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Workplace View

October 2016 Edition

Common Law Reasonable Notice Wins Against NES in Notice Period Fight!

Emily Tan, Associate

The question of what constitutes reasonable notice of termination, in the absence of an express term in an employment contract, has recently resurfaced in the case of *McGowan v Direct Mail and Marketing Pty Ltd* [2016] FCCA 2227 (*McGowan*). In this case, the Federal Circuit Court of Australia (**FC Court**) confirmed that employers may be required to provide reasonable notice greater than the minimum period in the National Employment Standards (**NES**) set out in the *Fair Work Act 2009* (Cth) (FW Act).

This decision disregarded the controversial July 2016 decision of *Kuczmarski v Ascot Administration P/L* [2016] SADC 65 (*Kuczmarski*) in which the South Australian District Court held that the right to reasonable notice was a thing of the past given the NES provides for minimum notice periods.

In this update, we take a look at the legal position on reasonable notice and what measures employers can take to avoid dismissed employees claiming large amounts of reasonable notice.

The Historical Position

In the absence of any express term in an employment contract or an established and recognised custom, the common law will generally imply a term that either party can terminate the employment on "reasonable notice". This principle has been supported by a long line of cases where the courts have implied a reasonable notice period far beyond the statutory minimum. In determining what period of notice is reasonable, the courts consider a number of factors including (but not limited to) the employee's length of service, age, position, seniority and the availability of similar employment post-employment.

The Turning Point

The case of *Brennan v Kangaroo Island Council* [2013] SASCFC 151 (*Brennan*) suggested a turning point had been reached. In this case, the employee was covered by a state award but argued that she was entitled to a more generous implied term of reasonable notice. The Full Court held that it was **not** necessary to imply reasonable notice given the award set out the minimum entitlement to notice. The employee's subsequent appeal to the High Court was refused on the basis that it did not have sufficient prospects of success.

While Brennan dealt with award-covered employees, it also threw into doubt whether non-award employees entitled to the minimum notice periods in the NES could claim reasonable notice.

Kuczmarski

In *Kuczmarski*, the employee's employment contract did not set out a termination notice period. However, when his role of HR Manager was made redundant, he was paid five weeks' notice in accordance with the minimum notice period in section 117 of the FW Act. Mr Kuczmarski claimed that five weeks' notice was inadequate and that he was entitled to reasonable notice of between 12-18 months. The Court held that it was **not** necessary to imply a term requiring reasonable into Mr Kuczmarski's contract because section 117 of the FW Act already provided for this.

McGowan – The Final Frontier?

The decision in *Kuczmarski* disturbed the position that in the absence of an express term, there would be a reasonable notice period implied. It was therefore little surprise that the FC Court disagreed with the decision in Kuczmarski and came to the opposite conclusion just two months later in the case of McGowan.

As part of his overall adverse action claim, Mr McGowan claimed that he was entitled to reasonable notice of 12 months on the basis that his various promotions resulted in new contracts of employment. The FC Court rejected this argument and stated that there was "genuine controversy" as to whether section 117 precluded the implication of a term of reasonable notice for employees not covered by awards.

Ultimately, the FC Court held (in contrast to *Kuczmarski*) that section 117 of the FW Act was intended to provide a **minimum period** only and did not displace the implication of a reasonable notice period where a contract of employment is silent. The FC Court commented that the same notice period under section 117 would not have been intended to apply to an employee who had worked with an employer for five years and another who had worked for 25 years.

Tips for Employers

Following the *McGowan* case, it appears that the implied reasonable notice term is here to stay (for now). Accordingly, employers should ensure that employment contracts:

- Contain an express notice of termination clause clearly specifying a notice period (the length of which is appropriate to the position)
- Make it clear that the employer can make a payment in lieu of notice
- Are varied in writing or replaced to reflect changes to positions and material changes to duties, roles or responsibilities
- Provide flexibility and allow employers to direct an employee to carry out additional duties and responsibilities with the terms of the contract continuing to apply

Did You Know…?

Jessica Geelan, Associate

Did you know that Western Australia will have to wait even longer for harmonised work health and safety legislation? The state government have announced that the WHS (Resources and Major Hazards) Bill (WHS Resources Bill) will not be introduced to parliament before March 2017.

The Department of Mines and Petroleum announced earlier this month that it expects a draft version of the WHS Resources Bill to be finalised by November 2016, and then released for a three-month public consultation period.

Harmonised WHS laws for WA's remaining industries have also been delayed, as Commerce Minister Michael Mischin continues to consider proposed changes to the Work Health and Safety Bill (WHS Bill).

The government has advised businesses against commencing training on the draft WHS Bill, as the proposed regulations could differ significantly from the national model. There are plans for a transitional period in which businesses can implement policies under the new legislation before it becomes enforceable.

OSH Update

Jessica Geelan, Associate

The Fair Work Commission recently found an employee, who participated in an unsafe practical "joke" on a co-worker **outside of work hours**, was lawfully terminated as the incident constituted exceptional circumstances creating a link to his employment.

In *Kedwell v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Operations/Warkworth Mining* [2016] FWC 6018, Commissioner Saunders said that it is only in exceptional circumstances that an employer has the right to control the private activities of its employees and "out of hours conduct must have a relevant connection to the employment relationship in order to be a valid reason for dismissal".

Upon leaving work on 11 February 2016, the applicant along with two co-workers deliberately "boxed in" another colleague on a stretch of highway to prevent him from making his usual turnoff towards home. One of the participants later claimed they were "playing a joke" on the victim.

Mount Thorley investigated the incident and decided to stand down two of the employees (including the applicant) and issued a final written warning to the third, claiming they had breached the company's Code of Conduct and Anti-Discrimination, Sexual Harassment and Bullying Policy.

In upholding the dismissal, the Commissioner said that the activities of the employees gave rise to a risk of a serious motor vehicle accident and that bullying conduct of that kind created a serious risk to the victim's health and welfare.

The Commissioner found that the behaviour had a "relevant connection to the employment relationship" because it occurred shortly after the end of a shift, was a continuation of earlier workplace harassment of the victim, took place on the way home from work and could have resulted in a "journey" claim under the *NSW Workers Compensation Act 1987* if injury occurred, it impacted the relationship between the four workers and that the employer has a legitimate reason to avoid future risk of injury.

It is important employers ensure internal policies and training addressing workplace harassment adequately inform employees that harassment of colleagues outside the workplace may still result in disciplinary action (up to and including termination of employment) where there is a relevant connection to their employment.

International Spotlight – China

Daniel Leung – Of Counsel and Jolene Fu – Shanghai

The Reform of Working Hours System in People's Republic of China (PRC) – Global Employers to Be Aware Following the Walmart Employees' Strike

Background

Walmart workers across China launched a series of wildcat strikes in July against the company's newly implemented Integrated Working Hours System (**IWH System**). The strike began with two stores in Nanchang on 1 July 2016, with the Chengdu and Harbin stores joining in on 3 and 4 July 2016 respectively. The Chinese employees were concerned that after the new working hours system was implemented, the company would cut overtime payments for employees. The strikes ended in the first week of July after Walmart store managers told striking workers that the management would address and respond to their issues and concerns. Walmart management later decided that employees could elect whether to participate in the IWHS or maintain their original Standard Working Hours System (**SWH System**).

SWH System v IWH System

The Chinese working hours systems are unique. According to Article 36 and Article 38 of the PRC Labour Law, the SWH System shall mean each employee works eight hours a day (i.e. 40 hours a week), and each employee shall have at least one day as a rest day per week. Employees who work more than the statutory working hours are to be paid for overtime according to law. The SWH System is currently the most widely used working hour system in China and is generally accepted by enterprises and their employees.

The IWH System is a comprehensive calculation of working hours, with a weekly, monthly, seasonal or yearly cycle. The average daily working hours and average weekly working time should be basically the same as with the SWH System. However, under the IWH System, enterprises will enjoy greater flexibility in arranging their employees' working hours, as store managers are permitted to allocate workers any number of hours per day without paying overtime as long as it does not exceed the total permitted working hours in a particular cycle.

For example, under the IWH System of a weekly cycle:

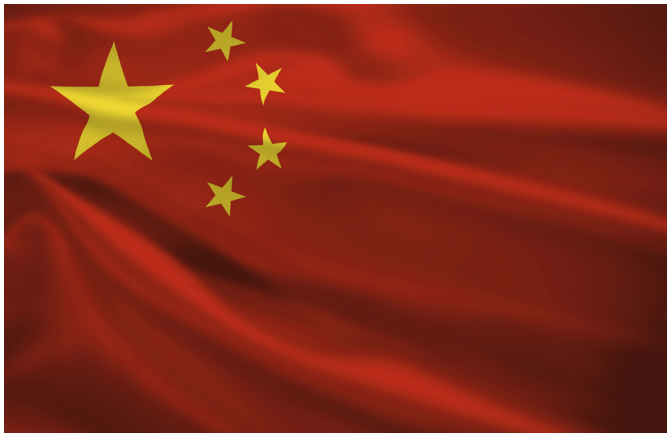
- The actual working time of the employees on a specific day can be more than 8 hours, but the total weekly working time within the comprehensive calculation cycle shall not exceed the statutory maximum of 40 hours.
- If it is more than 40 hours a week, it shall be deemed to prolong the working time, and the enterprise is required to pay overtime which is not lower than 150% of the wage regardless of whether it is a working day or rest day.
- If the enterprise arranges work for an employee during a statutory holiday, regardless of whether the sum of the entire cycle of working time exceeds the statutory standard working time, the enterprise is required to pay overtime which is not lower than 300% of the wage.
- The average number of prolonged working hours must not be more than 36 hours per month (i.e., nine hours per week), otherwise the company will face the risk of being punished by the labour supervision department.

Advice for Employers

The strike by Walmart employees serves a good lesson to global enterprises (and non-global ones) operating in China: that they should undertake planning and consultation before making any substantial changes. Before implementing substantial changes, global enterprises should:

- Consult and agree with the employees in advance – According to Article 4 of the PRC Labour Contract Law, when an employer formulates, revises or decides on rules or major matters pertaining to labour remuneration, *working hours*, rest periods etc., which directly affect the vital interests of employees, such changes are required to be discussed with the employee representatives congress or all employees in order to seek their opinions before such changes shall become effective. Global enterprises are required to undertake sufficient consultation with the employees in order to reach a consensus with the employees in advance.
- Obtain the prior approval from the Labour Bureau – According to Article 39 of the PRC Labour Law, changing from the SWH System to IWH System must be approved by the Labour Bureau. Therefore, obtaining the approval from the Labour Bureau before the global enterprise announces any changes to the working hours system is necessary.
- Plan for a strike strategy between the global management and the Chinese workers association or local management – Discussion between the global management and the Chinese workers association or local management should be conducted before any implementation of the labour system in China in order to formulate a strike strategy in case it occurs. Failure to do so may have a negative impact on the reputation of the global enterprise in China.

If you have any questions to the above, please contact Daniel Leung in our Shanghai office on +86 21 6103 6352.



Employer Reminder

Jillian Howard, Senior Associate

Employers should be alert to employees who attempt to 'double dip' when it comes to employment claims.

Although an employee is entitled to challenge a discriminatory dismissal either under the adverse action provisions of *the Fair Work Act 2009* (Cth) (**FW Act**) or under state or federal discriminations laws, they can't do both. This is the effect of section 725 of the FW Act which provides that an employee is precluded from pursuing more than one type of claim in respect of the same subject matter.

If, for example, an employee considers that their dismissal was discriminatory, they must elect whether to pursue either an adverse action claim in the Fair Work Commission (**FWC**) and Federal Court or Federal Circuit Court, or to pursue a discrimination claim either in the Australian Human Rights Commission (**AHRC**) or in the applicable state equal opportunities tribunal. Equally, an employee who claims their dismissal was unfair cannot also claim it constituted adverse action.

An employer faced with an employee who has tried their hand at a discrimination claim before issuing an adverse action or unfair dismissal claim should object to the FWC's jurisdiction to hear the claim.

A word of warning though – an employee was recently **granted leave to appeal** a claim in which her adverse action claim had been dismissed under section 725 because she had issued proceedings in the AHRC challenging her dismissal. In the case of *Ms Karren Hazledine v Mr Kirk Wakerley; Mr Ben Giddings* [2016] FWCFB 6892, the Full Bench of the FWC, in granting leave to appeal, recognised the decision may be less straight forward in cases where an employee argues, as in this case, that the acts leading up to their dismissal and the dismissal itself are two separate causes of action, the former constituting adverse action and the latter discrimination.

The merits of the appeal will now be determined by the Full Bench of the FWC – watch this space…!

Let's Get Quizzical

By Jillian Howard

You have just offered a job to Julia who you believe to be an Australian citizen. The Department of Immigration and Border Protection recommends that you should take steps to verify Julia's right to work in which of the following circumstances:

a. Where Julia has worked in Australia for more than five years

b. Where Julia is able to show that she undertook her primary and further education in Australia

c. Where you know that Julia has lived in Australia for at least five years

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

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