SQUIRE PATTON BOGGS

Workplace View

June 2016 Edition

"One and the Same": Continuous Service With Related Entities Counts Towards Long Service Leave in WA

Jessica Geelan, Associate and Dominique Hartfield, Senior Associate

In what may come as a surprise to many employers, a WA court has ruled that a worker engaged by a company in the UK almost 30 years ago is entitled to 23 weeks' long service leave under state legislation because he was ultimately transferred to an associated entity in Australia.

Many employers presume that long service leave does not accrue in the case of overseas service as it is not a common employment condition in overseas jurisdictions. However, the decision in *Martin Venier v Baker Hughes Australia Pty Ltd* [2016] WAIRC clarifies that continuous service with related entities (as defined in section 50 of the *Corporations Act 2001* (Cth)) will count as service for the purposes of calculating an employee's long service leave entitlements in Western Australia.

Mr Venier claimed he had been employed by Baker Hughes Australia Pty Ltd and its related entities from November 1988 until July 2015. Since commencing employment in the UK, he had worked for various divisions and related bodies corporate of Baker Hughes throughout the UK and China, until finally assuming a position in Western Australia.

Prior to commencing the position, Mr Venier entered into an employment contract with Baker Hughes, which provided that he was entitled to long service leave under the *Long Service Leave Act 1958* (WA) **(LSL Act**).

The LSL Act provides for 8.66 weeks of long service leave after 10 years' continuous employment with one and the same employer, and 4.33 weeks for each five years' continuous service thereafter. It also provides pro-rata entitlements on termination of employment after seven years.

Mr Venier claimed he was entitled to 23 weeks' long service leave, based on his 26.64 years of continuous service with Baker Hughes and its related body corporates, as he had been employed by one and the same employer for the duration of his employment.

The company denied the entitlement, claiming Mr Venier failed to reach the requisite continuous service threshold in his employment with the Australian entity between November 2008 and July last year. Baker Hughes also argued that Mr Venier was seeking too broad an interpretation of the "related company" provisions in the LSL Act and that his previous service with various Baker Hughes entities prior to July 2008 did not count towards long service leave.

However, the Industrial Magistrate said the language of the key provisions of the LSL Act, having regard to the history and purpose of the Act, requires the phrase "one and the same employer" to be construed to contemplate employment with related body corporates.

He said that "*denying long service leave to long serving employees of related entities is inconsistent with the historical application of the LSL Act and is inconsistent with the stated purpose of the amending legislation*".

He found that Mr Venier had worked for "*one and the same employer for the purposes of calculating long service leave entitlements under section 8(1) of the LSL Act*" and was therefore entitled to the 26 weeks' long service leave. He ruled on the "one and the same employer" argument as a preliminary issue and is yet to finalise the case.

Given the nature of Australia's increasingly mobile workforce, with employees often transferring between related entities within Australia and internationally, this case shows it is important to understand in what circumstances continuity of employment will attach to transferring employees.

In particular, employers in Western Australia need to be aware that an employee's prior service with related body corporates both here and abroad may count as service for the purpose of calculating long service leave entitlements.

Did you know…?

Emma Dawson, Associate

Did you know … that there is no common law right for an employer to stand down an employee without pay during a period in which they cannot be usefully employed. However, this rule is modified by section 542 of the *Fair Work Act 2009* (Cth) (**FW Act**) which provides that an employer can enforce a stand down without pay if:

- An employee cannot be usefully employed because of:
  - industrial action
  - breakdown of machinery/ equipment, or
  - a stoppage of work, and
- the employer cannot reasonably be held responsible for the stoppage.

Consequently, a stand down under the FW Act can only last for the length of time that an employee *cannot be usefully employed* for one of the above reasons and, if challenged, an employer will have the onus of establishing the causal connection.

However, the FW Act provides that if there is a stand down provision in a contract of employment or enterprise agreement, then the employer must proceed under that instrument and not the FW Act.

Accordingly, employers should consider including stand down provisions in their contracts or enterprise agreements if they wish to have more flexibility about the circumstances in which they can lawfully stand employees down.

OSH Update

Emma Dawson, Associate

A recent decision of the Federal Court of Australia (**FCA**), on appeal from the Administrative Appeals Tribunal (**AAT**), confirmed that an employee's *belief* that their workload is excessive can be enough to uphold a stress related workers' compensation claim.

In April 2013, an employee lodged a workers' compensation claim after being diagnosed with a "major depressive episode", which he argued was caused by long-term exposure to excessive workloads. The employer denied liability, arguing his workloads weren't objectively excessive.

Both the AAT and the FCA agreed that, in a claim for stress related workers' compensation, it is not necessary to consider whether a workload was objectively excessive, nor is it necessary to consider whether a workload could objectively be seen to have aggravated a condition. In upholding the claim, the Federal Court found that the injured worker was entitled to workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

This decision highlights the need for employers to deal with employee's health and safety concerns regarding workloads carefully, even if the employer doesn't agree that their workload is excessive.

Migration Alert

Jillian Howard, Senior Associate

Senate Inquiry Into the Use of the 457 Visa Stream

On 17 March 2016, the results of the Senate's Standing Committee on Education and Employment References Committee inquiry into the impact of the 457 visa programme on the Australian labour market and the exploitation of 457 workers were released. The inquiry has made a number of recommendations which, if implemented, will have a significant impact on the programme, including:

- Removing the current exemptions on labour market testing for ANZSCO skill levels 1 and 2.
- Requiring sponsors to take on a local apprentice or graduate for each 457 visa holder they sponsor.
- Imposing a training levy of up to US$4000 per 457 visa worker to replace current training benchmarks.
- Requiring labour hire companies to be licensed.
- Putting responsibility onto franchisors for franchisees' treatment of visa holders and compliance with workplace laws.

A copy of the inquiry and recommendations can be found here

Changes to the 457 Visa Programme

On 14 April 2016, the government amended the *Migration Regulations 1994* (Cth) to introduce changes to the 457 visa programme.

For standard business sponsors, the most significant change relates to the introduction of a requirement not to engage in discriminatory recruitment practices on the grounds of citizenship or visa status. This change has been introduced to address community concerns that sponsors are using the 457 programme to employ foreign workers without regard to the local labour market.

The new provisions require all employers to make a declaration as part of their sponsorship application that they will not engage in such practices. The government has given "teeth" to the provision by also creating a new sponsorship obligation which requires compliance with that declaration and those who breach the sponsorship obligation may face sanctions or penalties.

To demonstrate compliance, sponsors are recommended to retain documents that show how 457 visa holders were recruited in order to prove that their selection was not based on citizenship or visa status. This could consist, for example, of copies of job advertisements showing roles were advertised both inside and outside of Australia, or evidence showing a lack of suitably qualified applicants in the local area.

Meet the Team

This week we would like you to meet **Andrew Burnett**, who is **counsel** (and former partner) in our Labour & Employment team.

1. **My first ever job was…**

   Floor manager and cashier for a walk in diner (before fast food outlets existed!).

2. **What I like about my current job is…**

   Stimulating legal work, great team-mates and the flexibility allowed to me in my practice.

3. **A random fact about me is…**

   I gave up smoking 25 years ago and have never regretted it.

4. **The two rules I try to live by are….**

   (i) You are not indispensable, and (ii) switch your mind off the office as you leave it.

5. **My favourite quote is…**

   "The early bird catches the worm" – i.e. start your day early!

Events Update

Labour & Employment Seminar Series

The second Labour & Employment Seminar of the year, "*Strategies for Employers to Reduce Labour Costs*", will be held in:

- **Sydney** at **12:30 p.m.** on **Tuesday, 19 July 2016** at our offices located at Level 10, Gateway, 1 Macquarie Street, Sydney.

  Presenter: Anna Elliott (Partner)

- **Perth** at **8 a.m. on Wednesday, 2 August 2016** at our offices located at Level 21, 300 Murray Street, Perth.

  Presenters: Bruno Di Girolami (Partner), Felicity Clarke (Of Counsel) and Allan Feinburg (BDO Australia)

Legalwise Seminars – School Law Conference

Kylie Groves will be presenting at the "School Law Conference" on **15 June 2016**. The conference will be held from **9 a.m. – 5:15 p.m.** at the Duxton Hotel, 1 St George's Terrace, Perth.

Should you have any queries or wish to register for any of the above events, please do not hesitate to contact Isla Rollason on +61 8 9429 7624 (Perth).

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