Monthly Update— Australian Labour & Employment

Message from the Editor

by Adam Salter, Sydney Office

In this edition of the *Update*, we report on the calculation of sick leave in accordance with the National Employment Standards ("NES"). We then consider the recent *Unilever* decision concerning the interpretation of redundancy provisions in an Enterprise Bargaining Agreement ("EBA"). Finally, we discuss the decision of *Workpac v Skene* and comment on the meaning of "casual" employment.

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In the Pipeline—Highlighting Changes of Interest to Employers in Australia

Sick Leave Can Be Calculated Based on Average Shift Length

In October 2017, Mondelez Australia Pty Ltd ("Mondelez"), a chocolate manufacturing facility in Tasmania, sought approval of an EBA. Clause 24 of the EBA provided for 80 hours per year of personal/carer's leave rather than the 10 days per annum required by the NES.

The Fair Work Commission ("FWC") was concerned that the entitlement to 80 hours would preclude shift workers who worked a 12-hour shift from 10 days' personal/carer's leave.

Mondelez refused to provide any undertaking to change the entitlement and provided submissions as to why it believed its EBA did comply with the minimum entitlement. In April 2018, the FWC refused a request by the Workplace Minister to refer the case to a five-member full bench. However, a further hearing is now scheduled for 6 September 2018 to determine whether the matter will be referred to the Full Court.

The sick leave entitlements for shift workers across Australia are also being scrutinized in a dispute between the Australian Workers' Union ("AWU") and pharmaceutical company AstraZeneca in relation the way in which AstraZeneca employees accrue personal leave. AstraZeneca submitted that the quantum of accruable leave, whether expressed in days or hours, is not affected by the number of days over which an employee works his ordinary hours.

The AWU contended that calculating leave based on employees working 7.6 hours per day resulted in some employees receiving an inferior entitlement to the minimum 10 days under the NES. AstraZeneca, on the other hand, argued that the minimum sick leave entitlement needed to reflect the total number of hours for which the employee was being paid. In August 2018, the FWC handed down its decision concluding that a worker's typical shift length could be used to calculate the yearly entitlement to sick leave. The FWC ruled against employers providing an average of 76 hours of paid sick leave per year, based on employees working 7.6 hours per day, regardless of their typical shift length.
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Hot off the Bench—Decisions of Interest from the Australian Courts

Unilever Australia Trading Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) [2018] FWCFB 4463

Factual Background. This decision was an appeal in relation to the *Unilever Australia Trading Limited Tatura Site-Enterprise Agreement 2015* ("Agreement"), concerning an interpretation of the redundancy provisions contained within that Agreement.

In particular, the Agreement contained clause 2.6 of Attachment 4 stating that "each employee to be made redundant shall receive four weeks payment at normal rates provided that the employee has at least 12 months' continuous service". The Agreement also contained clause 2.7 of Attachment 4 of the Agreement which provided that redundancy payments are to be paid at four weeks' pay per year of service and pro-rata for incomplete years of service with a cap of 104 weeks in redundancy payments. Clause 1 of Attachment 4 stated, "This Redundancy Agreement does not apply to casual or seasonal employees".

The issue for the Commission on appeal was whether the reference to "service" under clause 2.7 included service as a casual or seasonal employee. The AMWU submitted that the effect of clause 1 was that those who happened to be engaged as casual or seasonal workers at the time of redundancy are not entitled to the benefits of the redundancy agreement. The AMWU construed the exclusion in clause 1 to relate only to the entitlement to payment itself, not to the calculation of service under the Agreement.

Decision. At first instance, the Deputy President agreed with the AMWU's construction and found that the exclusion in clause 1 of Attachment 4 meant that the employee had to be a permanent employee at the time of the redundancy. However, the Full Bench of the Commission found that this interpretation was incorrect.

The Full Bench found that periods of service as a casual or seasonal employee could not be counted as periods of service for the purposes of redundancy. The Full Bench concluded that clause 1 meant that the entire redundancy agreement did not apply to casuals and considered that the reference to years of service and incomplete years of service is an indication that the provision does not contemplate service rendered through casual engagements. The Full Bench also noted that casual employees are not ordinarily entitled to redundancy benefits.

Lessons for Employers. Although this decision is confined to its facts, employers should note that in some circumstances, casual service and seasonal work will not be counted toward calculation of redundancy pay. However, whether or not casual service will be counted will ultimately depend on the terms of the applicable industrial instrument.
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WorkPac Pty Ltd v Skene [2018] FCAFC 131

Factual Background. WorkPac operated a labour hire business which employed Mr Skene as a dump-truck operator. Mr Skene was provided with a "Notice of Offer of Casual Employment" and executed a document titled "Casual or Fixed Term Employee Terms & Conditions of Employment". He was firstly employed at Anglo Coal. Subsequently, he was placed at Rio Tinto's Clermont mine, where his hours were 12.5 hours per shift, seven days on, seven days off. He was provided with a 12-month roster in advance and worked in accordance with his roster. This case concerned whether or not Mr Skene was a casual employee.

Legal Background. The Full Court in *Hamzy v Tricon International Restaurants t/a KFC* (2001) 115 FCR 78 considered that the predominant and essential indicator of casual employment is the "absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work". The key indicators of an "absence of firm advance commitment" are irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work of the employee in question.

In *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034, Rangiah J observed that a strong indication that the employees were engaged as casual employees was that their "days and hours of work were not fixed and were dependent upon [the employer's] labour requirements". The payment of the employer and acceptance by the employee of casual loading may demonstrate an intention by the parties to create a casual relationship, but it is not determinative. An objective assessment must be made of the relationship which considers whether the intent has been put in place.

Decision. The Federal Court concluded that Mr Skene was not a casual worker and was entitled to payment of annual leave entitlements upon the termination of his employment. The Court found that the fact that Mr Skene had been paid as a casual employee at a casual rate did not prevent him from also receiving employee entitlements on termination.

Lessons for Employers. This decision is a significant warning to employers about hiring employees on a casual basis in circumstances where the employment relationship is not actually casual. Employers should

regularly check that the characterisation of the employment relationship accurately reflects the predictability and continuity of the hours worked. Employers should note that even if they pay employees a casual loading, employees may still be able to bring a claim for annual leave payments upon termination if it is found that the employee was incorrectly classified as a casual.
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