The Advisor

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web: www.siag.com.au phone enquires Australia wide 1300 SIAGHR (1300 742447)

'Casual Employee' and the Fair Work Act 2009 – Statutory Clarity

The pared down *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (**Amending Act**) received Royal Assent on 26 March 2021 and formally took effect on and from 27 March 2021.

As outlined in our previous Advisor, the Industrial Relations Omnibus Bill originally proposed a number of amendments across five key areas of the *Fair Work Act 2009* (**FW Act**), but ultimately only the amendments to casual employment were agreed to and included in the Amending Act.

SUMMARY

The Amending Act includes the following:

- a statutory definition of a 'casual employee';
- a NES casual conversion process including both an employer obligation to offer conversion and a 'residual' employee right to request conversion to permanent employment;
- a statutory 'set off' arrangement that requires a Court to offset a 'claim amount' by monies received by an employee as casual loading that were paid in compensation for the relevant entitlements claimed by the employee to have been not paid (i.e. in the situation where a Court finds that an employee was actually entitled to paid leave because they were not a casual employee); and
- a NES obligation to provide new casual employees with a copy of the Casual Employment Information Statement.

The provisions (particularly those dealing with casual conversion) are detailed and lengthy, and there is some complexity in terms of the processes contemplated by the Amending Act.

'Casual employee' defined

The Amending Act introduces a statutory definition of 'casual employee' at section 15A of the FW Act.

A person will be a 'casual employee' if:

(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

Importantly, under this definition determining whether the offer is made on the basis of '*no firm advance commitment to continuing and indefinite work according to an agreed pattern of work*' is assessed at the time that the offer is made and no regard can be had to the subsequent conduct of the employer and employee. In making such assessment, section 15A(2) provides an exhaustive list of relevant considerations:

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment;

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Section 15A also provides clarity in stating that a casual employee so defined, will remain a casual employee until their employment is converted to full-time or part-time employment (see below for further details) or the employee accepts some alternative offer of employment by the employer and commences work on that basis.

The statutory definition is a significant departure to the common law definition that was considered and applied by the Full Court of the Federal Court of Australia in *Workpac v Rossato* and will provide both employers and employees with more certainty around their employment arrangements.

Casual conversion procedures

The Amending Act has expanded the NES to include a new Division 4A – Offers and requests for casual conversion. As the name suggests, these provisions deal both with an employer's obligation to offer casual conversion and an employee's entitlement to make requests to convert to permanent employment.

The processes are summarised below.

Step 1 – The Offer by the Employer

(i) the obligation does not apply to small business employers (who have less than 15 employees);
(ii) an employer must make an offer to a casual employee if:
  (a) the employee has been employed by the employer for a period of 12 months beginning the day the employment started (the 12 month period); and

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(b) during at least the last 6 months of the 12 month period, the employee has worked a regular pattern of hours on an ongoing basis which without significant adjustment, the employee could continue to work as a full-time employee or part-time employee (as the case may be);

(the above two conditions are referred to as the Service Requirements)

(iii) the offer must be in writing;
(iv) the offer must be for the employee to convert to the equivalent type of employee that they have worked during the last 6 months (or longer) where they have been working a regular pattern of hours on an ongoing basis (this may be full-time or part-time);
(v) the offer must be given within 21 days after the end of the 12 month period;
(vi) the employer does not have to make an offer if there are reasonable grounds not to make the offer and those grounds are based on facts that are known or reasonably foreseeable at the time of deciding not to make the offer;
(vii) reasonable grounds could include the following:

(a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer; or
(b) the hours of work which the employee is required to perform will be significantly reduced in that period; or
(c) there will be a significant change in either or both of the following in that period:

1. the days on which the employee's hours of work are required to be performed;
2. the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period;

(d) making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory;

(viii) if the employer believes that there are reasonable grounds to not make an offer, it must provide a written notice to the casual employee advising the employee that the employer is not making an offer and including the reasons / grounds for not making an offer – this notice must be provided within the 21 day period following the end of the 12 month period.

Step 2 – The Response to the Offer

(i) after an offer is made, the employee must give a written response to the offer within 21 days stating whether the offer is accepted or declined;
(ii) if the employee fails to give a written response within 21 days, the employee is taken to have declined the offer;
(iii) if the offer is accepted, the employer has 21 days to give the employee written notice of:

(a) whether the employee will convert to full-time or part-time employment;
(b) what the employee's hours of work after the conversion will be; and
(c) the day that the conversion will take effect;

(iv) before providing written notice of the above three matters, the employer must discuss the matters with the employee;

Step 3 – The Residual Right of the Employee to Request Casual Conversion

(I) a casual employee may make a request to the employer to convert if:

(a) the Service Requirements are met; and
(b) all of the following apply:

1. the employee has not refused an offer to convert made by the employee during the period covered by the Service Requirements;
2. the employer has not issued a notice that it believes there are reasonable grounds not to make an offer to convert (per Step 1 (vi) above);
3. the employer has not already refused a request to convert from the employee;
4. the request is not made during the 21 day period that the employer has to make an offer (or decide it is not reasonable to do so) to convert;

(ii) the request must be in writing and be given to the employer;
(iii) the request must be for full-time or part-time employment, as per the casual employee's regular pattern of work during the Service Requirements;
(iv) the employer must give the employee a written response within 21 days after the request is given to the employer;
(v) the employer must not refuse the request unless:

(a) the employer has consulted the employee; and
(b) there are reasonable grounds to refuse the request; and
(c) the reasonable grounds are based on facts that are known or reasonably foreseeable, at the time of refusing the request;

(vi) reasonable grounds could include:

(a) that it would require a significant adjustment to the employee's hours of work in order for the employee to be employed as a full-time or part-time employee; or
(a) the other matters contained at Step 1 (vii);

(vii) if the employer grants the request, Step 2 (iii) and (iv) apply.

The Amending Act includes an anti-avoidance provision making it clear that an employer must not vary an employee's hours of work to avoid any right / obligation.

Disputes about casual conversion will fall under the dispute resolution procedures under the applicable modern award or enterprise agreement. Section 66M includes a dispute provision for employees who are award / agreement free.

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Casual Employment Information Statement

One clear and important obligation for employers to be aware of moving forward is the requirement to provide any casual employee who is employed on or after 27 March 2021 a ‘Casual Employment Information Statement’ (**CEIS**). The CEIS must be provided in addition to the standard Fair Work Information Statement (**FWIS**) - before or as soon as practicable after the employee starts employment as a casual employee with the employer. Failure to provide the statements is a contravention of the NES, which can attract a significant pecuniary penalty to the employer and individuals that are involved in the contravention.

The CEIS and FWIS are published by the Fair Work Ombudsman at

https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement

and

https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement.

In relation to existing casual employees (i.e. those employed *prior* to 27 March 2021) as well as small business employers, the guidance on the FWO’s website states:

Small business employers need to give their existing casual employees a copy of the CEIS as soon as possible after 27 March 2021. Other employers have to give their existing casual employees a copy of the CEIS as soon as possible after 27 September 2021.

Casual loading – set off in underpayment claims

In last year’s *Workpac v Rossato* decision ([2020] FCAFC 84), an employee who had been regarded by his employer as casual was held to be entitled to payments for unpaid annual leave. Workpac argued that the liability should be reduced by the amounts paid as casual loading, however its arguments were rejected. Therefore, Mr Rossato was held to be entitled to receive payment for the annual leave in addition to any amounts received as casual loading. This was viewed by some as ‘double dipping’.

The Amending Act introduces a statutory ‘set off’ requirement at section 545A that requires a Court to reduce the ‘claim amount’ (e.g. the amount of the employee’s successful claim of underpayment of annual leave) by an amount equal to the loading amount or an appropriate *proportion* of the loading amount based on the relevant entitlement. This means that if a casual loading of 25% was paid, the Court may decide or a contract may specify that only half of the 25% was paid towards the annual leave entitlement.

While this section applies prospectively, given that a Court considers claims based on underpayments of up to 6 years prior to the claim being made, the new section is likely to have a significant impact – noting that there are a number of class actions on foot seeking to recover significant sums of money for ‘regular’ casuals. It has been reported that the constitutionality of the Amending Act may be challenged to the extent that it proposes to alter the principles around ‘set off’ in such claims. The *Workpac v Rossato* decision is on appeal to the High Court of Australia (https://www.hcourt.gov.au/cases/case_b73-2020) and SIAG will publish a Circular when the decision is released.

What does this mean for employers?

- Employers should ensure that casual employment contracts and template contracts are updated to include and comply with the definition of ‘casual employee’ – SIAG can assist in such review.
- It is crucial to review employment practices with regard to casual employees – including by ensuring that the CEIS is provided.
- Employers will need to have a solid understanding of the new requirement to offer conversion to permanent employment including what and when to make an offer and related matters.

Insecure Work the Focus of ALP's IR Policy

The Australian Labor Party (**ALP**) released its industrial relations policy platform in February, focusing on the objectives of improving job security, delivering better pay and improving the fairness of the industrial relations system in Australia.

'Labor's Secure Australian Jobs Plan' contains the following elements:

- Make job security an object of the Fair Work Act 2009 (Cth) (**FW Act**) so that it becomes a core focus for the Fair Work Commission's (**FWC**) decisions.
- Ensure that the FW Act provides coverage and protection for all forms of work.
- Legislate a fair, objective test to determine when a worker can be classified as a casual employee to ensure a clearer pathway to permanent work.
- Limit the number of consecutive fixed-term contracts an employer can offer for the same role, with an overall cap of 24 months or two consecutive contracts, whichever comes first.
- Create more secure employment in the Australian Public Service where temporary forms of work are being used inappropriately.
- Use government procurement powers to ensure taxpayers' money is used to support secure employment.
- Work with state and territory governments, unions and industry to develop portable entitlement schemes for annual leave, sick leave and long service leave for Australians in insecure work, such as casuals and contractors. States have already begun this process in the cleaning, construction and community services industries.
- Ensure that workers employed through labour hire companies receive no less than workers employed directly by an employer.
- An aim of 26 weeks of paid parental leave at full pay, with superannuation payable during parental leave to be funded by government and employer contributions.
- Abolish the federal government's Registered Organisations Commission and the Australian Building and Construction Commission.

The Coalition's response has been that the ALP's policies could result in a "$20 billion tax on business" – and it has been especially critical of the proposed portable entitlement scheme for casuals and contractors. Employer group AMMA has also been vocally critical, stating that the policies would incur significant new costs and regulation for Australian businesses, whilst failing to encourage investment or create jobs during the nation's post-pandemic recovery.

What does this mean for employers?

- If elected, the ALP has promised to make a number of significant changes to the current IR system. In particular, the designation of job security as a central component of the FWC's decisions and redefining 'casual' employment would extend the rights of workers and have significant implications for employers who employ casual staff.

Respect at Work: Federal Government outlines plan for safe Workplaces

The federal government has announced that it will accept, to some extent, all of the 55 recommendations contained in the landmark Respect@Work report.

The government's plan, entitled 'A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces' was released on 8 April 2021.

It comes in the wake of several high-profile allegations of sexual harassment and assault made against federal politicians and the still-ongoing investigation into parliamentary workplace culture by Sex Discrimination Commissioner Kate Jenkins.

The Respect@Work report

The report was handed down in January 2020. In her foreword, Commissioner Jenkins noted that while Australia was once 'at the forefront of tackling sexual harassment globally… Australia now lags behind other countries in preventing and responding to sexual harassment.' Fully implementing the 55 recommendations in the report was a core demand of those who protested and petitioned the government as part of the 'March 4 Justice' earlier this year.

Key recommendations

1. Changes to the Sex Discrimination Act 1984 (SD Act)

The government agreed to amend the SD Act to ensure that it applies to sexual harassment.

The Commission recommended that the SD Act be changed to ensure that:

- the objects include 'to achieve substantive equality between women and men';
- sex-based harassment is expressly prohibited;
- creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited;
- the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed;
- the current exemption of state public servants is removed.

While agreeing in principle with the recommendation, the government has only committed to amending the SD Act to ensure greater alignment with model work, health and safety (**WHS**) laws.

The government stopped short of agreeing to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation. They argued that there is currently a positive duty under WHS laws to ensure all persons are not exposed to health and safety risks, including the risk of being sexually harassed, and were reluctant to make any further changes which might add complexity or uncertainty to the system without further consideration. This has been criticised by Commissioner Jenkins as a 'missed opportunity.'

2. Changes to employment law

The government agreed to:

- Amend Section 387 of the *Fair Work Act 2009* (Cth) (**FW Act**) to state that sexual harassment can be conduct amounting to a valid reason for dismissal.
- Amend the definition of 'serious misconduct' in the Fair Work Regulations to include sexual harassment.
- Clarify that a 'stop bullying order' in the Fair Work Commission is available in the context of sexual harassment. The government did not agree to create a 'stop sexual harassment order', arguing that clarifying the scope of the existing 'stop bullying order' would achieve the same aim with greater simplicity.
- Ask the Fair Work Commission and Fair Work Ombudsman to update their existing guidance for unfair dismission and workplace rights respectively, and develop additional guidance materials.

3. Uniformity across jurisdictions

The government agreed to work with state and territory governments to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency with the SD Act (where possible) and without limiting or reducing protections.

Respect at Work: Federal Government outlines plan for safe Workplaces

4. Complaint period extended to 24 months

The government agreed to amend the *Australian Human Rights Commission Act* to give victims of alleged unlawful discrimination 24 months from the time of the alleged unlawful discrimination to come forward with their complaint, extending the current 6 month timeframe in which a complaint can be lodged.

The response

ACTU President Michele O'Neil has criticised the government's roadmap, saying that the government 'sat on this report for over 12 months, and having been shamed into actually responding, they have the ignored the most important recommendations of the report – recommendations that would have delivered real change at the workplace.'

A joint statement by the ACTU and gender equality groups calls on the federal government to enact meaningful change in the following areas before or during the next sitting of Parliament:

- strengthen health and safety laws to require employers to tackle the underlying causes of sexual harassment at work;
- prohibit sexual harassment within the FW Act;
- provide a 'quick, easy, new complaints process';
- provide employees with 10 days paid family and domestic leave;
- strengthen the Sex Discrimination Commissioner's powers to decide to investigate industries and workplaces which are 'rife with sexual harassment';
- impose a positive duty on employers to take steps to eliminate sexual harassment;
- ratify International Labor Organisation Convention 190, which deals with eliminating violence and harassment at work.

What does this mean for employers?

- The government has indicated it hopes to have legislation drafted giving effect to the changes by the end of June.
- The Federal Government's approach to the implementation of Respect@Work recommendations has engendered a range of reactions across the political spectrum. Nevertheless, the changes will have an impact on the way sexual harassment is dealt with in workplaces across Australia. While a positive duty on employers to eliminate sexual harassment has not been adopted, the inclusion of sexual harassment in the definition of serious misconduct, and clarification of sexual harassment as a valid reason for dismissal, will empower employers to more confidently terminate the employment of employees where claims of sexual harassment have been substantiated.

Guidance on Compulsory Vaccinations for Employees

Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156 (20 April 2021)

An employee who failed to comply with a lawful and reasonable direction to have a flu shot was dismissed for a valid reason, according to a recent Fair Work Commission (**FWC**) decision.

Due to the high level of interest in the decision, Deputy President Nicholas Lake has cautioned that the decision turned on the particular facts of the case, stating that his reasoning 'is relative to the influenza vaccine in a highly particular industry' and that 'An attempt to extrapolate further and say that mandatory vaccination in different industries could be contemplated on the reasons [contained in the decision] would be audacious, if not improvident'.

The unfair dismissal application concerned the employment of a child care worker who had been employed by Goodstart for 14 years. In June 2020, Goodstart published a policy mandating influenza vaccines, unless employees had 'a medical condition which makes it unsafe for them to do so'.

The employee was not able to obtain satisfactory medical evidence, despite visiting several doctors to support her claim of, among other things, a 'sensitive immune system'.

The employer's decision to dismiss the employee was based on its assessment of incapacity to perform the inherent requirements of the job, rather than on misconduct for failing to comply with a lawful and reasonable direction.

DP Lake was critical of that reasoning, and stated, 'As will be seen throughout my consideration, I find this to be an unfortunate choice by [Goodstart]. I say this because I am not satisfied on the material before me that the [worker] lacked capacity to perform the inherent requirements of her role'.

Nevertheless, he concluded that, 'I am satisfied however, that a valid reason for dismissal exists, by virtue of [her] conduct in failing to comply with the lawful and reasonable direction of [Goodstart] to be vaccinated against influenza'.
In her application, the employee argued that the mandatory vaccination policy represented an unlawful assault and battery, which was rejected. The decision states,

'It is clear that [the worker] never actually received the vaccination; she asserted her right not to be vaccinated …Battery requires 'the defendant doing an act which causes physical contact with the plaintiff'. No contact with the [worker] was alleged at any point and I am not satisfied the action would be successful'.

Ultimately, the FWC's decision turned on the employee's inability to provide evidence that the vaccination would put her at genuine risk. It found that the mandatory vaccine policy was reasonable in an industry that involves caring for children, and the associated hygiene concerns.
The employer accepted several employees' requests for exemption on medical grounds, which were substantiated by appropriate evidence.

What does this mean for employers?

- In the absence of legislation or government direction as to mandating vaccines in particular industries, the question of lawful and reasonable directions must clearly be determined on a case-by-case basis.
- This decision gives an indication of how the FWC is likely to approach unfair dismissal cases brought about by the refusal of an employee to receive the COVID-19, amongst other, vaccinations.
- SIAG recommends seeking advice before implementing a mandatory vaccination policy, or making decisions in respect to employees who refuse to comply.

Hewlett Packard must pay sales commission to top employee

Hewlett Packard Pty Ltd v Subasic [2021] ACTCA 3 (19 February 2021)

In a decision that confirms that employers do not have an absolute discretion to amend the terms of bonus or incentive schemes, Hewlett Packard (**HP**) has been ordered to pay a former star salesperson more than $360,000 in unpaid commissions.

Facts

Ms Subasic was a salesperson at HP and between November 2009 and April 2010, she achieved over 500% of her budgeted sales target. In accordance with the terms of HP's incentive scheme, Ms Subasic was entitled to a commission of $446,250.39.

Ms Subasic's contract stated the following in relation to an incentive scheme:

> 'You are invited to participate in our Base Plus Program that includes a Target Incentive Amount (TIA) of $57,000 per annum in additional to your base pay. The Program and the TIA are subject to change or cancellation at [the employer's] discretion'.

The details of the program were set out in a separate policy document and Sales Letter, and included a term that incentive payments were not subject to caps. The purpose of the system was to reward strong sales performance and the possibility of higher payouts for high-achievers was acknowledged at the time of implementation. Sales staff were told that 'there [would] be a management review process for exceptionally high performance' and there were specific triggers for when such a review would be conducted.

Ms Subasic's high performance triggered such a review in February 2010 and, in May 2010, HP conducted a review and decided to retrospectively impose a cap on the incentive payment. As a result, HP paid Ms Subasic $136,500 commission, equivalent to 350% of her sales target, rather than the $446,250.39 which Ms Subasic believed she was entitled to under the incentive scheme.
At trial, Ms Subasic successfully argued that HP breached its employment contract by retrospectively capping the incentive payments in a manner not authorised by the contract.

HP appealed the decision to the ACT Supreme Court, arguing that:

1. It was clear from the employment contract that the incentive program and payments were discretionary. The details of the program, contained in the other policy documents, were mere guidelines which did not create a contractual right.
2. HP was permitted to review employee performance and as a consequence of that review cap the incentive payment at 350%.

Decision

The Court found that Ms Subasic was contractually entitled to participate in and receive payments as part of the incentive scheme, the targets of which she met.

The Court also stated that HP's ability to 'change or cancel' the policy at any time, and the potential for high achievers to trigger a review, did not confer an absolute right to impose a cap on the incentive payments, nor to do so retrospectively.

Instead, the discretion was limited by the express terms of Ms Subasic's employment contract, which entitled Ms Subasic to receive payment for her participation in the incentive scheme. Any amendments to the scheme must be exercised 'honestly and conformably with the purpose of the contract' which had not occurred in this case. The purpose of the policy, the Court said, was to provide an incentive for higher performance. The existence of a general discretion to impose a cap with retrospective effect would undermine this aim.

Further, the Court found the employment contract contained an implied term that the discretion be exercised in good faith and not 'arbitrarily' or 'capriciously'. The Court drew attention to the fact that the cap was imposed after the work that entitled Ms Subasic to the payment was complete. It also noted that Ms Subasic exceeded her sales quota in February 2010 to the extent that should have, but did not, lead to a review and was not informed that further sales beyond the trigger threshold of 350% would not be rewarded. On the contrary, in February 2010, HP sales employees were encouraged to 'aggressively pursue sales' and 'exploit what HP clearly understood to be a bullish commercial environment.' For these reasons, the Court concluded, the discretion was clearly not exercised in good faith.

Orders

HP was found to be in breach of its employment contract and ordered to pay Ms Subasic the remaining unpaid compensation plus interest.

What does this mean for employers?

- The decision confirms that reference to an employer's discretion to change a bonus system or structure does not provide the employer with unfettered discretion to do so.
- Notwithstanding any express terms, there is also an implied term for employers to exercise any discretion in good faith. Arbitrary capping of incentives, such as occurred in this case, amounts to a breach of a duty to act in good faith.

Employee recredited with unfairly withheld personal leave

Gonzalez v The Australian Capital Territory (Discrimination) [2021] ACAT 13 (25 February 2021)

A court has ordered the ACT government to re-credit an employee with almost 130 hours of paid personal leave after she claimed discrimination on the basis of parental responsibilities.

Facts

Ms Gonzalez lodged a complaint with the ACT Human Rights Commission alleging her employer, the ACT Community Services Directorate (**CSD**), discriminated against her on the grounds of parental responsibilities. In January 2019, CSD had directed her to work her core hours of 8.30am to 4.51pm as a result of a dispute regarding timesheets and to 'ensure others might be there to observe her attendance.' Ms Gonzalez argued that being required not to attend work prior to 7.30am had an impact both on her ability to care for her children and her health and wellbeing.

In a letter written as part of a conciliation agreement, CSD deputy director general Ms Sabellico acknowledged the 'personal stress, anxiety and difficulties that imposing a strict 7.30am to 3.30pm work day had on [Ms Gonzalez]' and that 'an avenue … to seek ad hoc changes to this schedule was not managed effectively or in a timely way'.

CSD agreed to recredit Ms Gonzalez with a total of 15 days (110.25 hours) personal leave, assessed by Ms Sabellico to be a 'reasonable level of leave' that 'reflects the times that may have been able to be managed by a level of flexibility on an ad hoc basis.' CSD did not, however, accept that the imposition of a 7.30am to 3.30pm standard working day was 'in any way inappropriate…given the circumstances at the time and the need to effectively structure and manage [Ms Gonzalez's] standard work arrangements.'

Ms Gonzalez argued at the tribunal that she was instead entitled to 238.5-hours (31 days) re-credit based on her medical certificates.

Decision

The ACT Civil and Administrative Tribunal acknowledged that the original conciliation agreement 'may have been more felicitously drafted', given it did not give a precise mechanism for calculating the amount of leave to re-credit. However, he considered it obvious that any assessment should be done in a 'reasonable manner', considering all relevant materials including medical certificates.

CSD did not re-credit all of the hours supported by medical certificates and argued that its lesser assessment was reasonable for the following reasons:

- The claims may also be the subject of a workers compensation claim.
- The lesser amount 'reflects the times that may have been able to be managed by a level of flexibility'.
- The lesser amount reflected the fact that the agreement to re-credit leave was a compromise.

Senior Member Meagher concluded that 'if any of these unstated ideas were to permit the [ACT Government] to allow less than what was assessed as leave, taken for which there were medical certificates, that should have been stated' and an objective set of criteria identified.

Senior Member Meagher also dealt with Ms Sabellico's claim that the leave may have been caused by stress related to an investigation into Ms Gonzalez's timesheets (which led to the direction to work her core hours) and not the changed hours themselves. He deemed this distinction artificial, as the stress of the investigation and changed hours were 'interdependent' and 'the inflexibility was a direct result' of the investigation itself.

The order

In assessing the amount to re-credit, Senior Member Meagher had 'regard to the existing leave records and the time for which there is a medical certificate.' He calculated a total of 34 days personal leave were supported by the medical certificates (255 hours); however, in her submission Ms Gonzalez had assessed it at 238.5 hours, which was the amount the Senior Member Meagher settled on. This amount was reduced by the 110.25 hours already agreed to and Ms Gonzalez was re-credited an extra 128.25 hours.

What does this mean for employers?

- Because of a negotiated settlement there was no finding or admission of liability in this case for discrimination on the basis of parental responsibilities. However, the case does highlight the need for employers to consider requests for flexible working arrangements on a case by case basis and in accordance with genuine operational requirements.
- The Tribunal in this case stressed that the assessment of the amount of leave owing in cases of underpayment must be 'reasonable'. Employers must not make reductions for reasons that are unsupported by documentary evidence.

Employee denied meal allowance for voluntary overtime

Princes Linen Services Pty Ltd v United Workers' Union [2021] FWCFB 1903

A Full Bench decision of the Fair Work Commission (**FWC**) has interpreted an enterprise agreement to find in favour of an employer who refused to pay a meal allowance to an employee who agreed to work overtime.

Ms Ly was a weekly employee of Princes Linen Services (**PLS**), who was scheduled to work from 7.00am to 3.30pm on the day in question. During her shift, her supervisor asked if she wanted to work additional hours at overtime rates, which she agreed to, and she consequently finished work at 5.30pm.

The question for the FWC to consider was whether Ms Ly was entitled to be paid a meal allowance, pursuant to the following clause:

> "An employee other than a shift worker who is required to work two (2) hours overtime … without being notified on the previous day or earlier that he will be so required will receive an allowance ..."

The case centred on the correct interpretation of the word 'required' in the context of the meal allowance clause. PLS argued that 'required' implies an 'imposition or directive', without which employees are not entitled to the meal allowance. It contended that Ms Ly was not so required, but simply asked if she wanted to work overtime.

Ms Ly, on the other hand, argued that if an employer 'needs the work to be done', then the meaning of 'required' will be satisfied. At first instance the FWC agreed that Ms Ly was entitled to the meal allowance, leading PLS to appeal the decision.

Interpretation of 'required'

On appeal, the Full Bench made the following findings:

1. The clause is drafted in such a manner that 'the requirement to work overtime is laid at the feet of the employee.' The focus is on an employee who is required to work and not an employer who needs work done.
2. The purpose of the provision is to compensate an employee who has, due to a lack of notice, been 'taken by surprise in the requirement to work overtime and, as such, has no opportunity to plan [their meal] ahead' and would otherwise have to pay for their own meal out of pocket.
3. The proper construction of the clause requires it to be read in light of the relevant overtime clauses, which recognise a distinction between employees who volunteer to work overtime in response to a request and those who are required by an employer to work overtime in the event there are not enough volunteers.

The Full Bench therefore construed 'required' as a compulsion or directive to work the additional hours.

Was Ms Ly required to work overtime?

Ms Ly's claim that the inherent power imbalance that exists between an employer and employee means employees cannot refuse an employer's request, thereby turning it into a compulsion, was found to be unsupported by either evidence or the terms of the Agreement.

The Full Bench concluded that it 'is clear that there was no directive or compulsion for Ms Ly to work the over time. A question was put to her if she wanted to perform the work and she accepted that request.' Consequently, Ms Ly was not required to work overtime and not entitled to be paid a meal allowance.

What does this mean for employers?

- The meaning of 'required' is pivotal to the interpretation of many industrial instruments and employment contracts, particularly in the context of penalties and allowances associated with overtime - and this decision is useful guidance for employers in determining when those entitlements will apply.
- The Full Bench agreed to hear the appeal because it is in the public interest to ensure that 'enterprise agreements are properly construed and applied', and the decision serves as a reminder of the importance of careful drafting for all employment arrangements – whether they be employment contracts or industrial instruments.