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Employee Relations News

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Welcome to my first newsletter for 2015. I will continue to my best to offer practical information to HR and other professionals that will assist in avoiding the pitfalls in an ever changing (challenging) workplace laws – and more appropriately how the courts interpret those laws. As a "non-lawyer" I look for pragmatic solutions.

In this edition, I examine a Queensland anti-discrimination decision that has caused me to revamp my standard **employment application form**. Please contact me if you would like to obtain a copy (no cost).

Remember, I am currently searching for permanent or contract opportunities. I would be grateful for any leads you may have ☺ I also would greatly appreciate if you could pass on to your business contacts.

Quick fact:

"Individual matters continue to make up a significant proportion of the Commission's workload. Consistent with previous years the greatest numbers of applications are for ***unfair dismissal****. Whilst this year there was a slight decline in the number of unfair dismissal applications received there was also an increase of 18.5 per cent in the number of applications for* ***general protections*** *involving dismissal. In recognition of this the Commission continues to develop materials to assist unrepresented parties who may be appearing before the Commission for the first time. "* **Source: FWC Annual Report 2013-2014**

Comment: "Adverse actions" (general protections) figures may decline given the change to the FWA aligning general protection and unfair dismissal and claim times (ie from 60 to 21 days).

Woolworths' recruitment practices fall foul of anti-discrimination law[1]

There were a number of aspects to this case, which can be summarised as follows:

- Anti-discrimination, where Woolworths online application for employment form required:
  - Date of birth;
  - Gender; and
  - The uploading of personal information relating to right to work in Australia.

- Woolworth's defence was that it required this information for legitimate purposes, including federal law requirements, in that federal law overrides State law and should be declared invalid under s 109 of the Constitution.

Woolworths has an online recruitment system that receives some 48,000 jobs to be filled each year, with about 670,000 applicants applying for those positions. It therefore relies heavily on its on-line recruitment system to streamline this process. This decision has caused Woolworths to change its on-line recruitment methodology with the consequence being a greater level of work for its HR team.

[1] Willmott v Woolworths Ltd [2014] QCAT 601

The decision found that:

> *"Here, Woolworths has already taken steps to change the online application form, which has addressed all of the applicant's complaints considered in these reasons. Therefore, the only remedy that would have any utility in the circumstances is to award compensation for the loss and damage suffered by the applicant.*
>
> *Taking into account the embarrassment, humiliation and some notional amount for the loss of a chance, I assess Mr Willmott's total compensation at $5,000. I will direct that the amount of compensation be paid by 19 December 2014.*
>
> *This case was instigated by a job seeker who was "sickened beyond belief at Woolworths disregard for the anti-discrimination laws in Australia". This resulted in his inability to apply for the advertised position."*

Whilst a Queensland decision, it has broader ramifications for the way in which we collect information when recruiting.

The decision found (noting I have intentionally used the Senior Member's words, as they akin to something from Rumpole of the Bailey):

Date of Birth

[Woolworths] contended that the employee computer system, will not allow a new file to be created without a person's name, date of birth and tax file number. Date of birth is important because:

- It determines the entitlements the employee might be entitled to, an example is an employee under the age of 21 is paid at a different rate under a different enterprise agreement as opposed to an employee over 21.
- It is a means of differentiating between employees with the same name (Woolworths has about 190,000 employees across Australia).
- In some positions, an employee must be over the age of 18, e.g. BWS liquor outlets.

For those positions that do require an applicant to be over 18 years of age a simple question on the form asking if the applicant is over 18 would probably suffice, together with an explanation on the application form as to why the question was being asked and why an answer was necessary.

As for the other reason, going to entitlements, this information is clearly not necessary until an applicant has been, at the very least been offered a position with Woolworths, or perhaps when discussing the position and advising an applicant of the entitlements relating to the position. It may well suit Woolworths' administrative processes to gather the information at an early time, but it cannot be said to be reasonably necessary at the time of completing the online application.

I therefore find that the defence in respect of asking for the date of birth on the application form is not made out.

Gender

[Referring to the Workplace Gender Equality Act 2012] It seems to have been assumed by Woolworths that the only way to gather the information required to comply with the obligation, is for applicants to nominate gender on the application. However, the obligation is on an employer to provide such information that it gathers in the recruitment process. It does not impose an obligation that requires potential applicants to nominate their gender when making an application. If the information gathered, without specifically insisting through a mandatory field to nominate gender, clearly identifies an applicant as female or male, it is this information that would be provided in the report. It is reasonable to suppose that the name of the applicant could, in many cases, give an indication of gender from which Woolworths could make a reasonable estimate of the gender of applicant for the purposes of complying.

What Woolworths has now done, sensibly, is firstly made the field non- mandatory and secondly, include an option of "no selection".

[My comment: Seriously? How is an employer supposed to collect this information? I suggest that reports provide the information: "Male", "Female", "Chose not to provide gender". Interestingly there was no reference to "title", ie Mr. Ms. etc.]

Right to Work Information

It is difficult to see how it could ever be justified to insist that an applicant upload documents containing confidential information, like birth certificates, passports and visas when first applying for a position with Woolworths. Accepting there are approximately 48,000 jobs to be filled each year, with about 670,000 applicants applying for those positions, means there is a substantial amount of confidential information being imparted to Woolworths during the recruitment process.

Again, the sensible approach now taken is to simply ask an applicant to nominate the basis upon which an applicant has a right to work in Australia. Then, if an interview is undertaken, the relevant documentation can be produced for sighting by a recruitment officer. This avoids the result that thousands of documents containing confidential information remain stored in Woolworths' database, or I suppose "the cloud".

It follows from this, that firstly; there is no legal requirement under the Migration Act for an employer to require proof, at the application stage, of an applicant's right to work, and secondly; it follows that the information could not be said to be reasonably required. The defence under the section therefore fails.

Is s 124 of the Anti-Discrimination Act inconsistent with the Migration Act?...how does the Migration Act conflict with the Anti-Discrimination Act so as to make s 124 of the Anti-Discrimination Act invalid? The offence referred to under the s 245AB only occurs when an employer allows or continues to allow the unlawful non-citizen worker to work. The offence does not occur by simply that matter by interviewing workers, even those not permitted to work in Australia. When moving on with the process to the point of considering a prospective applicant for a position, it is reasonable for Woolworths to require information about the

prospective employee's entitlement to work, as it now presently does. [This defence was therefore rejected].

Privacy Act

The privacy of individuals is governed by Commonwealth legislation, the Privacy Act 1988. It contains 14 Australian Privacy Principles, which must be adhered to by organisations, such as Woolworths. In particular, Principle 3.2 provides that an organisation 'must not collect personal information (other than sensitive information) unless the information is reasonably necessary for one or more of the entity's functions or activities', here the recruitment of employees for the operation of Woolworths' businesses.

Therefore, to avoid falling foul of the Privacy Act, Woolworths must establish the information sought was reasonably necessary.

However, Woolworths says that because the Privacy Act permits this conduct and the Anti-Discrimination Act prohibits it [that federal law overrides state law].

However, this argument seems to ignore the defence raised under the ADA Act, which imposes the same onus on Woolworths to establish that the information sought was "reasonably necessary" or "reasonably required". If the test is satisfied, then it seems to me that requirements of both Acts are satisfied and there is not inconsistency.

Despite the sophisticated argument mounted by Woolworths' counsel, I have found that in the pertaining circumstances, the information sought by Woolworths was not reasonably necessary. On the basis of this finding of fact, it cannot be said that the exemption in seeking the information under the Privacy Act would apply. Similarly, the defence under the Anti-Discrimination Act is not made out because I am not satisfied that the information was reasonably required for a purpose that did not involve discrimination.

It follows then that as I have found, as a matter of fact, it was not reasonably necessary for Woolworths to obtain the information, then Woolworths would not be in breach of the Privacy Act but would potentially be in breach of the Anti-Discrimination Act.

Commentary

I have revamped my standard job application form and this is available by contacting me by e-mail at no cost. However, the application form is only one aspect of the recruitment and selection jigsaw.

The take home message from this decision is that employers must ask the question: "Is the information I am seeking on application forms absolutely necessary?" Or will simple statements suffice: "if successful you will need to provide…"

Until next time…

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