The Advisor

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Interpretation of the JobKeeper provisions – the 'Request' by Employers for Employees to Take Annual leave

Ms Leonie McCreedy v Village Roadshow Theme Parks Pty Ltd [2020] FWC 2480 (13 May 2020)

In one of the few early arbitrated decisions of the Fair Work Commission (**the Commission**) under the new (and temporary) JobKeeper provisions, the Commission has rejected an employee's claim that her refusal to take annual leave when directed to do so by her employer was reasonable and has issued an Order directing the employee '*not to continue to refuse the request made by her employer*'.

Prior to the COVID-19 pandemic, Ms McCreedy was a permanent part-time employee of Village Roadshow Theme Parks (**VRTP**) working 2 days per week. In her 15-hour work week, she earned approximately $375. However, because of COVID-19 restrictions, VRTP was unable to operate its business and stood down a significant part of its workforce, including Ms McCreedy on March 23.

VRTP informed stood down employees that they would be required to take a certain number of days leave per week until their annual leave balance reached a minimum 'floor.' As a permanent part-time employee, Ms McCreedy was required to take one day's leave per week until either her annual leave balance reached four days or September 27. She was told that she must consider and not unreasonably refuse the request. Ms McCreedy was also notified of her eligibility for payments of $750 per week under the federal government's JobKeeper scheme.

Ms McCreedy refused to comply with VTRP's policy as she had intended to use her ten weeks accrued paid annual leave for five holidays planned for 2020 and 2021. Not all the trips had been booked and paid for. She had not submitted formal annual leave requests, though she had received verbal approval for two of the trips prior to being stood down. Ms McCreedy claimed that it was unreasonable of VRTP to reduce employees' annual leave accruals as a means of off-setting the costs incurred by the JobKeeper scheme. She additionally claimed that employees such as herself with considerable accrued annual leave would be disproportionately impacted by this policy.

Commissioner Hunt confirmed that the issue at hand was whether the employee's refusal, and not the VRTP's policy, was reasonable. The Commissioner described as 'extraordinarily unfair' the expectation that Ms McCreedy be entitled to use her paid annual leave for holidays she had not received formal approval for, in accordance with VRTP's annual leave policy. Commissioner Hunt made clear that though Ms McCreedy would be unable to enjoy her holidays using her current annual leave balance, the fact that she has other options available to her – such as requesting leave in advance or long service leave – renders her refusal unreasonable.

Regarding Ms McCreedy's argument that a medical condition was another reason for her refusal, the Commissioner found that it was not a 'serious medical condition, warranting the requirement of a balance of paid annual leave to her above a minimum of two weeks' leave.' However, it was suggested that a serious medical condition, such as that requiring surgery or ongoing treatment and exhausting paid personal leave entitlements, would be a relevant factor in determining whether a refusal to take annual leave is unreasonable.

Commissioner Hunt noted that there is no reason to suggest, as Ms McCreedy had, that the provisions of the Act should not apply to large corporations with 'solid financial positions.' This is because the purpose of the JobKeeper legislation is 'to put eligible organisations into hibernation, to allow for continued employment of eligible employees,' regardless of size.

What does this mean for employers?

- Employers may request that employees eligible for the JobKeeper scheme take annual leave until the balance of days reaches the minimum 'floor' of two weeks.
- In disputes, the onus is on the employee to prove that their refusal was not unreasonable.

No Entitlement to Access Personal / Carer's Leave during a Stand Down

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited [2020] FCA 656 (18 May 2020)

The Federal Court has rejected a claim that Qantas employees should have access to paid personal leave while stood down.

In response to widespread travel restrictions implemented due to COVID-19, Qantas stood down approximately 20,000 employees, many of whom were left without a source of income. A case was then brought on their behalf to the Federal Court by the TWU and the Qantas Engineering Alliance (AMWU, AWU, CEPU), arguing that the employees should retain access to paid personal leave while they are stood down.

However, Justice Flick stressed in his judgment that the right to stand down employees protects employers from liability to pay leave entitlements to employees who cannot usefully be employed. Requiring Qantas to do so would undermine the purpose of the *Fair Work Act* (**FW Act**) by denying Qantas that financial relief.

Justice Flick also emphasised that sick, carers' and compassionate leave are entitlements to be 'relieved from the work which the employee was otherwise required to perform' and intended to act as a form of 'income protection'. When an employee is not working and not receiving income, they therefore have no entitlement to paid personal leave under ss 96 and 105 of the FW Act.

Justice Flick finally considered the unions' argument that s525(b) of the FW Act, which provides an employee is not taken to be stood down if they are 'authorised to be absent from his or her employment' by an employer, applies to employees on personal or compassionate leave. Justice Flick interpreted s525(b) as applying only to absences authorised by the FW Act itself, such as community service, jury service and public holidays.

What does this mean for employers?

- Sick, carers' and compassionate leave are entitlements which presuppose receipt of income.
- While stood down due to a pandemic, employees cannot access paid personal leave as there is no work for them to do and no income to be protected.

Sushi Chain's Award Breaches Lead to Record Fines

Fair Work Ombudsman v HSCC Pty Ltd [2020] FCA 655 (18 May 2020)

The Federal Court has fined the directors of three Sushi Hero shops, and payroll officers employed at Sushi Hero's head office, a total of $891,000 for underpaying and denying access to entitlements to 94 employees between 2015 and 2016.

The Court considered claims that the respondents:

- Paid employees as little as $12 an hour and didn't pay causal loading, annual leave or superannuation.
- Calculated rates of pay in order to keep wages between 20-25% of sales and maximise profit.
- Failed to keep accurate records as required by the *Fair Work Act* and *Fair Work Regulations*, for instance by not providing pay slips to employees in an attempt to keep them 'in the dark' as to their hourly rates of pay.
- 'Reverse-engineered' records when requested to provide them to the Fair Work Ombudsman (**FWO**) in an effort to conceal the underpayments.

Justice Flick stated in his decision that the case centred around 'greed and the exploitation of the vulnerable', noting that most of the employees were young people in Australia on student and working holiday visas and thus likely to be unaware of their entitlements as employees. The respondents, he said, took advantage of this with extensive, 'deliberate' and 'calculated' breaches of the *Fair Work Act*.

The FWO and the respondents reached an agreement as to the penalty amount, which Justice Flick found to be within the range of appropriate penalties. However, he also noted that the Court must not act as a 'rubber stamp' and form its own view as to whether an agreed penalty be imposed. He stressed the importance of both specific and general deterrence, noting that the message to the fast food industry must be that the penalty is not simply the 'cost of doing business'. This was considered especially important given the widespread non-compliance of a significant percentage of sushi businesses audited in 2016.

In this case, despite 'considerable misgivings', Justice Flick imposed a total of $891,000 in penalties in accordance with the agreement. Of importance in reaching this decision were the facts that:

- The FWO endorsed the agreement, given its expertise and experience.
- The respondents eventually made admissions to and cooperated with the FWO.
- The respondents have either reimbursed employees for the amounts they were underpaid or, in the case of employees unable to be identified, paid into the FWO's trust accounts.

It should be noted that the total penalty of $891,000 did not include an application of the Serious Contravention provisions that were introduced in 2017 (and commenced operation after the contraventions). Noting that the Serious Contravention provisions introduced a multiplier on penalties of 10 times, if this case was heard under the Serious Contravention provisions, given the deliberate nature of the offending, it would seem quite likely that the penalties would have been up to $9 million.

What does this mean for employers?

- It is essential that employers ensure compliance with the *Fair Work Act* and *Fair Work Regulations* and keep accurate, up-to-date records.

Clarity of Stand Down Provisions – Stoppage of 'the Business' Activity

Michael Marson v Coral Princess Cruises (N.Q.) Pty Ltd T/A Coral Expeditions [2020] FWC 2721 (25 May 2020)

The Fair Work Commission (**the Commission**) has clarified the circumstances in which an employee will be taken to have been stood down for the purposes of the *Fair Work Act* (**FW Act**). The decision is significant as it comes at a time in which many employees have been stood down due to the COVID-19 pandemic.

Mr Marson was one of many employees stood down by Coral Princess Cruises (**CPC**) because of the federal government's COVID-19 restrictions. These restrictions have halted CPC's trade entirely, resulting in no income and putting on hold many vessel survey and maintenance requirements. Mr Marson argued that his standing down was unlawful under the FW Act as his responsibilities as Marine Superintendent continued to be performed, albeit to a limited degree, by other CPC employees.

In its findings, the Commission firstly set out the requirements for lawfully standing down an employee under s 524(1) of the FW Act:

- The employee must be stood down during a time in which they cannot be usefully employed.
- They must be stood down in one of the following circumstances: industrial action, a breakdown of machinery or equipment the employer cannot reasonably be held responsible for, a stoppage of work for which the employer cannot reasonably be held responsible.
- The employee cannot be usefully employed because of the stoppage.

Stoppage of work

The situation before the Commission was found to fall within the limits of s 524(1), which require that the employer is unable to provide useful work for its employees and as such halts work for a period of time. In CPC's case the primary activity of the business – to carry passengers on cruise holidays – was halted and therefore a stoppage was taken to have occurred, regardless of the fact some administrative functions continue. Therefore, a stoppage is not precluded if there remain some 'limited functions that can be performed' while the business itself is not trading.

The Commission also clarified that a stoppage is not constituted by mere reduction of work. The activity or primary function of the business must cease, due to factors outside the employer's control.

Useful employment

The Commission also considered whether Mr Marson is able to be 'usefully employed' in spite of the stoppage. In making this determination, the first consideration is the amount and nature of the work available. The Commission stressed that a role can be considered useful, but a particular individual cannot. Therefore, though Mr Marson's role is still being performed in a scaled-down way, Mr Marson himself is not considered 'useful' for the purposes of s 524(1).

Another relevant factor in defining useful employment is the 'economic consequence' to the employer. Given the 'extreme economic pressure' of the pandemic, the Commission stated, 'it is difficult to classify an abundance of work as useful.' The Commission concluded that CPC's decision to stand down Mr Marson was not an isolated one; many other employees were stood down, suggesting the decision was made in good faith and based on economic considerations.

What does this mean for employers?

- A reduction of work will not constitute a stoppage of work under s 524 of the FW Act.
- An individual cannot be considered 'useful' for the purposes of s 524(1) of the FW Act. In circumstances where there is a limited amount of useful work available, an employee may be stood down and their remaining responsibilities assigned to another employee.

Changes to the Fast Food Industry Award

The full bench of the Fair Work Commission has approved a change to the Fast Food Industry Award to allow for increased flexibility during the COVID-19 pandemic.

The decision adds a new Schedule H to the award and applies to employees and employers who do not qualify for JobKeeper payments.
These changes were approved in order to help fast food companies 'weather the storm' caused by the pandemic. However, the bench noted that 'COVID-19 restrictions on cafes and restaurants are easing' and as a result, Schedule H will have a temporary operation until July 31 2020.
Under this temporary system, an employer and employee can 'agree to new flexible part-time employment arrangements' which will temporarily replace the standard award arrangements. Under the 'flexible' award, part-time employees and employers must agree on:

- The guaranteed minimum hours of work to be provided and paid to the employee per week (no less than 8 hours).
- The times and days of the week the employee agrees to be available to work the guaranteed minimum hours of work.

Additional hours of work may be offered, above the guaranteed minimum hours, within the employee's agreed availability. These hours are not overtime.

Employees can also be asked by the employer to take paid annual leave:

- For reasons related to the COVID-19 pandemic or Government initiatives to slow its transmission.
- To help the employer prevent loss of employment.
- If the employee still has at least 2 weeks of accrued paid annual leave left after taking the leave.

Employees must consider such a request and not 'unreasonably' refuse it.

Disputes under Schedule H may be arbitrated by the Fair Work Commission.

What does this mean for employers?

- Schedule H adds flexibility to part-time employment, allowing employers to request employees take annual leave where doing so would help avoid further job losses.
- Employers must ensure that an agreement under Schedule H is made 'for reasons attributable to the COVID-19 pandemic and to assist the employer to avoid or minimise the loss of employment'.
- Any agreement under Schedule H must be made 'genuinely', without 'coercion or duress'.

Mondelez High Court listing date

The High Court has set the date for the appeal in the Mondelez case as July 7.

The court will consider whether to uphold the Full Court of the Federal Court's August 2019 decision that Mondelez employees working 12-hour shifts were entitled to 10 days or 120 hours of personal/carer's leave per year of service.

The core issue in that case was the interpretation of the word 'day' for the purposes of calculating leave entitlements under s 96(1) of the *Fair Work Act* (**FW Act**). The Full Court defined 'day' as '*the portion of a 24 hour period that would otherwise be allotted to working*', meaning that the employees were entitled to ten 12-hour shifts of paid personal leave per year (*Mondelez Australia Pty Ltd v. AMWU & Ors, Minister for Jobs and Industrial Relations v. AMWU & Ors*, Case M160/2019).

The High Court will consider a submission from Federal Industrial Relations Minister Christian Porter that the Full Court erred in its interpretation of the word 'day', arguing that it should be constructed as 'an employee's usual weekly hours of work over a 2-week (fortnightly) period.'

Mondelez in its submission argues interpreting the word 'day' as meaning 'average day' (an average working day of the employee in question based on a standard 5-day work week) to avoid serious anomalies and to better reflect the purpose of the FW Act.

What does this mean for employers?

- Until the High Court hands down its decision, employers should calculate leave entitlements in accordance with the Full Court's decision, i.e. that employees are entitled to a minimum of 10 'working days' of personal/carer's leave per year.
- SIAG will update clients once the appeal judgment is handed down.

Workpac Take 2.. Held, Not a Casual Employee Again

WorkPac Pty Ltd v Rossato [2020] FCAFC 84

A Full Court of the Federal Court of Australia has handed down a significant decision pertaining to casual employment. The decision reinforces the risks to exployers around engaging casual employees to perform work that is regular or predictable employment. This is not new territory; however, the decision serves as an important reminder to employers to consider their employment arrangmenets and whether they are optimised to reduced risk to such claims.

Facts

Between July 2014 and April 2018 Mr Rossato was employed by WorkPac to provide labour to the black coal mining industry. This arrangement was one of labour-hire and Mr Rossato was employed on six consecutive assignments/contracts during his employment with WorkPac. WorkPac treated each employment as casual employment and Mr Rossato as a casual employee. Relevantly, this meant that WorkPac paid Mr Rossato a 25% casual loading and he was not entitled to annual leave, personal leave, public holidays and other entitlements associated with permanent employment.

Following a different major decision concerning casual employment and WorkPac (*WorkPac Pty Ltd v Skene* [2018] FCAFC 131), Mr Rossato wrote to WorkPac and claimed that he had not been paid his workplace entitlements an accordance with the *Fair Work Act* (**FW Act**) and the relevant enterprise agreement.

The Question

Noting that the NES provides paid leave entitlements to 'employees, *other than* casual employees', the crux of the decision was whether Mr Rossato was 'other than a casual employee'.

The Court was also required to address Workpac's arguments in the event that the above question was decided against it, including the argument that it was able to 'set off' amounts sought by Mr Rossato against the casual loading that had been paid by it during Mr Rossato's employment.

Decision

In Skene, the Full Court the Full Court found that a casual employment relationship is indicated where there is no 'firm advance commitment as to the duration of the employee's employment or the days/hours the employee will work'.

WorkPac accepted that this was the correct test to be applied to Mr Rossato's case in terms of assessing whether Mr Rossato was entitled to the paid leave entitlements under the FW Act.

Accordingly, the Rossato decision turned on how the test of 'firm advance commitment' is to be assessed and determined.

WorkPac argued that the firm advance commitment was to be found expressly in the contract of employment and that how the parties actually came to perform the employment was not relevant to the test.

The Court did not accept the above argument, noting 'the process of defining the nature of a relationship by reference to its indicia, the course of dealing or the conduct of the parties, and not just the written terms of the contract, are likely to be relevant.'

In other words, it is the substance of the relationship rather than the written contract that will determine whether or not an employee is a casual at law.
The Court held that the correct approach was to assess the contract as a whole – including:

- whether the contract permitted the employer to elect whether to offer employment on a particular day;
- whether the contract permitted the employee to elect whether to work; and
- the duration of the employment.

In application, the Court found that the employment agreed to between WorkPac and Mr Rossato was for an indefinite period (however it was noted a true casual employment can be long term) and was stable, regular and predicable. Each of the six engagements constituted employment with a firm advance commitment of employment. It is noted in the decision that 'an employee's capacity to choose whether or not to work a period of working time demanded or requested by the employer, suggests an absence of the firm advance commitment.'

The characteristics of Mr Rossato's employment that indicated a firm advance commitment as opposed to an unpredictable, irregular, and intermittent arrangement included that:

- each contract was for continuing work in accordance with an agreed pattern of hours;
- the actual hours were pre-programmed in advance according to a fixed roster;
- an implied term of the relationship was that Mr Rossato must perform the rostered hours and could not elect whether or not to work a shift.

Accordingly, Mr Rossato was 'other than a casual employee' and therefore within the ambit of the paid leave entitlements afforded by the FW Act.

WorkPac's 'Set off' argument

In terms of whether WorkPac was able to set off the amounts claimed by Mr Rossato against the casual loading that had been paid, the Court said (amongst other things):

- the entitlements to paid leave have an important temporal connection and authorised an absence from work and a contemporaneous payment – therefore a payment in lieu of the entitlements was not an adequate substitute;
- WorkPac and Mr Rossato cannot contract out of the statutory entitlements to paid leave etc;
- the FW Act includes restrictions around the substitution of paid leave for money.

Workpac Take 2.. Held, Not a Casual Employee Again - continued

Accordingly, there was no capacity for WorkPac to lawfully 'set off' Mr Rossato's paid leave / public holiday entitlements with reference to amounts paid as a casual loading.

WorkPac's Reg 2.03A argument

One further argument raised by WorkPac was to rely on reg 2.03A of the *Fair Work Regulations 2009*. This particular regulation was introduced by the Federal Government in an attempt to avoid 'double dipping' claims, where a casual employee accepted a casual loading and later claimed further payments for paid leave etc on the basis that they were 'other than a casual employee' (ie a regulatory measure to address the Skene decision).

While ostensibly a regulation made to be of direct relevance in matters such as WorkPac/Mr Rossato, the Court found that the regulation had no application. This was because the regulation required four pre-conditions to be satisfied before it could operate. One of those preconditions was that the employee '*makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements*'. The Court held that Mr Rossato was not making a claim to be paid in lieu of NES entitlements, but rather was making a claim to receive his NES entitlement.

What does this mean for employers?

- While the Skene and Rossato decisions have provided guidance on what 'other than casual employees' means under the FW Act, many employers are rightly anxious that they may be exposed to significant liability to their long-term casual workforce.
- The Rossato decision also shines a rather glaring problem in the FW Regulations measures that were passed by the Federal Government to prevent casual employees from double dipping in such claims. To this end, the Morrison Government has flagged legislative change, and has indicated that the issue will be included in the upcoming round table working groups with employer and union representatives.
- We would strongly recommend that employers should closely review their casual employment contracts and long-term casual arrangements. SIAG would be pleased to provide advice on potential liabilities, and how to take proactive steps to avoid exposure to claims of this type.

Union challenges to reduced access period for variations to agreements

The CFMMEU has launched a challenge in the Federal Court to the reduced access period for variations to agreements implemented by the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (**the Amended Regulations**).

Under the FW Act when determining an application to vary an enterprise agreement, the Fair Work Commission must be satisfied the variation was the product of a 'genuine agreement' between the parties.

A step to ensuring 'genuine agreement' is the seven-day period for which employees must have access to a copy of the proposed variation. At the start of this 'access period', employees must also be informed of the time and place of the vote on the proposed variation and the method of voting.

The Amended Regulations shorten the 'access period' from seven calendar days to one calendar day, with the intention of reducing the minimum time required to vary an enterprise agreement during the COVID-19 pandemic. The Amended Regulations are temporary, and will be repealed six months after commencement. The Fair Work Commission will continue to consider applications to vary enterprise agreements with a one day 'access periods' for six months after the repeal of the Amended Regulations.

In its appeal, the CFMMEU submitted to the Court that the Amended Regulations made it 'practically impossible' to achieve informed consent on variations to enterprise agreements.

The CFMMEU appeal was head on 25 May and a decision has not yet been handed down. However, following the CFFMEU filing its notice of appeal, the Government did signal that it would update the Regulations to ensure that any variation that was made via the shortened access period would only be effective for 12 months. The revised regulation is not yet available.

What does this mean for employers?

- Currently, employers who want to make changes to an enterprise agreement may do so by giving employees one day's access to the proposed variation and notice of the vote.
- SIAG will update clients once the appeal judgment is handed down.

Delay to annual MA minimum wage review

The Fair Work Commission (the Commission) has published a review of its statutory powers in relation to the annual wage review against the backdrop of the COVID-19 pandemic due to which almost 600,000 people have lost their jobs and many more are working reduced hours.

The ACTU has proposed a 4% minimum wage increase this year, while the Australian Chamber of Commerce and Industry submitted to the Commission that an increase in the minimum wage would 'place even more jobs at risk by making the cost of employment higher.'

The legislative framework established by the *Fair Work Act* (**FW Act**) requires a national minimum wage order (**NMWO**) to be made and allows for variations to modern award minimum wages as part of an annual review conducted by the Commission. These orders must be made each year by June 30, to take effect on July 1 of the next financial year.

In its review, the Commission most notably considered the proposal that, under S 287(4) of the FW Act, any adjustments may be deferred to a specified day later than July 1 if the Commission 'is satisfied that there are exceptional circumstances justifying the adjustment taking effect on that day.' The ACCI and several employer groups have indicated they will be lodging submissions arguing that this is the approach that should be taken.

Other proposals considered by the Commission include:

- Staged variations and NMWO adjustments
- Exemptions for some employers/employees or reductions in the amount of the increase for some employers/employees from modern award minimum wage and NMWO increases
- Differential variations for different employees/industries (in cases of proved economic incapacity, stressing the legislative intention to ensure uniformity and consistency) and differential dates of effect for the NMWO for different employees/industries

The Commission made clear that, if implemented, exemptions and differential variations would have to be applied for by employers, who would bear a strong onus of proving the circumstances are exceptional.

The FWC found that the legislative framework is unlikely to support variations and NMWO adjustments that are contingent upon economic or other developments (such as a CPI increase of a certain percentage) that occur after the determination is made.

What does this mean for employers?

- The Commission has clarified it has the power to delay the annual minimum wage review – involving variations to the national minimum wage order and modern award minimum wages – if there are 'exceptional circumstances.'
- This is one of several options the Commission flagged as "What can be done" in its discussion paper.

Accord 2.0

Prime Minister Scott Morrison has announced an overhaul in industrial relations in a bid to restart the economy in the wake of the COVID-19 pandemic.

The first step in this process will be a series of working groups, to be chaired by Industrial Relations Minister Christian Porter, to facilitate discussions between government, employer groups and unions. These working groups will concentrate on a number of issues: casual workers, greenfields projects, compliance and enforcement, award implication and enterprise agreement making. The groups will meet through to September. In an address to the National Press Club, Mr Morrison said the review will lead to a 'practical reform agenda' needed to deal with the challenges posed to the economy by the pandemic.

'Our current system is not fit for purpose, especially given the scale of the jobs challenge that we now face as a nation,' he said.

Mr Morrison was critical of the current system, which he said 'has settled into a complacency of unions seeking marginal benefits and employers closing down risks, often by simply not employing anyone.'

The review, Mr Morrison said, will aim to see consensus reached on important issues that will determine the way Australia negotiates economic rebuilding post-COVID-19. 'I want to see employers and employees sit down around a table talk about those very issues and find a way forward,' he said. 'Whatever they agree is more likely to be sustained and maintained into the future.'