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MODERN AWARDS

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Since 1 January 2010, most Australian employers and employees have been subject to new modernised awards. While the modern awards were not intended to significantly change pre-existing award conditions, the process of amalgamating numerous overlapping State, Territory and Federal awards into one instrument has inevitably resulted in many changes to employee entitlements. It is therefore essential that employers understand the operation of, and their obligations under, these new awards.

Modern awards have been formulated along industry lines, and they are designed to build on the 10 National Employment Standards and provide a fair minimum safety net of enforceable terms and conditions of employment. They are available to view and download at www.fwa.gov.au.

One common stumbling block amongst employers has been the misunderstanding and misapplication of the transitional provisions which apply to these new awards. Employers need to understand that some provisions of the modern awards will be phased in gradually up until 1 July 2014. Until that time, the old award may still be relevant.

Employers whose operations will be significantly affected as a result of the transition from an old award to a modern award, should be aware of their options to contract out of modern awards by concluding an individual flexibility arrangement, annualised wage arrangement, or in the case of high income employees, by guaranteeing an annual wage over the high income threshold.

UNION RIGHT OF ENTRY

By Lara Radik,
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Since the Labor government took power on 24 November 2007, we have seen a considerable increase in the power of unions, particularly in relation to their rights to enter work premises.

It is essential that employers familiarise themselves with the union right of entry provisions, as a person who intentionally hinders, obstructs, delays or refuses a permit holder entry will be exposed to possible court action and fines of up to $6,600 per occurrence.
Union officials may apply to Fair Work Australia for permission to enter work premises where they have a reasonable suspicion that there has been a breach of:

- the FW Act; or
- a term of an employment instrument such as an award or enterprise agreement; or
- relevant OH&S regulations; and
- the suspected breach affects at least one member of the permit holder's organisation.

The danger with these broad powers is that, as long as the union official can prove that they have at least one member who is affected by an alleged breach, the official may enter work premises and seek to talk to other employees who are not members of the union. The union official may also gain access to documents regarding members and non-members so long as the non-members consent to such access.
If a union official wishes to enter your work premises, you should bear the following matters in mind:

- The union official must hold a valid entry permit issued by Fair Work Australia, and must provide you with a copy of the entry notice at least 24 hours before entering the premises (unless Fair Work Australia has granted permission to enter without notice due to concerns about possible destruction, concealment or alteration of evidence);
- The union official may only enter work premises:
  1. during work hours; and
  2. when a member of the official's union works at that premises. In other words, if your business operates from a number of premises, the official can only enter premises where their members actually perform work (note that there are limited exceptions to this rule in the case of outworkers);
- In most circumstances, the entry notice must specify the alleged contraventions that the union official wishes to investigate.

CONTRACTING OUT OF THE APPLICATION OF MODERN AWARDS

By Richard Ottley,
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Whilst the raft of changes to the National IR System introduced by the *Fair Work Act* **(the Act)** and its complementary legislation have abolished the making of AWAs, the Act seeks to provide a level of flexibility for employers who wish to vary modern award conditions for individual employees. The key feature of what might be termed "the contracting out provisions", is that the employee is better off under any such arrangement, thereby maintaining the integrity of the modern award system (and National Employment Standards) as a safety net.

What is interesting about individual arrangements which vary the applicability of modern award terms, is, that unlike AWAs, they are not bound to be scrutinised by any government department. The employer must be responsible for ensuring that any such arrangement meets the requirements of the Act and is lawfully entered into. Failure to do so can result in employers facing penalties under Act.

This article looks at three areas in which an employer may vary their obligations under an award. The first concerns utilisation of any annualisation provisions which may exist under an award. The other two methods which were created by the Act relate to utilisation of a "*guarantee of annual earnings*" and the entering into of "*individual flexibility arrangements*".

This article does not look at Enterprise Agreement making, however this remains a method by which an employer can, through *Fair Work Australia*, make an agreement to regulate their enterprise to the exclusion of awards which would otherwise apply in the workplace.

ANNUALISATION PROVISIONS OF AN AWARD

Some awards contain an annualisation provision but other awards do not. Under an annualisation provision, an employer may pay an employee an annual salary in satisfaction of certain award conditions. If one takes for example the *Clerks-Private Sector Award 2010 (clause 17)*, an employer may pay an employee an annual salary in satisfaction of any or all of: minimum weekly wages, allowances, overtime and penalty rates and annual leave loading.

Where an annual salary is properly paid by an employer in satisfaction of dedicated award provisions pursuant to an annualisation provision, then the employer is taken to have satisfied their obligations with respect to those award provisions. Importantly an employer must advise the employee in writing of the annual salary payable and which provisions in the award are satisfied by the payment of the annual salary.

The annual salary must be no less than the amount the employee would have received under the award for the year for which the salary is paid.

Employers have an obligation to review at least annually, compensation payable pursuant to an annualisation provision, to ensure that it continues to satisfy the award obligations in question.

GUARANTEE OF ANNUAL EARNINGS

The Act[1] provides an ability on the part of an employee (or prospective employee) to enter into an agreement with their employer whereby their employer provides a "guarantee of annual earnings" **(guarantee)** with the consequence that a modern award which would otherwise apply, ceases to apply whilst the guarantee remains in place.

However such an arrangement can only be made with an employee who is eligible to be a "high income employee"[2]. A high income employee is an employee who has formally entered into a guarantee and whose annual rate of guaranteed annual earnings exceeds the "high income threshold".

The high income threshold is prescribed by regulation and as at 1 July 2010 is $113,800 per annum.

It is important to understand what types of "earnings" can be included in calculating whether or not an employee's earnings exceed the high income threshold. An employee's earnings include:

- The employee's wages;
- Amounts applied or dealt with in any way on the employee's behalf or as the employee directs;
- The agreed money value of "non-monetary benefits"; and
- Amounts or benefits prescribed by regulation.

An employee's earnings **do not include**:

- Payments the amount of which cannot be determined in advance (such as bonuses and commissions and incentive based payments and overtime unless the overtime is guaranteed);
- Reimbursements;
- Compulsory contributions for superannuation; and
- Amounts as are prescribed regulation.

Non-monetary benefits are benefits other than an entitlement to money to which the employee is entitled for the performance of work, and for which a reasonable money value has been agreed by the employer and the employee.

The are different rules for entering into a guarantee depending upon whether the employer is dealing with a prospective employee or a new employee. If a new employee is to be engaged subject to a guarantee, the employer's undertaking and the employee's agreement to it, must be given before the start date of the guaranteed period and within 14 days after the day the employee commences employment.

If the employer wishes to enter into a guarantee with an existing employee then the agreement must be given before the start of the guaranteed period and within 14 days after a day on which the employer and employee agreed to vary the terms and conditions of the employee's employment.[3]

It should be noted that a guarantee cannot be given if an enterprise agreement applies

1. See Sections 328-333A of the Act
2. See section 329 of the Act
3. See section 330(1)(d) of the Act

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to the employee's employment at the start of the period proposed to be covered by the guarantee. The guarantee should be for a period of 12 months or more but may be for a shorter period in some circumstances. It would appear that employers are entitled to make an offer of employment conditional on a prospective employee accepting a guarantee of annual earnings without such pre-condition breaching the *general protection provisions* of the Act.[4]

The guaranteed period commences at the start of the period of the undertaking and ends at the earliest of the following:

- The end of the period nominated in the guarantee.
- Commencement of an enterprise agreement which starts to apply to the employee.
- The revocation of the guarantee (by agreement of the employee and employer).

Things that employers should be alert to:

- The requirement either before or at the time of giving the guarantee, to notify the employee in writing that a modern award will not apply during any period whilst the annual rate of the guarantee exceeds the high income threshold (the statutory notice).
- The need to ensure that an appropriate trigger exists in order to trigger the eligibility of an employer to enter into a guarantee with an existing employee.
- The need to monitor the high income threshold against their employee's earnings.
- The desirability of documenting the arrangement in detail covering, amongst other things:
- the calculations evidencing the fact that the "earnings" of the employee exceed the high income threshold (including any written agreement between the employee and employer as to the value of non-monetary benefits);
- the statutory notice to the employee;
- details of the guarantee including its duration; and
- statement confirming that the arrangement was freely entered into.
- Only earnings as defined under the Act are included when calculating whether the annual earnings of the employee exceed the high income threshold.

INDIVIDUAL FLEXIBILITY ARRANGEMENT

The Act5 contains provisions which require modern awards to include a flexibility term which enables an employee and their employer to agree on an "individual flexibility arrangement" (arrangement) which has the effect of varying the award in order to meet the genuine needs of the employee and the employer. If an arrangement is entered into, then the modern award is varied by the arrangement whilst the arrangement remains in force. Such an arrangement is taken to be a term of the award for the purpose of the Act. A breach of such arrangement therefore would be treated as a breach of the Award.

The Act requires that a flexibility term must[6]:

- Identify the terms of the modern award the effect of which may be varied by an arrangement.
- Require that the employee and employer genuinely agree to any arrangement.
- Require the employer to ensure that any arrangement results in the employee being "better off overall" than they would have been, had no such arrangement been agreed to.
- Set out how the arrangement may be terminated.
- Require the employer to ensure that the arrangement is in writing and signed by both parties (and the employer's parent or guardian if employee is under 18).
- Require the employer to give the employee a copy of the arrangement.

Most if not all modern award provisions relating to award flexibility, appear in clause 7 of the award. Terms which employers and employees may vary include:

- Arrangements for when work is performed.
- Overtime rates.
- Penalty rates.
- Allowances.
- Leave loading.

If one takes the *Clerks - Private Sector Award 2010*, clause 7 of the Award as an example, it contains the requirements for an arrangement described above, and includes requirements that the agreement state each term of the award that the employer and the employee have agreed to vary and how that term has been varied, as well as the commencement date of the agreement and how the agreement as a whole results in the individual employee being better off overall.

Where an employee's understanding of English is limited, the employer must take appropriate measures including obtaining a translation into an appropriate language to ensure the employee fully understands the proposed arrangement. Under the Award, the arrangement can be terminated by either party, upon giving the other 4 week's notice of termination, or at any time by written agreement of the parties.

The award also recites that the employer and employee must have genuinely made the agreement without coercion or duress. If an employer seeks to put pressure on an employee to agree to (or to terminate) an individual flexibility arrangement they may be liable to a penalty under the "general protection provisions" of the Act[7].

Initial concerns as to the flexibility and utility of the individual flexibility arrangement provisions appear to now have been resolved by *Fair Work Australia*[8].

4. See section 341 (4) of the Act
5. See sections 144-145 of the Act
6. See section 144(4) of the Act
7 See section 344(c) of the Act
8 See Minister for Employment and Workplace Relations (c 2010/3183) - Decision of Full Bench 19 May 2010

GOOD FAITH BARGAINING: LOOK ACROSS THE DITCH

By Anthony Russell,
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The introduction of good faith bargaining in the Fair Work Act 2009 (Australia) ("**FWA**") introduced a new concept into Australian employment law. Australian employment practitioners have looked to United States and Canadian jurisprudence to assist in understanding the concept. However, help may be closer at hand, as New Zealand introduced a good faith bargaining regime 10 years ago.

Therefore a New Zealand perspective on good faith bargaining may have particular relevance for Australian employment practitioners grappling with this new concept. This article will look at some of the central tenets of good faith bargaining and how they have been applied in practice in New Zealand. Also, comparisons will be made with the Australia model, where appropriate.

PROCESS REQUIREMENTS

The requirement to meet in New Zealand has been seen as a requirement to actually physically meet, as opposed to electronic meetings or conference calls.

The requirement to respond to proposals in bargaining means that a party cannot just take a position and turn up to the bargaining, but not engage in any dialogue or respond to proposals made by the other side. It means that parties do not have to continually respond to proposals that have already been put in and responded to, but they are required to respond to what the other side says. In *New Zealand Amalgamated Engineering, Printing and Manufacturing Union (Inc.) v Independent Newspapers Limited*[1], the Employment Relations Authority found that the effective intention of the employer companies to refuse to consider or respond to the substance of the Union proposals for a multi-employer collective agreement, was in breach of their duty of good faith. While it could not be said (with one exception) that the employer companies have refused to meet, consider and respond to the Union's proposals at all, the Authority found that they intended to do so in a limited way only

DISCLOSING RELEVANT INFORMATION IN BARGAINING

The New Zealand statutory framework requires information to be provided that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining. Therefore, if an employer takes a position in the bargaining or makes a statement in the bargaining, then they are required to provide information that is relevant to or supports that assertion. For example, if the employer states that they are unable to afford a wage increase, then the union is entitled to see the relevant audited accounts and related information of for the employer's business to ascertain whether this assertion is correct and then respond to such.

However, if the employer simply says that they are not inclined to make this increase, arguably this does not trigger a requirement for the employer to provide all the relevant information to the Union, as they are not attempting to justify this on the basis of affordability.

The provision in New Zealand is further clarified by a procedure whereby information that is regarded as confidential by a party is to be provided to an independent auditor, who is to decide whether it is in fact confidential or commercially sensitive, and if so release the information in a way to the other party that does not comprise that confidentiality or commercial sensitivity. There is no similar provision in the Australian FWA. However, the use of this type of process may provide a mechanism to ameliorate disputes in this area.

UNDERMINING BARGAINING / BREACH OF GOOD FAITH

The bargaining strategy of the employer came under scrutiny in *AUS v University of Auckland*[2]. The union argued that the employer was in breach of its good faith requirements by, among other things, offering a wage increase to non union employees once the bargaining with the union had commenced. The argument was that this undermined the bargaining between the union and the employer. The Employment Court found that the employer was not restricted in its communications with non union employees, and any potential undermining of the bargaining itself was dispelled by the employer later stating it intended to make the same offer for union employees.

RECOGNISING BARGAINING REPRESENTATIVES AND COMMUNICATION

In New Zealand, this has been the most contentious area in regards to good faith bargaining. The New Zealand provisions go further than the Australian provisions in terms of the matters that are restricted. These require recognition of the role and authority of the bargaining representative; not bargaining either directly or indirectly with members or persons representatives acting for; or not undermining or doing anything likely to undermine the bargaining or the authority of the other in the bargaining[3].

The restrictions in s. 32(1)(d) is balanced by a general good faith provision contained in the Act that states that good faith does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs[4]. The most authorative statement on the tension between these two provisions is contained in the Court of Appeal's judgment in *Christchurch City Council v Southern Local Government Officers Union*[5].

The Court of Appeal stated that the general requirement was modified by the specific restrictions imposed during bargaining if there was a conflict. Therefore, during the bargaining process the ability to communicate freely as stated in section

1 New Zealand Amalgamated Engineering, Printing and Manufacturing Union (Inc.) v Independent Newspapers Limited 3/8/01, GJ Wood (Member) WA 51/ 01
2 AUS v University of Auckland (2005) 1 ERNZ 224
3 s.32(1)(d) of ERA 2000
4 s. 4(d)4 of ERA 2000
5 (2007) 2 NZLR 614

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4(3) was constrained by the stricter requirements around communications and bargaining contained in section 32(1)(d). As a consequence, the various communications sent by the employer directly to employees was not protected by section 4(3) and were therefore in breach of section 32(1)(d). However, the Court of Appeal went on to state that the restriction on communications during bargaining was not a blanket restriction, as previously indicated by Employment Court, and instead the ability of employers to communicate with employees was limited only insofar as that communication was restricted by the specific provisions of section 32,1(d).

It is noted that the Australian provisions in the FWA are not as extensive or restrictive as the New Zealand approach.

REQUIREMENT TO CONCLUDE AGREEMENT

In New Zealand there is a requirement to conclude a collective agreement unless there are genuine reasons not to[6]. It has been considered that genuine reasons do not include an employer saying they do not wish to conclude a collective and there would probably be very few genuine reasons themselves that would justify such an approach by an employer.

It is noted that the FWA does not have such a provision and in fact states that there is no requirement to conclude an agreement. This may mean that bargaining deadlocks are likely.

BARGAINING DEADLOCKS

In New Zealand there is a requirement for the parties to continue to bargain even though they have reached a deadlock or a standstill. If this does not resolve the matter, there is a power for the Authority to provide facilitating bargaining where certain criteria are met. If this still does not resolve the matter, there is an ability, as a final mechanism, for the Authority to actually determine what the terms of the collective agreement will be, again, as long as certain criteria are met.

The ability to access these provisions is limited by the strict criteria placed on them in the ERA 2000. This "deadlock" type provision is reflected in the bargaining order provisions and the workplace determination provisions in the FWA. However, the criteria for access in the FWA, does not appear as strict or onerous as that of ERA.

CONCESSIONS

In New Zealand it is probably conceded or implied that in order to conclude a collective agreement, as required by section 33, that concessions will be required by the parties. However, in FWA (Australia), it specifically states that bargaining representatives are not required to make concessions.

SUMMARY

Therefore, the operation of the good faith bargaining provisions in New Zealand for the last 10 years may assist in the development of *jurisprudence* about the good faith bargaining provisions in the FWA. So, Australian employment practitioners should not forget the experience of its neighbours across the Tasman when considering good faith bargaining.

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6 s.33 of ERA 2000

GENERAL PROTECTIONS

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The "General Protections" provisions of the *Fair Work Act 2009* (**Act**) aim to protect employees' workplace rights, freedom of association and involvement in lawful industrial activities, and also to protect employees against workplace discrimination and sham arrangements. Dismissals covered by this section will be known as general protections disputes and will replace unlawful termination under the *Workplace Relations Act 1996*.

1. WORKPLACE RIGHTS

A person (including an employer) is prevented from taking "adverse action" against another person (such as an employee) where the other person has a "workplace right" or against a third person where that person exercises or proposes to exercise a workplace right on behalf of another person who has a workplace right. A person (such as an employee) has a "workplace right" where the person:

- is entitled to the benefit of or has a role under a workplace law, workplace instrument or order made by an industrial body; or
- is able to initiate or participate in a process of proceedings under a workplace law or workplace instrument (meaning a conference or hearing conducted by Fair Work Australia (**FWA**), court proceedings under a workplace law or instrument or making, varying or terminating a workplace agreement etc); or
- is able to make a complaint or inquiry to a workplace body for compliance of a workplace right.

"Adverse action" is taken by an employer against an employee where the employer threatens, organises or does any of the following:

- dismisses the employee; or
- injures the employee; or
- alters the position of the employee to the employee's prejudice; or
- discriminates between the employee and other employees.

The Act also protects prospective employees from adverse action and discrimination by prospective employers. Such action could include being refused employment on the basis of a workplace right or being offered inferior terms and conditions of employment.

A) PROTECTION AGAINST COERCION

A person (such as an employer or a union) must not organise or take or threaten to organise or take any action against another person (such as an employee) with intent to coerce the other person or a third person to exercise a workplace right or to do so in a particular way.

B) EMPLOYER MUST NOT EXERT UNDUE INFLUENCE OR POWER

An employer must not exert undue influence or pressure on an employee in relation to a decision by the employee:

- to make or not make an agreement under the National Employment Standard (**NES**);
- to make or not make an agreement under a term of a modern award;
- to agree to or terminate an individual flexibility arrangement;
- to accept a guarantee of annual earnings; or
- to not agree to a deduction from amounts payable to the employee in relation to the performance of work.

A person (such as an employer) must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person.

2. INDUSTRIAL ACTIVITIES

The Act prevents a person (such as an employer) from taking adverse action against another person (such as an employee) because the other person (such as an employee) is or is not an officer or member of an industrial association or engages or has engaged in industrial activity. In particular the Act provides that:

- A person must not organise or take or threaten to organise or take any action against another person with intent to coerce the other person or a third person to engage in industrial activity.
- A person must not knowingly or recklessly make a false or misleading representation about another person's obligation to engage in industrial activity.
- An employer must not induce an employee to take membership action.

3. PROTECTION AGAINST DISCRIMINATION

An employer must not take adverse action against a person who is an employee or prospective employee of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

An employer is excluded from the above obligations where the discrimination is due to the inherent requirements of the position or the action is taken against a staff member of a religious institution in accordance with the doctrines of the particular religion. An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury. Similar provisions are provided under some State based legislation.

Where an employee is dismissed on discriminatory grounds the employee can make an application at FWA for reinstatement or financial compensation.

4. MISREPRESENTING EMPLOYEE AS INDEPENDENT CONTRACTOR

An employer must not represent to a current or potential employee that the contract of employment is a contract for services and that the employee is an independent contractor. An employer has a defense to this claim if the employer can provide that it did not know or was reckless as to whether it was a contract of employment or contract for services.

An employer is also prohibited from dismissing an employee in order to engage the individual as an independent contractor performing the same work.

5. COMPLIANCE

If a person has been dismissed and alleges that they have been dismissed in contravention of the General Protections, the person may apply to FWA to deal with the dispute. The application to FWA must be made within 60 days after the dismissal took effect unless there are exceptional circumstances. FWA will then conduct a conference to deal with the dispute.

TRANSITIONAL PROVISIONS IN MODERN AWARDS

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All Modern Awards contain a number of transitional provisions, which can be found in Schedule A of each Award.

The rationale behind the transitional provisions is to ensure that employees do not suffer sudden pay cuts as a result of the introduction of a Modern Award, and to ensure that employers are not burdened with a sudden increase in staff wages as a result of the introduction of a Modern Award.

The following table sets out a very basic outline of how the transitional provisions are to operate:

	If the Modern Award provides greater employee entitlements than an existing wage instrument	If the Modern Award provides lesser employee entitlements than an existing wage instrument
1 July 2010 – 30 June 2011	Employer must pay the minimum entitlement under the Modern Award minus 80% of the difference between the two entitlements	Employer must pay the minimum entitlement under the Modern Award plus 80% of the difference between the two entitlements
1 July 2011 – 30 June 2012	Employer must pay the minimum entitlement under the Modern Award minus 60% of the difference between the two entitlements	Employer must pay the minimum entitlement under the Modern Award plus 60% of the difference between the two entitlements
1 July 2012 – 30 June 2013	Employer must pay the minimum entitlement under the Modern Award minus 40% of the difference between the two entitlements	Employer must pay the minimum entitlement under the Modern Award plus 40% of the difference between the two entitlements
1 July 2013 – 30 June 2014	Employer must pay the minimum entitlement under the Modern Award minus 20% of the difference between the two entitlements	Employer must pay the minimum entitlement under the Modern Award plus 20% of the difference between the two entitlements
From 1 July 2014	Employer must pay the minimum entitlement under the Modern Award	Employer must pay the minimum entitlement under the Modern Award

The above table is of necessity extremely simplistic, and there are a number of exceptions to the general rules set out in the table. For example:

- If the Modern Award provides lesser employee entitlements than an existing wage instrument, an employer may only avail themselves of the transitional provisions for new employees. Existing employees who enjoyed a certain amount of take-home pay under an existing wage instrument are entitled to continue receiving at least the old amount of take-home pay;
- Expense-related allowances are not dealt with under the transitional provisions. Accordingly, if employees in a particular industry are entitled to allowances such as tool allowances, mileage allowances, living away from home allowances, etc., the Modern Award will apply in full force and effect. Employers should, however, bear in mind the above rule regarding take-home pay for existing employees;
- Overtime rates are not dealt with under the transitional provisions. Accordingly, employers are obliged to pay the overtime rates set out in the Modern Award, however this is again subject to the rule about existing employees' take-home pay.

Fair Work Australia ("FWA") has attempted to assist employers during this transitional process by publishing a number of tables on the FWA website, which compare employee entitlements under Modern Awards with entitlements under old wage instruments. Unfortunately, the tables are somewhat confusing, and there are certain industries which have not yet been examined by FWA.

If you are in any doubt about your obligations under the transitional provisions, please contact your local Meritas firm.

THE UNFAIR DISMISSAL REGIME UNDER THE FAIR WORK ACT 2009 (CTH)

By Tammy Lo
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The commencement of the Fair Work Act 2009 (Cth) ("FW Act") on 1 July 2009 has introduced a number of significant changes to the federal unfair dismissal jurisdiction. The major changes to the unfair dismissal regime include:

1. the time period for lodging an unfair dismissal claim reduced from 21 days to 14 days, subject to the approval of an extension of time by the Fair Work Australia ("FWA");
2. the removal of the 100 employee small business exemption;
3. the introduction of the definition of "small business employer", being a business which employs fewer than 15 employees, and the Small Business Fair Dismissal Code;
4. the additional factor of whether the dismissed employee was unreasonably refused to have a support person attending meeting or discussions relating to the dismissal in determining the fairness of the dismissal;
5. the removal of the exclusion of employees on a probationary period; however, the inability of employees whose period of employment falls within the 6 month qualifying period (or 12 months for small business employers) to commence unfair dismissal applications is preserved;
6. the ability of a casual employee to make an unfair dismissal claim provided that the employee has completed the 6 months qualifying period (or 12 months with a small business employer) and was engaged on a regular and systematic basis and had a reasonable expectation of continuing to work with the employer on that basis.
7. the introduction of limitations on the rights of appeal from the FWA decisions;
8. the introduction of the requirements of the eligibility of an employee to make an unfair dismissal application;
9. the exclusion of employees who have not completed the qualifying period, who are not covered by an award or subject to the application of an enterprise and whose annual earning exceeds the high income threshold, which is currently indexed at $113,800.00 per annum; and
10. the empowerment of the FWA's discretion to dismiss claims where the claim has no reasonable prospects of success.

The practical and legal implications of these changes have gradually unfolded as the FWA decisions are handed down. This article will discuss FWA's approaches in its decisions relating to the extensions of time and the public interest test for appealing unfair dismissal decisions.

EXTENSIONS OF TIME – THE EXCEPTIONAL CIRCUMSTANCES

A stricter approach to applications for an extension of time appears to have been adopted under the FW Act than that under the former Workplace Relations Act 1996 (Cth).

An unfair dismissal application filed outside the 14-day time limit may be accepted by the FWA if the FWA is satisfied that there are "exceptional circumstances", taking into account:

- the reason for the delay;
- whether the person first became aware of the dismissal after it had taken effect;
- any action taken by the person to dispute the dismissal;
- prejudice to the employer (including prejudice caused by the delay);
- the merits of the application; and
- fairness as between the person and other persons in a similar position.

These provisions under the FW Act have provided the FWA with a relatively extensive degree of discretion in determining what constitute "exceptional circumstances".

For example, in Ms Helen Wemyss v Mission Australia Employment Services [2010] FWA 1798 (9 March 2010), the unfair dismissal application was made 36 days outside of the 14-day time limitation. An extension of time was sought on the basis of the applicant's unawareness of the 14-day limit. Commissioner Ian Cambridge was of the view that the employee's "ignorance of the time limit for lodging an unfair dismissal claim" was relevant in deciding whether to extend time. However, the employee's time extension request did not succeed as the claim was filed beyond the old 21-day limit and the employee appeared to have a general understanding of the unfair dismissal laws.

Similarly, Commissioner John Ryan, in Joao Bastos v Caelli Constructions (VIC) Pty Ltd 12010] FWA 3105 (19 April 2010), held that the lateness of the employee's unfair dismissal application could be excused because of the employee's ignorance of his rights under the FW Act and poor English language skills.

However, diverse views have also been adopted by the FWA as to whether slow mail constituted an exceptional circumstance contemplated by the FW Act.

In Mr Jon Paul Ellis v TNQITC Pty Limited T/A Cairns Voice & Data [2010] FWA 2479 (15 April 2010), the unfair dismissal claim was six (6) days outside of the time limit. The applicant employee claimed that he filed his unfair dismissal application via ordinary mail approximately four (4) days before the time limit expired, and that the fact it did not arrive the Brisbane Registry until 10 days later was beyond his control. Senior Deputy President Peter Richards allowed the extension of time on the ground that the employee had acted reasonably and that Australia Post, and not the employee, was responsible for the delay.

Conversely, Senior Deputy President Lea Drake took a stricter approach in a recent decision in Mr Jason Varcoe v Leo Fardell Pty Ltd [2010] FWA 6025 (12 August 2010), in which the time extension application was rejected. The unfair dismissal application was filed by ordinary post and arrived at the FWA's Sydney Registry one (1) day after the time limit expired. Senior Deputy President Drake stated that had the employee checked Australia Post's delivery standards and made allowances, faxed the application or used express post, the employee could have been certain of the delivery time.

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DISMISSAL APPEALS FROM THE FWA DECISIONS – THE PUBLIC INTEREST TEST

Under the FW Act, the FWA must not grant permission to appeal from a decision made by the FWA in relation to an unfair dismissal claim unless the FWA considers that it is in the public interest to do so. An appeal from an unfair dismissal claim can only, to the extent that it is an appeal on a question of fact, be granted on the ground that the decision involved a significant error of fact. The term "public interest" is not defined in the FW Act. Clearly the FWA is conferred with an extensive discretionary power when determining whether granting leave to appeal was in the public interest in the circumstances.

In Colin Makin v GlaxoSmithKline Australia Pty Ltd [2010] FWA 2211 (29 March 2010), Commissioner Bissett found that while GlaxoSmithKline had a valid reason for terminating Mr Makin's employment, its decision to dismiss Mr Makin for failing to follow OHS procedures was unfair and ordered reinstatement of the employee.

GlaxoSmithKline filed an appeal against the decision of Commissioner Bissett, which raised the issue of when permission to appeal a decision in relation to an unfair dismissal claim may be granted, that is, whether it is in the public interest to do so: GlaxoSmithKline Australia Pty Ltd v Colin Makin [2010] FWAFB 5343 (23 July 2010).

The Full Bench held that the threshold for establishing that it is in the public interest to grant an appeal is high. While it was "unlikely that [the Full Bench] would have found that the termination had been harsh, unjust or unreasonable", the Full Bench was of the view that it could not be satisfied that its refusal to grant leave would result in a substantial injustice and that the appeal failed to satisfy the public interest test. The Full Bench decision provided some guidance in relation to the circumstances in which the public interest might be attracted, which included "where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters".

CONCLUDING COMMENTS

In determining whether a jurisdiction objection should be raised against an unfair dismissal application lodged outside of the time limit, the factual circumstances should be considered on a case-by-case basis, bearing in mind that there had been cases where ignorance of the requirements under the FW Act can be considered by the FWA in determining whether to allow acceptance of a claim lodged outside of the time limitation. In some circumstances and given the approaches adopted by some members of the FWA, it may be more commercially viable for the respondent employer to proceed with its defence to the application.

Until further case laws in relation to the appeal rights in unfair dismissal applications are made, the guidelines set out in the Full Bench decision in GlaxoSmithKline Australia Pty Ltd v Colin Makin should be taken into account when assessing the prospects of success in seeking to appeal against the FWA decision in relation to an unfair dismissal application.

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