

# FOCUS

## WORKPLACE RELATIONS



March 2007

## OFFER OF EMPLOYMENT ON AWA AND DURESS

Offering employment on terms of an AWA only may still involve duress. Senior Associate Rowan Kelly reports.

### HOW DOES IT AFFECT YOU?

- Normally an offer of employment conditional on entering an AWA will not constitute duress. Duress cases usually arise when AWAs are offered in the course of an ongoing employment relationship. However, employers should still take care in how they make this offer, particularly in a transmission of business situation.
- In practical terms, this case may attract other claims of duress exploring the limits of the exception for conditional offers of employment. When this case is finally determined, it is likely that more definitive guidance on this issue will be given, as this decision only determined a summary dismissal application and whether the applicant's claim had no reasonable prospects of success.

### BACKGROUND

Ms Franklin and Mr King were employed by Action Supermarkets Pty Ltd under a certified agreement when part of its business, the IGA Hilton Supermarket, was sold to Ten Talents Pty Ltd.

Ten Talents offered Ms Franklin and Mr King continuing employment but only on the condition that they accept an Australian Workplace Agreement (**AWA**). Ten Talents had engaged Cyberlink Pty Ltd as its agent to make the offers of employment and was not directly involved in this process.

The Office of Workplace Services (**OWS**) alleged duress in connection with an AWA in breach of the *Workplace Relations Act 1996* (Cth) (the **Act**).

Cyberlink applied to have the proceedings against it dismissed summarily on the basis that the OWS had no reasonable prospect of successfully prosecuting the claim.<sup>1</sup>

### DURESS

Duress involves the illegitimate application of pressure both likely and intended to deny a person the opportunity to exercise their own free will. Illegitimate pressure may be in the form of unlawful threats or unconscionable pressure but can also, in some circumstances, include lawful conduct.

1. *Balding v Ten Talents Pty Ltd & Anor* [2007] FMCA 145 (15 February 2007).

Prejudicial organisational changes; bonus payments; state long-service leave and federal agreements; and industrial action for safety concerns.



While the Act makes it unlawful for a person to apply duress to an employer or employee in connection with an AWA, it also makes clear that ‘a person does not apply duress... merely because the person requires another person to make an AWA as a condition of engagement’.

## RELEVANT FACTORS IN DETERMINING WHETHER DURESS

Federal Magistrate Toni Lucev dismissed the summary dismissal application by Cyberlink, finding that:

“the alleged duress was arguably not ‘merely because’ entry into an AWA was a condition of engagement... but because of other possible factors... plus entry into an AWA being a condition of employment.”

In reaching this decision, Federal Magistrate Lucev noted that employment in the same job has been identified as the single most important factor in relation to duress claims, as well as taking the following factors into consideration:

- The transmission of business provisions under the Act might create a ‘special relationship’ between the purchaser and a potential new employee, particularly where the existing relevant industrial instrument would otherwise ordinarily apply to the employee and where the employee had a reasonable expectation of ongoing employment in their pre-existing position.
- The actual, or threatened, reduction in employee entitlements, or opportunities that might be afforded to an employee in their employment.
- Whether or not there was an opportunity to negotiate an alternative form of industrial instrument (other than an AWA) or to negotiate in a particular manner or form.
- The power disparity between the purchaser and potential employee and the use of that power disparity.

# PREJUDICIAL ORGANISATIONAL CHANGES

Overseas Practitioner Meriel Smith reports on a Full Federal Court decision that upheld a freedom of association finding, following an organisational restructure.

## HOW DOES IT AFFECT YOU?

- The highest penalty previously awarded for a contravention of section 298K of the *Workplace Relations Act 1996* (Cth) was \$74,507,60. Companies are now on notice to expect significantly higher penalties for contraventions.
- When a company changes its organisational structure, intending that employees will voluntarily move from one group company to another, it should ensure that advancement opportunities are not diminished if the employee refuses to transfer.

## BACKGROUND

In May 2002, Commonwealth Bank of Australia (**CBA**) decided that Commonwealth Securities Ltd (**CommSec**) should employ CBA employees working in the area of Premium Finance Service (**PFS**). Career advancement opportunities of those not taking up employment with CommSec were limited. CommSec was not unionised and not party to the industrial instruments to which CBA was a party.

## ORIGINAL DECISION

The Federal Court accepted that CBA had breached s298K(1)<sup>2</sup> of the pre-reform *Workplace Relations Act 1996* (Cth) (the **Act**) through prejudicial alteration of employees’ positions.

The court held, among other things, that the PFS decision altered the positions of 259 managerial employees to their prejudice, as they could only obtain promotional, advancement and transfer opportunities if they resigned from CBA and took up employment with CommSec.

CBA was ordered to pay to the union a penalty of \$600,000 for its breaches of s298K(1)(c).

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2. See s792 of the current *Workplace Relations Act 1996* (Cth).

## APPEAL

On appeal<sup>3</sup>, the Full Court upheld the original decision by a 2:1 majority. However, the \$600,000 penalty for the breach of s298K(1)(c) was considered manifestly excessive, having regard to previous penalties imposed under that section, and it was reduced to \$300,000.

# DO BONUSES COUNT TOWARDS REMUNERATION FOR THE PURPOSES OF AN UNFAIR DISMISSAL CLAIM?

Unfair dismissal applications must be dismissed if the employee's remuneration exceeds the prescribed limit of \$98,200. A recent decision sheds some light on whether bonus payments contribute to an employee's total remuneration for this purpose. Lawyer Erin Hawthorne reports.

## HOW DOES IT AFFECT YOU?

- It is possible that bonus payments may be counted as remuneration for the purpose of determining whether they employees are excluded from making unfair dismissal applications.
- All policies in relation to bonus payments should clearly set out how the bonus will be calculated and any conditions/requirements that must be met.
- It is important to clarify whether employees are entitled to particular bonus amounts or whether bonus amounts are subject to the employer's discretion.
- Payments made to salespersons/agents based on a scale or percentage of the value of the business may be more likely to be commission and count as remuneration.

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3. *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2007] FCAFC 18.

## BACKGROUND

Ms Noble was employed by Daikin Australia Pty Ltd until 28 September 2006. Her remuneration included base salary, annual leave loading and superannuation, totalling \$91,363. She also participated in a performance-based bonus scheme, under which she was entitled to a bonus if she was employed at 31 March 2007 and had met her key performance indicators. The amount of any bonus was at the discretion of Daikin.

Ms Noble filed an unfair dismissal application against Daikin. Daikin submitted that<sup>4</sup>:

- Ms Noble's bonus payment was commission for the purposes of section 638(7) of the *Workplace Relations Act 1996* (the **Act**); or
- Ms Noble's entitlement to a bonus should be regarded as part of her remuneration under s638(6).

Daikin submitted that if either (a) or (b) applied, Ms Noble's remuneration would exceed the prescribed limit of \$98,200.

## DECISION

The Australian Industrial Relations Commission (**AIRC**) adopted a literal interpretation of the term commission in s638(7) and observed that commissions are usually paid to an agent and are often calculated as a percentage of the price/value of the business or according to a scale. Whether any particular bonus payments were commissions would depend on the facts of each case.

The AIRC found that Ms Noble's bonus payment was not a commission, because:

- the amount of the bonus was at Daikin's discretion;
- the requirement that employees be employed on 31 March was in the nature of an incentive to continue in employment, rather than a commission;
- Ms Noble's function was not of a kind that would usually attract commissions (in contrast to an agent or salesperson); and
- the performance targets that had to be met were not directly linked to the value of the business.

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4. *Noble v Daikin Australia Pty Ltd* [2007] AIRC 126, Commissioner Thatcher, 21 February 2007 (U2006/6286) PR976205.

Further, the AIRC held that Ms Noble had no entitlement to any bonus payment before her termination as any payment was contingent upon:

- being employed on the specified date;
- meeting her performance targets; and
- Daikin's discretionary determination of the bonus payment amount.

Accordingly, Ms Noble's remuneration did not exceed the prescribed limit, and the unfair dismissal application was not dismissed.

## EXCLUDING STATE LONG-SERVICE LEAVE ENTITLEMENTS

A recent decision of the Federal Court of Australia has confirmed an employer's right to exclude state long-service leave laws through the use of federal agreements. Senior Associate John Naughton and Law Graduate Andrew Stirling report.

### HOW DOES IT AFFECT YOU?

- WorkChoices specifically permits state long-service leave legislation to continue, despite excluding a range of other state industrial legislation.
- While this case was decided under the pre-WorkChoices legislation, it remains lawful for an employer to enter into a workplace agreement that specifically excludes long-service leave.

### BACKGROUND

Compass Group (Australia) Pty Ltd employed Mr Bartram for 16 years as a casual under a certified agreement. Mr Bartram contended he was entitled to payment in lieu of long-service leave in accordance with the *Victorian Long Service Leave Act 1992* (the **state Act**).

The certified agreement applied to both permanent and casual employees at Compass and provided that 'long service leave entitlements shall be those provided in the Long Service Leave (Oil Drilling Rig Workers and Offshore Catering Workers) Award, 1985'. This award specifically excluded casuals from its scope.

At the initial hearing of the matter, the Magistrates Court of Victoria found that, since casual employees were excluded by the award, there was no intention in the award to exclude casuals from any statutory right to long-service leave. As such, long-service leave for casuals was to be governed by the state Act and Mr Bartram was entitled to payment in lieu.

## DECISION

Compass appealed the decision to the Federal Court,<sup>5</sup> arguing that the certified agreement that applied to Mr Bartram's employment did in fact 'cover the field' and exclude the casual entitlement. If the certified agreement covered the field, the state Act would not apply.

The Full Court of the Federal Court accepted that the intention of the award was to cover the field so far as long-service leave was concerned. Accordingly, the court determined that the certified agreement prevailed over the inconsistent state Act, meaning Mr Bartram was not entitled to long-service leave.

## WHEN WILL SAFETY CONCERNS NOT JUSTIFY PROTECTED ACTION?

Industrial action taken in response to general safety concerns is not always lawful. Senior Associate John Naughton reports.

### HOW DOES IT AFFECT YOU?

- The case shows that for action to be lawful, it must be based on reasonable concern about an imminent risk to health and safety, and the onus falls on the employees.
- It will not be sufficient for employees to rely on safety concerns unless they are specific, reasonable and present an imminent risk.

5. *Compass Group (Australia) Pty Ltd v Bartram* [2007] FCAFC 26 (9 March 2007).

## ACT PROVISIONS

Industrial action is unlawful. The *Workplace Relations Act 1996* (Cth) (the **Act**) defines industrial action to exclude action taken by an employee that is based on a reasonable concern by the employee about an imminent risk to his or her health or safety. However, it is up to the person claiming there is a health and safety risk to demonstrate that their concern is reasonable and that the risk to health and safety is imminent.

## 'IMMINENT RISK'

In the case of *Total Marine Services Pty Ltd v The Maritime Union of Australia*<sup>6</sup>, Total Marine Services Pty Ltd applied for orders requiring the crew of the *Veritas Voyager* to cease industrial action after the crew advised that it would not allow the ship to sail until their concerns about electrical issues had been addressed.

On behalf of the crew, the Maritime Union of Australia (**MUA**) argued that the employees were refusing to work for safety reasons, but was unable to convince the Australian Industrial Relations Commission that the concerns were reasonable because:

- the employees remained on the vessel notwithstanding their stated concerns about electrical incidents on board;
- officers of the Australian Maritime Safety Authority and MUA officials had agreed on an approach to the electrical problems, which involved Total Marine recruiting two additional, qualified electricians; and
- a ship surveyor and master mariner had been engaged by Total Marine to review the electrical problems and had determined that the vessel was safe to sail.

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6. Australian Industrial Relations Commission per Commissioner Williams, 7 February 2007, PR975953.



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