JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

In this edition of the *Update*, we report on the decision of the Fair Work Commission ("Commission") to increase award wages and the national minimum wage by 3.3 percent. We then comment upon a recent unfair dismissal decision in which the Commission concluded that formal performance management processes were not necessary in order to dismiss a poorly performing employee.

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

AWARD WAGES AND NATIONAL MINIMUM WAGE RAISED BY 3.3 PERCENT

On 6 June 2017, the Commission issued its annual wage review ruling, choosing to increase both award wages and the national minimum wage by 3.3 percent. For a minimum wage worker, that equates to an increase of 59 cents an hour, to $18.29 per hour. The ruling was made in the face of submissions from the Australian Council of Trade Unions ("ACTU"), Australia's peak union body, that the increase should be as high as 6.7 percent, and submissions from business groups supporting an increase of 1.2–1.5 percent. Nevertheless, the increase is relatively high, given that inflation sat at 1.3–1.4 percent at the close of last year.

In making the ruling, Commission President Iain Ross said that the Commission had in the past taken an "overly cautious" view when increasing the minimum wage. For example, the equivalent increase last year was 2.4 percent. That signals that there

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may be more to come for employers when the Commission comes to reviewing other award wages in the near future.

The ruling comes almost four months after the Commission issued its controversial decision in February 2017 to reduce penalty rates for hospitality, retail and fast-food workers working on Sundays and public holidays. That ruling was hotly contested, with ACTU President Ged Kearney calling it "an attack on the wages of the lowest-paid people in our economy". Rather than pursuing a similar path, the Commission has chosen in this recent ruling to avoid controversy and chart a middle course.

Employers of affected workers should make arrangements to comply with the ruling. More generally, employers should be aware that the difference of approach in recent Commission rulings shows that it is difficult to predict what view it will take in respect of future industrial relations policy and rulings.

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

- ***ETIENNE V FMG PERSONNEL SERVICES PTY LTD*** **[2017] FWC 1637**

Factual Background

Mr Etienne was employed as an inventory controller by FMG Personnel Services Pty Ltd ("FMG") in June 2015. It became clear to FMG soon after that Mr Etienne lacked the necessary knowledge, skills and capabilities to perform his role adequately and that his attitude to both his colleagues and customers was unsatisfactory. From September 2015 to May 2016, FMG staff spent a significant amount of time providing informal training, coaching and support to Mr Etienne to assist him in relation to all aspects of his work. Informal performance management was thought to be the most effective method of improving Mr Etienne's performance.

In or around May 2016, FMG determined that Mr Etienne's performance had not improved sufficiently and consequently placed him on a written performance improvement plan ("PIP"). FMG representatives met with Mr Etienne twice in the following months to discuss how the PIP process worked, what their performance expectations were, FMG's ongoing concerns about Mr Etienne's capabilities to properly perform his duties and the efforts taken by the company to improve his work performance. Mr Etienne's performance and behaviour did not improve, and FMG subsequently terminated his employment.

Mr Etienne made an application pursuant to the *Fair Work Act 2009* (Cth) ("Act") for a remedy in respect of his dismissal. He claimed that he had been unfairly dismissed and sought an order of the Commission that he be reinstated and compensated the lost remuneration between the date of his dismissal and his reinstatement.

Legal Background

An employee has been unfairly dismissed if the Commission is satisfied that a dismissal was harsh, unjust or unreasonable in the circumstances. The Act states that the Commission must take into account eight criteria in considering whether a dismissal was harsh, unjust or unreasonable, including whether there was a valid reason for the dismissal relating to the employee's capacity or conduct, whether the employee was notified of that reason and whether the employee was given an opportunity respond to any reason related to his or her capacity of conduct.

Decision

Was there a valid reason for Mr Etienne's dismissal? The Commission was satisfied that FMG had sought over a period of nearly a year to communicate to Mr Etienne its ongoing concerns about his capabilities to perform his duties properly, what their performance expectations were, how FMG had endeavoured to assist Mr Etienne to achieve those expectations, the reasons why his employment were at risk and, subsequently, the reasons why it proposed to terminate his employment. FMG turned to a formally documented PIP when they believed that the informal management process had been exhausted. There were reasonable grounds for FMG determining that further informal or formal performance management would be unlikely to be successful. The Commission was satisfied that FMG had genuine and reasonable concerns about Mr Etienne's capabilities to properly perform his duties and to perceive and address any deficiencies in his work performance. There were valid reasons for Mr Etienne's dismissal.

Had Mr Etienne been notified of the reasons for his dismissal and been given an opportunity to respond? The Commission concluded that Mr Etienne had "consciously and continually" refused to acknowledge any deficiencies in his work performance and that those deficiencies had

been raised with him at the PIP and termination meeting. He had been notified of the reasons for his dismissal at those meetings and was in a position to respond to those reasons.

In relation to the informal performance improvement processes undertaken by FMG, the Commission said that "performance management need not occur in a formal documented manner in order for an employer to rely on it as the basis for the termination of an employee's employment on the grounds of poor performance". In coming to this conclusion, the Commission had regard to the informal performance management of Mr Etienne over a period of nearly a year.

The Commission held that the dismissal was not in all the circumstances harsh, unjust or unreasonable. Accordingly, Mr Etienne's dismissal was found not to have been unfair.

Lessons for Employers

This decision of the Commission demonstrates that employers are not necessarily required to undertake formal and documented performance improvement processes before dismissing poorly performing employees. However, if employers do not undertake formal and documented processes, they should at least carry out sustained, informal performance management such as those undertaken by FMG in this case. That said, our advice to clients remains that they should endeavour to adopt a more formal process of performance management, followed up by formal written warnings in order to minimise the risk of the Commission finding that an informal process was not sufficiently sustained.

Employers should keep in mind that documented performance management processes will be more useful than informal processes from an evidentiary perspective if an employee disputes the fairness of their dismissal.

We thank Associate Katharine Booth and Law Clerk Bowen Fox for their assistance in the preparation of this Update.

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QUESTIONS

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ATLANTA	DALLAS	IRVINE	MINNEAPOLIS	SAN DIEGO	TOKYO
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