JONES DAY

MAY 2014

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

CONTENTS

MESSAGE FROM THE EDITOR

With the release of the 2014/1025 Federal Government Budget in mid-May, the government's attention turned away from non-financial matters and, most relevantly for us, industrial relations. Accordingly, there has been little to report in the way of impending changes in industrial and employment law, although the Attorney-General did foreshadow potential changes to certain aspects of the *Fair Work Act 2009* (Cth) that could arise out of an upcoming Australian Law Reform Commission Report.

There have, however, been some interesting decisions of the Courts over the past month. In particular, in this Edition we consider a recent Federal Court decision regarding the incorporation of company policies into employment contracts and make some suggestions on best practice in this regard. We also consider a decision regarding the right of employers to be legally represented in proceedings before the Fair Work Commission. Thankfully, the decision provides more scope for employers to be legally represented, particularly if the employer's HR representative lacks the skills to take carriage of the matter.

Finally, we report on the recent fall in the national unemployment rate to 5.8% and the Federal Government's proposed clarification of the changes to the rate of superannuation payable to employees, which will be increased to 9.5% as of 1 July 2014 but be capped at that rate till 2018, then ramping up to 12% by 2023.

Adam Salter, Partner

IN THE PIPELINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

LEGISLATIVE CHANGES TO RELIEVE THE BURDEN UPON EMPLOYERS

On 23 May 2014, Attorney-General George Brandis published the terms of reference for an inquiry to be undertaken by the Australian Law Reform Commission, identifying laws that limit rights and freedoms of the individual and proposing reforms to them where appropriate. One of the areas of focus is workplace relations laws, in particular laws reversing the onus of proof, such as those in the *Fair Work Act 2009* (Cth) obliging an employer to prove it did not take adverse action against an employee.

The Commission will invite submissions from business and take these into account in formulating its recommendations to Government. An interim report is due in December of this year, with the final report due to be published in December 2015.

PROGRESS ON *FAIR WORK AMENDMENT BILL 2014* (CTH)

The *Fair Work Amendment Bill 2014* (Cth) has been referred to the Senate's Education and Employment Committee which is due to publish its report on 5 June 2014. That report will be tabled in the Senate, the Bill amended according to its recommendations and returned to the House of Representatives for approval. If the amendments are accepted, the Bill is expected to become law before the end of the year.

As you might recall from our March Update, the Bill seeks to balance rights of employers against those of unions, amongst other things limiting the circumstances in which union officials may enter workplaces, empowering the Fair Work Commission to dismiss claims that have no prospect of success without hearing them and prohibiting the use of industrial action to force employers to bargain.

HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

TROUBLE ON THE HIGH SEAS: EMPLOYMENT POLICY NOT A TERM OF THE CONTRACT

Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCA 439 is the latest decision of the Federal Court of Australia on the incorporation of employment policies into contracts of employment. Farstad Shipping employed Lisa Romero as a sailor on vessels commanded by Captain Martin. As a result of incidents on those vessels, Ms Romero claimed that Martin had bullied her contrary to the *Sex Discrimination Act 1984* (Cth) and Farstad was vicariously liable for such actions. The claim failed as the captain's conduct was not attributable to Ms Romero's gender.

The sailor also complained that Farstad breached its contract of employment with her by failing to comply with its Workplace Harassment Policy in the course of its incident investigation by poorly documenting it and questioning her competence in an interview about the incident. Alternatively, the sailor claimed that those actions amounted to a breach of the implied term of "mutual trust and confidence" within that contract.

The issue of whether a breach of the policy constituted a breach of contract is answered through two inquiries: whether the policy was incorporated into the contract and, if it was, whether it was breached. The answer to the first question turned on an examination of the language of those aspects of the policy said to be contractual and analysing their context. The answer to the second question turned on the standard to which the investigation was to be held.

Marshall J held that the terms of the policy were not incorporated into the contract. Although the policy stated that Farstad "will" perform certain acts, that language was insufficiently specific to be contractual. Further, those remarks were placed in the context of aspirational statements. Finally, the policy was neither expressly nor impliedly incorporated into the contract. It did not matter to Marshall J that employees were required to sign the policy. There was no breach of these provisions in any event as Farstad was required to conduct its investigation merely in a "practical manner", not "like a judicial hearing". Similarly, Marshall J rejected the claim based on "mutual trust and confidence": the breaches did not strike at "something fundamental" to the employment relationship.

Lessons for Employers

There are three important points for employers to take away from this decision. Firstly, if the employer does not wish itself to be bound by procedures set out in workplace policies (for instance, workplace harassment policies), then

the employee's employment contracts should contain entire agreement clauses expressly excluding the policies from incorporation into the contract. Secondly, employers should draft procedural guidance for the conduct of incident interviews, confining the interview to the incident and excluding other matters. Here, discussion of the sailor's future career and pending approval of finance for further study caused problems. Thirdly, unless and until the High Court decides otherwise, the Federal Court will continue to accept the existence of an implied duty of "mutual trust and confidence" in employment contracts.

A NEW SCHOOL OF THOUGHT ON LEGAL REPRESENTATION AT THE FAIR WORK COMMISSION?

The decision of the Fair Work Commission in *Oratis v Melbourne School of Business* [2014] FWC 2838 indicates a change in attitude of the Commission to legal representation. Emily Oratis sued the Melbourne School of Business (**MSB**) for unfair dismissal in the Fair Work Commission. Self-representation is the normal course at the Commission unless there is an application for the appointment of a lawyer or agent that is granted at the discretion of the Commissioner: s 596 *Fair Work Act 2009* (Cth). MSB made such an application.

MSB advanced two arguments on the basis of s 596 for permission to appoint legal representation. Firstly, the complexity of the jurisdictional and evidentiary issues required the appointment of representation in order to efficiently resolve the matter. Secondly, self-representation would be unfair to the employer: the HR manager representing MSB was also a witness and there was no other suitable representative on staff.

Only one of those arguments succeeded: that the complexity of the evidentiary issues required the appointment of legal representatives. The jurisdictional argument failed as the issue was primarily factual. The second argument failed because the Commissioner held that there is no conflict in an individual acting as a witness and a representative. To hold otherwise would create an automatic right to representation, contrary to the statute.

Lessons for Employers

Employers should be aware that the decision does not entitle them to legal representation in the Fair Work Commission. However, it indicates that the Commission has somewhat relaxed its approach on this issue. Whether the employer is obliged to represent itself seems now to be a question of whether the HR manager tasked with appearing can efficiently address the matters raised. Raising issues that require specialist legal knowledge may therefore necessitate the Commission permitting the use of legal representatives. Importantly, in deciding whether MSB could represent itself, the Commissioner refused to take into account the skills of employees other than the HR manager.

BREAKING NEWS

SPRINGTIME FOR THE ECONOMY: GREEN SHOOTS IN AUTUMN UNEMPLOYMENT FIGURES

Unemployment figures announced for April show the national unemployment rate sitting at 5.8%, lower than the 5.9% expected to be announced by the Australian Bureau of Statistics. The figure was attributable to an increase in the number of individuals engaged in full time employment and a decrease in the participation rate. Employment figures have increased every month this calendar year, following a record drop in the unemployment rate from 6.1% to 5.8% in March 2014. Importantly, this means that economic activity on the east coast of Australia is increasing and mining is no longer the primary driver of employment growth in the Australian economy.

SUPERANNUATION GUARANTEE FREEZE TO EASE BUSINESS UNCERTAINTY

The Federal Government has announced that it will raise the superannuation guarantee from 9.25% to 9.5% on 1 July of this year and freeze it at that level until 30 June 2018. Despite this, the government still intends to increase the guarantee to 12% by 2023 through 0.5% increases each year from 1 July 2018.

The government hopes that this change will provide certainty for business as to the amount under the guarantee. Up until now there has been confusion over whether the current rate of 9.25% would be payable, as previously announced, or the legislated 9.5%. The move coincides with the proposed amendments to the age pension: the eligibility age will rise to 70 and it will be indexed against CPI instead of wages. These changes are in line with the stated intention of the Abbott government to encourage self-funded retirement.

Whilst other elements of the Federal Government's annual budget (one of the most austere budgets in the past 20 years) may not pass through both Houses of Parliament, it is expected that this measure will pass.

ACKNOWLEDGMENTS

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QUESTIONS

If you have any questions arising out of the contents of this *Update*, please do not hesitate to contact the author, Adam Salter, Partner.

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ALKHOBAR	CLEVELAND	HOUSTON	MEXICO CITY	PERTH	SILICON VALLEY
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ATLANTA	DALLAS	IRVINE	MILAN	RIYADH	SYDNEY
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