JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

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ECONOMIC DEVELOPMENTS

LABOUR MARKET MODERNISATION: RBA DATA REVEALS STRONG GROWTH IN PART-TIME EMPLOYMENT

In November 2016, the Reserve Bank of Australia ("RBA") published its latest quarterly Statement on Monetary Policy ("RBA Statement"). The RBA Statement highlights that although the national unemployment rate has steadily declined over the course of 2016, other market indicators suggest there has been a modernisation in the labour market, particularly in the case of part-time employment.

The RBA Statement notes that growth in part-time employment has been the sole factor contributing to the decline in the unemployment rate since the beginning of 2016, with full-time employment rates having decreased over the same period. In addition, part-time employment now accounts for over a third of all forms of employment, compared with just 10 percent in the mid 1960s. According to the RBA Statement, the increase in part-time employment can be attributed to both demand- and supply-side factors. Demand-side factors include greater flexibility in working arrangements, while on the supply side there has been a growing reluctance to hire full-time employees, with a preference for part-time employees in order to improve workplace flexibility and respond to market fluctuations.

The RBA Statement notes that growth in part-time employment has been most prevalent in the household services sector (which includes accommodation and foods, arts and recreation, and education and health assistance), with part-time employment

representing 45 percent of total employment in that sector. The RBA Statement suggests that employment growth in the household services sector reflects a "rebalancing" of the economy away from mining-related investment. In addition, across the States and Territories, differences in labour market trends are consistent with the rebalancing of the economy away from mining sectors into non-mining sectors. For example, we have seen employment growth in NSW and Victoria, while employment growth in resource-rich States such as Western Australia and Queensland has continued to decline.

Notwithstanding the nationwide increase in employment growth, the RBA Statement warns that the underemployment rate, which measures the percentage of employed people who are not being fully utilised, remains high and has continued to increase in 2016. The increase in underemployment has been driven by males, which the RBA Statement suggests is a reflection of the decline in full-time opportunities available in industries such as mining, manufacturing and utilities, which tend to hire males. The RBA Statement cautions that the high underemployment rate indicates that the recent increase in part-time employment is a reflection of declining demand for full-time labour, rather than a growing preference toward part-time employment.

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

FEDERAL GOVERNMENT INTRODUCES REVISED BILL TO ADDRESS "DOUBLE DIPPING" IN RESPECT OF GOVERNMENT AND EMPLOYER-PAID PARENTAL LEAVE SCHEMES

The Federal Government has introduced revised legislation designed to limit access to government-funded paid parental leave in circumstances where employees already have access to generous employer schemes. The Government first sought to introduce the changes in June 2015, but the bill failed to receive widespread parliamentary support and lapsed in April 2016. Community responses received as part of a Senate Committee inquiry suggested that many groups, including unions and some employer organisations, were largely unsupportive of the proposed changes, with many happy with the operation of the current scheme and concerned about the possible effect on workplace participation of women.

Since its re-election, the Coalition has sought to reintroduce the changes by way of the *Fairer Paid Parental Leave Bill 2016* (Cth) ("Bill"). According to the Government, the Bill takes into account community concerns and is intended to target those employees who have no employer-provided paid primary carer leave, or whose employer-provided paid primary carer leave is for a period of less than 18 weeks (or at a rate below the full-time national minimum wage). In circumstances where a person is entitled to less than 18 weeks of employer-provided leave, the person's paid leave will be topped up for the remaining weeks with government-funded leave (up to a total of 18 weeks). Likewise, in circumstances where a person receives employer-provided leave at a rate lower than the national minimum wage, the paid leave will be topped up with government-funded leave to bring it up to the national minimum wage, for a period of up to 18 weeks.

In addition, the paid parental leave work test will be modified so that pregnant employees who are required to cease work because of the hazardous nature of their job (where there is no safe alternative job available) will satisfy the work test and be entitled to access government-funded paid parental leave. Also, the permissible break in respect of the work test will be extended so that employees will be allowed a gap of up to 12 weeks between two working days and still meet the paid parental leave work test. The Government predicts that the amendments will deliver savings of almost $1.18 billion.

The Bill is currently before the House of Representatives, with commentators suggesting that it is unlikely the Bill will pass both houses by the time Parliament rises for the year, owing to the strong backlash against the Bill from the Australian Labor Party and the Greens.

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

HIGH COURT CONFIRMS NO RIGHT TO WORKERS COMPENSATION FOR PSYCHOLOGICAL INJURIES SUFFERED AS A RESULT OF FAILURE TO OBTAIN A PROMOTION

In a recent decision, the High Court of Australia clarified the test for causation for the exclusion of an employer's liability for diseases suffered as a result of reasonable administrative action. The Court confirmed that the employer's insurer in this case, Comcare, is not liable to pay compensation

for psychological injuries suffered by a Commonwealth employee arising out of the employee's failure to obtain a promotion, including injuries suffered in reaction to the perceived consequence of that failure.

Factual Background. The respondent, Ms Martin, was employed by the Australian Broadcasting Corporation ("ABC") as producer of a local morning radio program. She did not have a good working relationship with her immediate supervisor, Mr Mellett, and had made a formal complaint against him, alleging bullying and harassment. ABC management found her allegations to be unsubstantiated.

After a number of unsuccessful applications for other positions, Ms Martin was temporarily appointed to the higher position of cross media reporter, under a different supervisor, Ms Raabus. She applied for permanent appointment to this position when it was advertised but was unsuccessful. The selection panel included Mr Mellett. Ms Raabus informed Ms Martin that she had not been appointed by telephone. When the conversation turned to Ms Martin returning to her former role, Ms Martin "broke down uncontrollably" and immediately went home. She sought medical treatment and was diagnosed with an "adjustment disorder" which rendered her incapable of working.

Comcare refused Ms Martin's claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("Act"). Ms Martin appealed the merits of the decision to the Administrative Appeals Tribunal ("AAT").

Legal Background. Comcare is liable under s 14(1) of the Act to pay compensation in respect of an injury suffered by a Commonwealth employee if the injury results in incapacity for work. Section 5A(1) of the Act defines "injury" to include a disease but provides an exclusion where that disease is suffered "as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment". Under s 5A(2), "reasonable administrative action" includes "anything reasonable done in connection with the employee's failure to obtain a promotion". Section 5B(1) provides that a "disease" can be either an ailment, or the aggravation of such an ailment, suffered by the employee that was "contributed to, to a significant degree" by the employment.

Decisions Below. The AAT found that Ms Martin had an existing adjustment disorder which significantly deteriorated when she was notified that her application for the cross media reporter position was unsuccessful. Ms Martin argued that the deterioration of her condition was in fact caused by her realisation that she would be returning to the supervision of Mr Mellett, and any contribution caused by failing to obtain the promotion was immaterial. The AAT accepted this proposition but found that, in Ms Martin's mind, returning to her former position was a direct consequence of the decision. Accordingly, the AAT found that the worsening of her condition was "a result of" the administrative action. However, the AAT also found that, given Mr Mellett's participation in the selection panel, the decision-making process was not reasonable, so the exclusion under s 5A(1) did not apply.

Comcare appealed the decision of the AAT to the Federal Court. Griffiths J upheld Comcare's appeal, finding that the decision-making process was undertaken in a reasonable manner. His Honour also dismissed Ms Martin's notice of contention challenging the AAT's conclusion that her condition deteriorated as a result of the decision not to appoint her as cross media reporter.

Ms Martin appealed to the Full Court of the Federal Court, challenging Griffith J's decision to allow Comcare's appeal and his Honour's dismissal of her notice of contention. The Court unanimously rejected Ms Martin's challenge to allowing Comcare's appeal. However, the majority upheld her challenge to the dismissal of the notice of contention, finding that there was an "intervening administrative action" between the decision not to promote her and her return to the position of producer of the morning program.

High Court Decision. Comcare appealed to the High Court, arguing that the Full Court relied on an erroneous view of the causal connection required to satisfy the exclusion in s 5A.

The High Court found that any consideration of whether or not Ms Martin's return to her previous position was in fact an inevitable consequence of the decision not to appoint her to the higher position distracts from the AAT's critical finding on the issue of causation. The critical finding was that Ms Martin's perception that her return to working under the supervision of Mr Mellett was a direct and foreseeable outcome of the decision. As the Full Court had no basis for questioning that finding, the only issue for determination was whether the AAT's finding that the deterioration in Ms Martin's mental health

was a disease suffered "as a result of" the failure to obtain a promotion was correct in law.

The Court held that the Full Court's "common sense" approach to determining causation under s 5A(1) failed to adequately interrogate the text, context and purpose of the legislation. The phrase "as a result of" in s 5A(1) should be read, in the statutory context, as referring to the test of causation incorporated in the definition of "disease" under s 5B(1). Applying this test, for an employee to have suffered a disease under s 5A(1), she must have suffered an ailment, or aggravation of such an ailment, that was "contributed to, to a significant degree by the employee's employment". The exclusion of liability for a disease suffered "as a result of" reasonable administrative action under s 5A(1) should be read as referring to the contribution made to the disease by such action.

The administrative action must have been a cause of the disease, not necessarily the sole cause. What is necessary to invoke the exclusion in s 5A(1) is that, without the administrative action, the employee would not have suffered the disease as defined under s 5B(1). This causal connection is satisfied where the disease is suffered in reaction to the perceived consequence of an administrative action, regardless of whether that consequence is real or imagined.

Accordingly, the Court found that the reasoning of the AAT was correct in law. The High Court remitted the matter to the AAT to determine the matter according to law.

Lessons for Employers. The decision confirms that employees are not entitled to workers compensation for psychological injuries suffered as a result of reasonable administrative action, such as refusing an application for a promotion, where that action is taken in a reasonable manner. This is the case even where the disease is suffered in reaction to the perceived or actual consequence of the action, rather than the action itself.

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QUESTIONS

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JONES DAY GLOBAL LOCATIONS

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