

EMPLOYMENT UPDATE

SEPTEMBER 11

INAPPROPRIATE USE OF INDIVIDUAL FLEXIBILITY AGREEMENTS

In this Employment Update, we discuss issues with getting Individual Flexibility Agreements (IFAs) wrong and implications for employers.

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In the first case of its kind, the Fair Work Ombudsman (FWO) has been successful in its prosecution of a Gold Coast employer for contraventions in relation to the use of IFAs.

In *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064, the employer was fined \$25,000 and its managing director \$5,000 for signing seven employees up to IFAs containing unlawful terms and threatening employees who refused to sign the IFA with dismissal or loss of shifts. The Company was ordered to pay a further \$7,146 in compensation to an employee who had shifts taken away from him for refusing to sign the agreement.

In the decision, Justice Logan of the Federal Court of Australia found that the employer had contravened the *Fair Work Act 2009* (Cth) (Act) based on the following:

1. The IFA did not identify the terms of the Modern Award that were to be varied;
2. The IFA did not detail how each term of the Modern Award had been varied;
3. The IFA did not include the

date it commenced operation;

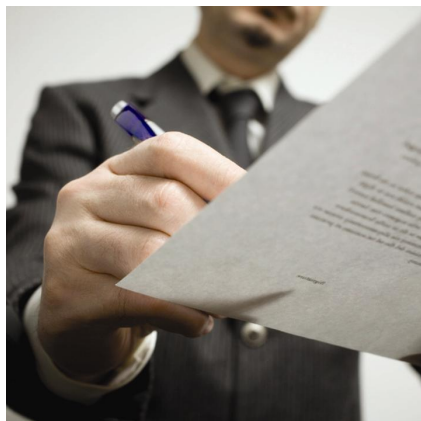
4. The employer had injured an employee in his employment and altered his position to his prejudice specifically by not affording any further work to the employee because the employee had a workplace right or workplace rights;
5. The employer had failed to ensure that it genuinely made the IFA without coercion or duress;
6. The employer had threatened to injure an employee in his employment and threatened to alter his position to his prejudice if he did not sign the IFA because the employee had a workplace right or workplace rights.
7. The employer had threatened to take action with intent to coerce the employee to exercise or not exercise his workplace right and/or exercise his workplace right in a particular way;
8. The employer applied undue influence and pressure on an employee to procure his agreement to the IFA; and



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9. The employee's director was involved in each of the contraventions of the employer for the purposes of section 550 of the Act.

The case highlights that it is essential that the procedural requirements be met including identifying the terms of the applicable Modern Award being varied, how they are being varied and even a very simple element of identifying the commencement date. It also serves as a clear reminder that when negotiating IFAs, the use of coercion or duress can result in action being taken against an employer.

It is therefore important that employers understand what IFAs are, what purpose they are meant to serve and the content that needs to be included.

What are IFAs?

Essentially, IFAs allow for variations to Modern Awards or enterprise agreements in order to meet the genuine needs of employers and individual employees. The matters covered and the scope of IFAs are determined by the terms of the flexibility provisions contained in Modern Awards and enterprise agreements which commonly adopt the Model Flexibility Term provided in

the *Fair Work Regulations 2009* (Cth).

The focus of IFAs is to provide for genuinely agreed individual flexibilities whilst maintaining that employees are 'better off overall'. Determining whether an employee is better off overall will involve a comparison of the employee's overall employment benefits under the IFA compared with the benefits otherwise provided under the applicable Modern Award or enterprise agreement. An employee's individual circumstances as well as other non-financial benefits are relevant but can sometimes prove troublesome to quantify.

What terms of a Modern Award can IFAs vary?

If the relevant Model Award contains the Model Flexibility Term, this provides that IFAs can vary the application of clauses in the Modern Award that concern:

- a) when work is performed;
- b) overtime rates;
- c) penalty rates;
- d) allowances; and
- e) leave loading.

Importantly, the content of IFAs is limited to these listed terms. In other words, employers and individual employees who wish to alter the application of a Modern Award to their particular terms and conditions of employment through an IFA can only seek changes to those terms listed above.

For example, an individual flexibility agreement might be negotiated between an employer and individual employee who is a parent and seeks to alter his or her ordinary hours of work to account for family

responsibilities.

What terms of an enterprise agreement can IFAs vary?

In relation to enterprise agreements, the Model Flexibility Term is only a guideline and for businesses that are negotiating their own enterprise agreements, it is possible for the flexibility term to provide a wider scope of application provided that the terms relate to 'permitted' matters. The Act defines 'permitted' matters to include:

- matters pertaining to the relationship between an employer and its employees who will be covered by the agreement;
- matters pertaining to the relationship between the employer and the unions that will be covered by the agreement;
- wage deductions for any purpose authorised by an employee; and
- the way in which the agreement (that is IFAs) are to operate.

In the case of *AMWU v HJ Heinz Company Australia I (Echuca Site)* [2009] FWA 322, Fair Work Australia (FWA) clarified that there was no restriction on what matters might be the subject of flexibility terms drafted for enterprise agreements, provided they relate to permitted matters and do not contain unlawful terms.

Therefore IFAs made to vary terms arising from an enterprise agreement approved by FWA, must comply with flexibility term in that instrument. If a flexibility term in an enterprise agreement is not included, or it is found to contain unlawful terms, then the Model Flexibility Term automatically applies.

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How are IFAs made?

IFAs can be made at the initiative of either an employer or individual employee. It is important that this process does not involve coercion or duress.

Once an IFA is successfully negotiated, in order for it to be effective and enforceable, it must be in writing and comply with requirements including the following:

- a) state the name of the parties to the agreement;
- b) be signed by the employer and the individual employee, or by a parent or guardian where the employee is under 18 years of age;
- c) state each term of the modern award that has been agreed to be varied;
- d) provide details on how the application of each term of the modern award has been varied;
- e) provide details on how the agreement passes the BOOT in relation the individual employee's terms and conditions of employment; and
- f) state the date the agreement commences operation; and
- g) include information about how the IFA may be terminated. Generally, an IFA may be terminated by agreement or by either party giving the required written notice. Modern awards require 28 days notice but this may be different in an enterprise agreement (but no more than 28 days).

The IFA must be signed by both the employer and the employee. If the employee is under 18 years of age, it must also be signed by the employee's parent or guardian.

Once an IFA has been made, it is the

employer's responsibility to ensure that a copy of the IFA is given to the employee. The employer should also retain a copy. It is also the employer's responsibility to ensure that the employee is better off overall than if there was no IFA.

When making an IFA, employers should keep in mind any language or cultural differences that might impact on the employee's understanding of the terms of the IFA or their choice to agree to an IFA.

It is important to note that an employer cannot make an IFA a condition of employment.

If an employer fails to ensure that an IFA is properly made in accordance with the Act, it may be liable to a penalty of up to \$6,600 for an individual or \$33,000 if the employer is a body corporate.

An IFA made in accordance with a modern award or an enterprise agreement will end when a new enterprise agreement begins operating.

Key Points: Whilst IFAs aim to provide for flexibility, employers need to ensure that they meet the necessary requirements provided under a Modern Award or an enterprise agreement and the Act.

As demonstrated by the *Australian Shooting Academy Case*, employers and directors may be prosecuted and fined if IFAs fail to comply with flexibility terms under the applicable Modern Award or enterprise agreement, or where there was use of coercion or duress in the negotiation process to compel employees to enter into the IFA.

Update – Variation to Retail Industry Award for casual hours

In previous Employment Updates, we highlighted that the application to vary the *General Retail Industry Award 2010* to allow for the reduction of the casual minimum engagement period to 90 minutes had proceeded to an appeal.

FWA has since heard that appeal and affirmed the original decision to vary the Award to allow for employees who are full time secondary school children to be engaged for a minimum of 90 minutes between the hours of 3:00pm and 6:30pm on a day which they are required to attend school, provided:

- a) the employee agrees to work, and a parent or guardian of the employee, agrees to allow them to work, a shorter period than three hours; and
- b) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

The variation takes effect from 1 October 2011.

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