

Voluntary Resignation or Constructive Dismissal? Employers be Wary

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Recent unfair dismissal cases before the Australian Fair Work Commission (**FWC**) have placed constructive dismissal back in the spotlight and provide an important reminder for employers to be careful in managing employee grievances.

The protection from unfair dismissal provisions under the *Fair Work Act 2009* (Cth) (**FW Act**) extend not just to employees who have been directly terminated by their employer but also to employees who have been constructively dismissed. Accordingly, it is important that employers and their managers fully understand the concept of constructive dismissal to guard against unfair dismissal claims.

Constructive Dismissals

A constructive dismissal will ordinarily arise at common law where an employee resigns from his/her employment, but that resignation is brought about by the acts of the employer. It is often described as a situation where the employee is forced to resign because the employee feels he/she has "no other option". In this situation, the employee may discharge themselves from further performance of their employment contract without providing the requisite notice.

The unfair dismissal provisions of the FW Act are intended to reflect the common law concept of constructive dismissal and protect employees who resign where the employee "*was forced to so because of conduct, or a course of conduct, engaged in by his or her employer*".

The current position in Australia requires an objective analysis of the employer's conduct to determine whether it was of such a nature that resignation was the probable result, *or* that the appellant had no effective or real choice but to resign. The conduct includes both an act or failure to act, and all the circumstances giving rise to the resignation must be considered.

Recent Cases

On 31 May 2013, the FWC found that an employee was constructively dismissed when the employer unreasonably refused a request by the employee to work part-time after the birth of the employee's second child, which she was entitled to request in accordance with the company's enterprise agreement. The Commissioner found the company knew the practical impossibility of the employee working full time and thus, forced her to "resign" after informing her (through her representative) that if she did not work full-time she would be deemed to have abandoned her employment. The Commissioner was satisfied the company engaged in a course of conduct that justified the employee treating the employment as at an end because there was an unreasonable refusal to perform the company's obligations under the enterprise agreement.

However, on 19 June 2013, the FWC dismissed an applicant's claim that she was constructively dismissed; having resigned on the basis the employer had failed to regularly pay her on time and had underpaid her superannuation entitlements. The Commissioner found the applicant had not been constructively dismissed because she had options other than dismissal for addressing the matter, such as referring to the matters to the Commission and the ATO.

What Should Employers Do?

An employer will therefore avoid an unfair dismissal claim arising from a constructive dismissal where the employee had other options reasonably open to them as an alternative to resignation. It is important employers are mindful that employees are not put in a position where they have no other available options but to resign. This means avoiding conduct which may be interpreted as "adverse, unfriendly or hostile" to the contract of employment and the employment relationship.

The implementation of a clearly defined grievance procedure in the workplace and provision of counselling services can be useful means of properly resolving employee issues and providing support before they reach the stage of resignation.

Did you know? ...

As of 1 July 2013, the high income threshold will increase to AU\$129,300, which will provide more employees access to the Fair Work unfair dismissal laws. The high income threshold is also relevant to the application of modern awards to employees. The unfair dismissal compensation limit has also increased to AU\$64,650.



Client Corner



Karen Browne

City Lawyer
City of Wanneroo

What attracted you to working for the City of Wanneroo? My husband and I sold up in Nedlands and bought a 60 acre farm in Gingin. For the first four years I commuted into the City and, effectively, got tired between the two hour travel each way (the freeway is a car park) and work commitments, and the City's CEO (through a mutual contact) decided the City needed in-house legal assistance given its extremely quick and sophisticated growth.

What occupation would you have taken up if you had not done your current job? Writer

What has been your best professional moment? Being part of a back door listing of a public company and travelling Australia undertaking due diligence for mergers and acquisitions has been the most satisfying experience to date.

As business becomes ever more global, what employee issues are becoming increasingly relevant to the City of Wanneroo? The City's workforce is more than 1,000 so the area of the ever-evolving industrial relations and work safety compliance and standards are the most pressing together with developer stakeholder engagements given the rapid growth of the northern corridor.

What do you do for fun and at the weekends? As much as possible, we whip over to Melbourne to visit our granddaughter. On a farm, maintenance is constant so most weekends are made up of farm chores and then strolls along the Gingin brook which is our southern boundary to check for damage etc. and, during winter, watching AFL footy.

What are two rules you try to live by? It sounds trite, but do unto others and act with integrity.

Legislation update

Legislative instrument	Stage of legislation	Key proposed change
<i>Migration Amendment (Temporary Sponsored Visas) Bill 2013</i>	Text passed by both Houses. Assent given 29 June 2013.	<ul style="list-style-type: none"> Introduces a requirement for employers to undertake labour market testing for a nominated roles. Increases the time period which a visa holder has to obtain alternative employment or leave the country if their current employment terminates from 28 days to 90 days. Grants powers to the Fair Work Ombudsman to investigate breaches of sponsorship obligations. Introduces enforceable undertakings for employers who have breached their obligations.

Squire Sanders 2013 Australian Labour & Employment Breakfast Series:

- 21 August 2013 – Executive Remuneration and Restrictive Covenants
- 23 October 2013 – Redundancy Refresher

External Events

- 30 August 2013 – Employment Law Fundamentals 2013 (by Konnect Learning); Rydges Hotel, Perth



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