SVENSON BARRISTERS

Employment Law Update 2022

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Agenda

- High Court cases: employee v independent contractor
- Transfer of business: major decision
- COVID
- Stop Sexual Harassment Orders (first case)
- Age discrimination (first successful claim under Commonwealth statute)
- Genuine redundancies and employer obligation to in-source work
- Pronouns in the workplace

High Court: E/ee v IC

- 2 key cases:
  - *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1
  - *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

- Please note quotation marks omitted from some slides

High Court: E/ee v IC

- Concerning commentary around these cases from some sources that may mislead about legal effect
- In some circumstances workers will be limited to arguments focused on the terms of a written contract and will not be able to rely on subsequent conduct of parties to establish relationship status
- Some employers may develop a false concept of protection from sham contracting and related underpayment/other claims by improperly labelling relationship as that of “contractor”

High Court: E/ee v IC

- Headline takeaway for test to apply to determine employee v independent contractor
  - “Where parties have comprehensively committed the terms of their relationship to a written contract, the efficacy of which is not challenged on the basis that it is a sham or is otherwise ineffective under general law or statute, the characterisation of that relationship as one of employment or otherwise must proceed by reference to the rights and obligations of the parties under that contract…Absent a suggestion that the contract has been varied, or that there has been conduct giving rise to an estoppel or waiver, a wide-ranging review of the parties' subsequent conduct is unnecessary and inappropriate” (HC summary)

High Court: E/ee v IC

- Based on that test, some ways to challenge position that rights and obligations of parties based on terms of written contract/to rely on subsequent conduct by parties to determine nature of relationship:
  - Formation - to establish whether a contract was actually formed and when it was formed
  - Where the partis have not comprehensively committed the terms of their relationship to a written contract - where a contract is not wholly in writing, to establish the existence of a contractual term or terms
  - Where the written contract is challenged on the basis that it is a sham (a prevailing way subsequent conduct by parties after the formation of a contract has sought to be used to date!) – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement
  - Where the written contract is challenged on the basis that it has been varied/discharged (which may be by conduct) – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract e.g. it started off as an contract for an independent contractor/principal relationship but then it was varied to became a contract for an employer/employee relationship
  - Where the written contract is challenged on the basis that there has been conduct giving rise to an estoppel
  - Where the written contract is challenged on the basis that there has been conduct giving rise to waiver
  - Other – to reveal probative evidence of facts relevant to any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract - where the written contract is challenged on the basis that it is otherwise ineffective under general law or statute

High Court: E/ee v IC

- Potential strategies for how employee representatives approach argument that worker was employee where parties have comprehensively committed the terms of their relationship to a written contract:
  - Increased sham contracting claims
  - Increased challenge of contracts as ineffective e.g. written contract is challenged on the basis that it has been varied/discharged (which may be by conduct) – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract

High Court: E/ee v IC

- Facts: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1
  - Worker (Mr McCourt) sought work from a labour-hire company (trading as "Construct")
  - Mr McCourt was offered a role and signed an Administrative Services Agreement ("ASA") with Construct
  - ASA described Mr McCourt as a "self-employed contractor“
  - Construct assigned Mr McCourt to work on two construction sites run by Construct's client, Hanssen Pty Ltd ("Hanssen")

High Court: E/ee v IC

- Outcome and reasoning: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1
  - Under the ASA, Construct had the right to determine for whom Mr McCourt would work, and Mr McCourt promised Construct that he would co-operate in all respects in the supply of his labour to Hanssen
  - In return, Mr McCourt was entitled to be paid by Construct for the work he performed
  - This right of control, and the ability to supply a compliant workforce, was the key asset of Construct's business as a labour-hire agency
  - <u>These rights and obligations constituted a relationship between Construct and Mr McCourt of employer and employee</u>
  - <u>That the parties chose the label "contractor" to describe Mr McCourt did not change the character of that relationship</u>

High Court: E/ee v IC

- Facts: *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2
  - Between 1977 and 2017, Mr Jamsek and Mr Whitby ("the respondents") engaged as truck drivers by business run by the second appellant ("the company")
  - Respondents were initially engaged as employees of the company and drove the company's trucks
  - However, in 1985 or 1986, the company offered the respondents the opportunity to "become contractors" and purchase their own trucks
  - Respondents agreed to the new arrangement and set up partnerships with their respective wives
  - Each partnership executed written contracts with the company for the provision of delivery services, purchased trucks from the company, paid the maintenance and operational costs of those trucks, invoiced the company for its delivery services, and was paid by the company for those services
  - Income from the work performed for the company was declared as partnership income for the purposes of income tax and split between each respondent and his wife

High Court: E/ee v IC

- Outcome and reasoning: *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2
  - After 1985 or 1986, the contracting parties were the partnerships and the company
  - The contracts between the partnerships and the company involved the provision by the partnerships of both the use of the trucks owned by the partnerships and the services of a driver to drive those trucks
  - The context in which the first contract was entered into involved the company's refusal to continue to employ the drivers and the company's insistence that the only relationship between the drivers and the company be a contract for the carriage of goods
  - This relationship was not a relationship of employment

High Court: E/ee v IC

- Cannot stress this emphatically enough!
- Sham contracting provisions in the FW Act remain
  - Misrepresenting an employment relationship as an independent contracting arrangement
  - Making false statements to a worker with the intention of persuading or influencing that worker to become an independent contractor
  - Dismissing or threatening to dismiss a person to engage the person as an independent contractor to perform the same, or substantially the same, work
- Neither of the High Court cases alleged sham contracting
- A company can put together a perfectly worded contract but still be liable for sham contracting in the correct circumstances

Transfer of business

- FW Act s 310: Transfer of rights and obligations under enterprise agreements and certain other instruments if transfer of business from old employer to new employer
- Policy rationale?
  - Multiple policy reasons but classic example is where one company buys another company. The transfer of business provisions give certainty to transferring employees that their terms and conditions will be stable because their enterprise agreement will come with them e.g. Company A sells its business assets to Company B and at least some of the employees transfer to Company B = generally means a transfer of business has occurred, understandable that enterprise agreement may follow those employees

Transfer of business

- FW Act s 311: There is a transfer of business from old employer to new employer if (among other circumstances):

1. Employee's employment with old employer has terminated
2. Within 3 months, employee becomes employed by new employer
3. The work (transferring work) employee performs for new employer is the same, or substantially the same, as work employee performed for old employer
4. There is a connection between old employer and new employer as described in statute, this includes if they are associated entities

Transfer of business

- Company A and B associated entities?
- Company A has enterprise agreement that covers Employee?
- Employee goes to work with Company B within 3 months of employment ending with Company A?
- Employee performs the same, or substantially the same work for Company B as Employee did for Company A?
- Transfer of business between Company A and Company B
- Enterprise agreement becomes transferrable instrument
- Company B must apply enterprise agreement that Employee was under at Company A to Employee at Company B (unless obtain order otherwise)

Transfer of business

- Practise to date:
  - Office worker/truck driver/casino worker applying and being successful for job in different state/territory in Australia with associated entity of current employer = considered transfer of business on the face of s 311 of the FW Act
  - E.g. truck driver in Melbourne, employee wants to move to Perth, truck driver job in Perth becomes available, employee applies for and gets job to move to Perth
  - Transfer of business even though Melbourne and Perth entities not transferring any functions to each other? Even though Melbourne role remains to be filled? Even though Perth may not even be aware that employee worked at Melbourne?
- Potential consequence:
  - New employer might have transferring employee on one enterprise agreement and everyone else on a different enterprise agreement
- Response:
  - Seek s 318 order under FW Act from Fair Work Commission that enterprise agreement (or certain other instruments) does not, or will not, cover the new employer and the transferring employee

Transfer of business

- *Crown Sydney Gaming Pty Limited v United Workers' Union* [2022] FCA 97 = supports change to long-standing practise of making s 318 applications when a person is being picked up in a role in an associated entity in the circumstances described
- Facts of this case
- Federal Court found that s 311(1)(c) was not satisfied and therefore no transfer of business in these circumstances
- Section 311(1)(c): requires that the work (the transferring work) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer

Transfer of business

- Reasoning:
  - "the "work" an employee performs or performed for the purposes of s 311(1)(c) may include the location at which the work is performed"
  - "if the tasks the transferring employees will perform for Crown Sydney will be the same or substantially the same as the tasks they performed for Crown Melbourne and Crown Perth, the transferring employees will be performing these tasks for Crown Sydney in Sydney in a new facility in a new business enterprise. Further, the existing facilities in Melbourne and Perth will continue to be operated by Crown Melbourne and Crown Perth respectively"
  - "not a case where, for example, an employer proposes to transfer employees within an existing business from one location to another proximate location where the employees continue to carry on the same work in the existing business from the new proximate location"
  - "Crown Melbourne and Crown Perth have no entitlement to direct the transferring employees to continue to perform their work for a new employer, Crown Sydney, in the new location"

Transfer of business

- Hopefully
  - Reduced expense for businesses who can avoid s 318 applications
  - Reduced expense for FWC who can avoid s 318 applications

COVID

- Employer found liable for death of employee who contracted COVID-19 during course of employment (*Sara v G & S Sara Pty Ltd* [2021] NSWPIC 286)

COVID

- Poor success rates for unvaccinated employees pursuing unfair dismissal
- Termination of employment for failure to get vaccinated generally based on:
  - 1. Employee incapable of performing the inherent duties of their position (e.g. *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWCFB 6015 at [53]-[54], [58] (Hatcher VP and Riordan C))
  - 2. Refusal to be vaccinated contravention of employer's lawful and reasonable direction (e.g. *Maria Corazon Glover v Ozcare* [2021] FWC 2989 at [260]; *Barber v Goodstart Early Learning* [2021] FWC 2156 at [296], [347], [359])
- In *Zarina Begum v Bupa Aged Care* [2021] FWC 6405 there was no contest that unvaccinated aged care worker did not have the capacity to perform the inherent requirements of her role because she was legally required to be vaccinated or hold an exemption certificate but did not satisfy either requirement (and would not do so)

COVID

- Employers receiving a lot of unusual “legal” material from employees resistant to vaccination
- Group of Qantas employees fail in attempt to achieve urgent interim injunction to restrain employer from enforcement of COVID-19 vaccination policy (*Motion v Qantas Airways Limited* [2022] FCA 25)
  - Employees did not succeed on submission that employer had not undertaken sufficient investigations into safety of vaccines on offer
  - Employees did not succeed on submission that underlying public health orders and directions were unlawful because inconsistent with other legislation which takes precedence over them

Stop Sexual Harassment Orders

- Applications commenced in Fair Work Commission on 11 November 2021
- Benchbook: https://www.fwc.gov.au/documents/documents/benchbookresources/orders-to-stop-sexual-harassment-benchbook.pdf
- One application so far: dismissed
- *THDL* [2021] FWC 6692
- Likelihood stop sexual harassment orders will go same way as stop bullying orders?

First successful age discrimination claim under Age Discrimination Act 2004 (Cth)

- 68 year old accountant
- $20,000 in general damages for hurt, distress and upset
- Former employer tried to move employee from permanent to fixed term role in breach of *Age Discrimination Act 2004* (Cth)
- *Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56

Redundancy and in-sourcing for redeployment

- FWC says redundancies not genuine because employer could have in-sourced contractor work for redeployment
- Appeal lodged
- *Mr Neil Bartley & Ors v Helensburgh Coal Pty Ltd* [2021] FWC 6414

Pronouns in the workplace

- British Columbia Human Rights Tribunal
- Employee non-binary, gender fluid, transgender person who uses they/them pronouns
- Manager persistently referred to employee with she/her pronouns and with gendered nicknames like “sweetheart”, “honey”, and “pinky”
- Manager refused to stop
- Employee fired
- Employer said reason for termination was because employee had come on “too strong too fast” and was too “militant”
- Manager's conduct and employer's response amounted to discrimination in employment based on gender identity and expression
- *Nelson v Goodberry Restaurant* 2021 BCHRT 137

Questions?

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