NEWSLETTER - JUNE 2022

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PRESIDENT'S MESSAGE

The electoral pendulum has swung (as is its wont) and IR is likely to undergo significant changes as a consequence. We will watch this space with bated breath and Alera will endeavour to bring members relevant seminar topics as issues old and new come to the fore.

Our usual seminar venue, The Police Club, is sadly no longer available. It was a top venue and we were well supported there.

The August 4th seminar and the August 15th AGM will be held at the Kings Head Hotel, 357 King William St, Adelaide.

The August 4th Seminar will be presented by Kaz Eaton and will address the legal rights and obligations of employees returning from parental and other long term leave. It will be available by Zoom and F2F. The downside of Zoom being it is necessarily BYO!

For those who aren't all "voted-out" we have an election to add to the various state, federal and by—elections.

The AGM will be held on Monday 15th August at the Kings Head Hotel and members present will elect members of the new Committee of Management. All positions are up for grabs, but I will have the only safe "seat" – that of Immediate Past President.

Please make sure memberships are paid to maintain eligibility.

To mediate the mundane reports and an election without Antony Green, the guest presenter will be a new Alera member Corrine Grant. Not sure whether the comedian or the lawyer will win this battle.

Glen Seidel, President – ALERA SA

Recent Activities

Seminar – 2 March 2022 – Shifting the Line: The New Boundary Between Employment and Independent Contracting, Professor Andrew Stewart

No industrial relations organisation would be worth its salt if it didn't offer something to its members following the High Court decisions in *Personnel Contracting* and *Jamsek*. So apart from the article provided later in this newsletter, the Association arranged for none other than Professor Andrew Stewart to bring attendees up to date on the effect of the High Court decisions in this important area of employment/industrial relations law.

1 - Professor Andrew Stewart

Whilst the overall effect of the High Court's decisions was pretty simple – the contractual agreement struck between the parties will be determinative of the nature of their relationship – there are some nuances to each decision and how the reasoning might be applied in other factual situations and, as ever, Professor Stewart was able to break those issues down into digestible bites for the benefit of all who attended. We're sure the recording of his seminar will be an instant 'go to' the first time our attendees are faced with a question as to whether any given worker is an employee or a contractor in the post-Personnel/Jamsek era.

Seminar – 4 May 2022 – How to Get Your Agreement Approved with a Minimum Fuss, Commissioner Christopher Platt

Commissioner Platt was kind enough to speak at our April seminar on the topic of the Fair Work Commission's Enterprise Agreement Approval processes.

The email flyer for the seminar told attendees that Commissioner Platt 'tries to take a practical no-nonsense approach to problem solving' and the Commissioner delivered. Attendees were treated to an engaging and highly practical session, where they were guided through the EA approval process in a straightforward, 'no fuss' manner, with the Commissioner pointing out those things that practitioners and bargaining representatives get wrong or overlook (or try include in an EA when they can't) and which ultimately cause issues or prevent the Commission from approving a new Enterprise Agreement.

Commissioner Platt took attendees through the major issues that arise, starting with pre-approval issues – issues such as Notices of Employee Representational Rights, the need for a proper explanation of the terms and effect of the agreement and access periods – right through to issues ensuring the NES are met, that the agreement passes BOOT and fixing problems (although best to avoid it!) with Undertakings. gets passed.

Commissioner Platt even gave attendees a number of links to make the process (almost) foolproof:

1. The NERR Generator – Create the NERR | Fair Work Commission (fwc.gov.au)
2. Making Compliant Agreement Applications - Making compliant agreement applications (fwc.gov.au)
3. Enterprise Agreement Benchbook - Enterprise agreements benchbook | Fair Work Commission (fwc.gov.au)

Especially for those who aren't regularly involved in the making of Enterprise Agreements, this was truly a seminar not to be missed!

Know Our New Members

A new initiative for our newsletter, this section is intended to become a regular feature, giving new members a chance to introduce themselves and letting existing members get to know a little bit about them when they join.

Member – Nino Marciano, Solicitor, EMA Legal

Nino recently joined EMA Legal as a Senior Associate. Nino's primary area of practice is Industrial Relations and Employment, Government and Administrative Law.

From 2019 to March 2022 Nino was appointed to the position of Ministerial Adviser – Industrial Relations to the Hon. Rob Lucas, MLC, Treasurer of South Australia (relevantly the Minister then responsible for Industrial Relations and Public Sector).

From 2015 to 2018 Nino worked with the Public Law Section at the Crown Solicitor's Office (SA), where his advocacy extended across several jurisdictions, providing legal services to a variety of agencies in respect of a wide range of issues, including underpayments, employee misconduct and incapacity and workers compensation.

Member – William (Billy) Elrick, Branch Secretary, Health Services Union SA & NT

Prior to being the Branch Secretary, Billy worked as the Lead Organiser for the SA/NT Branch and has previously worked as Organiser in a Victorian branch of the HSU. Billy started working in the disability sector as a Support Worker from the age of 18 and was an HSU Delegate before working for the HSU.

During Billy's leadership of the HSU SA/NT the Union has seen unprecedented growth while leading a team strong on industrial and social activism.

High Court Sheds Light on Determining Employee/Independent Contractor Arrangements

By Paul Dugan, Kylie Dunn, Lachlan Chuong, DMAW Lawyers

On 9 February 2022, the High Court handed down two very significant judgments on test cases about the legal distinction between independent contractors and employees.

In those decisions the High Court:

- decided that (save for very limited exceptions) where there is a comprehensive written contract in place, whether a person is a contractor or an employee must be determined solely by the terms of that written contract;
- clarified the key features of a contract which will determine whether workers are contractors or employees; and
- decided that workers provided under certain commonly used types of labour hire arrangements (who were previously considered to be independent contractors) are in fact employees of the labour hire agency.

This means that businesses involved in, or wishing to enter into, independent contractor arrangements will have much greater certainty as to the nature of the legal relationships they have with their workers, but only if they have properly drafted comprehensive written agreements in place.

It also means whilst there is now likely to be increased scope for businesses to enter into independent contractor rather than employment arrangements, labour hire businesses (in particular) who provide workers on a contractor basis may be at risk of substantial employee entitlement claims and regulator action unless they have written agreements in place which meet the independent contractor tests clarified by the High Court.

The two decisions are summarised below.

Labour hire "contractors" in fact employees

The first decision of *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 concerned a trilateral labour hire arrangement (commonly known as an Odco arrangement) in which Mr McCourt, a British backpacker, entered into a purported service agreement with Personnel Contracting (Construct), who operated a labour hire company.

Under the terms of that agreement, Mr McCourt was described as a "self-employed contractor" and assigned by Construct to work on two construction sites operated by a client of Construct, Hanssen Pty Ltd. Mr McCourt performed his work under the supervision and direction of Hanssen staff.

Based on the terms of the written contract between Mr McCourt and Construct the High Court found that Construct had effective control over how and for whom Mr McCourt would provide his labour, who in return received payment from Construct for the work he performed.

On that basis, the High Court held that the relationship between Mr McCourt and Construct was in fact an employment relationship at law, overturning a number of previous decisions which had found that workers under similar Odco arrangements were independent contractors.

In reaching this view, the majority of the High Court was not swayed by submissions of Construct that this type of Odco arrangement has been relied upon by a significant number of businesses and to overturn those authorities would throw those businesses into uncertainty and expose them to significant liability.

Drivers found to be independent contractors

The second decision of *ZG Operations Australia Ltd v Jamsek* [2022] HCA 2 (Jamsek) is likely to provide clarity to businesses or employees in the owner/driver and gig economy models.

Jamsek involved two truck drivers who were initially employed by ZG Operations as truck drivers driving trucks owned by the company. ZG Operations decided that it would no longer employ drivers and offered the truck drivers the opportunity to purchase their own trucks and to "become contractors".

The two truck drivers accepted the offer and (in partnership with their spouses) entered into written contracts with the company to provide delivery services, purchased trucks from the company, paid the maintenance and operational costs of those trucks and invoiced the company for delivery services via the partnerships.

Both drivers delivered for ZG Operations 5 days a week from at least 6am to 3pm each day. Both drivers did not drive or deliver goods for any other business and were encouraged to carry the company's logo on their clothing and trucks.

On the terms of the written contracts the High Court found that these were independent contractor relationships. The fact that the drivers' entry into the contracts "may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract". The High Court noted that, while the drivers did not in fact deliver for any other clients, they had the right to do so under the written contracts. This reflected the High Court's view that the relevant inquiry was as to the rights and obligations of the parties under the written contracts and not the practical outcome.

One matter that was not decided (and was remitted back to the Full Federal Court to determine) is whether the truck drivers were entitled to superannuation under the extended definition of "employee" for superannuation purposes (i.e. whether they were paid wholly or predominantly for their labour).

Take away points

In light of these decisions, businesses should review any existing contractor agreements to identify risks and make any necessary changes so that their agreements meet the High Court tests. In particular, those who have engaged with workers on the basis that they are independent contractors without reducing the terms of the contract to writing should do so.

The decisions probably also give scope to businesses to further explore their options for engaging workers as independent contractors.

Any businesses involved in contractor labour hire should obtain advice on their risks and the steps they can take to minimise those risks and restructure their arrangements going forward.

The decisions probably don't offer a whole lot for contractors who might previously have entertained a claim on the basis they are an employee, other than those whose contracts are in writing who may have greater clarity on where they stand.

Employee verbal resignations: what are the risks?

By Jodie Bradbrook, Bradbrook Lawyers

Employment law can be a minefield of surprising complexities for employers and employees alike, and a classic example from an employer's perspective is the need to understand the issues when an employee resigns verbally. Most employers mistakenly believe that a resignation needs to be accepted, and they enter into discussions about it. Others may not understand the law in this area.

Practitioners regularly field questions such as:

- Should I accept the resignation?
- Should I wait to see what they do next?
- Can I make them stay?
- What should I do if they don't put it in writing?
- Do I have to allow them to work the notice period?
- When does their employment actually end?
- Are there any legal risks arising from the resignation, such as a claim for constructive dismissal?

This article provides the answers to the basic questions and highlights the legal risks that can arise in these situations.

What happens after the employee says "I quit"?

When an employee is counselled, disciplined or directed to do something they object to, it can become a source of tension between the employer and the employee. If the employee isn't open to the direction or feedback, the situation can escalate, sometimes resulting in the employee's verbal resignation. It's often referred to as a 'heat of the moment' resignation.

At other times, an employee may indicate that they are going to resign. Or they may tell you they're resigning before returning to work as if nothing has happened. It's not surprising that employers in this situation are often unsure of what to do next and find themselves in need of guidance.

The general rule of thumb is that a resignation is immediate when given and the employment ends at the end of the valid notice period provided. Therefore, it doesn't need to be accepted by the employer and, in normal circumstances, cannot be unilaterally withdrawn by the employee later on. However, it's always better to get the resignation in writing. If that's not possible, an employer wishing to confirm the resignation should write to the employee confirming that they have resigned and, importantly, advising when their employment ends.

It's also critical for an employer to consider the circumstances surrounding the resignation to identify what steps to take to eliminate any legal risks. For example, the legal risks may be greater if the employer doesn't have proper documentation or had experienced uncertainty managing the situation.

Some, but not all, employment contracts require a resignation in writing. Ultimately, the employee's conduct is important. Even if a contract says the resignation may be in writing, a verbal resignation may be sufficient.

Why does the employee's conduct matter?

The employee's message and intent must be clear. Resigning under pressure or in the heat of the moment may be categorised as special circumstances. This means that an employer will need to consider the employee's conduct before, during and after the resignation before they can safely conclude that the employment relationship has ended.

The 2021 case of *Harvey*[1] concerned a casual worker who verbally resigned following a heated discussion with the employer about underpayment issues. He walked out of the meeting saying, "I will hand in my notice". He took a few days' sick leave and then returned to work.

Then he had another heated discussion with the employer. This time, he sent a text message to his manager indicating that he would resign the next day. But later, he sent another message saying that he had changed his mind and would work his next shift as usual. He did so, but four days later, the employer gave him a termination letter, saying that his resignation was "formally accepted."

The employee claimed unfair dismissal in the Fair Work Commission. The employer defended the claim, saying there was no dismissal because the employee had resigned.

The FWC found that the employee had not resigned, so the employer's termination letter was unfair. The key findings of the employee's conduct were:

- The employee had indicated an intention to resign rather than a final decision. An intention couldn't be taken as a clear signal to the employer of the resignation;
- The employee went to work after indicating his intention to resign;
- The circumstances were highly charged due to the employee's belief that he was underpaid.

The FWC also said that:

> "[The employee] did not resign. He raised legitimate issues which needed to be resolved concerning … a potential underpayment for the hours worked by him. Those issues were difficult, but they needed

[1] *Harvey v Valentine Hydroptherapy Pools Inc* [2021] FWC 3373 (10 June 2021).

> to be worked through in a careful manner. Rather than taking that course, [the employer] brought the employment relationship to a hasty end, without any prior notice to [the employee]."

What should an employer do if an employee verbally resigns?

The Harvey case demonstrates that an employer must pay careful attention to the employee's words and conduct before either:

- Taking steps to confirm that a resignation has occurred; or
- Terminating the employee.

When faced with a verbal resignation, employers should consider:

- Whether the resignation was clear and definite. If it wasn't, seek clarification.
- Having someone else present as a witness to the resignation. That person should make detailed notes of what was said, including time, date, and location. The active participant in the discussion should then do the same as soon as possible after the resignation.
- Asking the employee if they need time to consider their decision. If they do, send them a confirmation email. Don't leave things open-ended and make sure the employee is given a cut-off date for them to change their mind.

If the resignation is clear, an employer should follow up by sending the employee an email or letter to confirm that they have resigned. The employer should make sure they specify:

- The date of the resignation;
- Any relevant notice period; and
- Whether the employee is required to work out the notice period.

It is recommended that if is there is any uncertainty at all, an employer gets legal advice before issuing any correspondence or finalising any paperwork

Can I make the employee stay?
No, an employer can't force an employee to work for you. If the employee has:

- Left on bad terms;
- Doesn't want to be there; or
- Voiced a clear objection to a reasonable and lawful direction

it can a be fraught situation trying to force the employee to stay, even if there is a notice period they are arguable required to work out. It's usually best to let them leave and then consider whether there is any legal basis to withhold payment for any or all of the notice period. It is recommended that an employer seek legal advice on this point as not all awards cover this issue and, generally speaking, the law prohibits deductions for the employer's benefit.

Am I required to let the employee work the notice period?
You're not required to allow the employee to work their notice period. However, let's consider this situation: an employee has given the proper notice under their contract or the relevant award, and you don't want them to work through the notice period. If that happens, you should write to the employee, making it clear that you will pay them for the notice period instead of having them work.

When does the employment relationship end?
If an employee provides notice and works through to the last day, their employment ends when they last worked for you.

If an employee resigns, leaves immediately and refuses to work, their employment ends immediately regardless of any notice period in the award or contract.

If an employee provides notice but the employer releases them from their obligation to work all or part of the notice period (and pays the balance to the employee), the employment ends on the day the employee is released. It's important to be clear that their employment has ended on the day they are released (if that is what is to happen) and this should definitely be confirmed in writing.

However, it is important that you are aware that you are required to pay the employee's entitlements immediately on their departure from employment otherwise there will be technical difficulties with finalising the employee's end date.

It is essential for an employer to consider whether they have valid legal reasons for keeping the employee on the books during their notice period though. This is particularly so if there are non-solicitation or restraint provisions the employer wants to enforce. Enforcement of non-solicitation and restraint causes is best considered as topic all of its own though.

What about constructive dismissal?
Under the Fair Work Act, a constructive dismissal occurs when the employee resigns because they had no real choice. The employee must prove that:

- They did not voluntarily resign;
- The employer forced the resignation; and
- The employer intended to end the employment relationship.

Constructive dismissal is not often an easy claim for an employee to make. If the employee has not exhausted all options to resolve the dispute, they will have a difficult case to make before the FWC. These heat of the moment resignations often arise when the employee is subject to disciplinary action. Rather than participate in the process, the employee may choose to resign.

An employee may send the employer a lengthy letter indicating that they feel bullied by the process, or unwell due to it. Or they may say how unfair they think it is that they have had allegations put to them. When this happens, it's important that for an employer write to the employee and make it clear that:

- The employee is not being forced to resign;
- That no decision will be made until the employee has had their opportunity to provide their response and
- Participation in the process is a requirement to ensure a just outcome.

In other words, it is important – and in some cases will be found to have been incumbent – for an employer to check with the employee that they're sure they want to resign and are not just acting in the heat of the moment.

Summing up
As lawyers tend to say, 'each case will turn on its facts'. Although it's frustrating, it is the truth. It means that an employer must be aware of the issues and risks in dealing with any resignation, but particularly a verbal resignation, and that there is no 'one size fits all' way in which to manage the issue.

For many employers, it presents an opportunity to address an employee's concern. But without adequate time, consideration, clarification and evidence, if the employee's concerns cannot be addressed and the employee resigns, the legal risks are significant. It's always better and more efficient for an employer to be on the front foot and to proceed carefully, rather than being drawn in to the heat of the moment themselves and acting rashly themselves.