

“VISION IN THE WORKPLACE”

Issue Fifty Three, December 2010

In this issue of *Vision in the Workplace*, we look at two (2) decisions of Fair Work Australia dealing with salary sacrifice arrangements and a decision which finds an employer being able to reduce an employee's redundancy entitlement by half. We also look at occupational health and safety statistics released by the WorkCover Authority in New South Wales. Finally, we provide you with the new definition of “small business” employer for unfair dismissal purposes which takes effect from 1 January 2011.

Salary Sacrificing and Minimum Wages

Vice President Lawler of Fair Work Australia (**'FWA'**) has handed down a decision clarifying the legality of salary sacrificing arrangements (**'the Decision'**). The Decision involved an award covered employee who earned an annual salary of \$80,261.64. The employee made a request to their employer to salary sacrifice \$39,996.00 of their annual salary to be paid as employer contributions into their superannuation fund. Accordingly, the employee would receive a direct monetary annual salary of \$40,265.64.

The Modern Award which covered the employee specified that the annual minimum wage for the employee's particular classification was \$58,850.00. The employer refused to allow the employee to salary sacrifice on the basis that the direct monetary amount of \$40,265.64 was less than the minimum wage provided in the Modern Award and therefore contravened section 323(1) of the *Fair Work Act 2009 (Cth)* (**'the Act'**) which provides that “an employer must pay an employee amounts payable to the employee in relation to the performance of work; (a) in full (except as provided by section 324); and (b) in money by one, or a combination of the methods referred to in subsection (2) [i.e. cash/cheque/electronic transfer etc.]”.

Section 324(1) of the Act states “an employer may deduct an amount payable to an employee in accordance with subsection 323(1)” where the “deduction is authorised in writing by the employee and is principally for the employee's benefit” or the deduction is authorised in accordance with a modern award, enterprise agreement or relevant law. Pursuant to Note 1 to section 324 of the Act, a deduction in accordance with a salary sacrifice under which an employee chooses to forego an amount payable but receives some other form of benefit or remuneration will be permitted if it is made in accordance with this section 324 of the Act.

In considering sections 323 and 324 of the Act, Vice President Lawler stated, to comply with the same, a salary sacrifice arrangement will have to be “genuinely assessed as advantageous by the employee and genuinely agreed to.” Vice President Lawler in finding the salary sacrifice arrangement was consistent with section 324 of the Act stated, these arrangements “cannot properly be seen as undermining the safety net because the employee still derives the full benefit of the minimum award rate of pay albeit that it better suits the employee to receive part of the benefit of the minimum award rate of pay in employer payments to a third party on the employee's behalf.” However, an arrangement where an employer compels an employee to agree to “grossly excessive deductions” will most likely undermine the safety net.

If you would like advice on salary sacrificing arrangements or minimum wage rates, please contact Nick Stevens, Megan Bowe or Liza Isho.

Season's Greetings from Stevens & Associates Lawyers

Stevens and Associates Lawyers celebrated the end of the year by climbing the iconic Sydney Harbour Bridge!

Stevens and Associates Lawyers wish you a happy Christmas and safe New Year. It has been a pleasure working with you in 2010 and we look forward to working with you in the coming year.

Stevens & Associates Lawyers' office will be closed from midday Friday, 24 December 2010 and will re-open on Tuesday, 4 January 2011.



Nick and the team enjoying the view from the Bridge.

Employer Succeeds in Reducing Redundancy Payout by Half

Commissioner Asbury of Fair Work Australia (**'FWA'**) has handed down a decision which clarifies the circumstances in which FWA may use its discretionary power to reduce redundancy payments.

The case involved a company that offered a redundancy package to an employee which included arranging an interview with an alternate employer following the redundancy. The company sought a reduction in the redundancy payment it owed to the employee pursuant to section 120 of Act.

Section 120(1)(b) of the Act provides a discretionary power for FWA to vary redundancy entitlements where an “employer obtains other acceptable employment for the employee or cannot pay the amount”.

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Commissioner Asbury cited the Full Bench decision of the Australian Industrial Relations Commission (**'the AIRC'**) in *Derole Nominees Pty Ltd and ACM (1990) 140 IR 123* (**'the Derole Case'**), where it was held that the intention of the meaning of "obtaining alternative acceptable employment" within an Award was "not to impose an absolute test of the employer's ability to 'obtain' alternative employment but [rather refers] to an action which causes alternative employment to become available to the redundant employee. The Employer must be a strong moving force towards the creation of the available opportunity." [emphasis added]

Commissioner Asbury also relied on the Derole Case to determine what constitutes "acceptable alternative employment" which found "acceptable" employment is determined objectively and does not mean any employment but employment "being of like nature; the location must not be unreasonably distant; [and] the pay arrangements complying with Award requirements." If "acceptable employment" was not determined objectively, an employee would have an "unreasonable and uncontrollable opportunity to reject the new employment in order to receive the redundancy pay".

Commissioner Asbury, relying on the Full Bench Decision of the AIRC in *Clothing and Allied Trade Unions v Hot Tuna (1988) 27 IR 226*, stated the burden of proving the acceptability of alternate employment was on the "employer seeking exemption from redundancy provisions". This is also an objective test determined by consideration to such matters as "pay levels, hours of work, seniority, fringe benefits, workload and speed [and], job security."

Considering the above case law, Commissioner Asbury reduced the employee's entitlement to redundancy pay from eight (8) weeks to four (4) weeks, stating the employer was a "strong moving force" in obtaining alternate employment. The interview with the new employer was arranged by the employer, attended during working time and paid by the employer. The new position and the redundant position were covered by the same Award and although there was a different mix of duties, "there were no new duties in the new position that were not performed by [the employee] in the [redundant] position", no significant difference in the hours of work, the pay under the new job was "marginally higher" to that paid under the redundant position and the new role was in the same suburb as the employee's residence.

In relation to the second limb of the test in section 120(1)(b) of the Act, Commissioner Asbury accepted that the employer was in "some financial difficulty" but was not satisfied that the employer "had established the extent of the difficulty is such that the payment cannot be made."

For advice on this case or any redundancy queries, please contact Nick Stevens, Megan Bowe or Liza Isho.

Occupational Health and Safety Statistics

WorkCover Authority of New South Wales (**'WorkCover NSW'**) is the body which administers work health and safety, injury management, return to work and workers compensation in New South Wales. WorkCover NSW has released its Statistical Report for 2008/09 regarding workplace injuries and fatalities (**'the Report'**).

By way of summary, the Report reveals that a total of 133,188 employment injuries (made up of workplace injuries, occupational diseases, fatalities and other work related injuries) were reported in 2008/09 – a fall of 9,354 employment injuries from 2007/08.

Workplace Injuries

30,133 major workplace injuries were reported in 2008-09. The occupations with the highest workplace injury rates were:

- Other labourers and related workers – 3,685
- Social, arts and miscellaneous professionals – 2,855
- Road and rail transport drivers – 1,961
- Factory labourers – 1,342
- Construction tradespersons – 1,275

Occupational Diseases

8,985 major occupational diseases were reported in 2008/09. The occupational diseases with the highest number of claims were:

- Deafness – 3,285
- Mental disorders – 2,530
- Disorders of muscle, tendons and other soft tissue – 969
- Hernia – 747
- Dorsopathies - Disorders of the spinal vertebrae & intervertebral discs - 277

Fatalities

139 deaths resulting from work-related injury and diseases were reported for 2008/09:

- 75 occurred as a result of traumatic injury while the employee was at work
- 24 resulted from diseases contracted or aggravated as a result of employment; and
- 40 occurred while an employee was away from their place of work (e.g. commuting to and from the workplace).

The industries with the highest fatalities were:

- Construction – 22
- Manufacturing – 23
- Transport and Storage – 14
- Wholesale Trade – 11
- Government Administration and Defence – 7
- Agriculture, Forestry and Fishing – 5
- Mining - 5

The occupation with the highest number of fatalities was road and rail transport drivers, accounting for 19 of the total fatalities.

Please contact Nick Stevens or Troy Ready for advice regarding your occupational health and safety obligations.

New "Small Business" Definition

From 1 January 2011, the definition of "small business" for the purposes of unfair dismissal will change. Section 23 of the Act defines a "small business employer" as one who "employs fewer than 15 employees at a time". While this will not change, the same will be determined by a simple head count of employees as opposed to making reference to the number of hours worked by an employee (i.e. the "full time equivalent" employee measure will no longer apply)

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