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WORKPLACE RELATIONS

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Discrimination against casual teachers

Certain discrimination complaints will be harder to pursue after the High Court limited the traditional scope of indirect discrimination in the New South Wales casual teachers' dispute. Senior Associate Rebecca Davern reports.

Background

In January 2005, we reported that the New South Wales Court of Appeal had found that the NSW Department of Education and Training discriminated against female casual teachers by restricting their access to the higher pay rates available to permanent teachers. That decision has been appealed to the High Court and the result reversed by a 6-1 majority.

The case involved claims by 13 female casual teachers that they were indirectly discriminated against on the basis of sex because:

- only permanent teachers had access to the highest level pay rates; and
- there was a gender imbalance between numbers of permanent and casual teachers.¹

Of the 13 applicants:

- 11 had ceased working in permanent positions because of family responsibilities; and
- two had reapplied for permanent positions but, mostly because of family reasons, had placed a limitation on the areas in which they were prepared to work.

The matter was originally heard by the NSW State Administrative Decisions Tribunal, which awarded the women a total of \$250,000 in damages.

The Appeal Panel of the Administrative Decisions Tribunal then allowed an appeal by the department.

1. *State of New South Wales v Amery* [2006] HCA 14 (13 April 2006).

In the NSW Court of Appeal, it was held that the original decision of the NSW State Administrative Decisions Tribunal should be reinstated. This decision was then the subject of a High Court appeal.

High Court decision

To maintain a claim of unlawful indirect discrimination, the plaintiffs needed to establish that:

- a condition or requirement (that the plaintiffs needed to transfer to permanent status to access the higher pay scales) had been imposed, with which they could not comply;
- a greater proportion of males could comply with the condition or requirement; and
- the condition or requirement was unreasonable.

While the High Court held there was no indirect discrimination, the majority was split as to the basis for upholding the appeal.

The case is an important revision of the indirect discrimination test, and significantly reins in the creative development of a condition or requirement that is 'imposed' only in the most artificial way.

Justices Gummow, Hayne, and Crennan (with whom Callinan agreed) focused their attention on the terms and conditions under which permanent and casual teachers were engaged and held that the difference in those terms did not amount to the imposition of a condition or requirement. Their Honours stated that it could not amount to a condition or requirement under the legislation. They stated that 'it cannot be said to be a requirement or condition to be complied with in the terms and conditions of employment as a casual teacher that ... the employee must cease to be a casual teacher.'

Chief Justice Gleeson accepted there was a requirement or condition imposed on the plaintiffs, but considered the requirement or condition reasonable. He noted that whilst the department could not rely on compliance with an award as a complete answer to a complaint of unlawful discrimination, in determining (in all the circumstances) the reasonableness of the department's conduct, the industrial landscape,

including the terms of the award were relevant. In particular, Chief Justice Gleeson agreed with Justice Hodgson in the NSW Court of Appeal in saying:

It is hardly a practical possibility that the Department should make over-award payments only to women, or to teachers whose family commitments make it difficult for them to submit to the full conditions of permanent appointment.

Message to employers

The case is an important revision of the indirect discrimination test, and significantly reins in the creative development of a condition or requirement that is 'imposed' only in the most artificial way. The effect is likely to limit prospective claims that do not genuinely involve the employer imposing a requirement that impacts on one particular group more than it impacts on others.

Importantly, it is unlikely to assist employers who unreasonably refuse flexible working arrangements for those with family responsibilities or special services or facilities for workers with disabilities.

Duty owed to independent contractors

While it is becoming more widely recognised that employers owe a duty to provide contractors with a safe system of work, the extent of that duty is still unclear. Senior Associate Ric Morgan and Articled Clerk Jacqueline Goodall report on the decision of *Coca-Cola Amatil (NSW) Pty Ltd v Parrezar*² which partly clarifies the parameters of that duty where a contractor suffers injury through the criminal action of a third party.

2. [2006] NSWCA 45.

Background

A worker, who was a contractor to Coca-Cola Amatil (NSW) Pty Ltd (**Coca-Cola**), was shot five times while refilling and collecting money from a soft drink vending machine. The worker was seriously injured and sought damages from Coca-Cola on the basis that it had failed to provide a safe system for him to carry out his duties.

In the Supreme Court, Justice Hulme found that:

- the relationship between Coca-Cola and the worker created a duty of care;
- Coca-Cola had been aware of risks to safety in the area (the worker had been violently mugged while servicing a machine at the same site two years earlier); and
- Coca-Cola had been negligent in requiring him to collect money from a site which it knew posed an unreasonable risk of assault and robbery.

Coca-Cola was ordered to pay \$2.893 million in damages to the worker.

Coca-Cola appealed, arguing that there was no evidence of any breach of its duty of care or, alternatively, that the worker's injury was not caused by any such breach.

The decision on appeal

The Court of Appeal overturned the original decision and decided that:

- the worker was under sufficient control for Coca-Cola to owe him a duty;
- a special duty to protect another from criminal conduct can exist in cases where the relationship is 'extremely close' to that of employer and employee; but
- the highest duty that could be expected was:
 - a duty to train the worker; and
 - to provide as much security as was reasonably practicable.

The worker had claimed that Coca-Cola should have taken a number of precautions, including:

- providing training in armed robbery awareness;
- requiring a second person to accompany the driver;
- providing personal security alarms; and
- requiring a guard at the site of the vending machine to escort the filler.

However, the court unanimously held that the worker failed to establish that any of these precautions would have prevented his injury, stating that:

- Coca-Cola's failure to provide training could not be said to have caused the injury, because the worker did everything a properly trained person would have done; and
- the provision of additional security measures by Coca-Cola would not have prevented the shooting in this particular case.

Impact of findings

Employers may owe a duty to provide training and security as appropriate for the risks to which their contractors are exposed.

Any assessment of training and security measures should be made against these higher standards to avoid the risk of criminal liability.

In this case, the problem for the worker was establishing a link between a breach by Coca-Cola and the cause of the injury, when the injury was caused by a criminal act, and when the worker had acted appropriately in response to armed confrontation. Courts may reach a different conclusion depending on the facts of each case. For example, there may have been a different outcome in this case had the worker acted inappropriately in response to the armed confrontation because of the lack of training or some other breach of the duty.

The case does not affect the duty employers owe under occupational health and safety legislation (which clearly extends to subcontractors). Generally these duties are broader and employers need to do more to ensure they comply with their obligations. Any assessment of training and security measures should be made against these higher standards to avoid the risk of criminal liability.



Pre-reform bargaining periods

The introduction of the *WorkChoices* amendments continues to raise significant questions, not least in relation to how the amendments will affect industrial stand-offs straddling the reforms. The Australian Industrial Relations Commission has examined the effect of the reforms on bargaining periods initiated prior to *WorkChoices*. Lawyer Nico Burmeister and Law Graduate Rachel Darvey report.

In *Australian Nursing Federation*,³ the Australian Industrial Relations Commission (the **AIRC**) considered an application by the Australian Nursing Federation (the **Union**) for a secret ballot. Following *WorkChoices*, a secret ballot must be held before an organisation can take protected action.

The dilemma

The bargaining period in this case was initiated before the *WorkChoices* reforms came into force.

The AIRC was faced with the question of whether the Union was required to apply for a secret ballot under *WorkChoices*, or if protected action could be taken merely by complying with the law pre *WorkChoices*.

The decision

The AIRC found that the Union was entitled to proceed on the basis that *WorkChoices* did not extend to bargaining periods initiated, but not concluded, before the commencement of the reforms.

The basis of the AIRC's reasoning can be found in the transitional provisions. Under that regime, AIRC proceedings commenced before 27 March 2006 (the effective date of the reforms) are outside *WorkChoices* for a transitional period of three months.

3. Application under section 451 by Australian Nursing Federation - LawlerVP, 6 April, PR971312.

The AIRC found that since the Union initiated the relevant bargaining period before 27 March 2006, and because the AIRC had commenced conciliating the issues the subject of the bargaining period, the secret ballot provisions did not apply.

Change to timekeeping regulations

The Federal Government has responded quickly to criticism of the record-keeping obligations created by its *WorkChoices* reforms. Lawyer Elena Tsangari reports.

Background

In our March 2006 edition of *Focus: Workplace Relations* we reported on the record-keeping requirements created by the *Workplace Relations Regulations 2006* (Cth). These included a requirement to record all employees' daily starting and finishing times, the number of hours worked each day, and nominal hours of work (and any variations to those), and then retain these details for a period of seven years.

In response, the Minister for Employment and Workplace Relations issued a media release stating that the record-keeping requirements would be reviewed to ensure that they did not apply any more widely than was necessary.

Criticisms and proposed reforms

The new requirements were roundly criticised on the basis that:

- they inappropriately created the same record-keeping requirements irrespective of whether employees were entitled to overtime or not; and
- they imposed the same regime on managerial employees who often work flexible and irregular hours.

In response, the Minister for Employment and Workplace Relations issued a media release on 18 April 2006 stating that the record-keeping requirements would be reviewed to ensure that they did not apply any more widely than was necessary. The reforms (summarised below) identify four classes of employees, with different obligations applying to each:

Employee status	Record-keeping requirements
Employee has provisions for overtime and is paid less than \$55,000 per year	Employer required to record start and finish times and total hours worked
Provision for overtime and paid more than \$55,000 per year	Employer required to keep start and finish times
There are no provisions for overtime for the employee and they are paid less than \$55,000 per year	Employer required to keep total hours worked
There are no provisions for overtime and the employee is paid more than \$55,000 per year	No record-keeping requirements for the employer

Importantly, the changes mean that employers will not be required to keep time records if overtime is not payable and the employee is paid more than \$55,000 per year.

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