INDUSTRIAL RELATIONS UPDATE

October 2022

Pre-start activities constituted work

Expecting employees to perform some minor preparatory tasks prior to starting a shift can be, on the surface, no more than requiring them to be ready and able to start work. But some activities can go beyond that and, as in a recent case, found to be "work" and thereby attracting payment.

Employees testified in court they were obliged to do a number of pre-start checks on machinery serviceability and collect work-related equipment and supplies before their ordinary hours (and payment for them) commenced. Additionally, at shift end, they were obliged to perform similar tasks which were outside their ordinary hours too.

The employer's limited evidence showed the tasks took about five minutes, describing them as merely an expectation "*to be ready to commence work at the start of the rostered shift*". But the court dismissed this as unrepresentative, finding the tasks took on average overall, close to 20 minutes per day.

The court said to decide if the tasks constitute work requires construction of the enterprise agreement and "*whether it makes a specific provision for the activity in question*".

It found the pre-start tasks weren't private activity; they did not involve any activities of benefit to the employee, such as storing personal effects, putting on uniforms or PPE. Each activity was solely to the benefit of the employer, in that by the time the employee arrived at a designated location for the commencement of shift, all necessary activities for the employees to get immediately to work had been completed.

There was no personal benefit to the employee in the activities carried out. Each was to the benefit of the employer. This is the standard measure in these cases. In the circumstances, the court was satisfied that the activities constituted work and hence had to be paid for. It so ordered.

Interestingly, the court said "*no evidence was produced by way of reference to the enterprise agreement or otherwise to show that these pre-commencement tasks were acknowledged and deliberately excluded from hours worked*".

Twice in this decision there is reference to what might have been in the enterprise agreement to assist in the determination of the dispute. Clearly the court was of the view that the *idea* of having employees perform work before the official start time was not of itself repugnant in the legal sense.

The productivity dividend at the core of this issue is obvious. The message for employers who want employees kitted up, to check equipment and be ready to go on the hooter, is to make sure these expectations and requirements form part of the contract and contemplated in the pay. Plenty of companies pay well enough above the award to cover off the overtime or whatever other relevant payment might apply, but without the explicit trade-off in writing, any argument about what constitutes "work" will likely go the way it did here.

This is a case where a more robust approach to the needs of the business with a productivity payoff at the time of enterprise bargaining could have resulted in a different outcome.

SDAEA v Aldi Foods Pty Ltd [2022] FCF C2G 799 (30 September 2022)

"On contract" employees still covered

The age-old mistake of assuming employees "on individual contracts" are automatically removed from the regulatory framework of awards or agreements is alive and well, as the FWO found with a major employer. Every employee has an individual contract of employment with their employer, that's just basic contract law. Awards and agreements set the *conditions*. If either of those apply, then their conditions must be covered off, in toto, by the contracted salary and benefits. Set-off clauses can make all the difference in such cases. $7 million later and counting this employer has learnt that labels don't matter.

FWO v Seqwater (28 September 2022)

FWC superannuation review

Following legislative changes to superannuation, particularly stapled funds and underperforming products, modern awards may be in conflict with the new laws.

FWC has initiated a review, to be conducted in two stages using six awards in a pilot scheme, with the remainder to be dealt with later. In the meantime, employers should check they are complying with the new laws which will override the award provisions.

Statement super [2022] FWC 2603 (28 September 2022)

Slight uptick in wage settlements

The FWC fortnightly series on wage rises included in enterprise agreements is now established. The lag from lodgement of the agreements to publication of the data is only around five weeks so the data is the most up to date available.

The latest figures published relate to agreements lodged in the second half of August. It shows an average annual wage rise of 3.3%, up slightly from the previous data set but covering around a third less employees.

FWC Statistical Report Bargaining Data 10.10.22

Trainee wasn't an employee

Occasionally, the old saying 'if it waddles like a duck, quacks like a duck, it most likely is a duck' doesn't hold true. In a recent case, a trainee was paid $30,000 p.a. taxed as PAYG and had annual and personal leave entitlements. Payment was made on the basis of standard hours per week over 52 weeks.

Superficially, these features looked a lot like an employment relationship. When a dispute arose, he applied to the FWC, but the employer objected on jurisdictional grounds so the threshold question of status had to be determined.

The trainee tried to persuade the FWC to look at post-engagement conduct (the 'old' way of establishing the truth of the relationship) to bolster his case. He argued that omissions from the contract concerning day to day rostering meant "*the rights and obligations of the parties are only partly committed to the contracts and the contract is therefore vague. ..the Commission is justified .. in also analysing the conduct of the relationship after the contract was formed*".

The employer submitted High Court decisions about the supremacy of the written contract meant the nature of the relationship was plain. The contracts were clear and the trainee had not claimed the contract was a sham. He was well aware he had entered into a student training program, not an employment contract.

The FWC agreed, dismissing any suggestion that the contract was not comprehensive on the fundamentals of the relationship. The FWC went on to itemise a useful check-list of principles in determining these matters, summarised as follows:

- when describing a relationship regulated by a comprehensive contract which is not a sham, the question is determined solely by reference to the rights and obligations under that contract. It is not permissible to examine or review the performance of the contract;

- the subsequent conduct of the parties *may* be relevant to establish the existence of any *variation* of contractual terms;

- the multifactorial approach only has relevance in respect of the required assessment of the *terms* of the contract;

- it is necessary to focus on whether, by the terms of the contract, the person is contracted to *work in the business* of the purported employer;

- if is there a contractual right to control the activities of the person (including how, where and when the work is done), that is a major signifier of an employment relationship;

- labels placed on the relationship by the contract are not relevant even as a "tie breaker", or at least not decisive.

These principles primarily relate to the contractor-v-employee debate but can apply just as usefully to training positions such as in this case.

Tracey v Murdoch Uni [2022] FWC 2094 (11 August 2022)

Good intentions come unstuck

Allowing employees who are on leave or off the roster during the access period to lodge an absentee vote for an agreement has come undone because the votes were 'cast' before the access period concluded. The obvious intent was to give everyone a chance to vote. Absentee votes were in sealed envelopes and not opened until the count commenced.

But the law is so strict that the FWC would not waive this irregularity in favour of finding the agreement met the more important tests of being better than the award and agreed to by the employees and their union. The lesson is, do not provide an absentee mechanism unless that mechanism ensures the employees do not lodge their ballots until the access period is ended.

ACM Processing Pty Ltd [2022] FWC 2609 (28 September 2022)