SQUIRE PATTON BOGGS

Workplace View

April 2016 Edition

Navigating the Parental Leave Minefield

By Teliah Turrill (Paralegal) and Jillian Howard (Senior Associate)

Two decisions of the Federal Circuit Court in the past eight months highlight the risky business of implementing employment changes affecting employees who take parental leave.

In Scullin v Coffey Projects (Australia) Pty Ltd [2015] FCCA 1514, heard last June, the court rejected the employee's claim that the employer had taken adverse action against him by changing his role from full time to part time because he had exercised his workplace right to take parental leave.

In contrast, in February this year, in the case of *Heraud v Roy Morgan Research Ltd* [2016] FCCA 185, the court upheld three of the seven adverse action claims made by an employee who sought to return to work after a period of parental leave. The matter is listed for a further hearing this month when the court will make a determination on the appropriate penalty and relief.

The Facts

Heraud v Roy Morgan Research Ltd	***Scullin v Coffey Projects***
• Ms Heraud was the National Operations Director for Roy Morgan • In September 2013 she commenced parental leave and was due to return to her role in July 2014 • While she was away, Roy Morgan suffered a significant decrease in revenue due to the loss of major clients, prompting the company to embark on a restructure which resulted in several positions being made redundant, including Ms Heraud's • In May 2014, the company advised Ms Heraud that an appropriate redeployment option had arisen, only to retract the offer soon after she submitted a request for flexible working arrangements (**FWA**) • A redundancy proposal was then prepared by the HR Director who, in her email to the Head of Corporate Services and In-House Legal Counsel, referred to Ms Heraud's FWA request before stating that "*Given this, it is most sensible to maintain Euan* [the maternity leave replacement employee] *in the role in an acting capacity and to make the role redundant now...*" • On 27 June 2014, Ms Heraud's employment was terminated on redundancy grounds • Ms Heraud subsequently brought an adverse action claim alleging that Roy Morgan's failure to return her to her pre-parental leave role and her redundancy were because she had exercised a workplace right to, amongst other things, take parental leave	• Mr Scullin was a Project Manager for Coffey Projects • In early 2011, Mr Scullin, whose wife was pregnant with twins, made a request for paternity leave under the Coffey Projects policy • The Coffey Projects policy stated that in order to be entitled to parental leave, Mr Scullin had to be the primary carer for his children. Given primary care was being provided by his wife, his request was denied. The policy conflicted with the *Fair Work Act* 2009 (Cth) (**FW Act**) which only requires the parent have **a responsibility** for the child, **not the primary responsibility** • Believing he was not entitled to parental leave, Mr Scullin took a mixture of paid and unpaid leave for a period of 12 months • As Mr Scullin did not take parental leave, he was not entitled to return to his pre-parental leave position • When he returned to work a year later, he was only offered part time work • A year later, his role was made redundant • Mr Scullin, subsequently brought an adverse action claim alleging that the changes made to his role were because he had exercised his right to take parental leave and because of his family responsibilities

The Law

Under the general protections provisions of the FW Act an employer must not take adverse action against an employee because they have exercised a workplace right, such as the right to request a flexible working and the right to take parental leave, or because of a protected attribute, such as pregnancy or family/carer's responsibilities.

The Outcomes – Why the Difference?

Whilst Coffey Projects was deemed to have breached the NES for not providing Mr Scullin with parental leave, the company was able to prove that the decision to offer Mr Scullin only part time work upon his return to work was not made on the basis of Mr Scullin's family responsibilities or leave entitlements. The Federal Circuit Court accepted the evidence of the Coffey Projects General Manager who was found to be the sole decision maker regarding the changes to Mr Scullin's employment, that the economic downturn and a lack of work were the reasons behind his decision.

In contrast, in the Roy Morgan case, the decision-makers involved in making Ms Heraud redundant had left the company by the time her claim was heard. As a result, the company didn't provide any evidence relating to the reasons behind Ms Heraud's redundancy. Nor did it explain why the decision-makers had not been called as witnesses. Given the company was unable to prove that Ms Heraud's redundancy was not due to a prohibited reason, her adverse action claim succeeded.

Practical Tips

Whilst the cases demonstrate that employees who take parental leave are not immune from decisions which could adversely impact on their employment, they do highlight that the evidence of decision makers in adverse actions cases can make or break an organisation's defence.

Here are a few simple guidelines which, if followed, will significantly mitigate risk and put employers in the best possible position to defend an adverse action claim:

- Carefully select decision-makers and where possible, limit the number of decision-makers involved.
- Make sure decision-makers are aware of their obligations and the organisation's potential liability arising from those decisions.
- Make sure decision-makers take notes of meetings and record reasons for decision.
- Ensure their contact details are retained if and when they leave the organisation to ensure they can be contacted should a dispute arise.

To quote a sporting idiom: the best defence is a good offence!

OSH Alert

By Emily Tan Associate

THE QUESTION: Can you direct an employee to attend a medical examination?

Paul is a heavy manual labourer working at your company, Action Pack Minerals. Six months ago Paul severely injured his back while lifting a pack of products. He required surgery and extensive rehabilitation, but returned to work last week with a medical certificate from his doctor certifying he was "fit for work". The medical report disclosed neither the exact nature of Paul's injury nor the rehabilitation measures undertaken.

Consequently, you are still concerned about Paul's injury and the risk of him re-injuring himself. In fact, you overheard him in the lunchroom today complaining of some back pain though he insists to you that "I'm fine!"

Can you request further medical information from Paul or direct him to attend a medical examination with your company doctor?

THE ANSWER: Yes

It is well established that employers have a legal duty to take reasonable care to avoid foreseeable risks of injury occurring in the workplace. This duty exists at both common law and under statutory workplace health and safety laws, and may also be imposed by specific industry regulations or industrial instruments.

As Paul's employer, you are entitled at common law to issue him with the lawful and reasonable direction to undergo a medical examination for the purpose of assessing his fitness to perform the inherent requirements of his job. Whether or not your direction to him to attend a further medical examination is lawful and reasonable will depend on the circumstances.

Recent cases have held that an employer can question the adequacy of an employee's medical report if it has genuine and reasonable concerns that their return to work may compromise their health and safety. For example, Paul's complaints in the lunchroom may form the basis of your genuine and reasonable concern that he is not fit to perform the inherent requirement of his job. It has also been held that where an employer has reasonable concerns that a medical report provided by a practitioner does not disclose enough information about the nature of the injury or appreciate the risks of the employee's role, a direction to attend a further medical examination is likely to be 'reasonably necessary' to determine risk.

As Paul's employer, you should, as far as possible, acknowledge and uphold the privacy of any medical information. If your request is reasonable and made on reasonable terms, Paul should also be warned that failure to comply with your direction may result in disciplinary action, including termination.

International Spotlight Hong Kong

Legal Action over Unpaid Salaries

Camille Leung Associate, Squire Patton Boggs Hong Kong

In December 2015, one of the only two free-to-air television stations in Hong Kong, Asia Television Limited (**ATV**), owed its 800 employees their November pay cheques, totalling about HK$15 million. It was the second time in three months that ATV had failed to pay its employees on time. It failed to issue the September pay cheques until late October, prompting the government to issue ATV with a warning.

The principal piece of legislation governing the employment relationship in Hong Kong is the Employment Ordinance, Chapter 57 of the Laws of Hong Kong (**the EO**). Under section 23 of the EO, wages become due on the expiry of the last day of the wage period and must be paid as soon as practicable but in any case not later than seven days after becoming due.

Section 10A of the EO further recognises an employee's statutory right to terminate an employment contract without notice or payment in lieu in the event of any wages being outstanding for one or more months from the due date.

Moreover, section 63C of the EO subjects an employer who wilfully and without reasonable excuse fails to pay wages on time to the commitment of an offence with liability to a fine of HK$350,000 and to imprisonment for 3 years. Section 64B extends the criminal liability to any individual serving in a managerial capacity.

As a result of the troubled broadcaster's failure to pay employees' wages, overtime and termination payments within the legal seven-day limit, ATV's executive director Ip Ka Po was personally convicted on 100 summonses and was fined HK$150,000. "*When I heard* [the judge] *say I was convicted on 100 summonses, I thought this was the greatest stain on my life*" he told reporters later.

ATV's Futile Attempt to "Settle" with Employees

Following months of uncertainty and litigation, the provisional liquidator of ATV, Deloitte China, said on 2 March 2016 that the cash injection needed to keep ATV alive had not been forthcoming and all remaining staff would be laid off.

On 6 March 2016 ATV rehired about 160 members of staff on contracts stipulating they cannot seek to recover their outstanding January and February wages from the broadcaster or Deloitte China before April 2.

The Secretary for Labour and Welfare, Matthew Cheung Kin Chung, (**Secretary**) publicly criticised ATV's move to stop staff seeking outstanding pay as "inadvisable" after more than 60 per cent of the beleaguered broadcaster's former employees applied for financial help through a government fund. The Secretary stressed that an agreement could not be used to supersede the EO.

Did You Know?

By Emily Tan, Associate

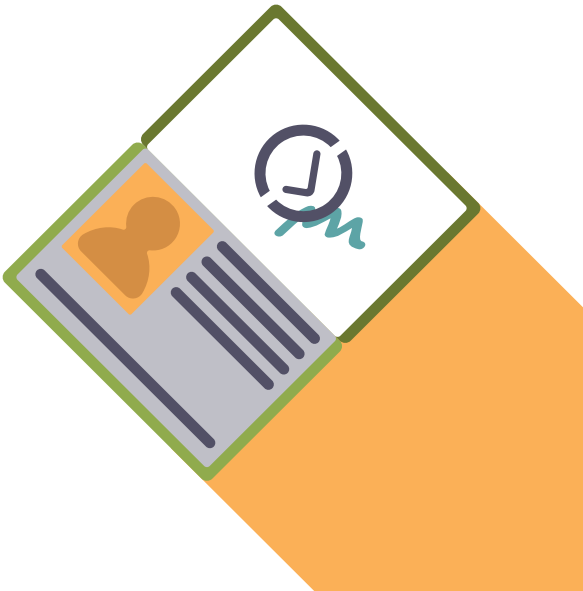
Did you know that new laws could be introduced to clampdown on the exploitation of temporary visa workers, sham contracting and underpayments?

On 15 March 2016 the Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth) was introduced into the Senate in response to a number of high profile cases in 2014-15 in which the Fair Work Ombudsman (**FWO**) recovered approximately AU$22.3 million in back pay for over 11,000 workers.

If passed, the new laws would:

- Increase maximum penalties for underpayments. This would apply to companies that would be expected to have a level of HR sophistication (the increased penalties will not apply to small businesses)
- Introduce criminal offences for breaches of the FW Act 2009 that involve coercing or threatening temporary overseas workers
- Introduce greater protection from adverse action if a worker queries whether they are an employee and not an independent contractor
- Introduce an objective test such that an employer is not involved in sham contacting if they believed the contract was a contract for services **and** a reasonable person would have believed the contract was a contract for services
- Give the FWO increased powers to pursue employers and directors personally who engage in "phoenixing" (transferring assets from a liquidated company to a new company to avoid paying employee entitlements)

The Australian Labor Party sought public submissions in March and is likely to release further details in the coming months. Watch this space…



Workplace View

Meet the Team

During 2016 we will introduce you to our Labour and Employment Team. This week we would like you to meet Anna Elliott, who was recently promoted to Partner in our Sydney office.

My first ever job was…

Selling merchandise (predominantly Christy towels and keyrings) at the Wimbledon Championships. Apart from meeting some players and drinking Pimms, the highlight was befriending the security guards in week one so they would then let me in to watch the finals during my split shifts!

What I like about my current job is…

Without a doubt, the variety of work and people I get to work with. I love interacting with clients in a broad range of industries to find solutions that add real value to their businesses.

How long have you been with the firm…

I started my career with Hammonds (now Squire Patton Boggs) as a trainee solicitor in 2000 and left to move to Australia. I was delighted to be able to re-join the firm when we opened a Sydney office in November 2012.

What are the key changes occurring in employment law

After a period of a fair amount of change, Australian employment law is generally taking a bit of a breather as we wait to see what happens in the General Election in late 2016. Industrial relations and employment law are always pretty high up on the political agenda in the lead up to the election.

A random fact about me is…

I love to cook and was once a contestant on Ready, Steady, Cook! Our Australian managing partner made the top 50 of MasterChef, which is far more impressive!

Events

Seminar series Sydney
Managing Redundancies – The Legalities and Practicalities
19 April 2016, 12:30 p.m.
Squire Patton Boggs Sydney

Social Networking and the Future of Work
27 April 2016, 7:15 a.m.
Squire Patton Boggs Perth
(Tickets available at www.paulinetarrant.com.)

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