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Employee Relations News

Edition 12 **4 December 2014**

There were almost 15,000 unfair dismissal applications in 2013/14 financial year. This equates (at an average of $10k per claim) to $1.5 million cost to businesses. Noting that this does not include "adverse actions" or discrimination claims.

In this edition I have researched the unfair dismissal trend from 1997 to 2014; and pose the question: ***"Why the sustained jump in 2010 (ie the end of 'Work Choices'?".*** Claims are now quickly trending towards 15,000 pa. Please send me your theories.

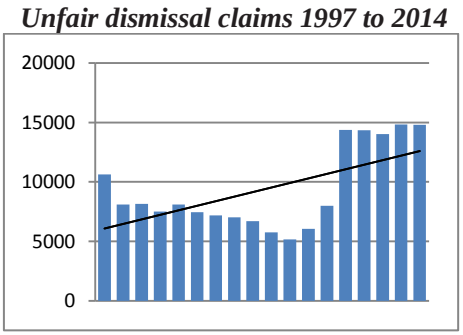
Remember, I am currently searching for work. I would be grateful for any leads you may have ☺ - I now have my own ABN and brochure. I would greatly appreciate if you could pass on to your business contacts.

In this issue:

The Unfair Dismissal Quandary

I first came across the "unfair dismissal" in the mid 1980's. However, it was in a unionised environment, and the unions used the dispute notification mechanism within the legislation of the time. Whilst at VECCI, in the mid to late 1990's, a large part of my budget was derived by defending employers against such claims under the new 1996 Act. The hard part was advising employers of the "commercial reality of "settling" such claims (ie pay blood money or legal costs – your choice).

But my overall fascination is why a person would put themselves through the stress and potential reputational harm by using this facility, instead of just "moving on". The only answer is the "no-win, no-fee lawyers" spruiking such services. [Hint to potential applicants: most of the money goes to the lawyers].



1 Mr Andrew Maunder v Moolarben Coal Operations Pty Ltd, (U2014/6585) [2014] FWC 7971, SENIOR DEPUTY PRESIDENT DRAKE

Year Ending	Applications	Legislation (Commonwealth)
1997	10621	***Workplace Relations Act 1996***
1998	8092	
1999	8146	
2000	7498	
2001	8109	
2002	7461	
2003	7171	
2004	7024	
2005	6707	***Workplace Relations Amendment (Work Choices) Act 2005***
2006	5758	
2007	5173	
2008	6067	
2009	7994	
2010	14366	***Fair Work Act 2009***
2011	14342	
2012	14027	
2013	14818	***Fair Work Amendment Act 2012***
2014	14797	***Fair Work Amendment Act 2013***
TOTAL	**168,171**	**"That's $16,817,100,000 folks"**

I am more than happy to provide advice on such matters, to avoid your organisation becoming an "unfair dismissal" statistic.

INTERESTING CASES

FWC uphold employer's to dismiss worker for failure to meet KPI's

[2]In this matter, the Applicant held the position of Business Development Manager with the Respondent. She was responsible for the management and growth of the wholesale division of the Respondent. Specifically **her contract** (my emphasis) stated that she was responsible for:

- Sales development and management including the recruitment of new staff and dismissal of staff as necessary;
- Financial management including ensuring that monthly and annual budgets were met;
- Development including optimal product assortment and pricing;
- Wholesale marketing, training and annual sales and marketing plan;
- Advising on online brand presence and marketing;
- Weekly reports and monthly reports.

Long story short, the Applicant failed to meet her KPI's, and despite the Applicant argument that she was unable to meet the KPI's due to various operational reasons, the Commissioner found in favour of the Employer:

> *"I am satisfied that there was a valid reason for the termination of the Applicant's employment. This reason went to the failure of the Applicant to meet sales targets and other KPI's set for her by the Respondent."*

[2] **Mandy Allford v Gorgeous Cosmetics** (U2014/8576) [2014] FWC 8314, COMMISSIONER BISSETT

Commentary

This decision reinforces "HR 101" whereby the fundamentals, such as having in place position descriptions and contracts of employment, and "key performance indicators". The best PD's have these included.

FWC finds against Applicant's stress related injury as a result *bullying, harassment, sexual harassment and racial harassment* [3]

Ms Kylie Jeffrey (the Applicant) was employed by IBM Australia Limited (IBM) on a full time basis as a Business Analyst from 28 June 2010. Prior to her employment with IBM the Applicant stated that she had been employed from 12 January 2009 as a Business Analyst with Qantas Airways Ltd (Qantas) through the Qantas/IBM Indigenous Information Technology Employment Partnership.

The Applicant stated that she suffered a stress related injury as a result of exposure to stressors at work. The stressors she referred to were "*bullying, harassment, sexual harassment and racial harassment*". The Applicant stated that she took extended sick leave (of 12 months) available to her under her contract of employment.

This very lengthy decision is best summed up by the DP:

> *"Amount of absences*
>
> *There was a significant amount of time that the Applicant was absent. The absences included a long period of paid sick leave, substantial periods of unpaid leave and a series of absences for which workers compensation was claimed. I do not suggest that the absences were avoidable. The extent of these absences should have been a cause for the Applicant to fully cooperate in any RTWPs. However the evidence outlined above illustrates that the Applicant did not cooperate but rather frustrated efforts to have a reasonable programme for her return to work. This influenced my decision not to issue an order."*

The DP went on to effectively dismiss the matter refusing reinstatement or compensation.

Commentary

Apart from the VERY generous sick leave entitlement provided by IBM, the applicant failed to fully cooperate with any Return to Work Plan. These plans are important and must be reasonable (on both sides) with the aim of a sustainable return to duties. In this matter the applicant failed to appreciate the importance of the RTW process.

EBA Approval scrutinised by Full Bench [4]

This was an appeal against decision the approval of an enterprise agreement on the basis of whether the group of employees covered by the agreement was fairly chosen.

The reason for the appeal was whether the group of employees to be covered by the Agreement was fairly chosen having regard to the Act.

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3 Kylie Jeffrey v IBM Australia Limited (U2012/13165, DEPUTY PRESIDENT MCCARTHY

4 OneSteel Recycling Pty Limited T/A OneSteel Recycling (C2014/6309) [2014] FWCFB 7560, JUSTICE BOULTON, SENIOR DEPUTY PRESIDENT; SENIOR DEPUTY PRESIDENT DRAKE; COMMISSIONER MCKENNA

> *"In Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union and Others, the Full Bench (in that matter) stated:*
>
> > *"Given the context and the legislative history it can reasonably be assumed that if the group of employees covered by the agreement are geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that the group of employees was fairly chosen. Conversely, if the group of employees covered by the agreement was not geographically, operationally or organisationally distinct then that would be a factor telling against a finding that the group was fairly chosen."*

Commentary

It is most important (as with all things FWC) that the step-by-step approach is taken to the negotiation of the EBA. More information on this can be found at the FWC's web-site or by contacting me.

Safety breach dismissal supported by FWC [5]

Mr Maunder commenced work for Moolarben on or about 5 May 2010 as a mechanical technician. Moolarben terminated his employment with notice on 26 March 2014. At the date of termination of employment Mr Maunder was a leading hand. Moolarben's reasons for the termination of Mr Maunder's employment are set out in the letter of termination as follows:

> *"I refer to the Company's investigation into allegations about your conduct on Saturday 22 March 2014 and to the meeting held today with Barry McKay, Maintenance Manager, Luke Bowden, Environment & Community Manager and yourself. Luke O'Connell was also in attendance as your support person.*
>
> *The investigation is now complete. In reaching the following findings I have considered all relevant information, including information that has been collected throughout the investigation and your response provided in our meeting on 25 March 2014.*
>
> *Findings*
>
> *I have made the following findings in relation to each of the allegations:*
>
> *1. Failed to isolate and dissipate energies associated with the task…*
> *2. Failed to carry out an appropriate pre-task risk assessment that identified the respective hazards for the task and implement appropriate controls…*
>
> *Based on the findings in the investigation I am satisfied that you have breached your responsibilities as employee of MCO. Specifically you breached the following:*
>
> - *The MCO Isolation Procedure;*
> - *MCO Risk Management Procedure;*
> - *MCO Safety Creed; and*
> - *Your duties under work health and safety laws.*

5 Mr Andrew Maunder v Moolarben Coal Operations Pty Ltd, (U2014/6585) [2014] FWC 7971, SENIOR DEPUTY PRESIDENT DRAKE

Despite, his union arguing that there were good reasons for the safety breaches (including "overlooked" and "personal circumstances), Drake, DP decided: "*…I am satisfied that the dismissal of Mr Maunder was on balance not harsh, unjust or unreasonable as contemplated by the Act.*"

Commentary

The important factors that weighed in favour of the company in this matter was that they had in place OH&S procedure and reinforced them through induction and regular tool-box meetings.

Until next time…

Greg Reiffel
(including Greg Reiffel HR & IR Consulting)