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Employee class actions – new claims in the flexible employment economy

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AT A GLANCE

- Litigation funders looking for new sources of profit have found fertile ground in a number of recent employment law decisions. With a surge in employee class actions, insurers are not immune to the effects.
- Companies operating in the gig economy reliant on pools of "on-demand" workers, and those using independent contractors and casual workers, risk engagements being re-classified and workers attracting historic entitlements.
- With a number of recent decisions going the employees' way, EPL policies may not have been designed with some of the new forms of pleading in mind, and policies should be stress-tested to check the extent of coverage they provide.

The evolution of employee class actions

Historically, employee class actions were the monopoly of the union movement. But with the waning of union membership and influence, litigation funders have stepped in to fill the void, as union funds are mobilised for campaigning rather than large litigation.

There are two types of employee class actions. The first is the "true" class action brought under Part IVA of the *Federal Court Act 1976* (Cth). These actions require seven or more employees to make a claim against the same entity, arising out of the same, similar or related circumstances where there is a substantial common issue of fact or law.

The second is where a union acts as the single applicant, representing the interests of as many of its members as is needed. The action need not be brought under class action provisions and does not need to meet the criteria for approval as a class action. The *Fair Work Act 2009* (Cth) gives unions the power to bring a claim on behalf of their members. Penalties under the Act may be awarded to a union, and for as little as $12, a potential applicant can join a union for the sole purpose of gaining entry to the litigation.

So, there is still a role for unions, and a large incentive for them to continue to be involved, in the modern employee class action.

Some new types of claims

A few recent decisions have given rise to employee class actions in two major areas:

- the classification of independent contractors as employees, and
- the classification of casual workers as permanent employees.

Contractors v employees

The gig economy has been under fire in some recent decisions that have looked at whether "on-demand" workers are employees. The courts found one of Foodora's delivery drivers to be an employee. While Uber in Australia has so far been able to preserve the status of its drivers as contractors in first instance decisions, its UK counterpart has not. UK Uber drivers are now classified as employees, meaning they receive numerous entitlements from Uber UK.

Casual v permanent employees

In August 2018, *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 completely changed the way casual employment is defined. The Federal Court held that, despite a casual employee receiving a casual loading under an award or enterprise agreement, the employee could, in fact, be a permanent employee, entitled to years' worth of historical annual leave.

Industries affected

Litigation funders are live to the opportunities created by these recent decisions. Any industry with large numbers of casual workers or contractors is at high risk of a potential employee class action. Companies working in the gig economy, mining, labour-hire and hospitality are prime targets, as are telecommunications and direct sales or marketing businesses.

The potential for insurance cover

When a worker is re-classified from an independent contractor to an employee, or from a casual worker to a permanent employee, a host of employee entitlements become payable. Annual leave is the obvious major entitlement, but there are numerous other minor allowances and entitlements in the Fair Work Act and various industrial awards that may also be payable.

Employee entitlements may not be immediately obvious sources of claims covered by insurance policies. However, cover may arise:

- where there is a claim against a director or officer who is alleged to be an accessory to the primary wrongdoing company. This may occur where EPL only covers the employer-company. Cover may arise under another insuring clause for claims against directors that may not attract the exclusions drafted to apply only to EPL cover
- where it is not clear whether the worker is or will be found to be an employee or a contractor. EPL cover may be declined on the basis that the damages sought are an employee entitlement. But if the worker is found to be a contractor, then cover may be available, again, under an alternative insuring clause that may not attract exclusions drafted to apply only to EPL cover
- where definitions of employee entitlements or benefits, intended to exclude claims as an uncovered loss, are not as robust as they could be
- where there are sham contracting arrangements, misrepresentations or 'adverse action' claims 'tacked-on' to the underpayment claim, where the nature of the damages sought is not clear, and

- where civil penalties are available for each breach of the Fair Work Act, an industrial award, or for each respondent where there are several respondents joined as accessories. Statutory liability, either as stand-alone cover or as an extension, may provide cover for fines and penalties levelled against companies or directors.

Employee class actions may plead a number of different causes of action. There may be a claim against a primary employer-company and against directors as accessories to the primary breach. Potential accessories to a primary breach are not just the company's directors. An accounting firm was found to be an accessory and liable for its client-company's underpayment of staff. An HR manager was also found to be an accessory when devising a scheme that terminated employees and then placed them on independent contractor agreements.

It may be that partial cover is available for some, but not all, of the manifestations of claims that can arise in an employee class action.

Where to from here

With specialty employee class action law firms springing up and litigation funders prepared to partner with unions, we anticipate a growing market for employee class actions this year.

It's possible we may also see other types of actions that lend themselves to employee class actions, such as indirect discrimination claims. The US provides some good case studies. For example, IBM is alleged to have fired 20,000 American employees over the age of 40 in a six-year period. IBM says the change in its workforce was needed to meet a skills requirement. Indirect discrimination occurs when a condition imposed by an employer has the effect of making it impossible for a person with a certain characteristic (in IBM's case, being over the age of 40) to comply.

With a number of recent decisions going the employee's way, it's important to consider that EPL policies may not have been designed with some of the new forms of pleading in mind. Policies should be stress-tested to check the extent of the coverage they provide.

Need to know more?

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