




## Recruitment Update

July 2010

Workplace Law Queensland is a division of 

## The Importance of Careful Recruiting



- The estimated costs resulting from early employee resignation or dismissal is between 1/2 and 2/3 of an employee's annual salary (from 2003 studies).
- Costs include job advertising, consultant/recruiters fees, and the indirect costs of man hours in reviewing resumes and interviewing short listed applicants, inductions, training and loss of productivity as the new employee learns on the job.
- Accordingly, it is clear that employers need to ensure that the recruitment process is a carefully considered process to secure the best possible applicant.

## Relevant Legislation



- It is important to consider the operation of the various disability and discrimination legislation at the outset.
- The amendments to the federal *Disability Discrimination Act 1992* (July 2009) place an explicit duty on employers to make reasonable adjustments for people with disabilities.
- The amendments overall make it easier for employees to bring discrimination complaints.
- Removal of the “dominant reason” test under the *Age Discrimination Act* means that discrimination occurs if a person’s age is just one of the reasons for taking discriminatory action that disadvantages the employee (rather than the “dominant reason”).

## Relevant Legislation



- The “inherent requirements” defence has been extended and now indicates the terms and conditions on which employment can be offered, and the matters taken into account, when determining if an employee is unable to carry out the inherent work requirements.
- The extent of the “justifiable hardship” defence has been extended to all unlawful discrimination on the ground of disability (except where there has been harassment and/or victimisation). There is some clarification as to the matters to be considered when determining the defence, and the onus of proving the defence falls on the person claiming it.
- The definition of “indirect discrimination” has been changed, so that there is now a need to prove that the condition or requirement imposed would disadvantage someone with the same disability. The onus of proving the reasonableness of a requirement or condition is shifted to the person who imposed the requirement of condition.

## Relevant Legislation



- Thus, in general terms there is now state and federal discrimination legislation that covers discrimination based on race, age, disability/impairment, sex or sexual preference, marital status, political and/or union affiliation, religious belief, parent and/or carer responsibilities, physical features and pregnancy.

## Job Advertisements



- It is important to ensure a job advertisement identifies the type of worker being sought by the employer. The wording and even imagery used in the advertisement should not be discriminatory in any way.
- To avoid speculative and completely unsuitable applicants, provide access to a comprehensive job description that clearly identifies the necessary qualifications, experience, and performance capabilities for the advertised role.
- For unsuccessful applicants, it is important to provide a polite but non-descript letter advising the applicant that they have been unsuccessful. Provision of any form of reason is extremely unwise as it can be used as evidence of discrimination.
- Similarly, a certain “sensitive” portion of the community who perceive that they suffer from a form of disability can jump to conclusions and bring proceedings that there has been discrimination due to the fact that they have not received the “courtesy” of a formal response to their application.

## Application Forms



- All short-listed applicants should complete an application for employment form.
- This form can conveniently contain a range of information without falling into the trap of asking an overtly discriminatory question.
- For example, it is appropriate to ask in an application for employment form to ask for a nominated contact person, or next of kin, and their contact details. In addition to wearing a wedding ring observable at interview, married people tend to nominate their spouse in answer to this question thereby bypassing the question of whether or not the applicant is married.

## Application Forms



- The application for employment form should be fully completed and make it clear that any false statement will constitute grounds for termination once discovered.
- Many applicants conveniently omit disclosure of prior or current injuries. They subsequently rely on the employer's failure to check the completeness of the form as evidence that the omitted or unanswered question was not in fact material to the employment decision
- The application for employment form should be carefully perused before the applicant proceeds to the next stage of interview to firstly ensure that all questions have been answered.
- After viewing the application form, and the candidate is not suitable, they should still be interviewed so they cannot claim they have been treated differently

## The Interview



- A structured approach to the interview process is essential as it ensures that all applicants are treated identically and equally.
- HR consultants often advocate “behaviour-based interviewing” that involves presenting applicants with scenarios and seek the applicant’s response.
- Behaviour based questioning can relate to issues including organisational skills, technical skills, interpersonal skills, communication skills, initiative, risk assessment and commitment.
- As past behaviour may not be a reliable predictor of their future behaviour, it is appropriate to also ask to what the applicant would do if a similar scenario arose in the future.
- In preparing “similar situation” questions, it can be useful to carefully introduce a potential discrimination element to the question to ascertain whether the applicant is overtly or ignorantly discriminatory in their consideration of situations.

## The Interview



At an interview, an Employer should:

- Sight and photocopy (to a legible standard) any relevant trade certificates or licences, noting the date originally issued, and the expiry date where applicable.
- Follow a recruitment questionnaire to ensure:-
  - Uniform questions asked;
  - No discriminatory / irrelevant questions are asked; and
  - Detail has been provided regarding the employment terms and any other specific details that are relevant, including any requirements for a Fitness for Work assessment (hearing tests, alcohol and drug tests), Blue Card or Police Check.

## Reference & Background Checks



- Following completion of the interview, and with the applicant's permission, a reference check should be carried out.
- The reference check should cover the candidate's:
  - experience and attitude
  - productivity
  - quality of work
  - skill level
  - work attendance
  - initiative and commitment
  - ability to follow instructions
  - safety habits and teamwork
- If possible get confirmation in writing / email.

### Pre-employment Medical

- If required, ensure the results are clear, documented, and are suitable to employment.
- This is particularly important in unskilled, manual positions or noisy environments.

## Inductions



It is an Employer's duty of care to ensure that Employees are:

- provided with safe systems of work;
- properly trained; and
- provided with the necessary information in relation to OHS risks in the workplace.

A good induction will provide an Employee with:

- an understanding of the Employer's safety culture;
- stance on discrimination in the workplace; and
- a brief history of the business.

The induction should deal with:

- specific details for the work the Employee is going to perform;
- the risks that exist and how those risk are managed - regardless of what training the Employee has previously had; and
- training in the safe use of any relevant machinery and chemicals.

## Inductions



- All new employees should attend the appropriate induction and it should be documented.
- A copy of the actual induction carried out (preferably including video and written procedures) should be signed off and also separately retained.
- It should be confirmed that employees are literate and/or can understand English.
- All employees should sign and date an Acknowledgment Form confirming this process has taken place prior to commencing work.

## Re-employment



- Re-engagement of a former employee can be economically beneficial, however there are some issues for employers with respect to the person's continuity of service with the organisation.

Issues an employer should check:

- Who terminated the previous contract of employment?
- What were the circumstances?
- What was the length of absence between cessation and re-engagement?
- What are the relevant provisions which may determine whether an employee's previous service counts towards accruing leave and other entitlements?
- An employee who resigns of their own volition and is subsequently re-engaged by the same employer would generally have no entitlements carried over from their previous service with the same employer, but see exception in the *Industrial Relations Act 1995 (QLD)*.

## Young Workers



Young workers need special attention because:

- they are inexperienced;
- require additional training and attention;
- are more vulnerable to injury, generally due to their lack of experience and more lax attitude to OHS;
- potential for harassment and bullying;
- potential for conflict in the workplace due to generational issues; and
- Special/ specific legislation and codes apply (i.e. Children in the Workplace Code of Practice).

## Transmission of Business



When recruitment can amount to a transmission of business?

- With the enactment of the *Fair Work Act 2009* (the “Act”), the ground rules, if not the whole playing surface, in relation to business transmissions have been significantly changed.
- The transfer of business provisions in Part 2-8 of the Act provides for the transfer of enterprise agreements, certain modern awards and certain other instruments from the national system employer to another national system employer (s307).

## Transmission of Business



Under the part, a transfer of business occurs if:

- a) The employment of an employee of the old employer is terminated;
- b) Within three months of the termination the employee becomes employed by the new employer;
- c) The work the employee performs for the new employer is the same or substantially the same as the work they performed for the old employer; and
- d) There is a connection between the old employer and the new employer (there is a transfer of assets from the old employer to the new employer, the old employer outsources work to the new employer, the new employer ceases to outsource work to the old employer, or the new employer is an associated entity of the old employer).

## Transmission of Business



- Where there is a transfer of business within the meaning of the Act, an Enterprise Agreement by Fair Work Australia, a workplace determination or a named employer award governing the transferring employee will be deemed to apply to the new employer where the transferring employee is employed with 3 months of termination from the old employer.
- Not only can the transferable instrument cover transferred employees, it will cover new employees who are to perform transferring work where no other Modern Award or enterprise agreement covers the new employees.
- The transferable instrument applies until terminated or replaced.

Examples: *PP Consultants v FSU* [2000]HCA 59

- unsuccessful tenders
- receiverships, winding ups, liquidations, auctions

## Transmission of Business



### Conclusions

- The circumstances in which a transfer of business may occur is substantially increased under the *Fair Work Act [2009]*. Employers will not be able to avoid the application of current industrial instruments by transferring employees between related entities and these provisions may inhibit new employers taking on employees from old employers where the new employer does not wish to be bound by the former's industrial instruments for an indefinite period.
- The only obvious solution is to ensure that the transferring employee has been out of employment for > 3 months.

## Adverse Action



- Contained in s340 FWA
- A person must not take adverse action against another person because they have a workplace right (which they have or have not exercised) or a third party has a workplace right which can be exercised for the 2<sup>nd</sup> person's benefit.
- S 341 - **workplace right** –
  - has the benefit of/a role/ responsibility under a workplace law, instrument or order;
  - is able to initiate/ participate in a workplace process/ proceeding;
  - is able to make a workplace complaint or inquiry
  - if the person is an employee - in relation to his or her employment.

## Adverse Action



- Adverse action can be claimed by a prospective employee against a prospective employer, employer & employee (& vice versa), principal & contractor (& vice versa), and principal against prospective contractor
  - An employer takes adverse action against an employee if the employer:
    - (a) dismisses the employee; or
    - (b) injures the employee in his or her employment; or
    - (c) alters the position of the employee to the employee's prejudice; or
    - (d) discriminates between the employee & other employees.
- Adverse action** includes:
- threatening to take the above actions; and organising such action.
  - Adverse action does not include action that is authorised by or under FWA or any other law of the Commonwealth.
  - **"action"** includes an omission.

## Adverse Action



- FWA s539 provides that the maximum penalty where the claim is brought by a aggrieved employee is 60 penalty units (s4AA of the Crimes Act 1914 sets at 1 unit = \$110)
  - ( $\$110 \times 60 = \$6,600$ ) & s 540 entitles an employee to claim
- S 544 - Time limits**
- 60 days if related to termination of employment
  - Otherwise within 6 years after the day on which the contravention occurred.

## Other Recent Developments



### Adam Espiner v Web Marketing Experts Pty Ltd T/A Web Marketing Experts (C2010/2806)

- s.773 - Application to deal with an unlawful termination dispute
- "A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a **general protections application** in relation to the conduct". (No application under s365 was ever made)
- 2 letters sent to Espiner noting an entitlement to a general protections application, including reference to s 352 FWA -
- *An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.*
- Application dismissed

## Other Recent Developments



### The Applicant v Origin Energy Ltd (C2010/120)

- Application filed 11/03/10 - 'general protections dispute' involving a dismissal in accordance with s365. (dismissed 21/12/09 – 8 days late).
- Commissioner accepts a similar approach to that by Lawler VP in *Mr Christopher Johnson v Joy Manufacturing Pty Ltd t/a Joy Mining Machinery ('Johnson')*
- Looked at 'exceptional circumstances' – "exceptional" given the same meaning as in s.366(2)
- S. 366(2)(a) - Reason for the delay - spent 21 days trying to directly resolve the matter, wanted to obtain new employment before incurring legal fees, suffered from 'stress related issues', & fear of adverse effect on employment prospects when industry discovered action against previous employer
- S.366(2)(b): action to dispute the dismissal - he contacted the head of his business unit to dispute the dismissal
- S.366(2) (c): prejudice to the employer: no evidence to indicate any prejudice to the employer if time extension granted

## Other Recent Developments



- S.366(2)(d) - merits of the application - Terminated after a probation review
- Criticised for being late, long lunch breaks, personal calls and leaving work early. Applicant alleges that these all related to medical appointments for a work shoulder injury.
- HELD: application has some merit however **No** exceptional circumstances that would justify granting the applicant an extension of time.
- Application for additional time dismissed.

## Contact Details



### Our offices:

#### Brisbane

Level 10, 410 Queen Street  
Brisbane QLD 4000  
GPO Box 3246 Brisbane QLD 4001 Australia  
**T** 61 7 3226 9099  
**F** 61 7 3220 1300  
**E** brisbane@workplacelaw.com.au

#### Gold Coast

Level 5, Corporate Centre One  
Cnr Bundall Road & Slatyer Avenue  
Bundall QLD 4217  
PO Box 9073 GCMC QLD 9726 Australia  
**T** 61 7 5597 8888  
**F** 61 7 5597 8899  
**E** goldcoast@workplacelaw.com.au  
**W** www.workplacelaw.com.au