JONES DAY

JULY 2015

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

ECONOMIC DEVELOPMENTS

WAGE RISES AT ALL-TIME LOW

According to a Department of Employment report, bargained wage rises in the private sector have dropped to a 23-year low. The agreements for the quarter provided an average of 3 percent increase, the lowest since the Department began the quarterly survey in 1992.

Similarly, the public sector is approving agreements averaging at a 3.7 percent increase. RBA Governor Glenn Stevens has been optimistic about recent slow wages growth, indicating that it might be saving jobs.

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

APPEAL COURT CLEARS UNCERTAINTY AROUND ANNUAL LEAVE PAYOUTS

In *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 100, the full Federal Court has concluded that on termination of employment, employers are obliged to pay out annual leave at the rate at which the employee is paid when he or she takes annual leave (including any applicable leave loading). The appeal turned on the proper construction of s 90(2) of the *Fair Work Act 2009* (Cth) which is concerned with rates of pay for accrued annual leave entitlements.

IN THIS ISSUE

The decision arose out of a dispute over the amount of annual leave benefits to be paid to 58 retrenched employees. Centennial Northern Mining Services Pty Ltd argued that the untaken leave of the employees was to be paid at the base rate for ordinary hours worked. The court rejected this submission, clarifying that under s 90(2), if there is a modern award or enterprise agreement which provides for payment at a higher rate for annual leave that is taken, then that is the rate which is payable on termination.

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

EMPLOYER FOUND BOUND BY DISCIPLINARY POLICY

In *Gramotnev v Queensland University of Technology* [2015] QCA 127 (10 July 2015), the Supreme Court of Appeal in Queensland has ruled that the terms of a Senior Staff Disciplinary Policy are incorporated by reference as binding terms of a contract of employment.

Factual Background. The employment contract of Mr Gramotnev, the applicant, stated, "Your employment conditions include the provisions of the MOPP and relevant University Statutes and Policies as current from time to time". Despite this, at first instance the primary judge rejected Mr Gramotnev's argument that the provisions of Queensland University of Technology's Enterprise Bargaining Agreement, Manual of Policies and Procedures or statutes and policies collectively constituted the terms of Mr Gramotnev's employment contract. The court heard an appeal of this decision.

Legal Background. A contract of employment will incorporate the terms of an enterprise bargaining agreement, manuals of policies and procedure or statutes and policies (collectively, "Policies") if a reasonable person in the position of the promisee would conclude that a promisor intended to be contractually bound by a particular statement or obligation contained within such extrinsic documents. The court must also be satisfied that the terms of the Policies are capable of operating as contractual promises and obligations and are able to be construed as operating that way by the promisee and promisor.

Decision. The court considered whether the terms of the Enterprise Bargaining Agreement, Promotion Policy, Code of Conduct and Grievance Resolution Policy, amongst others, could operate as terms of the contract. It was not persuaded to differ from the decision of the primary judge as to whether these Policies had contractual weight as a promise to the applicant, concluding that the subject matter of these Policies was not promissory in nature (rather, the statements in these Policies were aspirational).

However, the court allowed the appeal in relation to the Senior Staff Disciplinary Policy. This policy included detailed procedures to manage allegations of misconduct or serious misconduct against senior staff. The court held that there was nothing to suggest that the University would not be contractually bound by the terms of the policy to deal with an allegation of serious misconduct against the lecturer according to its procedures.

Lessons for Employers. Employers should be careful when making detailed statements and promises in their policies as courts can hold them contractually bound to such statements and promises.

WATCH OUT FOR EXPANDING WORKPLACE RIGHTS

In a recent Federal Circuit Court decision, construction giant Leighton has failed in an application seeking to have a former technical manager's adverse action claim dismissed. *Henry v Leighton Admin Services Pty Ltd & Anor* [2015] FCCA 1923 has left the door open for an expansion of an employee's rights under s 340 of the *Fair Work Act 2009* (Cth) (the "Act") by expanding the definition of a complaint made "in relation to an employee's employment".

Factual Background. The applicant, Mr Henry, was employed as part of Leighton's risk team. In the course of his employment, Mr Henry became aware of under-reporting of project costs and overstatements of project value. Mr Henry made a number of complaints about the discrepancies and Leighton terminated his employment shortly thereafter.

Legal Background. Under section 340 of the Act, employers cannot take action that is adverse to an employee because the employee has exercised a workplace right, or to prevent the employee from exercising that right. A workplace right includes an employee's right to complain in relation to his or her employment (s 341(1)(c)(ii) of the Act).

In *Harrison v In Control Pty Limited* [2013] FMCA 149, the Federal Circuit Court took a restrictive approach to sec-

tion 341(1)(c)(ii), finding that an employee does not have a workplace right to make a complaint at large (in this case, a complaint about the direction of the business), only in relation to complaints made about matters directly affecting the employee's employment relationship with the employer. *Dubow v Aboriginal and Torres Strait Islander Legal Service* provided an illustration of when a complaint relates to the employment relationship. In that case, the employee made a complaint about the manner in which she was disciplined, the basis for discipline and the penalty that was imposed, all of which were found to be complaints in respect of employment which fall within the scope of section 341(1)(c)(ii).

Decision. In *Henry v Leighton*, the court considered Mr Henry's argument that Leighton's termination of his employment was adverse action against him because he had made a complaint to Leighton "in relation to his employment". Leighton argued that the claim should be dismissed as the complaints did not constitute employment-related complaints, but instead related to its financial reporting.

The court considered the proper construction of "is able" and "in relation to his or her employment" in the Act. The court affirmed two earlier Federal Court decisions in which it was held that the requisite relationship between the complaint and the employee's employment may be direct or indirect. In *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456, the court adopted a broader approach than *Harrison*, finding that where the subject matter of the complaint raises an issue with potential implications for the complainant's employment, it is likely that the requisite nexus will be satisfied. In *Walsh*, the applicant managed an operation and made a complaint about the probity of a contract for services under this operation. The court held that if she had failed to report the suspected wrongdoing, it may have reflected badly on her in a way that could prejudice her employment, and therefore the complaint was "in relation to her employment".

As Mr Henry was obliged under his contract to adhere to Leighton's code of conduct and to report known or suspected breaches of the code, the company's rules or the law, the court found that if he had not made the impugned complaints, he could reasonably have been in breach of his contract. The complaints were about a subject that could have adversely affected him in his employment; therefore, they were made in relation to his employment, and Mr Henry had a reasonable prospect of successfully prosecuting this aspect of his claim.

Secondly, the court rejected Leighton's submission that to be "able to make a complaint", it is necessary for the employee to point to a provision in his or her contract, or in an industrial instrument or in a statute that conferred a right to make a complaint. The court went further to say that sections 340 and 341 of the Act are intended to protect not only a person's making of a complaint or inquiry in relation to his or her employment, but also to protect a person's capacity to make a complaint about the person's rights and matters which may prejudice the person in his or her employment.

Lessons for Employers. This broader interpretation of s 341(1)(c)(ii) will need to be affirmed by the Federal Court, but regardless this case should put employers on guard. This decision has the potential to expand the Act's adverse action jurisdiction to cases where a complaint is only indirectly related to the employee's employment, provided that it has the potential to prejudice his or her employment.

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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JONES DAY GLOBAL LOCATIONS

ALKHOBAR	CLEVELAND	HONG KONG	MADRID	PARIS	SHANGHAI
AMSTERDAM	COLUMBUS	HOUSTON	MEXICO CITY	PERTH	SILICON VALLEY
ATLANTA	DALLAS	INDIA	MIAMI	PITTSBURGH	SINGAPORE
BEIJING	DETROIT	IRVINE	MILAN	RIYADH	SYDNEY
BOSTON	DUBAI	JEDDAH	MOSCOW	SAN DIEGO	TAIPEI
BRUSSELS	DÜSSELDORF	LONDON	MUNICH	SAN FRANCISCO	TOKYO
CHICAGO	FRANKFURT	LOS ANGELES	NEW YORK	SÃO PAULO	WASHINGTON