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Employment Law Update

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Union right of entry – what are the limits?

By Stephen Booth

Industrial law has always placed a high priority on freedom of association, and as part of that, to facilitating union involvement in workplaces.

However, two recent cases illustrate some of the limits on a union's right of entry to an employer's premises, and indicate that the rules will be strictly enforced.

"No you can't use the lunch room – go to the training room": Could the Union insist on meeting in the lunch room?

In *Somerville Retail Services v AMIEU* (10 January 2011), the Full Bench of Fair Work Australia upheld the employer's refusal to allow union officials to meet employees in the company's lunch room. The employer had suggested the training room instead.

The union objected because the training room would only hold about 20 people, and because its position near Management would discourage employees from attending.

The employer argued that the lunchroom was needed to accommodate staggered shifts of 50 employees at a time for lunch, and that union use of the room would inconvenience employees who did not wish to participate in the union meeting.

FWA held that it had to consider all relevant circumstances, including the legitimate interests of the employer and the employees (both those attending and those not attending the meeting) and the union. As there was no other practical venue for employees to eat lunch, it was reasonable for the employer to refuse the union access to the lunch room. As the training room was fit for the purpose, and could have blinds drawn for privacy, it was a reasonable alternative - the union's preference to meet in the lunch room did not make it unreasonable.

"I will not move my ?!*! car!" : Right to enter, but not to disrupt

In *Lovewell v Pearson* (25 February 2011), the Federal Magistrates Court imposed penalties on a union official, Mr Pearson, and his union.

Mr Pearson entered a building site in response to a member's complaint about safety issues. He had the right to enter in the circumstances, but while on the site, he used his car to interfere with a concrete pour which had begun and for which five concrete trucks were lined up. He refused to respond to reasonable requests from management to move his car, and when the concrete contractor had the car towed away by a forklift, Mr Pearson swore at the forklift driver and refused to move until he had seen documents regarding the safety issues. He left only after a Police request 40 minutes later. The concrete pour was cancelled causing delay and over $12,000 in costs.

The penalties were $4,500 for Mr Pearson and $16,500 for his union.

If a union official wants to enter your premises, you are entitled to check that he or she has the relevant permits, and to insist on the proper notice being given, and to impose reasonable controls on his activity in the workplace (consistent with the different rules applying to entry to meet actual or potential members, to investigate suspected breach of industrial law, or to check on safety issues).

If you need assistance with ensuring compliance, contact Stephen Booth or Anna Ford on 02 9635 6422.

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"Adverse action" shows its teeth

By Stephen Booth

Since the introduction of the Fair Work Act, there has been a lot of speculation about the scope of actions concerning "adverse action" against an employee because the employee has exercised "workplace rights".

Two recent cases illustrate the application of the prohibition on "adverse action".

In the first case, Bendigo TAFE suspended an employee for a period during which an accreditation audit was being conducted, because of an email Mr Barclay had sent in the lead up to the audit. Mr Barclay was President of the local sub-branch of the union. His email alleged that members had complained of being asked to produce false or fraudulent documents for the audit *(surely that would never happen?).*

He declined to provide any information to Bendigo TAFE to support this allegation.

Mr Barclay made an application alleging that the suspension was adverse action related to him exercising his rights as a union official. Bendigo TAFE argued that the issue was not his union role, but the intemperate email alleging dishonest conduct by others, unsupported by any evidence. Mr Barclay lost before the judge who first heard his claim in the Federal Court, but won in the Full Court on appeal.

The majority of the Full Court held that it was impossible to separate Mr Barclay's conduct from his role as a union official, however wrong-headed or intemperate his conduct may have been: this should have been dealt with as an employer/union issue rather than an employer/employee issue.

The moral of this case is that employers need to take extreme care when taking disciplinary action against an employee who is also involved in union activity, and to be very careful that the conduct in question relates to conduct clearly in his role as an individual employee and not in any way connected with union activity.

In the second case, Mr Murray was a ground crew employee for Qantas, seconded for a period to work at Narita Airport in Japan. There was some confusion about which pay rates applied to employees seconded in this way, and when Mr Murray raised concerns about this, his manager became angry. Shortly afterwards all postings for Brisbane ground crew to overseas airports were suspended while Qantas tried to resolve the issue, and email comments by the manager referred to overseas postings being more likely to be available to those who didn't complain about the arrangements.

The suspension of overseas postings meant that Mr Murray was deprived of the opportunity for another overseas posting, although it was unlikely that he would in fact have received another overseas posting in the short term as they were allocated on a rotating basis.

However, the Court concluded that, nevertheless, this did amount to adverse action against Mr Murray, because he had exercised his right to raise issues regarding the pay structure (which were in fact found to be well founded).

It is critical when contemplating action which may appear to be detrimental to an employee to consider whether there are any risks in the background arising from, for example, complaints about pay or safety issues, or any issue which might amount to discriminatory conduct, as these could form the basis for an adverse action claim even if an unfair dismissal claim is not possible.

If you need assistance with risk management and guidance on process when considering terminating employment or disciplining an employee, contact Stephen Booth, Anna Ford or Enza Iannella on 02 9635 6422.

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Immigration issues: an update for your business

By Peter Stewart and Enza Iannella

1. Changes to the Migration Act

July 1 2011 sees the commencement of a range of new provisions under the Migration Act and Migration Regulations. The changes that might be relevant to our clients include:

Visa Application Charges (VAC)

Charges payable to the Department of Immigration and Citizenship for business related visas will increase by 2.8% in accordance with the CPI.

Application fees for review of a decision by the Migration Review Tribunal will increase by 15% (from $1,400 to $1,610). Tribunal fees remain refundable where an application to the Tribunal is successful.

Any applications to the Department or the Tribunal lodged on or after 1 July 2011 will be invalid unless accompanied by the current fee (or a credit card authority to that effect).

Minimum Salary

Employers sponsoring temporary staff under the sub class 457 visa program are presently obliged to ensure that the base rate of pay paid to an employee is the greater of the TSMIT and market rate for the position (determined with reference to Australian employees undertaking similar work).

From 1 July the TSMIT will increase from $47,480 to $49,330. Employers with current sponsored employees should ensure that salaries are adjusted with effect from 1 July to remain compliant.

"Base rate" of pay excludes incentive-based payments and bonuses, loadings, allowances, overtime and penalty rates.

English Language

Generally, applicants nominated for Trades occupations are obliged to demonstrate English language fluency to functional level (equating to a score of 5 in each of the IELTS test bands). Certain applicants are exempt from these requirement including holders of passports from Canada, New Zealand, the Republic of Ireland, the UK or the USA.

Holders of other passports who are nominated for Trade positions may be exempt from the English language requirements where their base rate of salary is not less than $88,410 (up from $85,090).

2. Training Requirements – a reminder

Our experience is that many employers wishing to sponsor skilled staff under the 457 temporary visa program are not adequately prepared to demonstrate their compliance with the training requirements of the Department of Immigration.

Businesses established for more than 12 months must be able to evidence training expenditure to meet Benchmarks A or B as follows:

Benchmark A – recent (meaning in the past 12 months) expenditure by the business to the equivalent of at least 2% of the payroll of the business, in payments allocated to an industry training fund, plus a commitment to maintain such expenditure in each fiscal year for the term of its approval as a sponsor.

Benchmark B – recent expenditure by the business to the equivalent of at least 1% of payroll of the business for the provision of training to Australian citizen or permanent resident employees of the business, plus a commitment by the business to maintain such expenditure for the term of its approval as a sponsor.

Training expenditure for Benchmark B can include:

- Employment of apprentices and trainees
- Employment of a person with a training role
- Payment to external training providers (including for courses of formal study)
- On the job training provided that it is structured and its outcomes can be audited.

3. Skill Assessments

Whilst formal assessment of an applicant's skills is generally not necessary, the Department of Immigration retains discretion to require a skill assessment. For persons coming to fill trade occupations who hold passports from Brazil, Fiji, PNG, South Africa, Vietnam, China, India, Philippines, Thailand or Zimbabwe, skill assessments are mandatory.

If you have any questions regarding the Migration Act, or if you are looking to employ someone from overseas, contact our experienced Business Migration team for advice. Qualified solicitors and migration agents can help you navigate the minefield of legislation and provide the best advice for your business.

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