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Editorial

In this edition of the *IR Bulletin*, we consider what constitutes industrial action. In particular, we look at two decisions which consider whether termination of employment and picketing can be industrial action within the meaning of the *Workplace Relations Act 1996*.

The obligation to make redundancy payments to employees in an outsourcing or sale of business context where continuing employment is made available to them continues to be a topic of interest for employers. We look at three recent decisions in this area.

The other articles in this edition cover a broad range of topics including who owns an invention made by an employee and whether an employer can require an employee to attend a medical examination.

We also outline the recent changes to Schedule 1A of the *Workplace Relations Act 1996* which provides minimum terms and conditions for Victorian employees who are not covered by a federal award or agreement and deals with the introduction of common rule awards in Victoria.

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Is Termination of Employment Industrial Action?

On 11 May 2004, a Full Bench of the Australian Industrial Relations Commission held that termination of employment is not industrial action within the meaning of the *Workplace Relations Act 1996: AMWU and CEPU v The Age Company Limited* (PR946290). This meant that an injunction was not available to prevent the termination of employment of certain employees working for *The Age*.

Background

John Fairfax Holdings Limited produces a number of journals for distribution in Melbourne. These include *The Age* and *The Australian Financial Review*. In 1999 Fairfax decided to build a new print facility at Tullamarine. At that time it was intended that production of *The Age* and *The Australian Financial Review*, which for years was carried out at Fairfax's premises in Spencer Street, would be transferred to the new print facility in July 2002.

The transfer of operations from Spencer Street to Tullamarine involved protracted negotiations and some disputation between *The Age*, the AMWU (covering printing employees) and the CEPU (covering electrical employees) in July 2001.

In order to settle the issues between them, *The Age* and the unions made, and had certified, the *Spencer Street Print Facility Agreement 2002* (2002 Agreement). The 2002 Agreement is not due to reach its nominal expiry date until March 2005. As the future of the Spencer Street premises was in issue, the Unions procured a commitment from *The Age* that "there will be no involuntary redundancies for the term of this agreement."

In February 2004, *The Age* announced that it intended to close its Spencer Street premises. It sent letters to the remaining Spencer Street employees advising them of the decision to close the premises and that their employment would end due to redundancy.

The unions filed applications for an injunction in the Industrial Relations Commission, on the basis that *The Age*, by its actions in closing down the Spencer Street facility and terminating the employment of the remaining employees, was engaging in industrial action in relation to work regulated by the 2002 Agreement.

Commissioner Whelan, at first instance, granted the unions' application. The Commissioner held that termination of the employees' employment could amount to industrial action because it was an act which prevents employees from working in accordance with their industrial agreement. This was a "permanent ban on the performance of work".

Decision on appeal

The President, Justice Giudice, Senior Deputy President Harrison and Commissioner Simmonds overturned Commissioner Whelan's decision on appeal.

The Full Bench held that conduct which severs the employment relationship could not be "industrial action" within the meaning of the *Workplace Relations Act* as the phrase is predicated on the existence of an employment relationship.

The Full Bench observed that it was unlikely that Parliament intended to include within the definition of industrial action conduct which stood completely outside the area of disputation and bargaining, and so the phrase should be read giving some weight to the word "industrial". For these reasons, termination of employment on account of a genuine redundancy could not be industrial action under the *Workplace Relations Act*, and the order had been wrongly issued by Commissioner Whelan.

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Lessons for employers

- **Termination of employment is not industrial action within the meaning of the *Workplace Relations Act*.**
- **To be industrial action under the *Workplace Relations Act*, conduct must meet the terms of the statutory definition. Included within this is the notion that there must be an industrial character to the conduct.**

Who Owns An Invention – University or Its Employees?

A decision of the Victorian Supreme Court earlier this year highlights the difficulties employers face in claiming ownership of discoveries or inventions made by employees. In *Victoria University of Technology v Wilson & Ors* [2004] VSC 33, the Court held that the university did not own the intellectual property in an ecommerce invention developed by two academics.

The head of the university's School of Applied Economics had been approached with a proposal for the university to develop an on-line education and training course in international business. He and another senior lecturer designed an electronic trade exchange, which they presented to potential investors in Malaysia, Australia and USA.

Although the project was initially undertaken by the university, the employees later decided it would be a private project. They formed a private company, despite having used university time and resources in developing the invention. They also continued to use university logos in their promotions.

The Court held that the university had no intellectual property rights to the invention because the university could not show that the invention was made within the scope of the duties the employees were paid to perform.

It was not enough that the employees were engaged to perform research. The Court looked at the precise nature of the research they were retained to perform. The Court held that the School of Applied Economics had never been engaged in the invention of an Internet-based ecommerce system. Rather, its academic staff had been engaged to conduct "academic research of the kind that is directed to the preparation and presentation of peer reviewed learned papers".

The Court was only concerned with the job descriptions of the relevant employees. It was irrelevant that other departments in the university may have developed computer-based ecommerce systems. Similarly, the Court gave no weight to a policy on intellectual property which had not been approved or published by the university.

However, the Court did find that the employees had breached their fiduciary duties by exploiting an opportunity that in truth belonged to the university. They were made to account to the university for their shares in the company which owned the invention. In return, the university had to pay a subscription for the shares and also pay the employees for their work on the invention.

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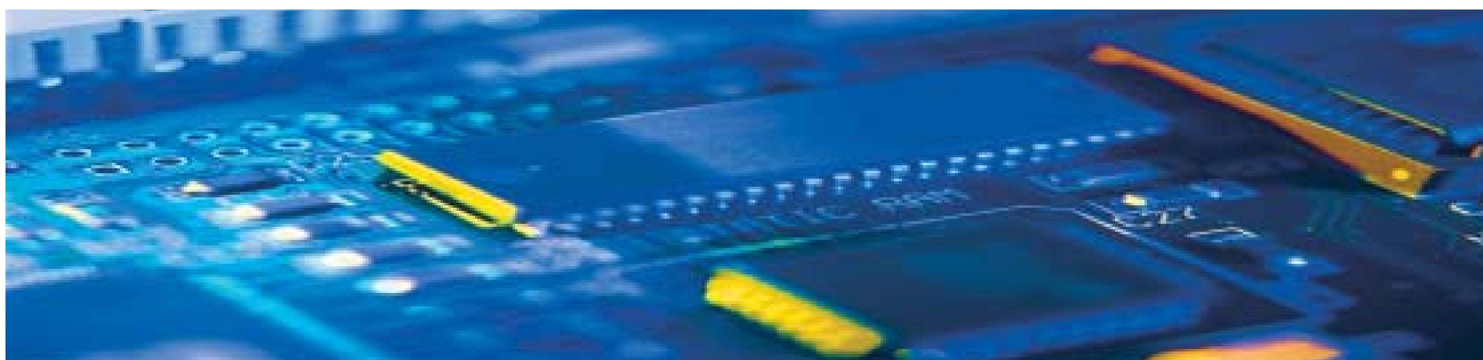
Lessons for employers

- **The decision severely limits the scope for employers to claim ownership over inventions or discoveries which are not the product of work the employee was specifically paid to perform.**
- **Employers wishing to assert intellectual property rights should:**
  - **include an express term in the employment contract giving the employer ownership of discoveries or inventions;**
  - **ensure that such a term is carefully drafted so as not to constitute an unreasonable restraint of trade; and**
  - **develop and publish a comprehensive policy on intellectual property rights.**
- **It is especially important to pay attention to these matters in employment situations where scientific, product, literary or other inventions or works are liable to be a feature.**



Outsourcing and Redundancy Pay Claims

The requirement to make redundancy payments to employees in an outsourcing or sale of business context where continuing employment is available continues to be an issue which the Federal Court and the Australian Industrial Relations Commission is having to consider.

The three decisions which are discussed in this article highlight the extent to which the obligation to make redundancy payments will depend on the specific facts in each case but also point out some of the ways that unmeritorious redundancy claims can be dealt with.

FSU v Commonwealth Bank of Australia [2004] FCA 257 (18 March 2004)

The decision relates to an application by the Finance Sector Union of Australia (FSU) against the Commonwealth Bank of Australia in relation to former employees of the Bank who resigned from their employment with the Bank to take up employment with a third party (EDS). This occured when the information technology services of the Bank were outsourced and subsequently provided to the Bank by EDS.

The principal application by the FSU was a representative proceeding brought on behalf of approximately 572 group members alleging that the Bank had breached the applicable award by failing to pay the group members severance payments on the basis that they had been made redundant.

This particular judgment concerns a declaration sought by the parties as to whether, on a true construction of the redundancy clause of the relevant award, the group members were entitled to severance payments in accordance with the award.

The facts

The relevant facts are as follows:

- in 1997, the Bank outsourced the functions of its Information Services Department to EDS;
- each employee in the Department was offered employment with EDS on the condition that the employee resign from the Bank prior to accepting that employment;
- the HR Agreement between the Bank and EDS required the offers of employment by EDS to affected employees to be on terms and conditions no less favourable than the current terms and conditions of those employees considered on an overall basis;
- over 1200 employees of the Bank accepted employment with EDS and resigned from their employment with the Bank with effect from close of business 9 October 1997;
- there were 201 Bank employees in the Information Services Department who did not accept offers of employment made by EDS before 10 October 1997 (these employees were subsequently compulsorily seconded to EDS and commenced separate Federal Court Proceedings against the Bank – see the first instance decision of Justice Moore J in *Finance Sector Union of Australia v Commonwealth Bank of*

Lessons for employers

- **When drafting redundancy provisions for inclusion in industrial instruments ensure that relief from the obligation to pay redundancy pay is available, at the minimum, where the employer obtains acceptable alternative employment for an employee.**
- **Even if a certified agreement contemplates avoidance of an obligation to pay redundancy pay only where there is internal redeployment available, the statutory context which deals with transmission of business may create an ambiguity or uncertainty about what this means.**
- **Where that ambiguity or uncertainty exists, it may be open to have provisions inserted in a certified agreement permitting relief from the obligation to pay redundancy pay if an offer of acceptable alternative employment is obtained for the employee by the employer.**
- **The timing of an application to make such an application, and if successful to proceed under the new clause, could well be critical. If a relevant application is not filed and pursued in advance of employees needing to consider the alternative employment on offer, the employer may not succeed or may not succeed in full.**

When drafting redundancy provisions for inclusion in industrial instruments ensure that relief from the obligation to pay redundancy pay is available, at the minimum, where the employer obtains acceptable alternative employment for an employee.

Australia (2001) 111 IR 241 and appeal decision of the Full Federal Court in *Commonwealth Bank of Australia v Finance Sector Union of Australia & Anor* (2002) 125 FCR 9 which were discussed in *IR Bulletin,* March/April 2002, page 2 and *IR Bulletin*, October 2002, page 2, available on our website, www.bdw.com);

- the employees who resigned to take up employment with EDS commenced employment with EDS from 10 October 1997 and in large part performed the same duties in the same location as performed for the Bank prior to 10 October 1997; and
- the positions of the employees who went across to EDS were not filled or otherwise occupied by anyone else within the Bank's employ on or after 10 October 1997.

The decision

Justice Moore held that, under the terms of the relevant award, the employees who resigned from their employment with the Bank and took up employment with EDS were *not* entitled to severance payments in accordance with the redundancy clause of the relevant award.

The substantial reasoning for this conclusion was that there was no "termination through redundancy" as required by the relevant award clause in order for the employees to become entitled to severance payments.

Justice Moore made the following finding:

> "The employment of each of the group members was terminated by their own act of resignation at the point in time when the Bank might otherwise have redeployed or retrenched them. There was no termination by the Bank and accordingly... there was no 'termination through retrenchment' for the purposes of cl 42(d)(i) of the Award."

Justice Moore found that in the present case it was not open to him to conclude that all or any of the group members were in a circumstance where they were given no effective choice but to resign at a time when their position became redundant. On the agreed facts prepared by the FSU and the Bank for the purposes of the proceedings, the employees who accepted offers with EDS still had, at the time of accepting the offer, an alternative to remain in the employment of the Bank and either be redeployed or later retrenched.

Justice Moore concluded (based on authority in previous proceedings involving the Bank) that none of the

employees of the Bank's Information Services Department were, on or immediately before 10 October 1997, in a redundancy situation.

Re The Colonial Group Enterprise Agreement 1999 and others (29 March 2004, PR945162).

The Colonial Group Enterprise Agreement included extensive provisions about redundancy, redeployment and retrenchment. Where a redundancy situation arose, redeployment was to be pursued. In the event that an employee was offered redeployment to a comparable position, it was expected that the employee would accept the offer. Where, however, the employee declined the offer, it was said that the employee's employment would be terminated as a result of redundancy, but no retrenchment payment would be payable.

The employer sought to vary the Agreement under section 170MD(6) of the *Workplace Relations Act 1996*, a provision which allows variation of a certified agreement over the objection of the other party in order to remove an ambiguity or uncertainty.

Decision at first instance

In exercise of this power, Senior Deputy President Duncan had inserted two new provisions. The first provided that the employer, in a particular redundancy case occurring after a nominated date, may make application to the Commission to have the severance pay prescription varied if it obtains acceptable alternative employment for an employee.

The second provided that where a business is, after the same nominated date, transmitted from the employer to another employer (a transmittee), and an employee who at the time of the transmission was an employee of the first employer in that business becomes an employee of the transmittee, then the continuity of employment will be deemed unbroken and the period of employment with the first employer deemed to be service of the employee with the transmittee. In other words, conventional provisions derived from the *Termination, Change and Redundancy Case* of 1984 were inserted into the Agreement.

A series of cross appeals by the companies concerned and the Finance Sector Union were dealt with by the Full Bench.

Full Bench decision

The power to vary the certified agreement over the union's objection was dependent upon there being an ambiguity or uncertainty. The Full Bench accepted the proposition that a reading of section 170MB of the *Workplace Relations Act* was relevant in determining whether there was an ambiguity and uncertainty in this case. Section 170MB is the provision of the *Workplace Relations Act* which says that if there is a transmission of the whole or part of a business then, following the transmission, a certified agreement binding on the transmittor becomes binding on the transmittee.

The Full Bench accepted that, against the background of section 170MB, there was an ambiguity concerning the scope of the discretion of the employer under the Colonial Group Enterprise Agreement to retrench an employee without retrenchment payments in the event that a comparable position was on offer, and concerning the meaning to be given to expressions such as *redeployment* and *comparable position*. There was ambiguity concerning the establishment of whether an otherwise comparable employment with another employer in contractual relationship to Colonial was within the meaning of *comparable position.*

The employers in the case were nevertheless unsuccessful because the variation was made with prospective effect only. Mutual rights in connection with the outsourcing which had occurred prior to the effective date of the variation were left undisturbed.

Re Banking Services – ANZ Group – Award 1998 (17 March 2004, PR944615)

The December 2003 edition of the *IR Bulletin* included an article about litigation involving the Australian and New Zealand Banking Group Limited and the Finance Sector Union of Australia (see pages 8 to 9, available on our website, www.bdw.com). The litigation revolved around whether ANZ could obtain relief from the obligation to make redundancy payments to former ANZ employees who transferred to ING in May 2002.

The final stage of that litigation has now been concluded with Commissioner Eames deciding on 17 March 2004 that it would not be appropriate for ANZ to be obliged to provide severance pay or make redundancy payments to employees who, in his view, were offered suitable alternative employment with ING.

He said, "It would not be appropriate to find otherwise, and provide for an inappropriate windfall gain for the affected employees".

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Corrigendum

In the June 2004 *IR Bulletin* – Labour Hire Special Edition, a Parliamentary Paper, "Labour Hire: issues and responses", was wrongly attributed to Shane O'Neill. Our sincere apologies to Steve O'Neill, who is the author of the paper.

Can an Employer Require an Employee to Attend a Medical Examination?

There are many circumstances in which an employer may want an employee to be medically examined; for example, to ensure the employee is fit for duty. An employee might claim that the employer cannot lawfully require attendance or participation in a medical examination.

Whether an employer can, at law, require an employee to attend and participate in a medical examination will depend upon whether the employer has a statutory or contractual right to do so. Employers also have privacy obligations in respect of information gained during a medical examination, but this does not directly impact on the employer's right to require an employee to undertake a medical examination.

Some legislation, for example in the aviation and mining industries, requires employers to ensure that employees undertake medical examinations to assess their fitness for work at regular intervals. In such cases, the employer may direct an employee to attend and participate in a medical examination and is, in fact, obliged to do so.

A term requiring attendance at a medical examination may be included in a contract of employment or industrial instrument such as an award, certified agreement or Australian workplace agreement.

An employer can rely on such an express term to direct an employee to attend and participate in a medical examination as contemplated in the express term. For example, a term may enable an employer to require an employee to attend a medical examination following a safety incident involving the employee.

Such a term is useful but does not create a general right to have an employee medically examined where there is concern about fitness for work – for example, where an employee has been absent on sick leave for an extended period.

If there is no express term allowing an employer to require an employee to attend and participate in a medical examination, it may be that the courts will imply such a term into the employee's employment contract.

In his decision in *Blackadder v Ramsey Butchering* (2002) 113 IR 461, Justice Madgwick considered the circumstances in which such a term may be implied. In that case, he said:

> "It is, in my opinion, essential for compliance with [OH&S] duties, that an employer be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. Likewise, an employer should, where there is a genuine indication of a need for it, also be able to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness...
>
> "The matters will generally require a sensitive approach including, as far as possible, respect for privacy. Nevertheless, I assume that there now should be implied by law in contracts of employment terms such as those set out in the first 2 sentences of the preceding paragraph."

Justice Madgwick said that a term requiring an employee to attend a medical examination will not be implied into all contracts of employment.

Such a term will only be implied in a particular case if it is a reasonable requirement in all the circumstances. An example is where employees work in a dangerous work environment and employers are under a strict obligation to ensure employee safety.

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Lessons for employers

- **Employers likely to need to have employees participate in medical testing should ensure that they have an express right to require an employee to attend and participate in a medical examination and that their right is broad enough to cover all possible circumstances in which the employer might require an employee to do so.**
- **If there is presently no express right to require an employee to be medically examined, employers should consider including an express right in a contract of employment or applicable industrial instrument to avoid needing to rely on the implication of a term.**
- **In limited circumstances, even an employer which does not have an express right to require an employee to be medically examined may be able to assert that right. Advice should be sought in advance of relying upon an implied right, however, and special care should be taken.**

Employee Entitlement Schemes

Following the dramatic collapse of companies such as Ansett and HIH, unions have sometimes pressed employers to secure employee entitlements (eg redundancy, annual leave, long service leave) by way of payment into a fund designed for that purpose. Such funds have been a long standing feature of employment in some industries – eg building and construction.

The employee entitlement schemes include:

- union based employee entitlement funds (eg NEST and Manusafe);
- industry based funds (eg BERT and coal mining industry long service leave schemes); and
- employee entitlement trust arrangements which are similar in concept to a master trust whereby a trust is established and managed by an independent trustee.

From 1 April 2003, contributions made by an employer to an *approved* worker entitlement fund are FBT exempt if:

- the fund is an *approved* worker entitlement fund;
- the employer is required to make the contributions under an industrial instrument; and
- the contributions are required either for:
  - the reasonable administrative costs of the fund, or
  - to ensure that the employer's obligation under an industrial instrument to make leave or redundancy payments is met.

Contributions which do not comply with these requirements may still be FBT exempt if made between 1 April 2003 and 31 March 2005 where certain criteria are satisfied.

If an employer contributes to an employee entitlement scheme but is not required to do so by an industrial instrument, FBT may be payable.

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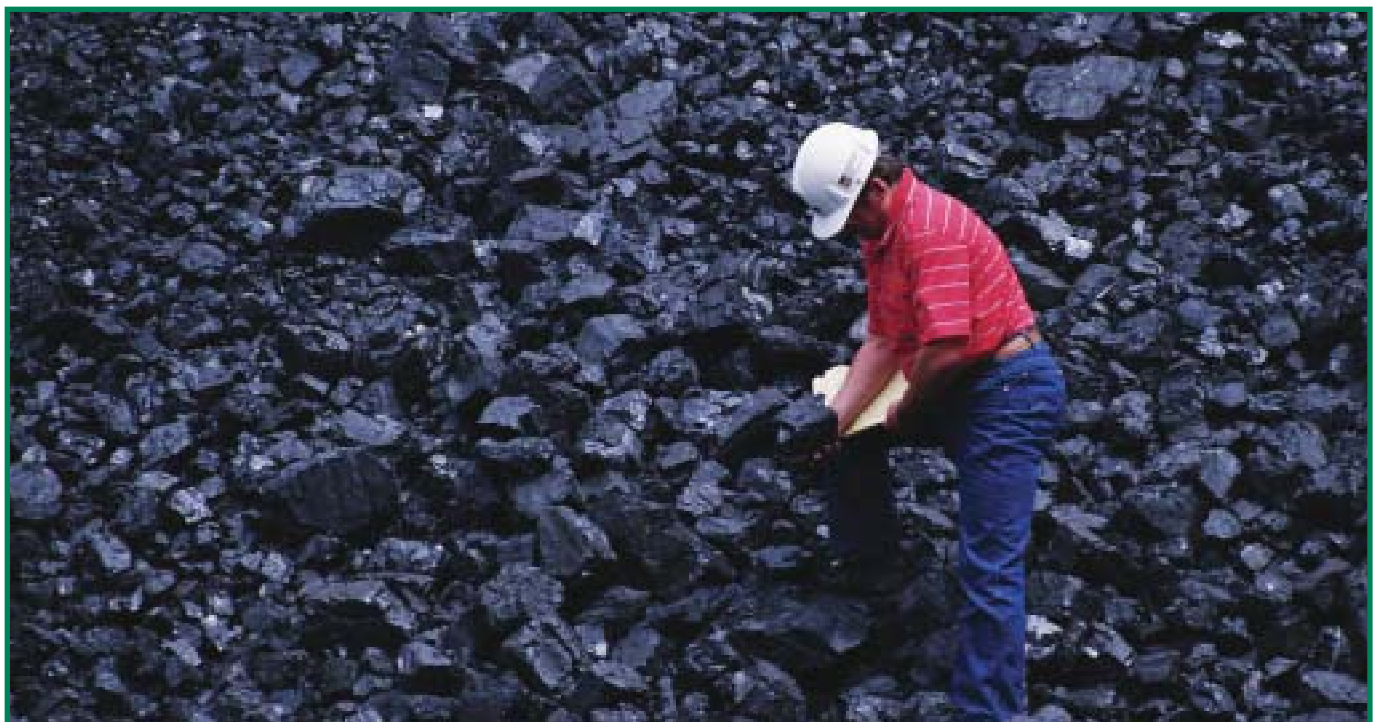
Lessons for employers

- **Employers are not compelled by law to secure employee entitlements although some employers are under increasing pressure to do so.**
- **Employers who contribute to an employee entitlement fund should seek advice about the FBT implications of such contributions.**



Picketing Could be Protected Industrial Action

Picketing may be protected action and enterprise agreements could be enforceable as contracts, according to a controversial interlocutory decision of Justice Finkelstein of the Federal Court: *CEPU & Langley v Australian Postal Corporation* (unreported, Federal Court of Australia, Finkelstein J, 26 February 2004).

Background

The case arose out of a dispute between Australia Post, its employees and the CEPU about the introduction of new technology at the Melbourne Parcel Facility. During the dispute, the CEPU notified Australia Post of its intention to take protected action including a peaceful picket line and a 24 hour stoppage. Mr Langley and Mr Shead were among the Australia Post employees who participated in the CEPU action.

Australia Post alleged that Mr Shead verbally abused two drivers and an Australia Post manager at the picket and that Mr Langley failed to deliver the truck he was driving to its destination. Australia Post commenced an investigation into whether the employees' conduct amounted to a breach of its Code of Ethics. The Australia Post Enterprise Agreement 2001 gives Australia Post the right to dismiss an employee or transfer an employee to another position where he or she has failed to observe the Code. The investigator concluded that both employees had breached the Code and recommended that Mr Shead's employment be terminated and that Mr Langley be transferred to other duties at a lower rate of pay.

The employees sought interlocutory injunctions in the Federal Court restraining Australia Post from taking disciplinary action against them and relying on section 170MU of the *Workplace Relations Act 1996*. That section provides that an employer must not dismiss, injure or alter an employee's position to the employee's prejudice wholly or partly because the employee has engaged in protected action. Section 170MU places the onus of proof on the employer to establish that its action was *not* taken because of the employee's participation in protected action.

The decision

In relation to Mr Shead, Australia Post argued that it could not have breached section 170MU because picketing is not industrial action for the purposes of the Act (and therefore cannot be protected action). Despite other decisions of the Federal Court indicating that picketing which prevents or hinders others from performing work is not industrial action, Justice Finkelstein found that the legal position was unclear and that, for the purposes of the interlocutory injunction, it was arguable that "picketing may well be industrial action".

Justice Finkelstein also suggested that, to the extent that there were procedural flaws in Australia Post's investigation, Mr Shead may have an action for breach of contract. His Honour did not consider that the decision in *Ryan v TCFUA* [1996] 2 VR 235 ruled out such a finding. (In that case, the Victorian Court of Appeal held that an unregistered agreement between an employer and a number of unions was not enforceable as a contract.) Justice Finkelstein said that he was "tentatively inclined to reach the opposite conclusion" about the Australia Post Agreement.

Justice Finkelstein issued interlocutory injunctions restraining Australia Post from terminating Mr Shead's employment and from removing Mr Langley from his usual duties.

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Lessons for employers

- **The prohibition on subjecting an employee to a detriment because of his or her involvement in protected action may be broadly construed in favour of the employee.**
- **There remains some doubt about the view that picketing is not industrial action within the meaning of section 4 of the *Workplace Relations Act 1996.* This can leave open the possibility, at least, of an interlocutory injunction being issued in an appropriate case.**
- **Although the decision is only an interlocutory one and makes no conclusive findings of law, it may assist an employee or union in arguing that an employer's failure to comply with an enterprise agreement gives rise to an action for damages. This needs to be factored in if for some reason an employer may intend not honouring an obligation accepted in an enterprise agreement.**

Changes to Schedule 1A of the Workplace Relations Act 1996

The *Workplace Relations Amendment (Improved Protection of Victorian Workers) Act 2003* came into effect on 1 January 2004. Employers should be familiar with certain amendments to Schedule 1A of the *Workplace Relations Act* 1996. Schedule 1A provides for minimum terms and conditions of employment for Victorian employees who are not covered by a federal award or agreement and extends the power of the Australian Industrial Relations Commission to apply federal award conditions to industries as common rule awards in Victoria.

Wages

Employees now have an entitlement to be paid, at the applicable minimum hourly rate, for each hour worked in excess of 38 hours per week. Where an employee is being paid at a higher rate than the minimum wage, there is no obligation to pay for hours worked in excess of 38 hours per week – unless a calculation of the total hours worked in any week multiplied by the minimum hourly wage rate would be higher than the employee's current weekly wage.

Leave entitlements

Schedule 1A sets out minimum conditions for paid annual leave, paid personal leave and paid bereavement leave. The minimum leave conditions do not apply to casual employees.

Annual leave

Schedule 1A contains new rules relating to the accrual and calculation of annual leave. These rules do not apply to annual leave accumulated prior to 1 January 2004.

Lessons for employers

- Contracts of employment for Victorian employees (who are not covered by a federal award or agreement) must comply with the minimum conditions of employment contained in Schedule 1A of the *Workplace Relations Act 1996*. A breach of the minimum conditions may lead to a penalty of up to $10,000 as well as orders for payment of any underpayment.
- Human resources and payroll personnel need to be aware of the changes to leave accrual and calculation and of the obligation to pay employees who are receiving the minimum wage for hours worked in excess of 38 hours per week.
- If common rule awards are declared in a particular industry, employers who have been award free may have to make changes to established terms and conditions to ensure they are in line with federal award standards.
- Employers should keep up to date with developments in their industry regarding applications for common rule awards. In some instances, it may be desirable to make submissions to the Commission about the appropriateness of specific award conditions applying as a common rule, or alternatively encouraging an industry association to do so.

An employee's entitlement to annual leave is calculated by multiplying by four the usual number of ordinary hours worked by the employee per week during the year. If an employee's weekly hours fluctuate to the extent that the employee does not have a usual number of hours, the employee's annual leave entitlement is calculated by reference to the average number of ordinary hours the employee has worked per week during the year.

Personal leave

The previous entitlement of five days paid sick leave has been replaced by a minimum entitlement of eight days paid personal leave per year. If an employee has less than 12 months employment, the employee's personal leave entitlement is calculated on the basis of one day for each six weeks of employment.

Up to five days of the personal leave entitlement is available to be taken as carer's leave for the purposes of caring for a member of the employee's immediate family or member of the employee's household who is sick and requires the employee's care and support.

Employers are entitled to request a medical certificate or statutory declaration in order to verify an employee's entitlement to sick leave or carer's leave.

Bereavement leave

Employees are entitled to paid bereavement leave of two days (per incident not per year) upon death of an immediate family member or a household member. Employers are entitled to request applicable verification.

Common rule awards

Victorian employers in an industry who have previously not been bound by any federal award may become bound by an award if the Commission declares that it should operate as a common rule for the industry in question. Such an award will prevail over any employment contract to the extent that the terms of the contract are less favourable.

The Commission has been able to receive common rule applications since 1 January 2004 but the earliest date that a common rule award can come into effect in Victoria is 1 January 2005.

The Commission will not make a declaration of a common rule award until it has published a notice specifying the manner in which it is proposed the common rule will be declared. Affected parties will have the opportunity to make submissions prior to a declaration being made.

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STOP PRESS

Reserve Service Private Sector Guidelines Released

In the April 2004 edition of the *IR Bulletin*, we discussed developments in the granting of defence leave and employer compensation where employees who are Defence Force reservists spend extended periods on Defence duties (see page 6, available on our website, www.bdw.com).

Since that publication, the Australian Defence Force and the Defence Reserve Support Council have released the final version of the private sector leave guidelines. These guidelines provide information on recommended policies for private sector employers. However, they also provide information on what employers can expect from the employee and from the Australian Defence Force in terms of notification of training commitments and confirmation of availability. The guidelines are available through the Defence Reserve Support Council website.

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Bill Renews Small Business Severance Exemption

In the April 2004 edition of the *IR Bulletin*, we reported on the decision of the Full Bench of the Australian Industrial Relations Commission to extend some aspects of the standard award redundancy pay prescription to small businesses with less than 15 employees. Employers in a small business were obliged by this decision to pay up to eight weeks severance to redundant workers (see page 10 of the edition, available on our website, www.bdw.com and see also the article below).

On 26 May 2004, the Workplace Relations Minister introduced legislation into Federal Parliament which, if enacted, will restore the "small business exemption" in relation to the making of severance payments. The Bill seeks to ensure that employers with less than 15 employees will not have to make severance payments. It also seeks to override any State laws or award changes made after the Commission's decision that oblige small businesses to provide severance pay.

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Redundancy Test Case

As mentioned above, we reported in the April 2004 edition of the *IR Bulletin* on the decision of the Full Bench of the Australian Industrial Relations Commission in relation to severance pay scales. On 8 June 2004, the Full Bench of the Commission handed down a supplementary decision.

The Full Bench considered whether the severance pay scale applying to employers with 15 or more employees, which now grants extra benefits to persons with more than five years service, should be modified to take into account State and Territory long service leave legislation. The new severance pay scale introduced by the March decision took account of the standard federal long service leave provision; however, there are differences in the State and Territory long service leave schemes in relation to both the rate of accrual and the number of years continuous service required to qualify for pro rata payment upon termination. The Full Bench considered differentiation on a State basis but decided this would lead to more problems than it would solve. The Full Bench held that there should be a national minimum standard for severance pay in the Commission's awards.

In relation to the new and lesser redundancy pay prescription for small businesses with fewer than 15 employees, the Full Bench decided that the severance pay scale should not be introduced retrospectively. This means that only service rendered since 8 June 2004 counts for redundancy pay purposes in the case of employers with less than 15 employees.

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