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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

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

Employee Relations Newsletter

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Quote of the day

"Uncertainty is the root of all progress and all growth. As the old adage goes, the man who believes he knows everything learns nothing. We cannot learn anything without first knowing not knowing something. ***The more we admit we do not know, the more opportunities we gain to learn****"* – Mark Manson, The Subtle Art of not Giving a F*ck.

Introduction

Happy New Year! In this, my first newsletter for 2018, I thank you for your ongoing support and, as the old saying goes: if you are happy with my services tell others - if not tell me.

- Is it getting harder to define employment relationships?
- Focus on Casual employment.
- FWC orders compensation in $US.

Is it getting harder to define employment relationships?

The casualisation of the Australian workforce is nothing new. It has been increasing in popularity along with labour-hire agencies, as employer are becoming more and more wary of employment litigation.

I have written previously that "temporary" or fixed" term contracts are quite permissible, insofar as they have a distinct commencement and end date. Or alternately, if they are "project based", the project is clearly defined (in writing). In any event such contract cannot contain a termination clause, as the courts have ruled to do so nullifies the purpose of the employment.

Lawyers have tried to circumvent the limitations of temporary employment by introducing the concept of "maximum term of employment" (ie a "temporary contract with the ability to reduce the end date). This offers little to no protection under unfair dismissal law.

"Permanent" or "ongoing" employment would appear to be the holy grail of employment these days. And whilst "permanent casual" employment exists, it does not protect an employer from unfair dismissals.

In fact, it does not matter what form of employment an employer may choose, there is no protection against claims of WorkCover, discrimination or "adverse actions".

"Whilst I am most likely preaching to the converted, all employers should ensure that they have rigorous contracts of employment and polices, codes of conduct and employee handbooks in place. Guess what? I can

help – believe me, it is an investment".

Focus on Casual employment

In Robert Smith v Goldfields People Hire Pty Ltd ATF Goldfields People Hire Trust T/A GPH Recruitment. (U2017/10373). McKinnon, C. 14 December 2017, the respondent failed to prove its case that the applicant was:

- Mr Smith was a casual employee, and had no reasonable expectation of continuing employment;
- In the alternative, Mr Smith was employed for discrete specified tasks, in each case shorter than the minimum employment period (six months); and
- In the alternative, Mr Smith was employed for a specified task which came to an end, and there was no termination at the initiative of the employer.

Mr Smith was place with the "host" employer by a labour-hire firm, which appeared to have all bases covered – contractually. However, in this matter, it was not contested that the "host" employer was the legal entity for which Mr Smith was employed (despite the decision constantly referring to the labour-hire employment provisions).

Mr Smith was employed in various roles and was placed on a roster of work. His employment period was 1 November 2016 to 7 September 2017 (ie over six months).

So, let's pause: the "host" was the employer therefore (although not mentioned in the decision) presumably Mr Smith was paid though the "host's" payroll, Mr Smith was placed on a roster (regular and systematic) and, if the work was available, Mr Smith has an expectation of ongoing employment.

So, in relation to the first option, the Commissioner found:

> *"….I am satisfied that during his period of service as a casual employee, Mr Smith was employed on a regular and systematic basis and that he had an expectation that his employment by Goldfields would continue on a regular and systematic basis. In my view, this expectation was reasonable in the circumstances".*

However, in coming to this conclusion, the Commissioner made a couple of interesting statements:

> *"It is clear that Mr Smith acknowledged his status as a casual employee when he sought employment with Goldfields by completing the Registration Pack, and that he held that understanding for the duration of his service. The fact that he knew and accepted his status as a casual employee does not, of itself, mean he could never hold an expectation of continuing employment by Goldfields. An expectation of continuing employment is not the same as an expectation of permanent employment. Similarly, the fact that Mr Smith knew he was working "on assignment" to Bis does not mean he could never have expected his employment by Goldfields to continue (with or without that assignment)".*

And in dismissing the "specified task" argument, the Commissioner found:

> *"The meaning of the phrase "contract of employment for a specified task", was considered by the Full Bench in Dale v Hatch Pty Ltd. It requires that the specified task be identified in definite terms, either through express words in a written contract of employment, or as a matter of necessary implication. To be a contract of employment for a specified task, the contract must be "for" the specified task in the sense of having been entered into for the purpose of performing and completing that task. Critically, it must be sufficiently clear and predictable as to when the task will be completed".*

With the jurisdictional decision failing, the respondent will now have to (in practical terms) prove that Mr Smith was no unfairly dismissed. I suspect it will be "settled".

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FWC orders compensation in $US

Ahmed Kenawy v The Embassy of the Republic of Iraq (U2017/2734). Kovacic, DP. 3 January 2018.

Apart from the excellent step-by-step logic of this decision by the DP, it is more of a curiosity (to me anyway). The matter involving an embassy driver who, due to a back condition which manifested itself during the employment, was medically restricted to not drive more than two (2) hours at a time.

His employment came to an end in February 2017 when on a Saturday he drove the Ambassador to a festival in Canberra city and later refused to drive the Ambassador from Canberra to Sydney, Sydney to Newcastle and back due to his medical condition.

The interesting points were:

- Each party represented themselves with the help of interpreters (the embassy was represented by the Mr Ahmed Kareem, Second Secretary with the Embassy of the Republic of Iraq).
- The only real argument put by the embassy was that the applicant was not employed by the embassy, but by the ambassador himself. This was considered and dismissed by the DP.
- The Applicant was paid $US2,000 per month.
- The DP found in favour of the applicant, awarding compensation of $US8,500 less applicable tax.

Fly-on-wall questions: Does diplomatic immunity apply? How did the matter progress via conciliation to an arbitrated decision? Was the embassy just following the law of the land, and left its “fate” in the hands of the FWC?

Until next time....

Greg Reiffel
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