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Employment Law Update

Four yearly review of modern awards - Annual leave

The Fair Work Commission (FWC) is in the process of undertaking the first four yearly review of modern awards (commenced in 2014). The review involves an intensive examination of all modern awards, and proposals for adjustment from employers and employees and their associations and unions, as well as a "plain language" project to improve the readability of awards. The review is picking up many issues which could not be dealt with during the award modernisation process in 2009.

Among the issues being addressed by the FWC are several aspects of annual leave:

- Cashing out of annual leave
- Paid leave and electronic funds transfer
- Granting annual leave in advance
- Excessive annual leave.

On 23 May 2016, the FWC released a 104 page decision canvassing the submissions made by all interested parties on previous in-principle decisions, and determined which model clauses would be inserted into which awards.

The model clauses dealing with:

- Cashing out of annual leave will be inserted into 112 awards
- Paid annual leave will be inserted into 51 awards
- Leave in advance will be inserted into 113 modern awards
- Excessive annual leave will be inserted into 80 modern awards.

The model clauses:

- Allow annual leave to be cashed out rather than taken, within fairly strict parameters (for example, a maximum of two weeks per year)
- Allow employers to use EFT to pay wages while annual leave is being taken (rather than having to pay it prior to the leave being taken, which was the previous provision in some awards)
- Facilitate an employee taking leave in advance of it being accrued, and consequential adjustments to future entitlements
- Allow an employer to direct an employee to take leave if their accrued leave balance is excessive (more than six weeks) so long as the employer gives the employee four weeks' notice to take the leave, and the employee retains at least four weeks leave after the direction given by the employer.

When the changes will take effect has yet to be determined, but we will provide information about this to our clients as the review process comes to a conclusion.

If you're unsure of whether you are affected by the changes, or would like to know more about the changes, contact our Employment Law team:

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Four lessons employers need to know about terminating an employee's employment over personal social media posts

The use of social media as a necessary means of communication in business has been so widely recognised that many employers now have social media policies in place to ensure that employees are aware of what is appropriate use of social media, and what is not - and an employer who doesn't, should!

Social media unavoidably blurs the boundaries between public and private and the blurred line has led to employers scratching their heads over situations where an employee has posted something in their "private" capacity on social media, which is likely to have a negative impact, and which could be connected to the employer.

It is therefore no surprise that the Fair Work Commission has had to rule, on several occasions, on the lawfulness of an employer terminating an employee's employment over a "private" post on social media.

For example, last year SBS and former sports reporter Scott McIntyre was dismissed from the SBS for his controversial tweets on Anzac day where he referred to the commemorative day as "Remembering the summary execution, widespread rape and theft committed by these 'brave' Anzacs" and questioned whether "poorly-read, largely white, nationalist drinkers and gamblers had paused to consider the horror that all mankind suffered."

The public outrage that followed Mr McIntyre's tweets resulted in his dismissal from SBS, and an ensuing adverse action claim filed by Mr McIntyre, on the basis that he was discriminated against for exercising a political opinion. SBS argued that he was not dismissed for expressing his political opinions, but because he failed to comply with their social media policy. The matter settled privately, and Mr McIntyre confirmed that his tweets were his views, and not SBS's.

In another "attribution to employer" case, a Meriton employee was dismissed for a misogynistic Facebook comment where his employment by Meriton was apparent to readers.

The first social media lesson

When expressing personal opinions, employees should take care to ensure that they disclaim that the opinions are their own, and not those of their employer. In a similar vein, employers should take care to ensure that their social media policy stipulates that employees must make such a disclaimer when expressing their own opinions, or take steps to ensure that there is no link to their employer at all, when posting or tweeting.

Another instance of social or political commentary causing problems occurred when an airline employee who allegedly made comments under a pseudonym in support of IS, was sacked. The employee has alleged unfair dismissal, on the basis that his comments were sarcastic and political in nature.

Four lessons employers need to know about terminating an employee's employment over personal social media posts cont.

And in yet another case involving political opinions in March this year, the Fair Work Commission held that offensively worded posts were political speech and were not a valid reason for dismissal. Mr Starr had been employed as a Centrelink Officer by the Department of Human Services for 21 years. During his employment but outside of business hours, he had frequently posted in online community forums under the screen name mmmdl. He identified himself in some of his comments as a public servant who dealt with Centrelink recipients regularly, although he never disclosed his full identity.

Among his online posts were comments including: "Try dealing with whinging junkies hour after hour," and "I honestly have zero idea what all our managers do," and "if you can't afford to have a child without receiving a Welfare payment ... then don't have a kid." He also referred to welfare recipients as spastics. Other comments involved criticisms of the budget and other aspects of federal government policy. These comments were interposed between others made by Mr Starr which offered helpful tips and advice to individuals enquiring about the processes of Centrelink.

In terminating Mr Starr's employment, the Department referred to their Code of Conduct and said that Mr Starr had an obligation not to make comments that were "obscene, defamatory, threatening, harassing, discriminatory or hateful to or about your work, or harsh or extreme in your criticism of the government, or strong in your criticism of the department's administration." The Department also referred to their social media policy which stated that, among other things, employees were not to make derogatory comments about managers or customers, or to disclose internal information on their social media accounts.

In determining whether an employer could regulate or take disciplinary action in relation to out of hours conduct, VP Hatcher applied a previous decision which held that the an employee's employment could only be validly terminated because of out of hours conduct where the conduct is "of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee. Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct."

VP Hatcher identified a difference between Mr Starr's social media posts which were political in nature, and those that were critical of his place of employment. Those posts which criticised the budget and federal government policy were political comments which could not be regulated by the employer, because of the implied constitutional right to freedom of political communication - an employer's social media policy or Code of Conduct cannot curtail this freedom.

However, the posts that criticised Centrelink management and clients could be subject to disciplinary action. VP Hatcher found that there was a justifiable reason for the termination, but that it was nonetheless harsh given Mr Starr's comparatively unblemished employment record, his length of service, the fact that comments were in reaction to other posts and general in content (eg no particular person could be identified as the subject of his criticism), and not done to intentionally harm the Department, in addition to the remorse shown by Mr Starr. He was reinstated, but not awarded compensation for the length of time he was unemployed, because his own misconduct had brought about the termination.

The second social media lesson

Ensure that the conduct complained of is conduct that an employer is entitled to regulate, before deciding on disciplinary action.

The third social media lesson

If you are entitled to regulate the conduct, ensure that the social media post is of such gravity as to justify disciplinary action, especially termination.

Four lessons employers need to know about terminating an employee's employment over personal social media posts cont.

The fourth social media lesson

If termination of employment is justified, make sure that you have taken all relevant facts and angles into account, before terminating the employment, to ensure that the termination is not harsh, unjust or unreasonable in the circumstances.

So, employees and employers need to be mindful of where to draw the line between private and public, and of the legal minefields that they can create where the line is blurred.

If you need help navigating these minefields, please contact our Employment Law team:

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Tackling a bullying claim in your workplace: Do you have to protect an employee against hurt feelings?

The bullying provisions in the Fair Work Act 2009 were introduced in 2013, and give the Fair Work Commission (FWC) the power to deal with anti bullying applications in limited circumstances.

Since the introduction of these provisions, various cases have helped to clarify exactly how they are meant to operate in practice. However, despite such attempts, there is still confusion as to what does and does not constitute bullying in the workplace. Helpfully, a recent bullying case, Gore [2016] FWC 2559 (24 May 2016), provides further clarification on the issue of 'hurt feelings'.

The relevant background details of that case are as follows:

The application was made by Mrs Gore, a casual receptionist, employed by the Yura Tungi Aboriginal Medical Service in Halls Creek, Western Australia. In the application, Mrs Gore sought an order to stop bullying by three employees - Mr Evans, Mrs Evans and Mrs Chadwick. A summary of the allegations made by Mrs Gore against the three employees included:

- One of the accused employees openly praised another employee in the same role as Mrs Gore, in front of her
- One of the accused employees corresponded with Ms Gore on occasion using what Mrs Gore describes as an impolite tone
- One of the accused employees gave Mrs Gore a "suspicious stare"
- One of the accused employees was quieter and more withdrawn than usual in her dealings with Mrs Gore and acted in a hesitant manner towards her
- One of the accused employees requested that Mrs Gore take more detailed phone messages, and did not make the same comment to the other receptionists
- One of the accused employees asked Mrs Gore whether she was aware of a particular company policy after she did something contrary to it
- One of the accused employees initially ignored Mrs Gore after she called out the accused employee's name.

Pretty petty, right? But such complaints aren't uncommon in some workplaces – so what did the FWC decide and what were the key take-homes from the decision? The FWC ruled that the alleged conduct did not constitute bullying. In the ruling, it was determined that an employee's perspective has to be balanced against the conduct of others, including reasonable management action carried out in a reasonable manner.

The FWC said that "Having a preference about how things should be done…and suggestions not being agreed to by a supervisor, is not bullying. The choice is a matter for the supervisor. An employer gives a supervisor a role and responsibilities. To deprive a supervisor of the ability to carry out their role in a reasonable way… is not a breach of reasonable management action."

"While Mrs Gore may be sincere in her beliefs and views, the anti-bullying provisions of the FW Act, are to protect bullying behaviour, not substantially a person's feelings."

The FWC explained that complimenting one employee in front of another is not bullying; and that seeking a compliment or thank you and not receiving one is not an act of bullying by the other employee.

Tackling a bullying claim in your workplace: Do you have to protect an employee against hurt feelings? cont.

If you need assistance with managing complaints of bullying in your workplace, or if you would like your bullying policy reviewed, or for your employees to have some training on the subject as a proactive preventative measure, please contact our Employment Law team:

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Employment Law Update

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Franchisee underpayments and the supply chain

I do not recall worker underpayments ever having been an election issue before, or even rating a policy announcement but this year, under the media spotlight ignited by 7-Eleven, this issue is now very much on the agenda. This is part of a trajectory of heightened enforcement activity and a broader view of who might be liable for pay infringements.

Employers not complying with award minimum wages, or trying to avoid awards by sham contracting, is not a new issue. In the old days, pre-Workchoices in 2006, the Department of Industrial Relations in each state had inspectors to investigate and prosecute underpayments but it was pretty low key, and had not been given a shake up for a long time. With Workchoices and the Fair Work Act, and the shift of responsibility to the Federal Government, came a much higher-profile regulator, in the form of the Fair Work Ombudsman (FWO) which had a more sophisticated approach to enforcement (drawing on the likes of the ACCC), including savvy use of the media to spread the word.

So, when the 7-Eleven issues became public knowledge, the FWO was the responsible regulator. In order to minimise the prospects of an aggressive approach from the FWO, 7-Eleven appointed its own independent panel, headed by Professor Allan Fels, to deal actively with the claims of employees of its franchisees who had been underpaid. In many cases the workers were recent migrants or on student visas with poor English and no resources, and were vulnerable to threats to report them to Immigration, so that they may be detained or deported, if they complained. It was reported that some franchisees paid the right money on the books, so that the records looked OK, but then forced the employees to pay back up to half of their pay in cash.

Among the issues this raised was the point that 7-Eleven's business model gave franchisees a very small margin, so that franchisees were under pressure to squeeze pay in order to make a dollar. So while 7-Eleven wasn't directly responsible for the employee underpayments, it was responsible for the structure within which underpayments happened, and for not acting to ensure franchisees met their legal obligations.

During May, 7-Eleven dispensed with its panel and internalised its claims assessment process. Professor Fels has noted that this occurred after the independent panel had served 7-Eleven's purpose as window dressing for the Senate enquiry into this issue, and that the main point of difference between 7-Eleven and the panel was that 7-Eleven wanted to insist on strict legal proof of entitlements while the panel took a broader view, given the vulnerability of the employees and the lack of full records and evidence - because of the franchisees' conduct - to enable cases to be strictly proved.

In response, the Turnbull Government has promised that if it is re-elected, it will appoint Professor Fels to a Migrant Worker Taskforce within the FWO, with an extra $20m in funding, and with franchisors being made directly legally responsible for underpayments to franchisee's employees. The ALP has also promised to stiffen penalties, and to focus on sham contracting.

The role of the Taskforce will be to pursue exactly the issues which have come up at 7-Eleven – and elsewhere. Where is "elsewhere"? It extends well beyond franchising:

Recent media coverage has also included Myer's cleaners and Coles and Woolworths' trolley collectors. Note that Coles has received kudos for a proactive approach to prevent underpayments down the supply chain, once the issue was raised.

Franchisee underpayments and the supply chain cont.

The media focus on big players like this is enforcement activity in itself because public pressure may do more, more quickly, than legal action. These high profile cases also serve as education for everyone else - and the message that people up the chain can be legally liable for being knowingly involved in the exploitation of workers at the bottom of the chain, or via the proposed legislation to bring franchisors directly into the loop, is a new element in this issue which goes a step beyond the traditional legal approach.
Whatever the outcome of the election, it seems that this is an issue with some way to run yet, with a more-or-less bipartisan commitment to do more to protect vulnerable employees. Prudent businesses will make sure that suppliers of goods and services over whom they have some influence are doing the right thing, and take responsibility where evidence of underpayments emerges.

If you think there may be an underpayment issue affecting your business, contact our Employment Law team:

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*See a more positive note in a recent piece, 'Why you should pay staff properly' in the Sydney Morning Herald's My Small Business section, including comments from Coleman Greig.