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## WORKPLACE RELATIONS

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## Unfair contract claims survive amendments

Recent amendments to the *Industrial Relations Act 1996* (NSW) were widely regarded as significantly limiting the ability of employees to bring claims under the unfair contracts jurisdiction. The reality has proven to be quite different, reports Senior Associate Deegan Fitzharris.

### Limitations introduced last year

The *Industrial Relations Act 1996* (NSW) (the **Act**) allows claims to be brought alleging that the terms or operation of a contract or arrangement under which work is performed were unfair. These claims are commonly referred to as 'unfair contract' claims.

With effect from 24 June 2002, the Act was amended to limit the type of people who are able to bring unfair contract claims. The most significant of these limits are the requirements that, in order to bring an unfair contract claim, a person must:

- earn remuneration of less than \$200,000 per annum; and
- where the claim relates to the termination of a contract, bring the claim within 12 months of that termination.

### The Kennedy case

In *Kennedy v Contract Transport Solutions Pty Ltd*, the Industrial Relations Commission of NSW (the **Commission**) considered a claim regarding the termination of a contract that had occurred before the amendments to the Act took effect, but where it was argued that the claim had been brought outside the 12 months required by the amendments to the Act.

The Commission found that the claim had been brought inside the 12-month period. However, it went on to comment that the amendments to the Act did not have retrospective effect. This meant that, because the termination occurred prior to the amendments, the 12-month time period in which claims must be brought would not have

applied to it, and would not have prevented that claim from being pursued.

## Implications

Although the Commission's comments regarding the application of the amendments are not strictly binding (because, due to the finding that the claim had been brought within 12 months, the Commission was not required to consider the application of the amendments), they potentially have wide consequences. If, as is suggested by *Kennedy*, the amendments do not apply to terminations before 24 June 2002, this has significant implications.

*Employers should not assume, when considering potential liability to senior employees, whether arising out of termination or otherwise, that those employees are not entitled to bring an unfair contracts claim.*

More significantly, it also suggests that, when issues after the termination are involved, unfair contract claims can be pursued by persons who earn remuneration of more than \$200,000 per annum, if those claims are based on events that occurred before 24 June 2002. For example, unfair contract claims are often based on representations made at the time that an employee is offered employment. If these representations occurred before 24 June 2002, *Kennedy* suggests that the employee could make an unfair contract claim, despite being a high-income earner.

## Conclusion

If, as seems likely to be the case, the reasoning in the *Kennedy* case is applied by the Commission, the amendments may not have the broad effect of limiting the type of employee who can bring unfair contract claims to the extent expected. Given this uncertainty, employers should not assume, when considering potential liability to senior employees, whether arising out of termination or otherwise, that those employees are not entitled to bring an unfair contracts claim.

# Resignation and pro rata long service leave

A recent decision of the Queensland Industrial Relations Commission addresses the issue of whether pro rata long service leave should be paid to an employee who resigns because of a domestic or other pressing necessity. Lawyer Simon Dewberry reports.

## The Queensland legislation

Employees in Queensland who resign after seven years' service are entitled to a pro rata long service leave payment only if they resign for reasons of illness, incapacity, death or other pressing necessity. A payment should not be made to employees resigning for any other reason.

This entitlement exists in a number of other Australian jurisdictions. However, as in other Australian jurisdictions, the terms 'illness', 'incapacity', or 'domestic or other pressing necessity' are not defined and have been the subject of debate on a number of occasions.

## General principles

The difficulty for employers is anticipating whether the circumstances of a particular employee will be considered by the Queensland Industrial Relations Commission (the **Commission**) as falling within the set criteria. The general thrust of case law on this point is that employees ceasing work for reasons beyond their effective control are entitled to the benefit.

The words 'domestic or other pressing necessity' have been interpreted to encompass a broad range of scenarios, including:

- a pregnant employee leaving work to take on the responsibility of home duties;
- an employee forced to leave work to take care of a sick spouse, or take care of children;
- an employee changing jobs to lessen travel expenses when in a difficult financial situation;



- an employee leaving a job because working night shifts had become a strain on the employee's family relationships and repeated requests for a transfer to the day shift had not been granted; and
- an employee leaving employment because the employer was relocating and the employee would have been required to travel substantial distances to attend work each day.

## Broad interpretation

Perhaps the low watermark of domestic or other pressing necessity was the 1996 decision of *AMACSU v Qantas Airways Ltd*. In that case, a Qantas employee became engaged to an American citizen who was unable to relocate to Australia because he was a member of the US Marine Corps. She terminated her employment and submitted a claim for pro rata long service leave payments, citing her intention to move to the US to be married as the reason for her resignation.

Qantas advised that they were not prepared to grant the claim, as her decision to resign did not constitute a domestic or other pressing necessity. In effect, her decision to leave was her choice, and there was no existing 'domestic' relationship. However, the Australian Industrial Relations Commission held, with very little debate, that the employee had no reasonable choice except to terminate her employment and relocate, and recommended payment of pro rata long service leave.

## Narrower test

This is an extremely broad interpretation, anticipating both existing domestic arrangements, as well as proposed or future arrangements. A more conservative test, which appears to have been accepted generally, involves the following questions:

1. Was the reason claimed for resigning:
  - (a) the employee's illness or incapacity?
  - (b) a domestic or other pressing necessity?
2. Was the reason claimed for termination genuinely held by the worker and not simply a rationalisation?
3. Although the reason claimed may not be the sole ground that actuated the worker in his [or her] decision to terminate, was it the real or motivating reason?
4. Was the reason such that a reasonable person in the circumstances in which the worker found himself [or herself] placed might have felt compelled to terminate his [or her] employment?

## Application of the test in Queensland

This test was applied by the Commission in the *AWU v Sunshine Coast Private Hospital*, which involved an employee who claimed that he resigned because of illness or incapacity. Most recently, the Commission in *Thomson v Pauls* applied the test to an employee who claimed that he resigned because of a domestic or other pressing necessity.

Mr Thomson resigned his employment because his parents were moving to Tasmania and he decided to stay with his family. Mr Thomson was a bachelor and had always lived with his parents.

Applying the test, the Commission held that:

1. The reasons advanced by Mr Thomson did not constitute a domestic or pressing necessity. There was, for example, no suggestion of there being a really serious problem in the home, nor was the case analogous to situations where an employee has resigned to be married in another area, or to join their spouse whose employment had been transferred overseas.
2. The reason advanced by Mr Thomson was not the primary, or motivating, reason for his decision to resign. Rather, his decision was to allow him - in conjunction with the rest of his family - to make a lifestyle change.
3. The reasons claimed were not the real or motivating reason for Mr Thomson's resignation. The real or motivating reason was so that Mr Thomson could effect a lifestyle change.
4. A reasonable person in the circumstances in which Mr Thomson found himself would not have felt compelled to terminate their employment for the reasons claimed by Mr Thomson. Elements of choice were involved.

## Implications

While the cases show that there are a broad range of circumstances in which individuals can claim a pro rata long service leave payment based on a domestic or other pressing necessity, the recent Queensland cases demonstrate that claims will still need to be justified on the evidence, and there is no blanket entitlement. It is not enough that the employee claims to be resigning for one of the relevant reasons. Employers should feel comfortable in scrutinising claims where they believe the reason for the resignation may be other than a domestic or other pressing necessity.

# Employee inventions

Employers cannot assume ownership of an invention if it is created outside the 'ongoing duties of employment'. A recent Federal Court<sup>1</sup> decision shows that employers must use specific language in employment contracts if they wish to retain the benefit of inventions created by their employees – especially if inventing is not a usual part of the employee's role. Lawyer Natalie Shaw reports.

## Creation of the invention

Spencer Industries manufactured tyre retreading equipment. In 1990, Spencer Industries employed Mr Collins as sales manager. It was not suggested to Mr Collins at any stage before or during his employment that he was employed to invent new products.

In 1996, Mr Collins designed a new tooth for a rasp blade. In 1998, Spencer Industries expressed interest in the invention and asked Mr Collins to prepare enlarged drawings. Mr Collins did this in his own time using his own equipment. After delivering the enlarged drawings, Spencer Industries asked Mr Collins to print the general layout of the invention - again in his own time. Mr Collins did this partly during working hours (when he was free of sales work), using Spencer Industries' drawing board.

In 1999, Spencer Industries filed a patent for the invention in its name, identifying Mr Collins as the inventor. Spencer Industries then pressured Mr Collins to assign his rights under the patent to the company in return for a nominal payment of \$1. When Mr Collins refused, the company said he could 'sign or resign'. Mr Collins resigned, and assigned his rights to a rival company.

## Decision of the Delegate of the Commissioner of Patents

Spencer Industries applied under the *Patents Act 1990* (Cth) for an extension of the patent, but the application

was refused on the basis that Mr Collins was the real owner of the patent.

## On appeal to the Federal Court

Spencer Industries appealed to the Federal Court, submitting that, because Mr Collins had a duty as sales manager of Spencer Industries to advance the sales of Spencer Industries, any invention capable of advancing Spencer Industries' sales was within the course and scope of his employment. This was rejected by the Federal Court.

After considering the seniority and nature of Mr Collins' duties as sales manager, the court held that inventing products for Spencer Industries was not part of his ongoing duties, and that he had not assigned the benefit of the invention to Spencer Industries.

## Conclusion

The decision demonstrates that inventions made by an employee outside the scope and course of employment – and not dealt with by an express clause in the contract of employment – are unlikely to be the employer's property.

# OH&S and disability balance

Articled Clerk Laura Colavizza reports on the Federal Court decision of *Commonwealth of Australia v Williams*<sup>2</sup>, which demonstrates a broad approach to the conflicting obligations imposed on employers regarding their duties to employees under occupational health and safety law and anti-discrimination legislation.<sup>3</sup>

## Background

In 1996, the Royal Australian Air Force (*RAAF*) introduced a Minimum Employment Standard (the *Standard*), which required each employee to be medically fit for combat deployment and not rely on uninterrupted access to medication, or have

2. (2002 ) FCAFC 435

3. These conflicting obligations were discussed in an article by Partner Julian Riekert in Focus: *Workplace Relations*, February 2003

1. *Spencer Industries Pty Limited v Collins* [2003] FCA 542 (4 June 2003)



a condition that was prone to deterioration. Mr Williams was dismissed from the RAAF when he was diagnosed with diabetes, on the basis that his condition was unpredictable and required careful monitoring.

### Inherent requirement?

The Federal Magistrates Court held that combat-related duties were not an inherent requirement of Mr Williams' particular employment as a communications operator, and that the RAAF discriminated against him on the basis of his disability when his employment was terminated.

*In assessing the disabled employee, the employer should determine whether there is the possibility of improvement or rehabilitation, and whether the performance of duties could occur through assistance or special facilities.*

The Full Court of the Federal Court disagreed, finding that, although Mr Williams was employed as a communications operator, his position required that he provide communications support to those performing combat-related duties, and thus the RAAF requirement that employees be fit for combat-related duties applied to his position.

### Employers' assessment of disabled employees

To ensure compliance with both anti-discrimination and OH&S legislation, employers should give careful consideration to management of a disabled employee. Once a disability issue arises, employers should examine both the inherent requirements of a position and the nature of the employee's disability. This decision, and others, show, if nothing else, that there is a fine line between proper management and unlawful discrimination.

In assessing the disabled employee, the employer should determine whether there is the possibility of improvement or rehabilitation, and whether the performance of duties could occur through assistance or special facilities. This process should occur in consultation with the employee to ensure, apart from fairness, that the employer is aware of any likely grievance with the handling of the issue.

## Transfer of employment in Queensland

The Queensland Industrial Relations Commission recently considered the continuity of service provisions in Queensland, in the context of an outsourcing arrangement. Law Graduate Leo Whiteley reports.

### Background

A debate about transmission arose when an employee ceased employment with a mining company (first employer) and was then employed by a labour hire company (second employer) to perform the same duties for the first employer. The employee had three months' service with the first employer at the time of transfer and 11 months' service with the second employer. The employee made an unfair dismissal application to the Queensland Industrial Relations Commission (the **Commission**).

### Casual status

The second employer argued that the employee had less than 12 months' service with the second employer, and, as such, he was a short-term casual employee (excluded from the unfair dismissal provisions). The employee argued that he had more than 12 months' service, as service with both employers was continuous. Therefore, although casual, he was not a short-term casual. To win that argument, the employee needed to show there was a 'transfer of a calling' from one employer to the next. If so, there would be a deemed continuity of service under the *Industrial Relations Act 1999* (Qld).

### The decision

In line with previous decisions, the Commission found that it was required to consider the calling of the employer and not the employee. The Commission then looked at the callings of the two employers and concluded that:

- the first employer was a provider of mining services; and
- that the second employer was a provider of labour under contract.



As a result, the Commission decided that there was no transfer of the first employer's calling to the second employer, and no continuity of service. The employee, having less than 12 months' service, was consequently a short-term casual and excluded from the unfair dismissal provisions. This approach is consistent with that taken under the transmission of business provisions in federal law.

## Mitigation after termination

The NSW Industrial Relations Commission may decide that an employee should have done more to minimise loss on termination of employment, but this does not necessarily mean that it will reduce the compensation awarded. As Lawyer Andrew Cardell-Ree explains, it is all about fairness.

In *Focus: Workplace Relations*, July 2002, we reported the introduction of changes to the NSW unfair contracts jurisdiction. One of those changes requires the NSW Industrial Relations Commission (the **Commission**) to consider any steps an employee

took to minimise loss on termination. The Full Bench has now found that it can meet this duty by simply considering the steps taken, without reducing the amount of compensation it awards.

### Duty to mitigate loss

Mitigation is a legal concept that is well accepted in the context of a claim for breach of contract. A court must reduce the amount of damages it awards if an employee has not taken adequate steps to minimise loss. The usual step is to try and obtain other employment as soon as possible after termination.

By contrast, as this decision makes clear, the Commission must consider whether an employee has taken steps to minimise his or her loss, but it need not reduce the compensation it awards, even if it finds that the employee should have taken up an alternative position.

### What is fair?

The decision highlights an important distinction between a claim for breach of contract and a claim of unfairness. The Commission is required to determine what is fair in the circumstances and it is clear that it will reduce an award of compensation because an employee has not (but should have) taken up an offer if it is fair to do so. But the decision does not offer employers any reliable guidance about when that reduction might occur.

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