

NEWSLETTER

OCTOBER 2010

Cornwalls' E&IR Team

The E&IR team is excited to announce that Lorraine Buckley and her partner Anthony are engaged. Ant popped the question on beautiful Santorini Island in Greece during their recent trip through Europe. After 10 years together, Lorraine is not planning on a long engagement!

November will see our Trainees rotate through the practice groups, which means Matt Southwell will be moving into Commercial Litigation and the E&IR team will welcome Vanessa Hardley. Vanessa completed a double degree at Monash University, a Bachelor of Arts and Bachelor of Laws. She may be familiar to some of you: she completed a seasonal clerkship here at Cornwalls in 2007 and has finished rotations through our Commercial Property, Banking & Finance and Corporate & Commercial groups.

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*Click on image to view Tracey's profile

Paid Parental Leave: Reminder!

Eligible working parents of children born or adopted from 1 January 2011 will be entitled to government funded paid parental leave for the first time. The key points to remember about this new system are:

- Employers only need to make parental leave payments under this scheme from 1 July 2011. From 1 January 2011 to 30 June 2011 payments will be made by the Family Assistance Office (FAO) unless an employer chooses to make the payments.
- Payments under this scheme are at the rate of the National Minimum Wage (currently \$569.90 per week gross / \$15 per hour) for a maximum of 18 weeks. The FAO will provide the employer with the funds necessary to make the payments.
- Payments under this scheme only need to be made to eligible employees. Whether or not an employee is 'eligible' will be assessed by the FAO (employees must lodge their claim for paid parental leave with the FAO).
- Payments to employees should be made in accordance with their usual pay cycle and a payslip should be provided to the employee. Tax should be deducted from parental leave payments but superannuation contributions do not have to be made.
- Government funded paid parental leave is in addition to any other employer funded schemes.
- Leave (annual/sick/carer's) does not accrue to an employee absent on

paid parental leave under this scheme.

- The Fair Work Ombudsman may investigate any claims for failure to comply with obligations under this scheme. Failure to comply could result a penalty of up to \$33,000 (for body corporates), issue of a compliance notice or an infringement notice.

OHS Harmonisation Update: NSW Backflip

In December 2009 each state and territory agreed to introduce a new 'Work Health and Safety Act', replacing all current occupational health and safety (OHS) legislation. The purpose of this is to 'harmonise' the occupational health and safety laws in force around Australia, making it simpler and cheaper for all parties (employers and employees) to know what their respective obligations and rights are.

The content of the new Acts should mirror that contained in 'model' legislation agreed upon by the Workplace Relations Ministers from each state and territory in 2009. However, the future of the harmonised system has been put in doubt after a backflip by the NSW State Premier, Kristina Keneally. Premier Keneally has informed Prime Minister Julia Gillard that NSW will now only enact mirror legislation if it can retain:

1. Union led prosecutions: the current NSW system enables unions to independently prosecute employers for safety breaches. Under the model Act a union would not be able to commence a prosecution, but could request that a prosecution be brought if an employer is not prosecuted within six months of an alleged breach of the legislation.



- Reverse onus of proof laws: in NSW an employer is under an absolute duty to ensure the workplace health and safety of employees and, if prosecuted, bears the onus of proving it took reasonable steps to ensure safety. Under the new legislation, the obligation would be on the prosecutor to prove the employer breached its duty.

In 2009 the ACTU highlighted these two issues as problems with harmonisation, arguing there should be no 'reduction in standards' in any jurisdiction under the harmonised laws. Nevertheless, the NSW state labor government went on to approve the model Work Health and Safety Act – a move which it has now reversed. It appears this issue may feature high on the election agenda; the NSW opposition leader, Barry O'Farrell, has stated that if the coalition wins the NSW state elections in March 2011 it will pass the model legislation.

We will feature further developments regarding health and safety harmonisation in future newsletters.

Fair Work Australia Full Bench denies retailers' request for short shift minimums

The Full Bench of Fair Work Australia (FWA) has confirmed its earlier decision of rejecting an application by retail employers who sought to shorten casual minimum daily engagements.

The current minimum engagement for casuals under the *General Retail Industry Award 2010 (Award)* is three hours. The retail groups sought to reduce the minimum shift for ordinary casual employees to two hours. The application to vary the Award was denied by FWA.

At first instance the applicants' submissions were primarily based on the engagement of casual school-aged employees, arguing that the current minimum shift length restricted school students from working after school.

They had also argued that employers were disadvantaged because they had been forced to extend the shifts of their part-time employees, given that the 1.5 – 2 hour shifts were unavailable to their casuals. The applicants claimed this stripped hours away from the casuals, and made it more difficult for employers who did not have flexible arrangements with their part-time employees.

The parties opposed to the application argued that, although school students may be presented with difficulties when seeking casual employment in the retail industry, the interests of casual employees generally should be taken into account. The disadvantages to casual employees resulting from the proposed provisions outweighed the disadvantages to casual school students under the current provisions.

FWA observed that no evidence had been put forward in support of a reduction in the minimum period of engagement for casual employees other than for casual school students. The fact that rural

and regional supermarkets were affected by the current provisions was not necessarily representative of the entire population of casual employees in Australia.

As such the Full Bench refused to grant permission to appeal the FWA ruling, satisfied that it would not be in the public interest to do so.

Things to Note

- Minimum engagement periods are significant because they: (1) provide protection to vulnerable employees; (2) ensure that work-related travel is compensated for sufficiently; and (3) ensure that part-time employees do not suffer reductions in their hours.
- It is important to note that FWA could not consider the submission to create a provision in the Award specifically for student casual employees because the issue had not been raised at first instance. However, FWA did not see any barriers for such a separate application to be made in future; that is, an application to add a provision specifically allowing casual school students to work two hour shifts.

Employment relationship must be over before lodging dismissal claim

Fair Work Australia (FWA) has ruled that a worker given six months' notice could not start dismissal proceedings because the employment relationship had not officially ended.

In accordance with their enterprise agreement (EA), the employer was entitled to terminate the employment upon the giving of six months' notice if the employee failed to attend a directed medical examination and his employer concluded that he was not fit to carry out his usual



duties. The employee (who was not currently working) failed to attend a directed medical examination and was given notice pursuant to the EA.

Soon after being given notice, the employee lodged a general protections application under s365 of the Fair Work Act 2009 (Cth) (Act), which relevantly provides that a person may apply to FWA to deal with a dispute if that person 'has been dismissed'.

The employee submitted that his employment had been terminated at his employer's initiative on the day he was given notice of his termination. Even though the dismissal had not yet taken effect, the employee argued that FWA had jurisdiction to deal with the matter because he had been, for the relevant purposes, 'dismissed'.

Deputy President Sams stated that the interpretation of the provisions of the Act were 'relatively straightforward'.

In his decision, the Deputy President considered the words 'has been' to mean an event that has already occurred or taken place, not one that may, is likely to or will take place. For the purposes of s365, the relevant event is the actual dismissal of the employee and not the giving of notice.

He went on to say that the act of dismissal constitutes the severance of the employment relationship. As the applicant continued to be employed by the employer and presumably continued to accrue certain rights because of that employment, the employment relationship had not been severed or brought to an end at the employer's initiative. This was true despite the employee not currently being at work.

'Has been dismissed' could not have a prospective operation and therefore all that had occurred, in the legal sense, was the giving of notice in accordance with the terms of the industrial instrument. Consequently, the employee had not been dismissed and was precluded from bringing the complaint at this time. The Deputy President did note, however, that

nothing precluded the parties from initiating negotiations in order to resolve their differences to avoid the likely claim when the dismissal does take effect.

For employers

This decision highlights:

- 'Notice' and 'dismissal' are entirely different legal and industrial concepts – the giving of notice does not sever the employment relationship.
- Employees must wait until the end of their notice period (ie when the dismissal takes effect) before they can lodge a general protections dismissal dispute.
- There is no legal obligation on the employer (or the employee) to engage in formal conciliation until the dismissal takes effect (ie during the notice period).

Workplace Relations Highlights (Watch this Space)

The definition of 'small business employers' for the purposes of unfair dismissal laws will come into effect from 1 January 2011. The change simplifies the way in which employees are counted for the purpose of deciding whether an employer has fewer than 15 employees.

The new *Sex and Age Discrimination Bill 2010* was introduced into parliament this month. The Bill establishes breastfeeding as a new, separate ground of discrimination, broadens the prohibition on discrimination on the ground of family responsibilities, and strengthens protections against sexual harassment in the workplace.

This month the *Paid Parental Leave Act 2010* (Cth) came into effect, with payments to commence next January. Employers should get on top of the legislation as soon as possible. See our article in this month's newsletter on parental leave entitlements.

A mine worker who reported to work over the BAC limit set by the company was justifiably dismissed according to FWA. Commissioner Bissett held that the misconduct resulting in the termination was not that he miscalculated how long it took his body to process alcohol, but that he presented for work with a BAC in excess of that specified in the policy, and this was a valid reason for dismissal: *MH v The Respondent* [2010] FWA 7860.