0438 906 050 greg@gregreiffelconsulting.com.au gregreiffelconsulting.com.au ABN: 35 968 039 202

GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

Employee Relations Newsletter

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Quote:

"Tell me and I forget. Teach me and I remember. Involve me and I learn." Benjamin Franklin.

Casual Service NOT counted for redundancy pay

Unilever Australia Trading Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) [2018] FWCFB 4463, (C2018/1367). Full Bench: Catanariti, VP; Colman, DP, Wilson, C. 30 July 2018.

This is a precedent setting full bench decision of the Fair Work Commission, which has categorically found that casual and seasonal employment does not count towards redundancy pay. This decision does not count where an employer, at it its own volition, has a written policy providing that such service shall be included when calculating redundancy pay.

The main statements to consider in the decisions are:

> *"Casual and seasonal employees render service. In relation to casuals, the common law position is that each engagement stands alone. Each engagement constitutes a period of service, but there is no continuity of service from one engagement to the next. Such is the case also with seasonal workers, who render service for each season they are engaged, but ordinarily do not have continuity of service from one season to the next. The common law position can of course be altered by statute, contract, or an industrial instrument.*

And:

> *"…casual and seasonal employees would not ordinarily be entitled to payment of redundancy benefits anyway. The employer could simply not reengage casual employees; there is no need to make them redundant. The position is similar in relation to seasonal employees; 'redundancy' occurring at the end of the season would simply mean that the employer would not reengage the person for the following season…"*

Redundancy: "Acceptable employment" explained.

The Trustee for Altman Unit Trust No 1 T/A Southgate Holden. [2018] FWC 3542 (C2018/2603). Hampton, C. 19 July 2018.

This matter related to an employer seeking to have redundancy pay set aside because it had offered alternate employment to the employee (Mr Klemm) wishing to receive redundancy pay.

Klemm was concerned about the sales aspect of the new position, Southgate Holden stated that it had offered him training and advised that his sales targets would be reviewed after a period of 6 months. It submits that

this reinforced the acceptable nature of the offer of alternate employment. Further, it contends that Mr Klemm could have earned commission on sales in the new role and this was potentially additional remuneration that was designed to encourage Mr Klemm to take up, and succeed in, the new role.

The Commissioner stating:

> *"The critical issue here is whether the alternative position was acceptable.*
>
> *"What constitutes "acceptable alternative employment" is a matter to be determined…on an objective basis. Alternative employment accepted by the employee (and its corollary, alternative employment acceptable to the employee) cannot be an appropriate application of the words because that meaning would give an employee an unreasonable and uncontrollable opportunity to reject the new employment in order to receive redundancy pay; the exemption provision would be without practical effect.*
>
> *"Yet, the use of the qualification 'acceptable' is a clear indication that it is not any employment which complies but that which meets the relevant standard…including the work being of like nature; the location being not unreasonably distant; the pay arrangements complying with award requirements. There will probably be others."*
>
> *"It is also clear that acceptable employment does not mean identical employment; however, it has been held by the Commission that:*
>
> > *"…the objective test of acceptability appears to be that the alternative work bears a sufficient comparability to the original work and is not unreasonably removed from the employee's original duties, skills set, qualifications, experience and other terms and conditions of employment. The test is not whether or not the employee is capable of carrying out the new employment as such, it is whether there is sufficient correlation between the relevant indicia of the current work and the alternative employment as proposed.*
> >
> > *"Further, employees should not unreasonably refuse offers of alternative employment merely because they wish to access the benefits of redundancy pay."*

The Commissioner considered the position description of Mr Klemm's current role in comparison with the new role. The "sales" component was the outstanding item, which the Commissioner ultimately found that the employment offered was "not suitable".

Of course, this course of action is only need be considered where the employee's employment comes to an end and alternate employment is found to the satisfaction of the employee, who would otherwise have been made redundant.

Sacked for providing (alleged) favours to girlfriend(s) results in maximum payment under the Fair Work Act (and five weeks)

Adrian Tainsh v Toyota Motor Corporation Australia Limited T/A Toyota. [2018] FWC 4192 (U2016/2952). Harper-Greewell, C. 16 July 2018.

Toyota, acting on an anonymous tip-off via its whistleblower's hotline, that one of its General Forepersons (Mr Tainsh) was providing favours to his girlfriend and her friend(s) in the form of renewal of contracts, approval of leave not accrued, etc.

Toyota engaged Frances O'Brien QC to investigate the allegations, who interviewed some 15 employees plus Mr Tainsh and his girlfriend's ex-husband (who worked at the same place). Following this report Toyota dismissed Mr Tainsh for "favouritism".

Mr Tainsh had been employed for 27 years by Toyota, and in his role was supervising 69 employees. He had an unblemished record during his employment. Toyota ended Mr Tainsh's employment by handing him a letter of termination and five week's pay in lieu of notice. The decision also noted that Mr Tainsh was also a senior union delegate.

In the outset, the Commissioner stated that:

> *"The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer. The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees)".*

And:

> *"In cases relating to alleged misconduct, it is well accepted that the Commission must make a finding, on the evidence in the proceedings before it, whether, on the balance of probabilities, the alleged conduct occurred. Where the misconduct is disputed the* ***employer bears the onus of proving to the Commission on the balance of probabilities that the misconduct has taken place. It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason****."* [My emphasis].

In setting out a number "procedural" failings by Toyota, the Commissioner noted that "*…had he not been dismissed he would have been entitled to receive a substantial redundancy package"*. Further, and more telling, the Commissioner also found that leave policies were not always followed across the board.

The Commissioner in considering all the allegations, including that Mr Tainsh and his witnesses unreliable, awarded the maximum allowable under the Fair Work Act:" ***$68,350 plus*** *applicable* ***superannuation****, less appropriate taxation as required by law"*.

Are your witnesses "Credible".

I thought it informational that when presenting witnesses before any tribunal, they are carefully scrutinised. For example the following is from a recent unfair dismissal decision:

> *"I found the applicant to be an impressive witness. His oral evidence was clear, plausible and consistent both internally and with the contemporaneous documents that he filed with his statement.*
>
> *"Mr Gummi's written statement, on the other hand, contained a number of sweeping factual assertions about the applicant's alleged misconduct, none of which were backed up by any specific evidence. I also note that Mr Gummi lives in Canberra and was not closely involved in the day-to-day running of the restaurant, except that he was at the restaurant on some*

weekends. This in itself limited the weight I could give to his evidence. For example, while he purported to give evidence about the applicant's hours of work during the week, he also admitted that he was not present during this time. In contrast to the applicant, I did not find Mr Gummi to be a credible witness. Therefore, where there is any inconsistency between the applicant's evidence and that of the respondent, I prefer the former".

Until next time…

Greg Reiffel
Principal Consultant