

6 February 2017

Labour Hire Regulation
Executive Director Industrial Relations
Office of Industrial Relations,
GPO Box 69
Brisbane QLD 4001.

By email: labourhirereg@justice.qld.gov.au

Dear Minister,

RE: Regulation of the labour hire industry 2016

Thank you for the opportunity to make a submission in response to the government's 'Regulation of the labour hire industry 2016' issues paper.

Introduction

Caxton Legal Centre provides legal and social welfare services to low income and disadvantaged persons in need of relief from poverty, distress, misfortune, destitution and helplessness.

Since 2010 Caxton has provided over 6000 free legal advice appointments in employment law, with the most common issue being unfair dismissal.

The evidence shows that job loss is a trigger for disadvantage¹ and can have profound implications for the worker and their family, correlating with other adverse outcomes such as a reduced likelihood of obtaining post-secondary education².

It is therefore with some concern that we note the absence of any discussion in the issues paper of the inadequacy of unfair dismissal laws as they apply to labour hire workers. The lack of reform in this area compounds the disadvantage experienced by labour hire workers.

In response to question 11 of the issues paper the following observations outline why reform is necessary to ensure the labour hire industry operates ethically, particularly, in relation to dismissal where this occurs as a result of termination of the worker's engagement by the host employer.

We otherwise commend the government in its consideration of options to regulate the industry by way of a licensing scheme, and by the imposition of contractual obligations on

¹ Rosalie McLachlan, Geoff Gilfillan and Jenny Gordon, 'Deep and persistent disadvantage in Australia' (Report, Productivity Commission, 2013) 128.

² Ibid 114.

the host employer. We do not however offer any specific responses to questions one through 10 of the issues paper.

Unfair dismissal

The inadequacy of unfair dismissal laws as they apply to labour hire workers (“LHW”) is well documented in the academic literature³, case law⁴ and government commissioned reports⁵.

In his report to the Victorian government Professor Forsyth recommended that a voluntary code for the labour hire industry establish ‘best practice requirements’ for ‘fair processes leading to dismissals of labour hire employees’. It is worth reflecting on the reasons behind the recommendation:

The current unfair dismissal provisions in the Fair Work Act operate, in practice, to limit substantially the protections from unfair dismissal for labour hire workers. This principally arises from the exclusions of most casuals, as well as fixed term/specified task employees and contractors, from being able to bring an unfair dismissal claim.⁶

Given the increasing ‘casualisation’ of the workforce this is a broader issue not limited in effect to LHWs. However, the ‘structural impediments’⁷ to a successful unfair dismissal application mean LHWs are in effect treated like ‘second class workers’⁸ when it comes to dismissal, as reflected in this observation from the Victorian report:

Even for labour hire employees who can bring an unfair dismissal claim, the relevant provisions are sometimes interpreted by the FWC so as to enable the labour hire agency to ‘hide’ behind the actions of the host and/or their commercial relationship with the host. This approach enables both the host and the labour hire employer to

³ Pauline Thai, “Unfair dismissal protection for labour hire workers? Implementing the doctrine of joint employment in Australia” (2012) 25 *Australian Journal of Labour Law* 152; T Malone, ‘Vulnerability in the fair-work place: why unfair dismissal laws fail to adequately protect labour-hire employees in Australia’ (Student Working Paper n. 6, Centre for Employment and Labour Relations Law, The University of Melbourne, May 2011); E Underhill and M Rimmer, ‘State Protection for Temporary Agency Workers: Australian Developments’ in R Blanpain (Ed), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*, Kluwer Law International, Austin, 2009, pp 178-9; A Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 235 at 235-42. Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working paper 76, University of Sydney, April 2002, 5.

⁴ *Orlikowski v IPA Personnel Pty Ltd* (2009) 185 IR 127; [2009] AIRC 565 (26 June 2009) (*Orlikowski*) at [42]. *Kool v Adecco* [2016] FWC 925 [48].

⁵ Economic Development Committee, *Final Report: Inquiry into Labour Hire Employment in Victoria* (Parliament of Victoria, Melbourne, 2005); Steve O’Neil, “Labour hire: issues and responses Economics” (Research paper no. 9, Parliamentary Library, Parliament of Australia, 2003-2004); G Stevens, *Review of the South Australian Industrial Relations System: Report, Workplace Services*, Adelaide, 2002; Anthony Forsyth (Final Report, Victorian Inquiry into the Labour Hire Industry and Insecure Work, 2016) 20.

⁶ *Ibid* 20.

⁷ *Ibid* 112.

⁸ *Ibid* 14.

avoid having to account for their respective roles in causing or contributing to the termination of the labour hire employee's employment.⁹

Unfair dismissal cases generally turn on whether the dismissal was procedurally fair and for a valid reason. To appreciate in a practical sense how the labour hire structure operates to deprive LHWs of real protection it is convenient to consider the example of a real case, here as summarised by Thai¹⁰:

In *Costello*¹¹, Deputy President Hampton acknowledged that the client's concerns about the worker's performance may not have constituted a valid reason for the dismissal if the worker had been the client's direct employee. Further, there were some 'procedural fairness concerns'. However, the relevant inquiry was whether the agency's actions were unfair. Since the client had informed the agency of its decision to remove the worker, the agency 'could not have been reasonably expected' to provide the worker with an opportunity to respond to the client's concerns. Moreover, the agency had a valid reason for the dismissal being 'the fact that [the client] no longer sought that [the worker] be supplied'.

The Victorian report considers proposals for legislative amendment to introduce a 'joint employment' framework¹². This would allow LHWs to bring an unfair dismissal claim against both the agency and the host. However, Professor Forsyth rejects this in favour of addressing the issue within a proposed code of practice¹³. The upshot of this recommendation would seem to be no change to the legal obligations of the labour hire agency or host organisation, or to the legal rights of LHWs, with respect to unfair dismissal.

The case for actual legal reform of unfair dismissal laws to benefit LHWs is compelling. Multiple submissions to the Queensland¹⁴ and Victorian¹⁵ inquiries identified the failure of unfair dismissal laws to protect LHWs and proposed legislative reform including the introduction of a 'joint employment' framework.

Against the introduction of a joint employment framework, Professor Forsyth opines that such a 'leap' would have 'significant economic effects on the users of labour hire services'¹⁶. He concludes that 'more extensive investigation is required of the full implications, for the many different aspects of labour hire relationships, of adopting the joint employment

⁹ Ibid 116.

¹⁰ Ibid 159.

¹¹ *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* (2004) 71 SAIR 249.

¹² Above n 5, 115.

¹³ Ibid 115, 201.

¹⁴ Australian Works Union, Submission No 13 to the Finance and Administration Committee, Parliament of Queensland, *Inquiry into the Practices of the Labour Hire Industry in Queensland*, 5 April 2016, 3; United Voice, Submission No 16, April 2016, 5-6; Queensland Law Society, Submission No 19, 7 April 2016, 2-3; Queensland Council of Unions, Submission No 29, 3, 12.

¹⁵ Centre for Employment and Labour Relations Law, Submission No 99 to the Victorian Inquiry into the Labour Hire Industry and Insecure Work, 14 December 2015, [23]; Jobwatch Inc, Submission No 46, 27 November 2015, [8, 14-15]; National Union of Workers, Submission No 91, 11 December 2015, [23-24].

¹⁶ Above n 5, 116.

doctrine'¹⁷. Perhaps further investigation is required, although it is not clear why any economic effects would be prohibitive if something like a joint employment framework was introduced only in the discrete area of unfair dismissal. It is also not clear that the rejection of a joint employment framework, if this is too great a leap, means there can be no legislative reform whatsoever, necessitating the retreat to a purely voluntary form of regulation.

In terms of the cost on users of labour hire posed by legislative amendment, we note that host organisations already owe legal obligations to their LHWs under anti-discrimination legislation and the 'general protections' provisions of Commonwealth and Queensland industrial legislation. This is appropriate but no substitute for access to adequate unfair dismissal protection. As the Fair Work Commission's 2015 - 2016 annual report reveals unfair dismissal is by far the more common remedy with a total of 14,694 applications accepted¹⁸ compared with a total of 3270 applications accepted to deal with general protections disputes involving dismissal¹⁹. Moreover, it could be argued that protection from unfair dismissal is so fundamentally valuable to employees that the cost to business is justified, in labour hire arrangements as in other forms of employment.

Reform

Queensland's LHWs deserve adequate protection from unfair dismissal equivalent to that enjoyed by other workers. Legislative reform, ideally of both the federal and state industrial relations systems, is necessary to achieve this but it is not our intention to offer detailed and prescriptive recommendations. Nor do we attempt to delimit the possible options for an improved legislative framework, or assess the relative merits of the available options. Our aim primarily is to raise the profile of this important issue and provoke the government's consideration of the available options.

We do however make some observations with respect to the possible features and implications of an amended legislative framework to protect LHWs from unfair dismissal.

Firstly, it is not the case that the amended framework would necessarily involve the introduction of something like the concept of 'joint employment', with the capacity for a dismissed LHW to bring an unfair dismissal application against both the host organisation and labour hire agency. The Queensland Law Society identifies the 'creation of direct obligations between the labour hire client and labour employee' as one option, but also raise the possibility of 'legislatively specifying that, for the purpose of unfair dismissal claims...the acts of the client should be regarded at law as the acts of the labour hire employer'.²⁰ The latter option would not necessarily involve any alteration to the legal obligations of the host employer.

Secondly, making the labour hire agency liable for the actions and decisions of the host organisation would be a logical adjunct to a code of 'best practice' if best practice means

¹⁷ Above n 5, 115.

¹⁸ 35.

¹⁹ 48.

²⁰ Above n 14, 2.

not using the contractual relationship with the host to defeat the rights of a dismissed employee. Labour hire agencies might choose instead to contract so as to require the host to afford procedural fairness to LHWs, or so as shift liability for unfair dismissal to the host. Agencies who deal with recalcitrant hosts would bear the cost. This should be the cost of doing business as a labour hire agency. At present the cost of unfair dismissal too often falls at the feet of LHWs.

Finally, if the government were interested in pursuing and developing a voluntary code of practice with industry, compliance with such a code could be incorporated into the legislative framework. For instance, it could be legislatively specified that in deciding whether a dismissal was unfair, any compliance or non-compliance with the code is a relevant consideration.

We urge the government to act decisively, both in its own legislative agenda and in its representations to the Council of Australian Governments, to ensure that Queensland's labour hire workers enjoy the same legal protections as other workers.

Yours faithfully
Caxton Legal Centre

A handwritten signature in black ink, appearing to read 'Scott McDougall', with a stylized flourish at the end.

Scott McDougall
Director