

# Workplace View

October 2020

## An Expensive Dismissal – AU\$1,105,000 Later

*Andrew Burnett, Of Counsel*

A recent decision in the New South Wales Supreme Court illustrates a number of legal principles in Australian employment law and provides lessons for employers on the management of legal risk in this area.

### Background

In *Roderick v Washington H Soul Pattinson & Company Limited (No 2)* [2020] NSWSC 1224, the court awarded Melinda Roderick, a former finance director, an additional nine months' notice, an amount of AU\$517,000, with interest amounting to AU\$50,676.75 calculated from the date of her dismissal on 12 October 2018, and costs. In addition, she was awarded long-term and short-term incentive bonuses totalling AU\$537,152.75, including interest. The trial ran for five days. Roderick was employed by the company in June 2006 as chief financial officer. The agreed terms were contained in a letter dated 26 June 2006, and annual remuneration was AU\$250,000. This contract was terminable by either party at will on three months' notice.

On 1 November 2014, Roderick was appointed finance director, reporting directly to the board. She was now an executive director of the company and 12 related companies. After the CEO, she was the most senior employee. In October 2014, the company arranged to provide Roderick with a new executive director employment contract. She received and signed a letter of appointment to the board. By February 2015, she had received a draft executive employment agreement prepared by the company's solicitors. Roderick suggested some amendments, but despite two requests by her to meet with the company, the agreement had not been agreed to or signed by the time she was dismissed on 12 April 2018. Her employment ended with immediate effect because "she was not the right fit," and the company required someone with a different skillset. No performance issues were ever raised at any time prior to termination. Roderick was paid three months' notice on 12 July 2018. By that time, she had already commenced legal action for wrongful dismissal.

### Legal Principles Highlighted

- Did the parties remain bound by the terms of the 2006 contract, which provided for three months' notice? No, because when assessed on an objective basis, the evidence indicated that the parties intended that the 2006 contract would be discharged and a new contract created. The 2006 contract was not simply varied and continued. Because no second written contract was created, it was necessary for the court to imply a term as to reasonable notice into Roderick's unwritten contract.
- The determination of a reasonable period of notice is a question of fact determined at the date notice should have been given. The primary purpose is to enable the employee to obtain employment of a similar nature. After considering Roderick's age (49), length of service (12 years), seniority in a very large public company, very high remuneration, no evidence of misconduct and abrupt termination, the court found that if the employer had complied with its contractual obligations, it would have provided 12 months' notice.
- May Roderick's damages be limited because she accepted the repudiation of her contract by suing her employer, which ended the contract? No, because her damages were to be assessed with reference to the loss of entitlements that she would have received but for the breach. This meant that in assessing the STI and LTI benefits, the court was required to place a value on the loss of the opportunity to obtain a benefit assuming that the company had given 12 months' notice.
- Could the company have ended the contract sooner if it had paid the 12 months' notice in lieu? No, because absent an express term, the common law does not afford the right to terminate a contract in lieu of reasonable notice.

### Lessons for Employers

- Written agreements enable the risks created by uncertainty to be managed.
- When it is operationally necessary to change the terms of employment, ensure this variation is documented and agreed. If in doubt whether the variation in fact creates a new agreement, seek advice.
- Always ensure the employer has the discretion to pay in lieu of notice.



## JobKeeper 2.0 – Is Your Business Eligible?

Anna Lee, Associate

The Commonwealth government has extended the JobKeeper Payment until 28 March 2021 to support businesses that continue to be significantly impacted by COVID-19.

The key changes are as follows:

### Actual GST Turnover in the Relevant Periods

Previously, the projected decline in GST turnover was sufficient. Although the GST turnover percentages remain the same (15%, 30% or 50% depending on the status of the legal entity), actual decline in GST turnover must be satisfied to be eligible for the JobKeeper extension periods:

#### Extension 1 – From 28 September 2020 to 3 January 2021

The actual decline in turnover test is satisfied when the entity's actual GST turnover has declined in the September 2020 quarter (July, August and September) relative to the corresponding quarter in 2019.

#### Extension 2 – From 4 January 2021 to 28 March 2021

The actual decline in turnover test is satisfied when the entity's actual GST turnover has declined in the December 2020 quarter (October, November and December) relative to the corresponding quarter in 2019.

### Two-tier Rate

The tier 1 rate applies for eligible employees who worked 20 hours or more a week on average in the four weeks or pay periods before either 1 March 2020 or the newly introduced assessment date of 1 July 2020. The tier 2 rate applies to all other eligible employees.

|             | Tier 1                          | Tier 2                        |
|-------------|---------------------------------|-------------------------------|
| Extension 1 | AU\$1,200 (gross) per fortnight | AU\$750 (gross) per fortnight |
| Extension 2 | AU\$1,000 (gross) per fortnight | AU\$650 (gross) per fortnight |



### JobKeeper Enabling Directions and Agreements for Legacy Employers

Employers who are no longer eligible for JobKeeper (Legacy Employers) can continue to access the work flexibilities under the JobKeeper provisions provided they have a 10% decline in turnover shown by a turnover certificate issued by an eligible financial services provider (or self-certified if the employer is a small business).

Legacy Employers can make new JobKeeper enabling stand-down directions, directions to change an employee's duties or work location and agreements to change days or times of work to employees who previously received JobKeeper Payments provided that:

1. Legacy Employers cannot issue JobKeeper enabling stand-down directions to reduce an employee's hours of work below 60% of the employee's ordinary hours of work as at 1 March 2020, or require an employee to work less than two hours a day;
2. Legacy Employers must provide an employee with at least seven days' written notice of any reduction in their hours and/or directions to change the duties or location of work, and consult with the employee accordingly; and
3. Legacy Employers can agree with an employee to change their usual days or times of work provided the employee works for more than two hours on a work day.

If Legacy Employers wish to utilise the JobKeeper enabling directions and agreements after 27 September 2020, new directions will need to be issued and new agreements will need to be entered into.

## Is Your Business Calculating Employees' Personal/Carer's Leave Correctly?

**Sharon Payn, Associate**

The recent High Court decision of *Mondelez Australia Pty Ltd v AMWU & Ors* [2020] HCA 29 (*Mondelez*) clarified how paid personal/carer's leave is to be calculated under the Fair Work Act 2009 (Cth) (FWA).

But what does *Mondelez* mean for your business? More importantly, is your business calculating employees' paid personal/carer's leave correctly?

### How Much Personal/Carer's Leave Are Employees Entitled To?

If your business is a national system employer, your full-time employees are entitled to 10 days of paid personal/carer's leave per year and part-time employees are entitled to paid personal/carer's leave on a pro rata basis. Casual employees are not entitled to paid personal/carer's leave under the FWA.

### Accrual of Paid Personal/Carer's Leave

Full-time and part-time employees start accumulating paid personal/carer's leave from their commencement date and continue to do so throughout the year. An employee's paid personal/carer's leave balance rolls on to the next year.

Due to *Mondelez*, national system employers are now required to accrue paid personal/carer's leave based on the employee's ordinary hours of work, not working days. Paid personal/carer's leave is calculated as 1/26 of the employee's ordinary hours of work in a year.

### Examples

- A full-time employee who works 38 hours per week would be entitled to 76 hours of paid personal/carer's leave per year (38 hours x 52 weeks / 26)
- A part-time employee who works 15 hours per week would be entitled to 30 hours of paid personal/carer's leave per year (15 hours x 52 weeks / 26)



### What Should an Employee Be Paid When They Are on Paid Personal/Carer's Leave?

Paid personal/carer's leave is paid at an employee's base pay rate for each hour (or part thereof) of leave that they take. An employee who takes paid personal/carer's leave is paid for the ordinary hours they would normally work during the period. It does not include any overtime hours.

### What If My Business Fails to Follow Mondelez?

If your business is a national system employer, it is required to follow *Mondelez*. Failure to do so is a breach of the FWA, and an employee may bring a claim under section 44 of the FWA for breach of the National Employment Standards. Further, a maximum civil penalty of AU\$13,320 applies for an individual or AU\$66,600 for a body corporate, or for a serious contravention AU\$133,200 and AU\$666,000, respectively.

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