STEVENS & ASSOCIATES

LAWYERS

"VISION IN THE WORKPLACE"

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In this edition of "Vision in the Workplace" we look at the third Minimum Wage Decision and the revival of the ability to amend Pre-Reform Certified Agreements. We also look at a recent decision of the Western Australian State Administrative Tribunal regarding parental leave and restrictions on dismissing employees, and a Federal Magistrates Court judgment regarding the interpretation of what amounts to dismissing a worker for a prohibited reason.

The 2008 Australian Fair Pay Commission Decision

The Australian Fair Pay Commission ("**The Commission"**) recently handed down its third Wage-Setting decision (**"the Decision**"). The Decision has raised the Federal Minimum Wage by $21.66 per week to $543.78 per week, being $14.31 per hour. The Decision has also raised the Australia Pay and Classification Scales by approximately $21.66 per week ($0.57 per hour).

The Decision will take effect on the first pay period on or after 1 October 2008 and will flow onto junior employees, people in training arrangements and workers with a disability – some 1.3 million workers.

This decision also ends the deferral of the 2007 wage increases in the drought affected agricultural sector, meaning those employees will be entitled to both the 2007 and 2008 increases.

Chairman of the Commission, Professor Ian Harper, said the announcement was the third increase in minimum wages made by the Commission, and follows an increase of $10.26 per week in July 2007. Professor Harper stated the wage rise, together with relevant tax and social security changes, will provide low-income households with real increases in disposable income.

Professor Harper also stated that in making the decision, *"the Commission has sought to balance a range of key trends and developments in the economy, including inflation, employment conditions and factors affecting the safety net for low-paid workers."* He believes that *"the decision will only have a minor impact on wage and inflation outcomes on the economy as a whole."*

The Commission has only one remaining decision next year before it is abolished and its minimum wage fixing function taken over by Fair Work Australia.

For further information on the Decision, to check whether your wage rates are affected by the Decision or are correct, please contact Nick Stevens or Alicia Mataere.

Amendments of Pre-Reform Certified Agreements

The introduction of the Federal Government's first round of legislative changes under its *Forward with Fairness Policy,* has revived the ability to vary and extend Pre-reform Certified Agreements (**"Pre-reform Agreement"**) for up-to three years. There is a possibility that the power may extend further, allowing a variation of the parties to the agreement, for example, including new parties not originally bound by the Pre-reform Agreement.

The ability to vary certified agreements existed prior to the WorkChoice amendments of 2006, in the now repealed section 170MD(1). The now repealed section 170MD(1) of the Workplace Relations Act 1996 (Cth) ("**the Act**") allowed the parties to "vary the agreement" in writing and seek the approval of the Australian Industrial Relations Commission (**"the Commission**").

With the introduction of the *Workplace Relations Amendment* (*Transition to Forward with Fairness) Act* 2008 (**"the Amending Act"**), a new clause has been inserted in the Act which allows the parties to apply to the Commission to "vary the terms" of a Pre-reform Agreement. In recent months, there have been a number of cases which have used this clause to extend the duration of a Pre-reform Agreement, backdate pay increases and provide monthly and annual production incentives.

Although the Amending Act has expanded the powers of the Commission, the Commission still does not have the ability or power to certify agreements – this remains with the Workplace Authority.

Prior to considering any variations to Pre-Reform Agreements, employers should note that Pre-reform Agreements may unintentionally contain prohibited content and unintentionally incorporate an underlying industrial award. Accordingly, care should be taken in considering any such variations or requests.

For more information on varying your Pre-Reform Certified Agreements, including precautions to guard against exposure to unexpected obligations or potential penalties for prohibited content, please contact Nick Stevens or Alicia Mataere.

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Employer Ordered to Pay Damages to a Dismissed Pregnant Employee

A Full Bench of the Western Australian State Tribunal ("**the Tribunal**") has awarded damages in the sum of $7869.80 and $2500 for hurt and humiliation in favour of a pregnant employee (**"the Employee"**) who was dismissed for alleged poor performance and excessive sick leave absences, just weeks before she became eligible for unpaid maternity leave.

Within six (6) weeks of the Employee advising her employer of her pregnancy, a new employee was employed, whom the Employee was required to train to take over her role whilst she was on maternity leave.

The Employee had taken sick leave before becoming pregnant, but took further sick leave afterwards, to the point where she used up all her sick leave entitlements. By agreement with the employer, the Employee began using her annual leave entitlement when ill.

In early July 2007, the Company's HR manager told the Employee that it was monitoring her phone and internet usage and that it had become apparent that she was using both for personal reasons. She did not deny personal use but maintained it was not excessive.

The HR manager also complained about the Employee's late arrival at work. The Employee accepted she had been late on occasions, particularly since her pregnancy, but said she made up the time by the end of the day.

The HR manager then issued a written disciplinary notice about the Employee's performance. The disciplinary notice related to lateness and internet/phone usage. Later, the Employee tore a ligament and took further sick leave. Soon after the Employee returned, the HR manager dismissed the Employee for unsatisfactory work performance.

A Full Bench of the Tribunal held the Company did not genuinely consider the Employees' performance was "*so unsatisfactory as to warrant termination.*" Finding the real reason for the termination was "*the amount of sick leave she took once pregnant.*" Further adding, the "*apparent haste*" of the dismissal can "*only be plausibly explained by her impending entitlement to maternity leave.*"

For more information or assistance in managing your employee's performance and/or parental leave, please contact Nick Stevens or Alicia Mataere.

Complaints to WorkCover NSW not Protected by Freedom of Association Provisions

The Federal Magistrates Court has determined that sacking a worker for making a complaint to WorkCover NSW is not a prohibited reasons under section 793 of the Workplace Relations Act 1996 (Cth) (**"the Act"**), which deals only with freedom of association breaches. A former employee claimed his dismissal in May 2007 was due to the fact that he threatened to complain to WorkCover NSW about his employer's treatment of him.

Section 793 of the Act prohibits termination of an employee because they have made or are intending to make an inquiry or complaint to "*a person or body having the capacity under an industrial law to seek compliance with that law or the observance of a person's rights under an industrial instrument.*" The Employer argued even if the conduct was proven, it did not fall foul of section 793, as a complaint to WorkCover NSW had nothing to do with the attached freedom of association provisions under Part 16 of the Act. The Employer further claimed that WorkCover NSW was not a "*person or body having the capacity under an industrial law to seek compliance with that law.*"

Federal Magistrate Cameron agreed with the Employer stating an interpretation of section 793(1)(j) that would encompass an inquiry or complaint for a body such as WorkCover NSW "*would not be one which promoted the purpose*" of the Act.

Federal Magistrate Cameron stated only one construction of section 793 of the Act was open, "*conduct must involve an infringement of a complainants rights of freedom of association before it will be classed as prohibited under s. 739(1)(j).*" The Employee's complaint contained no freedom of association element. Federal Magistrate Cameron also held that even if the Employer had terminated the Employee for threatening to contact WorkCover NSW it would not be a prohibited reason within section 793.

Moreover, Federal Magistrate Cameron stated that WorkCover NSW was not a "*person or body having the power under an industrial award to seek compliance with an industrial law*" WorkCover NSW was not an industrial association as contemplated by section 793 of the Act.

For further information or assistance in dealing with complaints made by your employees, please contact Nick Stevens or Alicia Mataere.

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