Workplace Relocation

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Change in the workplace can often be difficult. When routines are upset or expectations suddenly change this can cause a degree of stress and anxiety for staff. As with most things in life, the bigger the change the greater the anxiety. So it is not surprising that when an employer proposes to unilaterally change the geographical location of the workplace employees are not always happy. This article explores some of the case law surrounding relocation of employment and sets out some of the rights and responsibilities of both employers and employees.

What does the contract say?

The first place to start is with the express written terms of any contract of employment. The Courts will not usually allow an employer to change an essential term of an employment contract where the change was never envisioned by the parties[1]. The Courts are even less inclined to allow the change where the contract expressly mentions the location where the employment is to be performed. For example, in *Han Jian Liu v NHP Electrical Engineering Products Pty Ltd*[2], the Court held that requiring the employee to move to another manufacturing location was as an unlawful request because it directly contradicted the original agreement which stated his work was to be performed at 'Richmond'.

Reasonableness of request

If the employment contract is silent on where the work is to be performed, then the Courts will look to see if the requested relocation is reasonable. The Courts impose an objective standard which asks *what is reasonable* as a question of fact. Factors which have influenced this position have included:

- Whether similar employment opportunities exist at the new place of work.
- The specificity of the terms of employment;
- The amount of notice given;

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[1] *Whittaker v Unisys* [2010] VSC 9; 26 VR 668
[2] AIRC - C2004/6073

- The ease of access to the new location;
- Efforts to accommodate the employee in transitioning;
- Size and nature of employer;
- The amount of additional travel time; and
- Disruption to the personal life of the employee and any other inconvenience suffered as a result of the relocation.

In *Han Jian Liu* it was held that relocating the agreed place of work was unreasonable notwithstanding the fact the company had paid to cover relocation costs and had offered to readjust the employee's working hours. This was because the employee had unique family responsibilities requiring him to tend to his elderly mother and to be available at certain times to collect his school-aged daughter. This made the burden of relocation far greater for him than other employees. The employer's submission that the reasonableness of relocation terms need only be satisfied as a whole was rejected by the Court. Rather, it was held that private and individual circumstances are relevant. The relocation was therefore irreconcilable with the employee's familial duties and contrary to the stated objects of the *Fair Work Act 2009* in assisting employees to balance work/family responsibilities.

Conversely, in *AS Webb v Australian Customs Service*[3] the employee's individual circumstances were not fatal to the company's claim that a proposed relocation was 'reasonable'. This was because relocation of employment was an ordinary requirement under the company's policy and the company had made reasonable attempts to accommodate the employee including offering paid flights to visit his children. On this basis it was held the company had given adequate thought to work/family balance and so the relocation request was justified.

What if the request to relocate is unreasonable?
As shown above, whether a request to relocate can be enforced depends significantly on the facts of the case. If the request to relocate involves a significant departure from the original employment contract then it would, in most cases, amount to a repudiation of the contract by the employer – that is, by asking the employee to move to a new work location the employer has evidenced that it no longer intends to be bound by the terms of the current employment contract. Where the repudiation of the employment contract is established an employee can claim damages for breach of contract. This will enable the employee to claim damages at common law to the extent of the unfulfilled employment contract, which may include loss of remuneration, loss of future earnings and other benefits.

Additionally, where the original position is being relocated, an employee can argue that their position has become redundant which opens the employer to obligations of redundancy pay under the National Employment Standards or any applicable Enterprise Bargaining Agreement.

Repudiation however may be 'cured' if the employee accepts the repudiatory conduct by relocating to the new workplace[4], which essentially replaces the existing the original contract[5]. An employee cannot in effect 'reserve' their rights in repudiation,

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[3] [PR948530] 28 June 2004
[4] *O'Connor v The Argus and Australasia Ltd* (1957) VR 374
[5] *Quinn v Jack Chai* (Australia) Ltd, [1992] 1 VR 557

meaning the employee must make a definite decision to either accept the move to the new location or to reject the move and seek damages.

Has there been a repudiation of the contract?

Implied duties

Where the contract is silent on the matter of relocation the employer may be able to rely on an implied term of 'obedience' in refuting alleged repudiation. For a request to relocate to come within a 'lawful and reasonable order' at common law, it must be within the scope of the employees job and it must be within the managerial authority of the person requesting it[6]. This considers:

- how the job was advertised;
- what the employer was told prior to being hired;
- any guidance provided from an applicable Modern Award or Collective Agreement;
- any existing 'custom and practice' as to relocation of workplace[7];
- whether the relocation was a result of technological advancements; and
- whether an express contractual term reserves the right to vary roles, even significantly.

In *Kweifio-Okai v RMIT University*[8], a contract of employment stated that the employment would primarily occur at 'Bundoora campuses with the possibility to work at others'. After a series of disputes which prevented the employee from working effectively with staff at Bundoora, the employer made an attempt to relocate him. It was held that the employer had the power to do so because the contract of employment described that possibility and it was within their managerial authority to maintain trust and confidence within their staff.

Relocation may also be contractually implied as a matter of fact. Where there exists a written contract which does not expressly reserve the right to do so, the proposed relocation must be said to be 'reasonable, necessary for the business efficacy of the contract, obvious and consistent with the express contract'[9]. In other words, the relocation is 'so obvious it goes without saying'[10] – such as a relocation where the employer's primary workplace has been destroyed or rendered unusable. A relocation provision will not be so 'obvious that it goes without saying' where it is not permitted by a Collective Agreement[11].

Company policy

Even if the employment contract does not expressly empower an employer to relocate an employee, a company policy can be considered as part of the contract by incorporation[12]. Whether a company policy is contractually enforceable in this way raises its own issues but, very simply, the test in the case of *Riverwood* looks at whether:

a. the company policy is contractually worded;
b. the employment contract makes an attempt to incorporate the policy by reference; and

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[6] *Commissioner for Government Transport v Royall* (1966) 116 CLR 314 at 322

[7] Sim v Rotherham Metropolitan Borough Council (1986) 2 WLR 851

[8] [1999] FCA

[9] *BP Refinery Western Port v Shire of Hastings* (1977) 180 CLR 266 (PC)

[10] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*

[11] *DL Employment Pty Ltd v AMWU* [2014] FWCFB 7946 (1 December 2014)

[12] Riverwood International Australia Pty Ltd v McCormick (2000) 177 ALR 193

c. the employee was provided with the policy before or at the time of the employment agreement.

If the above elements are established the employer can rely on a workplace policy to enforce the relocation of an employee. Even if not contractually enforceable, the mention of the possibility of relocation within a company policy may provide evidence of reasonableness.

Effect of enterprise agreements
In a recent decision involving the confectionary company Darrell Lea[13], the Court held that a contractual power to relocate employees is limited to the extent that an applicable Enterprise Agreement places conditions on the relocation of employees. In this case Darrell Lea's agreement stated that the employees could 'only be employed under the terms of the enterprise agreement'. Although the Enterprise Agreement was silent on the specific matter of relocation, it was found that surrounding provisions suggested that no other location could conceivably be utilized. Darrell Lea had attempted to overcome this obstacle to providing staff with new contracts that allowed Darrell Lea to change their work location. However the court held that the contract term dealing with relocation was "displaced and rendered inoperative" due to the Enterprise Agreement.

In conclusion
In deciding to relocate an employee to an alternate workplace, an employer needs to consider the following:

- whether the employer has the right to make the relocation request under the terms of an employment contract, a workplace policy and/ or an enterprise agreement;
- whether the request is reasonable in all the circumstances, including the personal circumstances of the employee;
- whether the employer has made all necessary reasonable accommodations to facilitate the employee's move to the new workplace; and
- whether any implied right to request the relocation exists.

For employees, they need to consider:

- whether the relocation will adversely affect them, not just in the workplace but also their work/ life balance;
- whether they were ever made aware that relocation may be a possibility under workplace policy, contract, Collective Agreement or custom and practice; and
- whether they wish to accept the change in location or seek compensation for breach of contract or a payment on account of redundancy – they cannot do both.

It is important to note that even if the employer does not have a right to direct an employee to relocate their workplace, in many cases the employee will not then have a right to remain where they are if the employer has decided to end employment at that workplace. Rather, the employee's rights will be limited to pursuing either damages for breach of contract or a payment in relation to redundancy. Where the employer does have a right to request an employee to relocate to another workplace

[13] *DL Employment v AMWU [2014]*

then the employee is limited to either resigning from employment or complying with the request.

About the Author

Joseph Kelly has had extensive experience in commercial litigation and workplace law, having advised employers and employees on all issues relating to industrial relations and employment law. Joseph has advised industry bodies, unions, employers and government and continues to run training and information seminars for legal practitioners. Joseph is currently the Principal of Kelly Workplace Lawyers. [Web: www.kwlawyers.com.au]