

Employee Relations News

Edition 4

19 August 2014



I just commenced a contract for a few weeks work with OzChild (see www.ozchild.org.au). What a worthy and brilliant organisation. OzChild has been around for 160 years looking after disadvantaged kids 0 to 18 years through a number of professional areas to ensure that every child has a chance to shine.

OzChild is currently fundraising for its Kokoda Challenge (see later this bulletin for further details.



“Letter to the editor”

Following Edition 3’s opening remarks, I received the following e-mail:

“Hi Greg,

Just an interesting point:

You make comment that Australia is not a third World Country and does not compete against such countries, and you use the analogy of the Dickensian period in England. Well, here is food for thought:

- *My cousin and his girlfriend visited us last weekend as they are undertaking their rites of passage and travelling the World. They have just arrived in Melbourne from Darwin and had some stories to tell. In particular, Victoria could only find work in a nightclub, where the owner only hired travellers because he paid them in pizza slices!*
- *The second story is that as part of the working visa the Government requires the traveller to spend some time working in agriculture. They were refused all jobs they enquired about as the farmers would only hire Indian/Sri Lankan workers as they again, would only have to pay them in food!*

Both are degree qualified, trained in a profession but cannot extend their Visas!

Interesting!

Regards,

Patrick”

“Interesting” indeed. I too have heard such horror stories. The media picked-up then dropped the 457 visa rorts story. In my experience, overseas workers come to Australia under the pretence to study for qualifications of a spurious nature. This visa allows them to study (say Certificate III in hospitality, having gained maybe a doctorate from their home country) and work 20 hours per week during non-school time. The quantity of work does not seem to be monitored. But during this study time, the visa holder is able to apply for permanent residency.

Another rort is unpaid “trials” and the exploitation of apprentices is rife. My own son worked from dawn to dusk for six months without pay and was used as free labour without ever being signed up

as an apprentice. Complaining to the Fair Work Ombudsman was useless, as after 18 months of procrastination by the FWO it was put in the too hard basket.

It would appear that it is easier to import skills than nurture our own young people. We no longer can rely on the big government departments in transport (eg railways) and utilities (eg SEC, Gas & fuel, MMBW) to push out the 100's if not 1000's of apprentices.

Overall, it is all too easy to focus on the big building sites (for example). I challenge the FWO to conduct blitzes of the building industry in residential growth areas.

We can also help by ensuring the contractors we engage comply with the laws of the land, not only through tenders and contracts, but through audits.

Recent Decisions

Two decisions, both relating to redundancy, both handed down by Commissioner Gregory (whom I had the pleasure of working with when at VECCI some years ago).

Pharmacy employee rejects job offer and loses (“no redundancy pay for you”)

In the first matter¹, a part-time pharmacy employee rejected a job offer on the same money and hours following the business being sold. Having rejected the offer the employer terminated the employee's services. The former employee then sought redundancy pay via application to the FWC.

The Commissioner, was required to decide on the issues of:

- Has Lodhia obtained “other acceptable employment”?
- If so, is it appropriate to reduce the redundancy pay entitlement otherwise due to Ms Sahib, and by what amount?

The Commissioner then used relevant case law (as DP Sams set down in *Spotless Services* in the determination of this matter. That is:

- Determining what constitutes acceptable alternative employment involves an objective exercise.
- Mere rejection by the employee of the alternative employment does not make it objectively unacceptable of itself.
- Comparable or equivalent of pay and conditions, including hours of work and continuity of service are important and relevant considerations.
- To be acceptable the employment needs to take account of the employee's skills, seniority, experience and capacity to perform the role.

[Noting that the lawyers were allowed in again on the basis that the matter involved a degree of complexity and his involvement would enable it to be dealt with more effectively. The former employee elected to participate by telephone.]

¹ Lodhia (Jayesh) Nominees Pty Ltd v Rosita Sahib, (C2014/4342) [2014] FWC 3703, Gregory, C.

The former employee had worked in the pharmacy for apparently three different owners of the business over a period of more than ten years.

In finding in favour of the company, the commissioner stated:

"I am accordingly satisfied the test of obtaining "other acceptable employment" has been met. In addition, Ms Sahib's rate of pay was to be maintained and her continuity of employment preserved if she accepted the offers made to her. I am therefore satisfied, in all the circumstances, Lodhia should be relieved of any obligation to make redundancy payments to Ms Sahib."

Redundancy pay cost of doing business

The next "redundancy" matter² the employer made application to the FWC, seeking to avoid paying redundancy pay. The matter had already been investigated by the Fair Work Ombudsman in the redundant employee's favour.

The company claimed it is currently insolvent and in danger of financial collapse due to the current highly competitive trading conditions within the cleaning industry. This has resulted in a material contraction of the Applicant's business (with the loss of a dozen contracts in the last 12 months) with the reduction in the viability. With the Applicant's bank facility being fully drawn the Applicant is now only able to continue trading with the added support of its family backers.

In finding against the company, the Commissioner stated *"the amount involved, given Ms Gunningham only worked part time on the relatively low hourly pay rates contained in the Award, is not an excessive amount...equates to an entitlement equivalent to 8 weeks pay."*

The Commissioner commented:

*"It is also clear that Employers generally have obligations under Awards and Agreements which are to be observed and complied with. I also accept they may take issue with the rationale for why some of those obligations exist, as Mr Walker has done in the present matter, but these are issues for another time. For the time being they continue to be part of the **costs of "doing business.** (My emphasis)".*

Commentary

The first case was a simple transfer of business proposition, with the employee obviously looking to sweeten the pie with a bit of redundancy payout. The employer called her bluff and won, because it had followed all the rules required of it under the FWA.

The second case found that the FWC had little sympathy for a company that did not account for redundancy pays for lost contracts. It is very hard for businesses when tendering for work to factor all matters, but clearly contingencies ought to have been made for the workers.

SEE NEXT PAGE FOR DETAILS ON THE OZCHILD KOKODA CHALLENGE

² GM+JE Walker Pty Ltd T/A Gateway Regional Property Services v Shirley Gunningham(C2014/4543) [2014] FWC 4335. Gregory, C.



OzChild's 2014 Kokoda Challenge: \$96K for 96km to help protect the rights of Australian children.

No Australian child should be at risk of abuse, trauma, social exclusion, poor education outcomes, family disconnection or mental illness – but they are.

Our team's goal for the Kokoda Challenge is \$96K for 96km.

We want to raise \$1000 per kilometre for every step of the 96km journey to provide hope and ensure support for at risk and vulnerable children who face challenges every day.

Each \$1000 will make a difference – it can allow 28 children the opportunity to participate in playgroup sessions.

Playgroup activities aid early development including language, cognition and fine motor development skills. This enables children to develop their social skills and identity, and gives them confidence!

“OzChild needs your support! Help OzChild make a difference in the lives of children and give them a chance to shine. You can learn about the team taking on the Kokoda Challenge and donate through our [Everyday Hero](#) page.”

Play your part today and donate to help us raise \$96K for OzChild - because every child deserves the chance to shine.



About OzChild

Every child has rights - observing these rights and ensuring the safety and protection of our children is at the heart of OzChild's work. For more than 160 years OzChild has been protecting the rights of Australian children and making sure they have the best opportunities for a brighter future. The children we work with are often abused, vulnerable and disadvantaged and it is our role to protect them, nurture them, develop them and give them a voice.

Our programs range from foster care for children aged 0 – 18 who can no longer live at home; services for children with disabilities; support such as counselling for families experiencing difficulties; respite for families whose children often have complex needs; education and development programs and scholarships for disengaged and underprivileged youth.