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Family provisions test case

In an important test case, the Australian Industrial Relations Commission (the **AIRC**) has established a number of general award standards to deal with family-friendly work practices. Lawyer Yaseen Shariff reports.

Employees will have a right to request additional entitlements

Employees will have the right to request:

- up to eight weeks' simultaneous unpaid parental leave (ie when both parents take parental leave);
- an extension of unpaid parental leave for a further 52 weeks (ie a total of 104 weeks' leave); and
- to return to work on a part-time basis until their child reaches school age.

An employer can refuse the request only on 'reasonable grounds'. For example, because of:

- the costs involved;
- the lack of adequate replacement staff;
- loss of efficiency; and
- the impact on customer service.

Consultation during parental leave

While an employee is on parental leave, the employer will have to:

- take reasonable steps to make information available to the employee about changes affecting his or her status, responsibilities and position; and
- provide an opportunity for the employee to discuss these changes.

In most cases, this obligation will arise when employers plan to restructure their business in a way that affects employees who are on parental leave at that time.

Personal, emergency and annual leave

The AIRC has also approved standards in relation to personal, emergency and annual leave:

- Employees will be permitted to take up to 10 days' personal leave every year, which can be used for sick leave or carers' leave. Bereavement leave will be provided in addition to personal leave.
- Employees who have exhausted all their personal leave entitlements can agree with their respective employers to take unpaid leave to care for members of their immediate family or household in an unexpected emergency.
- Employees will be permitted to accumulate annual leave entitlements for a period of two years from the time at which they accrue, and will also be permitted to take up to 10 single-day absences.
- Casual employees will be permitted to leave work, or not be available to work, for an agreed period upon the death, or unexpected illness, of a member of their immediate family or household.

What does this mean for your business?

At this stage, the standards have been included in only a small number of federal awards. Although it is likely that unions will seek to have the standards included in many more awards, they may have a limited life because of the federal government's impending industrial reforms.

Labour agency clause pertains to the employment relationship

In a split decision, a Full Bench of the Australian Industrial Relations Commission recently found that a clause dealing with labour hire workers was a matter pertaining to the employment relationship. Lawyer Stacey Kelly reports.

Background

This case¹ concerned an appeal by the Transport Workers' Union (the **union**) against the decision of Senior Deputy President Lloyd refusing to certify an agreement between the union and Australian Air Express Pty Ltd (the **employer**) because the labour hire clause in the agreement (the **AAE clause**) did not pertain to the employment relationship and tainted the whole agreement.²

In a split decision, the Full Bench of the Australian Industrial Relations Commission (the **AIRC**) overturned Senior Deputy President Lloyd's decision and held that the AAE clause concerned a matter pertaining to the employment relationship.

The decision

The majority (Senior Deputy President Harrison and Commissioner Smith) compared the AAE clause with the labour hire clause considered by the Full Bench of the AIRC in *Re Schefenacker*.³

The AAE clause provided that employees of labour hire agencies will be paid at the same rate as the employer's own employees. The *Schefenacker* clause required the employer to instruct the labour hire agencies to increase the wage rate of their employees by the same percentage as the direct workforce. The majority applied the reasoning of the Full Bench in *Re Schefenacker* and held that the AAE clause pertained to the employment relationship.

Senior Deputy President Hamberger accepted *Re Schefenacker* but distinguished the clauses on the bases that the AAE clause:

- imposed a significantly greater restriction on the contractual relationship between labour hire agencies and their employees; and
- went well beyond the scope of the employment relationship.

1. *Transport Workers' Union of Australia v Australian Air Express and Another*, 21 June 2004, Senior Deputy President Harrison, Senior Deputy President Hamberger and Commissioner Smith, PR959284.

2. *Australian Airports (Townsville) Pty Limited Partnerships Agreement 2004-2007*, 10 December 2004, Commissioner Richards, PR954186.

3. *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004*, 28 October 2004, PR952801; *Re La Trobe University Children's Centre Enterprise Bargaining Agreement 2004*, 24 November 2004, PR953628; *Re Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004*, 29 October 2004, PR952449.

What guidance?

This case provides an example of the differing views that continue to emerge from the AIRC as to the proper characterisation of particular clauses in agreements. While previous decisions of the AIRC can guide employers, it must be remembered that the wording of specific clauses in agreements, although dealing with the same general subject matter, may lead to different treatment on certification.

Response to employee's difficult behaviour constitutes disability discrimination

A recent Federal Magistrates Court decision illustrates the need to assess whether inappropriate employee behaviour is linked to an employee's disability, and then deal with it accordingly. Lawyer Nicky Friedman reports.

Background

Mr Ware suffered from attention deficit disorder (**ADD**) and depression. During his employment, he exhibited dysfunctional behaviour, including poor interpersonal relations, periodic alcohol abuse, absences from the workplace, some serious neglect of duty, and declining work performance.

After a period of hospitalisation in May and June 2003, he returned to work in July 2003 and was subjected to work restrictions and told that he would be subject to further disciplinary action if he failed to meet his employer's requirements. He was subsequently demoted and then dismissed in September 2003.

Decision

Mr Ware claimed that his employer, OAMPS Insurance Brokers Ltd (**OAMPS**), had directly discriminated against him in breach of the *Disability Discrimination Act 1992* (Cth) (the **DDA**).⁴

The court accepted that:

- Mr Ware's ADD and depression were disabilities recognised under the DDA;
- those disabilities affected Mr Ware in the course of his employment; and
- OAMPS was aware of Mr Ware's disabilities.

To assess whether direct discrimination had occurred, the court compared Mr Ware's situation with that of another (hypothetical) employee of OAMPS who had the same responsibilities as Mr Ware, and exhibited the same behaviour, but who did not have ADD and depression.

Findings

The court found that the imposition of work restrictions and the warning given in July 2003 did not constitute discrimination, as they resulted from Mr Ware's excessive drinking and his manager's belief that he had lied to him.

However, the court concluded that Mr Ware's demotion and dismissal did constitute discrimination. Specifically, the court found that, although the explanation given to Mr Ware was that he had not met the employer's requirements, the actual trigger for his demotion and dismissal was his absence from work for three days during September 2003. The court found that those absences were caused by Mr Ware's disabilities, and that this was a case where Mr Ware's manager at OAMPS had simply 'exhausted his capacity to accommodate Mr Ware's condition'.

The court noted that Mr Ware's previous performance and behaviour may have warranted dismissal. However, having accepted in July 2003 that Mr Ware should be given the chance to prove himself by reference to specific criteria, the court said that OAMPS could not then dismiss Mr Ware by reference to this previous performance and behaviour.

Mr Ware's claim for indirect discrimination failed because the court held that there can be no indirect disability discrimination where direct disability discrimination has been found. According to the court, the two are mutually exclusive.

Implications

This case underlines the need for employers to exercise consistency in their dealings with employees with attributes protected by anti-discrimination legislation, and to understand and distinguish between permissible and impermissible grounds for the different treatment of individuals.

4. *Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664.

Objectively unacceptable workplace behaviour may justify disciplinary action, even if the behaviour is linked to a disability protected under anti-discrimination legislation. Handled carefully, it will often be possible to take lawful, non-discriminatory disciplinary action in response to such behaviour. As the court found here, the employer must analyse carefully the specific reason for taking action against an employee and make sure that it is truly based on the quality of the employee's performance or conduct.

Limits on access to unfair contract claims

The NSW Industrial Relations Commission cannot hear a claim of unfairness by NSW executives who are dismissed while earning more than \$200,000 a year. Senior Associate Andrew Cardell-Ree reports.

Background

With effect from 24 June 2002, the NSW Parliament introduced two limits on access to the NSW Industrial Relations Commission's unfair contract jurisdiction. In language that has been the subject of much litigation since, the amending legislation introduced:

- an annual income limit of \$200,000 at the date of dismissal; and
- a time limit of 12 months from the date of dismissal to lodge a claim.

In a number of decisions, various members of the Commission explored the nature of the right to bring a claim and whether a highly paid executive could bring a claim after 24 June 2002 (when the limits were introduced) alleging unfairness before that date. In the *Aveling* decision,⁵ a Full Bench of the Commission found that the limits are absolute, and that a dismissed employee paid more than \$200,000 in their final 12 months could not bring a claim, regardless of when they said the unfairness arose.

Clear exclusion

In another case⁶, a NSW executive was dismissed in 2003 (after the limits came into effect) while earning

an annual income of more than \$200,000. She went to the Commission claiming unfairness. Before her case came on for hearing, the Commission handed down its decision in *Aveling*, undermining her claim. She asked the Court of Appeal to find that her contract was on foot at the time of the limits, and so unaffected by the June 2002 amendments, because, properly understood, the amendments did not extinguish her pre-existing right to bring a claim. In other words, she asked the Court of Appeal to reach a conclusion different from the Full Bench in *Aveling*.

The Court of Appeal found that the amending legislation clearly prevented the executive's claim. It says that 'an application cannot be made' after 24 June 2002. The court found that, whether or not the executive had a pre-existing right to bring a claim, the clear wording of the legislation extinguished it.

Implications

Following these decisions, there is far greater certainty about the status of unfair contract claims made by highly paid executives. When paid or promised more than \$200,000 a year, they cannot ask the Commission to intervene, no matter when the employment or consultancy contract was made or when the unfairness is alleged to have happened.

Who is responsible for the safety of labour hire employees?

Labour hire providers will always carry some responsibility for the safety of their employees. Some responsibility can be shifted to the host employer but this is clearly limited. Lawyer Ric Morgan considers two recent Court of Appeal decisions that provide some insight into what is required.



5. *Aveling v UBS Capital Markets Australia Holdings Ltd* (2004) 135 IR 98.

6. *Colley v Futurebrand FHA Pty Ltd & Anor* [2005] NSWCA 223.

Case 1

A labour hire employee was killed while controlling traffic at roadworks.⁷ The employee was struck by a reversing truck driven by an independent contractor engaged by the host employer, Emoleum (Australia) Pty Ltd (**Emoleum**). The NSW Court of Appeal upheld the trial judge's decision that the labour hire provider, Employment Labour Services Pty Ltd (**ELS**), was partly responsible. The trial judge had observed that:

... the only way ... to effectively protect itself from liability in the circumstances of hiring out its employees is to put in position a person whose task it is to observe and enquire, and make sure that safe working practices had been instituted and are being maintained in the working situation; that is to act in the role of a quasi shop steward and withdraw the services ... when dissatisfied ...

Although ELS had two other employees at the site (one of whom had considerable experience), only limited training – and no supervision – was provided to the employee. In these circumstances, the court held that ELS should bear 20 per cent of the responsibility arising from the employee's death.

Case 2

A labour hire employee was injured when struck by a forklift operated by an employee of the host employer, Hazeldene's Chicken Farm Pty Ltd (**Hazeldene**).⁸ There was no dispute that the injury was a result of a failure of Hazeldene's systems. However, the question for the Victorian Court of Appeal was the extent of the labour hire company's responsibility, in light of its failure to properly supervise the work conducted by its employee.

As in the *Emoleum* case, the labour hire provider had other employees at Hazeldene's site but took no steps to have the relevant employee properly supervised. In this case, the court determined that the labour hire provider should bear 15 per cent of the liability.

Lessons

In both cases, the court decided that the host employer must ensure safe systems of work, but that the labour hire provider must ensure:

- the host employer has safe systems of work;

7. *Emoleum (Aust) Pty Ltd v Cecil Henry Bond & Ors* [2004] NSWCA 352.

8. *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* [2005] VSCA 185.

- the labour hire employee's tasks are clearly defined; and
- the labour hire employee is properly trained.

The extent to which the labour hire provider must arrange supervision depends on what is reasonably practicable. However, both cases point to a requirement for labour hire providers to take positive steps to ensure that their employees are safe, even where the failure to provide a safe working environment is attributable to the host employer. This is more so where there are multiple labour hire employees at a host employer's site, and in these cases a labour hire provider should ensure supervisory arrangements are put in place.

Court takes new ground on bullying and vilification

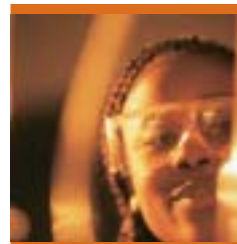
A novel decision of the NSW Supreme Court has established new contractual duties to protect employees from racial or personal vilification, and to prevent employees from being placed in fear of insult or physical harm. Lawyer Yaseen Shariff reports.

Background

Mr Naidu was employed by a security company, Group 4 Securitas Pty Ltd (**Group 4**), which directed Mr Naidu to provide security services to a third party. Mr Naidu was required to act as an assistant to a manager of the third party.

Mr Naidu alleged that the manager bullied, harassed, victimised and intimidated him over a period of five years. Specifically, Mr Naidu claimed that the manager subjected him to:

- physical assaults;
- indecent exposure;
- constant racist and sexist verbal abuse;
- financial threats; and
- extreme work hours.



Mr Naidu also claimed that he had been forced to do building work at the manager's home without compensation.

Mr Naidu claimed that he reported the conduct to Group 4, but was told that he should tolerate the conduct.

The treatment of Mr Naidu finally came to light during an investigation of sexual harassment claims against the manager. During further investigations, and during the eventual hearing, some of Mr Naidu's colleagues said that they had personally witnessed the manager treating Mr Naidu in an inappropriate way.

Mr Naidu took legal action after suffering post-traumatic stress disorder and major depression.

Findings against Group 4

The Supreme Court of New South Wales held⁹ that Group 4 breached its duty of care to Mr Naidu because it failed to:

- provide him with a safe system of work; and
- prevent him from suffering psychiatric harm.

In a novel development of the law, the court also held that Group 4 had breached contractual duties to:

- protect Mr Naidu from racial or personal vilification; and
- prevent Mr Naidu from being placed in fear of insult or physical harm.

The court held that these duties were implicit in every contract of employment, but that they were limited by the extent to which the employer knew or ought to have known about the manager's conduct. The court

observed that, as a general matter, even one complaint of alleged misconduct should trigger an enquiry to determine:

- the truth of the complaint;
- the extent of the misconduct; and
- the ability of the victim to cope with that misconduct.

In this case, the court did not accept Mr Naidu's claim that he had reported the manager's conduct to Group 4's management repeatedly. However, the court determined that Group 4 must have been aware of Mr Naidu's mistreatment because:

- Mr Naidu's colleagues knew about his mistreatment and this knowledge should be attributed to Group 4;
- Group 4 failed to make reasonable enquiries about the manager's conduct; and
- Group 4 failed to put in place an appropriate procedure to permit Mr Naidu's colleagues to report the manager's misconduct, and did not encourage them to do so.

The court said it was not relevant that the manager was not an employee of Group 4.

Implications

Mr Naidu's case establishes new common law duties for employers. Prudent employers will respond by:

- establishing processes to detect unacceptable forms of workplace behaviour; and
- becoming more vigilant about stamping out such behaviour.

It may also mean that employers will need to carry out rigorous investigations, even in relation to complaints of a relatively minor nature, plus take steps to address potential psychological harm that complainants may suffer.

9. *Naidu v Group 4 Securitas Pty Ltd & Anor* [2005] NSWSC 618.

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