SQUIRE PATTON BOGGS

Workplace View

December 2015

'Tis the Season for Reviewing your Leave Policies

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Christmas may have come early for some employers with a new model term for annual leave likely to be implemented this month into 70 modern awards. The model term will give employers the *right to direct* employees to take annual leave in order to reduce "excessive" leave accruals, and will bolster the cashing out of leave provisions in the *Fair Work Act* 2009 (Cth) (**FWA**).

You may be aware that under certain modern awards and enterprise agreements, employers can already direct employees with excessive annual leave accruals to take paid annual leave during the Christmas shut-down. However, it has not been possible to *compel* employees covered by an award that is silent on the issue to take annual leave until now.

The new model term will provide increased flexibility and additional rights for both employers and employees, including:

- **Cashing out of excessive annual leave:** Subject to certain safeguards, employees will be allowed to elect to cash out up to two weeks' annual leave each year (provided they retain at least four weeks' annual leave).
- **Granting leave in advance:** Employees will be allowed to take annual leave in advance of accruing the necessary entitlement (with the employer's agreement), and an employer will be able to deduct leave taken in advance from the employee's final pay.
- **Time for payment of annual leave:** Employers will be allowed to pay annual leave by electronic funds transfer in an employer's usual pay cycle, removing the obligation to pay in advance.

While recognising that the management of excessive accruals remains primarily the responsibility of the employer, the Fair Work Commission (**FWC**) said that the model term will facilitate "mutually beneficial arrangements" between the employer and employee and provide an "effective mechanism" to address excessive accruals.

Other Highlights From the Review

TOIL

The FWC finalised a model term for time-off-in-lieu (**TOIL**) of payment for overtime. Some features of the model term include:

- the requirement for employers to enter into a separate written agreement with employees for each TOIL arrangement; and
- in calculating TOIL, overtime taken as time off during ordinary-time hours should be taken at the ordinary-time rate (that is, an hour for each hour worked).

The FWC confirmed the TOIL term is "necessary" to underpin the safety net and might "encourage greater workforce participation, particularly by workers with caring responsibilities".

NES inconsistencies

The FWC ruled that provisions contained in 11 modern awards dealing with the transfer of employment and service for annual leave purposes must be amended because they are inconsistent with the National Employment Standards (**NES**).

The FWC noted a number of awards contain provisions which automatically deem a transferring employee's service with the first employer to be service with the second employer for the purposes of annual leave entitlements. However, section 91 of the FWA (which forms part of the NES) provides that the new employer may decide not to recognise service for the purpose of annual leave entitlements, provided they are non-associated companies.

Where to go from here?

Some of the biggest decisions of the modern award review – including what's likely to happen to penalty rates – won't be made until early 2016. However, given that significant changes to the annual leave provisions in most modern awards could be implemented as early as this month, employers should:

- ensure that they have an up to date copy of the modern award(s) which apply to their business;
- take the time to familiarise themselves with the changes to the annual leave provisions in any applicable modern awards; and
- ensure the current leave policies and/or procedures are consistent with the new minimum legal obligations.

Employer Reminder

The recent case of *James Deeth v Milly Hill Pty Ltd* [2015] FWC 6422 is a reminder for employers to take a deep breath and think carefully before summarily dismissing an employee based on out-of-hours criminal charges. Despite Mr Deeth, an apprentice butcher, being charged as an accessory after the fact to murder, the FWC still found he had been unfairly dismissed and awarded him six weeks of wages. The FWC stressed that there is no presumption that a criminal conviction alone is a valid reason for termination of employment, particularly when it was committed outside of working hours.

While the circumstances of both Mr Deeth's charges and the significant publicity the murder received in the local media was said to be a valid reason to dismiss Mr Deeth, the FWC held that the employer did not afford Mr Deeth procedural fairness in the dismissal process by failing to undertake reasonable enquiries, or provide him with an opportunity to respond. Having regard to these factors, Mr Deeth's dismissal was harsh and unjust, but was not unreasonable.

The lesson to be learned

Employers in this sticky situation should refrain from dismissing employees in a knee-jerk reaction, and appropriate pre-dismissal procedures must be adhered to. Covering these bases will mitigate the risk of an unfair dismissal claim being successful and allow everyone to get back to business.

Did You Know..?

… that having "exemplary" standards in your approach towards discrimination will not always be enough to avoid liability for the discriminatory behaviour of your employees?

As most of you will be aware, a defence is generally available for harassment claims in which an employer is said to be vicariously liable if it can demonstrate that it took *all reasonable steps* to prevent the discrimination from occurring.

In a recent case brought by a courier who claimed he had been racially abused and assaulted by a supervisor (*Murugesu v Australia Postal Corporation & Anor* [2015] FCCA 2852), the Federal Circuit Court applauded Australia Post's formal position on discrimination and acknowledged the various steps it had taken, which included providing training to employees, distributing information leaflets with payslips to reinforce its policies and code of conduct, and holding regular toolbox sessions.

However, the Court found that, while the courier had reported several instances of racial abuse, Australia Post had failed to act upon his complaints. Despite all of the preventative measures which Australia Post had in place, the Court found they were undermined by Australia Post's "inadequate" response to the courier's complaints.

Employers therefore need to ensure that, in addition to implementing policies and training, they must also implement processes for dealing with any complaints of discrimination to ensure their policies are enforced.

LET'S GET QUIZZICAL

The first correct answer to all questions emailed to **isla.rollason@squirepb.com** will win a AU$50 David Jones voucher (Australia only).

Question 1

A union official holding a right of entry permit may enter premises to hold discussions with persons who work at those premises who:

a. are not members of the permit holder's union but have written to the union asking it to represent their industrial interests; or

b. have obtained permission in writing from their employer to speak to the union official; or

c. wish to participate in discussions and whose industrial interests the union is entitled to represent.

Question 2

Which of the following is not an NES entitlement?

a. Workplace health and safety training; or

b. Maximum weekly hours; or

c. Annual leave; or

d. Requests for flexible working arrangements

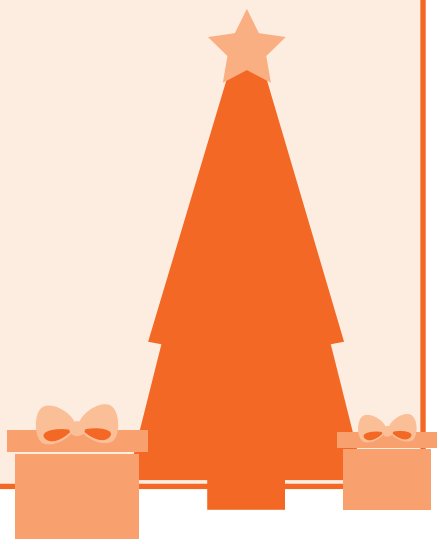
Question 3

A contract for a "specified period of time" as defined in section 123 (1) of the FWA is a contract of employment:

a. for a maximum term which has a clear end date and may be terminated on notice by either party at will before that date; or

b. for a maximum and defined term, terminable on notice at will by either party, but subject to the completion of a specified task; or

c. with a clear end date and which can be terminated for breach but not at the will of either party.



Legislation Update

Legislative Instrument	State	Status	Proposed Changes
Workers Compensation Amendment (Lump Sum Compensation) Bill 2015	NSW	Currently in the Legislative Assembly	The Bill will amend section 66 of the *Workers Compensation Act* 1987 to allow workers to make a second permanent impairment claim.
Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015	CTH	Second reading speech moved in the House of Reps on 12/10/15	Amends the FWA to provide for employees employed by a franchisee to recover unpaid remuneration from the franchisor.
Fair Work Amendment Act 2015	CTH	Received assent on 26/11/15	Amends the FWA in relation to: • requests for extended periods of unpaid parental leave • payment of annual leave upon termination of employment • taking or accruing leave while receiving workers' compensation • requirements for flexibility terms in modern awards and enterprise agreements and individual flexibility arrangements made under those terms • negotiation of single-enterprise greenfield agreements • transfer of business rules • application for a protected action ballot order • right of entry framework • FWC not having to hold a conference or hearing to dismiss an unfair dismissal application • interest payments on unclaimed monies

Workplace View

Legislative Instrument	State	Status	Proposed Changes
Treasury Legislation Amendment (Repeal Day 2015) Bill 2015	CTH	Second reading speech moved in the House of Reps on 12/11/15	Contains provisions to reduce superannuation guarantee penalties by: • changing the current requirement to pay double the superannuation guarantee charge (SGC) penalty for employers who refuse or fail to provide information to assess liability with a flat fee • calculating SGC using "ordinary time earnings" rather than "salary and wages" • charging interest for the period over which contributions are late rather than for a full quarter
Fair Work Amendment (Gender Pay Gap) Bill 2015	CTH	Referred to Senate Education and Employment Legislation Committee on 15/10/15 – report due 12/05/16	Amends the FWA to: • remove restrictions on employees' rights to disclose the amount of, or information about, their pay or earnings • prohibit employers from taking adverse action against employees for disclosing this information
Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015	CTH	Second reading speech moved in the House of Representatives on 19/10/15	Amends the FWA to make it unlawful for an employer to take adverse action against an employee or potential employee based upon where they live.

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