Enterprise Agreements - Penalty Rates Abolished For NSW Enterprise Agreements

Greater wage flexibility through enterprise agreements will be achieved when the *Industrial Relations (Amendment) Bill* 1993 is passed. Section 122 of the *Industrial Relations Act* 1991 (NSW) is to be amended to allow the minimum wage for 'ordinary hours' under an enterprise agreement to be determined without reference to any penalty rates which would apply under the award being replaced. At present the Act provides that employees' remuneration must not be less than the 'ordinary hours' rate under the applicable award.

Some enterprises have been able to formulate agreements which determine 'ordinary hours' without reference to award penalty rates, while other enterprises have not, depending on whether the 'ordinary hours' clause in the relevant award is expressed to include penalty rates. This amendment will overcome the arbitrariness of the present position. Effectively it will be possible for an employer to reduce or eliminate penalty rates when formulating the rates of wages under an enterprise agreement, regardless of the awards involved.

More Than One Thousand Federal Enterprise Agreements

1057 enterprise agreements have now been certified under the Federal Government's industrial relations legislation. Under Division 3A of the *Industrial Relations Act* 1988, 42% of the agreements have been achieved. More than one-third of all employees under Federal awards - 740,000 workers - are now covered under enterprise agreements.

The number of enterprise agreements registered in NSW continues to grow slowly with only 134 agreements at the end of June. These agreements cover only 8,500 employees, representing less than 1% of employees covered by NSW state awards.

State Enterprise Agreement Defeats Application For Federal Award Coverage

The Federal Industrial Relations Commission declined to make an employer a respondent to a Federal award on the basis that the employer and its employees had registered a State enterprise agreement. Commissioner Merryman found that since the State enterprise agreement had been genuinely negotiated it was in the public interest to refrain from dealing with the application, despite some concerns he had about the terms of the agreement.

Unions Excluded From WA Enterprise Agreements

Under recent legislation in Western Australia it is no longer mandatory to involve trade unions in the negotiation of enterprise agreements. The *Workplace Amendments Bill 1993* provides that employers and employees must agree in writing that a union should be included as a party to the agreement. Even then the inclusion of the union is on a strictly defined basis and subject to an undertaking by the union that it will conduct its affairs in a way consistent with the observance of the enterprise agreement and so as not to incite or encourage its breach.

The Bill also provides for the first time in Australia that any party to an enterprise agreement may be represented by an "authorised bargaining agent". As is the practice in New Zealand, specialist negotiators may now be used in Western Australia to negotiate and conclude an enterprise agreement on behalf of a party.

International Conventions Ratified by Australia

The International Labour Organisation is a specialist agency of the United Nations with the principal objectives of improving work conditions by providing world programs to achieve full employment, to enable workers to attain the fullest measure of their skills and to create adequate guarantees for basic standards of training and the transfer of labour.

ILO Convention Number 156 - Workers With Family Responsibilities

In March 1990 Australia ratified International Labour Organisation Convention 156 which addresses problems faced by workers with family responsibilities. The Federal Government has recently implemented this Convention by amending the Sex Discrimination Act 1984 to provide an additional ground of unlawful discrimination if an employee is dismissed because of family responsibilities. Family responsibilities include the need to care for or support a dependent child or immediate family member. Consequently employers should review the terms and conditions of employment and the extent to which employees with family responsibilities are accommodated in the work place.

ILO Convention 158 - Unfair Dismissals and Job Protection

The Federal Government recently ratified the ILO Convention 158 on standards pertaining to dismissal and redundancy of employees. The ratification does not take effect until 26 July 1994.

This Commonwealth initiative is likely to have a major impact on unfair dismissal laws throughout Australia, by providing a constitutional basis on which the Commonwealth may pass uniform legislation in the area.

The current law on unfair dismissal/job security varies from State to State. For example in New South Wales unfair dismissal actions may be brought only by employees who are covered by an award or enterprise agreement or who are Crown or special employees. In Victoria employees with less than six months' service have no cause of action at all for unfair dismissal. In Queensland mon-

etary compensation is available to the dismissed employee only where reinstatement is inappropriate.

By contrast the provisions of this Convention applies to all branches of economic activity and to all employed persons. The Convention also provides for monetary compensation for unfair dismissal, whether or not reinstatement is appropriate.

Misleading Prospective Employees - Trade Practices Act and Negligence

Information used by an employer to induce a potential employee to accept an offer of employment must be factually accurate. Recently dismissed employees have taken proceedings against employers for misleading representations made by the employer at the time their contract of employment was formed. In the case of corporate employers such an action would usually be brought under section 52 of the Trade Practices Act, 1974.

In addition scope exists for similar actions at common law. In a recent case before the Supreme Court of Canada damages were awarded to a former employee as a result of an allegedly negligent misrepresentation made by an employer during the hiring interview. The Court held that an employer owes a duty to a prospective employee to take care during the pre-employment interview not to make false representations about the nature and existence of the employment opportunity being offered. The interviewer must exercise such care as any reasonable person would require in the circumstances to ensure that what was said was accurate and not misleading.

Sex Discrimination Act 1984 and New Superannuation Guidelines

From 25 June 1993 discrimination on the basis of sex or marital status in superannuation schemes is prohibited by the provisions of the Sex Discrimination Act 1984. The Act provides a narrow exception which allows discrimination on the grounds of sex or marital status if it is based on reliable actuarial or statistical data on which it is reasonable to rely and it is reasonable having regard to that data and other relevant factors.

Examples of situations where the eligibility criteria for a superannuation scheme could be discriminatory include rules restricting access to the fund to employees above certain incomes, managerial employees, permanent employees, full-time employees and employees who have a minimum period of service. The Sex Discrimination Commissioner has published guidelines to assist those involved in the superannuation industry and employers to comply with the new regime.

Contracts of Employment - Taxation Issues

The Federal Commissioner of Taxation has issued draft taxation determinations relating to costs associated with employment agreements.

Costs associated with negotiating and drafting employment agreements and settling disputes under contracts of employment are deductible to the employer. An employee in an existing employment relationship who incurs legal and other expenses in renewing an employment agreement after its term is concluded or in changing the conditions of the agreement is also entitled to a deduction for associated costs.

Both employers and employees are entitled to a deduction for costs incurred in the settling of disputes arising out of employment agreements.

The Commissioner has also confirmed that where a company transfers a business to an associated entity a payment made in respect of employees who are transferred as a consequence of the termination of employment with the company will qualify as an eligible termination payment.

Recent Cases
High Court Limits Use of Ambit Claims

Because the ambit of an award made in settlement of a dispute is limited by the parameters of the dispute itself, it has been the practice for unions to serve logs of claims which make extravagant demands.

The validity of this practice has been thrown into doubt by a recent decision of the High Court, which held that a log of claims was not genuine and therefore could not give rise to an industrial dispute. In that case the log of claims sought $7,500 per week for each employee, indexed for inflation with no differentiation between various classes of employees.

The High Court were unanimous in viewing this claim as a "fanciful" and non-genuine demand. Consequently the claim could not give rise to an industrial dispute and could not confer jurisdiction on the Commission to make an award in the matter. *Re SPSF: ex parte Western Australia and Anor.*

Restriction Of Unfair Contract Jurisdiction Of Industrial Court

As a result of a recent decision of the Full Industrial Court the unfair contract jurisdiction of the Court under section 275 of the Industrial Relations Act 1991 has been considerably narrowed. Where previously the Court could declare void or vary the terms of a contract if the terms or the operation of a contract were unfair, harsh, unconscionable or against the public interest, this is no longer the case. Whether a contract is unfair, etc. will now be determined solely by reference to its terms, and not by the way in which the contract is carried out by the employer.

In this case an employee, dismissed for alleged inefficiency, claimed that his employment contract was unfair because it allowed him to be dismissed in circumstances which deprived him of redundancy payments.

The Full Court held that the essence of his complaint related to the conduct of his employer and not to the actual terms of his contract, which were unambiguous and unexceptional.

This decision will now make it more difficult for former employees to complain about the circumstances in which they were dismissed otherwise than by an unfair dismissal claim under section 246 of the Act, which is restricted to employees covered by an award or enterprise agreement, or to Crown and special employees.

This case is the subject of appeal which will be heard by the New South Wales Court of Appeal. *Hussman Australia Pty Ltd v Walker.*

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