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Employee Relations News

Edition 3 **12 August 2014**

The main thrust of this edition is my response to a letter from HK in commenting on the subject of the previous edition. It my lament to the hi-jacking of the industrial relations tribunals by "No-win, No-fee" lawyers.

An interesting case of employee dishonesty involving (amongst other things) working for a competitor whilst on sick leave from his employer.

There have also been some important legislative changes to the Accident Compensation Act (3 into 1); and if you have not caught up, changes to the FWA are before the Senate Fair Work Bill 2014.

(My first) "Letter to the editor"

"Thank you for the Newsletter, Greg.

I feel our labour laws have progressively moved too far to the left and away from a reasonable common sense position for workplaces.

The number of lawyers (not forgetting judges) who make a good living out of the IR system will ensure that this trend is not reversed.

Meanwhile, various industries within the private sector will decline due to global competition, while jobs will grow in services and other tax payer funded ventures that are insulated from commercial realities.

HK
(Name supplied)"

Thank you for your letter HK. You have voiced the sentiments of many a business – whether it be small, medium or huge.

Australia is not a third world country and should not expect to compete with workers who are paid a pittance and work in conditions that would make the Dickensian era look like a paradise.

In my experience no matter what legislation is in place, unscrupulous employers will take advantage of employees – despite the efforts of unions and government agencies.

There are numerous "on-costs" that effect labour costs in Australia (payroll tax being my biggest "bugbear"). Let's focus on the law of employment for instance – in particular the "unfair dismissal" industry.

In my last count there were more than 70 pieces of employment related legislation nation-wide. Add the various "codes" and this figure is sure to swell over the 100 mark. Of course each piece of legislation has its own government department to overview see it.

Whilst the ridiculously high payouts for discrimination claims hit the headlines, the good old unfair dismissal has also been doing quite well.

In the past, the Australian Industrial Relations Commission (AIRC) – the precursor to our current system was established "to resolve disputes that occurred over the borders of any one state" (or words to that effect). This federal body was set up to assist companies and its workers to resolve disputes in an atmosphere free of legal restraints and solemnities.

The system, whilst being far from perfect, was well understood by the so-called industrial relations club. That is the practitioners who understood the rules and (generally) played by them.

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It was the era in which "employers got the unions they deserved" and as Clarrie O'Shea (1906-1988), was the Victorian State Secretary of the Australian Tramway & Motor Omnibus Union) eloquently put it "all bosses are bastards". The inference being that bad bosses got militant unions, etc.

Fast forward to the present time and there have been a small in number but major in changes to the industrial legislation (anybody remember "Work Choices"). The current Fair work Act 2009 (with pending amendments) on face value is a fair and innovative piece of workplace legislation.

It would now appear that with less disputation in the workplace, the "IR Club" has been replaced by the infamous "no-win no-fee (NWNF)" club. This "new" club owes its allegiance to no cause. It exists simply to make money from employers via their (often) naive clients. They are not new, but their usual past hunting ground was mainly workers compensation.

What *is* new is the ability for legal firms to advertise. And the NWNF brigade does this extremely effectively. They actively encourage employees who have dismissed from their employment to sue their ex-employer via the "unfair dismissal" system. If the "unfair dismissal" does not fit, then let's try "general protections/adverse action" or "unlawful/discrimination".

I read a report by the Commission some years ago that stated that the average settlement for an unfair dismissal at conciliation was $15,000 (that is, the average amount of money that an employer pays to the disgruntled employee to go away). How much the ex-employee sees is another matter – I've heard stories of fees charged by the NWNF of 75% of the settlement! All unions wanted were their monthly fees paid.

Let's face it; the number of reinstatements is miniscule. NWNF lawyers work hard to ensure settlements (read: "Cashflow") abound north of 80%.

In extrapolating figures from 1 July 2001 to 30 June 2013 (yes I have been following this a while), I have used a multiplier effect of total claim cost of $20,000 per claim to the employer. Pretty conservative given the time and productivity loss and legal fees, etc.

Table 1: Claims

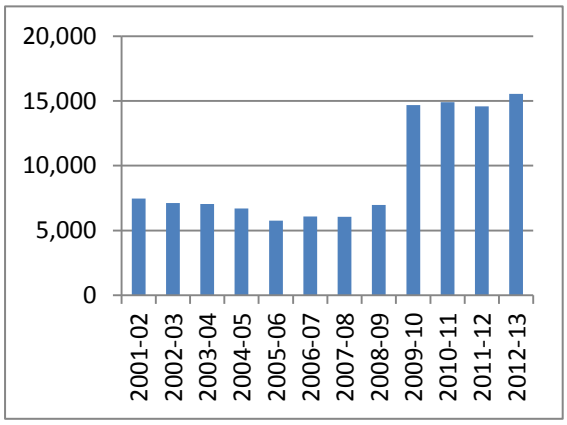
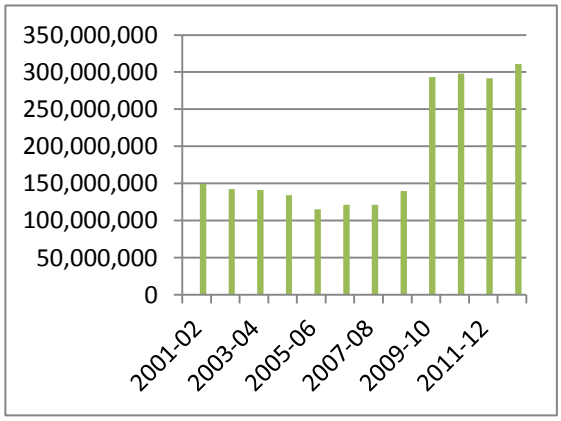


Table 2: Costs



As the above tables state, during the period 1 July 2001 to 30 June 2013 there have been **112,907 claims for unfair dismissal**.

Multiplying that by $20,000 equates to **$2,258,140,000.**

In the words of Arthur Daly: "Not a bad little earner".

This is despite the current legislation limiting the appearances of legal representatives.

And to make matters worse, conciliations are now being undertaken over the phone. Employers and ex-employees are not required to attend any formal conciliation. It's all about efficiency. It's all about churn. The Commission has timelines to deal with these matters and this is the way of improving productivity!

I am noticing a worrying trend where the legal fraternity are being allowed into this jurisdiction because of the "complexity" of cases. If the case is too complex, find people who will make its simpler.

The Commission is also focussing far too much (in my humble opinion) on the "procedural fairness" of a case (especially at conciliation) rather than the real reason why an employer got rid of the employee ("substantive fairness") to bludgeon employers into agreeing to "settle".

And, by the way, this is why the new Anti-Bullying law is doomed. Not because it is bad law, but because it provides zero succour to the NWNF fraternity.

PS: Google "no win no fee lawyers" and get to choose from "about 2,350,000 results".

Your thoughts…?

Employee dishonesty (including working for a competitor whilst claiming sick leave)

In this matter [1] the applicant thought he was wrongly dismissed because his employer because his employer sacked him for:

- Engaging in a conflict of interest by being involved in establishing a competing business;
- Taking sick leave while driving a truck for a competitor;
- Misappropriating a cash payment of $3,303.50; and some of the respondent's product.

In considering all of the facts, the SDP found against the applicant, stating (in part):

> *"First, I am satisfied that on 28 October 2013 the applicant told his employer that he would not be coming into work that day because he was sick. In fact, he took the day off to do some work for Elite Haulage.* ***Abuse of sick leave in this manner is grounds for termination of employment*** (my emphasis). *In this case, the misconduct is aggravated because it was linked to the second instance of misconduct, namely that the applicant was closely involved in establishing and operating a business in competition with that of his employer. This was inconsistent with his duty of fidelity and good faith to the respondent. Mr Kosutar had brought his concerns to the attention of the applicant who simply denied them. The applicant was dishonest to his employer about his relationship with Elite Haulage."*

And further, in relation to "Prior Warning" requirements: *"This criterion is not relevant as the dismissal was related to misconduct, not unsatisfactory performance."*

New and pending legislation

The Workplace Injury Rehabilitation and Compensation Act 2013 (the WIRC Act) commences on 1 July 2014. Coinciding is the demise of the brand "WorkSafe" which will now be known by its legal parent, the Victorian WorkCover Authority.

The Workplace Injury, Rehabilitation and Compensation Act 2013 replaces the:

- Accident Compensation Act 1985 (for claims lodged before 1/7/14)
- Accident Compensation (WorkCover Insurance) Act 1993 (repealed)

[1] Jason Roberts v Resource Australia Transport (U2013/15752) [2014] FWC 4411, Hamberger, SDP

- Accident Compensation Regulations 2001 (revoked 1/7/14)

Readers with responsibilities in this area are encouraged to skill-up on this new legislation as the explanatory note provided by the government underplays some of the changes.

Go to: http://www.vwa.vic.gov.au/laws-and-regulations/accident-compensation for the

The Fair Work Amendment Bill 2014 is currently being contemplated by the federal Senate.

The proposed amendments include:

Leave

- Clarification that an employer is not required to pay annual leave loading on termination of employment. This may still be required by an award or enterprise agreement.
- Employers must not refuse a request for the extension of parental leave without first giving the employee a reasonable opportunity to discuss it.
- Employees do not accrue, and cannot take leave while absent from work and receiving workers compensation. Noting that this conflicts with the Victorian Long Service Leave Act.

Unfair Dismissals

- The Fair Work Commission may dismiss an unfair dismissal application without a hearing where the application has no reasonable prospects of success or the former employee has unreasonably failed to attend, comply with directions or discontinue the application which has been settled.

Transfer of Business

- The transfer of business provisions will not apply to the transfer of an employee between associated entities where the employee sought the transfer at their own initiative.

Individual Flexibility Agreements(IFA's)

- IFA's made under both awards and enterprise agreements must provide for 13 weeks' notice of termination (as opposed to 4 weeks, which is the current requirement).
- Employers will not breach an award or EBA if they reasonably believe that the employee would be better off under an IFA.
- Clarification that non-monetary benefits are taken into account in assessing whether employees are better off under the IFA than the award or EBA.
- An IFA provision in an EBA must permit variations to: arrangements when work is performed; overtime; penalty rates; allowances; and leave loading. This will prevent unions 'neutering' IFA provisions in new enterprise agreements by restricting what they can deal with.

Greenfields EBA's

- Unions will only be a bargaining representative for a greenfields EBA if the employer agrees to bargain with them. This means, for example, an employer could potentially choose to negotiate with one union with coverage and not others with coverage.
- However, a greenfields EBA must still (in effect) be negotiated with at least one union for a minimum of 3 months (known as the 'notified negotiation period').

- After the conclusion of the 'notified negotiation period', the employer can apply to FWC for approval of the EBA – even if the union/s do not agree. The good faith bargaining and related requirements cease to apply on expiry of the 'notified negotiation period'.
- The FWC must approve the greenfields EBA if it meets the Better Off Overall Test and also provides for pay and conditions, considered on an overall basis, that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work – which can include geographic considerations.
- The greenfields EBA is taken to be made when application is made to the FWC.

Protected Action

- Employees cannot take protected industrial action to force an employer to agree to bargain.

Right of Entry

- A union official may only enter premises for discussions with employees if the union is party to an applicable EBA, or (if there is no EBA) where an employee has invited them. To avoid disputes, a union official can apply for an anonymous 'invitation certificate' from FWC.
- A union official will no longer have the right to insist on conducting discussions in a lunch room. Rather, the union official must comply with reasonable requests to conduct interviews or discussions in a particular room.

There are some other miscellaneous changes – importantly, to restore previous provisions about resolution of disputes over right of entry, including frequency of entry, and make the focus fairness between the parties.

For more information go to:
http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5174