JONES DAY

APRIL 2018

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this edition of the *Update*, we comment on the *Labour Hire Licensing Act 2017* (Qld), which was recently implemented in Queensland and obliges labour hire providers to be licensed. We then discuss an enforceable undertaking agreed to by a swim school, and a decision of the Fair Work Commission ("Commission") confirming that medical conditions preventing employees from performing the inherent requirements of their role are valid reasons for dismissal. Finally, we outline the Commission's recent decision to terminate an enterprise agreement.

IN THE PIPELIINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

QLD IMPLEMENTS LABOUR HIRE LICENSING LAW

In the July 2017 *Update*, we examined the *Labour Hire Licensing Bill 2017* (Qld). In April 2018, the *Labour Hire Licensing Act 2017* (Qld) and the *Labour Hire Licensing Regulation 2018* came into effect. In short, the Act establishes a licensing scheme to regulate the provision of labour hire services in Queensland.

Section 7 of the Act states that a person ("Provider") provides labour hire services if, in the course of carrying on a business, the person supplies to another person a worker to do work. A "worker" is an individual who enters into an arrangement with a

Provider under which the Provider supplies to another person the worker to do work, and the Provider is obliged to pay the worker for the work done.

The Regulations expand on the definition of "worker" in the Act. An individual who is not a worker includes:

- an individual who earns equal to or more than the high income threshold under the *Fair Work Act 2009* (Cth) (currently $142,000);
- an individual who is an executive officer of a corporation and the only individual the provider supplies to another person to do work;
- an in-house employee of a provider whom the provider supplies to another person to do work on a temporary basis on one or more occasions—for example, a consultant employed by a consultancy business being supplied to a business to conduct a review for the other business; and
- an individual whom a provider supplies to another person to do work if the provider and the other person are each part of an entity or group of entities that collectively carry on a business as one recognisable business.

This means that Providers of individuals who do not fall under the definition of "worker" do not need to obtain a licence.

HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

SWIM SCHOOL FRANCHISE SIGNS ENFORCEABLE UNDERTAKING IN RELATION TO UNDERPAYMENT OF WAGES

Between 2010 and 2016, widespread underpayment of swimming teachers was discovered across the Paul Sadler Swimland franchise network, breaching both the Award and the franchisees' Enterprise Agreements. The underpayments were self-reported to the Fair Work Ombudsman ("FWO") by Paul Sadler, the franchisor, in October 2016. Specifically, the underpayments included a failure to correctly implement age increments for junior employees, a failure to pay employees correctly according to their experience levels and a failure to correctly apply the transitional wage provisions set out in the Award.

Paul Sadler signed a two-year enforceable undertaking with the FWO in April 2017. This undertaking revealed that Paul Sadler had underpaid 1,308 swim instructors a total of $1,425,477. The undertaking includes an agreement by Paul Sadler to allow for third-party audits of its swim schools and also requires Paul Sadler to maintain an email address which current or former employees can use to raise complaints or issues concerning their payment.

Paul Sadler has now rectified all underpayments and has paid all affected staff an additional 5 percent of voluntary repayment. It has also implemented an automated payroll system to ensure that future mistakes which led to the underpayment no longer occur.

DISMISSAL NOT FOUND UNFAIR AS WORKER WAS UNABLE TO PERFORM THE INHERENT REQUIREMENTS OF THE ROLE

***Mr Vijayan Kothandan v Transdev Melbourne Pty Ltd T/A Transdev* [2018] FWC 2119**

Factual Background. Mr Kothandan was employed by Transdev as a bus driver. He suffered a work injury in July 2016 and was employed on modified duties thereafter, until March 2017 when he did not return to work. Mr Kothandan was dismissed in November 2017 on the basis that his restricted medical capacity prevented him from performing the inherent requirements of his role.

Legal Background. Section 385 of the Fair Work Act provides that a person has been unfairly dismissed if the dismissal was harsh, unjust or unreasonable.

In determining whether a dismissal was harsh, unjust or unreasonable, the Commission must (among other things) look to whether there was a valid reason for the dismissal. In *CSL Limited T/A CSL Behring v Chris Papaioannou*, the Commission established that where a dismissal relates to an employee's capacity, the Commission must consider whether the employee suffered from a medical condition. Courts have found that "capacity" refers to an employee's ability to do the work he or she is employed to do, and confirmed that there can be a valid reason for termination where the employee does not have the capacity or ability to do the job. Where the employer relies upon the employee's capacity as the reason for termination, the substantial position of the role must be considered rather than modified, restricted duties or a temporary position.

Decision. Commissioner McKinnon decided that there was a valid reason for Mr Kothandan's termination and that the dismissal was not harsh, unjust or unreasonable (and consequently was not unfair). Commissioner McKinnon found that Mr Kothandan's restricted capacity prevented him from safely performing his role as a bus driver. He considered that the medical evidence established that at the time of the dismissal, Mr Kothandan's medical condition prevented him from regularly driving buses whilst applying a sustained level of attention, concentration and judgement.

The Commission also considered whether Mr Kothandan was notified of the reason for dismissal and whether he was given the opportunity to respond (in both cases, it was found that he was). Commissioner McKinnon did not consider that additional time or medical evidence that could have been provided by Mr Kothandan would have made any difference to the outcome.

Lessons for Employers. This case confirms to employers that, subject to other considerations noted above, an employee's incapacity to perform the inherent requirements of the role can constitute a valid reason for dismissal. Employers should nevertheless ensure that all medical evidence as to capacity is obtained before terminating the employment of an employee due to his or her not having the capacity to perform the inherent requirements of his or her role.

TERMINATION OF THE PORT KEMBLA COAL TERMINAL LIMITED ENTERPRISE AGREEMENT 2012–2015

Facts. The Port Kembla Coal Terminal Limited ("PKCT") Enterprise Agreement 2012–2015 was approved by the Commission in 2012 and nominally expired in June 2015. The Agreement contained generous superannuation entitlements and "unusual" provisions regarding self-directed working teams. These teams were described by the Commission as "attractive from the point of view of industrial democracy, [but] significantly constrain[ed] [PKCT's] ability to manage its employees, including in relation to performance, discipline, rostering, working time, leave, and promotion".

The parties commenced bargaining for a replacement enterprise agreement in March 2015 and continued to bargain throughout 2016 and early 2017. PKCT provided several proposed replacement agreements to the employees (and their employee organisation, the Construction, Forestry, Mining and Energy Union); however, these agreements were rejected. In April 2017, the employees covered by the Agreement took protected industrial action. In October 2017, PKCT applied to the Commission to terminate the Agreement.

Legal Background. Section 225 of the FW Act provides that if an enterprise agreement has passed its nominal expiry date, an employer, employee or employee organisation covered by the agreement may apply to the Commission for the termination of the agreement. The Commission may terminate an enterprise agreement only if it is satisfied that it is not contrary to the public interest to do so and it considers that it is appropriate to terminate the agreement, taking into account all the circumstances, including the views of the parties to the agreement and the effect that the termination will have on them.

Decision. The Commission held that it would not be contrary to the public interest for the Agreement to be terminated, and expressed concern that the Agreement was not consistent with the "promotion of economic prosperity, especially as its retention in the longer term may jeopardise PKCT's viability".

The Commission concluded that the Agreement needed to be replaced, chiefly because it prevented PKCT from flexibly organising and structuring its working arrangements and utilising its workforce to maximum benefit during working and paid hours. However, the Commissioner delayed the termination of the Agreement for 12 months, in order to maximise the likelihood that the parties would negotiate a new agreement which removed the team system before termination takes effect.

Lessons for Employers. This case demonstrates that the Commission can and will exercise its power to terminate inflexible enterprise agreements which no longer suit the circumstances of employees and/or their employer.

We thank Associate Katharine Booth and Law Clerk Jacqueline Smith for their assistance in the preparation of this Update.

LAWYER CONTACT

Adam Salter
Partner
Sydney
+61.2.8272.0514
asalter@jonesday.com

QUESTIONS

If you have any questions arising out of the contents of this *Update*, please do not hesitate to contact Adam Salter, Partner. Adam can be contacted by email at asalter@jonesday.com or by phone on +612 8272 0514.

UNSUBSCRIBE

If you no longer wish to receive the *Monthly Update—Australian Labour & Employment*, please send an email to asalter@jonesday.com with the subject UNSUBSCRIBE.

GLOBAL LOCATIONS

ALKHOBAR	CLEVELAND	HOUSTON	MILAN	RIYADH	TAIPEI
AMSTERDAM	COLUMBUS	IRVINE	MINNEAPOLIS	SAN DIEGO	TOKYO
ATLANTA	DALLAS	LONDON	MOSCOW	SAN FRANCISCO	WASHINGTON
BEIJING	DETROIT	LOS ANGELES	MUNICH	SÃO PAULO	
BOSTON	DUBAI	MADRID	NEW YORK	SHANGHAI	
BRISBANE	DÜSSELDORF	MELBOURNE	PARIS	SILICON VALLEY	
BRUSSELS	FRANKFURT	MEXICO CITY	PERTH	SINGAPORE	
CHICAGO	HONG KONG	MIAMI	PITTSBURGH	SYDNEY	