CATHOLIC ARCHDIOCESE OF MELBOURNE

HUMAN RESOURCES OFFICE

http://www.melbourne.catholic.org.au/policies/index.html

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CIRCULAR HR0209 (10 JULY 2009)
ALL PARISH PRIESTS AND ADMINISTRATORS
IN THE ARCHDIOCESE OF MELBOURNE

ADVICE IN RESPECT TO THE FAIR WORK ACT 2009

Part of the Fair Work Act came into effect on July 1 2009. The balance of the Act comes into effect on January 1 2010. It makes significant changes to Australian employment law

This circular seeks to address the major changes which came into effect on July 1 and is addressed to you as an employer of parish based staff.

Advice in respect of the major changes which will come into effect on January 1, ie the introduction of "National Employment Standards" and "Modern Awards" and further changes to the names of enforcement and judicial bodies, together with information sessions to support both advices will be provided at a later date.

This advice applies specifically in respect of parish employees not covered by the Victorian Catholic Education Multi Employer Agreement 2008. Advice on matters in respect of those classes of employees should be sought from the Catholic Education Commission of Victoria's Industrial Relations Unit.

CHANGE OF NAME

The Workplace Ombudsman is renamed as the Fair Work Ombudsman.

UNFAIR DISMISSALS AND REDUNDANCY

Commencing 1 July 2009, there is a new definition of 'small business' and changes to the process in relation to applications for unfair dismissal. A small business is one with 15 FTE employees (but from 1 January, 2011, 15 on a simple head count). This means that many of you will no longer be protected from an unfair dismissal claim.

Under the new legislation, to bring an unfair dismissal claim:

- an employee must have been employed for at least the minimum qualifying period (12 months for small businesses and 6 months otherwise). Employees who have worked for a shorter period than the qualifying period cannot take action for unfair dismissal;
- the employee must not earn more than $108,300 FTE per annum (which will be indexed) or must be covered by an award or enterprise agreement; and
- the employee must make an application within 14 days of the dismissal to Fair Work Australia.

For a small business employer, the dismissal will not be unfair if the employer complies with the Fair Dismissal Code for Small Business. That code is attached and can also be accessed at http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/C397113E9E9E215BCA2575E100235C46/$file/Codeinstrument.pdf

While there is no equivalent for employers with larger numbers of employees, the Code represents the minimal procedural process they will need to follow.

Under the new rules, a redundancy must be genuine, ie the role must cease to exist and not be refilled by another employee. An unfair dismissal claim cannot be brought in relation to a genuine redundancy. It will not be a genuine redundancy if the person could reasonably have been redeployed either with the same employer or an associated entity, or if the employer breaches the consultation requirements in the relevant Modern Award.

Relevant to this consideration is another key change which is that the range of remedies for breach of industrial instruments has been expanded to include injunctions, compensation and other remedial orders. For example, an employer who tries to implement redundancies allegedly without having fulfilled the consultation obligations under a Modern Award may face an application for an injunction restraining the employer from making the employment redundant.

Before you initiate a termination of employment or take action which may lead to an employer initiated termination, you are advised to seek advice from this Office.

GENERAL PROTECTIONS

New "general protection" provisions have been introduced. Under these provisions, employers will not be able to take "adverse action" against employees or potential employees on the grounds of their workplace rights, eg exercising an award entitlement, their membership or non membership of a union and their engaging or not engaging in lawful industrial activity. Employees are also protected, among other matters, against prohibited discrimination and termination of employment on the grounds of temporary illness.

A reverse onus of proof applies, except where injunctions are sought.

Care therefore needs to be taken to ensure any action on your part which may have an adverse effect on an employee is not, and cannot seriously be argued to have been, taken for a prohibited reason. If you are in any doubt on this matter, please contact this Office.

COLLECTIVE BARGAINING

Employers can now be made to bargain for a collective agreement.

If the employer agrees or initiates the process, obligations follow and both parties are required to bargain in good faith. This is in effect a new concept in Australian employment law.

If the employer does not agree to commence bargaining, Fair Work Australia can make a majority support determination if a majority of employees who will be covered by the proposed agreement wish to bargain with the employer. The effect of such a determination will be to force an employer to commence bargaining.

Collective agreements are not a feature of non school based parish employment. Such employees are either covered by an award or are award free and the recommended approach is to employ staff on a common law contract which acknowledge award entitlements where they exist and which provide favourable conditions and just remuneration outcomes (refer the *Conditions of employment for parish employees* and *Conditions of employment for Pastoral Associates* and related circulars regarding rates of pay which can be found on the diocesan website at http://www.melbourne.catholic.org.au/policies/index.html and the following pages). A change from this framework is not recommended.

You are advised to neither initiate nor agree to bargain if requested. If requested, you are advised to contact this Office for advice.

TRANSFER OF BUSINESS

The Act makes fairly significant changes to the current circumstances in which a transmission of business (now called a transfer of business) occurs, broadening the types of transaction caught to include some outsourcings and insourcings.

A transfer of business will occur where:

- an employee changes employer, and
- the work the employee does for each employer is the same or substantially similar, and
- there is a particular 'connection' between the old and new employer, such as a transfer of assets used in connection with the work, or an outsourcing, or an insourcing or where the two employers are 'associated entities'.

The industrial instrument (usually an award or collective agreement) that transfers continues to apply to the new employer until it is terminated or replaced. Importantly, however, instruments only transfer where the new employer takes on employees from the old employer, and there is no obligation to do so.

This has specific implication for the insourcing of Outside School Hours Programs. Should you decide to terminate the arrangement with an outsourced provider and conduct the program in house, you should seek advice from this Office, such that we can advise on the effect of the transferring instrument.

EMPLOYEES ON WORKCOVER

Employers with workers in receipt of compensation weekly payments may need to adjust the accrual of annual leave and sick/personal leave for those employees as the Act provides that employers need not provide leave to a worker who is in receipt of weekly compensation for the same period.

An employee is no longer entitled to take or accrue any leave of absence (whether paid or unpaid) during a compensation period when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under workers' compensation legislation.

Workers working part time on return to work programs will now accrue on a pro rata basis only for the hours they actually work. Accruals prior to that date will still be retained.

You are advised to check whether you are complying with the legislation and take remedial action where necessary.

Tom Carr
Human Resources Manager
10 July 2009

Small Business Fair Dismissal Code

Fair Work Act 2009

Declaration under subsection 388(1)

I, Senator the Hon Mark Arbib, Acting Minister for Employment and Workplace Relations, declare the Attachment to this Declaration to be the Small Business Fair Dismissal Code.

Dated: 24/06/09

[signed]
[Signed]

Senator the Hon Mark Arbib
Acting Minister for Employment and Workplace Relations

ATTACHMENT

Small Business Fair Dismissal Code

Commencement

The Small Business Fair Dismissal Code comes into operation on 1 July 2009.

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.