Legislative Council

Industrial Relations Amendment (Unfair Contracts) Bill Hansard - Extract

11/04/2002

Second Reading

The Hon. EDDIE OBEID (Minister for Mineral Resources, and Minister for Fisheries), on behalf of the Hon. John Della Bosca [5.03 p.m.]: I move:

That this bill be now read a second time.

The Industrial Relations Amendment (Unfair Contracts) Bill 2002 makes a number of changes to the unfair contracts provisions of the Industrial Relations Act 1996. As they stand, these provisions give the Industrial Relations Commission of New South Wales wide powers to overturn and vary contracts for the performance of work, and to issue orders for the payment of money. Unfair contracts provisions were first introduced into New South Wales industrial relations legislation in 1959. The intention behind the provisions was to protect award terms and conditions from being undermined by artificial contract arrangements. However, due both to amendments to the provisions and to the manner in which they have been interpreted, the operation of the unfair contracts provisions has moved away from this original intention. In recent years, the unfair contracts jurisdiction has been utilised overwhelmingly as a means of obtaining compensation in connection with the termination of employment of highly paid executives.

The commission has awarded former highly paid executives far greater benefits for termination of employment than other workers can expect to receive. In particular, the restrictions on the compensation that can be awarded to employees with more limited bargaining power under the unfair dismissal provisions of the Industrial Relations Act do not apply when unfair contracts claims from highly paid executives are being considered. Furthermore, the compensation orders that are awarded in executive employee termination cases are being based on the higher remuneration paid to executive level employees, which was in part meant to compensate such employees for having less job security.

A number of cases have shown that the commission may find unfairness, notwithstanding lavish remuneration packages during employment and generous payouts on termination. The most notorious example is probably *Canizales v Microsoft Corporation,* in which a human resources director was awarded access to share options valued at $12 million to $14 million in a decision arising from his redundancy, even after evidence that between the ages of 21 and 31 the earnings of the applicant were more than $10 million. The expansion of the jurisdiction to enable highly paid executives to achieve large compensation payments has coincided with significant increases in the number of claims being made.

Almost twice as many unfair contracts applications were lodged in 2001 compared to 2000, that is, 956 claims in the year 2001 compared to 552 in the year 2000. This was after a 76 per cent increase from 1999 to 2000. One firm conclusion can be stated: the unfair contracts provisions are being regularly invoked by persons who are neither being exploited nor treated ungenerously. The consequences of this situation are negative and serious. Such unfair contract provisions as exist in other Australian jurisdictions are of much narrower application than are the New South Wales provisions, while overseas centres with which New South Wales is competing for business and investment have no comparable provisions.

By narrowing the application of the unfair contracts provisions of the Industrial Relations Act 1996, greater certainty will be introduced into their operation, and the more extravagant and speculative claims will be prevented. The Industrial Relations Amendment (Unfair Contracts) Bill 2002 will introduce the following limitations on the operation of the existing unfair contracts provisions. An employee earning an annual remuneration package in excess of $200,000 will not be able to make an application under the unfair contracts provisions. "Remuneration package" will be defined to mean the total value of the monetary remuneration and employment benefits that are payable or receivable under a contract of employment. Bonuses and other performance-related or incentive payments will be included in the meaning of monetary remuneration.

"Employment benefits" will mean all those benefits of a private nature that are provided to an employee at the cost of his or her employer. The bill spells out that this includes superannuation contributions and motor vehicles, but makes it clear that this is not an exhaustive list. The bill also empowers the making of regulations to prescribe any new types of employment benefits that might emerge. The $200,000 cap on applicants will be annually indexed by reference to the percentage increase from year to year of the cap on access to the unfair dismissal provisions. The unfair dismissal cap increases on an annual basis by reference to the increase in the Federal unfair dismissal cap. That increase is worked out on the basis of increases in weekly earnings, as published by the Australian Statistician.

The bill will also exclude partnership contracts from challenge under the unfair contracts provisions. People in partnerships are business people. They can be assumed to have sufficient skills, resources and capabilities to protect their own interests when negotiating their partnership contracts and in the ongoing management and

conduct of their business operations. Partnerships are created and exist against the legal framework of the Partnership Act 1892, the partnership deed or agreement, and the law of equity. This framework is adequately enforced by recourse to the Supreme Court or the District Court, when necessary.

It is to be noted that it is not the intention of the bill to exclude people in partnerships from being able to challenge other contracts to which the partnership is a party. For example, in the transport industry family members often form partnerships. The bill would prevent those partners from challenging their partnership agreement under the unfair contract provisions, but it would not prevent the partnership from challenging the fairness of a contract of carriage to which the partners were a party. There will be a new requirement that, in deciding on whether any orders are to be made for the payment of money in relation to those contracts that are still able to be the subject of an unfair contract claim, the commission must take into account whether or not the applicant has made any efforts to mitigate loss.

It is also intended that a time limit will be imposed on the making of applications under the unfair contracts provision. This time limit will operate only in respect of contracts that have terminated. Given the complexity often attached to cases of this nature, it has been decided that a period of 12 months is appropriate for unfair contract claims. No discretion will be provided to the Industrial Relations Commission to extend this period of time. The bill deals in a simple and direct way with the phenomenon of highly paid employees who would not be able to make an unfair dismissal claim using the unfair contract provision as an avenue to excessive enrichment when their relationship with their employer comes to an end. These highly paid employees will be excluded from this jurisdiction. Any contractual claims they have will still be able to be pursued in the common law courts. I commend the bill to the House.