

Employment Agreements for On-Site Staff and Husband and Wife Managers

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Introduction

The landscape of industrial law can be a minefield. This is partly because we have seen, in the past 10 years, a procession of different governments passing and subsequently repealing, numerous pieces of industrial legislation. To complicate matters further, we have moved in more recent years from a system involving State and Federal industrial laws and Industrial Commissions, to a more centralised federal scheme. In this context, there has been an award modernisation process resulting in a reduction of the total number of applicable awards from the thousands down to 122.

The Award System, the NES and the Fair Work Act

Employers need to be careful when considering the legal protections that may underpin the rights and entitlements of their employees.

Employees who carry out a scope of duties that might generally be captured by a particular job classification within a particular Award, are usually protected by the safety net provisions contained within that Award. Many employers believe, quite incorrectly, that they can alter the fundamental entitlements of an employee under an Award, simply by paying an employee above Award rates.

Modern Awards do however contain an Award flexibility clause. This allows some limited bargaining between the employer and the employee to “trade-off” certain Award entitlements provided that the employee is more than adequately remunerated in respect of the overall package of employment. An example may be the trading off of holiday leave loading for a higher hourly rate under the employment contract.

However, the scope of Award flexibility is limited and only a small number of rights may be traded away. Even then, it is absolutely necessary that the process contained within the Award flexibility clauses of the Award are complied with.

If an employee’s duties are generally not covered by a job classification under an Award, then the employee is still entitled to the basic protections contained in the National Employment Standards (NES). There are, generally speaking, 10 NES entitlements. These cover:

- Maximum weekly hours;
- Request for flexible working arrangements;
- Parental leave and related entitlements;
- Annual leave;
- Personal carers leave and compassionate leave;
- Community service leave;
- Long service leave;
- Public holidays;
- Notice of termination and redundancy pay;
- Fair work information statement.

These are legislated by the *Fair Work Act* and cannot be the subject of any agreement to the contrary.

If an employer engages an employee and fails to pay the employee minimum legislated or Award entitlements, then the employer may be prosecuted under the *Fair Work Act*. Furthermore, the employee may bring proceedings against the employer to recover past entitlements that should have been paid. These claims can often run into many tens of thousands of dollars.

The Applicable Award

In the tourism industry, a common Award that may apply is the Hospitality Industry (General) Award 2010. There are many classes of employees whose entitlements are protected by this Award. These range from people employed in a clerical role in the front office, to housekeepers, handymen, people carrying out the booking of leisure activities etc.

If a management rights holder intends to employ a person whose general duties would be covered by this Award, then it would be appropriate to have a letter of engagement prepared and presented to the employee containing the terms and conditions of employment. If there is to be some Award flexibility then the letter of engagement would need to ensure that the requirements to successfully engage in Award flexibility are carried out. The letter of engagement may also incorporate certain policy obligations on the part of the employee. It may also require the employee to be bound by confidentiality terms during the course of the employment and following the conclusion of the employment.

These letters of engagement can represent a good protection for an employer against any future claims.

The Husband and Wife On-Site Managers

It is common in this industry for the owner of management rights to engage a husband and wife team to carry out the duties of the on-site managers. This is an area in respect of which employers need to be very careful.

Many people would be familiar with the template style of document that is used in the industry which employs the husband and wife jointly. In many instances these template documents are far from satisfactory. They are often vague or uncertain in respect of their terms and in other respects, they may actually be in breach of Award or NES entitlements.

However, the fundamental problem with these template documents is that it is simply not possible to employ two people within the one contract. That is because the engagement of the employee is a contract for service and that service is personal between the employee and the employer. To “lump” two employees into the one contract of employment defies logic and presents a potential legal minefield if there is an attempt by the employer to end the relationship of one or both of the employees.

What can be done?

(a) Separate Award Compliant Contracts

One option is to separate the duties of the husband and wife. These individual duties can then be examined against any Award entitlement or at least against the NES entitlements. Separate contracts can then be entered into. For example, it may be the case that the wife is going to be responsible for managing the front office, attend to the telephone duties, bookings, receipting and accounting of monies, preparation of trust account reconciliations etc. In that situation, the wife may be engaged on a contract which is compliant with the Award entitlements that she would enjoy under one of the clerical divisions in the Hospitality Industry (General) Award.

On the other hand, the husband's duty statement may include attending to the upkeep of the common property, the repair of the property, undertaking cleaning duties etc. In that situation, the husband's employment may be subject to the protections afforded to a handy person contained within that same Award.

(b) Separate Managerial Contracts

Alternatively, and this is perhaps a less desirable option, the duties of the management rights holder contained within the Caretaking and Letting Agreements may, subject to approval of the Body Corporate, be effectively re-stated in the job description of the onsite managers in their employment contracts. By providing a level autonomy on the part of the husband and wife managers, subject at all times to appropriate supervision and control by

the employer, it may be argued that the husband and wife are being employed in managerial roles with a level of responsibility that is higher than any individual job classification contained within the Award.

In so doing, two employment contracts may be drawn, one for the husband and one for the wife with a recognition in each agreement that there is to be a separate or collateral agreement employing the other spouse and allowing the spouses, between them, to divide up the managerial duties to be carried out, as between themselves.

The important thing in this process, is to still ensure that there are two separate contracts of employment albeit, that in this case, each contract will reflect the fact that there is a secondary agreement with the spouse and therefore, that the employment of each spouse as managers is contemporaneous.

Whilst this type of legal structure would require some careful examination of the duties that are to be carried out by the resident employee managers, it is likely to provide a better protection for the employer than the current template that is largely used within the industry, which purports to employ both the husband and wife in the one contract.

Conclusion

The issue of ensuring compliance with industrial laws and Awards is complex and must be assessed on a case by case basis. It is simply impossible to attempt to adapt a template document for every situation. Anyone contemplating these sorts of arrangements should seek legal advice from a lawyer with proven experience in employment law.

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Please contact Tony O'Connor, Partner if you require any further information.