SQUIRE PATTON BOGGS

Workplace View

January 2016

To Terminate or not to Terminate – That is the Question?

Fair Work Commission Shifts its Stance on Terminating Expired Enterprise Agreements During Bargaining

Emma Dawson, Associate

The recent cases of *Australia and New Zealand Banking Group Limited* [2015] FWCA 8422 (ANZ) and *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540 (**Aurizon**) have signalled a shift by the Fair Work Commission (**Commission**) in approving the termination of nominally expired enterprise agreements (**EAs**) during bargaining.

Section 226 of the *Fair Work Act 2009* (Cth) (**Act**) provides that the Commission must only terminate an EA if it is not contrary to the public interest to do so and it is appropriate taking into account all the circumstances.

Traditionally, in applying section 226, the courts have refused to terminate EAs where bargaining for a replacement EA was under way, on the basis that it would be against the objects of the Act and contrary to the public interest because the termination would create an unequal bargaining position between the parties. The decisions in *Aurizon* and subsequently *ANZ* have signalled a softening of this stance by the Fair Work Commission.

The Full Bench Decision in *Aurizon*

In the Aurizon decision, the employer applied to the Commission under section 225 of the Act to terminate 12 expired EAs (including one which was 17 years old) after months of bargaining had resulted in a deadlock in negotiations.

The EAs contained a number of highly restrictive and uncompetitive terms which had made their way into the agreements during the privatisation of Queensland Rail (which ultimately became Aurizon).

Despite opposition from many of Aurizon's employees and their unions, the Full Bench made orders to terminate the 12 expired EAs under section 226 of the Act. In reaching its decision, the Full Bench overturned the reasoning adopted by earlier decisions which consistently relied on the notion that it will generally be inappropriate to terminate EAs when bargaining is underway.

The Full Bench maintained that, on the proper construction of section 226 of the Act, the emphasis that the earlier decisions placed on the objects of the Act requiring collective bargaining in good faith was *not* inconsistent with the capacity to terminate an EA under section 226 while bargaining was underway.

Unsurprisingly the Union lodged an appeal against the decision of the Full Bench with the Full Federal Court but the appeal was dismissed by that court in September 2015.

Recent Approval in *ANZ*

The more recent decision of the Commission in *ANZ* handed down in December 2015 has provided comfort for employers that the Full Bench decision in *Aurizon* is likely to stay. In that case, the ANZ applied to the Commission to terminate an EA which expired over 14 years ago and only applied to 8% of ANZ's most senior workforce.

ANZ sought comments from its employees and the Finance Sector Union of Australia (**FSU**).

In doing so, the only feedback ANZ received was from the FSU who argued that terminating the agreement would remove "long established protections and benefit", including rights to consultation and access to external dispute settlement procedures.

The bank disputed this proposition and argued that the termination would have no real impact on the employees, who now have access to terms and conditions in employment contracts which far exceed those of the EA.

In determining whether or not the EA "must" be terminated under section 226 of the Act, Commissioner Lee adopted the Full Bench's construction of section 226 in the *Aurizon* decision. In doing so, Commissioner Lee terminated the EA after reaching the conclusion that the EA was largely irrelevant in terms of regulating the terms and conditions of the senior staff to whom it applied and accordingly found that it would not be contrary to the public interest or inappropriate to terminate the EA in the circumstances.

What Do These Decisions Mean for Employers?

The above decisions provide comfort to employers that in appropriate circumstances the FWC will approve the termination of nominally expired EAs while bargaining is underway.

However, employers should be mindful that the Aurizon decision does not provide an automatic 'green light' to terminate during the bargaining process. The Full Bench were at pains to point out the unique circumstance Aurizon found itself in, following the privatization process, which weighed heavily in their finding. Employers' are still required to prove to the FWC that terminating an EA is not against the public interest and is appropriate in the circumstances.

Did You Know

… that managers can be individually liable to pay a fine as a result of providing an employee with insufficient notice of termination?

As most of you know, the National Employment Standards (**NES**) set out the minimum entitlements for employees in Australia covered by the national workplace relations system. As part of the NES, an employer must not terminate an employee's employment unless it has given the employee, or made a payment in lieu of, the minimum period of notice outlined in the NES.

In the recent case of *Cerin v ACI Operations Pty Ltd & Ors* [2015] FCCA 276, the Federal Circuit Court ordered the employer and its Human Resources Manager to pay penalties to the employee for failing to provide him with the appropriate notice of termination in breach of sections 44 and 117 of the *Fair Work Act 2009* (FW Act).

The employee was on workers' compensation and was given 28 days' notice of termination of employment.

The employer argued that this complied with section 58B of the *Workers Rehabilitation and Compensation Act 1986* (SA) however the Court found that this was in breach of the NES which required the employer to give the employee five weeks' notice.

The employee was entitled to a further two days' notice and suffered a loss of $181.66 as a result of the breach.

The Court found that the employer's conduct in terminating the employee's employment without the appropriate notice was "bizarre" since no excuse could be given by the employer or the Human Resources Manager for not complying with the FW Act.

The Court imposed substantial penalties on the employer (AU$20,400) and the Human Resources Manager (AU$1,020) both of which were ordered to be paid to the employee.

High Court Decision Alert

High Court decision alert: *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors [2015] HCA 45*

A recent High Court decision handed down on 2 December 2015 may be of great interest to those who are engaging workers through third party providers.

In our May 2015 edition of Workplace View we reported on Federal Court proceedings involving serviced apartment operator Quest South Perth Holdings. It was alleged that Quest had breached section 357(1) of the *Fair Work Act* 2009 (Cth), which provides that an employer who employs or proposes to employ an individual must not represent that a contract of employment under which the individual is, or would be, employed is a contract for services under which he/she performs work as an independent contractor.

While the Full Court of the Federal Court found that two of the Quest housekeepers were employees, it did not agree that Quest had breached the sham contracting provisions of the Act. This was due to the fact that the contractors were provided to Quest via a labour hire company, and the Court found that the sham contracting provisions did not capture this tri-partite arrangement where the workers were engaged under contracts for services by a third party. This finding was made despite the fact there had been no real change in the employees' working arrangements, since the workers were originally employed by Quest, other than the fact the labour hire business was to take over the payroll function. This decision revealed a loophole in the application of section 357 to triangular arrangements.

However, the matter did not end there, with the Fair Work Ombudsman appealing to the High Court. The High Court allowed the appeal and held that section 357(1) is not to be so narrowly construed and does prohibit an employer from misrepresenting to an employee that the employee performs work as an independent contractor under a contract for services with a third party (in this case the labour hire company). While Quest represented they were performing work for Quest as independent contractors, they continued to perform the same work they had always done for Quest and remained employees under implied contracts of employment.

In its unanimous decision, the High Court commented that Quest's conduct in misrepresenting the arrangement to the employees fell "squarely within the scope of the mischief to which the prohibition in section 357(1) was directed and is caught by its terms".

Employers should accordingly review their arrangements with potential contractors to ensure they have not inadvertently entered into employment relationships with workers, even when such workers have been provided through labour hire companies.

International Spotlight

The United States is certainly ahead of the game when it comes to legislating around social media and freedom of association laws!

Our colleague from our Columbus office in Ohio, Anne Marie Prack, reports below on how a Facebook "like" can be considered "protected concerted activity" in the United States, that is an activity an employee can partake in without fear of employer retaliation….

Second Circuit "Likes" NLRB Decision on Facebook Activity

By Anne Marie Prack on October 29, 2015

On October 21, 2015, the US Court of Appeals for the Second Circuit upheld the National Labor Relations Board's (**NLRB**) ruling that a Facebook "like" can be protected concerted activity under the National Labor Relations Act (**NLRA**).

In short, the recent judicial endorsement of the NLRB decision reinforces that not only written social media activity can be protected, a simple Facebook "like" may be as well – in this particular case, the protected act was the "liking" of a negative post related to employer tax withholdings and the alleged failure to pay a former employee's wages. Because the post/conversation at issue was work-related, an employee's support/"like" of the post was found to be protected. The Court did note that there are limits to the NLRA's protections, including instances in which a post or comment is both defamatory and maliciously untrue – no doubt we will be seeing cases delving into this issue in the coming years.

In the meantime, employers in the United States should think twice before terminating employee for a Jerry Maguire-worthy post decrying the conditions of the workplace – or "liking" something similar.

Legislation Update

Legislative Instrument	State	Status	Proposed Changes
Fair Work Amendment (Remaining 2014 Measures) Bill 2015	Cth	Second reading speech moved in the House of Reps on 3/12/15	Amends the *Fair Work Act 2009* to implement elements of *The Coalition's Policy to Improve the Fair Work Laws*. Specifically, the Bill responds to a number of outstanding recommendations from the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (June 2012) review into the operation of the Fair Work Act by the Fair Work Review Panel.
Work Health and Safety (Mines and Petroleum) Legislation Amendment (Harmonisation) Bill 2015	NSW	Received assent on 2/11/2015	Amends the *Work Health and Safety (Mines) Act 2013* to extend that Act to work health and safety at petroleum sties and to clarify how that Act interacts with the *Work Health and Safety Act 2001*

Contacts

Kylie Groves
Partner
T +61 8 9429 7475
E kylie.groves@squirepb.com

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

Felicity Clarke (Editor)
Of Counsel
T +61 8 9429 7684
E felicity.clarke@squirepb.com

Dominique Hartfield (Editor)
Senior Associate
T +61 8 9429 7500
E dominique.hartfield@squirepb.com

Anna M. Elliott
Of Counsel
T +61 2 8248 7804
E anna.elliott@squirepb.com