DLA PIPER

AUGUST 2014

FAILURE TO CONSULT
EMPLOYMENT UPDATE

FINANCIAL PENALTY FOR CONSULTATION FAILURE

ALL ENTERPRISE AGREEMENTS IMPOSE MANDATORY OBLIGATIONS ON EMPLOYERS TO CONSULT WITH EMPLOYEES ABOUT "MAJOR" CHANGES IN THE WORKPLACE. THESE OBLIGATIONS ARE NOT ONLY RELEVANT TO UNFAIR DISMISSAL CLAIMS, BUT A FAILURE TO COMPLY CAN RESULT IN FINES AND PENALTIES. A RECENT DECISION OF THE FEDERAL CIRCUIT COURT OF AUSTRALIA EMPHASISES THE IMPORTANCE OF THE OBLIGATIONS AND DEMONSTRATES THE WILLINGNESS OF COURTS TO IMPOSE A PENALTY EVEN FOR A SINGLE CONTRAVENTION.

In *CEPU v ThyssenKrupp Elevator Australia Pty Ltd*[1] a penalty of $15,300 was imposed on the employer for neglecting to consult with an employee whom it made redundant. The Court stressed that consultation was an "important and valuable right" and it is imperative for employers to properly understand the nature of their obligation.

THE CONSULTATION OBLIGATION

Under the *Fair Work Act 2009 (Cth)* (**FW Act**) it is mandatory for enterprise agreements to contain a clause requiring employers to consult with its employees about:

- a major workplace change which is likely to have a significant effect on an employee; or
- changes to regular roster or ordinary hours of work.

A major workplace change is said to have a significant effect on employees if it results in:

- termination of employees;
- a major change to the composition, operation or size of the employer's workforce or to the skills required of employees;
- elimination or diminution of job opportunities;

[1] [2014] FCCA 1615 (16 July 2014)

- alteration of work hours;
- the need to retrain employees or relocate employees to another workplace; or
- restructuring of jobs.

If an enterprise agreement does not include a consultation clause, it will be taken to include the model consultation clause that is prescribed by the *Fair Work Regulations 2009* (Cth).

A failure to consult with employees may result in the imposition of pecuniary penalties of up to $10,200 for an individual and $51,000 for a corporation.

THE CLAIM

David McDonagh was employed by ThyssenKrupp Elevator Australia Pty Ltd (**Employer**).

Mr McDonagh was covered by an enterprise agreement. The enterprise agreement contained a consultation clause (as required under the FW Act), which in summary, required the Employer to:

- consult with relevant employees (and their union) as soon as practicable after making a definite decision to introduce a major change in relation to its enterprise; and
- provide the relevant employees with information about the change proposed and the expected effects of the change.

On 24 May 2013, Mr McDonagh was called into a meeting with his Employer and informed that his position had been made redundant and that he had been chosen for redundancy by reason of a performance matrix. Mr McDonagh was not provided with a copy of the performance matrix or given any further explanation. Mr McDonagh was then handed a letter terminating his employment.

The CEPU commenced proceedings in the Federal Circuit Court alleging the Employer contravened the enterprise agreement by failing to consult with Mr McDonagh (or the CEPU, of which Mr McDonagh was a member) in relation to the circumstances which led to his redundancy

THE DECISION

The Court found that the Employer had breached its consultation obligations in the agreement by failing to consult with Mr McDonagh (or the CEPU) prior to his termination.

The Court highlighted that the consultation obligations were designed to assist employers (not just employees and their unions) by allowing employers to gain access to ideas, suggestions and alternatives proposed by employees and their unions. The Court stated that if proper consultation had taken place, the sharing of ideas may have meant the decision to make certain positions redundant could have been avoided.

The Court held that a significant penalty was necessary to "bring home to the respondent the significance of the contravention". The level of penalty also took into account matters of general deterrence, in order to prevent employers considering it easier to contravene the FW Act than to meet consultation obligations.

The penalty ($15,300.00) would have been much higher but for the Court observing:

- this was a single contravention only;
- the evidence established it was a genuine oversight by the Employer's HR Manager;
- it was a first offence; and
- the Employer had admitted the offence in the proceedings.

LESSONS FOR EMPLOYERS

Employers must treat their consultation obligations seriously and not as a mere formality. Consultation should take place prior to identifying any specific employees for redundancy.

To properly discharge their obligations, employers need to pay careful attention to consultation obligations in any applicable award or enterprise agreement. This could include:

- explaining to the employee (or union) the circumstances which have led to a potential redundancy;
- describing any measures being taken to mitigate the adverse effects;
- setting out whether all feasible options have been considered;
- asking for input from the employee (or union) and taking any input into account; and
- keeping an open mind about ways to mitigate the adverse effects.

MORE INFORMATION

For more information, please contact:

Murray Procter
Partner
T +61 7 3246 4062
murray.procter@dlapiper.com

Nicole Jones
Solicitor
T +61 7 3246 4099
nicole.jones@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE
Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA
Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE
Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH
Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY
Level 22, No.1 Martin Place
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 8007
sydney@dlapiper.com

www.dlapiper.com

AUG/1202095656.1