

MEDIA RELEASE

Reinstatement of dismissed employees under Fair Work Australia presents operational challenges for business

Wednesday, 10 March 2010 – Under the newly implemented Fair Work legislation, the reinstatement of unfairly dismissed employees is now not only more likely than before, but a recent far-reaching reinstatement order from Fair Work Australia demonstrates the significant operational issues employers could face, according to Lesley Maclou, Partner at Harmers Workplace Lawyers.

Ms Maclou says many employers may not consider the repercussions of the forced reinstatement of a dismissed employee, or factor this possibility into their operations.

“For example, a company which has recently hired a new employee to replace a dismissed employee might not factor in the possibility that the dismissed employee may be reinstated to their role by Fair Work Australia, nor its impact on the organisation,” she said.

Ms Maclou said the recent Fair Work Australia reinstatement order (between contractor, Bilfinger Berger Services, and Sugar Australia) goes further than many employers might imagine, with Fair Work Australia making it clear that an order for reinstatement to a position carried with it the requirement that the employee return to the exact conditions, type of work and even work location. This means that the employer is prevented from redeploying the employee within the organisation. Consequently, an employer might find they could have two permanent hires for the one role.

“Despite the employer arguing that they have the right to redeploy contracted staff as and when required, Fair Work Australia is determined to see the employee return to the exact conditions he was previously employed,” she said.

Ms Maclou said this example showed the particular issues reinstatement could raise for companies with fixed term contracts or commercial arrangements that require flexibility with respect to the provision of labour. “Reinstatement is not just defined as recreating the contract of employment, but also including the place, duties, remuneration and conditions of employment.”

This particular example, in addition to the expected increase in Fair Work Australia rulings of this nature and access to the jurisdiction (following its implementation on 1 January 2010), raises a number of questions for employers that have dismissed an employee in circumstances where the employee may seek to claim unfair dismissal.

Employers should therefore consider the practical implications at the relevant time including but not limited to the following:

- Could the business sustain leaving the relevant position vacant for a period of time?

- If not, can I utilise contract labour rather than employee a permanent employee?
- How likely is it that my dismissed employee will file for unfair dismissal and have we taken legal advice about the circumstances or prospects of success?
- Could that new hire be absorbed elsewhere in the business should the dismissed employee be reinstated?
- How could I better manage the dismissal of employees to minimise risk to the business and its operations?
- Do our commercial arrangements allow us to manage our employees within the parameters of the new workplace relations law regime?

Ms Maclou said employers who believe recently dismissed employees were likely to bring unfair dismissal claims against them would be wise to seek legal advice particularly where third party commercial contracts or contractual obligations were involved.

“Ideally, to ensure the best risk management strategy, employers should manage any employee dismissal with the utmost care, using the correct processes and procedures to minimise potential claims against the organisation in the first place and take legal advice where there are any concerns,” Ms Maclou said.

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Note to editors:

About Harmers Workplace Lawyers

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia’s leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business’s ‘employment specialist firm of the year’ for the past three years running.

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