Greg Reiffel: Tel: 0438 906 050 E-mail; greiffel@bigpond.net.au

Employee Relations News

Edition 35 **7 November 2015**

Greg Reiffel HR & IR Consulting

I have more than 25 years' experience and Employee/Industrial Relations, EBA's, unfair dismissals and policies/employee handbooks are a speciality. Qualifications include IR and HR, Training & OH&S systems.
For further information, please see my LinkedIn profile:
https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

Please consider me should you require a HR or ER/IR person on a full-time, temporary or contract basis.

In this edition:

Fair Work Amendment Bill 2014 passed by Senate

After, initially very slow progress, the Federal Senate has had a rush of energy and passed the Bill. Next step will be for the amended Bill to be passed by the Lower House; the seeking enactment by Royal Assent. Without going into too much detail, the Bill did not pass through the Senate unscathed, with the changes sought in relation to Right of Entry, Individual Flexibility Agreements, Transfer of Business, and Annual leave entitlements being omitted.

Once the Bill receives Royal Assent, the Fair Work Act 2009 will see changes to provisions relating to:

- The making of Greenfield's Agreements.
- Protected Industrial Action.
- Unpaid Parental Leave.
- Interest on Unclaimed Monies.

Suspicion (of theft) not proof[1]

When moving from one site to another the Employer as part of the transfer process allocated a "clean-up team". The applicant was part of this team.

The employer set in place a voucher system process whereby employees were able to request to take materials excess to the employer's requirement; insofar they did so with permission and in their own time.

In this matter the applicant was dismissed for "serious misconduct" for removing copper pipe despite being refused permission to do so, and in company time.

The pipes went missing, with the site manager suspecting that Mr Chandra stole the copper pipe.

As stated by the VP:

> *"…suspicion is not proof. When an employer relies upon misconduct as a ground for dismissal it is necessary for the employer to establish that the misconduct occurred on the balance of probabilities (with the Briginshaw * satisfaction when an allegation of fraud or dishonesty is involved)."*

*Ed note:

"When a criminal offence is relied on as a ground of dismissal of an employee a more than cursory examination of the facts is required.

1 Ravindra Chandra v UGL Rail Fleet Services Ltd. (U2015/6105) [2015] FWC 7381. LAWLER, VP. 26 OCTOBER 2015

> *"The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. ..... In such matters `reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences." Briginshaw v Briginshaw (1938) 60 CLR 336 at 361 and 362."*

As the VP observed:

> *"The Respondent, in its reasons for dismissal in the dismissal letter, did not allege theft, fraud or dishonesty but it is tolerably clear that the suspicion that Mr Chandra had been preparing to steal the copper pipes lay behind the decision to dismiss him for the particulars of misconduct set out in the dismissal letter."*

The VP also considered

> *"Mr Chandra's age (49 years) and the inevitable difficulty that someone of his age and experience will have in finding ongoing work and the very adverse effect on his reputation that the dismissal has had within his own community, where he has been unjustly branded as a thief as a result of the dismissal. The evidence does not establish that Mr Chandra was a thief or that he engaged in any dishonesty."*

This absence of proof led to the VP ordering Mr Chandra be reinstated to his former position without loss of pay or entitlements.

Commentary

This case turned out to be a bit of a disaster, because the worst thing that can happen when you sack an employee is to have them reinstated.

"Fixed Term" temporary employment quandary

When reviewing a recent decision in *William Zammit v Larrakia Nation Aboriginal Corporation. [2015] FWC 7368 (U2015/9313). BISSETT,C. 30 OCTOBER 2015*, where the applicant failed due to wont of jurisdiction (ie the Commissioner found the contract to be a true fixed term contract), this decision referred to another citation in:

> *Miss Eleanor Downes v The Uniting Church in Australia Property Trust (Q.) T/A Wesley Mission Brisbane. [2013] FWC 8890 (U2013/10566). RICHARD, SDP. 19 NOVEMBER 2013*

In the Richard decision, Ms Downs was "paid out her contract (by four weeks) and as such the SPS found that it was not a true fixed term contract, because it did not end by the "effluxion of time".

However, whilst finding in favour of the applicant, the SDP cautioned:

> *"The critical question for the purposes of any arbitration - and it is one about which the Applicant may seek advice - is whether the Applicant, even if she was found to have been harshly unjustly and unreasonably dismissed (and that is a question that remains very much left open for determination) would have any scope for re-employment, or compensation in lieu, as a consequence of the employer having discharged its obligations to her in full.*
>
> *"The Applicant would need to carefully consider this question before pressing her claim further."*

[IE: She "won" but she "lost"].

The importance of this decision is the amount of work that the SDP put into it, including examining the many precedents. The SDP then compare ding the Fair Work Act explanatory Memorandum, with wording of the Act itself, finding:

> *"Here, the meaning of an employee engaged under a contract of employment for a specified period of time is not one that emerges from the plain words of the statute as such, or its context, as it is not a defined term. But the phrase has a meaning derived from judicial interpretation over time (and which is reflected in the parochial authorities).*

> *"The Parliament may have intended by the exclusion of the statutory note in the Act to provide a different definition of the phrase that is consistent with the Explanatory Memorandum. Yet Parliament did not see fit to alter the statutory phrase itself. The jurisdictional exclusion remains referrable to an employee engaged under a contract of employment for a specified period of time. The words of the central statutory phrase have not been amended. The exclusion of the statutory notation arguably changes little as such notes are not a substitute for the words of the statute itself."*

[In short, you can have all the explanatory documents you like, but unless the words are transferred to the Act, then they mean zero].

The main point of this article is to reinforce the following:

- Having a probationary employment clause is okay as:

  "…should the Applicant fail to satisfactorily achieve service of the contract [as] the probationary provision in the contract is not a broad or unfettered right to terminate the contract."

- A clause that ends the contract because of a breach by the other party is also acceptable.

- An "*unqualified right"* (such as a termination clause) *"… to terminate without reason…cannot be so characterised (as one contract of employment for a specified period of time)."*

Commentary

It is my strong opinion that temporary contracts of employment should be used with great caution, whereas casual employment might be a more appropriate option.

Until next time…

Greg Reiffel
Principal Consultant