



The LSLC Shell

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Lynda's Corner:

Welcome to our Autumn 2007 edition. After a month jam packed with speaking gigs, I am now knee deep in interesting work for both old and new clients. I have really enjoyed presenting and having the opportunity to educate new audiences on legal issues, but it is nice to be back in the office. I'm off again on 12/13 June but to Ballarat this time for a quarterly meeting of the State Government Small Business Advisory Council. We will be discussing many things including the upcoming Energise Enterprise Festival. I am on an Export Panel at the festival and a number of my business colleagues are presenting seminars. I encourage all of you to consider taking part in one or more activities during the Festival, which will be widely publicised.

This edition is the second part of our Employment special and focuses on Unfair Dismissal and the difference between it and Unlawful Termination. At the time of writing, the Federal Government has also just introduced a Fairness Test for Australian Workplace Agreements and Collective Agreements which we summarise in the News section.

At LSLC, things are great. I congratulate my assistant Ellie who got through her probation period earlier this month with flying colours and is now a fully fledged permanent member of our little team.

Finally, let us know if there are any specific topics you would like us to highlight in coming newsletters. We welcome new ideas so we can ensure that the information is relevant and helpful to you all.

That's all for now from legal land.

Regards Lynda Slavinskis ☺



LSLC News:

LYNDA SPEAKS AT AUSPACK CONFERENCE

In early May 2007, Lynda was a very warmly received speaker at the Australian Institute of Packaging's Forum at the Auspack Conference at Jeff's Shed. Lynda presented to delegates from the packaging industry on the legal ins and outs of export and entertained with her bottle of Veuve Cliquot and Camper shoe box to illustrate that delegates could consider trade marking their packaging.

Feedback was excellent and referred to Lynda's "passionate presentation on a subject [she] obviously know[s] in depth". The opportunity to speak at such a large conference was great for raising Lynda's profile as a speaker to yet another level and Lynda thanks her colleague, IP Lawyer Sharon Givoni for referring her to the Forum organisers.

ENERGISE ENTERPRISE SMALL BUSINESS FESTIVAL 2007

The State Government is again hosting Energise Enterprise in 2007 aimed at educating small businesses, creating networking opportunities and opportunities for growth for those businesses. The Festival will take place in August. Lynda will be on an Export Panel on 25 August 2007. For more information, go to www.business.vic.gov.au



LYNDA PRESENTS TO TOLL

Lynda was recently invited by the Australian Institute of Export to present to executives at TOLL Solutions in Melbourne in relation to International Trade law and in particular sea carriage which are crucial issues in TOLL's logistics business. The presentation was a success as attested to by the National Education Manager of the ALEX, Jessie Sadler: "a BIG THANK YOU for your presentation at TOLL - received very good feedback. I look forward to working with you in the future!"

TRADE MARK APPLICATION FEES INCREASE

In our last issue we alerted you to the decrease in Registration Fees for trade marks. Application Fees however have increased! For online applications the cost is now \$120 per mark per class if a generic Pick List of descriptions of goods and services is used and \$160 per mark per class if you formulate your own description. The Pick List is OK to use for very simple goods claims eg: Clothing, but if you want to ensure that your entire ranges are protected or specifically describe your goods and services within a class of goods then the non-pick list option is best. LSLC can advise you further on this if you have any questions.

TOP 10 IS COMING...

Will you be on our next LSLC Top 10 List of our most loyal clients? Keep an eye out for a surprise in the mail around 1 July ...

FEDERAL GOVERNMENT'S NEW "FAIRNESS TEST" FOR AWAS AND COLLECTIVE AGREEMENTS

In the wake of negative publicity about Workchoices, the Federal Government has introduced a "Fairness Test" in an effort to offer a safety net to employees covered by an Australian Workplace Agreement and earning under \$75 000 a year who have had protected award conditions removed or changed in an agreement. This includes the following award conditions:

- Penalty rates
- Shift and overtime loadings
- Monetary allowances
- Annual leave loadings
- Public holidays
- Rest breaks and
- Incentive based payments and bonuses.

The Fairness Test also applies to all collective agreements which remove or change protected award conditions.

Employees must receive fair compensation for changes to the protected award conditions and payments. In most cases this will mean a higher rate of pay but non-monetary compensation will also be taken into account, such as flexible work hours, paid meals, paid training and other non-monetary incentives. The Fairness Test applies to all workplace agreements lodged on or after Monday 7 May 2007. Agreements made before this date will not change.

The Fairness Test will be conducted by the Workplace Authority, previously known as the Office of the Employment Advocate. Fairness Test pre-lodgement reviews will be available to employers to check that their workplace agreements are fair before they are implemented. If a pre-lodgement review is not obtained and an agreement is deemed not to pass the Fairness Test, the employer and employee will be given the opportunity to respond to the decision and alter the agreement so it does pass the test.

The actual ins and outs of the Test will be unknown until the new legislation is introduced. For updates, please go to www.oea.gov.au



What you may not know about Workchoices Part 2 - *Unfair Dismissal and Unlawful Termination*

100 employee exemption from Unfair Dismissal Laws

Under WorkChoices, employers who employ up to and including 100 employees are now exempt from unfair dismissal laws. To calculate the number of employees in a business, you need to take into account part timers, certain casual employees and employees of the employer's "related bodies corporate" eg: subsidiary companies.

Other employees excluded from federal unfair dismissal laws include:

- seasonal workers;
- employees engaged under a contract of employment for a specified period or a specified task;
- employees on probation;
- casual employees engaged for a short period;
- trainees; and
- employees earning \$98,200 or above.

Employees who are dismissed for genuine operational reasons are also not allowed to pursue an unfair dismissal claim, for example if a business is struggling or wishing to restructure.

This is however not a green light for employers of small businesses to sack employees without reason. Employers still need to prove that the reasons are "genuine" and you should have proof of the reason. We would recommend keeping very clear records both financial and in relation to the performance and efficiency of employees and the business in general. We would also recommend that notwithstanding the 100 employee exemption, all employers still develop a process for dismissal of employees which involves good communication of what is required of employees, warnings and counselling for workers who are not performing.

Protection against unlawful termination

Under WorkChoices, it continues to be unlawful for an employer to terminate an employee's employment on discriminatory grounds. This is called unlawful termination. Unlawful termination provisions apply to all employees in Australia. Employees who are excluded from making unfair dismissal claims are not excluded from making unlawful termination claims.

An employee can apply to the Australian Industrial Relations Commission ("AIRC") if they believe their employment was terminated for an unlawful reason, including:

- temporary absence from work because of illness or injury;
- trade union membership or participation in trade union activities;
- non-membership of a trade union;
- seeking office as a representative of employees;
- the filing of a complaint, or the participation in proceedings, against an employer;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate, sign, extend, vary or terminate an AWA;
- absence from work during maternity leave or other parental leave; and
- temporary absence from work because of the carrying out of a voluntary emergency management activity.



Feature Article Contd:

Unfair Dismissal Claims that can still be brought

An employee may lodge an unfair dismissal claim with the AIRC, if he or she has worked for the employer for six months or more and is:

- employed by a constitutional corporation (ie: a pty ltd or ltd company); or
- employed in Victoria or a territory; or
- a Commonwealth employee; or
- employed in interstate or overseas trade or commerce as a waterside worker, maritime employee or flight crew officer.

The AIRC may dismiss an application for unfair dismissal without a hearing if it is clear that:

- the employer has up to and including 100 employees;
- the employee is excluded by the legislation from bringing an unfair dismissal claim;
- the employee has not completed the necessary six month qualifying period;
- the application is frivolous, vexatious or lacking in substance; or
- the application was not made within 21 days of termination and does not warrant an extension of that time limit.

If it appears that there may be a genuine operational reason for terminating employment the AIRC must hold a hearing to determine the issue. If a genuine operational reason exists, the unfair dismissal application will not be successful.

The AIRC, in determining an unfair dismissal claim must consider a number of factors including:

- whether there was a valid reason for the dismissal such as the employee's conduct;
- whether the employee was notified of the reason and given the opportunity to respond; and
- if the dismissal related to unsatisfactory performance by the employee, whether the employee had been warned before the dismissal.

Except for Victorian employees, employees of unincorporated businesses will remain covered by state industrial and employment laws under WorkChoices. These employees may access state remedies for unfair dismissal. State, Territory and Commonwealth equal employment opportunity or discrimination laws may also contain remedies in relation to termination of employment. However, the Workplace Relations Act prevents an employee from substantially pursuing the same claim more than once.

Remedies For Unlawful Termination And Unfair Dismissal

Employees who believe their employment has been unlawfully terminated or who have a claim for unfair dismissal can make an application to the AIRC. The AIRC must try to conciliate the matter, and if conciliation is unsuccessful, the AIRC must issue a certificate on the merits of the application.

At that point, for Unlawful Termination, the employee has 28 days (this was previously 14 days) to elect whether to proceed to court.

For Unfair Dismissal an applicant can elect to have the claim decided by the AIRC at an arbitrated hearing.

Ed's Note: some extracts in this article have been taken from www.oea.gov.au

This newsletter is for information purposes only. Nothing in it should be construed as legal advice nor relied upon as such. If you have a specific legal query please contact us on 9885 5105 or e-mail lynda@slc.com.au.

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