NEWSLETTER

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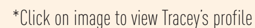
ENHANCING SUCCESS

JANUARY 2011

Cornwalls' E&IR Team Welcomes

Welcome to the first edition of the E&IR newsletter for 2011. We hope you find this monthly update helpful and informative. If there are any particular topics you would enjoy seeing more on in 2011, please let us know!

This month, trainee Jane O'Brien joined our team. Jane completed a double degree in Commerce (Accounting) and Law at the University of Adelaide before coming to Cornwalls to complete a seasonal clerkship at the end of 2008. Jane moved to Melbourne at the start of 2010 to begin her traineeship with Cornwalls. This is Jane's final rotation before admission.



*Click on image to view Tracey's profile

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New Fair Work Australia Rules & Forms available

From 1 January 2011, new *Fair Work Australia Rules 2010* and associated forms have commenced.

The new rules are largely similar to the interim Fair Work Australia Rules that have been in operation since the commencement of the *Fair Work Act 2009*.

However, there have been amendments to each form. In the majority of cases the changes have been minimal, although service requirements have been clarified for a number of forms. Notably, Form F3 has been amended to take into account the new small business employer definition and two new forms (F23A and F23B) have been devised to accompany Form F23 (Application for Approval of Variation of Enterprise Agreement).

The new version of the Rules is available on the FWA website. The new rules and forms should be referred to before initiating any proceeding at FWA.

Small business – a new method of calculation for unfair dismissal

Under the *Fair Work Act 2009* (Cth) (**FW Act**) a 'small business' employer is one who employs fewer than 15 employees. The method of calculating the number of employees in a business for the purposes of unfair dismissal has recently changed.

Calculating the number of employees

From 1 January 2011, the method of calculation is based on a simple *headcount* of the number of employees in the business, irrespective of how many hours they work. The headcount includes casuals employed on a regular and systematic basis and employees of associated entities.

The previous definition of 'small business' referred to an employer of less than 15 'full-time' equivalent employees, which was calculated by adding the total number of hours worked by all employees in a business and dividing it by 38.

This change brings the unfair dismissal definition of a 'small business' into line with other elements of the FW Act, including redundancy.

Why this so important

Under the national Fair Work system, the termination of an employee from a small business cannot be regarded as an unfair dismissal if the employer has followed the Small Business Fair Dismissal Code (**Code**).

An updated version of the Code is now available.

It is important to note that for some employers, the new method of calculation may change whether you are considered a small business and whether you can rely on the Code. Employers should seek advice if they are unsure.

'Sickie?'

Fair Work Australia (**FWA**) has reinstated an employee who was dismissed after noting *'sickie?'* on his roster in advance of taking sick leave.

The employee submitted that he wrote *'sickie?'* on his roster to remind himself to take carer's leave (which he considered to be the same as sick leave) to care for his wife, who suffers from Parkinson's disease. The employee forgot to complete the relevant leave form prior to the leave date, but in any event claimed he was unable to attend work that day, being unwell due to food poisoning.

Prior to commencement of his rostered shift, the employee's wife rang to notify the company that her husband would not be attending work. The company, which had become aware of the employee's notated roster, said this confirmed its suspicions that he intended to fake sickness and arranged a meeting with the employee upon his return to work.

Following three meetings between the parties, the employee was dismissed. The company had formed the view that the employee had been dishonest in relation to his absence and thus had intended to defraud the company.

In her decision Commissioner Ashbury stated she was not satisfied that, on the balance of probabilities, the employee had engaged in fraud or behaviour amounting to serious misconduct. The company did not have sufficient grounds to form the view that the employee intended to take a sick day to which he was not entitled, and it was unreasonable for management to assume that the employee was being dishonest when questioned about the notation. The company was aware that the employee's wife was ill and should have considered this fact in forming its view.

Commissioner Ashbury considered that it was at least equally likely that the employee was sick from food poisoning as it was that he took sick leave in circumstances where he was not really sick and, therefore, it could not be said that clear and cogent proof of fraud existed in support of a valid reason for dismissal. In the circumstances, the company should have given the employee the benefit of the doubt.

Moreover, the Commissioner rejected the company's argument that the employment relationship had broken down and that the employee's word could not be relied upon. The employee had been with the company for 11 years and had a previously unblemished record. Commissioner Ashbury said there was no basis for a loss of trust and confidence because the employee was not guilty of the misconduct alleged against him. Therefore, reinstatement was ordered (with continuity of service).

For employers

This case makes clear that employers should consider several factors before deciding to terminate an employee, including the employee's length of service, work history and personal situation.

In addition, this case highlights FWA's willingness to order reinstatement in preference to compensation.

Fruit of the poisoned tree – a ruling against admitting covertly obtained evidence against an employee

In a recent unfair dismissal ruling, an employer who invaded the privacy of one of its employees was ordered to pay the employee $15,000 in compensation.

The company summarily dismissed the employee after another worker reported seeing a trail of oil drips leading to the employee's vehicle. The manager believed the employee had decanted oil from a larger drum (belonging to the company) into two smaller containers in the back of the ute.

Without the employee's consent, the manager took a sample from one of the smaller containers (**the ute sample**) and tested it to determine its origin. When questioning the employee about the oil in his ute, the manager did not disclose that he had taken the sample.

Some days later, the manager informed the employee of the ute sample and stood the employee down on full pay.

The results of the company's tests indicated that the ute sample and another sample taken from the large drum were 'without doubt' from the same batch of oil. The employee was asked to attend a disciplinary hearing, but refused to do so until he was provided access to the report. The report was not provided and the employee did not attend the meeting.

The employee then arranged to have the samples tested by an alternative laboratory. In a subsequent meeting the employee explained that he was obtaining his own expert report and, acting on legal advice, would respond to the company's allegations against him once this report was available.

On the basis that he had continually failed to respond to the company's allegations of misconduct, the employee was summarily dismissed. The employee's expert report ultimately found that the samples tested did not match the company oil.

Commissioner Colin Thatcher excluded the evidence that the company had covertly obtained to support its position that the employee had misappropriated company property. He said that the ute and the container were clearly the property of the employee and that in obtaining the ute sample, the manager had technically committed trespass and larceny (stealing). Under the rules of evidence the manager's actions were unlawful, and evidence obtained as a result of the unlawful act was inadmissible (the ute sample and the analysis of same).

The Commissioner found that the timeframe adopted by the company failed to provide the employee with an adequate opportunity to respond to the 'incriminating material'.

Furthermore it was unreasonable for the company, once it became aware of the employee's pending expert report, to insist that he respond to allegations at the disciplinary meeting. Commissioner Thatcher found the employee was not in a position to discuss the results of the company's report, because he was not suitably qualified and because he believed he did not steal the oil. Without his own analysis, the employee could not have demonstrated to the company that the ute sample was not the same oil as contained in the company's drum.

The employee was found to have been unfairly dismissed and was awarded $15,000.

For employers

Employers should be conscious of the invasion of privacy in the workplace. Any evidence obtained without the employee's consent is likely to be considered 'fruit of the poisoned tree' and inadmissible. At the very least, security checks of bags, parcels, lockers and the like should not take place unless the employee concerned is present, or the employee has given permission for such a search to take place in his or her absence.

Non-compete clauses – protecting your business interests

There has been a sharp increase in litigation to enforce non-compete agreements in the past decade. Employers are insisting on relying on terms of agreements to prevent ex-employees from working for competitors; this is a move that is increasingly being backed by the courts.

A term in a contract of employment that prevents an employee from working in a particular field, for a particular time or in a particular area, is known as a non-compete clause or covenant in restraint of trade. Many employers include such clauses in employment contracts; however, these clauses will be enforceable only if they are reasonably necessary to protect the employer's business.

A non-compete clause that operates during the employee's employment is more likely to be considered enforceable. This is because, while the employee is rendering services, the employee's duty of fidelity supports such a restraint. However, once actual employment ceases, a restraint will only be enforced if:

- the prohibition operates to protect a legitimate commercial interest (eg the employer's confidential information or the prevention of the solicitation of clients or employees) and not merely to preclude competition; and
- the prohibition is drawn so as not to exceed what is necessary for the protection of the employer.

Post-employment restraints must also be limited in time. The onus of establishing the reasonableness of the restraint lies with the employer.

Interestingly, the courts have been prepared to sever any unreasonable part from the remainder of a clause, rather than declaring the whole of a restraint clause void. However, throughout most of Australia this will only be done in circumstances where the unenforceable part, if severed, would leave the remainder of the restraint reasonable and readable.

In New South Wales, the legislative approach permits the reading down of an unreasonable restraint (meaning that a court may redraw an unreasonably wide restraint).

A valid non-compete clause can be enforced by declaration or an injunction. A court may however refuse to grant an injunction to restrain an employee if it considers that the employee's breach would not cause the employer any significant damage, notwithstanding that the restraint is otherwise reasonable.

In order to ensure your restraints are valid, please contact a member of the Cornwalls E&IR team for assistance.

Workplace Relations Highlights (Watch this Space)

Our thoughts go out to the many families affected by the floods. We urge you to exercise caution when in the flood-affected regions and to be aware of the numerous additional hazards you may encounter. Please stay safe. Employers who need advice on how to operate during these emergency conditions should contact a member of our E&IR team.

Draft Work Health and Safety Regulations and model Codes of Practice were released last month. The public comment period for the draft Regulations and Codes of Practice closes on 4 April 2011. The National Work Health and Safety Act and Regulations are scheduled to commence in January 2012. More information is available via the Safe Work Australia **website** (*please click to follow the link).

A former CFO was awarded $250,000 after discovering via an 'all staff' email that he would be replaced in his position. The employee argued that by unilaterally removing him from the role of CFO and failing to offer him an alternative equivalent position, the company had repudiated his employment contract. The court found that the employment had been terminated, and consequently the employee was entitled to the termination payment specified in the contract (equal to 12 months' base salary): ***Earney v Australian Property Investment Strategic Pty Ltd*** **[2010] VSC 621.**

There have been further developments regarding annual leave cashing out provisions included in enterprise agreements (**EA**); *see article from our November 2010 newsletter*. On appeal, Fair Work Australia's (**FWA**) original decision (in refusing to approve three EAs because of their 'cashing provisions') was quashed.

The Full Bench held that a provision allowing an employee to cash out annual leave, in accordance with the safeguards set out in the *Fair Work Act 2009* (Cth) (**FW Act**), is a valid term and will not prevent FWA from approving an EA.

The Full Bench went on to clarify the effect of EA provisions allowing employees to cash out long service leave (**LSL**) (which is not expressly provided for in the Act). In doing so, the Full Bench distinguished between employees to whom state long service leave laws applied and those whose entitlement was contained in a federal (pre-Modern) award and is preserved under the FW Act.

In relation to the former, if the relevant state LSL law permits cashing out, then EA provisions reflecting this ability are valid. If an EA contains LSL terms that are inconsistent with state LSL law, it will not prevent FWA from approving the EA, however the inconsistent EA term will have no effect.

For employees who are otherwise subject to federal award LSL provisions, the EA must not provide for the cashing out of LSL unless the federal award allows cashing out. Nonetheless, despite an offending term, the EA may still be approved by FWA subject to the provision of undertakings in respect of the term.