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Post-election workplace relations reform

The federal government has wasted no time in introducing its much-delayed workplace relations reforms and in responding to recent court and tribunal decisions. Lawyer John Naughton reports.

Workplace Relations Amendment (Agreement for Validation) Act 2004

This legislation amends the *Workplace Relations Act 1996* (Cth) (the **Act**) to ensure the validity of agreements certified, approved or varied before the High Court's decision in *Electrolux* on 2 September 2004¹ (see our reports on *Electrolux* in *Focus: Workplace Relations*, September 2004 and November 2004). It does so by declaring that where an agreement was made before *Electrolux*, but included matters not pertaining to the employment relationship, the agreement is valid nonetheless. Also, the legislation validates industrial action that occurred before 2 September 2004 but that was taken in support of matters not pertaining to the employment relationship.

Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004

This Bill aims to prevent employees of businesses with fewer than 20 employees from applying for a remedy under the Act in relation to harsh, unjust or unreasonable termination of employment. This Bill has been introduced by the government repeatedly (and rejected by the Senate repeatedly) over the past few years. While the Bill was re-introduced to the House of Representatives on 2 December 2004, it is unlikely to pass without amendment, unless the government waits until mid-2005 when it will obtain control of the Senate.

¹ *Electrolux Home Products Pty Ltd v The Australian Workers' Union and Others* [2004] HCA 40.

Workplace Relations Amendment (Right of Entry) Bill 2004

This Bill was introduced on 2 December 2004 and has the effect of clarifying the rights and responsibilities of union officials, employers and occupiers of premises in relation to right of entry. Significantly, it prevents the AIRC from certifying an agreement that contains right of entry provisions, and also establishes a 'fit and proper person' regime for union officials seeking a right of entry permit.

The government's approach in pursuing protection for small businesses from redundancy and unfair dismissal claims so soon after the election shows its resolve in implementing these reforms.

Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

This Bill proposes to amend the Act to allow redundancy pay to apply only to employers of 15 or more employees. The number of employees would be determined at the time when notice of redundancy is given, or when the redundancy actually occurred – whichever occurred first. The Bill would override any state or territory laws that required employers of fewer than 15 employees to pay redundancy. The Bill was introduced on 8 December 2004, but may face some objection in the Senate.

Conclusion

The government's approach in pursuing protection for small businesses from redundancy and unfair dismissal claims so soon after the election shows its resolve in implementing these reforms. Its legislation regarding agreement validation and proposed legislation regarding union right of entry have been quick responses to recent court and tribunal decisions. The Bill dealing with right of entry responds comprehensively to the recent cases involving the ANZ Bank² (see our reports in Focus: Workplace Relations,

² *ANZ Banking Group Ltd v Finance Sector Union of Australia*, 6 May 2004, Commissioner Smith, PR946294. *ANZ Banking Group Ltd v Finance Sector Union of Australia*, 8 September 2004, Full Bench, PR951766.

June 2004 and October 2004). The legislation in response to Electrolux does not limit the role of courts and tribunals from determining matters pertaining to the employment relationship, leaving the potential for inconsistent interpretation.

Common rule awards

As a result of legislative amendments made at the beginning of 2004, many federal awards have been declared common rules in Victoria and will become binding on affected employers from 1 January 2005. Partner Julian Rieker and Lawyer Luke Gattuso report.

Background

Since 1 January 2004, the Australian Industrial Relations Commission (**AIRC**) has had the power to declare federal awards, or parts of awards, to be common rules in Victoria.

Previously, a federal award only applied to a Victorian employer who was:

- named as a respondent to the award;
- a member of an employer association named as a respondent to the award; or
- a successor, assignee or transmittee of an employer named as a respondent or a member of an employer association named as a respondent to the award.

However, as a result of legislative amendments, federal awards declared to be common rules will, subject to specific exemptions, apply to all employers in particular industries in Victoria.

Status

Many awards have already been declared common rules in Victoria and will become binding on affected employers from 1 January 2005. There are also more than 100 further common rule applications currently before the AIRC.

Implications

As a result, from 1 January 2005, the majority of Victorian employees who are currently subject only to the minimum terms and conditions under Schedule

1A of the *Workplace Relations Act 1996* (Cth) will progressively move to a federal award safety net. The change is also significant in that it will widen the scope of unfair dismissal claims in Victoria, as any employee covered by a common rule award will have access to the unfair dismissal jurisdiction irrespective of remuneration (subject to other likely legislative changes in unfair dismissal laws).

Employers should check whether their Victorian employees will be covered by common rule awards in the new year.

Restraint of trade clause enforced

The New South Wales Court of Appeal recently enforced a restraint of trade clause to prevent an executive from working for a competitor. Senior Associate Simon Dewberry reports.

Background

Mr Olson was a Woolworths' executive with responsibility for a software system development program. On 2 July 2004, Mr Olson sent confidential documents relating to the project by email to his wife's computer. On 5 July 2004, Mr Olson gave notice of resignation to Woolworths and, on 7 July, he signed an employment contract with Franklins.

Mr Olson's employment contract included a restraint clause preventing Mr Olson from being involved in a competing business in Australia or New Zealand for a period not exceeding 12 months. The restraint only operated if Woolworths made a payment to Mr Olson.

Woolworths dismissed Mr Olson from his employment on 12 July 2004 and paid him \$60,650 to trigger the restraint clause for a period of six months.

Decision

Woolworths sought to enforce the restraint clause in the NSW Supreme Court, to prevent Mr Olson from working for Franklins, or any of its other competitors.

The court dismissed Woolworths' claim on the basis that the clause was unreasonable in its scope and incapable of being read down to get a reasonable operation. Woolworths appealed to the NSW Court of Appeal.

Appeal successful

The Court of Appeal upheld the restraint on the basis that, even if the restraint was unreasonable under general law principles, the *Restraints of Trade Act 1976* (NSW) should be applied to ensure the restraint was reasonable when enforced by the court. Further, it was held that the restraint would be reasonable if it was limited in the manner proposed by Woolworths; that is, Mr Olson be restrained from being engaged by Franklins or any other supermarket business with which Woolworths competes in Australia for a period of six months.

Careful drafting of restraint clauses is necessary even in New South Wales. Woolworths was able to use the Restraints of Trade Act in this case only because the restraint clause could be limited to be reasonable.

In coming to its decision, the Court of Appeal took account of the fact that the restraint:

- protects trade secrets, which is a legitimate interest of Woolworths; and
- does not prevent Mr Olson from earning a living, particularly in light of the provision for restraint payment.

Lessons

Careful drafting of restraint clauses is necessary even in New South Wales. Woolworths was able to use the *Restraints of Trade Act* in this case only because the restraint clause could be limited to be reasonable. The necessity of careful drafting is even more pronounced in other states, where there is no legislation allowing a court to rescue an unreasonable restraint clause.

The end of the unfair breach of contract claim

Conduct in breach of a contract does not, of itself, make the contract unfair or give the Industrial Relations Commission of New South Wales the ability to review it. As Lawyer Peter Beacroft and Senior Associate Andrew Cardell-Ree report, a recent decision overrules the Commission's previous approach, but may not limit the Commission's powers greatly.

Unfair breach v unfair term, operation or conduct

Recent Industrial Relations Commission of NSW full benches have found that the Commission has the power to review a contract if it does not prohibit an unfair breach of its terms. By contrast, in *Sydney Water Corporation Ltd & Anor v IRC of NSW & Anor*³ (*Sydney Water*), the NSW Court of Appeal found that this need not be the case. It distinguishes an unfair breach (which is beyond the scope of the Commission's powers of review), from an unfair term of a contract or unfair conduct allowed by a contract (which is within the Commission's review powers). It says that the Commission:

- can make orders to overcome unfair terms or unfair operation of a contract; but
- cannot hear a claim of breach of contract, however unfair the breach is alleged to be.

Conduct in breach of a contract does not, of itself, make the contract unfair or give the Industrial Relations Commission of New South Wales the ability to review it.

No limit?

It remains to be seen how the Commission will interpret and apply the *Sydney Water* decision. There is the prospect that the decision will have little practical effect. For example, consider an inadequate notice claim, where an employer, in breach of the express notice period written into the relevant employment contract, dismisses an employee and gives no notice or payment in lieu. On the basis of the *Sydney Water* decision, the Commission would have no power to consider the breach, irrespective of its unfairness. However, in the same circumstances, the Commission would be entitled – consistent with the *Sydney Water* decision – to entertain a claim that the amount of notice required by the contract was so inadequate as to be unfair, and hence within the scope of the matters that could be considered by the Commission. If this is correct, a carefully framed claim may be unaffected by the decision.

Ultimately, the Commission's approach is unlikely to become clear until it has had the opportunity to consider these questions for itself. We will keep you informed of developments in this area in future editions of *Focus: Workplace Relations*.



Discrimination against casual teachers

The New South Wales Court of Appeal has found that the NSW Department of Education and Training discriminated against female casual teachers by restricting their access to the higher pay rates available for permanent teachers. Senior Associate Rebecca Davern reports.

Background

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.⁴ The matter

³ *Sydney Water Corporation & Anor v Industrial Relations Commission of New South Wales* [2004] NSWCA 436 (1 December 2004).

⁴ *Amery & Ors v State of NSW (Director-General NSW Department of Education and Training)* [2004] NSWCA 404 (15 November 2004).

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.

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.

Decision

The Court of Appeal considered a number of suggested errors of law made by the appeal panel. In particular, it considered issues of statutory construction of the *Anti-Discrimination Act 1977* (NSW) and the test of reasonableness contained in section 24(1) of that Act. In a 2:1 decision, the Court of Appeal rejected the appeal. Both Justice Beasley and Justice Cripps held that the Appeal Panel did not err in law and the original decision of the Tribunal should be reinstated. However, it is the decision of Justice Hodgson that is of most interest.

Justice Hodgson seemed to be of the view that the important question to be considered was whether the relevant requirement or condition imposed (ie the requirement to have permanent status in order to access higher salary scales) was reasonable. In particular, Justice Hodgson commented that the fact that rates of pay are determined by an award, arrived at after careful investigation by a specialist tribunal, was a significant factor in determining whether the Department's requirement was reasonable. Justice Hodgson was of the opinion that the Tribunal had made an error of law in not considering this issue appropriately.

Given the financial implications for the State of New South Wales and its budget, it appears likely that this case is destined for the High Court

Interestingly, Justice Hodgson identified errors of law that had not been raised by the Notice of Contention and arguments put by the department. These errors of law related to the question of whether making over-

award payments was reasonable, whether the different statutory obligations on permanent teachers were relevant and the Tribunal's failure to give regard to the existence of the enterprise agreement and award as a factor bearing on reasonableness.

More cases pending

The Teachers Federation has indicated that there are approximately another 700 discrimination cases pending. Given the financial implications for the State of New South Wales and its budget, it appears likely that this case is destined for the High Court (although, at the time of writing, the department has not yet announced any such appeal).

This case provides further confirmation that employers must take great care in providing employees access to flexible work hours because of family responsibilities, but also in setting the conditions and terms applied to those employees who work on a more flexible basis.

Risk assessment: not a job for the boys

A recent decision of the Industrial Court of Queensland illustrates the strict obligation on employers to conduct proper risk assessments and to use administrative controls for a risk only as a last resort. Senior Associate Simon Dewberry reports.

Background

Devan Management Pty Ltd managed a farm. Its employee, Mr Cockburn, was driving a tractor fitted with a 'plastic picker upperer' implement, which rolled up plastic that had been laid in rows in a paddock for farming purposes. The 'plastic picker upperer' consisted of two cylindrical drums that were operated by a hand throttle.

When the plastic was being picked up by the implement, it was quite common for the plastic to



break. When that happened, operators had been instructed to turn the motor off (which stopped the cones revolving) before retying the plastic onto the cones. Mr Cockburn failed to follow this instruction and was entrapped by the cones, causing his death.

When its complaint was dismissed at first instance, the Division of Workplace Health & Safety appealed to the Industrial Court.

It is patently clear from the authorities that employers have no prospect of defending workplace health and safety prosecutions in Queensland where they have failed to conduct a proper risk assessment.

Appeal decision

The court held that the offence was made out because the defendant failed to adopt and follow the Risk Management Advisory Standard 2000, or adopt

and follow another way that gave the same level of protection against the risk. Two facts were critical:

- on the defendant's own evidence, risk assessment had been left 'to the boys' and no risk assessment was carried out; and
- the tractor was redesigned post-incident to control the risk. This risk control measure was available before the accident and should have been used (rather than relying on the instructions given to operators).

Strict liability

It is patently clear from the authorities that employers have no prospect of defending workplace health and safety prosecutions in Queensland where they have failed to conduct a proper risk assessment, including (where possible) implementing control measures that eliminate rather than minimise any hazards. Further, where an advisory standard or industry code of practice applies, it would be very difficult for the employer to prove that they adopted and followed another equally stringent method to protect against the risk.

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