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**Employee Relations News**

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| 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.***<br>***For further information, please see my LinkedIn profile:***<br>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:



## Employers object to ACTU's claim for domestic violence & family friendly arrangements clauses [1]

As part of the four yearly review of modern awards the ACTU has sought for the following clauses to be included in all modern awards. The matter will proceed to a final hearing before a Full Bench of the FWC for final determination.

- Family and Domestic Violence leave (10 days paid leave pa):
  - Defined as any violent, threatening or other abusive behaviour by a person against a member of the person's family or household (current or former).
  - 10 days per year of paid family and domestic violence leave for the purpose of:

    (a) attending legal proceedings, counselling, appointments with a medical or legal practitioner;

    (b) relocation or making other safety arrangements; or

    (c) other activities associated with the experience of family and domestic violence.

- Parental leave, allowing the employee that is returning to work:
  - the employee's pre-parental leave position on a part-time basis; or
  - if the employee's pre-parental leave position is part-time, on reduced hours; or
  - if the employee's pre-parental leave no longer exists – an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position on a part-time basis or on reduced hours.

- Antenatal leave (15.2 hours paid leave pa) for attending appointments associated with:
  - antenatal;
  - fertility treatment;
  - surrogacy;
  - pre-adoption; or
  - permanent care orders.

[1] Family and domestic violence clause (AM2015/1, Family friendly work arrangements clause (AM2015/2) [2015] FWCFB 5585. HATCHER, VP, ACTON, SDP, SPENCER, C. 22 OCTOBER 2015

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## FWC agrees that overweight worker unable to perform inherent requirements of the job [2]

- The applicant, who was formerly employed as a Cool Room Operator at one of the respondent's distribution centres in suburban Sydney, commenced employment with the respondent as a transferring employee in 2009, and had previously worked as a labour hire employee from 2000.

- There was no evidence of any issues concerning the applicant's capacity or performance, other than the particular circumstances related to the dismissal itself involving an alleged incapacity to perform the inherent requirements of his role.

- The applicant, among other employees of the respondent, completed a manual handling hazard and risk assessment which was conducted by an external occupational therapist. The applicant was considered to have a medium-to-high risk assessment, raising resulting concern that he may not be able to safely and competently perform his role.

- The applicant attended various appointments and assessments. Principal among the issues concerning the applicant's fitness were his weight and associated medical-type issues. As at the date of an assessment instigated by the respondent and conducted in May 2014 the applicant's weight was 165kg.

- This precluded him from operating the forklifts due to the forklifts' maximum weight safety ratings (such as for the maximum weight on the forklift seats).

- From June 2014, the applicant initially was stood-down from duties with pay; he next accessed accrued paid leave entitlements; and, when the paid leave entitlements were effectively exhausted, he thereafter remained employed by the respondent, but without pay. The applicant encountered significant financial hardship as a result of the stand-down; his income protection insurer apparently advised that an insurance application would not be entertained, with the result the applicant did not make a formal application; and the applicant was otherwise apparently ineligible for social security benefits so long as he remained employed by the respondent.

- The respondent expected that during the stand-down the applicant would, in accordance with medical advice, take steps concerning weight/health management with a view to a resumption of duties.

- When the occupational physician conducted a second assessment of the applicant in February 2015 in connection with fitness for work, the applicant's weight had increased from 165 kg to 175 kg

- The occupational physician was of the view that the applicant could (only) conduct semi-sedentary-type work which did not require any heavy manual handling and operating mobile machinery for full-time hours and days, if this was available to him.

- The respondent proceeded to dismiss the applicant on 26 May 2015, with a payment in lieu of notice.

In finding in favour of the company, the Commission stated that there was a valid reason to dismiss the applicant on the basis of the applicant's incapacity concerning the inherent requirements of his position (and note also that the decision to dismiss was made approximately a year after the applicant was stood-down with a view to a return to work after addressing medically-advised weight/health management issues).

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2 Ranui Parahi v Parmalat Australia Ltd. [2015] FWC 7191 (U2015/8466). MCKENNA, C. NOVEMBER 2015

## Employment starts when being paid (FWC finds applicant within minimum employment period) [3]

- Ms Holly Dunn alleged the termination of her employment by IVvy Pty Ltd was unfair. In her application she advised that she commenced employment on 8 December 2014 (when she signed a confidentiality agreement) and her employment ended 13 July 2015.
- In the employer response, IVvy objected to Ms Dunn's application on the basis that Ms Dunn had not met the minimum employment period.
- Ms Dunn gave evidence that she received an offer of employment on 14 November 2015 and she accepted the offer on the same day. That letter provided that her start date would be 12 January 2015.
- There is no dispute that Ms Dunn did not commence paid employment until 12 January 2015.
- Ms Dunn submitted that her employment commenced when she accepted the offer of employment. If that is not correct, she submitted that she commenced employment when she signed the confidentiality agreement.

The Commissioner found that:

- Ms Dunn's employment commenced on 12 January 2015. That a person choses to do some preparatory work before the commencement of work does not make the person an employee.
- That she did not apply for other work because she had accepted the position with IVvy did not change the fact that she was not employed by IVvy until 12 January 2015.
- The confidentiality agreement did not create an employment relationship between Ms Dunn and IVvy. That it was signed before employment commenced is not relevant to a determination of when Ms Dunn commenced employment. While it referred to Ms Dunn as the employee and IVvy as the employer, it does not purport to be a contract of employment.
- Ms Dunn's employment commenced on 12 January 2015 and consequently the six month period ended at midnight on 11 July 2015 and that she had not served the minimum employment period and therefore she is not protected from unfair dismissal and her application must be dismissed.

***Until next time…***

**Greg Reiffel**
Principal Consultant

[3] Holly Dunn v IVvy Pty Ltd. [2015] FWC 7552 (U2015/9619). GOOLEY, DP. 4 NOVEMBER 2015.