlements afforded to employees' including dismissal protections'.

What does this mean for employers?

- Employers must exercise caution and care when considering an employment model to ensure employment contracts do not exclude employee protections and benefits.

- Sham contracting arrangements continue to be a key of from the Fair Work Ombudsman. Both the employment entity and specific individuals may be found liable for contraventions of the FWA.

GENUINE REDUNDANCY: REFUSAL TO ACCEPT PAY CUT NOT GENUINE

The Fair Work Commission has rejected a wide view of the genuine redundancy provisions in the Fair Work Act raised by an employer who claimed that the refusal of four employees to accept a 13% pay cut amounted to their positions becoming genuinely redundant.

Case Brief: ***Mallard (and Ors) v Parabellum International Pty Ltd T/A Parabellum International*** **[2017] FWC 2531 (15 May 2017).**

Parabellum International Pty Ltd (**Parabellum**) argued that the Commission should adopt a wide view when construing the interpretation of the genuine redundancy provisions in the FWA. They claimed that because the jobs were not required to be performed at the previous salaries due to the company's operational requirements, the positions were no longer required. Further, they argued the decreased salaries were still above the salaries of the positions in the relevant Enterprise Agreement.

The employees argued their terminations were not a case of genuine redundancy because the jobs, the functions and the duties remained the same but at a lower rate of pay.

Deputy President Bull agreed with the employees, finding the employment position had not been altered such 'that the functions, duties or responsibilities no longer reflect the roles occupied.' He stated that while delegation of various roles may be considered a genuine redundancy, it 'is not the same as advertising the positions with identical duties on a lower wage to new prospective employees'. To

support this, Deputy President Bull said that the memorandum of the Fair Work Bill presented a number of circumstances involving genuine redundancy but that this circumstance was not one of them.

What does this mean for employers?

- Employers should be cautious of calling a termination a genuine redundancy if it does not meet the inherent requirements of the definition of a genuine redundancy under the FWA.
- The same or substantially the same role being performed at a lower salary does not make the role redundant

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FOR FURTHER INFORMATION, CONTACT:

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OTHER NOTEWORTHY CASES

- **Reasonable adjustments all that are required:** The Federal Circuit Court has found that an employer did not breach disability discrimination legislation when sacking an employee for an injury suffered at work. After an employee injured his left hand, his medical certificates showed he was unable to work as a fitter and no adjustments could help him do so. Therefore, because reasonable adjustments could not have been made to help the employee perform his role, the employer did not discriminate in dismissing him: ***Hilditch v AHG Services (NSW) Trading as Lansvale Holden* [2017] FCCA 1086.**
- **No jurisdiction - Flexible Workplace Arrangements on reasonable business grounds:** The Fair Work Commission has confirmed that it does not have the jurisdiction to hear cases regarding flexible workplace arrangements where the justification of 'reasonable business grounds' is raised unless it is specifically stipulated in the employment agreement: ***Oliver Sims v StarTrack Express Pty Ltd T/A StarTrack* [2017] FWC 3018 (2 June 2017)**

UPCOMING EVENT

Presentation	Event details	Register
Masterclass – Redundancy This session will cover the latest legal developments to assist you in managing the key aspects of redundancy in your workplace.	Allion Partners – Level 9, 863 Hay Street, Perth Tuesday, 1 August 2017 12.15pm for a 12.30pm start to 2.00pm	As places are limited, please RSVP: by Friday, 28 July 2017 rsvp@allionpartners.com

allionpartners.com

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