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Workplace Relations Reform

On 26 May 2005, Prime Minister John Howard announced the key features of the Government's workplace relations reform package.

It is important that all employers be alert to the implications for their enterprises of the Government's announcement. The changes will for the first time create a national, or unified, workplace relations system. They will further downplay the significance of industry awards and promote even more the use of enterprise level individual and collective agreements. They will greatly reduce the access of employees to unfair dismissal laws.

Much of the detail is yet to be announced and, perhaps, negotiated with State Governments. A Bill is unlikely to be tabled until August or September 2005 and unlikely to become law before the end of 2005. Nevertheless, the main features of what will become law are known. For more details see the June 2005 *Industrial Relations and Employment Client Alert,* available on our website, bdw.com under publications.

This edition

In this edition of the *IR Bulletin* we look at recent decisions dealing with a variety of topics including selection for redundancy, post employment anti-poaching restraints and the enforcement of contractual arrangements not included in industrial instruments.

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Selection for Redundancy – A Reasonable Process

Employers looking to undertake a process to select employees for redundancy may confront a range of issues and challenges. In developing a redundancy selection process employers need to ensure that the process is fair and reasonable. The process should ideally provide for as objective an assessment as possible, and may need to provide an opportunity for employee input.

Two recent unfair dismissal cases in the Australian Industrial Relations Commission, *Geetha Rajaratnam v Australian Nuclear Science and Technology Organisation (ANSTO)* (21 February 2005, PR946907) and *Paper Australia Pty Limited v Stephen Day* (1 February 2005, PR954801) highlight the importance of an appropriate selection process, and the challenges which employers may face.

The unfair dismissal provisions of the *Workplace Relations Act 1996* relevantly require that an employer has a valid reason for the termination, that the employee be notified of the reason and, to the extent that reason relates to the capacity or conduct of the employee, the employee has an opportunity to respond.

In both *Geetha* and *Paper Australia* the Commission accepted that the need to reduce labour was a valid reason for the termination of employment. The determining issue in both cases was the procedural approach of the employer to the selection of employees for redundancy.

Geetha

In *Geetha*, ANSTO, due to reduced government funding and increases in wages, had to reduce its staff levels. Notwithstanding a valid reason for the termination of employment, Vice President Lawler still found that the employee had been unfairly dismissed and ordered ANSTO to reinstate the employee.

In allocating staff to particular projects, ANSTO had an annual "bidding" process, which involved managers bidding for those employees they wanted to work on their projects. ANSTO relied on this bidding process to determine which employees would be selected for redundancy. That is, those employees not successful in the bidding process would be made redundant. Vice President Lawler found that the staff bidding process used by ANSTO did not provide objective redundancy selection criteria by which the skills and performance of individual staff members could be judged in a consistent manner. As a result, the process operated unfairly.

Paper Australia

In *Paper Australia*, a Full Bench upheld an appeal that an employee made redundant after 17 years of service had not been unfairly dismissed.

The Full Bench on appeal accepted that the employee had been dismissed for operational reasons, and not due to an assessment of the employee's capacity in his former position which had ceased to exist. Whilst the employee argued that he should have been considered for certain alternative positions (which involved either promotions for the employee or a significant demotion), the Commission found that it was unlikely the outcome for the employee would have been any different when considering those positions which were promotions, and it was not unreasonable for the employer not to consider the significant demotion.

Lessons for employers

- **In selecting employees for redundancy, employers must comply with any applicable industrial instrument or company policy.**
- **Redundancy selection processes must be fair and reasonable and be as objective as possible. Where conclusions are being made about an employee's capacity or conduct, the employee should be given an opportunity to respond to the matters which have been taken into account or to add any other relevant information.**
- **Options to mitigate the effect of the termination, such as the availability of alternative positions, need to be considered.**

Implications

While each case will turn on its facts, these two cases confirm that in redundancy situations generally an employer should be able to establish that there was a valid reason for the termination of employment. However, a redundancy selection process should be carefully considered to ensure it will withstand the scrutiny of the Commission.

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WAIRC can Exercise Powers Despite Employees being Covered by AWAs

The Full Bench of the Western Australian Industrial Relations Commission has determined it has jurisdiction to make an enterprise order under the *Industrial Relations Act 1979* (WA) where employees are covered by Australian workplace agreements (AWAs): *Construction, Forestry, Mining and Energy Union of Workers v Hanssen Pty Ltd* [2005] WAIRC 00418. This decision follows a recent decision of the Industrial Relations Commission of New South Wales which determined that an inconsistency did not automatically arise between its conciliation and arbitration powers under the *Industrial Relations Act 1996* (NSW) and AWAs under the *Workplace Relations Act 1996*.

Background

Section 42I of the *Industrial Relations Act 1979* (WA) allows parties to seek enterprise orders in circumstances where good faith bargaining between parties for an industrial agreement has failed.

The section requires that there be no reasonable prospect of agreement being reached between the parties before an application for an enterprise order may be made.

An enterprise order can include any provision which may otherwise be provided for in an award or industrial agreement. The Western Australian Commission must, however, determine whether such an order is fair and reasonable in the circumstances of a particular case.

In this case, the CFMEU made an application to the Western Australian Commission for an enterprise order against Hanssen Pty Ltd, with whom the Union had been involved in unsuccessful negotiations for an industrial agreement.

Hanssen sought that the application for an enterprise order by the CFMEU be dismissed on the ground that the Western Australian Commission was precluded by section 170VQ of the *Workplace Relations Act 1996* from making an enterprise order because Hanssen's entire workforce was covered by AWAs. Section 170VQ(4) states that during its period of operation, an AWA operates to the exclusion of any State award or agreement that would otherwise apply to an employee's employment. The Act defines a "State award" as any award, order, decision or determination of a State industrial authority.

Decision

At first instance, Commissioner Gregor held that an enterprise order fell within the definition of "State award" as set out in the *Workplace Relations Act*. He concluded that because of section 170VQ, the Western Australian Commission had no jurisdiction to make an enterprise order.

On appeal, a Full Bench of the Commission upheld the appeal by the CFMEU, suspended Commissioner Gregor's decision and remitted the matter to the Commissioner for determination on the merits.

The Full Bench agreed that an enterprise order was a "State award" and confirmed that the effect of section 170VQ is that an enterprise order does not and cannot operate whilst an AWA is operating. However, the Bench held that section 170VQ does not prohibit the jurisdiction and power of the Western Australian Commission to make an enterprise order. Accordingly, an enterprise order can be made even though AWAs are in operation and the order remains valid but inoperative.

Whether an enterprise order would in fact be made by the Western Australian Commission is a matter of merit in the proper exercise of the Commission's discretion.

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Lessons for employers

- **Employers should be aware that even when employees are covered by AWAs, State industrial tribunals may still be able to exercise their powers.**
- **The Western Australian Industrial Relations Commission may exercise its power to make an enterprise order, and the NSW Industrial Relations Commission may exercise its conciliation and arbitration dispute resolution powers, to the extent they are not inconsistent with the terms of an AWA.**

New remuneration and compensation caps

New remuneration and compensation caps for the purposes of the unfair dismissal provisions of the *Workplace Relations Act 1996* (Cth) for the 2005-2006 financial year are:

- **The new remuneration cap, effective from 1 July 2005, is $94,900 (up from $90,400 last year).**
- **The new compensation cap, also effective from 1 July 2005, is $47,450 (up from $45,200 last year).**

Disciplining a Discrimination Complainant not Victimisation

The UK Employment Appeals Tribunal (EAT) recently held that disciplining a discrimination complainant for refusing to participate in the employer's investigation into the complaint may not amount to victimisation: *London Metropolitan University (Previously University of North London) v C Henry* [2004] UKEAT (19 November 2004).

Applying the House of Lords decision in *Chief Constable West Yorkshire v Khan* [2001] 4 All ER 834, the EAT found on appeal that a final warning given to a difficult employee, Mr Henry, may not have been done because of complaints he made under the *Race Relations Act 1976* (UK) but rather because of his refusal to cooperate in a non-confrontational way in the employer's investigations.

Complaints

Mr Henry made complaints against his superiors in relation to bullying, refusal of a compassionate leave claim, performance management and institutional racism due to his Afro-Caribbean ethnicity. Mr Henry complained internally to the University which conducted an investigation. Mr Henry deciding that the investigation findings were unsatisfactory and racially-stereotypical, raised the matter with a lawyer friend and notified the Commissioner for Racial Equality. The University attempted to organise discussions with Mr Henry as part of its further investigation. Mr Henry continued to press his complaints but refused to attend meetings with the University's investigating officers. The University demanded that Mr Henry attend such meetings in accordance with his contractual obligations.

The University ultimately issued a written warning to Mr Henry for his refusal to participate in the investigation into his repeated complaints which therefore remained largely unsubstantiated, and were tarnishing the reputation of the University and several of its senior officers. The University also undertook a Performance Review Discussion with Mr Henry for the purpose of discussing work performance and staff development issues.

Victimisation – performance review discussion

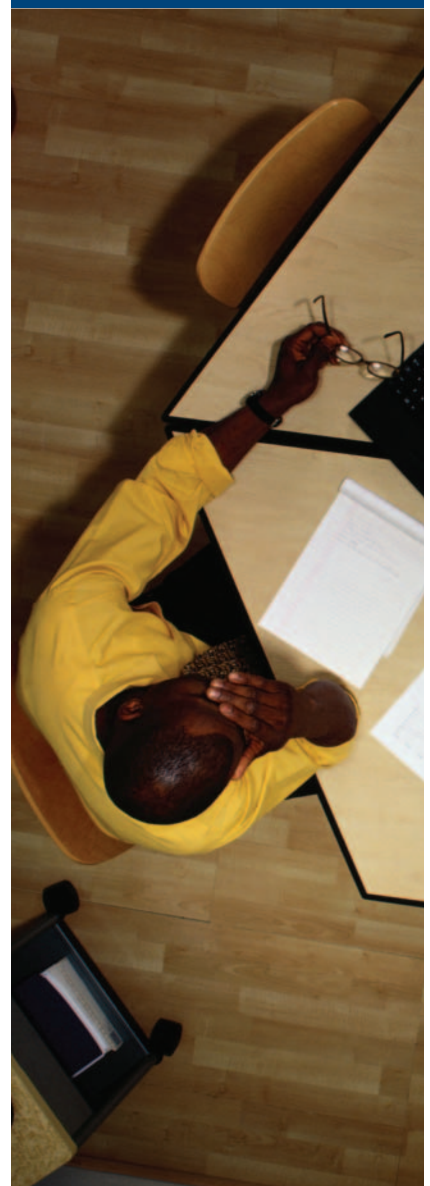
The Employment Tribunal, at first instance, found that Mr Henry had been victimised by being required to attend the Performance Review Discussion as this was requested because he had raised complaints which were protected acts under the relevant legislation.

The EAT on appeal agreed that requiring Mr Henry to attend the Performance Review Discussion was victimisation. He was subjected to less favourable treatment than other employees who were not required to attend the Performance Review Discussion. Further, the Performance Review Discussion was aimed at assessing and developing

The UK Employment Appeals Tribunal recently held that disciplining a discrimination complainant for refusing to participate in the employer's investigation into the complaint may not amount to victimisation.

Lessons for employers

- **Employers have the right to protect their interests by investigating complaints made by employees, including requesting the complainant to provide details of their complaint.**
- **Employees who refuse to participate in an investigation of a complaint may be disciplined. This may not amount to victimisation if the reason for the disciplinary action was not the making of the complaint.**



competencies and skills and was therefore an inappropriate forum to deal with any concerns in relation to Mr Henry's complaints or his refusal to assist in the investigation.

Victimisation – written warning

The Employment Tribunal held that the written warning issued to Mr Henry was because of his complaints and amounted to victimisation.

On appeal, the EAT held the University was entitled to show that it had a non-discriminatory reason for disciplining Mr Henry, which may have arisen from his complaints but was not done to victimise him for making the complaints. The EAT held that to make a finding of victimisation the *Race Relations Act* required a conclusion that the detriment to Mr Henry was *by reason that* he had done the protected acts. This was not a legal question of causation, but a question of fact.

The EAT decided that Mr Henry had been warned for refusing to follow his contractual obligation to assist the investigation, and not for the reason that he had made complaints. The University could reasonably demand that Mr Henry cooperate or desist and then discipline him for failure to comply with a management direction if he continued to refuse to cooperate and also continued to repeat his allegations. The EAT quoting *Khan* stated "employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of discrimination".

Australian perspective

It is generally accepted in Australia that employers may discipline employees for refusal to cooperate in an employer's investigation or to substantiate any complaints. The question of how this interacts with victimisation legislation has not yet been examined in Australia.

The decision of *Khan* has been cited by the minority in the High Court decision *Purvis v NSW (Department of Education and Training*) (2003) 202 ALR 133 as being consistent with the approach of the High Court in other discrimination decisions. The majority effectively agreed on this point.

However, whilst Australian discrimination legislation is similar to the UK, the Australian courts have so far taken the approach that for victimisation to be established an employee's complaint must be a substantial and operative factor in the employer's victimising act. A distinction is drawn between the test applied for acts of discrimination and victimisation.

It is a defence to a victimisation complaint federally and in NSW, South Australia, Western Australia, the ACT and Northern Territory that an allegation is false or not made in good faith.

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Post Employment Anti-Poaching Restraints – How Enforceable Are They?

A recent decision of the New South Wales Supreme Court in *Aussie Home Loans & Anor v X Inc Services Pty Ltd & Ors* [2005] NSWSC 285 highlights the importance of paying attention to the drafting of anti-poaching clauses and how they are incorporated into employment contracts. A failure to do so may mean that a clause cannot be enforced.

When considering whether to make an order to enforce a post-employment restraint or award damages for breach of such a restraint, the courts start from the position that a restraint seeking to protect an employer against all competition is invalid. However, if the restraint goes no further than protecting the employer's legitimate business interests, the restraint may be valid. Examples of legitimate business interests include an employer's interests in its trade secrets, in preventing customers from being solicited or otherwise enticed away from it and in protecting confidential information that an ex-employee may have about the relations between the employer and its current employees.

In *Aussie Home Loans*, anti-poaching restraints in employment contracts were intended to prohibit former employees for a period of 12 months after their employment ended from "soliciting, interfering with or endeavouring to entice away any employee or contractor". Aussie Home Loans' Victorian State Manager, Mr Kolenda, resigned, entered into business in competition with Aussie Home Loans and approached one of Aussie Home Loans' contractors in an attempt to poach the contractor from Aussie Home Loans. Aussie Home Loans sought from the Court an order enforcing the anti-poaching clause.

Enforcement of the restraint

The Court held that the non-solicitation restraint in Mr Kolenda's contract was invalid because it went beyond what was necessary to protect Aussie Home Loans' legitimate business interests. There were three main reasons for this. All were associated with the drafting of the anti-poaching clause in Mr Kolenda's contract.

First, the reference to contractors could extend to contractors engaged after Mr Kolenda had left employment with Aussie Home Loans and about whom Mr Kolenda could not have confidential information. Secondly, the restraint extended to all Aussie Home Loans' contractors, not just those in Victoria with whom Mr Kolenda could be expected to have dealings or for whose supervision Mr Kolenda had responsibility. Thirdly, the 12 month period of the restraint was too long given that the contractors could resign or be dismissed on one week's notice, the competitive and fluid nature of the market for the contractors, and that Mr Kolenda's contract had provided for his resignation or dismissal on only

Lessons for employers

- **Careful consideration should be given to the drafting of post-employment restraints, including anti-poaching clauses, in individual employment contracts.**
- **Using a standard form clause without tailoring it to what is reasonably necessary given the circumstances of an individual employee may render a restraint unenforceable.**
- **A post-employment restraint is not a term or condition of employment, but a post-employment obligation, and should be referred to specifically if it is to be part of an employment contract following a "transfer" to another employer.**

one month's notice. As the restraint was invalid, the Court refused to make an order enforcing it.

Transfer of employment, and the restraint, to a related company

A company related to Aussie Home Loans, AHL Investments, was also involved in this case. AHL was concerned about the potential for former employees of AHL, who went to work for Mr Kolenda, to poach AHL's employees and contractors. The former employees of AHL had originally been employed by Aussie Home Loans under employment contracts that contained the anti-poaching clause set out above. As part of a corporate restructure, the employees were transferred to employment with AHL on the basis that "the terms and conditions of your employment [*with AHL*] will not differ from those you currently have [*with Aussie Home Loans*]." AHL sought from the Court a declaration about the extent of its former employees' obligations under the anti-poaching clause.

The main issue for the Court was whether the anti-poaching clause formed part of the employment contracts of the employees following their transfers to AHL. The Court held that they did not as the anti-poaching clause was not a term and condition of employment, but a post-employment obligation.

The Court said that terms and conditions of employment refer to things that regulate employment, such as an employee's duties, remuneration, hours of work, leave entitlements, superannuation and the way in which employment can be terminated. As a post-employment obligation, the anti-poaching clause would have to have been referred to specifically to be included in the employment contracts with AHL.

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Contract of General Manager Found to be Unfair

The Industrial Relations Commission of New South Wales in Court Session recently ordered a Local Council to pay $143,000 to a former general manager on the basis that his contract of employment was unfair. The contract was considered unfair because it did not provide for adequate notice and failed to provide for fair termination benefits having regard to his performance: *Vincenzo Paparo v Moree Plains Shire Council* [2005] NSWIRComm 4.

Mr Paparo was employed by Moree Plains Shire Council in the position of general manager on 16 November 1998. At the time of his employment, the Council carried a $4 million deficit and Mr Paparo was employed to improve the poor financial position of the Council. The term of his contract of employment was for a period of four years with an ability to extend the contract subject to satisfactory performance.

A number of workplace reforms and management plans were proposed by Mr Paparo and endorsed by the Council to address the poor financial position of the Council. The Council acknowledged the enthusiastic and new approach to management adopted by Mr Paparo and he received a positive appraisal in July 1999.

By June 2000, during the course of implementing workplace reforms, Mr Paparo encountered significant opposition from the union and employees. Emerging factions within the Council also contributed to the growing opposition to Mr Paparo.

By August 2001, the Council realised a surplus of $1 million and Mr Paparo continued to receive mainly positive feedback in relation to his performance. However, the employment of Mr Paparo was suddenly terminated on 19 November 2001 for the alleged reason that he had failed to abide by a Council resolution relating to unauthorised payments of voluntary redundancies to two employees. Mr Paparo was paid an amount equal to three months in lieu of notice. Mr Paparo commenced proceedings alleging that his contract

Lessons for employers

- **Employers should ensure that the termination of an employee's employment is based on reasons which can be supported by evidence.**
- **In NSW in particular, it is important that employers consider the surrounding circumstances relating to a particular employee when assessing the reasonableness of a notice period, to ensure that it is fair.**

was unfair, harsh and unconscionable under section 106 of the *Industrial Relations Act 1996* (NSW).

Findings as to unfairness

The Commission rejected the submission of the Council that the alleged failure by Mr Paparo to abide by a resolution of the Council justified termination upon the giving of three months' notice. That Mr Paparo had engaged in misconduct justifying termination was not substantiated by the Council. The contract was also found to be unfair as the Council had failed to review the performance of Mr Paparo as required by the contract and because it contained a term which provided that the longer the service the shorter the notice period.

Reasonable notice

In considering the reasonableness of the notice of termination, the Commission took into account, among other factors, that Mr Paparo was 51 years of age, his salary of $135,000, his length of service of three years, his re-location to Moree and his unsuccessful attempts to procure further employment. For these reasons, Mr Paparo was awarded an amount equal to 12 months' notice.

Orders

The Commission ordered that Mr Paparo receive a payment in lieu of an additional nine months' notice and a bonus payment of $4,000 taking into account his performance in rectifying the negative financial position of the Council.

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Unfair Dismissal Proceedings – Security for Costs Order

The Australian Industrial Relations Commission ordered a person seeking relief in respect of the termination of her employment to make a payment as security for costs. When the applicant failed to make the payment, her application for relief was dismissed: *Lis v Suncorp Metway Staff Pty Ltd* (3 February 2005, PR955459; 4 March 2005, PR956250).

Facts

Ms Lis was employed by Suncorp Metway Staff Pty Ltd. Her employment was terminated when she was found to have sent inappropriate emails to colleagues. After several directions hearings, Suncorp made an application that Ms Lis be ordered to make a payment as security for costs under rule 47A of the Australian Industrial Relations Commission Rules. Rule 47A gives the Commission the power to make an order for security for costs.

Considerations

Commissioner Richards granted Suncorp's application and ordered Ms Lis to make a payment for security for costs. Factors taken into account by Commissioner Richards in making the order included:

- Ms Lis failed to demonstrate that she had the capacity to meet any costs order that might be made against her;
- Ms Lis' impecuniosity was not caused by Suncorp;
- Suncorp's application was not motivated by a desire to delay the substantive proceedings;
- the evidentiary foundation of Ms Lis' claims were found wanting;
- Ms Lis' substantive application for relief relied heavily on evidence she may be able to adduce during cross examination;
- there were no developed submissions which would suggest that Ms Lis had a sustainable case; and
- Ms Lis was not legally represented. An order for costs would not affect her ability to proceed with the application.

Outcome

Commissioner Richards ordered that Ms Lis pay $7,350 to the Collector of Public Monies at the Commission within 28 days. He further ordered that if the payment was not made within this time, the proceedings would be dismissed. When Ms Lis did not make the payment, the proceedings against Suncorp were dismissed.

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Lessons for employers

- **The Australian Industrial Relations Commission has discretion to order a person seeking relief in respect of the termination of his or her employment to make a payment as security for costs.**
- **Whether an order under rule 47A will be made will depend on all the facts and circumstances. Given that costs orders do not usually follow in Commission proceedings, one expects that the circumstances in which the Commission will exercise its discretion to make an order under rule 47A may be limited.**

Implying Severance Clauses in Contracts of Employment

A Full Bench of the Western Australian Industrial Relations Commission has found that an employer was contractually obliged to extend to a managerial employee the same quantum of severance pay that was available to its production employees under an enterprise bargaining agreement: *Richardson Pacific Ltd v Deborah Anne Miller-Smith* [2005] WAIRC 000537.

Facts

The employee was employed by Richardson Pacific Ltd (RPL) from 1988 in various positions, and ultimately as the WA State Manager. There was no written employment agreement. The employee was dismissed in May 2003 after her position was made redundant following the purchase of shares and assumption of managerial control of shares of RPL by the Locker Group in April 2003.

The final entitlements paid to the employee included a severance payment of two weeks pay for every year of service in accordance with a Locker Group policy which had not been communicated to employees. The employee claimed that she was entitled to the same quantum of severance pay as RPL's production employees – 3.5 weeks for every year of service.

Decision

At first instance, the Western Australian Commission found that the RPL severance pay entitlement was an implied term of the employee's contract of employment on the basis of past practice. The employer appealed on a number of grounds, including that the Commissioner erred in finding that the implied term was necessary for the reasonable or effective operation of the contract.

On appeal, the Full Bench of the Western Australian Commission found that the severance pay entitlement was an express term of the employee's contract of employment, on the basis that:

- there was no written contract of employment in relation to the employee's position;
- several senior employees had advised the employee that the term applied to non-production staff; and
- the employer's records indicated that severance payments calculated in accordance with the RPL severance pay standard, had been made to every non-production employee since 1991.

In considering whether the RPL severance pay term should be implied, the Full Bench followed High Court authority that a term will only be implied in a contract if the term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances. The Full Bench concluded that both the employee and the employer saw the severance pay clause as obvious and necessary.

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Lessons for employers

- **In the absence of an express entitlement in a contract of employment, an entitlement may still exist either expressly, or by way of implication, where an employer has a long-term practice of providing that entitlement in accordance with established criteria. When considering purchasing a business, consideration should be given to the employer's past practices, as well as any written contracts and policies.**
- **Contracts of employment should wherever possible be reduced to writing. While written contracts do not need to be comprehensive, they should refer to the employer's policies as varied from time to time and matters not dealt with in the contract should be contained in a written policy that is known and understood by employees and followed by the employer. Employers should ensure that employees are notified of any variations to policies.**

Enforcing Contractual Arrangements not Included in Industrial Instruments

Do your employment arrangements rely on training or other contracts which are not found in the awards, collective agreements or Australian workplace agreements which apply to your workforce? You may need to consider whether you can enforce those contracts following a recent decision of the Federal Court.

In *McLennan v Surveillance Australia* [2005] FCAFC 46 the Full Court of the Federal Court dealt with a training-bond agreement under which pilots would agree to receive training and be bound to repay training costs if they resigned their employment within a period after the training. The Court found that the industrial instrument (an Australian workplace agreement) dealt comprehensively with the issue of training. This meant that any subsequent agreement about training which imposed a further burden on the employee (such as the training-bond agreement) would conflict with the AWA.

The Court ruled that for the employer to be able to enforce the training bond to the employee's detriment, it was necessary that the provisions be implemented by way of a variation to the AWA. This served the statutory scheme because a variation under the *Workplace Relations Act 1996* would provide the opportunity to assess whether the AWA, as varied, satisfied the no-disadvantage test.

A similar principle was applied, but with a different result, in *AMWU v Nestle Australia* [2005] FCA 488. In that case, the Federal Court ruled that an employer and an employee are free to enter into a contract which does not detract from the industrial conditions set out in applicable industrial agreements. In the *Nestle* case, the company offered employment subject to the prospective employee passing a medical examination. The AMWU claimed that the imposition of this requirement was inconsistent with the no extra claims provisions in the Agreement.

The Court ruled against the AMWU argument and found no inconsistency. Accordingly Nestle was free to enforce its medical examination requirement as a contractual provision.

Lessons for employers

- **Contractual employment arrangements which operate alongside an applicable industrial instrument need to be checked to ensure they do not seek to override the industrial instruments, whether award, collective agreement or AWA.**
- **Where there is a conflict, employers may need to seek a variation to the industrial instrument in order to permit the full operation of those arrangements.**

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Psychiatric Injury as a Consequence of Work – Reasonably Foreseeable?

The High Court has held that an employer did not breach its duty of care to an employee who claimed that she developed a psychiatric injury as a result of the employer's failure to provide a safe system of work: *Koehler v Cerebos (Australia) Pty Ltd* [2005] HCA 15, 6 April 2005.

Facts

The appellant, Ms Koehler, was employed by Cerebos (Australia) Ltd as a merchandiser setting up supermarket displays on a three day per week basis.

Ms Koehler's letter of appointment set out such matters as hours of work and salary structure, but was scant on details in respect of the duties she was expected to perform. When she commenced work on 29 April 1996, she was provided with a "territory listing", which listed the number of stores she was required to visit. She immediately informed the supervisor that there was "no way" that she would be able to do it within the hours she was engaged. The supervisor suggested that she try it for one month.

In the next six months, Ms Koehler complained both orally and in writing to management that the job was too big for three days and that she was working more than eight hour days, although she did not specifically state that the job was affecting her health. She suggested to management ways of solving the problem, which included reducing the number of stores on the list or increasing her days of work. The employer did not act upon any of these suggestions.

In October 1996, Ms Koehler attended a doctor complaining of physical aches and pains which she thought were caused by the demands of her job (she was required to lifts cartons in the course of her employment). By January 1997, Ms Koehler had been diagnosed with a psycho-physical disorder which resulted in pain, anxiety and depression.

Claims

Ms Koehler brought an action claiming that Cerebos:

- had been negligent and had breached its common law duty to provide a safe system of work;
- had breached an implied term of the employment contract that it would provide a safe system of work; and
- had breached the statutory duty owed under the *Occupational Health and Safety Act 1984* (WA).

High Court findings

The High Court ruled against the claim on the basis that Cerebos could not have reasonably foreseen that Ms Koehler was exposed to a risk of psychiatric injury as a consequence of her work.

In the absence of external signs of distress or injury, a reasonable person in the position of the employer could not have foreseen that Ms Koehler was exposed to a risk of injury as a consequence of her work. While the complaints about the workload might have suggested that some action could be taken to avoid any industrial dispute, the nature of Ms Koehler's complaints was not sufficient to alert a reasonable employer to the possibility of injury.

The Court stated:

> "It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work."

The Court indicated that it was not inclined in a psychiatric injury case to look at industry or external standards to consider concepts such as overwork or excessive work, and that as long as it was within the law, parties could agree for an employee to perform work which might be of a greater amount or for longer periods than any industry standard prescribed.

Essentially, the High Court reinforced that parties are free to agree about the work that one will perform for the other, and to interfere with such agreements on the basis of the common law of negligence would be a significant step.

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Lessons for employers

- **It is not reasonable to expect employers to foresee that employees who complain about their workload will develop a psychiatric injury or illness.**
- **Employers and employees are free to agree in an employment contract about the work that one will perform for the other.**
- **An employer will not be liable for breaching its duty of care if the employee is performing work in accordance with the agreed terms of an employment contract and those terms are compliant with relevant legislation.**

Long Service Leave Entitlements for Casual Employees

A Victorian Supreme Court decision, coupled with the introduction of the *Long Service Leave Act (Amendment) 2005* (Vic), has brought Victorian long service leave entitlements for casual employees into focus: *Melbourne Cricket Club v Francis Clohesy* [2005] VSC 29.

Decision

Mr Clohesy had been employed by the MCC for 15 years as a casual employee. He worked as an "events person". Casual employees obtain shifts by filling out an appointment sheet at the beginning of each season to indicate availability. Events personnel would then be given details as to when they would be required to work based on that information.

At the relevant time, the definition of "employee" in section 59 of the *Long Service Leave Act 1992* (Vic) was general and did not specifically include casual employees. At first instance, the Magistrate held that Mr Clohesy's 15 years of employment with the MCC was sufficient to constitute "continuous employment" under section 56 the Act and Mr Clohesy was therefore entitled to long service leave entitlements.

The Magistrate's decision was subject to an appeal to the Supreme Court of Victoria. The appeal was upheld. Justice Dodds-Streeton of the Supreme Court ruled that the Magistrate should have ruled the other way in conformity with an earlier decision referred to as *Ex parte Kingston*. The key point was that Mr Chohesy had not been continuously employed by the Club.

Justice Dodds-Streeton stated:

> "In my opinion, the broad *ratio decidendi of Ex Parte Kingston* is that continuous employment within the terms of s 56 of the Act requires a continuous contract imposing an obligation on the employer to offer, and on the employee to render, employment. The learned Magistrate was bound to apply that ratio."

A series of separate casual engagements did not meet this description.

Long Service Leave (Amendment) Act 2005

In a recently published paper, the Victorian Government recognised the increasing "casualisation" of the workforce and stated a need to improve entitlements available to casual employees. It has also recognised the need to bring provisions of the *Long Service Act 1992* concerning casual employees into line with those applicable in other States and Territories. Long service leave legislation in all other States and Territories makes specific reference to the long service leave entitlement of casual employees.

Lessons for employers

- **Victorian employers should be aware of the changes to the long service leave legislation and that as a result casual employees may be eligible for long service leave.**

An Act to amend the *Long Service Leave Act 1992* was assented to on 31 May 2005 and commences operation on 1 January 2006. The Act has been amended so that:

- "employee" includes a casual or seasonal employee;
- "continuous employment" includes employment by the same employer more than once over a period if:
  - a) there is not more than an absence of three months between each instance of employment in the period, or
  - b) there is more than an absence of three months between two particular instances of employment but the length of absence is due to the terms of the engagement of the employee by the employer, or
  - c) the absences are due to the seasonal nature of the employment.

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