JONES DAY

NOVEMBER 2015

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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

FAIR WORK COMMISSION REPORTS INCREASE IN GENERAL PROTECTIONS DISPUTES

The Fair Work Commission Annual Report for 2014–15 ("Annual Report") notes a 17.5 percent increase in general protections disputes involving dismissal compared with 2013–14.

Under section 365 of the *Fair Work Act 2009* (Cth) ("Act"), if a person believes that he or she has been dismissed in contravention of the general protection provisions, he/she can apply to the Fair Work Commission ("FWC") to deal with the dispute by way of a conference. If the dispute is not resolved during the conference, the FWC must issue a post-conference certificate under section 368 of the Act. The post-conference certificate enables the dispute to proceed to the Federal Court or Federal Circuit Court.

The Annual Report states that in 2014–15, the FWC received 3,382 general protections applications involving dismissal, compared with only 2,879 in 2013–14. This is consistent with longer-term trends, with 2,429 and 2,162 applications being received by the FWC in 2012–13 and 2011–12 respectively. Of the 3,475 applications which were finalised in 2014–2015, a post-conference certificate was issued in 1,073 cases.

IN THIS ISSUE

General protections applications not involving dismissal increased by 12.5 percent in 2014–2015. This is also consistent with longer-term trends, with 598 applications made in 2011–12 compared with 879 in 2014–15.

The Annual Report also details the FWC's plans to introduce procedures to streamline the processing of general protections cases. This follows the success of a pilot scheme introduced in several states to improve the FWC's efficiency in dealing with general protections claims. Previously, FWC members had been conducting conferences to assist the parties to resolve general protections disputes. However, the pilot scheme involved training staff conciliators to conduct telephone conferences instead. In his foreword to the Annual Report, the president of the FWC, Iain Ross, stated that the pilot program has given members more time "to concentrate on more complex determinative matters and to list such matters more quickly".

The FWC will adopt these procedures for all general protections applications involving dismissal in 2015–16. This should improve the FWC's ability to deal with the steadily increasing numbers of general protection claims which have been observed in the past five years.

ABS DATA REVEALS DECLINE IN TRADE UNION MEMBERSHIP

On 27 October 2015, the Australian Bureau of Statistics released the results of its 2014 Characteristics of Employment Survey ("Survey"), revealing a significant decline in trade union membership to 1.7 million Australians. The Survey found that in August 2014, only 15 percent of people (1.6 million) were trade union members in their main job, compared with 17 percent in August 2013 and 40 percent in August 1992.

Additionally, the Survey revealed that 8.4 million employed persons (84 percent) had never been a trade union member, while 1.5 million who were not currently trade unions members had previously been members. Tasmania had the highest level of union membership (24 percent) while Western Australia had the lowest proportion (13 percent).

The Survey revealed that the level of union density in the public sector was 39 percent (down from 41.7 percent in 2013) compared with 10 percent in the private sector (down from 12 percent in 2013). Further, the data showed that union membership was strongest in the Education and Training division (34 percent), followed by the Public Administration and Safety and the Electricity, Gas, Water and Waste Services divisions (both 31 percent). The industries with the lowest proportion of trade union membership were the Agriculture, Forestry and Fishing and Accommodation and Food Services divisions (both 2 percent).

Since the release of the Survey, the Australian Council of Trade Unions has questioned the accuracy of the data, claiming that its 46 affiliated unions reported membership of 1.8 million in October 2015.

HOUSE OF REPRESENTATIVES PASSES AMENDMENTS TO THE GREENFIELDS AGREEMENT PROVISIONS IN THE *FAIR WORK ACT 2009* (CTH)

On 11 November 2015, the Fair Work Amendment Bill 2014 ("Bill") passed its final hurdle as the House of Representatives approved the Senate's amendments to the greenfields provisions in the *Fair Work Act 2009* (Cth). The Bill is intended to ensure that enterprise agreements are negotiated efficiently. The amendments give employers greater power to resolve deadlocks and make unilateral deals.

Greenfields agreements, which are often difficult to negotiate, are enterprise agreements made between an employer and one or more unions, in circumstances where the employer is establishing a new enterprise. The amendments allow employers to submit their proposed greenfields agreements to the FWC for approval if a deal has not been reached with the union or unions after a six-month "negotiating period". This is intended to provide employers with a mechanism though which to resolve deadlocks and avoid unnecessary delays to project start dates. The FWC's approval nonetheless remains subject to a number of restrictions, including the "better off overall test" and good faith bargaining requirements.

The original Bill allowed employers to seek approval of their proposed greenfields agreements after a three-month negotiating period. However, following opposition from cross-benchers, the amendments agreed in the Senate extended the period to six months. The new greenfields provisions are subject to a two-year review period.

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

VICTORIAN EDUCATION DEPARTMENT FOUND TO HAVE UNLAWFULLY DEDUCTED $20 MILLION FOR LAPTOP USE

In *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196 (6 November 2015), the Federal Court found that the Department of Education and Early Childhood Development ("DEECD") had breached the *Fair Work Act 2009* (Cth) ("Act") in deducting more than $20 million from the salaries of more than 40,000 teachers and principals for laptops used primarily for work.

Factual Background. Between 1 July 2009 and 29 November 2013, the DEECD made fortnightly deductions of between $4 and $17 from the salaries of teachers and principals who participated in a scheme whereby the DEECD provided the employees with a laptop. More than 40,000 employees participated in the scheme, and more than $20 million was deducted from the salaries of participating employees.

Legal Background. Section 323(1) of the Act requires an employer to pay its employee amounts payable for the performance of work in full and in money, except where the deduction is permitted under section 324(1). Section 324(1) allows an employer to make deductions in specified circumstances, including where the deduction is authorised by the employee in accordance with an enterprise agreement or the deduction is authorised under state law. Section 325(1) prevents an employer from requiring an employee to spend amounts payable to the employee in any way that is "unreasonable in the circumstances". Additionally, section 326(1) invalidates any term of an enterprise agreement or employment contract that enables an employer to make a deduction which is for the benefit of the employer and is "unreasonable in the circumstances".

The Australian Education Union ("AEU") challenged the legality of the deductions and sought orders that the amounts deducted be repaid to the participating employees. The parties had agreed that the part of the claim relating to a sample group of 11 teachers, as well as a set of common questions, would be determined at an initial trial, while all other issues raised would be deferred to a later trial.

Decision. Firstly, Bromberg J held that the deductions were not permitted under section 324(1) of the Act. His Honour rejected the DEECD's contention that the deductions were authorised by the teachers in accordance with their enterprise agreement which provided for "salary packaging arrangements". His Honour held that the subject of a salary packaging arrangement is remuneration earned and its fundamental feature is the substitution of one form of remuneration for another. On that basis, his Honour concluded that the because the laptops were not provided to the teachers as remuneration, it was not a "salary packaging arrangement" and therefore not authorised in accordance with the enterprise agreement. Furthermore, his Honour rejected the contention that the deductions were authorised under a state law, being a Ministerial Order made on 19 December 2012 determining that section 324(1) did not apply retrospectively to a scheme which commenced operation in July 2009.

Second, Bromberg J determined that even if the deductions were authorised under section 324(1), they were inoperative under section 326(1) on the basis that they were "unreasonable in the circumstances". His Honour considered the deductions to be unreasonable because there was a lack of genuine choice regarding participation in the scheme, the rate of contribution to the cost was excessive, the deductions were not primarily for the benefit of the employees and the value of the benefit did not provide any counter justification.

Although deciding that the deductions were unlawful, Justice Bromberg's decision on orders to be made in relation to the 11 teachers as well as the disposition of the claims not yet decided will be determined in a further trial for which a directions hearing was listed for late November 2015.

Lesson for Employers. This case serves as a reminder that when making deductions from an employee's remuneration, employers must carefully consider not only whether such deductions are authorised under the Act, but also whether the deductions are reasonable in the circumstances and whether they impermissibly benefit the employer. Deductions are unlikely to be deemed reasonable if they are mandatory, excessive or detrimental to the employee. In the case of employees who are not covered by an enterprise agreement or award, the deduction must be authorised in writing by the employee and be principally for the employee's benefit.

- **ADVERSE ACTION CLAIM DISMISSED AFTER EMPLOYER FOUND TO HAVE NO KNOWLEDGE OF EMPLOYEE'S DEPRESSION**

In *Kubat v Northern Health* [2015] FCCA 3050 (17 November 2015), the Federal Court dismissed an employee's claim that disciplinary action taken against her and her eventual dismissal amounted to unlawful adverse action taken due to her mental illness.

Factual Background. The employee worked as a hospital-based Turkish interpreter. Throughout 2011–2012, Northern Health gave the employee various warnings and engaged in disciplinary meetings with the employee regarding her repeated lateness and absences from work. The employee told her managers that she had personal issues and "was not well in herself" but did not disclose her depression diagnosis.

In late 2012, Northern Health received medical evidence that the employee was suffering from depression and could return to work for only one half day per week and only if Northern Health could guarantee that she would not encounter undue stress or tension. Northern Health refused to allow the employee to return to work and eventually dismissed the employee in May 2014 on the basis that it could not accommodate those conditions.

Legal Background. Firstly, the employee claimed that prior to her dismissal, Northern Health had taken unreasonable disciplinary action in the form of disciplinary meetings and warnings. The employee argued that the action was unlawful adverse action because it was taken against her because of her mental disability, which is a prohibited reason under section 351 of the *Fair Work Act 2009* (Cth) ("Act").

Second, the employee argued that her dismissal constituted unlawful adverse action taken because of her mental disability. However, as a defence, the employer relied on section 351(2)(b) of the Act, which states that the prohibition in section 351 does not apply to action "taken because of the inherent requirements of the particular position".

Decision. In relation to the employee's first claim, Judge Riley found that the disciplinary action in question could not have been based on her depression, because at the time the disciplinary action was taken, the employer was not aware that the employee was suffering from depression. The behaviour which the employee argued was sufficient to communicate her depression was found by Judge Riley to not necessarily be a clear indicator of depression. Her lateness and absences were found also to be consistent with a lack of commitment to work, and crying at disciplinary meetings was also considered to be a normal response in the context which did not unequivocally indicate that the employee was suffering from depression.

In relation to the second claim, Judge Riley accepted the employer's evidence that the employee was dismissed because it was impossible for Northern Health to create a work environment which guaranteed that the employee would not encounter conflicts or tension. Those elements were found to be inherent and unpredictable in the employee's role as a hospital interpreter for patients, and reasonable adjustments could not be made to eliminate those potential stressors. Since medical evidence showed that the employee could not work under those conditions, she was found to be unable to fulfil the inherent requirements of her role.

Lessons for Employers. Employers should be mindful that dismissing an employee or taking unreasonable disciplinary action on the basis of physical or mental disability amounts to unlawful adverse action. If such factors are present, employers should dismiss the employee only if the employee is unable to fulfil the inherent requirements of his or her role and reasonable adjustments to allow the employee to fulfil the inherent requirements of his/her role cannot be made.

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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ATLANTA	DALLAS	INDIA	MIAMI	PITTSBURGH	SINGAPORE
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