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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.
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In this edition:

EBA given the BOOT despite undertakings [1]

As we all know, when submitting an EBA to the FWC, it must accompanied by a number of forms. In this matter the DP found that some of the paperwork was *"… at best inaccurate and at worst, misleading."*

In summary:

- When the vote was taken by the employees, the rates of pay were slightly over award. But in the meantime the Annual Wage Review was handed down by the FWC, which made these rates below par.
- The nominal expiry date is not consistent with the requirements of the Act in that it states that the Agreement will operate for a period of four years from a date which is seven days after approval by the Commission, rather than from the date the Agreement is approved.
- The consultation term does not meet the requirements of the Act.
- Clauses which provide that employees will be paid at ordinary rates when they "volunteer" to work at times or on days which would entitle them to be paid at overtime or penalty rates.
- Provisions of the Agreement relating to piecework, which extended piecework arrangements to employees covered by other modern awards which do not allow piecework arrangements
- Failure to include provisions in relation to setting ordinary hours of work for part time employees and overtime payments for hours worked in excess of, or outside of, those ordinary hours.
- The superannuation clause in the Agreement may be an unlawful term under the Act as it does not require the default fund to be a complying fund.

The Applicants proposed that the Commission accept a number of undertakings in the hope that the EBA would be approved.

The DP cited AMIEU v Golden Cockerel Pty Ltd:

- The construction of an award, like that of a statute, begins with the consideration of the ordinary meaning of the words;
- Regard must be paid to the context and purpose of the provision or expression being construed including the legislative background against which it was made and in which it is to operate;

[1] Brockfield Enterprises Pty Ltd and Ors [2015] FWC 7863 (AG2015/4222). ASBURY, DP. 17 NOVEMBER 2015

- A narrow, pedantic approach should be avoided and meanings which avoid inconvenience or injustice may reasonably be strained for; and

- The exercise is not one of giving effect to some anteriorly derived notion of what would be fair or just regardless of what is written in the Award.

The DP concluded:

> *"The voluntary hours provisions are a substantive part of the Agreement...For the reasons set out above, and in many Decisions of the Commission I am satisfied that the Agreement does not pass the BOOT as required [under]the Act. I can only echo the observations of Deputy President Bartel in MP Resources Pty Ltd to the effect that the agreement … bears more than a passing similarity to other applications …which have been found to have failed the BOOT on the basis that they contain voluntary hours provisions. The Applicants, through their legal representative, have put arguments that have been consistently rejected by the Commission in many cases. The Applicants have not attempted to establish that exceptional circumstances exist."*

Commentary

When drafting an EBA, put the relevant award(s) in one hand and the EBA in the other. If the EBA weighs slightly more (in configurative terms) then it will pass the BOOT. It was the same under the previous legislation which had the "no disadvantage test", so it really should not be that hard.

When is a temporary contract not a temporary contract? [2]

This is a jurisdictional issue, where Ms Morris's employment was terminated and she subsequently made application for an unfair dismissal. Cheap as Chips objected to the application on the basis that Ms Morris was working under a contract of employment which specified an "outer limit" for the continuation of Ms Morris's employment.

What is of real interest in this decision is the detail provided that should assist readers in considering drafting common law contracts of employment.

By way of background, Ms Morris:

- Commenced part-time employment with Cheap as Chips as a Shop Assistant, on 24 March 2014.

- Employment was agreed in a written contract, confirming that she was a permanent part-time employee.

- In June 2015 hours of work were increased by agreement.

- 8 September 2014 was appointed in writing to the position of Assistant Store Manager. This was to be a "salaried" (ie inclusive of all penalties, etc) position.

- In late April 2015 "asked if I could step down from my role as Assistant Store Manager of the Broken Hill store".

- Was appointed to the position of Shop Assistant/Shift Runner, effective from 11 May 2015 and until 16 August 2015. This correspondence confirmed that her employment status was that of a "Permanent Part Time Employee".

- Was advised on 1 August 2015 that her employment would end on the expiry of her fixed term contract. She was not required to work until 16 August 2015 and was paid up to that date.

The SDP found:

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[2] Kim Morris v Palcove Pty Ltd T/A Cheap as Chips [2015] FWC 7890 (U2015/11521). O'CALLAGHAN, SDP, 18 NOVEMBER 2015.

- The Full Bench decision in Searle v Moly Mines Limited confirms the requirement that any conclusion about matters of this nature are based on an objective assessment rather than on a subjective assessment of the reasonableness of the actions of the parties.

- The phrase "permanent" appears numerous times throughout the contracts.

- Cheap-as-Chips submitted that word "permanent" is used to denote a "non-casual" employee, without regard to whether an engagement is for a defined or indefinite period of time.

- The 7 May 2015 letter confirmed her appointment to the Shop Assistant/Shift Runner position and also acknowledged she was a weekly hire employee. In this regard the reference to Permanent Part Time employment and does not purport to confirm the termination of her earlier employment with Cheap as Chips or the commencement of a new employment contract. It does establish a new position for her the basis that position operated from 11 May 2015 until 16 August 2015.

- Changes to positions held by an employee or to position requirements do not mean that there is a cessation of employment as distinct from a cessation of particular duties or functions so that a new or different function or position can be undertaken.

- Simply put, Ms Morris moved from one position to another. While these positions may have been for prescribed periods, as an on-going employee, she was not "employed under a contract of employment for a specified period of time".

The SDP also cited *Department of Justice v Lunn* the Full Bench stated (which I have dot-pointed):

- Whatever may have been the position in the past, under the modern law; there can be no employment relationship without there also being a contract of employment in existence between the parties to the employment relationship.

- However, as the Full Court of the Federal Court in *Brackenridge v Toyota Motor Corporation Australia Ltd* made clear, the termination of a contract of employment does not necessarily result in the termination of the employment relationship between the parties to that contract of employment:

    - If the parties enter, or are taken to have entered, a new contract of employment of employment, the employment relationship continues notwithstanding the termination of the prior contract of employment.

    - Thus, a "continuous employment relationship" is not inconsistent with a series of back-to-back fixed term or "outer limit" contracts, each of which takes effect according to its terms.

    - On the other hand, as noted by Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson*, it is possible for a contract of employment, and thus an entitlement to wages, to survive a termination of the employment relationship."

- Further, I have noted the Cheap as Chips position that *Forrest v Cosmetic Co Pty Ltd & Anor* establishes that clear written contractual requirements establish obligations irrespective of the extent to which a party has read these documented provisions. As I have indicated, Ms Morris was an on-going employee, to whom the probationary arrangements could not be applied.

In citing *Anderson v Umbakumba Community Council* and *Cooper v Darling Rugby League Inc* to support this decision, the SDP found Ms Morris was not an employee employed under a contract of employment for a specified period of time.

Commentary

The following is not "new" but is worthy of mention:

- "Fixed term" or "temporary" employment contracts become null and void if the employ works beyond the contracted "end" date.

- A “fixed term” or “temporary” employment contract cannot contain any reference to termination (except for misconduct) – including probationary periods.
- Say what you mean: just because it is local language or corporate-speak within an organisation don’t make it so.
- When contemplating the temporary hire, consider a casual arrangement instead.

In this matter Cheap-as-Chips was let down by having in place documents that would stand-up to scrutiny. Do yours?

Until next time…

Greg Reiffel
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