

ClientUpdate

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IR MIGHT HAVE CHANGED, BUT SOME THINGS ARE STILL THE SAME!

By Peter Punch

The recent decision of Justice Goldberg in the Federal Court in *TCFUA v Givoni Pty Limited* [2002] FCA 1406; decision 15 November 2002 ("Givoni's case") certainly demonstrates that while Australian industrial relations (or, to use the expression in vogue currently, "workplace relations") has changed considerably in the last 10 years, some very old principles still apply with equal impact, and employers ignore them at their peril.

The essential facts in Givoni's case is a sad repetition of the type of story that is very familiar to IR practitioners in this country, and the outcome on those facts (a bad one for the employer) was reasonably predictable. It seems that there are still employers out there who have not grasped the essentially compulsory nature of the award system and award prescriptions.

His Honour found that in January 1993 two employees of the Company, Mr Hanna and Mr El Hajj, approached their manager Mr Deon Givoni and asked if they could be changed from a regime whereby they were paid award rates and penalty rates for the hours they worked pursuant to the Clothing Trades Award to an arrangement where they received a set amount every week based on a fixed hourly rate (somewhat above the award rate) for 60 hours per week, whatever hours were actually worked. While the employees disputed that they had initiated the new arrangement, his Honour accepted that they had sought out the arrangement because they wanted to have the security of fixed income each week rather than suffer "peaks and troughs" of income depending on what hours were actually worked each week.

Of course, eventually there was a dispute - in mid 1999 - and the Union representing the two employees inspected the books of the Company and (unsurprisingly) found that in a large number of the working weeks examined the employees had been underpaid when their pay was

compared to entitlements under the Award for the hours actually worked, while in some weeks the employees had received more than the Award required.

The Union subsequently prosecuted the Company under Sections 178 and 179 of the *Workplace Relations Act 1996 (Cth)* and (again unsurprisingly) the Company was found to be in breach of the Award, fined \$3,000.00 and ordered to pay moneys to the employees for underpayments, in an amount to be subsequently worked out.

There were a number of factual and legal issues in the case but in terms of general interest there were two main issues:

1) Could the Company and the employees contract out of the Award, bearing in mind that the Workplace Relations Act encouraged employers and employees to enter into co operative workplace relations and choose the forms of agreement for their particular circumstances?

2) If the Award did apply, could the Company apply any amounts in excess of the Award entitlements that it had paid to the employees in certain weeks as a credit against its liability for underpayments in other weeks?

The answer to each of these questions was a resounding NO.

And why was that?

In relation to the first question, it is very well established (in both the Federal and the State industrial award systems) that employers and employees cannot contract out of award obligations and the courts do not accept that employees waive their award rights if they enter into such private contracts (and no matter how willingly).

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The Company's lawyers sought to argue that because of the changes to Federal industrial law introduced by the *Workplace Relations Act 1996 (Cth)*, including its much greater emphasis upon "workplace solutions" agreed between employers and employees, the Act had adopted a new approach which would countenance private agreements such as those in question in this case. His Honour rejected that argument - in the first place the agreements were entered into before the Act was extensively amended in 1996, and secondly what the legislature clearly intended was to allow for greater flexibility in the form of agreements that could be reached (eg enterprise agreements and Australian Workplace Agreements) but did not intend to undermine the security of award prescriptions, as a "safety net system" where they continued to exist. With respect, his Honour was clearly correct and any other view would make no sense of the fact that agreements under the Act (whether enterprise or individual) could not be registered or approved unless they passed the "No Disadvantage" test in Section 170XA.

In relation to the second question, the Company was also unsuccessful because of the binding authority of the Full Court decision in *Poletti v Ecob (1989) 91 A.L.R.381* (a case with which the writer is especially familiar because he acted for the successful party). In Poletti's case the Full Court of the Federal Court ruled decisively and authoritatively that the principle adopted by the New South Wales Industrial Commission in this area (as most clearly declared in *Pacific Publications v Cantlon (183) 4 I.R.415*) applied to Federal awards - namely that a payment made by an employer on one occasion that is in excess of its award obligations cannot be set off against a claim for underpayment of award entitlement arising on another occasion unless at the time that the employer makes the overaward payment it specifically designates that the overaward component is to be applied to the satisfaction of the entitlement that is otherwise underpaid. The ruling in Poletti's case has been universally applied by the Federal Court ever since, and Givoni's case is just another instance of the old rule having equal force and authority, despite intervening changes in legislative "focus" (ie from a fully award based system to a system that encourages workplace agreements designed to meet the needs of a particular workplace).

What then does all this mean for employers?

■□ If employees ask for a more flexible arrangement to suit them, carefully check (or get advice on) whether the proposed arrangement will expose the employer to liability later (of course, while every one is happy there will be no problem, but work circumstances can change and if people are unhappy they understandably want their rights upheld).

■□ If the arrangement is likely to generate liability, then ascertain whether there is a lawful and practical means whereby the arrangement can be implemented without accruing "silent liability" - eg consider an enterprise agreement, or an Australian Workplace Agreement (if appropriate), or even consider having a specific provision in any private agreement that payments under the agreement that are in excess of award entitlements are to be applied to the satisfaction of other entitlements (eg overtime), with provision for a reckoning process at certain intervals to ensure award obligations are being observed.

■□ Seek advice before entering into the agreement; once the agreement is implemented it will be difficult to change, and moves to change it could well generate ill feeling or suspicion - which is a particularly regrettable outcome in those not uncommon situations where an employer agrees to the liability creating arrangements just to keep the employees content. ■□

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