

HR Minds
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Employment Law Overview

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OUTLINE

- The Legal Services Award 4-yearly review
- “Harshness” in unfair dismissal decisions
- Ill health management
- Casual employment
- Post-employment obligations – can they be enforced?

LEGAL SERVICES AWARD

- The 4-yearly review has just clocked up its 2 year anniversary
- The Commission has published a Legal Exposure Draft of the Award
- The Decision of the Commission is pending
- None of the changes are vital but it does prove that change is enormously difficult to pursue in this environment

“HARSHNESS” IN UNFAIR DISMISSALS

- There are examples of decisions which have been made by the Fair Work Commission where, whilst a valid reason for the dismissal has been substantiated, it does not follow that a decision to dismiss was fair.
- Some cases:
 - Ricegrowers Co-operative Limited AIRC 2001 Print 908351
 - Jones v Commissioner for Public Employment [2012] FWA 7069
 - Sipple v Coal and Allied Services Pty Ltd [2015] FWCFB 5728
 - Renton v Bendigo Health Care Group [2016] FWC 9089

ILL HEALTH MANAGEMENT

- This is a complex area of human resources management
- Cases have upheld the right of an employer to seek more information from a medical practitioner after a reasonable period of absence *Thompson v IGT (Australia) Pty Ltd [2008] FCA 994; AIPA v Qantas Airways [2014] FCA 32*
- It is prudent to get that information by letter rather than seeking to ring up the doctor *Hinchen v Moonee Valley Racing Club [2016] FWC 2176*
- The recent decision of *Grant v BHP Coal Pty Ltd (No.2) [2017] FCA 1379 (10 March 2017)* highlights the issues involved

THE FAIR WORK OMBUDSMAN HAS SPREAD ITS WINGS

- The Fair Work Ombudsman (**FWO**) has taken a very prominent role in employment in the last 12 months and its powers should not be forgotten.
- The cases have included 7-Eleven; *FWO v Priority Matters Pty Ltd and Anor [2016] FCCA 1474*; *FWO v Oz Staff Career Services Pty Ltd and Ors [2016] FCCA 105*
- Laws are being introduced into federal parliament with the support of parties to untangle the relationship between franchisees and franchisors to ensure that where franchisees are bereft of monies the franchisor can be held liable
- While these cases are about underpayment of wages, failure to adhere to Enterprise Agreements and Awards or knowingly involved in unlawful deductions from employee wages, it is pertinent to remember the Fair Work regulations about employee records and the FWO's powers
- FW Regulations 3.31-3.46
- FW Act Sections 708-14

CASUAL EMPLOYMENT

- Who is a casual employee appears to vary between the Federal Courts and the Fair Work Commission
- In *Telum Civil (QLD) Ltd v CFMEU* (2013) FWCFB 2434 a Full Bench of the Fair Work Commission concluded that if someone was engaged as a casual then they were a casual
- In *Skene v Workpac Pty Ltd* [2016] FCCA 3035 (25 November 2016) the Federal Circuit Court takes a more traditional view of a casual employee: where an employee is engaged as a casual it does not follow that they are a casual for Award or EBA purposes

POST-EMPLOYMENT OBLIGATIONS

- Can you restrain employees after the employment ends for a period of time?
- The answer is no unless it is reasonable and goes no further than is necessary of the party enforcing the post-employment restraint
- Two recent cases:
 - *Herbert Smith Freehills v White & Case (Pryse v Clarke [2017] NSWSC (1 March 2017))*
 - *Just Group Ltd v Peck [2016] VSCA 334 (20 December 2016)*

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