

Heavy damages award for failing to follow employee grievance procedure

A recent Federal Court case provides employers with useful lessons on managing concerns regarding employee behaviour to reduce potential litigation.

The case considered whether an employee should receive damages for his employer's failure to follow the grievance procedure prescribed in the applicable Australian Workplace Agreement (AWA) and his employer's breach of implied terms of good faith, trust and confidence in his employment contract.

Facts

In June 2006, the employee was hired by the employer to work on a construction project in Port Hedland, Western Australia. The employee entered into a three year AWA with the employer. The employee also received and signed a letter of offer from the employer regarding his employment on the project.

While working on the project the employee had a number of disagreements with the Project Manager about occupational health and safety issues at the project site.

In early October 2006, the Project Manager informed the employee that it was not working out between them and that the employee would be taken off the project and transferred to the employer's Geelong office, despite the lack of work at that location. The employee moved to the Geelong office and was subsequently made redundant in late October 2006.

Claims

The employee lodged an application for damages in the Federal Court on the basis that the employer had breached terms of the AWA and his employment contract.

The employee argued that clause 2.10 of the AWA required the employer to follow a prescribed grievance procedure once the employer developed concerns about the employee's behaviour. The employee further argued that this requirement was contractually binding on the employer. The employee claimed that the employer's failure to follow the prescribed procedure resulted in the employee's transfer off the project, redundancy and subsequent loss of wages, for which he should be compensated pursuant to s721(1) of the *Workplace Relations Act 1996* (Cth) (Act).

The employee also argued that the employer had breached implied terms of good faith, trust and confidence in the employment contract (which had resulted from the employee's acceptance of the employer's letter of offer) and that he should additionally receive damages on this basis.

The employer submitted that the grievance procedure prescribed in clause 2.10 of the AWA was only applicable once it decided to take disciplinary action and that since the employer had not decided to take disciplinary action against the employee there had been no need for it to follow this procedure. Regardless, the employer argued that clause 2.10 was not contractually binding on it.

The employer also claimed that even if the court accepted the employee's argument as to the application and contractually binding nature of the grievance procedure clause in the AWA, there was no causal link between the employer's failure to follow the prescribed procedure and the employee's loss of wages.

Additionally, the employer claimed that under the AWA it had the right to transfer the employee to the Geelong office regardless of the circumstances surrounding the transfer.

Findings

Tracey J agreed with the employee's arguments in relation to the application and contractually binding nature of the grievance procedure clause in the AWA. He found that the words of the clause did not indicate that the grievance procedure should only be followed once the employer had decided to take disciplinary action against the employee. He further found that a reasonable person taking into account the words of the clause, the surrounding circumstances and the nature of the arrangements being made between the parties, would conclude that the employer intended to be bound by the clause and thus that the clause did impose a contractually binding obligation on the employer.

His Honour held that the employer's failure to follow the procedure prescribed in the AWA clause had caused the employee's loss of wages. This was due to a number of reasons, including that if the employer had followed at least the first step in the grievance procedure, the employee and Project Manager may have been able to resolve their disagreements, in which case the employee would not have been transferred to the Geelong office where his redundancy and subsequent loss of wages was a significant possibility.

Additionally, Tracey J held that whilst the employer did have the right under the AWA to nominate an alternative location for employment of the employee, it could not use this right to avoid its obligation to follow the grievance procedure.

When awarding damages to the employee for his employer's breach of the AWA, his honour noted that since the Act was silent on how employees should be compensated for loss incurred as a result of such a breach, there was no reason why damages under s721(1) should not be assessed on a contractual basis. He held that the employee should receive sufficient damages to place him in the same position as if the employer had performed its obligations under the AWA with regard to the grievance procedure and the employee had consequently not been transferred off the project and made redundant. Tracey J awarded the employee \$274,288 in damages, reflecting the income the employee would have earned if he had continued working on the project until its completion, less the income the employee had earned in alternative employment since his redundancy, discounted by ten per cent for the possibility that his employment on the project may have been validly terminated before the project concluded.

As for the employee's argument that the employer had breached the implied terms of good faith, trust and confidence in his employment contract, his Honour was not prepared to find that these terms were implied. Consequently, he did not consider the issue of damages in relation to this type of breach.

Lessons for employers

Employers may be contractually obligated to follow grievance procedures contained in AWAs with an expiry date beyond 1 July 2009 and other industrial instruments such as certified agreements and employment contracts, when dealing with concerns about employee behaviour.

Employers cannot avoid this obligation by relying on their rights under the industrial instrument to nominate an alternate place of work for employees about whom concerns have arisen.

Employers who fail to follow grievance procedures prescribed in an applicable industrial instrument and subsequently dismiss employees with whom they have had disagreements, may be found to have breached their contractual obligations and face orders for damages. Such damages may be substantial since they will likely be calculated on a contractual basis.

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