

Employee Relations News

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Redundancy pay, loss of contract: whether employer obtained other acceptable employment for employees, meaning of "obtains"¹

This full bench of FWC decision relates to whether the applicant had obtained other acceptable employment for employees whom it had retrenched in consequence of the loss of a contract.

The FW Act exempts employers from paying redundancy pay where it "obtains other acceptable employment for the employee". This matter focuses on the word "obtains".

As is all too familiar in our current working environment - contracts for services are tendered out by companies and are won or lost by way of a tender box. In most cases, the outcome has a direct bearing on employees.

The FB held that in this matter, that the applicant had not done enough to "obtain" employment for its workforce, despite:

- 49 employees were offered, and accepted, employment with the new contractor.
- 48 of them, their employment with the new contractor was in the same position, and on the same terms and conditions, as before. One was offered, and accepted, employment in a lesser position.
- Four did not receive employment.
- In all cases, the new contractor did not recognise the employees' previous service.

And, the applicant having a number of steps to secure employment with the new contractor, including:

- Having discussions with representatives of the new contractor.
- Providing the new contractor with the contact details of the employees.
- Providing the new contractor with information about the arrangements within the enterprise agreement.
- Advising that it had paid the employees their wages and all accrued leave entitlements up to the end of its contract.

However, the FB found that the applicant it played no role other than the provision of contact details to the new contractor; adding that the only other actions taken by the applicant were its unsuccessful attempts to engage the new contractor in discussions directed to a commercial agreement between the two companies in relation to the employees' accrued leave and accrued service with the applicant, and the provision of a copy of the enterprise

¹ FBIS International Protective Services (Aust) Pty Ltd v Maritime Union of Australia [2015] FCAFC 90

agreement, which the new contractor already had from another source.

The FB also considered the history of redundancy from the precedent setting Termination, Change and Redundancy Case (1984) 8 IR 34 noting:

*“We do not wish to prevent an employer making an application to be exempted from the general prescription pursuant to this decision in cases where an employer obtains acceptable alternative employment for an employee but we would point out that, in our decision, severance payments are not made for the purpose of assisting employees to find alternative employment. Where such an application was made it would be **important to consider whether previous service with the previous employer was recognised** as service with the new employer (my emphasis). However, we would make it clear that we do not envisage severance payments being made in cases of succession, assignment or transmission of a business.”*

A provision in terms similar to those referred to above came before a Full Bench of the Industrial Relations Commission in Re Clothing Trades Award 1982(1) (1990) 140 IR 123.

Viewed in this way it will be seen that the intention is not to impose an absolute test on the employer’s ability to “obtain” alternative employment but rather it refers to action which causes acceptable alternative employment to become available to the redundant employee. The employer must be a strong, moving force towards the creation of the available opportunity.

By way of commentary, for the applicant to have been successful in this matter, it would have had to:

- “Hand deliver” the new employment to its employees to a solid offer on the same or similar terms as the employee enjoyed prior to the change.
- The new employer recognising the employee’s service with the previous employer.

Workers compensation and Leave Accrual²

This full bench of the federal court appeal upheld the previous decision relating to whether an employee on workers compensation is entitled to accrue and take leave whilst in receipt of workers compensation payments.

It was found in the first instance (and I reinforce this matter is related to NSW) that the answer is “yes” and supported by a full bench of the federal court on appeal.

The full bench decision, in particular:

- Took an Australia-wide view of the compensation laws in each state and territory.
- Considered the National Employment Standards (“NES”) (law of the Commonwealth) over that of “state-based workers compensation laws.
- Gave an extraordinary lesson in grammar (involving the context and meaning of “permitted):

“The first question is what is meant by “permitted” and more precisely “permitted by” in s 130(2). The expression is not defined and, unless the context suggests otherwise, it is to be inferred that it carries its ordinary English meaning. The difficulty, of course, with the ordinary English meaning is that the expression admits of more than one meaning. It might refer to a situation in which permission is granted. More commonly, however, “permitted” is used as a synonym for “allowed”.

Anglican Care placed considerable emphasis on the accompanying preposition “by”. In our opinion, as used in s 130(2), it does not have the effect for which Anglican Care contended. The preposition is merely a grammatical device, denoting a preference by the draftsman for the passive rather than the active voice. If the active voice had been used, the subsection would read:

Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if a compensation law permits the taking or accruing of the

² Anglican Care v NSW Nurses and Midwives’ Association [2015] FCAFC 81

leave.

Apart from the archaic use of the verb "permit" to connote "commit, submit, hand over, leave, resign or yield", the first meaning of the transitive verb given in the Oxford English Dictionary is:

To allow the occurrence of (an action, etc.); to allow (something) to be carried out or to take place; to give permission or opportunity for.

The next meaning is:

To allow or give consent to (a person or thing) to do or undergo something.

The meaning given to the adjective "permitted" (of a thing, action, etc.) is "allowed, not forbidden".

This is precisely the meaning given to the word by the primary judge."

It is therefore apparent that an employee who is on compensable benefits in **NSW** is entitled to accrue all leave types.

In **Victoria**? The (new consolidated) Workplace Injury Rehabilitation and Compensation Act 2013, whilst providing for the payment of superannuation whilst being on paid workers compensation, is "silent" on other forms of leave. Therefore based on the FB decision, leave should not accrue.

Unproductive expired EBA's set aside by Full Bench³

A Full Bench of the Fair Work Commission (FWC") has ordered the termination of 12 enterprise agreements that had passed their nominal expiry dates.

Aurizon was privatised by the Queensland government in 2010, with the new "privatised" entity taking on the more generous and somewhat inflexible working conditions imported (pun intended) by the EBA's, such as:

- Prohibition on forced redundancies.
- Restrictions in rostering.
- Tasks employees could be asked to perform.

The FB stated that:

- There is no inherent inconsistency between "the termination of an enterprise agreement that has passed its nominal expiry date and the continuation of collective bargaining in good faith...agreement."
- Termination of an unproductive agreement might actually further the objects of the FWA by incentivising the negotiation of a replacement agreement.

The FB considered:

- Bargaining had reached a stalemate.
- Aurizon undertook that the employees' wages and allowances under the agreements would continue for six months.
- Changes sought by Aurizon were "rationally based" on a desire to change "clearly inefficient" work practices.
- Many provisions in the agreements were "not common" and were imposed on Aurizon as a result of the company's "peculiar history" of privatisation.

The FB thus concluding that the termination of the expired EBA's was both appropriate and consistent with the public interest.

By way of commentary, this decision may provide hope for businesses that have taken over another business (transmission) that have expired EBA's to revisit the contents that may be negotiable by virtue of their restrictive or unproductive work practices.

Note:

Once an enterprise agreement reaches its nominal expiry date, it operates indefinitely until it is replaced by another agreement or is terminated by the FWC.

If terminating an EBA after its expiry date the FWC must be satisfied that:

- It is not contrary to the public interest to do so; and
- It is appropriate to terminate the agreement taking into account all the circumstances, including the views of the parties covered by the agreement and the likely effect that the termination will have on each of them.

Important changes in place as of 1 July 2015

Wage increases:

- National Minimum Wage increased by 2.5% to \$656.90 (ie up \$16.00) per 38 hour week, or \$17.29 per hour (based on 38 hour week).
- All modern award minimum wages by 2.5 per cent. Weekly wages will be rounded to the nearest 10 cents.
- Increases effective on 1 July 2015.

The increases do not apply in the following circumstances:

- There is an EBA in place.
- The wages (including the increase) being paid are in excess of the modern award rate.

Superannuation:

The superannuation guarantee contribution rate remains at the rate 9.5%.

However, there are other changes (please contact your fund for further information).

Tax on redundancy payments:

The tax-free component for bona fide redundancy payments increase to a base limit of \$9,780 and \$4,891 for each completed year of service.

Fair Work Act:

- High income threshold: \$136,700 per annum.
- Maximum award for unfair dismissal \$68,350.00 or six month's pay.
- Filing fee for unfair dismissals: \$68.60.

Until next time...

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