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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

"Providing practical Industrial Relations solutions to business since 1986"

Employee Relations Newsletter

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Introduction

I rely mainly on referrals, and I would appreciate any "warm leads" that you be able to provide. Whilst my office is located in the western suburbs of Melbourne, I do travel. Your consideration is warmly appreciated.

This edition is a little different in that I explore the future of the FWC, against the its past "glories". I therefore ponder…

What is the future role of the Fair Work Commission?

After recent events in the FWC, I can't help but wonder whether Henry Bourne Higgins (acknowledged "father" of the what is now the FWC) would think of today's version of what was the Australian Industrial Relations Commission (enacted in 1904).

Dissention in the ranks

In recent times, I can identify three areas of "controversy":

- News Ltd reported: **"Resigning fair work chief blasts system"** (23/1/17).

  "…vice president Graeme Watson launched a scathing attack in his letter of resignation, which came as a surprise to FWC president Iain Ross...[Watson stating]:

  - There is an increasing understanding in the business community that the Fair Work Commission is partisan, dysfunctional and divided.
  - It had become clear the workplace system was actually undermining the objects of the Fair Work legislation.
  - I do not consider that the system provides a framework for co-operative and productive workplace relations and I do not consider that it promotes economic prosperity or social inclusion. Nor do I consider it can be described as balanced."
  - In 2012, he condemned the narrow union backgrounds of commission members and in 2014 he called for 20 per cent cuts to Sunday penalty rates in hospitality because the basis of such rates was "archaic".

  Mr Watson, was a member of the commission since June 2006, and a former Freehills lawyer since 1983 who represented Patrick stevedores in the 1998 waterfront dispute was obviously an "employer" appointment (note commission is purported to be made up of an equal parts employer, union and government backgrounds).

- As reported by ABC News 3/3/2106): "Fair Work Commission (FWC) vice-president Michael Lawler has resigned, ending a protracted legal stand-off".

Mr Lawler's resignation came just 24 hours before he was due to respond to a report by former Federal Court Judge Peter Heeley into his conduct.

That report was commissioned after Mr Lawler took sick leave for more than nine months, on his full $430,000 salary. During that time, he helped his partner, former Health Services Union official Kathy Jackson, fight a Federal Court ruling that she misappropriated $1.4 million of union funds.

[Ed: Whilst most workers make do with ten days' sick leave year, the commission has potentially unlimited sick leave entitlements].

Formerly a Sydney-based criminal lawyer with Wentworth Selborne Chambers was appointed to the commission in 2002 by tony Abbott. Various reports have described him as being seen at a pool party with Kathy Jackson jumping into the pool exposing his **nipple rings** to questioning his power of attorney of dementia sufferer David Rode QC, who left his $30 million fortune in the hands of Mr Lawler.

- A recent Full Bench had a dissenting member. Please correct me if this is incorrect – but I cannot recall a full bench decision of the FWC (and its predecessors) that had a contrary opinion. That is, a usual three-member bench would have the one decision – all in lock-step.

  This case was an appeal by the employer which I reported on in Edition 54, 14 Novembver 2106, which I summarised as:

  "Crude, lewd and sexist comments on the two-way radio system" at lower end of the scale decision upheld on appeal (Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal v Jodie Goodall [2016] FWCFB 5492. (C2016/4422). HATCHER, VP, WELLS, DP, JOHNS, C.

  > *"This is a classic interpretation of "whether the punishment meets the crime." The company in this matter dismissed the applicant, and one other person. It also barred a contractor, and disciplined a number of other employees.*
  >
  > *"It did so following an investigation found that the applicant (and others) had used a two-way radio to communicate in a homophobic and isomorphic manner. The channel used on the radio was meant for training purposes, with "channel 1" being the required channel for communication – also for OH&S emergencies".*

  What I did **not** report was that this was a "majority decision", with Commission Johns disagreeing with the decision of his two colleagues stating in the outset that *"Unfortunately, I find myself unable, with respect, to agree with the majority in dismissing the appeal".*

  Whilst agreeing that the appeal was justified, but not the outcome – in which the Commissioner found that the decision should be quashed – in that the Commissioner would not find that the termination of Mr Goodall was not harsh, unjust or unreasonable stating:

  > *"This is more than me expressing a preference for a different outcome. The ultimate outcome, i.e. the reinstatement of Mr Goodall to his employment, was unreasonable and plainly unjust when considered in the light of the duty to ensure a "fair go all round" is accorded to both the employer and the employee concerned.*
  >
  > *"With respect, the Commissioner at first instance, in my opinion, failed to properly exercise the discretion reposed in him. He took into account irrelevant matters in relation to the comments made by Mr Goodall and failed to take into account relevant matters about the known **adverse impact of discrimination in the workplace**.* [My emphasis].

And taking a not-too-subtle" crack at his fellow bench sitters where they found that the Mr Goodall's behaviour was at the "lower end of the scale":

> *"…were not findings that, with respect, a logical or rational person could reach".*

The Commissioner went on to record a number of strong opinions, including:

- That there is extensive literature about the effects of discrimination, including in the workplace.
- Making jokes or comments that are inherently Islamophobic and homophobic is likely to negatively affect the mental health of people in the workplace ranging from anxiety to depression. And in another swipe:

  "The Commissioner should have taken 'judicial notice' of the same".

- Mt Arthur has a Code of Business Conduct that expressly prohibits behaving in a way that is "offensive, insulting, intimidating, malicious or humiliating", making "jokes or comments about a person's race, gender, ethnicity, religion, sexual preference, age, physical appearance and disability." It also trained all its employees (including Mr Goodall) with the aim of eliminating discrimination in the workplace.
- Mt Arthur was fulfilling its obligations as an employer under Federal and State legislation to ensure that its workplaces are free of discrimination and harassment. The Commisioner stating:

  "In the face of a substantial and willful breach of that policy, Mt Arthur took the matter seriously, and ultimately concluded that it was a valid reason for termination that was not otherwise harsh, unjust or unreasonable. Requiring Mt Arthur to reinstate Mr Goodall in this context is plainly unjust. Mt Arthur took decisive action to eliminate Islamophobia and homophobia in its workplace. ***It should have been commended for its action, not punished by being required to take Mr Goodall back****".* [my emphasis].

  I am unable to include the actual conduct of Mr Goodall as it would not pass through your e-mail filters (if you wish more detail go to the decision's para's 94 to 98 – particularly the reference to "tea-bagging".

Concluding:

"The consequence of each of the Commissioner's failings was his decision to reinstate Mr Goodall. On any analysis this was a manifestly inadequate consequence for Mr Goodall's substantial and wilful breach of Mt Arthur's policies"

And for technically minded:

"As such the decision falls within that special category of a House v King error…Quashing the decision at first instance would also make it consistent with the decision of the Full Bench of this Commission in Harbour City Ferries Pty Ltd v Toms where the applicant in that matter also engaged in deliberate disobedience of policy and, on appeal, the application for an unfair dismissal remedy was dismissed".

Where to from here?

As I have reported on a number of occasions, the so-called "IR Club" has been replaced by the parasitic "No-win No-fee" club – which encourages litigation, no matter how trivial. The NWNF business model is simple: employers cannot afford the time or legal costs to properly defend their decisions (eg unfair dismissal, adverse actions, etc) so pay "go away" money, of the which the NWNF mob take a good portion.

This has been a very successful industry, for NWNF law firms, industrial advocates (me too), and keeping the doors of the FWC open. I would also argue that the government has a vested interest given the figures involved.

Since unfair dismissals came into law in 1997 there have 189,149 applications alleging unfair dismissal. At a (conservative) $20,000 average cost to employers, this equates to **$3,782,980,000**. Yes, it is a multi-$billion industry in its own standing.

And these figures do not include "General Protection" or Bullying claims under the FWA or claims under other jurisdictions, such as discrimination or workers' compensation.

How did we get here?

I have a few thoughts based on my observations (please share me yours):

1. The Commonwealth Conciliation and Arbitration Act 1904 lasted until 1988. It was mainly based on prevention of strikes and lock-outs and the making of awards. It handed down many seminal decision over the years, including the setting of a minimum wage for low paid employees (the "Sunshine Harvester" case). The Sunshine Harvester factory is now the Sunshine Plaza shopping centre in the western suburbs of Melbourne.
2. Manufacturing was plentiful, union activity high – leading to many disputes. Mostly resolved by the Commission.
3. My first full-time job was packing alternators for Joseph Lucas, which is now long gone and replaced by Southland shopping centre.
4. Today, manufacturing is mostly being off-shored to cheaper, non-unionised countries. Jobs are hard to come by – especially full-time ongoing employment. Casualisation of the workforce through "labour-hire" companies are rife.
5. Meaning that once when you left one job, there was another one "down the road", now if you have a job (and are smart), you do nothing to jeopardise it.
6. School leavers could rely on the government owned areas, such as Gas & Fuel Corporation, State Electricity Commission, and the Board of Works – not to mention the railways for jobs and apprenticeships. With the Kennett era privatisation of everything, this has directly led to estraordinary decrease in employment opportunities for school leavers.
7. The privatisation has reduced the number of skilled employees in the work-pool, which has directly led to employers importing skilled labour from other countries.
8. Sham training companies have popped all over the land (making a fortune from government subsidies) that provide suspect training and qualifications to overseas people who use this system to enter and stay in Australia. It is also an abuse of the labour market, in terms of these (so-called) trainees being exploited by unscrupulous employers and ignoring their visa obligations of (say) not working greater than 20 hours per week. Legitimate employers have also lost trust in the qualifications.
9. There seems a greater shift to the employment of people from other countries who are less likely to "cause a fuss" and unscrupulous employers are taking advantage of this (as proven by the Fair Work Ombudsman reports).

The Fair Work commission today

Fast forward to our current Fair Work Commission, established under the Fair Work Act 2009. Whilst I do not diminish some of the great work it has achieved (especially in the area of equal pay), it now sees its main business as:

- Resolving unfair dismissal claims - most of which are conciliated by phone by a person who is not a sworn member of the FWC.
- Dealing with anti-bullying claims – why? There other jurisdictions (including WorkSafe) that are more effective in dealing with such matters.
- Dealing with general protections and unlawful termination claims, again, why? The Human Rights and

Equal Opportunity has been around for years and is better equipped to deal with such matters.

- Setting the national minimum wage and minimum wages in modern awards. A good thing for low paid workers. But I would like to see more prosecutions for award breaches, but this is not the realm of the FWC.
- Making, reviewing and varying modern awards – whilst fantastic that we have a much lower number of awards, and all mostly consistent. The four-yearly review process is overly complicated and time consuming.
- Assisting the bargaining process for enterprise agreements – I would argue important but minimal work.
- Approving, varying and terminating enterprise agreements – arguably very important, but can be overly pedantic with the procedural. Not to mention letting through dodgy agreements (reference SDA).
- Dealing with disputes – used to be core business, now seems to be restricted to the building industry and public sector. In numbers, it was less 10 per cent of the FWC's workload in 2105/2016 (3,466 of the total 34,215 applications) which means there is still as role for dispute resolution by the FWC.
- Right of entry permits – for union officials, as a means of controlling union officials' behavior whilst on a job site (main issues appear to be the building sector.

The future of industrial relations

As an IR specialist of some 30 years, I have a clear bias (especially towards employers – the lifeblood of our economy, I would value others opinion of the role the FWC should play in the future of work in Australia.

Until next time…

Greg Reiffel
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