



WORKPLACE RELATIONS & SAFETY

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INTRODUCTION

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Federal industrial relations changes brought forward

Some of the Federal Government's *Forward with Fairness* amendments to the *Workplace Relations Act 1996 (Cth) (Act)*, scheduled to take effect from 1 January 2010, have been brought forward amidst criticism the Federal Government is not acting fast enough to "tear up" *Work Choices*.

Fair Work Australia

The central government agency created to administer the Federal Government's new workplace relations system is Fair Work Australia.

There are currently seven government agencies in the workplace relations system. It is intended that by 1 January 2010 the Australian Industrial Relations Commission (AIRC), Australian Industrial Registry, Australian Fair Pay Commission, Australian Fair Pay Commission Secretariat, Workplace Authority, Workplace Ombudsman and the Australian Building and Construction Commission, will be replaced by Fair Work Australia - a "one stop shop" to be granted investigative and arbitral power.

This new independent umpire will move away from adversarial and legalistic processes in favour of less formal, user friendly processes and services. It is also intended that specialist Fair Work Divisions will be created in the Federal Court and the Federal Magistrate's Court. The small claims mechanism in the Federal Magistrate's Court will also be increased from \$10,000.00 to \$20,000.00.

The Substantive Bill

The bulk of the Federal Government's reforms will be outlined in a Substantive Bill which will be released in the coming months and some proposed reforms to the Act, relating to enterprise bargaining and unfair dismissal (set out below), are now planned to take effect from 1 July 2009. The remaining changes (including

the new National Employment Standards and the modern award system) are set to commence on 1 January 2010.

Enterprise agreements

The proposed reforms to the Act will enable employers and employees to bargain over a wider range of matters in relation to enterprise agreements than are currently permitted under the Act. The concept of "prohibited content" under *Work Choices* will be removed, and the focus will be shifted to whether the matters relate to the direct employment relationship between the employer and the employees and, where relevant, the Union(s) involved.

Similar to the current system, enterprise agreements will need to be approved by Fair Work Australia before commencing operation. Fair Work Australia will apply the "Better Off Overall Test" (yet another name for the no-disadvantage test) to ensure each employee covered by the agreement is better off overall in comparison to the relevant Modern Award.

Parties to an agreement will not be able to take industrial action in relation to matters that do not pertain to the employment relationship covered by the agreement, further, matters not relating to the employment relationship will not be enforceable.

Bargaining

There is currently no requirement under the Act to bargain in "good faith". The Federal Government intends to amend the Act by imposing the following obligations on parties involved in collective bargaining:

- attend and participate in meetings at reasonable times;

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- disclose relevant information in a timely manner;
- respond to proposals made by a party in a timely fashion;
- give genuine consideration to proposals of other parties; and
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

The Federal Government is quick to note that these good faith bargaining requirements will not force parties to make concessions or sign up to agreements where they do not agree to their terms.

Where an employer refuses to bargain, and there is a majority of employees who wish to negotiate an enterprise agreement, those employees may approach Fair Work Australia. If Fair Work Australia determines that there is majority employee support for pursuing an enterprise agreement, the employer will be required to bargain collectively with those employees.

Fair Work Australia will also be able to make orders to ensure the “integrity and fairness of the bargaining process” in situations where:

- employees refuse to respond to an employer’s proposal about new work methods to increase productivity;
- a party pursues a claim that could not lawfully be included in the agreement (such as one which does not comply with the National Employment Standards);
- bargaining representatives are being prevented from consulting with employees;
- employers refuse to communicate with bargaining representatives; and
- the group of employees to whom the agreement would apply has been unfairly selected.

There is also a proposal for multi-employer bargaining in a low paid bargaining stream. Here it is intended that a bargaining representative may apply to Fair Work Australia to bargain with a specified list of employers on behalf of low paid employees. This proposal is designed to assist those employees who historically have not had the skills, resources nor means to access collective bargaining.

Industrial Action will not be “protected” without the approval by a secret ballot of a majority of employees and the provision of 72 hours notice. It is intended that the Australian Electoral Commission will conduct any such ballot.

Importantly there will be no compulsory arbitration to resolve bargaining disputes. However, arbitration may be ordered by Fair Work Australia if the industrial action is protracted and causing significant harm to the Australian economy.

Unfair dismissal and the fair dismissal code

Under *Work Choices*, the ability of many employees to access unfair dismissal rights has been severely restricted if not removed altogether. The Federal Government is proposing substantial changes to the unfair dismissal system, including new special arrangements for small businesses. The proposed special arrangements for small businesses, which are those with fewer than 15 employees, include:

- lengthening the qualifying period from 6 to 12 months, during which time employees cannot make an unfair dismissal claim; and
- the creation of a fair dismissal code which, if followed by small business employers, will ensure a dismissal is not unfair.

Under the six-paragraph fair dismissal code, multiple warnings will not be required, and if a warning is to be issued,

it is desirable for it to be in writing. A single warning and a reasonable opportunity for the employee to rectify the problem before he/she is dismissed will satisfy the code.

The Code does not abrogate employers’ common law rights to summarily dismiss employees for serious misconduct. However, a summary dismissal will be deemed “fair” if the employer reports the conduct to the police (where relevant) or if the employer had reasonable grounds for believing the conduct took place.

Larger employers, with more than 15 employees, will not be able to rely on the code and their employees will be entitled to make an unfair dismissal claim if they have been employed by the employer for more than 6 months.

Conclusion

The Substantive Bill is due to be released in October 2008, with the abovementioned reforms to commence on 1 July 2009.

If you have any queries in relation to the proposed amendments, please contact a member of HWL Ebsworth’s Workplace Relations and Safety Team.

Employer unlawfully discriminated against a new worker after learning she was pregnant

Recently the South Australia State Administrative Tribunal considered whether a new worker was unlawfully discriminated by the employer when her probation period was doubled after finding out she was pregnant (*Bukilic and Lifenet (WA) Financial Advice Pty Ltd [2008] WASAT 213*).

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Ms Bukilic, who was 3 months pregnant, attended her first day of work with LifeNet (WA) Financial Advice Pty Ltd as an administrative assistant. The practice manager handed a letter setting out the conditions of employment to her where she was subject to a three months probation period. The practice manager then noticed Ms Bukilic was pregnant.

On the second day of work, Ms Bukilic was asked to return the first letter of employment and received a new letter with a probation period of six months. On the third day, Ms Bukilic left the job. Later, she alleged unlawful discrimination and constructive dismissal. The Equal Opportunity Commission made an application to the Western Australia State Administrative Tribunal on her behalf.

Ms Bukilic said that the practice manager's conduct towards her changed, further, the probation period was doubled after the manager learnt about the pregnancy. Ms Bukilic further argued that she was constructively dismissed by the company.

The practice manager said that the first letter was a mistake as administrative staff at LifeNet are offered a six months probation. Ms Bukilic said that the first letter was read out aloud to her, and the practice manager did not correct the error.

The tribunal accepted the worker's evidence regarding unlawful discrimination, and held that the manager would not have treated a person who was not pregnant in the same way as increasing the probation period was a detriment to the worker. The tribunal ordered the company to pay \$1,000 for hurt and humiliation suffered by Ms Bukilic.

The tribunal accepted the manager's evidence that she would have continued to employ Ms Bukilic. It rejected the claim of constructive dismissal because the

manager's treatment of Ms Bukilic did not leave her with no option but to resign from the job. The tribunal held that the company is not liable to pay for any lost income resulting from the resignation.

This case highlights the need for employers to act carefully and with sensitivity when dealing with pregnant employees. This is a delicate area; while it is a legitimate for an employer to consider

a candidate's pregnancy when recruiting, it will be unlawful to discriminate against that candidate if a decision is made to employ. Equally it would be unlawful to discriminate against a candidate on the basis of potential pregnancy. Employers need to be aware of these issues and always seek advice.

Workplace Relations and Safety Knowledge Program

Management of ill and injured employees

HWL Ebsworth Lawyers is hosting the first of four workshops in their Workplace Relations and Safety Knowledge Program.

This interactive session will examine the complex problems that often arise with injury and illness in the workplace. Participants will learn:

- the interaction between workers compensation, OHS, privacy and discrimination laws;
- how to identify minimise risks involved in terminating the employment of injured workers;
- the legal risks involved in managing ill and injured workers from recruitment and beyond;
- what "inherent requirements" of a position means and its importance;
- how to use, obtain and request medical reports;
- how to determine whether an employee is fit for work and the impact this has on employment laws.

Who should attend?

This seminar is designed for HR managers and professionals and anyone who is involved in the management of people in the workplace.

Contact on Tonia Vitali on (02) 9334 8527 or tonia.vitali@hwlebsworth.com.au for enquiries.

To register, visit hwlebsworth.com.au



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Good faith in employment

There are at least 392,850 reasons why employers should be concerned about implied duties in employment.

It is well settled that the law will imply into contracts terms which the parties have not expressly agreed. Such is the case with contracts of employment.

A decision of the NSW Court of Appeal (*Russell v Trustee of the Roman Catholic Church*) on 8 September 2008 recognised that there is an implied term of good faith, mutual trust and confidence in an employment contract, however, expressed some doubts about the scope of the doctrine.¹

Mr Russell had complained that St Marys Cathedral breached its duties to him by terminating his contract of employment in consequence of an investigation relating to alleged sexual assault with respect to children. The Industrial Commission of New South Wales reinstated his employment and compensated Mr Russell for his loss of income. Mr Russell complained to the Supreme Court that even though his employment was reinstated and his lost wages made up, he was entitled to damages in consequence of the breach of the implied duty of good faith.

This decision is the latest in a series of cases that have considered the extent to which the law will impose obligations upon parties to an employment contract that they have not otherwise expressly agreed. The content of the duty appears to be an implied term of good faith, which obliges the parties to act only with reasonable and proper cause and not in a manner calculated to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. As with all obligations in contract, the starting point is that those obligations are mutual. That is, they are owed by each party to the contract. In

Russell's case, the Judge at first instant, Mr Justice Rothman considered the content of the duty as obliging each of the employer and employee to act "*honestly and reasonably; with prudence, caution and diligence, and with 'due care to avoid or minimise adverse consequences' to the other party that are inconsistent with the agreed common purpose and expectation of the parties to the contract*".²

The competing principle is however that parties to a contract, whilst they may be obliged as a matter of implied law to so conduct themselves, maintain a "*capacity to exercise their rights in their own interests*".³

In *Russell's* case the Court of Appeal pondered the scope of the implied duties adopting the recognition "*that an employer may act with reasonable and proper cause to pursue its own interest, whether or not they are adverse to the employee and may terminate the employment at any time without cause on giving notice*". In such circumstances, the Court noted that such a permission would "*cast some uncertainty on the scope and extent of the implied duties*".⁴

Whilst the Court of Appeal was prepared to recognise a duty of good faith subsisted, it was not prepared to find on the facts presented by Mr Russell that that duty had been breached and to the extent that any breach of that duty had led to the termination of Mr Russell's contract of employment, that grievance had been remedied by reinstatement and the making good of lost wages.

Similarly, in the case of *McDonald v State of South Australia* the Supreme Court of South Australia⁵ on 21 May 2008 awarded damages to a South Australian teacher who complained that the common law duty of trust and confidence had been breached when Mr McDonald, a teacher, was obliged to undertake tasks "*much*

different and more onerous" than those for which he was employed. Mr McDonald claimed to have been overworked, harassed and victimised by the South Australian Department of Education because, in addition to his workload as a teacher, he was obliged to juggle an additional Business Studies teaching load and the management of his school's computer network, in circumstances where he had no qualification to discharge that task. Further, when he complained, the evidence suggested that he was demeaned, if not harassed and victimised, it seems in breach of the Department's own grievance procedures. He was awarded \$392,850.

Historically, the obligations of trust and confidence implied by law have been relied upon by employers seeking to complain that an employee has acted contrary to the obligations. An employee may have taken advantage of confidential information or acted in conflict with the employer's interests or had otherwise misbehaved in employment in circumstances where the employment contract itself contained no *express* provisions outlawing such conduct. There is a long history in the case law where employers have relied on the implied term to sanction disciplines against employees including termination of employment. The implied term doctrines have survived the introduction of the so called unfair dismissal jurisdiction

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¹ *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2008] NSWCA 217

² *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC at 118

³ *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC at 118

⁴ *Russell* [2008] NSWCA 229

⁵ *McDonald v State of Australia* [2008] SASC 134



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afforded to industrial tribunals. In other words, employers in unfair dismissal (reinstatement) proceedings often rely on the common law duty to justify decisions leading to the termination of an employee's contract.

As the case law demonstrate, the mutuality principle has been similarly relied upon by employees claiming that the same duty is owed by the employer to the employee.

There is little doubt that the duty exists even though the most recent cases ponder the question as to the extent of that duty. Our prediction is these doctrines will develop and not be abandoned. The duty obliges employers, whilst maintaining an entitlement to exercise the employer's own rights in its own interests to have proper regard to the competing rights of employees. The duty obliges the employer to treat the employee with fairness and equity. A failure to do so may well ground a claim, including a claim for money compensation, based upon a breach of the implied obligations.

Increase in industrial activity

The last few months have seen a marked increase in the level of industrial activity and the ferocity of the type of industrial action taken by Unions and their members.

The first and most obvious reason for this upsurge in activity is that we are presently in a bargaining season across a large number of industries, which traditionally have high levels of Union membership and industrial activity.

Prior to the introduction of Work Choices, most Unions and industries hurried to get pre-reform Enterprise Agreements

negotiated and registered before Work Choices kicked in on 27 March 2006. The corollary of that, is that two and a half years on, these agreements have either expired or are close to expiration, thus we are in bargaining periods across those Government and Non-Government sectors.

Recent figures from the Australian Bureau of Statistics indicate that time lost to industrial action and the number of disputes that employees are involved in is back to pre Work Choice levels. Is there another reason for the upsurge in industrial activity? Some commentators suggest that the new Government and the promise of new legislation has led Unions and their members to act with more confidence and militancy in pursuing their wage setting goals. While this may hold some water, it is clear from the *Forward with Fairness* details that have been released, that laws covering industrial action will be very similar to the laws currently in place.

Recently we have seen a protracted wage dispute in Qantas among the maintenance and engineering workforce. This shows little signs of abating over the coming months. In addition, a number of New South Wales Government instrumentalities have been imposing work bans and going on strike in an attempt to break the Governments commitment to low wage increases across the board.

For example, in the last few weeks we have seen disputes arise amongst the Ambulance service, the Fire fighters and of course in our schools with the Teachers Federation. Last month, around five hundred workers from Fairfax Media went on strike in order to further their claims. The company and the Unions ended up agreeing to pay rises of 3.9% to 4.3% per year to journalists which was a management offer made during the stoppage in order to get people back to work.

One of the more interesting industrial disputes has been the saga unfolding in a division of Telstra. Clearly frustrated with the process of bargaining with the CPSU, Telstra pursued an aggressive IR strategy to achieve a Non-Union Agreement across one division of its operation.

In doing so, a number of interesting legal arguments were debated in both the Federal Court and the Australian Industrial Relations Commission. As is often the case, the union movement including the CPSU, the CEPU, the APESMA and the ACTU pursued a campaign involving publishing material, flyers and press releases in order to influence employees voting in the non-union ballot.

This is across a division of Telstra which had traditionally low levels of union membership. Some estimate them to be as low as 20%. Telstra took the Unions to the Federal Court seeking an injunction on the basis that the Unions had breached Section 401(c) of the *Workplace Relations Act* by making false and or misleading statements in a bid to convince the employees to vote down the non-union deal. In particular, Telstra argued that the Unions had made statements proposing the Agreements would:

1. cut workers pay;
2. deprive workers of their right to Union representation or support; and
3. prevent employees from enforcing them.

The Federal Court dismissed the Application and upheld the Unions argument that in fact these matters did have substance and Telstra's own documents supported the conclusions, which the Unions had drawn in their material. The final act was played out last week, when Telstra employees voted to reject the company's non-union Agreement.



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