

IR Bulletin

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Editorial

There have been a number of decisions since the High Court's judgment in *Electrolux* which assist in determining whether particular clauses in certified agreements pertain to the employment relationship. In this edition of the *IR Bulletin* two of these decisions are considered. These decisions, while providing further guidance, also highlight that making such determinations can be difficult and may often turn on the specific wording, not just the general subject matter, of the clause in question.

We also consider two decisions of the Federal Court of Australia in relation to breaches of the freedom of association provisions contained in the *Workplace Relations Act 1996*. One decision relates to the outsourcing of a business and redundancy of employees. The other concerns national construction company Barclay Mowlem's decision not to engage a contractor because it employed non-union workers. The decisions highlight the operation of the reverse burden of proof that employers face if accused of breaching the freedom of association provisions.

Other articles in this edition consider whether bonuses form part of an employee's rate of remuneration for the purposes of the remuneration cap that applies in respect of unfair dismissal applications, and the approach which must be taken by the Australian Industrial Relations Commission when determining whether to terminate a certified agreement.

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Labour Hire Employees – Independent Contractors or Employees?

In an important decision for the labour hire sector, a majority of the Western Australian Industrial Appeal Court has found that two construction workers who were engaged by a labour hire company and provided as required on construction projects in Perth were independent contractors: *Personnel Contracting Pty Ltd T/As Tricord Personnel v The Construction Forestry Mining and Energy Union Of Workers* [2004] WASCA 312 (22 December 2004).

Background facts

Two workers had been engaged by Tricord Personnel to work as labourers, as required, on construction projects in Perth. Under the agreement with Tricord:

- the workers were described as independent contractors;
- they were not obliged to accept any work offered by Tricord; and
- if they did accept work, they agreed that they had no claim on Tricord for holiday or sick leave; they were to supply some minor equipment and they accepted various safety and other obligations as independent contractors.

However, in many respects the services provided by the workers did not appear to differ significantly from the provision of services as an employee.

Industrial Appeal Court decision

The Full Bench of the Western Australian Industrial Relations Commission found that the two workers were employees of Tricord. Tricord appealed to the Western Australian Industrial Appeal Court. Tricord's appeal was upheld by a majority of 2-1.

The Court said that when deciding if a worker is an employee or an independent contractor a tribunal must consider all facets of the working relationship. In doing so, the tribunal must not only have regard to the system of work and work practices imposed, but also to the terms of the contract entered into by the parties. Where the parties have defined their relationship by a clause in a contract made between them, that clause must be given weight (if it is not a sham), although it will not be determinative. Express provisions in a contract should be given weight where the relationship is ambiguous.

Lessons for employers

- The terms of any contract for the supply of labour are important and should unambiguously reflect the nature of the working relationship being created.
- However, for the situation to be secure, the intention of the parties to engage a worker in a particular relationship must be evident also in the manner and circumstances in which the work is performed.

In the case before it, the Court found that there was ambiguity in determining the status of the workers. There were factors pointing to an employment relationship and factors pointing in the other direction. The Court regarded many of the work arrangements as being consistent with either relationship. Accordingly, the intention of the parties in the contract became determinative. The intention of the parties in each contract, the Court ruled, was to create an independent contractor relationship. Therefore, the two workers were not employees of Tricord.

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Redundancies Breach Freedom of Association Laws

Seven workers have been reinstated pending a full hearing of the AMWU's argument that their redundancies breached the freedom of association provisions contained in Part XA of the *Workplace Relations Act 1996*: *AMWU v Eaton Electrical Systems Pty Limited* [2005] FCA 2 (7 January 2005). The Federal Court accepted that there was an arguable case that reasons for redundancy included the employees' membership of the AMWU and their entitlements under an industrial instrument, both prohibited grounds under Part XA.

Background

On 21 December 2004, the AMWU arranged for employees from Eaton Electrical's Low Voltage Assembly business to meet with journalists in the Company's carpark. On 22 December, an article appeared in *The Australian* quoting delegates in a story about Australian manufacturing jobs moving offshore. The same day, the Company's Australian management recommended to its US parent that the Low Voltage Assembly business should be closed and outsourced. The recommendation was approved and the workers were notified of their redundancy that afternoon.

The AMWU applied to the Federal Court for an interim injunction reinstating the employees. The union argued that since the reasons for the decision to terminate included the employees' union membership, and/or the fact that they were entitled to the benefit of the *Eaton Electrical Systems Pty Limited Certified Agreement 2003*, the dismissals breached the freedom of association provisions of the *Workplace Relations Act 1996*.

Interlocutory decision

Justice Moore found that there was a serious question to be tried.

Under Part XA, there is a presumption that the conduct in question was carried out for the prohibited reason alleged, unless the contrary is proven. In this case, the Company's evidence did not satisfy the Court that the reasons it gave for the redundancies were its only reasons, or its actual reasons.

Justice Moore found significant omissions in the Company's evidentiary case as it was unable to produce any paperwork supporting the recommendation to close the business, and did not explain its departure from its past practice of consulting with the union and employees about redundancies. While accepting the evidence of the Company's Director of Integration that he had not read the article in *The Australian* at the time he made the recommendation, Justice Moore held he could not discount entirely that the events of 21 December angered senior management and played a part in the decision.

Justice Moore noted that he was "initially sceptical" that the reason for the dismissals could have been that the employees were entitled to the benefit of the Agreement. However, the Company gave evidence that its decision to close the business was to enable outsourcing to a third party for cheaper production. One reason for the cost advantage of outsourcing was the lower wages rates payable by the third party which would not be required to apply the Agreement.

Justice Moore also found that the balance of convenience favoured reinstatement given the circumstances of the dismissals – without notice and immediately before Christmas. He rejected arguments that the significant redundancy payments given to the employees and the existence of unfair dismissal proceedings before the Australian Industrial Relations Commission should be taken into account.

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Lessons for employers

- Giving effect to redundancies is a serious matter which requires careful planning. Redundancy proposals should be documented and reasons communicated to employees and their unions in conformity with statutory consultation processes prior to implementation.
- Employers bear the burden of establishing that reasons for dismissal do not breach the freedom of association provisions.
- Injunctions provide a flexible form of discretionary remedy potentially available to a dissatisfied union or workforce, extending to interim reinstatement even where unfair dismissal proceedings are an option.



Post Electrolux – Further Guidance From Courts and Tribunals

There continue to be more decisions post *Electrolux* about which matters pertain to the employment relationship. In this article we look at two of these decisions: *Wesfarmers Premier Coal Limited v AMWU* [2004] FCA 1737 (23 December 2004) and *Re: Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004* (18 March 2005 PR956575).

Wesfarmers Premier Coal Limited v AMWU

In April 2004, the AMWU filed a Notice of Initiation of Bargaining Period for a new federal certified agreement to cover maintenance workers at Wesfarmers' Collie mine. Negotiations occurred about the terms and content of a draft certified agreement. The draft agreement was amended as clauses were agreed. Employees took strike action in July and again in October 2004, primarily about roster and pay arrangements.

Wesfarmers sought a declaration that both periods of industrial action were not protected and that the AMWU had engaged in coercion in relation to the making of a certified agreement in breach of section 170NC of the *Workplace Relations Act 1996*. Wesfarmers argued that the industrial action was taken in support of claims about matters that did not pertain to the employment relationship.

The law post *Electrolux*

In December 2004, the Commonwealth Parliament passed the *Workplace Relations Amendment (Agreement Validation) Act* (the Validation Act) to respond to concerns, following the *Electrolux* decision handed down on 2 September 2004, that existing certified agreements might be invalid if they contained clauses which did not pertain to the employment relationship. (See the September 2004 *IR Client Alert* for more details about the *Electrolux* decision, available at www.bdw.com under Publications.) The Validation Act ensures that agreements approved or

varied before 2 September 2004 are not susceptible to challenge on the basis that they contain "non-pertaining" clauses. The legislation also validates protected action taken before 2 September 2004 despite such action being taken in support of matters that do not pertain.

Was the industrial action taken against Wesfarmers protected?

Justice French found that industrial action will not be protected if the agreement proposed at the time of the action includes matters not pertaining to the employment relationship, notwithstanding that the industrial action is taken to advance particular claims which do pertain (here, the roster and pay levels).

The Court ruled that some provisions in the proposed agreement did not pertain to the employment relationship. In particular:

- a clause dealing with union meetings did not pertain to the employment relationship;
- the requirement to make payments to union delegates to attend union meetings, even where the person is not rostered for duty, was a requirement for payments to be made in a context and for purposes extraneous to the employment relationship; and
- a clause which restricted or qualified the employer's right to use independent contractors did not pertain to the employment relationship.

The Court found that the July 2004 strike action was nevertheless protected because of the operation of the Validation Act which extended protected action coverage to industrial action taken prior to 2 September 2004. However, the October 2004 strike action was unprotected and the AMWU and its officials had breached section 170NC of the Act.

Justice French noted that in a practical sense "parties contemplating industrial action will need to carefully consider whether all the elements of their proposed agreement identified to that point...pertain to the employer-employee relationship" but that there was a degree of "technicality in this result" because the strike action in this case was clearly about permissible matters. His Honour stated that a punitive response to the union in such circumstances would be difficult to justify.

This decision is the subject of an appeal.

Re: Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004

This appeal arose from three decisions of single members of the Commission. In each decision, the Commission had dismissed an application to certify an agreement under Part VIB of the *Workplace Relations Act 1996*. The decision to dismiss the application in each case was based on the conclusion that certain matters in the agreement did not pertain to the employment relationship.

In particular, matters which were found not to pertain to the employment relationship included salary packaging, union right of entry, and clauses related to the recognition of worksite representatives and union officials. The appellants challenged these rulings and asked the Full Bench to find that the matters in question did pertain to the employment relationship thereby enabling all three agreements to be certified.

Matters pertaining to the employment relationship

The Full Bench concluded that the following types of provisions are capable of being validly included in a certified agreement as matters pertaining to the employment relationship:

- salary packaging;
- labour hire clauses, including clauses that regulate:
 - an employer's ability to use labour hire employees;
 - the number of labour hire employees engaged;
 - periodic reviews of labour hire agency employees;
 - an employer's ability to offer permanent employment to labour hire employees;
 - an employer's ability to instruct labour hire agencies to increase pay rates for labour hire employees in line with the terms of the certified agreement;
- paid trade union training leave;
- union right of entry to a workplace where confined to entry for the purposes of investigating and securing compliance with a relevant

award, agreement or a matter that pertains to the employment relationship; and

- recognition of worksite representatives, shop stewards and union officials.

Matters not pertaining to the employment relationship

The Full Bench concluded that the following matters did not pertain to the employment relationship and that their inclusion in a certified agreement would result in the agreement being refused certification:

- payroll deductions of union fees; and
- union right of entry to the workplace, where the clause is wide and not confined to entry or the purposes of investigating and securing compliance with a relevant award, agreement or a matter that pertains to the employment relationship.

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Lessons for employers

- These decisions highlight that whether particular clauses pertain to the employment relationship is not always clear cut and may turn on the specific wording contained in the clauses.
- An agreement may not be capable of certification if it contains broad union right of entry clauses, or payroll deduction clauses.
- An agreement may be certifiable even though it contains clauses relating to labour hire arrangements, confined union right of entry clauses, salary packaging provisions and clauses which require employers to recognise certain employees as union officials or shop stewards.
- During enterprise bargaining negotiations, employers should consider carefully whether each clause of any proposed draft agreement pertains to the employment relationship.
- Industrial action taken for the purposes of supporting or advancing claims for a new agreement might be unprotected if the proposed agreement contains matters which do not pertain to the employment relationship.

Applications to Terminate Certified Agreements

A Full Bench of the Australian Industrial Relations Commission has handed down a decision clarifying the approach the Commission must take when applying the public interest test in applications to terminate certified agreements under section 170MH of the *Workplace Relations Act 1996: Kellogg Brown & Root Pty Ltd & Ors and Esso Australia Pty Ltd* (31 January 2005, PR955357).

Section 170MH

Section 170MH provides that application can be made to the Commission to have a certified agreement terminated after the nominal expiry date of the agreement. On receiving the application, the Commission must take such steps as it considers appropriate to obtain the views of persons bound by the agreement about whether it should be terminated. If, having done this, the Commission considers that it is not contrary to the public interest to terminate the agreement, the Commission must terminate the agreement.

Background facts

On 7 September 2004, Commissioner Whelan handed down her decision dismissing applications by a number of employers engaged at certain ESSO facilities to have various certified agreements terminated under section 170MH. In summary, Commissioner Whelan dismissed the applications because she found that termination of the relevant certified agreements would be contrary to the public interest.

The employers appealed to a Full Bench of the Commission. Commissioner Whelan's decision was overturned by the Full Bench.

Full Bench decision

The Full Bench said that while the views of persons bound by the agreements may be relevant if they shed light on the public interest, the notion of public interest refers to matters that might affect the public interest as a whole as opposed to what might affect the interests of the parties.

For example, the mere fact that termination of a certified agreement will result in a change in employment conditions (say by permitting a change back to award conditions) is not of itself contrary to the public interest. The Full Bench found that Commissioner Whelan's findings about the possible consequences of termination on the parties (for example, a change in roster patterns) was not enough to excite the public interest. In addition, it was held that the Commission needs to be guided by the likely foreseeable consequences of termination rather than speculation about possible consequences.

Lessons for employers

- A party who wishes to oppose an application under section 170MH will have to do more than adduce evidence about how termination will affect the parties to the agreement.
- They will have to adduce evidence about how termination affects the public interest as a whole which, absent unlawful or unconscionable conduct by another party, will be a difficult task.

In a practical sense, matters that may affect the public interest are matters such as the achievement or otherwise of the various objects of the *Workplace Relations Act 1996*, employment levels, inflation and the maintenance of proper industrial standards. The Full Bench noted that unconscionable conduct by a party in connection with the renegotiation of an agreement may touch upon the public interest, but this was not such a case.

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Employment Advocate Wins Freedom of Association Case for Contractor

The Federal Court has found that national construction company Barclay Mowlem unlawfully refused to engage a contractor because it had non-union workers engaged under Australian workplace agreements (AWAs) and a non-union agreement: *Employment Advocate v Barclay Mowlem Construction Limited* [2005] FCA 16 (20 January 2005).

The Employment Advocate applied for orders under section 298U of the *Workplace Relations Act 1996* on behalf of Robson Excavations Pty Limited, claiming that Barclay Mowlem terminated a contract for services with, or refused to engage, Robson Excavations for prohibited reasons.

Background facts

Robson Excavations submitted a tender for work with Barclay Mowlem. The negotiations were advanced to the stage where the parties shook hands on a deal and agreed a start date subject to Robson Excavations providing evidence of insurances and certain other documents.

Robson Excavations sent copies of insurance policies to Barclay Mowlem but were later advised that some further "risk analysis" was required. Barclay Mowlem asked Robson Excavations if it had AWAs or a certified agreement, if it employed union members and how many. Robson Excavations said it did not know how many union members it employed but provided a copy of its certified agreement. Shortly after that, Robson Excavations was advised that the contract had been awarded to another company.

Federal Court decision

The Federal Court first considered whether the parties had entered into a contract. The Court found that Barclay Mowlem and Robson Excavations did not intend to conclude a bargain before Barclay Mowlem had an opportunity to consider the documents it had requested. The Court also found

that the intention not to conclude a bargain was clear irrespective of the fact that those present at the meeting shook hands during the meeting and that in the relevant industry deals are sometimes done on a handshake.

The Federal Court then considered whether Barclay Mowlem had "refused to engage" Robson Excavations within the meaning of section 298K(2)(d) of the Act. Barclay Mowlem argued that there is a material distinction between refusing to engage and deciding to award a particular subcontract to one contractor in preference to another. Barclay Mowlem argued that "refusing to engage" involved a positive and definite decision not to engage a contractor for a particular reason. It argued that awarding the job to another did not involve such refusal, even though the end result might be the same.

The Court rejected this submission. It held that, by deciding in a context which included giving active consideration to Robson Excavations' tender to engage a subcontractor other than Robson Excavations to undertake the work, Barclay Mowlem had refused to engage Robson Excavations as an independent contractor within the meaning of section 298K(2)(d) of the Act.

The Federal Court also considered section 298V of the Act. This section creates a presumption that the conduct alleged by an applicant was, or is being, carried out for that reason or with that intent, unless the respondent proves otherwise. In this case the Court held that Barclay Mowlem was presumed to have refused to engage Robson

Lessons for employers

- Offering a contract to one contractor may be deemed a refusal to engage another who has tendered for the job.
- A party accused of engaging in conduct for a prohibited reason under Part XA of the Act is subject to a reverse onus of proof and must establish that the conduct was not motivated by that prohibited reason.
- Those responsible for awarding contracts must arrange their offers so that they can show, on the evidence, that they have made selections by reference to proper commercial or operational considerations and not unlawful considerations.

Excavations as an independent contractor for a prohibited reason, namely because Robson Excavations at the relevant time had one or more employees who were not, or did not propose to become, members of an industrial association. It was then for Barclay Mowlem to prove otherwise. Barclay Mowlem failed to discharge this reverse onus of proof.

The Federal Court subsequently imposed a penalty of \$6000 on Barclay Mowlem for its contravention of section 298K(2)(d) of the Act.

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Bonuses – Part of the Rate of Remuneration in Unfair Dismissal Matters?

A Full Bench of the Australian Industrial Relations Commission was recently asked to consider whether a bonus that was part of an order of the Commission in a successful unfair dismissal application formed part of the employee's "rate of remuneration" under section 170CBA(5)(b) of the *Workplace Relations Act 1996: BMS Entertainment Pty Limited v Sawiris* (18 November 2004, PR953325).

Decision at first instance

In unfair dismissal proceedings commenced by Ms Sawiris against BMS Entertainment, the evidence presented indicated that Ms Sawiris had received a letter which said that she would receive a \$4,000 net bonus payment. The bonus was to be paid to Ms Sawiris at the end of January 2004. Ms Sawiris' employment was terminated in early February 2004 and no bonus was paid to her.

Senior Deputy President Lacy found that other employees had received bonuses, that the bonus payment was promised to Ms Sawiris in a written communication and that a failure to pay the bonus at the end of January 2004 was a repudiation of the contract and a breach of good faith. Further, he found that the amount of \$4,000 "would have been remuneration received by Ms Sawiris if her employment had not been terminated".

SDP Lacy found that the termination was harsh and ordered BMS to pay Ms Sawiris compensation, including a bonus payment of \$4,000 net.

Appeal

BMS appealed against the decision. BMS argued that the bonus should be included in Ms Sawiris' rate of remuneration. If this was done, her remuneration exceeded the then prescribed rate for unfair dismissal applications (ie, \$85,400).

The Full Bench of the Commission said that in determining an employee's rate of remuneration it is necessary to consider the legal obligations of the employer under the contract of employment. In relation to the unpaid bonus, it was necessary to consider whether BMS had a contractual or other obligation to pay it. Ms Sawiris' contract of employment contained no reference to bonus payments. BMS had argued at first instance that bonus payments were entirely discretionary. It sought to argue on appeal, however, that a contractual liability had arisen through the conduct of Ms Sawiris' manager in promising that the bonus would be paid.

The Full Bench held that the bonus had not been incorporated into the contract by conduct or otherwise and that it did

Lessons for employers

- A bonus payment will not form part of an employee's rate of remuneration if it is entirely discretionary and there is no legal obligation to make the bonus payment.
- If a bonus is paid prior to the termination of an employee's employment and that payment is made in accordance with a contract or other legal obligation, the bonus payment may count in the calculation of remuneration relevant to the statutory threshold for unfair dismissal applications.

not form part of the rate of remuneration for the purpose of section 170CBA(5)(b) of the Act. The bonus payment remained at all relevant times a discretionary matter for BMS and if paid was like a gratuity or inducement in nature.

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