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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

"Empowering businesses through practical and strategic IR & HR solutions"

Employee Relations Newsletter

Edition 60 **26 February 2017**

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.

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Check Award requirements before redundancy

Ms Sharon O'Shea v Stihl Pty Ltd [2017] FWC 739 (U2016/11440). Roe, C. 6 FEBRUARY 2017.

Before making major changes to your workplace, do you check your Award requirements? It is a requirement under the Fair Work Act 2009 in relation to redundancies and could leave your business open to prosecution for breaching the Award.

In an examination of this case, I find the decision and the outcome quite perplexing. The commission found against the company (Stihl) for lack of consultation prior to the retrenchment of a customer service employee. This is despite proof that consultation occurred – but to the level of satisfaction of the Commissioner.

Your thoughts on the following?

The applicant, Ms O'Shea:

- Was employed by Stihl from 2004 until her retrenchment on 9 September 2016.
- Worked in the Customer Service Team throughout her employment. The team included four Customer Support Advisers and a Customer Support Team leader in addition to Ms O'Shea and the Customer Services Manager and two receptionists.
- Was the only person made redundant as a result of the September 2016 restructure.
- Argued that her redundancy was a sham, stating it (the redundancy), was due to the fact that she had complained about her treatment by the Customer Service Manager.

The Fair Work Act provides that for a redundancy to be "genuine":

- The employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

- The employee cannot be reasonably redeployed within the employer's enterprise; or associated entity.

The Commissioner considered the actual structural changes undertaken by Stihl and found that the operational reasons and was satisfied that these operational changes were the rationale for the reduction in positions and Ms O'Shea's redundancy was because of the operational needs of the business.

The Commissioner also rejected that the reason for Ms O'Shea's selection for redundancy was her complaint about the Customer Service Manager, who was about to retire and therefore would no longer be an issue.

There was evidence that Stihl had considered redeployment to other parts of the business, with the Commissioner stating:

> *"During the proceedings, I raised the possibility that another customer service advisor may have been selected or volunteered for redundancy and Ms O'Shea could have been redeployed into that role. There is no doubt that Ms O'Shea had the skills and experience for the role. This option was not the subject of any consideration at the time of the redundancy. There was no evidence before me concerning the viability of this option".*
>
> > **Ed:** This raises the question of whether Ms O'Shea's advocate ought to have pushed this point further, or, based on previous cases, it is not up to the FWC to determine whether the choice of the person selected is right or wrong. For example, I reported some time ago (20 November 2014 - Edition 11, entitled: "Two into one won't go – how to conduct a redundancy" Tebikenibeu Low v Menzies Property Services Pty Ltd (U2014/11250) [2014] FWC 7829 VICE PRESIDENT HATCHER stated:
> >
> > *"It is not the function of the Commission, in determining whether a dismissal is a case of genuine redundancy, to form a view about the merits of the decision to make a position redundant. Whether it was objectively fair or justifiable to decide to abolish a position is beside the point, as long as the employer acted as it did because of changes in its operational requirements"*

Ms O'Shea was subject to the terms and conditions of the Clerks Private Sector Award 2010 which provides considerable obligations on the requirement to consult widely when introducing major change (restructuring being considered as major change).

Despite a number of letters and meetings being held on the subject, the Commissioner found that they were not specific to Ms O'Shea, nor did it invite or propose any consultation about the operational changes themselves and measures to avert or mitigate the adverse effects of such changes, stating:

> *"I am not satisfied that the consultation requirements of the Award were met. The failure was not a minor technical failure. It was a substantial failure to provide Ms O'Shea with the opportunity to influence the decision maker or to mitigate the impact of the changes.*
>
> *"As a consequence, I must find that the dismissal was not a genuine redundancy".*

In (what could be argued goes beyond the scope of the Fair Work Act), the Commissioner was forthright in the (his opinion) the importance of consultation:

> *"The opportunity to consult is about **justice** and procedural fairness. However, it is also a recognition of the negative impacts redundancy causes to employee **wellbeing** and that it is harsh to terminate employees for reason of redundancy without giving them the **dignity** and opportunity provided by the consultation process".* [My emphasis].

Then (contradicting?):

> *"…it is difficult to conclude that nothing would have changed if the consultation process had occurred. This is the case even where other viable options have not been specifically identified. The whole idea of the consultation process is to allow for exploration of options both known and unknown. Employees often have information and ideas which are not apparent to management…It is often not possible to determine what might or might not have resulted from consultation which did not occur".*

In determining the remedy, the Commissioner decided:

- The length of service of almost 12 years is significant
- Estimated (how?) that if there had not been a redundancy, Ms O'Shea's employment would have continued for a further three years.
- Her history of good work performance.
- Estimated that effective consultation, including consideration of alternatives, would have taken two weeks.
- (Given) it was not possible to exclude the possibility that consultation would have resulted in an alternative which continued Ms O'Shea's employment, the Commissioner held that the probability of continuing employment to be 33.3% (how?).

Then after all this was taken into account, the Commissioner decided:

> *"I am therefore satisfied that the employment would have continued for 52 weeks plus the five week notice period; a total of 57 weeks".*
>
> **Ed:** The maximum that can be awarded is 26 weeks.

Stihl had already paid Ms O'Shea 5 weeks' pay in lieu of notice (ie preserving her **dignity**), and 35.75 weeks' severance pay. She has also earned $9,801.26 from employment in the period since her dismissal. The Commissioner then calculated that the two weeks between the date of the hearing and the date of this decision Ms O'Shea would have earned a further $2,291.50.

After further calculus, the Commissioner arrived at the princely sum of **$4,590.95 (less tax, - and no doubt - a hefty bill from her representative).**

Commentary

It is not in question whether it was open to the Commissioner to examine the Award provisions (although if it were not for the FWA, the FWC would not have the jurisdiction to make rulings on its own awards). Does this mean that Stihl could be investigated by the Fair Work Ombudsman for not complying with the award?

What I question is:

- The Commissioner found that Stihl lost the case because of an inherent failure to communicate to Ms O'Shea in an adequate or specific manner. On my reading of the award clause, there is no defined method of communication and what Stihl undertook in this regard would have passed (to my mind) the "pub test".
- Why all the fuss on how to calculate Ms O'Shea's remedy? There appears (to me) no logic in the calculation, except for (maybe) the two weeks it may have taken to appease the Commissioner's communication requirements – especially when the 33% chance of the job continuing is contradictory to the Commissioner's own finding that there was no chance of continuing employment.
- Lots of paperwork, time and money spent by a business that was trying to remain competitive and continue to employ people. The end result for Ms O'Shea was a lot of stress and little to no financial advantage.

- And, not to mention, that Stihl had already paid Ms O'Shea **almost a year's pay** and she had found another job.

Aged Care Worker dismissal for Elder Abuse upheld by the FWC

Della Lehmann v Mary Mackillop Aged Care SA. [2017] FWC 478 (U2016/11131). HAMPTON, C. 8 FEBRUARY 2017

A patient care attendant in a residential facility was dismissed following a report from a recently trained (ie relatively inexperienced PCA) that the applicant had been rough when tending to the cleaning of a client's private areas (body) and waved a bag of poo in her face. The resident lives with dementia.

The applicant had been on a previous final warning, but the Commissioner placed very little probity value on this, but still found that dismissal was valid, fair and reasonable.

Police and the appropriate government agency were contacted as is required under the mandatory reporting provisions.

The interesting part, is what do you do when it is one person - in this case, an inexperienced, but trained, worker - makes allegations against a more senior/experienced worker.

This is where the FWC relies on precedents; with the "gold standard" being Briginshaw v Briginshaw, which in this matter the Commissioner cited a number of cases that further interpreted Briginshaw v Briginshaw. For example, in Budd v Dampier Salt Ltd (a Full Bench of the Australian Industrial Relations Commission) stated:

> *"Where allegations are made in civil proceedings which, if proven, might found criminal liability, the standard of proof remains the civil standard. It follows that it is necessary that the court only be satisfied on the balance of probabilities. The second thing is that in such a case a proper degree of satisfaction is required having regard to the seriousness of the allegations".*

FWC cops more flack…

In my previous newsletter, I pondered the future of the FWC. I came across the following article along the same lines (cut and paste the following link into your browser):

http://www.mondaq.com/article.asp?articleid=569014&email_access=on&chk=1213123&q=644109

Please be safe out there

WorkSafe Victoria has reported that three men were killed in three separate incidents at the weekend.

- On Friday, a man in his late 30's died when his quad bike overturned on a property at Reedy Flat, near Ensay, in east Gippsland.
- On Saturday, a worker in his early 50's was crushed by a load of steel which fell from a forklift at a scrap metal yard at Foster in South Gippsland.
- A painter in his late 60's suffered critical head injuries, later dying, after falling four metres at a construction site at Merricks North on the Mornington Peninsula.

"If you need advice or assistance, please ring me first on 0438 906 050. This is one phone call that can you save you a lot of time and money".

Until next time....

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