

Drafting watertight individual and collective agreements

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LAWYERS

Agenda

- Permanent individual employment agreements (IEAs)
 - Good faith bargaining
 - Terms and conditions
- Transfer of undertakings
- Fixed term IEAs
- Casual IEAs
- Collective agreements
 - Good faith bargaining
 - Managing the 30-day rule
 - Terms and conditions
 - Bargaining fee clauses and unlawful passing on

IEAs - good faith bargaining (1)

- General duty - section 4(1A) Employment Relations Act 2000
 - Broader than trust and confidence
 - Active, constructive, responsive and communicative
- Specific duties - section 63A Employment Relations Act
 - Provide the employee with a copy of the intended agreement
 - Tell the employee he/she has an opportunity to seek independent advice
 - Give the employee a reasonable opportunity to seek that advice
 - Consider any issues that the employee raises and respond to them

IEAs - good faith bargaining (2)

- Failure to comply may be deemed “unfair bargaining” under section 68 of the Employment Relations Act
 - Authority may require employer to pay compensation or make an order cancelling or varying the IEA

IEAs - terms and conditions (1)

- Statutory requirements - section 65 Employment Relations Act
 - Must be in writing
 - Must contain the following terms:
 - The names of the parties;
 - A description of the work to be performed;
 - An indication of where the employee is to perform the work;
 - An indication of the arrangements relating to the times the employee is to work;
 - The wages and salary payable to the employee; and
 - A plain language explanation of the services available for the resolution of employment relationship problems (including the 90 day time limit on raising a personal grievance)

IEAs - terms and conditions (2)

- Statutory requirements - part 6A Employment Relations Act
 - For all employees other than “vulnerable employees”, the IEA must include an employee protection provision
- Statutory requirements - section 73 Holidays Act 2003
 - Employer required to inform employees that they can obtain further information about their entitlements from the Dept of Labour or their union (if applicable)
- Statutory requirements - Minimum Wage Act 1983
 - Current minimum wage - \$10.25/hr for adults and \$8.20/hr for youth
 - Will increase on 1 April 2007 - \$11.25/hr and \$9.00/hr, largest 12 month increase since 1999

IEAs - terms and conditions (3)

- Parties
 - Parties should be defined and definitions used consistently
- Term
- Probationary periods
 - Must be specified in IEA otherwise employer may not rely on any term that the employee serve a probationary period, if employee treats term as ineffective
 - Employer must take disciplinary action, prior to relying on probationary period
 - Employees are entitled to a fair dismissal procedure
 - Recent opposition Amendment Bill rejected

IEAs - terms and conditions (5)

- Duties
 - Ensure flexibility
 - Specify includes other duties employer may lawfully and reasonably require to be performed
- Location
 - Ensure location is not too narrowly defined
- Hours of work
 - Ensure flexibility i.e. additional hours as and when required

IEAs - terms and conditions (6)

- Remuneration
 - Rate and intervals of pay, and method of payment
 - Payment for overall performance (if no overtime payable)
 - Benefits
- Deductions
 - Wages Protection Act 1983 – except in limited circumstances an employer cannot make deductions without written consent
 - Employer should gain consent in IEA to make deductions
 - Employee entitled to withdraw consent at any time

IEAs - terms and conditions (7)

- Leave entitlements
 - Entitlements are in accordance with the Holidays Act
 - Public holidays
 - Reference to payment for work on a public holiday
 - Annual leave
 - 3 weeks after 12 months' continuous service (4 weeks from 1 April 2007)
 - IEA should state that pay will be made in any period during which a holiday is taken
 - Sick leave
 - 5 days after 6 months' continuous service
 - Medical certificate may be required in accordance with Holidays Act
 - Bereavement leave
 - 3 days for close family member/1 day if employer accepts bereavement

IEAs - terms and conditions (8)

- Suspension
 - Must be an express provision in the IEA
- Termination provisions
 - On notice
 - Serious misconduct
 - Medical verification/incapacity
 - Abandonment
 - Delivering up of company property
- Garden leave
 - Operates in a manner which is similar to a restraint of trade

IEAs - terms and conditions (9)

- Redundancy
 - Record if no redundancy compensation will be payable
 - Be mindful of possible risk of implied term or obligation arising from policies
- Technical redundancy
 - No redundancy arises where the employer's business is transferred, leased, sold, restructured, amalgamated or contracted out and the new employer offers the employee employment on substantially similar terms and conditions

IEAs - terms and conditions (10)

- Employee protection provision
 - Must be included in employment agreements of non-vulnerable employees
 - Must set out:
 - The process that the employer will follow in negotiating with a new employer;
 - The matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and
 - The process to be followed at the time of restructuring to determine what entitlements will be available to employees who do not transfer
 - Should include a technical redundancy provision

IEAs - terms and conditions (11)

- Confidential information
 - Common law duty to keep confidential information of employer confidential
 - In addition, IEA should include definition of confidential information
- Intellectual property

IEAs - terms and conditions (12)

- Restraints of trade
 - Prima facie unenforceable
 - Enforceable if employer can establish restraint is reasonable as to: time; geographic coverage; and scope
 - Two types:
 - Non-competition
 - Most difficult to enforce
 - An employer is not entitled to protection against mere competition
 - Non-solicitation
 - 3-6 months likely to be considered reasonable
 - Should state that remuneration in agreement assessed in light of undertakings in RoT and that the undertakings are reasonable

IEAs - terms and conditions (13)

- Severance
 - Should be included in any IEA that contains a RoT
 - Ensures that the validity of the agreement is not affected if RoT is deemed to be unreasonable
 - If RoT deemed to be unreasonable, it will be severed from agreement, or modified
- Company rules and policies
 - Employees must abide by these
 - Employer may vary from time to time
 - Should not be elevated to contractual terms

IEAs - terms and conditions (14)

- Employment relationship problems
 - Must set out process to be followed in the event that an employment relationship problem arises
 - Must include a reference to 90-day period within which an employee may raise a personal grievance
- Completeness
- Acknowledgement
 - Assists in rebutting an allegation of unfair bargaining (under s 68 Employment Relations Act)
 - Should specify that the employee:
 - Understands the provisions of the agreement;
 - Was not induced to enter the agreement; and
 - Was given a copy of the agreement, told to seek independent advice, and given a reasonable opportunity to do so

Transfer of undertakings (1)

- Two tiered scheme – vulnerable employees and all other employees
- Vulnerable employees are entitled to protection under the Employment Relations Act where an employer restructures its business and employee's work is performed for a new employer
- Definition of “vulnerable employee”:
 - Employee who performs food catering services; cleaning; care-taking; or laundry services
- Definition of restructuring:
 - Contracting in, contracting out, subsequent contracting, and selling or transferring employer's business (or part of it)

Transfer of undertakings (2)

- Vulnerable employees have the right to elect to transfer on the same terms and conditions of employment, and have service treated as continuous where:
 - The situation falls within the definition of restructuring;
 - As a result of the restructuring, the employee is no longer required to perform the work previously performed by them;
 - Work performed by employee is, or is substantially similar to, work performed by or on behalf of another person
- Fixed term employees:
 - Can transfer to new employer as permanent employees in contracting in, sale/transfer situations
 - Can transfer as fixed term employees in contracting out, and subsequent contracting situations

Transfer of undertakings (3)

- Where part of a vulnerable employee's work is to be transferred, the vulnerable employee is entitled to remain with his/her current employer for the part of the work that is not being performed by the new employer
- Employers must advise employees of restructuring so vulnerable employees can elect to bargain with their existing employer for alternative arrangements or elect to transfer to new employer
- If no provision in employment agreement for redundancy entitlements in restructuring situations, employees can bargain with the employer

Transfer of undertakings (4)

- Information provision
 - 2006 amendments to the Employment Relations Act allow for prospective employers of transferring employees to obtain information from their current employers that is relevant to their business decisions
- All other employees
 - Employment agreements must contain an EPP. This sets out the process an employer must follow in the event of a restructuring (restructuring does not include contracting in or subsequent contracting in this subpart)
 - An EPP must be in every new IEA or CA that bind employees (other than vulnerable employees). Existing employment agreements must be amended to contain an EPP

Fixed term IEAs (1)

- Employed for a specific reason and pre-determined period
- Section 66 Employment Relations Act:
 - Employer must ensure it has genuine reasons based on reasonable grounds for entering fixed term agreement
 - Employee must be advised of and the employment agreement must record:
 - Fact of fixed term
 - Reasons for fixed term
 - How or when employment will end

Fixed term IEAs (2)

- Termination
 - On the expiry of the fixed term; or
 - Prior to the expiry of the fixed term either summarily for serious dismissal or on notice
- Annual leave
 - Fixed term of 12 months or more:
 - 3 weeks' annual leave after 12 months' continuous service (4 weeks after 1 April 2007)
 - Fixed term of less than 12 months:
 - 6% (8% from 1 April) of gross earnings at end of fixed term; or
 - "Pay as you go" (must have employee's agreement)

Casual IEAs (1)

- Nature of casual IEA
 - Employee works on “as and when required” basis
 - No expectation of ongoing employment
 - These matters should be set out in agreement
- Termination
 - Detailed termination provisions are not necessary
 - Employment may be terminated by failing to provide further assignments or rostering employee on for work
 - However, if employment relationship acquires strong degree of continuity and regularity, nature of relationship may alter and become permanent (in which case dismissal would have to be substantively justified and procedurally fair)

Casual IEAs (2)

- Leave under a casual IEA
 - Public holidays
 - If employee works, entitled to be paid time and a half for hours worked
 - Most likely will not be entitled to alternate holiday
 - Annual leave
 - Paid as part of hourly wage; or
 - Paid at 6% (8% from 1 April 2007) of gross earnings at the end of each engagement
 - Sick and bereavement leave
 - Entitlement where employee has over a 6 month period, worked an average of 10 hours a week and at least one hour a week, or no less than 40 hours a month

Collective agreements (CAs) - good faith bargaining

- General duty - section 4(1A) Employment Relations Act
- Specific duties - section 32 Employment Relations Act
- Required to conclude a CA unless “genuine reason”, based on reasonable grounds, not to
 - Reasonable grounds do not include:
 - opposition or objection in principle to bargaining for/being party to a CA;
or
 - disagreement about including a bargaining fee clause in a CA
 - Authority may facilitate bargaining or fixed terms of CA in certain circumstances

CAs – 30 day rule (1)

- Applies where:
 - Employee is not a member of union, party to CA, whose work is covered by coverage clause
 - Employee enters into IEA, where there is an existing CA that covers work to be done by employee

CAAs – 30 day rule (2)

- Employer's obligations prior to 30 day period, inform employee:
 - CA exists
 - Employee may join union
 - How to contact union
 - If employee joins union, employee will be bound by CA
 - Employee's terms to comprise terms of CA and any additional mutually agreed (and not inconsistent) terms
- Employer must provide employee with copy of applicable CA

CAAs – 30 day rule (3)

- Following expiry of 30 day period:
 - Employee may join union and be covered by CA, or
 - Parties may vary IEA or enter into a separate IEA
- Cannot draft first 30-day IEA to automatically expire after 30-day period
- Before entering into an IEA on different terms to those contained in the CA, good faith bargaining obligations apply

CAs - terms and conditions

- Must be in writing and signed by the parties
- Must contain:
 - A coverage clause;
 - A variation provision;
 - An ERP clause;
 - An expiry date/event on which the CA will expire; and
 - An employee protection provision (EPP)
- Other terms:
 - May be negotiated, provided they are not inconsistent with the CA
 - Will be the subject of a separate IEA between the employer and employee(s) concerned

CAAs – Wages Protection Act consistency

- Section 16 of the Wages Protection Act allows that notwithstanding any provision of that Act, it is lawful to comply with a term of a CA
- Strongly suggests that clauses prima facie inconsistent with the Wages Protection Act are legal if agreed to in a CA
- Limited case law
- Only applies to terms agreed in a CA, not an IEA

CAs - bargaining fee clauses

- Aimed at recognising the benefits of the CA to non-union employees who are covered by its terms
- Will not come into force unless agreed to:
 - By the employer and the union in a CA; and
 - In a secret ballot held in accordance with section 69Q of the Employment Relations Act
- Employer must notify affected employees of the existence of, and amount of, the bargaining fee clause and that the employee's terms and conditions will be the same as those in the CA

CAAs – unlawful passing on

- It may be unlawful for an employer to pass on terms and conditions of employment bargained for, or agreed, with a union, to non-union employees
- Terms or conditions must be “substantially the same”
- Threshold during bargaining - intention or effect of undermining bargaining
- Threshold outside bargaining - intention and effect of undermining a CA
- Limited case law