Employment & Safety Law Update November 2014

No Implied Term of Mutual Trust & Confidence

In a surprise decision the High Court of Australia unanimously determined that there is NO implied term of mutual trust and confidence in Australian employment contracts. The implied term was to not to act in a manner that destroys the "necessary trust and confidence" in the employment relationship. They overturned the Full Federal Court decision and quashed the growing anticipation that the UK position would be adopted as Australian Law. The case centred on the employer's failure to comply with its redeployment policy following the redundancy of the employee (where the policy was not incorporated into the contract).

Australian employers will breathe a great sigh of relief at this decision. Contracts can have terms implied but the implied term must be necessary for the contract to operate. The High Court found that this term is not essential to the contract operating effectively. Sadly the question about employment contracts requiring "good faith" was left open for consideration on another day.

High income earning employees who had been unable to access unfair dismissal claims had increasingly been making claims for a breach of this implied term, essentially trying to assert "fairness" as a contractual term in all dealings. This decision ends those claims based on this general implied term and brings some certainty in the law.

Of course all employers still have statutory obligations in terms of the treatment of employees and must comply with the terms of their contracts of employment.

$1.3M in damages for failing to provide a safe workplace

A Victoria teacher successfully sued the Department of Education for negligence and was awarded nearly $1.3M in compensation as a result of his inability to work following a nervous breakdown and ongoing major depressive illness. His claim was that the School failed in its duty of care to him when he was assigned teaching classes full of the school's most challenging and poorly behaved students. He had bought to the attention of the principal the fact that his health was in steep decline including evidence from his psychologist and repeatedly made requests for help that the school had not responded to. Each employer has a duty of care to their employees to provide a safe place of work, which extends to providing an environment that does not expose them to psychological injuries. Employers should be mindful of the potential impacts in their workplace and specifically address matters when they are raised. Becoming aware of issues requires a response.

$1.5M for breach of employment contract

The WA Supreme Court awarded a former managing director more than $1.5M in damages for the wrongful termination of his employment. The MD had not acted in compliance with his contract and specifically had attempted to circumvent a board directive. His contract provided for termination by the Board if, on reasonable discretion, he committed any serious or persistent breach of the contract and did not remedy the breach within 14 days. While he was in breach he had effectively remedied it (although not in the specified format) and the exercise of the right to terminate was held to be wrongful. His loss was assessed considering his loss of contract earnings for the rest of his contract period, lost opportunity for increases, contract renewal and long service leave. This is essentially a case where the employer was found to have wrongfully terminated the contract on the terms of the written contract itself. Employers should carefully consider the terms it commits to in drafting contracts and if considering termination seek advice on the terms of an employee's contract. In addition to the statutory scheme for unfair dismissal, claims for wrongful dismissal in the courts remain possible when contractual terms are not met.

WA Parliament introduces the modernised / harmonised Work Health & Safety laws

Finally the WA parliament has released Work Health & Safety Bill. There will be a 3 month consultation period for comments and review (closing 30 January 2015). The Bill largely reflects the model Work Health and Safety Acts which intended to create uniform laws across Australia.

Notable differences to the model include:

- exclusion of volunteers from the definition of workers;
- inclusion of the concept of "control" into the obligation to manage risks; and
- longer time limits for actions including a 3 year limit on prosecutions rather than the 2 year limit in the model.

Major changes for WA employers include:

- significant increases in penalties (from $625K to $3M for companies) and up to $600K plus 5 years imprisonment for officers& individuals conducting businesses;
- Specific requirements for directors and officers to meet due diligence requirements for safety;
- enhanced consultation provisions; and
- changes to injury and incident reporting requirements.

For many businesses who are managing workplace safety and health proactively, there may not be a great deal that you need to change in systems and operations other than updating references to legislation and coming to grips with a new set of terms and phrases contained in the Bill. For those with some way to go to achieving best practice, there is no better time than now to start thoroughly addressing your safety obligations.

Superannuation increases on hold

Previously the federal government had introduced law to increase compulsory employer superannuation increases going from 9% to 12% (by July 2019). New legislation is now in force freezing the statutory minimum superannuation contribution at 9.5% until 30 June 2021, with increases to 12% occurring at 0.5% per year until 2025.

Super remains at 9.5% until 2021

If you would like to talk about any of these updates and how they may affect your business, or any other employment, HR, IR or safety matter – please give me a call!

Contact
Robert Greig, Director & Principal Lawyer
Mobile: 0424 565 320 Email: robert@greigs.com.au