JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

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MESSAGE FROM THE EDITOR

In this month's *Update*, we examine a number of important developments likely to affect employers, including significant changes to the approach of the Fair Work Commission to enforcement of the accessorial liability provisions in the *Fair Work Act 2009* (Cth) ("FWA") and two decisions involving alleged adverse action under the FWA. In each of the two decisions, the court provided much-needed clarification on what amounts to a workplace right, in what circumstances an employer will be found to have engaged in adverse action and the compensation and pecuniary penalty orders likely to be made in respect of such contraventions. Finally, we look at what factors will be taken into account by the Commission when considering an application to terminate an enterprise agreement that has reached its nominal expiry date (in circumstances where the parties have been unable to negotiate a new agreement).

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

LOW CPI MAY CONTRIBUTE TO LOW WAGES GROWTH IN AUSTRALIA

On 27 July 2016, the Australian Bureau of Statistics ("ABS") released the Consumer Price Index ("CPI") for the June quarter, which rose by just 0.4 percent, following a fall of 0.2 percent in the March quarter. The CPI rose just 1.0 percent through the year to the June quarter 2016, the weakest annual rise in 17 years.

The biggest price rises for the June quarter were in medical and hospital services, petrol and tobacco, which were in part offset by price falls in domestic travel and accommodation, cars and telecommunication equipment and services.

Given that many employers and employees use the CPI as a gauge on wage increases, such a low figure may result in even lower wage growth in the second half of the year. Yearly growth in Australia's Wage Price Index ("WPI") to March 2016 was just 2.1 percent, the lowest level since 1998. The next WPI is due to be released on 17 August 2016.

In our May *Update*, we reported on the Fair Work Commission Expert Panel's ("Panel") decision to increase the national minimum wage by 2.4 percent and its plans to hold a preliminary hearing into whether a medium-term target for the national minimum wage should be adopted by the Panel (as part of the 2016–17 review). The date for the preliminary hearing has been set down for 24 October 2016, and final consultations for the Annual Wage Review 2016–17 are to be held on 17 and 18 May 2017. These low inflation figures, as well as figures for future quarters, are likely to feature heavily in support of an argument against any significant increase to the minimum wage from 1 July 2017.

EXTENSION OF ACCESSORIAL LIABILITY TO HR ADVISER

The Fair Work Ombudsman ("Ombudsman"), the national workplace watchdog, has warned that accessorial liability for breaches of the FWA also applies to those involved in the decision-making process around strategy for and compliance with the FWA, including human resources managers and advisers.

Under s 550 of the FWA, a person is considered to have been involved in the contravention of the FWA, if the person has: (i) aided, abetted, counselled or procured the contravention; (ii) induced the contravention, whether by threats or promises or otherwise; (iii) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or (iv) conspired with others to effect the contravention.

In addition, the Ombudsman has indicated it will increasingly pursue accessories to breaches of the Act in circumstances where employers are no longer solvent and unable to pay underpaid workers. Not only are penalties likely to be sought against accessories but also orders for personal liability to repay underpaid workers.

As we reported in our June *Update*, the Coalition proposed increasing penalties associated with employers deliberately and systematically underpaying employees, from $10,800 to $108,000 for individuals and from $54,000 to $540,000 for corporations.

In light of the Ombudsman's recent comments regarding accessorial liability and the Coalition Government being likely to legislate to increase associated penalties under the Act, it is fair to say that HR managers and advisers are now on notice. They, along with employers, must ensure vigilance in compliance with workplace laws now more than ever.

ACTU VOWS TO BLOCK GOVERNMENT'S PROPOSED INDUSTRIAL RELATIONS REFORMS IN THE SENATE

In a recent media release, the Australian Council of Trade Unions ("ACTU") has responded to the results of the recent Federal election (which saw the Government retain power and Michaelia Cash returned as Employment Minister) by promising to frustrate any Government attempts to pursue industrial relations reform in the Senate. In particular, the ACTU said it would seek to block any bills to re-establish the Australian Building and Construction Commission and set up a Registered Organisations Commission.

ACTU President Ged Kearney stated that despite their re-election, the Coalition Government had no mandate for any "major and adverse" industrial relations ("IR") changes because of the failure of the Liberal Party to present its IR policies to voters as part of its election campaign. Mr Kearney said that the ACTU would attempt to work with the newly appointed Senate crossbenchers "to ensure they understand these bills are dangerous and deeply unfair to working Australians".

However, the Government is unlikely to be deterred by such warnings, with its focus likely to remain on negotiating with key Senate crossbenchers to ensure its substantial reform agenda can be achieved.

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

FEDERAL CIRCUIT COURT CONFIRMS NO "WORKPLACE RIGHT" IN RESPECT OF COMPASSIONATE LEAVE WHERE EMPLOYEE FAILS TO PROVIDE SUPPORTING EVIDENCE

The Federal Circuit Court considered an application in respect of adverse action allegedly taken against an employee who made a request for compassionate leave. In dismissing the application, the court confirmed there is no unqualified right to compassionate leave where the request is not accompanied by supporting documentation, in circumstances where the employer has requested it.

Factual Background. Ms Morris was a senior sales manager employed by the respondent, Allied Express Transport. In May 2015, she took compassionate leave after the death of her grandfather. Six weeks later, she requested a further day's leave to attend the memorial service, providing a copy of the death notice as supporting evidence. On the morning of the service, a meeting was held between Ms Morris and senior staff in which she was given a final warning letter (after several prior warnings had been given relating to her poor work performance and attitude). Ms Morris was also told she would need to provide further supporting evidence (specifically, evidence of the service). A heated argument followed, and Ms Morris did not return to work. Ms Morris filed an application in the Federal Circuit Court seeking compensation on the basis that her employment was terminated after she proposed to exercise a workplace right (taking compassionate leave) and that this constituted "adverse action" in contravention of the FWA.

Legal Background. Section 340(1) of the FWA states that "[a] person must not take adverse action against another person (a) because the other person (i) has a workplace right; or (ii) has, or has not, exercised a workplace right…". Section 341 of the FWA defines "workplace right" broadly to include an entitlement to a benefit under a workplace law. Pursuant to section 342(1) of the FWA, an employer takes adverse action against an employee if the employer (amongst other things) "dismisses the employee". The definition of "dismissed" in section 386 of the FWA covers situations where: (i) the person's employment has been terminated on the employer's initiative; or (ii) the person has resigned but was forced to do so because of conduct engaged in by his or her employer ("constructive dismissal").

Section 104 of the FWA entitles employees to two days of compassionate leave for each "permissible occasion", defined under section 105(1) as leave taken: (i) to spend time with an immediate family or household member who has a serious, life-threatening illness or personal injury; or (ii) after the death of an immediate family or household member. Under section 107, there are requirements employees must comply with before taking compassionate leave. First, they must give their employer notice of the leave (and the expected period) as soon as practicable and, if required, provide supporting evidence that would "satisfy a reasonable person that … the leave is taken for a permissible occasion".

Decision. The court held that because Ms Morris had not provided evidence as required by her employer under section 107(3), she did not have a relevant "workplace right" at the time she sought to take leave. As a result, her adverse action claim failed. Further, Ms Morris had not been "dismissed" as there was no evidence she had been forced to resign by virtue of her employer's conduct. The court also dismissed Ms Morris's contention that she was constructively dismissed by her employer's repudiation, noting that the employer's issuing of the warning letter and request for Ms Morris to return to work after the service showed a willingness to continue the contract of employment. Further, even if she had a workplace right at the relevant time, Ms Morris had been permitted to attend the memorial service. Therefore, there was neither a "workplace right" nor any "adverse action" for the purposes of sections 340 and 342, and the application was dismissed.

Lessons for Employers. This decision provides guidance as to how requests for compassionate leave should be handled and what forms of supporting evidence can be requested in order to establish that the leave is being taken on a permissible occasion. The decision also confirms that employees who seek to argue they have been "dismissed" under section 396 of the FWA (by means of constructive dismissal or repudiation of their employment contract) will not succeed without evidence that the employer engaged in conduct that effectively forced the employee to resign.

TERMINATION OF ENTERPRISE AGREEMENT COVERING MAINTENANCE WORKERS AT THE GRIFFIN COAL MINING COMPANY UPHELD BY FULL BENCH

The Full Bench of the Fair Work Commission has upheld a decision to terminate an enterprise agreement that applied to maintenance employees engaged in the Griffin Coal mining operations in Western Australia.

Factual Background. The applicant, Griffin Coal Mining Company Pty Ltd ("Griffin Coal"), was acquired under administration in 2011 and from that date continued to suffer significant trading losses. As part of a broader commercial restructure, Griffin Coal sought to negotiate a reduction in the wages of maintenance workers as part of a new enterprise agreement. Negotiations commenced in March 2015 but were largely unsuccessful, and the existing *Griffin Coal (Maintenance) Collective Agreement 2012* ("Agreement") nominally expired on 26 April 2016. By that stage, a total of 24 bargaining meetings and 15 conferences had taken place between Griffin Coal and the Australian Manufacturing Workers' Union ("AMWU"). Thereafter, Griffin Coal lodged an application to have the Agreement terminated. In a last-ditch effort by Griffin Coal and the AMWU, a proposed agreement was put to employees but was overwhelmingly rejected. Commissioner Cloghan subsequently made the order to terminate the Agreement.

The AMWU appealed the decision, relying on numerous grounds, including that the Commissioner had erred in: (i) failing to properly apply the "public interest" test in section 226(a) of the FWA; (ii) failing to take into account relevant considerations in accordance with section 226(b); (iii) giving insufficient weight to the views of employees and employee organisations as required by section 226(b); and (iv) taking into account evidence that was not before the Commission (in a way that constituted a breach of natural justice).

Legal Background. Section 225 of the FWA provides that once an enterprise agreement reaches its nominal expiry date, one or more employers, or an employee or employee organisation covered by an enterprise agreement, may apply to the Commission for termination of the agreement. Under section 226 of the FWA, the Commission must terminate the agreement if satisfied that: (i) it is not contrary to the public interest to terminate the agreement; and (ii) it is appropriate to do so, taking into account all the circumstances including: (a) the views of the employees, each employer and each employee organisation (if any) covered by the agreement; and (b) the circumstances of those employees, employers and organisations.

Decision. In affirming the decision, the Full Bench held that the Commissioner had considered all relevant factors and undertaken a comprehensive consideration of the views and circumstances of all parties as required by section 226 of the FWA. In relation to section 226(a), the Commissioner was entitled to interpret the "public interest" as incorporating the objects of the FWA, which include: to facilitate good faith bargaining, provide flexibility for businesses and promote productivity and economic growth. In this case, the Commissioner balanced the public interest benefit in expansion of the Griffin Coal operations against the likely detriment for employees due to the reduction in wages on termination of the Agreement (once employment reverted to the applicable Award). In relation to section 226(b), the Full Bench confirmed that the Commissioner did not err in his consideration of all the circumstances of the case. In particular, it was proper to have regard to:

- Whether the rights and benefits under the relevant Award (*Black Coal Mining Industry Award 2010*) differed from those under the Agreement;
- The overall effect of termination on employees, their families and community life;
- The financial position of Griffin Coal and its need to improve efficiency and productivity;
- The fact that employees had rejected an opportunity to consider a replacement agreement; and
- The fact that termination would not extinguish the role of the AMWU with respect to the employees covered by the Agreement.

In emphasising the relevance of the loss-making position of the company and the public interest in it remaining sustainable, the Commissioner noted that "…inflexible and unprofitable business[es] do not remain in existence as some sort of societal right". For this reason, he observed that enterprise agreements might need to accommodate changing economic circumstances. In this case, there was evidence that Griffin Coal was taking steps to improve productivity and that the Agreement (and the conduct of employees in the negotiation process) had impaired progress in this regard. The Full Court found that it was open to the Commissioner to make these findings.

Finally, the Full Bench affirmed that there was no denial of natural justice as a result of the Commissioner taking into account the vote that took place in May 2016 after the hearing (but before the decision was handed down). On the facts, the AMWU knew that the Commission had been notified about the vote but made no request to be heard in relation to the issue. Further, the vote was a relevant consideration as it countered the AMWU's claim that the employees were not given an opportunity to consider a replacement agreement. Thus, as the AMWU had failed to identify any appealable error in the Commissioner's exercise of his discretion, the Full Bench dismissed the appeal.

Lessons for Employers. This decision provides guidance as to how applications pursuant to section 226 of the FWA will be dealt with by the Commission. Specifically, it makes clear that the Commissioner's discretion to take into account "all the circumstances" of the case in determining whether it is appropriate to terminate an enterprise agreement will not be narrowly construed. As seen in this case, a consideration of the commercial objectives and financial position of the employer company may be relevant to whether an agreement covering its workers should be terminated. This decision also reflects the general reluctance of the Full Bench to overturn a decision of the Commission where there has been no obvious error in the exercise of their discretion and where it is apparent that all relevant factors were examined in a fair and equitable manner.

FEDERAL CIRCUIT COURT IMPOSES PECUNIARY PENALTY OF $52,000 AGAINST EMPLOYER AFTER IT DENIED EMPLOYEE'S REQUEST FOR FLEXIBLE HOURS ON RETURN FROM PARENTAL LEAVE

Factual Background. The applicant, Ms Heraud, was employed as an operations director with the respondent employer. She commenced parental leave in September 2013. Shortly thereafter, the employer began a significant restructure of its organisation. As a result, a number of redundancies took place, and in June 2014 Ms Heraud was made redundant. Prior to her redundancy, Ms Heraud made a request for flexible working arrangements on her return. The employee filling in for Ms Heraud continued to act in the position and was later transferred to a different role (with overlapping duties). Ms Heraud made a claim for compensation under section 545(2)(b) of the FWA and for pecuniary penalties under section 546 arising from contraventions of the general protections provisions in Part 3-1 of the FWA. These contraventions were established by an earlier decision of the Federal Circuit Court ("liability proceeding").

In the liability proceeding, three contraventions of the FWA were identified:

Firstly, the employer, in deciding not to restore the applicant to her pre-parental leave position on her return, had injured the applicant in her employment because she had exercised a workplace right (to take parental leave), in contravention of section 340(1).

Secondly, the employer also contravened section 340 by not making a position available to the applicant (and altering her position to her prejudice) after she had exercised a workplace right (in requesting flexible working arrangements).

Thirdly, the employer contravened section 340 when it decided to terminate Ms Heraud's employment because she had exercised a workplace right (again in requesting flexible work arrangements). The question for the Federal Circuit Court in this proceeding was the amount of compensation and/or pecuniary penalties payable in respect of the contraventions.

Legal Background. Section 83 of the FWA provides that, where an employee is on unpaid parental leave and his or her employer makes a decision that will have a significant effect on the status, pay or location of an employee's pre-parental leave position, the employer must take all reasonable steps to consult with the employee about the decision and its effect on the employee's pre-parental leave position. Section 84 of the FWA states that, on ending unpaid parental leave, an employee is entitled to return to: (i) his or her pre-parental leave position; or (ii) if that position no longer exists, an available position for which the employee is qualified and suited and nearest in status and pay to the pre-parental leave position.

Section 545 of the FWA provides that the Federal Court or Federal Circuit Court may make certain orders if satisfied a person has contravened, or proposes to contravene, a civil remedy provision. Common civil remedy provisions relate to equal remuneration (Part 2-7), general protections (Part 3-1) and unfair dismissal (Part 3-2). The orders available include: (i) an order granting an injunction or interim injunction; (ii) an order for compensation and (iii) an order for reinstatement.

In addition, under section 546 of the FWA, the federal court, federal circuit court or eligible state or territory court may, on application, make an order for a pecuniary penalty (payable to the Commonwealth or a particular person or organisation). Section 546(5) provides that pecuniary penalty orders can be made in addition to any other orders made under section 545.

Decision. The court held that, in calculating an appropriate measure of compensation under section 545 of the FWA, the relevant common law principles require assessment of what is reasonable in all the circumstances, with the aim of placing the employee in the position he or she would have been had the contraventions not occurred. In relation to the first and third contraventions, the court held that the applicant was entitled to damages equivalent to the wages she would have earned from the date of the dismissal to the end of the contract (subject to any mitigation).

In relation to the second contravention, the court assessed the compensation based on the loss of opportunity that resulted from the adverse action. The court found that, but for the contraventions, the applicant would have been employed in a newly created position of project manager for a period of 12 months on her return to full-time work. On the facts, management had created an expectation that the applicant would be redeployed in the role. The economic loss was therefore based on the value of the applicant's potential earnings stream with a 10 per cent discount for contingencies and vicissitudes. This amount would be reduced by the mitigated loss (the applicant's actual earnings since termination) and any redundancy payments received. In relation to non-economic loss, the applicant was entitled to an award of $20,000 for the loss of enjoyment, loss of reputation and distress experienced as a result of her employer's contraventions of the FWA. The court did not make any orders for payment of compensation, but the matter was listed for a later directions hearing on the issue.

The court then considered whether to make a pecuniary penalty order under section 546 of the FWA. It outlined the relevant principles to be taken into account, including:

- The nature and extent of the conduct;
- The nature and extent of any loss or damage sustained;
- Whether there was evidence of similar previous conduct;
- The size and financial circumstances of the respondent;
- Whether the breaches were deliberate;
- Whether the responsible party showed contrition and/or took corrective action;
- The need for compliance with minimum standards relating to employee entitlements; and
- The need for specific and general deterrence.

The court concluded that the conduct deprived the applicant of fundamental entitlements, including the right to return to work after maternity leave and to request flexible working arrangements. Although the conduct occurred in the context of a structural reorganisation, it was deliberate, and the respondent had not demonstrated any contrition. The most crucial factor identified was the need for employers to comply with the FWA by consulting with employees about the return to work guarantee and any matters that might have an impact on their pre-parental leave position. Taking into account the totality of the respondent's conduct, the court found that an appropriate penalty for the total contravening conduct was $52,000 to be paid to the applicant.

Lessons for Employers. This case illustrates the broad powers of courts to make substantial orders for compensation and/or pecuniary penalties against employers who take adverse action in contravention of the FWA. Importantly, it demonstrates the willingness of courts to make pecuniary penalty orders over and above substantial orders for compensation in respect of the same conduct. The substantial pecuniary penalty (and likely order for compensation) in this case makes clear that courts will vigorously defend what they regard as fundamental rights of employees to take parental leave and seek flexible working arrangements. Therefore, it is critical that employers act to ensure they comply with these minimum entitlements, especially in circumstances where the employer company is undergoing restructuring and/or managing redundancies.

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QUESTIONS

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