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Greg Reiffel Employee Relations News

Edition 55 2 December 2016

Greg Reiffel HR & IR Consulting

"My business grows by referrals. I would appreciate it if you would let me know if you have any colleagues, clients or associates who could benefit from my skill-set."
I also would greatly appreciate if you could pass this newsletter on to your business contacts. Thank you.

In this edition:

Reasonable notice, making a complaint and condoning poor behaviour

When was the last time you reviewed your employees contract of employment? Do they even have a written agreement? Is they do, is it up to date? Does it, amongst other things, ensure that policies are not imported into the contract and have a terminations clause?

I have recently had a case where a n employee was made redundant (blue collar, award employee) and offered $50,000 redundancy. This was double the FWA rate. The employee refused to sign a Deed of Release and went to a well-known "no-win no-fee" law firm who advised the employee not to accept the offer as they would do better.

Said law firm (cleverly?) lodge an Adverse Action claim, based on a spurious premise. Our problem: no contract of employment. This means that if the matter is prosecuted, the court has the capacity to award what it believes to be fair and reasonable. 12 months' pay is not unusual.

Enter good friend and mentor **Gary Katz (Partner, Meerkin and Apel),** workplace lawyer extraordinaire:

Hi Greg,

> *"Unfortunately, this South Australian decision [stating that the FWA termination be considered reasonable notice] was recently considered and rejected in a decision handed down on 28 June 2016 by the Federal Circuit Court in the matter of McGowan v Direct Mail and Marketing Pty Ltd, …I have to say that I reluctantly agree with the decision and disagree with the South Australian decision (which, in any event, I doubt would have been followed by our Victorian Courts). So, at present, the long body of cases in our Victorian Courts implying a term of reasonable notice, together with this latest Federal Circuit Court decision, means that [law firm] argument for implying a term of reasonable notice in our case is a good one. Of course, the actual period of reasonable notice is very much a 'live" argument. Kind regards,* ***Gary Katz*****".**

Thanks Gary. So, the following is an examination of a decision which explores, not only "reasonable notice", but the meaning of "making a complaint" in the context of an adverse action, and the condoning poor behaviour.

McGowan v Direct Mail and Marketing Pty Ltd, Federal Circuit court of Australia, [2016] FCCA 222 7, McNab, J. 29 June 2016.

In summary, the applicant waited some 17 months to have his day in court and lost. This meant that the applicant (and his previous employer) not only had the stress of waiting such a long period, but had to bear his own costs. I will let you draw your own conclusions on the business of workplace law – put in place to protect workers, results in such an outcome.

Why did the previous employer prevail? Because it had a written contract of employment!

By way of background the commenced employment with the respondent on 25 February 1999 as an account manager, then later 2009 sales manager and finally 3 January 2012 Group General Manager.

Each appointment was confirmed in writing, including that in the event that either party was to terminate the third employment agreement they would provide the other party with reasonable notice of termination.

The applicant was terminated with five weeks' notice 17 November 2014. The applicant was pursuing 12 months' notice of termination of employment, believing this to reasonable notice.

The applicant argued that his services were terminated because he had made a complaint to the company's external HR advisor along the lines that he was being excluded from key communications.

The company argued that the complaints has nothing to do with the decision to dismiss the applicant and that the contract of employment reflected the legal minima laid down in the FWA. It also stated that the making of the complaint, in any event, did not constitute an "adverse action" as set out in the FWA. The company stating that the dismissal was because the applicant's:

- Behaviour, rude and crude conduct (as was complained of by a number of employees and clients), including one client refusing to deal with the applicant. And an incident (which was one of many):

  "…at a race meet at a party held at the Moonee Valley Race track reception facility, which was a social function organised by the respondent with clients present, the applicant made grossly offensive remarks in the presence of customers [including] is alleged to have said to a pregnant wife an employee of the respondent "when you have a baby your wife is ripped from asshole to c – – t and it never looks the same again".

- Lack of interest in the company's proprietary software.

Because the applicant was paid five weeks' in lieu of notice and not summarily dismissed (ie without notice) that where an employer terminates on notice in circumstances where it is aware of conduct which may justify summary termination, the employer cannot then rely on that conduct to defeat a claim for notice), he argued that in Carter v The Dennis Family Corporation [2010] VSC 406 at 121 – 125 ("Carter"):

> *"Habersberger J stated (citing Phillips v Foxall, Blackburn, J stated:*
>
> > *'Now the law gives the master the right to terminate the employment of a service on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned…'*
>
> And
>
> > *'Gillard, J in Rankin v Marine Power International Pty Ltd (2001) 107 IR 117). His Honour stated:*
> >
> > > *'An employer who has full knowledge of the misconduct of an employee, and who makes a decision to continue to employ the employee, cannot at a later date, unless of course other facts come to his knowledge, dismiss him summarily on the basis of the employee's known conduct. It is said that the employer has waived his right to dismiss the employee summarily, and thereby condones the misconduct (however] It is clear that no such waiver, condonation or election can take place until the employer has full knowledge of the misconduct"*

In turning to the written contract of employment, his Honour noted the wording of the subsequent letters which stated (in part) "This letter will now form part of your employment agreement as an amendment." Observing:

> *"…the words of contract should be interpreted in the grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy.*
>
> > *"The Macquarie Dictionary defines the primary meaning of "explicit" as "leaving nothing merely implied; clearly expressed; unequivocal". The parties agreed that the terms of the contract would continue to apply unless expressly agreed that they would not. There is no evidence of such an express agreement and, in those circumstances, the terms in relation to termination of the contract continued to apply throughout the employment and* ***there is no basis for implying a term of reasonable notice****.* [My emphasis].
> >
> > *"It is generally accepted that the common law will imply a term that a contract of employment may be terminated on reasonable notice into such a contract which makes no provision for termination…it was argued that such a term is implied into every contract of employment unless excluded. The two propositions are different. The first is concerned with filling a gap; the second with establishing a position of primary operation.*
> >
> > *"…the implication of a term of reasonable notice was not necessary because there was no gap to fill…"*

And to remove any doubt that all employee ought to have a written contract of employment:

> *"I think the better view is that…National Employment Standards…is intended to provide a minimum period only. It does not displace a right to reasonable notice when the contract of employment is silent on the question of notice. By paying or giving the minimum period of notice under [the FWA], the employer will have satisfied the National Employment Standard and not be liable for a claim of breach of those standards. However, it is strongly arguable that payment or provision of that notice will not necessarily satisfy a claim for reasonable notice. The proposition may be tested where the employment of two employees is terminated. Both are over 45 years of age. One has worked for 5 years in a mid-range role, the other has worked for 25 years and worked her or his way up on a high-level role. Both are employed under contracts that make no provision for notice of termination. I doubt that parliament intended that both would receive the same period of notice of termination by the enactment of [the FWA]".*

Blatant plug: I am available to review/provide contracts of employment.

FWC provides permission for union to investigate non-members pay records

Transport Workers' Union of Australia, [2016] FWC 8197. Gregory, C. 15 November 2016.

In this matter the union (TWU) applied to the FWC for an order allowing the union to investigate suspected wages breaches at two sites. This investigation would result in the union having access to employee employment records of people who are not members of the union.

[Noting that this is what I thought was the job of the Fair Work Ombudsman].
But in the words of the Commissioner:

> *"[The FWA] requires that the Commission may make an order sought "if it is satisfied that the order is necessary to investigate the suspected contravention". I am satisfied that the orders being sought are necessary to investigate the suspected contraventions and whether the individuals are employees who are entitled to be paid in accordance with the relevant Award. However, in coming to this decision, I am obviously not expressing a concluded view about whether any such contravention exists. The orders sought will be issued in conjunction with this decision".*

Blatant plug: I am available to conduct audits for any business to ensure full compliance and eliminate the risk of FWO or Union interference.

Until next time…

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