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Respect@Work legislation to strengthen workplace sexual harassment laws

On 2 September 2021 the House of Representatives voted to pass the Respect@Work bill, as amended by the Senate.

The new legislation is named the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (**the Act**), and it adopts some of the recommendations of the landmark Sex Discrimination Commission's Respect@Work report.

The Act's central aim is to 'strengthen, simplify and streamline the legislative and regulatory frameworks that protect workers from sexual harassment and other forms of sex discrimination in the workplace,' thereby 'advancing both women's safety and economic security.'

The key provisions of the Act are as follows:

Amendments to the Fair Work Act 2009

The Fair Work Act 2009 (**FW Act**) is amended to expressly prohibit sexual harassment at work, and to provide compassionate leave in circumstances of pregnancy miscarriage.

1. Sexual harassment is now a valid reason for dismissal

Sexual harassment by an employee at work has been added to the FW Act as conduct that can amount to an employer's valid reason for dismissal. 'Sexually harass' has the meaning given by section 28A of the Sex Discrimination Act 1984, which is *unwelcome conduct of a sexual nature that occurs in circumstances where a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated by the conduct.*

Currently, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Fair Work Commission must take into account a range of criteria, including:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees) (s.387(a)).

A note has been inserted at the end of that section, stating:

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:

(a) the person sexually harasses another person; and
(b) the person does so in connection with the person's employment.

2. 'Stop orders' for sexual harassment

The Act extends the Fair Work Commission's power to make stop bullying orders to include the power to make an order to stop sexual harassment in the workplace.

Subsection 789FF(1)(b)(ii) of the FW Act will now relevantly include that:

If the FWC is satisfied that the worker has been sexually harassed at work by one or more individuals, and the FWC is satisfied that there is a risk that the worker will continue to be sexually harassed at work by the individual or individuals;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to…prevent the worker from being sexually harassed at work by the individual or individuals.

As orders of this nature are concerned with preventing future harm, an order may be made in circumstances where a worker has been sexually harassed at work by one or more individuals, and there is a risk that this will continue. This may occur after a single instance of sexual harassment, and does not require repeated or habitual conduct.

An 'anti-sexual harassment' order will cover conduct of not only co-workers, but also employers and visitors to the workplaces. The conduct does not have to occur in the course of performing work duties at the workplace; it will be sufficient that the worker is engaged in conduct connected to work or visiting a place because of their role.

The Act's explanatory memorandum notes that this may include conduct that occurs at a pub or café during a work-related discussion, in vehicles used to travel to work or a work-related event or out of hours if the parties have only a professional relationship.

The start of the anti-sexual harassment regime has been delayed by two months from Royal Assent of the Act, in order to give the Fair Work Commission time to prepare. This will include the publication of a benchbook relevant to the new jurisdiction.

Respect@Work legislation to strengthen workplace sexual harassment laws - continued

3. Paid miscarriage leave

The Act inserts into the National Employment Standards an entitlement to compassionate leave in circumstances of miscarriage.

The definition of miscarriage is 'a spontaneous loss of an embryo or fetus before a period of gestation of 20 weeks'.

The amendment means that section 104 of the FW Act, which sets out the entitlement to compassionate leave, now gives an employee two days of paid compassionate leave (unpaid for casuals) when the employee, or the employee's spouse or de facto partner, has a miscarriage.

Amendments to the Sex Discrimination Act 1984

1. Harassment of a person on the ground of their sex is prohibited

A new provision is inserted into the Sex Discrimination Act 1984 (**SD Act**), clarifying that it is unlawful to harass a person on the ground of their sex. This provision is designed to complement existing SD Act prohibitions against sexual harassment and sex-based discrimination.

Importantly, 'harassment on the ground of sex' is defined as follows:

28AA Meaning of harassment on the ground of sex

(1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:

(a) by reason of:

(i) the sex of the person harassed; or
(ii) a characteristic that appertains generally to persons of the sex of the person harassed; or
(iii) a characteristic that is generally imputed to persons of the sex of the person harassed;
(iv) the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(2) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

(b) the relationship between the person harassed and the person who engaged in the conduct;

(c) any disability of the person harassed;

(d) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;

(e) the seriousness of the conduct;

(f) whether the conduct has been repeated;

(g) any other relevant circumstance.

(3) In this section:

***conduct** includes making a statement to a person, or in the presence of a person, whether the statement is made orally or in writing.*

This provision covers all forms of unwelcome conduct, including both physical acts and verbal or written statements, that a reasonable person would have anticipated would 'offend, humiliate or intimidate' and be 'seriously demeaning to' the person harassed, by reason of the person's sex. Harassing conduct by reason of a person's sex may occur even if the conduct is not sexual in nature. The Act recognises that it may extend to harassment by reason of physical attributes or gendered stereotypes.

'Mild forms of inappropriate conduct' will not meet the required threshold.

2. The coverage of the SD Act is expanded

The Act amends the SD Act to adopt the broader terms 'worker' and 'person conducting a business or undertaking (PCBU)' so that the sexual harassment and harassment on the ground of sex provisions in the SD Act are extended to a range of workers including interns, volunteers and self-employed workers. The Act also extends the application of the SD Act to MPs, judges, and political staffers employed under the Members of Parliament (Staff) Act, who were previously exempted from coverage.

3. Civil action for victimisation

The Act introduces a prohibition on victimisation, which can now form the basis of a civil action for unlawful discrimination under the SD Act, in addition to the existing criminal action.

'Victimisation' will occur when a person 'subjects, or threatens to subject' another person to any detriment on ground that the other person:

Respect@Work legislation to strengthen workplace sexual harassment laws - continued

(a) has made, or proposes to make, a complaint under this Act or the Australian Human Rights Commission Act 1986; or

(b) has brought, or proposes to bring, proceedings under this Act or the Australian Human Rights Commission Act 1986 against any person; or

(c) has given, or proposes to give, any i nformation, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the Australian Human Rights Commission Act 1986; or

(d) has attended, or proposes to attend, a conference held under this Act or the Australian Human Rights Commission Act 1986; or

(e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the Australian Human Rights Commission Act 1986; or

(f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the Australian Human Rights Commission Act 1986; or

(g) has made an allegation that a person has d one an act that is unlawful by reason of a provision of this Part (other than subsection (1));

or on the ground that the first person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g), inclusive (s.47A(2))

A person will not be held liable for victimisation if they can prove that the allegation of victimisation was false and not made in good faith.

4. Complaint period extended to 24 months

The time for making a complaint to the Australian Human Rights Commission under the SD Act has been extended to 24 months from the alleged conduct, instead of the previous time period of 6 months.

What does this mean for employers?

- Employers will need to review and update policies and training in line with the amendment, in order to protect their employees from prohibited conduct and themselves from vicarious liability.
- In particular, employers should ensure their policies and complaints procedures are updated to address:
  - potential dismissal for the valid reason of sexual harassment,
  - the prohibition against harassment on the ground of sex,
  - the extension of potential liability to new categories of worker,
  - the prohibition of victimisation.
- Employers should also update their leave policies to include the new compassionate leave ground of miscarriage.

Rossato ruling overturned

On 4 August 2021, the High Court of Australia (**HCA**) handed down the much-anticipated decision in *Workpac Pty Ltd v Rossato [2021] HCA 23* (**Rossato**) and had the final say on when an employee is a casual employee. The decision, self-described as 'orthodox' (in terms of legal analysis), restores the primacy of contract and the bargain reached between an employer and employee.

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' (where Mr Rossato was hired out by WorkPac to perform work for another company – in this case Glencore) and Mr Rossato was placed on six consecutive assignments / contracts during his employment with WorkPac. During each assignment, Mr Rossato worked in accordance with a roster set well in advance (annually) and worked a regular roster on a 'drive in / drive out' (eg 7 days on, 7 days off).

Each contract referred to Mr Rossato as a 'casual employee'.

WorkPac treated each employment as casual employment and treated Mr Rossato as a casual employee. Relevantly, this meant that WorkPac paid Mr Rossato a 25% casual loading and he did not accrue annual leave, personal leave, compassionate leave, public holidays and other entitlements associated with permanent employment.
Mr Rossato alleged that he was not a casual employee and that he was owed paid leave entitlements by WorkPac.

The Decision being appealed

The Full Court of the Federal Court of Australia (**FCA**) had decided (circa May 2020) that Mr Rossato was not a casual employee and therefore he had been underpaid in relation to entitlements including annual leave.

The FCA held that in assessing the nature of a person's employment regard must be had to the totality of the relationship and not just the terms of the contract between the employer and employee. Therefore, in determining whether there was *'an absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'* (being the accepted test of casual employment), the FCA held that it was relevant to consider the employment that had in fact been created by the parties during the employment relationship and not just the employment that may have been contemplated by the express terms of the contract of employment.

In entertaining Workpac's argument that regard must only be had to the terms of the contract of employment, the FCA considered the express terms of the contract of employment and found that they too contemplated employment that was 'regular, constant, predictable hours fixed long in advance', and therefore did not refer to casual employment.

The FCA also rejected the various arguments that WorkPac advanced in relation to it being able to off-set the quantum owed to Mr Rossato by the fact that it has paid him a casual loading in circumstances where he was not entitled to receive such loading (i.e. accepting that he was not a casual employee).

The Decision of the HCA

Similar to the FCA decision, the HCA's task was to determine how the test of casual employment was to be *applied*. That is, neither decision was about articulating what the test was.

Workpac ran the same argument before the HCA – specifically, that the characterisation of an employee as 'casual' depends only on the express or implied terms of the employment contract and that regard to post-contractual conduct was impermissible. Workpac further submitted that the six contracts that Mr Rossato had received during his employment with Workpac were consistent with casual employment (contrary to the analysis conducted and conclusion reached by the FCA).

Mr Rossato submitted that there was a firm advance commitment as to his working hours, agreed by the roster, such that neither he nor Workpac ever had to confirm or query whether he was required for work or whether he would be attending for work on a particular day. Mr Rossato further submitted that the work he was employed to perform was ongoing and indefinite, stable and predictable.

It is noteworthy that Mr Rossato conceded to the HCA that the 'firm advance commitment' in this case must be for an '*indefinite period*' – meaning that Mr Rossato had to demonstrate that his employment with WorkPac was ongoing and indefinite. The HCA did note in obiter that in a '*different case*' a firm advance commitment for a fixed period *might* be sufficient to demonstrate that the employment was not casual. While the reasons for Mr Rossato's concession are not discussed in the decision, it does appear to have had a bearing on the overall determination of the case.

In considering the submissions of the parties, the HCA made the following observations about the *Fair Work Act 2009* (Cth) (**the Act**):

Rossato ruling overturned - continued

- the Act itself contemplates that a casual employee may be a long term casual employee and have a reasonable expectation of continuing employment on a regular and systematic basis – however, such expectation, however reasonable, falls short of a 'firm… commitment' – and therefore such person will remain a casual employee;

- the search for a *'"firm advance commitment" must be for enforceable terms and not unenforceable expectations or understandings which might be said to reflect the manner in which the parties performed the agreement'*; and

- nothing in the Act inhibits the freedom of parties to enter into a contract for casual employment – rather the Act leaves the making of such an arrangement to be agreed between employer and employee.

In line with the above analysis, the HCA said that the judicial function is to enforce '*binding contractual promises*' and it is not the Court's function to '*substitute for the bargain actually made one which the court believes could better have been made*'.

In setting out the above propositions, the HCA unanimously found that it was in error for the FCA (as well as the FCA in *Skene*) to consider the '*entirety of the employment relationship*' in undertaking the characterisation of employment exercise.

The central proposition from the HCA is therefore, where the parties have committed an employment relationship to a written contract and thereafter adhered to those terms, the process of characterising that employment is to consider only the terms of the contract.

After making this finding, the HCA then considered Mr Rossato's contracts of employment with WorkPac to determine whether the terms established a firm advance commitment to continuing work beyond the completion of an assignment (noting, as above, Mr Rossato conceded that he was required to demonstrate non-casual employment on an ongoing / indefinite basis in order to be successful).

The critical clauses of Mr Rossato's contracts said:

- that the employment was on an 'assignment-by-assignment' basis;

- Mr Rossato was entitled to accept or reject an offer of an assignment; and

- Workpac was under no obligation to offer any further assignments.

It was held that on a 'plain and ordinary meaning' of the provisions of the contracts, the parties had '*deliberately avoided a firm commitment to ongoing employment once an assignment had been completed*'. It followed therefore inescapably that Mr Rossato was a casual employee. The HCA stated:

'…the whole point of the arrangements under which the parties undertook one assignment at a time was that there should be no basis for any suggestion that either of them was providing a firm advance commitment to continuing work in circumstances not marked by indicia of irregularity, such as uncertainty, discontinuity, intermittency and unpredictability.'

The contract was directly inconsistent with a mutual obligation to pursue a continuing working relationship and therefore there was no room for the implication of any such term into the contractual relationship (contrary to aspects of the analysis of White J in the FCA).

Noting the '*inordinate emphasis*' that was placed on the nature of Mr Rossato's work rosters by the FCA, the HCA made some explicit comments on this. Most directly it was said that '*the qualities of regularity and systematic organisation* [of Mr Rossato's working hours] *during the period of each assignment*' were entirely compatible with the notion of 'casual employment' in the Act.

The HCA acknowledged the reality of the situation, in that WorkPac's customer (Glencore) needed a regular pattern of work to be performed on each assignment by the worker and that it would be uncommercial for WorkPac to engage employees on the basis of irregular or discontinuous work patterns. However, the central

Rossato ruling overturned - continued

question in this case was whether there was a contractual promise of work on an indefinite basis, and there clearly was no such promise. It did not matter that Mr Rossato worked the same as a full time employee within the period of an assignment – he needed to be able to demonstrate that he had an enforceable contractual right to be offered work beyond an assignment.

What does this mean for employers?

- As a result of the changes made to the FW Act in March 2021 relevant to casual employment, the HCA's Rossato decision has a limited application.
- However, it is worth noting that the HCA accepted a definition of casual employment that is closely related to the new statutory definition included in the FW Act.
- Employers should ensure that they have reviewed all casual employment agreements to comply with the FW Act requirements and definitions.

Woolworths taken to court for underpayments totalling $1.17 million

The Fair Work Ombudsman (FWO) has commenced court proceedings against Woolworths in relation to 'major underpayments' of its salaried managers, to the sum of more than $1.17 million.

In 2019, Woolworths self-reported that it had underpaid salaried employees more than $390 million over the previous decade, which led to an FWO investigation.

The 70 employees used as a sample in the FWO investigation were underpaid for their work between March 2018 and 2019 and Woolworths rectified those underpayments. However, the FWO alleges that Woolworths:

- Failed to ensure that annual salaries were sufficient when compared to the actual hours worked, leaving their salaried managers significantly underpaid'
- Implemented salary arrangements which did not account for overtime, weekend and holiday rates, meal allowances and annual leave
- Did not make or keep accurate records of overtime hours or the applicable allowances, penalty rates and leave entitlements
- Has not yet full back-paid the underpayments due to a calculation error, leaving the 70 employees still out of pocket

The FWO is seeking orders that Woolworths rectify the underpayments of those 70 managers, including interest and superannuation, and undertake the same process for all other affected employees. It is estimated that, nation-wide, 19,000 salaried managers were employed by Woolworths during the relevant period.

What does this mean for employers?

- It is essential that employers keep accurate records and ensure their policies are up-to-date and compliant with the Fair Work Act. Employers must be able to verify that their employees are receiving their full employee entitlements.

Increase to the national minimum wage and unfair dismissal cap

The national minimum wage has been increased by 2.5% and now sits at $772.60 per week or $20.33 an hour.

Workers covered by hospitality, aviation, tourism and fitness awards, among several others, will receive their pay rise on November 1, in recognition of the continuing effect of the COVID-19 pandemic on their industries.

General retail workers received their wage increase on September 1, and all other workers covered by awards received increases from July 1.

Meanwhile, the high income threshold for unfair dismissal applications was increased on 1 July 2021 from $153,600 to $158,500. The threshold excludes employees who are not covered by an award or an enterprise agreement from making an unfair dismissal claim if they earn more than the threshold amount.

The maximum compensation for unfair dismissal claims has increased from $76,800 to $79,250 – that is, half of the amount of the high income threshold.

What does this mean for employers?

- Employers should ensure that their rates of pay are consistent with the new minimum award rates by the relevant start dates.
- Payroll systems and employee contracts should be updated to reflect these changes.
- Employers are advised, in making decisions in relation to termination of employment, to take into account whether or not the employee's income is within the threshold of the unfair dismissal jurisdiction.