INDUSTRIAL RELATIONS UPDATE

June 2022

Predisposition not fatal to consultation obligation

Just because an employer had a strong inclination to introduce a new WHS policy didn't mean that its consultation obligations could not be fulfilled according to the FWC. Accepting that "*consultation isn't merely about the impact of a decision and means to mitigate the impact, but about the decision itself*", the FWC rejected argument that the employer left the employees with no option but to accept the new policy.

While the particulars of this case obviously influenced the determination of the matter, the issue of whether or not the employer had met consultation obligations was fundamental, as much as the policy itself. This in turn presented an opportunity for some guidance on consultation principles.

The FWC said "*consultation should be meaningful and engaged in before an irreversible decision has been made. Consultation should not be perfunctory. It has been said that the obligation will only be met where a party has a real opportunity to influence the decision maker. The obligation will not generally be met where the party upon whom the obligation rests treats the implementation of a proposal as a* fait accompli*, with only the details ... left for discussion*."

Responding to argument that the employer was predisposed to the action and nothing the employees said would make a difference, the FWC said this: "*Holding a predisposed view to a particular course …. and holding to that view during the subsequent period of consultation, did not mean that the consultation was not genuine and meaningful. Whether other or different approaches to decision-making and consultation could or should have been taken ….is not to the point*."

Underpinning this situation is a basic issue of management. This case involved the response to client demand for security of supply during the pandemic which meant a stable workforce, not one rife with absenteeism due to illness. The employer had to respond to that demand or face serious consequences for the business. So the consultation was undertaken, as the FWC put it, "*in the context of the matters at hand*".

The decision also has relevance for another everyday situation – consultation prior to termination. Again, just because an employer has virtually made up their mind to terminate someone, does not mean the consultation is a sham. It doesn't preclude a change of mind if the facts change relevantly. This issue often raises its head when a HR manager has prepared a termination letter prior to having the expected exit interview. It does not mean the decision to terminate is irrevocable, it means the manager is prepared for the more likely outcome of the meeting. That's all.

As FWC said, "*having a predisposed view to a particular course rather than ...opening discussion on neutral options is not, of itself, a failure to consult provided the necessary ingredients exist that meet minimum consultation obligations*."

AMWU and AWU v ASC Pty Ltd T/A Australian Submarine Corporation [2022] FWC 1198 (3 June 2022)

More uncertainty on the casuals front?

The ALP government wants to restore the common law definition of a casual rather than the legislated definition introduced last year. This would mean going back to not knowing if a casual, hired and paid as such, is going to be later determined by a court to be permanent. This problem was a curse for generations and the federal legislative changes brought certainty at last. Junking that would be a regressive step. Employers need to be alert to opportunities to influence the debate on this issue, or face the consequences of a return to the bad old days of engaging a casual but keeping fingers crossed.

ALP Secure Australian Jobs Plan

Two-tiered award wage increases

The FWC has decided to split the wage increase applicable in this year's Annual Wage Review at the cut-off point of $869.60 per week. Award pay rates below that figure will increase by $40 per week, and award rates above that figure will increase by 4.6%. The operative date, for all but a small group of awards, will be the first pay period commencing on or after 1st July. The FWC agreed that ten awards in the tourism and hospitality sector would not have their rates adjusted until 1st October.

Summary of Annual Wage Review June 2022

Super news

From 1 July 2022, employers will need to pay super to those employees who earn less than $450 per month, provided they meet other eligibility requirements. This change expands super guarantee eligibility so that employees can receive super regardless of how much they earn.

Meanwhile the new federal government has committed to retain the existing set-up increasing the superannuation levy incrementally to the 12% level. However it has also signalled it will be working on a plan to extend the levy to 15% down the track.

Repudiation, not dismissal, over relocation

When a company advised its employees their work at one site was over and their new work location was interstate, 17 of them chose not to move. They said they were dismissed because they were engaged to work on their current site. In the alternative, they claimed they were forced to resign by the employer's actions requiring them to relocate.

Whichever way you looked at it, it was all the employer's doing, so they were either redundant at their existing site, or constructively dismissed. But the FWC disagreed, finding their employment contracts clearly provided for the redeployment, so they were not terminated by the employer.

The case focussed on a clause in the employees' contracts which included "*you may be required to work on multiple sites ... as directed by the Company*". The employees argued that since the initial job advertisements and cover letter confirming appointment included reference to their current site, this was an implied term of their contracts.

But the FWC said that it is impermissible to have an 'implied term' override a specific term of a contract. It is a long-established legal principle that in the absence of ambiguity or uncertainty, extraneous or collateral material cannot substitute for, or inform the meaning of, the agreed written provisions of a contract. Basically, an implied term can really only be useful if it is necessary to render effective some aspect of the contract that is either silent or confused.

None of these preconditions existed. The plain meaning of the words in the contract needed no help in order to be understood or applied. The employees knew from the outset relocation was a possibility. The behaviour of the employer, once it became clear the work at the initial site was drawing to a close, was entirely consistent with the contract.

The employer directed the employees to report for work in the new location and they failed to do so. FWC found they repudiated their contracts, rejecting argument of forced resignation too, saying the employees "*abandoned their employment by refusing to work at their new deployments".*

A clear contractual term that work may be required in different locations is fundamental in these situations. Employees agree contractually that it may occur. If it does, provided there's fairness between relevant employees, a refusal to relocate, as the FWC said here, will likely constitute a renunciation of contractual obligations.

Ambrose v OS MCAP Pty Ltd [2022] FWC 1481 (10 June 2022)

Zombies in the frame?

As part of the ALP government's workplace relations agenda, it's a fair bet cancelling zombie agreements will feature. There are thousands of these agreements, up to 20 years old and still in force, many with inferior conditions. While they will have delivered the employer advantages over competitors paying higher labour costs, others are not dependent on sub-standard conditions for their longevity. Rather, they are founded on structural fundamentals which, if removed by cancellation, may significantly alter the way work is performed, rostered and otherwise completed.

This issue was on the Coalition's list of changes about two years ago, so it's unlikely to be impeded in the parliamentary process. Currently, unions, or employees working under these agreements, successfully apply to the FWC for the agreement to be cancelled, with not much grace time to adjust. But they are few and far between. A legislative change would dramatically change that. The unknown in all this is what cut-off date might be chosen. Whatever the date, all those workplaces affected would, on most likely little notice, become liable to follow whatever awards apply to their workplace.