Case review: labour hire employees and unfair dismissal

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Labour hire employees are workers employed by one company (a company with whom they have their employment agreement) but perform their work at an external company (the “client” of their employer). An increasing number of workers in Australia perform work under a labour-hire agreement. This has triggered important questions for many of those workers:

- What rights do I have as a labour-hire employee?
- Am I protected from being unfairly dismissed if my employer’s “client” no longer wants me?

Under most labour-hire agreements, a worker will have an employment agreement with their employer but perform their work for their employer’s “client”. The worker will not have an employment agreement directly with the company where they perform their work.

Most labour-hire employers will have an employment agreement with the worker and a separate agreement with the “client”. This can create a conflict between the obligation of the labour-hire employer to provide fairness to its employees, with its obligations to the host company under its service agreement.

Regardless, as has been previously expressed by the Commission in a successful case for labour-hire employee Kim Star, who Hall Payne represented:

“However, the contractual relationship between a labour-hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair

dismissal. Labour hire companies cannot use such contractual relationships to abrogate their responsibilities to treat employees fairly."

In the recent decision of *Johnson v Chelgrave Contracting Australia Pty Ltd*, the Fair Work Commission has considered the questions raised above.

Background

Chelgrave Contracting Australia Pty Ltd (**Chelgrave**) is a labour-hire provider of services to a number of businesses. One of Chelgrave's clients is Carlton United Breweries (**CUB**).

Chaya Johnson was employed by Chelgrave as a maintenance fitter. He was employed from May 2017 until 28 May 2020.

Mr Johnson was engaged to perform work for CUB for the entirety of his employment with Chelgrave.

Investigation into alleged misbehaviour leading to termination

CUB reported to Chelgrave that it had concerns about Mr Johnson's behaviour in relation to a safety incident that occurred when Mr Johnson was using a palletising machine on 21 April 2020.
Chelgrave investigated the concerns and found that:

- Mr Johnson broke safety rules by failing to isolate a palletising machine that he performed work on; and
- he was not entirely responsible for what happened as there was a known difficulty and some deficiencies with the palletising machine.

Chelgrave's investigation report concluded that Mr Johnson should be issued with a final warning for his unintended failure to operate the palletising machine safely.

Termination

Following the investigation, CUB informed Chelgrave that it no longer wanted Mr Johnson to perform work at its site.

Despite Chelgrave's report recommending that Mr Johnson be given a final warning rather than having his employment terminated, Chelgrave terminated Mr Johnson's employment. Chelgrave advised Mr Johnson that his employment was terminated on the basis that CUB no longer wanted him to return to its site.

Unfair dismissal

Mr Johnson filed an unfair dismissal application alleging that there was no valid reason for his dismissal and that his dismissal was otherwise harsh.

The Fair Work Commission concurred with the Chelgrave investigation report in many respects and concluded that Mr Johnson's dismissal was:

- harsh, because the penalty of dismissal was disproportionate to the established facts;
- unjust, because Mr Johnson was not afforded an opportunity to provide a response to Chelgrave's consideration of dismissal; and
- unreasonable, because it did not adequately take into account the contributing factors to the events of 21 April 2020.

The Fair Work Commission ordered that Mr Johnson be reinstated

The Fair Work Commission ordered that Mr Johnson be reinstated to his position at CUB with back-pay and continuity of service. Although Chelgrave argued that CUB would not allow Mr Johnson to return, there was no actual evidence which led to that effect.

Lesson for labour-hire employees

Mr Johnson worked at CUB's site for the entirety of his employment and CUB no longer wanted him to work there due to his safety breaches. In the labour-hire employer's view, this provided grounds upon which to terminate Mr Johnson's employment.

In rejecting that simplistic view, the Fair Work Commission concluded that Chelgrave needed to have a valid reason for terminating Mr Johnson and had to afford him procedural fairness, irrespective of CUB's view on the desirability of continuing to have Mr Johnson work at its site.

This approach demonstrates that labour-hire employees will be able to utilise the unfair dismissal provisions to obtain reinstatement, even if their employer's "client" no longer wants the worker on their site. There may, however, be practical difficulties in effecting that reinstatement after the order is made, as the host company may still refuse reinstatement. This is an issue that arose in *Star v Workpac* and which we expect to arise in future cases.

Get help

If you've been terminated, whether as a labour-hire employee or not and you feel that termination was unjust, unfair or unreasonable, seek immediate advice from your Union or a lawyer experienced in employment law.

There are strict time limits which apply to unfair dismissal claims.

Legal advice and assistance continue during COVID-19

We continue to provide our client services during the coronavirus outbreak.

Most of our teams have now returned to their respective offices with others remaining fully equipped to work remotely, where necessary.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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