Allens Arthur Robinson

FOCUS

WORKPLACE RELATIONS

May 2008

IMPUTED DISABILITY AND OTHER ISSUES

We look at discrimination and an imputed disability; unlawful work stoppages; the implication of an entitlement to redundancy; protected action ballots; and who is responsible for workplace safety.

Unlawful work stoppages; the implication of an entitlement to redundancy; protected action ballots; and workplace safety

DISCRIMINATION OVER IMPUTED DISABILITY

The adverse treatment of an employee can be unlawful even if the employer mistakenly assumes the employee has a disability. Senior Associate John Naughton reports on a Federal Court decision that looks at discrimination over an imputed disability.

HOW DOES IT AFFECT YOU?

- Discrimination laws protect not only people with disabilities, but also those who have the characteristics of disability attributed to them.
- Employers should verify the facts and take qualified advice about perceived disabilities before acting.
- Employers should consider carefully when taking action based on a disability or perceived disability that there is a logical link with the limitations imposed by the disability.

BACKGROUND

Mr Gordon applied for a position with the Australian Taxation Office (the ***ATO***) in Launceston as a GST compliance officer. The ATO offered him employment, but subject to the proviso that the offer would be withdrawn or his employment terminated if he was unfit for employment.

Health testing organised by the ATO showed Mr Gordon had high blood pressure, and the ATO withdrew the offer of employment. The ATO claimed that it was an inherent requirement of the position that the employee drive frequently, sometimes for substantial distances, and that made the role unsuitable for a person with high blood pressure.

Mr Gordon claimed he had been discriminated against contrary to the *Disability Discrimination Act 1992* (Cth) (the ***DD Act***).

LEGISLATION

The DD Act makes it unlawful for employers to discriminate:

- in determining who should be offered employment; or
- by dismissing an employee.

A defence is available to the employer if the person, because of their disability:

- is unable to carry out the inherent requirements of the position; or
- can carry out the inherent requirements, but only with services or facilities that would involve unjustifiable hardship to the employer.

THE DECISION

In the Federal Court, Mr Gordon was able to show that his high blood pressure was an anxiety reaction to the health testing, and that blood pressure readings taken over a longer period showed his blood pressure was not problematic. In addition, he was able to show that his blood pressure could be stabilised easily with medication.

The court accepted that:

- high blood pressure had been incorrectly imputed to the employee; and
- the ATO's 'real and operative reason' for withdrawing the offer of employment to Mr Gordon was the imputed disability.[1]

The ATO was unable to show that its belief about Mr Gordon's high blood pressure was not a real and operative reason for withdrawing the offer. Therefore, in spite of there being no disability, Mr Gordon was entitled to the protection of the disability discrimination regime.

However, in a strange twist, the court confirmed that, when assessing the ability of the employee to meet the inherent requirements of the position, the court must assume the employee has the imputed disability. In effect, the discrimination regime is not designed to promote fairness of treatment – it is designed to promote equal treatment. If the employee asserts a claim based on an imputed disability, and satisfies the court there was discrimination on that basis, the employer's conduct is assessed in the same way as if the disability was real. In this case, Mr Gordon was able to satisfy the court that the ATO had committed unlawful discrimination and judgment was entered against the ATO for $121,762, comprising past economic loss, Centrelink reimbursement, compensation for mental anguish and interest.

1. *Gordon v Commonwealth of Australia* [2008] FCA 603.

STOPPING WORK STOPPAGES

Employers are entitled to seek orders against employees who habitually participate in invalid work stoppages. Partner Jamie Wells and Law Graduate Will Brennan report.

HOW DOES IT AFFECT YOU?

- Work stoppages initiated without good cause can be unlawful and may be the subject of an order to cease taking industrial action.
- If the justification for a stoppage is a concern for safety or welfare, the concern must be genuine and material.
- The failure to follow an agreed dispute resolution procedure before taking industrial action will be an important consideration when any order is being considered.

BACKGROUND

Kaefer Integrated Services Pty Ltd (***Kaefer***) is a multi-service contractor, currently undertaking work on the North West Shelf LNG Phase V Expansion Project (the ***LNG project***) at the Burrup Peninsula onshore processing facilities in Western Australia.

Kaefer's employees include members of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and the Construction, Forestry, Mining and Energy Union.

In August and September 2007, and again in January, February and April 2008, several Kaefer employees either failed to attend work, or attended but failed to perform work. The employees claimed these work stoppages were not industrial action, but were for other valid reasons, including:

- a reasonable concern that there were imminent and serious threats to their health or welfare;
- a show of respect for an employee who had died; and
- grievances over late pay and the alleged unfair dismissal of an employee.

Kaefer claimed before the Australian Industrial Relations Commission (the ***AIRC***) that:

- the health and welfare concerns were unfounded;
- the stoppages were not authorised or agreed; and
- the employees' conduct involved unlawful industrial action under the *Workplace Relations Act 1996* (Cth).

Kaefer further asserted that its employees had little or no regard for the company's dispute resolution procedures and had a propensity to take industrial action when workplace grievances arose. Accordingly, Kaefer claimed that further industrial action was probable and sought an order from the AIRC that the action not occur.

THE DECISION

The AIRC found the employees had not provided sufficient evidence to support the health and welfare claims at the relevant times, and that all of the work stoppages constituted unlawful industrial action. The AIRC also found that future issues were certain to arise and that the dispute resolution procedure was unlikely to be followed.[2]

The AIRC held that further action had to be probable, and that a 'real chance or possibility' of future industrial action would not be enough. In making that assessment, the AIRC must be satisfied 'as a matter of judgment informed by the evidence and circumstances.'

In making its determination, the AIRC found that the employees' history of industrial action against Kaefer was not sufficient to show a probability of action in the future. However, after considering each instance of industrial action and the employees involved, the AIRC accepted that some employees had a propensity to take industrial action, making further action probable as far as they were concerned.

While also noting that the employees had previously been ordered to stop industrial action, the AIRC ordered further that future industrial action not occur for the duration of Kaefer's involvement in the LNG project (until 31 August 2008). However, the order was applied only to employees who had participated in previous industrial action against Kaefer in relation to the LNG project.

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2. *Kaefer Integrated Services Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Anor* [2008] AIRC 412.

NO IMPLIED RIGHT TO REDUNDANCY PAY

The Supreme Court of Victoria has explained how difficult it is to argue an entitlement to redundancy pay is implied in an employment contract. Senior Associate Stacey Van der Meulen reports.

HOW DOES IT AFFECT YOU?

- An entitlement to redundancy pay exists only if it is incorporated into the contract by specific reference, or based on an earlier course of dealing. It is not enough that general industrial standards include redundancy pay for employees.
- Coverage provisions of any industrial agreement or policy should be clear, to minimise the risk of ambiguity about which employees are covered.

BACKGROUND

Mr Rinaldi's position as production manager with Tibaldi Smallgoods (Australasia) Pty Ltd was made redundant in December 2005. Despite his employment contract being silent on the matter of redundancy, he was paid 12 weeks' redundancy pay.

Mr Rinaldi claimed he was entitled to a redundancy payment calculated in accordance with the more generous scale in the collective agreement that applied to Tibaldi's shop floor workers, and issued proceedings in the Magistrates' Court of Victoria.

The Magistrates' Court found:

- the terms of the redundancy entitlement in the collective agreement would have been well known to the parties and an entitlement to be paid in accordance with that agreement should be implied into Mr Rinaldi's employment contract; and
- Tibaldi had breached its contract of employment with Mr Rinaldi by failing to pay him his full entitlement to severance pay.

APPEAL

Tibaldi appealed to the Supreme Court of Victoria, which overturned the decision of the Magistrates' Court.[3] The Supreme Court found there was no basis for implying a term into Mr Rinaldi's contract that he was entitled to a redundancy payment in accordance with the collective agreement because:

- redundancy was not a matter contemplated at the time the contract was made;
- the fact Tibaldi volunteered to pay Mr Rinaldi an amount for redundancy was not a concession by Tibaldi that it had a legal obligation to do so; and
- it had not become a custom in the workplace to make redundancy payments in accordance with the certified agreement to employees not covered by that agreement.

The decision emphasises that there must be a proper basis for implying a term providing for redundancy. That other employees of a company are entitled to redundancy under a collective agreement will not be a basis for implying a redundancy payment in an employment contract that is not covered.

PROTECTED ACTION BALLOT ORDERED

A recent decision demonstrates that rules relating to protected action ballot applications under the *Workplace Relations Act 1996* (Cth) will be applied flexibly. Lawyer Maree Norton and Articled Clerk Hugh Foley report.

HOW DOES IT AFFECT YOU?

- A union that is not eligible to represent a group of employees will not necessarily be precluded from being involved in a secret ballot application brought on behalf of those employees.
- The Australian Industrial Relations Commission takes a liberal view of applications in substantial compliance with the *Workplace Relations Act* and is unlikely to entertain technical objections.

BACKGROUND

In February 2008, the Maritime Union of Australia (the ***MUA***) applied for orders for protected action ballots in relation to employees of the Fremantle Port Authority (the ***FPA***). The MUA later withdrew the applications following FPA submissions that the MUA was not eligible to make the applications because it was not entitled to represent the industrial interests of the employees involved.

Mr Canning, an employee of the FPA, subsequently made a similar secret ballot application.[4] Two factors made it apparent that the MUA was involved in the application:

- at the time of making the application, Mr Canning was acting as a relief organiser with the MUA; and
- Mr Canning and other FPA employees had appointed an MUA organiser as bargaining agent.

The FPA argued that the application should be dismissed on the basis that:

- the application was a device intended to allow the MUA to be involved in a bargaining process from which it was otherwise excluded; and
- Mr Canning's failure to identify the other FPA employees on whose behalf he was acting meant that no proper bargaining period had been commenced, thereby rendering the application invalid.

THE DECISION

The Australian Industrial Relations Commission (the ***AIRC***) rejected all of the FPA's objections and issued a ballot order.

The AIRC held that, although the MUA was not eligible to formally represent the industrial interests of the relevant FPA employees, it was not precluded under the *Workplace Relations Act 1996* (Cth) (the ***Act***) from assisting those employees to negotiate an agreement with the FPA.

The AIRC was not convinced that identification of the employees on whose behalf Mr Canning was acting was required, and held that even if this was a requirement, a failure to comply would not necessarily render the bargaining period or the application invalid. The AIRC was satisfied that a bargaining period had

3. *Tibaldi Smallgoods (Australasia) Pty Ltd v Rinaldi* [2008] VSC 112 (11 April).

4. *Michael James Canning v Fremantle Port Authority* [2008] AIRC 309.

been commenced and that the application substantially complied with the Act. This approach is consistent with section 110(1)(c) of the Act, which requires the AIRC to decide matters according to the substantial merits of a case, without regard to technicalities.

SAFETY IN THE WORKPLACE – THE CHAIN OF RESPONSIBILITY

Where health and safety are concerned, the courts will not be easily persuaded that the duty to provide health and safety induction training to employees before they commence work on a building site has been delegated to a subcontractor. Senior Associate Della Stanley reports on a recent decision of the New South Wales Court of Appeal.

HOW DOES IT AFFECT YOU?

- A principal contractor at a construction site must ensure a reasonable level of safety.
- Even if a subcontractor takes responsibility for induction training, the head contractor must have systems in place to ensure that the training has in fact been provided.
- While a principal contractor may well delegate duties to subcontractors, the principal should establish effective systems to ensure that those contractual obligations are being fulfilled.

BACKGROUND

Mr Fox was cleaning pipes used to pump cement on a building site and was injured when the bottom end of a pipe swung and hit him on the head. The principal contractor on the building site was Leighton Contractors Pty Ltd who had contracted with Downview Pty Ltd to carry out the concreting work.

There was a clause in the contract between Leighton and Downview requiring all workers at the site to attend an induction conducted by Leighton. The contract also required Downview to provide Leighton with details of workers proposed for the site and to induct workers 'as to particular procedures and requirements relevant to that work'. Mr Fox had not received any safety induction training before commencing work.

Mr Fox brought a civil claim in the District Court, but failed to recover damages against Leighton and Downview.

THE COURT OF APPEAL'S DECISION

The New South Wales Court of Appeal overturned the trial judge's decision and found that Leighton and Downview were both liable to compensate for Mr Fox's injury.[5]

Leighton's defence was that it had delegated the obligations of supervision and training to Downview. The Court of Appeal found the contractual provisions and the relevant NSW health and safety laws did not allow for delegation of this responsibility. A relevant consideration was the way that Leighton had taken upon itself a supervisory role in:

- checking work method statements prepared by Downview;
- employing a gatekeeper to allow workers on site;
- employing a foreman who issued directions to workers to wear safety vests and hard hats; and
- issuing green cards to workers who had undertaken induction training.

These steps were found to be significant in that they indicated the level of control that Leighton maintained over the site.

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5. *Fox v Leighton Contractors Pty Ltd & Ors* [2008] NSWCA 23 (7 March 2008).

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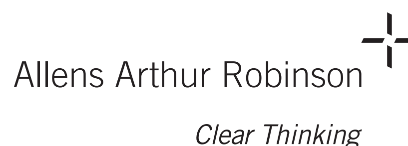

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