FAIR work

Gerard Nelson reviews what the latest industrial relations changes mean to employers.


Gerard Nelson

Much has been made in the popular press about the changes to occur in the workplace as a result of the Federal Government's new industrial relations legislation, the Fair Work Act - but the real question is whether or not the changes will materially affect the way in which employers conduct their business?

The first issue is the changes to the unfair dismissal provisions. There are some changes to the eligibility criteria, based upon the size of the employer's business, which will allow access to the unfair dismissal processes. Previously, provided that the dismissal was not for an unlawful reason, such as race, colour, sex, sexual preference, membership of a trade union or other grounds specified in s.659 of the Workplace Relations Act (1996), the employer did not have to submit to the jurisdiction of the Australian Industrial Relations Commission (the Commission).

An employer can seek to have an employee's application that the termination was harsh, unjust and unreasonable dismissed for want of jurisdiction on the basis that the employer employed less than 100 employers. However, the employer could decide whether or not they would seek the Commission's assistance to conciliate. This means a member of the Commission could assist the parties in resolving the situation. Many employers did not avail themselves of this assistance.

For some employers a decision not to seek the Commission's conciliation assistance is a very costly. Many employees file applications for relief, because they are owed or believe they are owed wages or other statutory entitlements. Employees have other avenues to recover those wages and entitlements, mainly the Magistrates' or Local Courts - depending upon the amount claimed such proceedings can be much more costly than using the Commission's conciliation process.

Despite enterprise size or the changes to the eligibility criteria for an employee to access the unfair dismissal provisions, the fact there is a need to terminate an employee in a way perceived to be harsh, unjust or unreasonable means that in the majority of cases, there has been a breakdown in communication between employer and employee leading to the breakdown of the employment relationship. No amount of legislative amendment can change that fact!

> "wise employers deal with industrial relations issues, through sound communications strategies and planning"

This is the true regardless of the employment situation. If an employer needs to make redundancies (as will happen in this current economic climate) then the employer needs to communicate the situation to employees as soon as possible. It has been my experience even in situations with a large numbers of redundancies, the impact on both parties can be greatly reduced if the situation is explained to employees and both parties work together.

Obviously, there are situations where the intervention of a third-party, often a union, can derail this process. However, if the employer, the employees and the union communicate, there may be no need to resort to the court or tribunals.

One area of the new legislation that should be of concern to employers is a requirement to bargain in good faith when a collective agreement is being negotiated. In broad terms, parties now need to negotiate for an outcome. This is not necessarily the situation in the negotiation of collective agreements, to this time where either party could take a position and not move from that position, rendering an outcome impossible.

In such a situation, the new legislation requires that the parties submit to the new arbitral body, Fair Work Australia, to ensure an arbitrated outcome. Usually this means that ultimately, none of the parties are happy with the final result!

Wise employers

So, how do you ensure the new collective agreement is one you are happy with as an employer, rather than one imposed as a result of arbitration?

The wise employer plans for the new collective agreement by doing some modelling to understand the financial ramifications. They take the initiative to develop an agreement, suiting both their business needs and financial capabilities and know the sorts of outcomes acceptable to them. Employers going into bargaining negotiations with such knowledge can usually, provided they are capable negotiators, get the outcome that best suits them.

They can outsource the planning and negotiating process to those who are professionals in the area but, regardless of who negotiates, unless they've done the modelling and know the required outcomes, they could end up with an agreement they don't want!

The answer to the question posed at the beginning of this article is, only legislative context has changed - not the way in which wise employers deal with industrial relations issues, through sound communications strategies and planning.

Remember, planning and communication can overcome most industrial relations issues. ■

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