JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

This month, we briefly discuss the *Tax and Superannuation Laws Amendment (Employee Share Schemes) Bill 2015* which, if passed into law, will introduce tax concessions and further promote the use of employee share schemes in Australia. We also look at a recent decision of the New South Wales Court of Appeal extending and reinforcing the High Court's decision in *Commonwealth Bank v Barker* in relation to public servants' employment contracts. As winter approaches (and absenteeism increases), we also take a look at a recent Fair Work Commission decision which provides guidance on when it is reasonable to direct an employee to attend a medical assessment.

Adam Salter, Partner

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

On 25 March 2015, the Federal Government introduced legislation to reverse changes made by the former Labor government to the taxation of employee share schemes. The *Tax and Superannuation Laws Amendment (Employee Share Schemes) Bill 2015* will introduce tax concessions and promote the use of employee share schemes in Australia.

The new scheme (which will come into force on 1 July 2015) will allow options to be deferred and taxed on exercise (rather than grant) in a broader range of circumstances. The new scheme (if passed into law) will allow employees to access deferred tax treatment where there is no real risk of forfeiture of the option, provided that the employee share scheme rules: (i) restrict the employee from immediately disposing of their option; and (ii) expressly state that the scheme is subject to deferred taxation.

The scheme also imposes other restrictions and conditions on the deferred tax treatment of options which employers should be careful to meet when implementing their employee share plans in Australia. Finally, the scheme creates special tax concessions for small start-up companies mainly related to broadening the scope of capital gains tax discounts and exemptions.

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

NO IMPLIED TERM OF MUTUAL TRUST AND CONFIDENCE IN PROBATIONARY CONTRACTS

In *State of New South Wales v Shaw [2015] NSWCA* 97, the Court of Appeal overturned a decision of the District Court of New South Wales in which it implied a term of mutual trust and confidence in the probationary contracts of two Aboriginal teachers.

The decision came on the back of a succession of proceedings in which the respondents, Mr Shaw and Ms Salt (the "Respondents"), sought damages or compensation following the annulment of their probationary appointments. After bringing unsuccessful claims in the Industrial Relations Commission, before the Anti-Discrimination Board and in the Administrative Decisions Appeal Tribunal, the District Court handed down judgment in their favour.

The District Court found that the school principal, on behalf of the State of New South Wales (deemed to be their employer under the *Teaching Services Act 1980* (NSW)) (the "State"), had seriously breached the implied term by informally handing Ms Salt an envelope containing a "petition" signed by the teachers of the school complaining of intimidatory and unprofessional conduct by the Respondents, and other "critical and damaging" material. The primary judge found that the Respondents were humiliated by the incident but awarded no damages.

After the decision of the High Court in *Commonwealth Bank of Australia v Barker* held that as a matter of law, there is no implied duty of mutual trust and confidence in all employment contracts, the State of New South Wales appealed the District Court decision. The Respondents insisted that due to the probationary nature of their employment contracts, the State was required to "support and nurture" the Respondents who had been "invited" to develop their teaching skills, and therefore as a matter of necessity a term of mutual trust and confidence is implied in their contracts, as distinct from *Barker*.

The court considered that this would produce disconformities between the content of contracts for teachers with/without a probationary period, an anomalous result. Further, the statutory regime applying to members of the teaching service gives the State the power to annul appointment at any time, including for reasons divorced from teachers' performance (such as economic reasons), thereby denying the implication of a term of mutual trust and confidence.

Ultimately the court decided against the implication of the term as the probationary character did not provide a meaningful point of distinction from the conclusion reached in *Barker*. Emphasising that terms should be implied only with caution, especially concerning a broad-ranging class of contracts, the Court held that the respondents' contracts would not be "deprived of its substance, seriously undermined or drastically devalued" if a term of mutual trust and confidence was not implied.

The respondents did not raise a separate allegation of an implied duty of good faith, instead insisting it had been subsumed by the pleaded term of mutual trust and confidence. Regardless, the Court noted that if good faith had been pleaded as a stand-alone implied duty, the Court would have found that it was not implied. Had either term been implied, the Court held that the impugned conduct would not have been a breach regardless.

FAIR WORK COMMISSION RULES THAT COMPULSORY HEALTH ASSESSMENTS ARE UNREASONABLE

In *Transport Workers' Union v Cement Australia Pty Ltd [2015] FWC 158*, the Fair Work Commission ("FWC") ruled that it was unreasonable for Cement Australia Pty Ltd ("Cement Australia") to introduce a compulsory Physical Risk Review Program (the "Program"). Specifically, all employees in the Distribution Division were required to participate in a 45-minute compulsory assessment by an external health professional or face disciplinary action.

The Program was introduced to address the higher frequency of injuries reported by Distribution Division employees, especially those occasioned "outside the cabin". Although the report was not provided to Cement Australia, a summary produced by the health professional identified whether the employee was at risk of injury and included recommended voluntary well-being programs such as "Quit Smoking Program" or a "12 Week Body Transformation Program". This summary was kept on the employees' file.

The FWC considered whether there was a genuine indication of need for the Program and whether it was reasonably necessary. The Commissioner distinguished the case from earlier cases where a direction to see a health professional was found to be reasonable, holding that the general concern (lacking a specific factual basis) in relation to musculoskeletal injuries in this group of employees fell short of a genuine indication of need. Further, due to the voluntary nature of the recommendations, the Program lacked efficacy in achieving its stated aim.

As Distribution Division drivers already undertook legislative health screening, the Program did not provide any further medical information directed to the inherent requirements of the job. Questions concerning the process and privacy were raised, privacy being an important consideration in considering reasonableness. Cement Australia could not guarantee the privacy of the information, and could impliedly receive medical information, another point weighing against the reasonableness and lawfulness of the direction.

Points to Note for Employers

This decision confirms earlier decisions that an employer cannot direct an individual to undertake medical assessment unless it has a particular concern that the employee was unable to perform his/her job. Even if as an employer you are seeking to proactively reduce risk at work, without a genuine concern that the employee or group of employees cannot perform their duties, the direction will be unreasonable.

This case highlights the need for relevance of the assessment to the requirements of the worker's job, as distinct from a broader invasion into an employee's personal life.

Before instructing their employees to attend medical assessments, employers should think about whether or not the assessment is reasonable and necessary.

UNREASONABLE TO REQUIRE CONSIDERATION OF REDEPLOYMENT TO "ASSOCIATED ENTITIES" LACKING COMMON MANAGERIAL CONTROL

In recent FWC decisions, the unfair dismissal claims of four mineworkers employed by a Rio Tinto subsidiary have been dismissed by the Commission, confirming that workers who seek redeployment in an associated entity must establish evidence of overall managerial control and integration between the associated entity and their former employer.

The respondent, Kestrel Coal Pty Ltd ("Kestrel"), is a subsidiary of the Rio Tinto Coal Australia ("RTCA") Group, which in turn is a subsidiary of Rio Tinto Ltd. The workers' primary argument was that the dismissal was not a genuine redundancy because it would have been reasonable for Kestrel to consider redeployment in an associated entity such as one of the other coal mines operated by RTCA, or an associated entity of Rio Tinto Ltd outside of the RTCA Group. Kestrel objected, maintaining that it had considered all opportunities within RTCA before making the workers redundant.

By reference to the earlier decision in *Ulan No 2*, the Commission considered what degree of control was required to establish an entity as "associated". In *Ulan No 2*, the Full Bench of the FWC qualified that redeployment considerations extended to associated entities which are all subject to overall managerial control by one member of the group. The Commission accepted the respondent's submissions that the Rio Tinto subsidiaries had structured their companies as autonomous business units, and Kestrel had no power to influence the recruitment decisions of other entities. As a result, Kestrel lacked the managerial integration and overall managerial control with non-RTCA entities for it to be reasonable to require consideration of redeployment there.

The Commission accepted that Kestrel had considered all opportunities within its authority before making the workers redundant. In light of the timing and the short-term engagement of the project, the Commission also accepted that Kestrel had no authority to redeploy the workers into contractor roles.

Point to Note for Employers

When making a position redundant, it will be expected that an employer will consider redeployment of the employee in associated entities but only those with which they share common managerial control.

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QUESTIONS

If you have any questions arising out of the contents of this *Update*, please do not hesitate to contact Adam Salter, Partner. Adam can be contacted by email at asalter@jonesday.com or by phone on +612 8272 0514.

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ALKHOBAR	CLEVELAND	HOUSTON	MEXICO CITY	PERTH	SILICON VALLEY
AMSTERDAM	COLUMBUS	INDIA	MIAMI	PITTSBURGH	SINGAPORE
ATLANTA	DALLAS	IRVINE	MILAN	RIYADH	SYDNEY
BEIJING	DUBAI	JEDDAH	MOSCOW	SAN DIEGO	TAIPEI
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