

## Commencement of Work Choices Record Keeping Requirements

The Work Choices record keeping requirements were deferred until March 2007. No action could be taken against companies for breach of the record keeping obligations until 27 March 2007. Employers must now comply with the time and record keeping obligations under the Work Choices Regulations. A breach of the record keeping obligations may result in a fine of up to \$2,750.00 per breach.

The original Regulations required employers to keep records relating to hours worked and start and finish times for all employees.

The June 2006 amendments mean that employers will not be required to keep records in relation to hours worked by employees who both:

1. Earn a "base annual salary" in excess of \$55,000.00 (as indexed);
2. Are not entitled to overtime under an industrial instrument or common law contract.

Please contact us if you require further information an employer record keeping obligations.

## Probationary Period and Qualifying Period can Restart After Transmission of Business

In a decision which will have serious implications for employees and employers who are involved in a transmission of business, the Australian Industrial Relations Commission ("AIRC") in *William Rogers v Reflections Group Pty Limited* [2007] AIRC2 PR 975688 (2 January 2007) has held that probationary periods and qualifying periods restart when employees are transferred to a new employer in a transmission of business situation, unless specifically agreed otherwise. An employee who is subject to a probationary period or a "qualifying period" is precluded from bringing an unfair dismissal application against his or her employer.

### The Facts

The employee ("the Employee") had been employed as a security guard by Thakral Pty Limited ("the Old Employer") for a

substantial period of time. Although the Commission did not view any relevant transmission documents, it assumed that a transmission of business agreement occurred between the Old Employer and the Reflections Group Pty Limited ("the New Employer"). Pursuant to this transmission, a number of the security guards would begin to work for the New Employer following the transmission of business. The Employee commenced employment with the New Employer on 1 September 2006.

It was uncontested between the parties that the transmission document provided that the various entitlements and credits that had been accrued by the employees during their employment with the Old Employer, would be recognised by the New Employer as a condition of employment with the New Employer.

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## Probationary Period and Qualifying Period can Restart After Transmission of Business (cont.)

There was some dispute as to whether the Employee consented to having his employment effectively transferred from the Old Employer to the New Employer, however, the Commission inferred from the fact that he performed duties in accordance with the directions of the New Employer and was remunerated by the New Employer from 1 September 2006, that the Employee was not uninformed about the arrangement that was put in place "at the very least in the broad terms" and as such was regarded as an employee of the New Employer from 1 September 2006.

The Employee was terminated by the New Employer on 20 October 2006, and the Employee made an application under section 643(1)(a) of the Workplace Relations Act 1996 (Cth) ("the WPR Act") for relief in respect of the termination of his employment on the ground that it was harsh, unjust or unreasonable.

The Old Employer lodged a Motion to Dismiss the Application on the basis that at the time of the termination of the Employee, the Employee was serving a probationary period of employment under section 638(1) of the WPR Act. Relevantly, the Old Employer's Motion did not refer to the "qualifying period" exception.

### Legal Issues

The relevant question for the Commission was whether or not in a transmission of business context an employee who has been transferred from the Old Employer to the New Employer is regarded as commencing a new contract of employment with the New Employer, or whether his employment with the Old Employer and the New Employer is seamlessly transferred such that his service with the Old Employer reflects an extended, continuous period of employment with both employers. The consequence of the latter interpretation is that a probationary period imposed by a New Employer could be of no effect, as the probationary period of employment would have been served out at a prior time within the continuous period of employment. Similarly a qualifying period of employment could be of no effect.

The Commission however noted that the law as it stands does not provide for the retention of an unbroken contract of employment in circumstances where there is a transmission of business and an arrangement is put in place for the New Employer to become the employer of the former employees of the Old Employer. Notwithstanding that the Employee's contract of employment with the New Employer recognised existing accruals of sick and annual leave and continuity of service with the Old Employer for the purposes of long service leave, it was not in doubt that following a transmission the old employment contract is extinguished or terminated by the Old Employer and a new contract of employment commences anew with the New Employer. On this basis the Employee's employment with the New Employer commenced on 1 September 2006.

Subject to the requirements of the WPR Act, employees who are terminated during their probationary periods are excluded from bringing applications for relief from termination of employment on the grounds that the termination was harsh, unjust or unreasonable.

Section 638(1) of the WPR Act provides that an employee serving a period of probation is excluded from bringing an unfair dismissal claim, if the duration of the period or the maximum duration of the period, as the case may be, is determined in advance and, either the period, or the maximum duration, is three months or less; or the period, or the maximum duration; is more than 3 months; and is reasonable, having regard to the nature and circumstances of the employment.

In this case the Employee had not served at least 3 months employment with the New Employer at the time of termination of his employment. However, 638(1) of the WPR Act requires the relevant period of probationary to be "determined in advance" of the commencement of employment. In this case there was disputed evidence as to whether the New Employer and the Employee had agreed in advance that a probationary period would apply to the Employee.

The Commission noted that it did not need to consider whether a period of probation was determined in advance as it was undoubtedly the case that the Employee was subject to a qualifying period of employment under section 634(6) of the WPR Act, which provides that an unfair dismissal application must not be made, unless the employee concerned had completed the qualifying period of employment with the employer at the earlier of the time when the employer gave the employee the notice of termination or the time when the employer terminated the employee's employment.

The WPR Act clearly stipulates that the qualifying period of employment does not need to be determined in advance and will be a period of 6 months unless a shorter period, no period, or longer period is determined by written agreement between the employer and the employee.

In this case, the terms and conditions of employment with New Employer did not refer to a qualifying period of employment and in such circumstances the default 6 month qualifying period applied to the Employee. Section 643(7)(b) provides an opportunity for the contract of employment to expressly provide that there will be no qualifying period of employment, however in the present case no such written agreement existed and on this basis the Employee's application for relief made under section 643(1)(a) was dismissed as the Employee did not have jurisdiction to make such an application as he had not completed the relevant qualifying period at the time his employment was terminated.

## Probationary Period and Qualifying Period can Restart After Transmission of Business (cont.)

### Practical Consequences

The Commission noted that the Employee had not made any submissions as to whether the Old Employer was required to make redundancy payments to the Employee pursuant to the provisions of a certified agreement to which the Employee was a party. Many industrial instruments (such as awards and certified agreements) provide that in order for the Old Employer to be exempt from the requirement to make severance payments to its employees in the circumstances of a transmission of business, the New Employer is required to provide "acceptable alternative employment" or employment "on terms no less favourable" than the terms of employment with the Old Employer. It may be arguable that if a New Employer places employees on probationary periods or does not expressly exclude the qualifying period of employment, then this may expose the Old Employer to a claim by transferring employees that they are entitled to severance pay on the basis that the new terms of employment are less favourable than the terms with the Older Employer. In this regard the terms of the relevant transmission document (usually a Business Sale Agreement) will be significant.

### Vendors (Old Employer)

The Old Employer's primary concern with respect to employee issues is avoiding liability associated with employee entitlements on transmission of business. For employees who are transferred to the New Employer, the transmission document should include provisions that the new contracts of employment for the transferring employees are on terms no less favourable than the terms with the Old Employer.

### Purchaser (New Employer)

The New Employer may wish to protect itself from possible liability associated with terminating transferring employees who have commenced employment with the New Employer as a result of the transmission of business. Therefore, the new contracts of employment should contain an express probationary period which has been agreed in advance. Further if the contracts do not refer to a qualifying period then the default qualifying period of 6 months will apply. In this way, the New Employer will be entitled to rely upon the exclusions contained in the WPR Act in relation to employees commencing applications for unfair dismissal.

# Work Choices 100 Employee Unfair Dismissal Exemption

One of the most significant amendments to the WPR Act made by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) is the exemption from unfair dismissal claims for employers who employ 100 or less employees. Significantly, recent decisions of the AIRC have confirmed that employees of related foreign corporations will be included in the 100 employee count.

Section 643 of the WPR Act provides that an employee is precluded from bringing unfair dismissal proceedings against his or her employer, if at the "relevant time" the employer employed 100 employees or fewer. The "relevant time" is the time when the employer gave the employee the notice of termination, or the time when the employer terminated the employee's employment, whichever happened first.

The following employees are expressly included within the definition of 100 employees:

- (i) The employee whose employment was terminated;
- (ii) All ongoing full-time and part-time employees; and

- (iii) Any casual employee who has been engaged by the employer on a regular and systematic basis for at least 12 months (other casual employees are excluded).

Of significance for corporations who are part of a group company structure, the WPR Act expressly provides that "related bodies corporate" (within the meaning of section 50 of the Corporations Act 2001 (Cth)) are taken to be one entity for the purpose of calculating the number of employees employed by an employer.

Section 50 of the Corporations Act provides that a body corporate is "related" to another body corporate if the body corporate is:

- A holding company of the other body corporate;
- A subsidiary of the other body corporate; or
- A subsidiary of a holding company of another body corporate.

The Corporations Act provides that a company is a

## Work Choices 100 Employee Unfair Dismissal Exemption (cont.)

subsidiary of another company ("Holding Company") if:

- The Holding Company controls the composition of the company's board of directors Holding Company; or
- The Holding Company is a position to cast, or control the casting, of more than one half of the maximum number of votes that might be cast at a general meeting of the company; or
- The Holding Company holds over 50% of the issued share capital of the company.

Therefore, employers will need to take into account the employees employed by "related" companies for the purposes of assessing whether they will be able to rely upon the 100 employee exemption. For example, an employer with 5 employees would not be entitled to rely upon the exemption if the employer was a subsidiary of a parent company which employed 96 employees.

But, to what extent are foreign companies relevant for this exemption?

Recent decisions of the Commission have applied a wide interpretation of the term "related bodies corporate" so as to include employees of related foreign corporations for the purposes of the 100 employee count. In *C. Baldacchino & Ors v Triangle Cables (Aust) Pty Limited* (U2006/3545) it was held that employees of foreign related companies were to be included in the employee count in ascertaining whether the employer was exempt

from a dismissal application. The Commission found that Triangle employed 97 persons, including 9 employees employed by two related bodies corporate of Triangle incorporated in Singapore and New Zealand respectively, and as such Triangle was exempt from unfair dismissal proceedings. Furthermore, the Commission held that a Thailand company was not a related body corporate of Triangle as it did not control the composition of Triangle's board of directors, nor hold more than one half of the issued share capital of Triangle. A number of other Triangle businesses in Germany, USA, Italy and the Netherlands were not included in the employee count as they were only trading names and not companies.

The decision in *Wilkinson v Hospitality Marketing Concepts Pty Limited* (U2006/4478) supported this proposition by holding that the relevant employer was a subsidiary of an ultimate holding company incorporated in California and the total number of employees of both these corporations exceeded 100 such as to disentitle the employer from the unfair dismissal exemption.

Employers with 100 or fewer employees in Australia would be well minded to check their corporate structure (including related foreign companies) before attempting to rely on the exemption when terminations are being considered.

# What Does "Genuine Operational Reason" Mean?

A recent decision of the Full Bench of the AIRC has important implications for employers implementing redundancies following the restructure or closure of a business.

In *Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35 (15 January 2007) the Full Bench of the AIRC was required to consider the meaning of the phrase "genuine operational reasons" contained in section 643(8) of the WPR Act. The case involved an appeal from an earlier decision of the AIRC involving an unfair dismissal claim brought by a former cinema manager whose employment had been terminated as a consequence of the closure of the cinema. The employee brought an unfair dismissal claim which the employer company defended on the basis of the genuine operational reasons exemption contained in Section 643(8) of the WPR Act.

The AIRC, at first instance, found in favour of the employee and the employer subsequently appealed to the Full Bench. The case was of such importance that the then Workplace Relations Minister, Kevin Andrews, intervened on behalf of the employer. On appeal, the Full Bench in finding for the employer, held that the Commissioner at first instance had erred in being "guided" by "extraneous or irrelevant matters" in determining that the employee was unfairly dismissed. Such matters included:

- the former employee's length of service,
- the employers refusal to consider redeployment or transfer to a lower status,
- the fact that the cinema manager was the only employee that was not re-deployed to another position, and

## What Does “Genuine Operational Reason” Mean? (cont.)

- whether the termination was a “logical response” to the to the employer’s operational requirements.

The Full Bench in considering whether a “genuine operational reason” existed, stated that the only requirement was to examine whether the termination of employment was for a genuine operational reason, or a reason that included a genuine operational reason and no regard was to be had to the extraneous matters that were initially considered at first instance. Consequently, the Full Bench stated that “whether the employer could have done something other than terminating the employee’s employment will generally be irrelevant in deciding whether the termination was for genuine operational reasons, or reasons that included genuine operational reasons.”

In commenting on the “logical response” analysis which had been applied in earlier decisions, the Full Bench stated that this test may be appropriate in assessing whether the operational reason advanced by the employer in justifying the termination of employment was “a sham”.

The Full Bench confirmed that an employer who asserts that genuine operational reasons exist as a defence to an unfair dismissal claim bears the evidentiary onus in establishing that the termination was on account of genuine operational reasons. The “mere assertion” that such reasons exist will not usually be sufficient to discharge the evidentiary onus and the requisite evidence will vary from case to case depending on the circumstances.

The consequences of the decision are that it will now be more difficult for an employee to bring an unfair dismissal claim in circumstances where the employer asserts that the reason or, part of the reason for the termination of employment is attributable to “genuine operational reasons” broadly defined. Importantly, the case also establishes that an employer will not usually be required to consider other options, such as redeployment, prior to terminating the employment.

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