

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT



Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this edition of the *Update*, we report on increased activism by the Fair Work Ombudsman in relation to underpayment of wages. We discuss a decision where penalties have been imposed for underpayment and a cash-back scheme. We also consider a proposal by unions and the Labor Party to criminalise the conduct of employers who systematically and deliberately underpay employees. Finally, we report on the recent update to modern awards to include five days' domestic violence leave.

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

■ FAIR WORK OMBUDSMAN'S INCREASED ACTIVISM

Fair Work Ombudsman v Robit Nominees Pty Ltd & Anor [2018] FCCA 183

Factual Background. In January 2018, the operator of Bar Coluzzi in Darlinghurst, Robit Nominees, as well as the director and secretary of the operator, Mr Vertes, were fined \$87,345 and \$9,720 respectively for various contraventions of the *Fair Work Act 2009* ("FW Act"). Robit Nominees contravened the FW Act by failing to pay Ms Coianiz, a full-time cook, penalty rates, overtime rates and annual leave entitlements. In addition, Robit Nominees required Ms Coianiz to pay back \$218 of her weekly wages in cash, which over the contravening period totalled \$13,952.

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Legal Background. Under Section 45 of the FW Act, a civil remedy can be imposed on any person who contravenes a term of a modern award. Furthermore, section 325 of the FW Act prohibits an employer from requiring the employee to spend any part of an amount payable to that employee if the requirement is unreasonable.

Section 550 of the FW Act then imposes accessorial liability onto any other person who is found to have been involved in the contraventions.

Decision. The respondents admitted the contraventions of the FW Act, and the parties reached agreement on the penalties the court should impose. The court noted that the assessment of penalties is always at the discretion of the court, but ultimately agreed to impose the penalty sought by the parties.

In assessing the penalty, the court acknowledged that Ms Coianiz was a vulnerable employee, as she relied on her employment with Bar Coluzzi to remain in Australia. The court also noted the significant length of time over which the contraventions occurred and the fact that Mr Vertes was an experienced business person and an admitted legal practitioner. In addition, the court took into account the fact that Robit Nominees admitted liability as well as the requirement in this instance to send a strong message to the restaurant industry about the consequences of underpayment.

Lessons for Employers. This decision confirms that the Fair Work Ombudsman remains active in pursuing employers who fail to pay their employees correctly. Directors and other executive staff should also be on notice that the Fair Work Ombudsman will also seek to impose penalties onto individuals where the individual has contributed to the contravention.

■ GROWING MOVEMENT TO CRIMINALISE UNDERPAYMENT

We have recently seen a number of high-profile cases brought in relation to underpayment of wages, including the case discussed above. In 2017, this resulted in the passing of the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, which increases penalties for employers that underpay employees and imposes liability onto franchisors and lead companies whose franchisees and subsidiaries have contravened the FW Act. Since July 2017, there has been a further push by unions for underpayment of wages to be criminalised, with advocates for the change arguing that the current

system does not provide enough incentive for employers to comply with the law.

In July 2017, Unions NSW sought support from the NSW Labor Party to criminalise deliberate and systematic wage fraud by employers. The Transport Workers' Union national secretary also sought a motion to criminalise such behaviour in Victoria.

The NSW Labor leader, Luke Foley, announced his party's new five-point plan to combat wage underpayment in July 2017. The first of his five points involves a new law which criminalises the deliberate failure to pay wages and other entitlements. In February 2018, the South Australian Labor Party announced that it would also support the creation of a new offence of wage theft through changes to the *Criminal Law Consolidation Act*. More recently, the Victorian Trades Hall Council and its Young Workers Centre have continued discussions with the Victorian Labor Party in an attempt to obtain an election commitment by the party in relation to the issue.

Although no changes have been passed as yet, employers should be aware that criminal consequences, including jail sentences for unscrupulous employers, may be the Federal Government's next move in attempting to stamp out wage underpayment across all industries.

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

■ UPDATE ON DOMESTIC VIOLENCE LEAVE IN AUSTRALIA *Four-Yearly Review of Modern Awards—Family and Domestic Violence* [2018] FWCFB 1691

Factual Background. In September 2014, the Australian Council of Trade Unions ("ACTU") sought to include a domestic violence clause in all modern awards.

In July 2017, Deputy President Gooley and Commissioner Spencer rejected the ACTU's claim for 10 days' paid domestic violence leave to be added to all modern awards. However, in rejecting the claim, Deputy President Gooley and Commissioner Spencer formed the view that an entitlement to unpaid domestic violence leave should be inserted into modern awards. This issue was addressed in a four-yearly review of modern awards—*Family and Domestic Violence* [2018] FWCFB 1691.

Legal Background. Under the FW Act, the Commission must conduct a four-yearly review of modern awards as soon as practicable after 1 January 2014. These reviews are conducted by the Commission's own motion and do not arise on application by any party. The purpose of such a review is to review the modern award as a whole to ensure that the modern awards objective is being met and that the award, along with the National Employment Standards ("NES"), provide a fair and relevant minimum safety net of terms and conditions.

Decision. In conducting its review, the Commission considered existing entitlements to be insufficient for employees facing family and domestic violence and confirmed the view of Deputy President Gooley and Commissioner Spencer that all employees should have access to unpaid family and domestic violence leave.

In relation to the quantum of the entitlement, the Commission noted that it would take a cautious approach given the entitlement was new and there was uncertainty about the extent to which it would be utilised. The ACTU submitted that the leave should be uncapped per occasion, or in the alternative submitted that it should be a maximum of 20 days annually. The Commission rejected both options and decided that the entitlement would be five days' unpaid leave. The Commission decided that it was to be made available in full at the commencement of each 12-month period rather than accruing progressively and was not to accumulate from year to year.

A separate hearing is to be held on 1 May 2018 to determine whether the model clause will apply to the Australian Government Industry Award, the Road Transport and Distribution Award 2010 and the Road Transport (Long Distance Operations) Award 2010.

Lesson for Employers. Employers should be aware that all award employees may soon be entitled to five days' domestic violence leave in addition to their current terms and conditions. The exact terms of the clause will be decided in the coming weeks, and interested parties will be given the opportunity to comment on the model term. The Commission will revisit the operation of the domestic violence clause in its review in June 2021.

We thank law clerk Jacqueline Smith for her assistance in the preparation of this Update.

LAWYER CONTACT

Adam Salter

Partner

Sydney

+61.2.8272.0514

asalter@jonesday.com

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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