

### “VISION IN THE WORKPLACE”

Issue Forty-six, February 2010

In this edition of Vision in the Workplace, we look at the recent and historic development which sees New South Wales private sector employees joining the National Industrial Relations System and comment on the release of the Fair Work Information Statement which Employers must provide all new employees. We also look at two (2) recent Fair Work Australia decisions which deal with enterprise agreements containing clauses regarding the foregoing of penalty rates, which have failed the No Disadvantage Test, and a decision from the Federal Magistrates Court of Australia dealing with effective dismissals. Finally, we take this opportunity to welcome Megan Bowe to our Office!

#### NSW Joins the National IR System

In a historic development, The *Industrial Relations (Commonwealth Powers) Bill 2009* was passed on 1 December 2009 and has become the *Industrial Relations (Commonwealth Powers) Act 2009* (**‘the Act’**). As a result, since 1 January 2010, all NSW private sector employers and employees (including non-corporations) have moved into the Federal national industrial relations system.

The NSW Government has made a firm commitment to ensure that the State retains its own public and local government sectors, the Act excludes the State public sector and the local government sector. NSW has now joined Victoria, South Australia, Queensland and Tasmania in referring its IR powers to the Commonwealth. Western Australia is the only State not to join the new National System.

The *Fair Work Act 2009 (Cth)* and before that, the *Workplace Relations Act 1996 (Cth)* previously only covered employers who were constitutional corporations and their employees, therefore excluding all partnerships, sole traders and other non-corporations. Since 1 January 2010, all NSW private sector employers (such as partnerships and sole traders) and their employees fall within the ambit of the federal system.

Accordingly, NSW private sector employers and employees will be subject to federal unfair dismissal law; Modern Federal Awards; and the federal minimum wage. However, there will be a one (1) year transition period during which the Ten (10) National Employment Standards will provide a safety net. Accordingly, Modern Awards will apply to current State employees come 1 January 2011.

For more information on the impact of the Act on your workplace and to ensure that you are meeting the minimum requirements of the federal legislation, please contact Nick Stevens or Megan Bowe.

#### Staff Changes at Stevens & Associates Lawyers

Stevens & Associates Lawyers are delighted and pleased in welcoming Megan Bowe to their Office. Megan was admitted as a Solicitor in New South Wales in 2007 and has worked in the field of employment law since 2008, having more recently been employed by a Central Coast law firm.

Megan has extensive experience in advising on implementing common law employment contracts and enterprise agreements, termination of employment including unfair dismissal, redundancy, implied duties of good faith in employment relationships, employee entitlements and the transition to the *Fair Work Act 2009 (Cth)*.

Prior to practicing law, Megan commenced her career in the financial services industry. Megan also has experience in providing quality legal advice and representation in the areas of subcontractor arrangements, contract disputes, debt recovery, taxation and superannuation.

#### Fair Work Information Statement Released!

The Fair Work Ombudsman has released the Fair Work Information Statement (**‘the Statement’**). Section 125 of the *Fair Work Act 2009 (Cth)* (**‘the FW Act’**) requires a copy of the Statement be given to all **new** employees who commence employment after 1 January 2010 and “before, or as soon as practical after, the employee starts employment.” Penalties of up to \$6,600 for individuals and \$33,000 for corporation apply for non-compliance. Employers do not need to provide the Statement to current employees.

The Statement outlines an employee’s rights and entitlements at work and includes information on the Ten (10) National Employment Standards; modern...

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awards; agreement making; individual flexibility arrangements; freedom of association and workplace rights; termination of employment; right of entry; and the Fair Work Ombudsman and Fair Work Australia.

The *Fair Work Regulations 2009 (Cth)* states that the Statement may be provided by an Employer to an Employee either: personally, by pre-paid post mail; by emailing the website link where the Statement is located; or by facsimile.

Once the Statement has been provided to an Employee, it is prudent for the Employer to keep a record of when the Statement was provided and the medium in which the Statement was provided.

A copy of the Statement can be found on the Fair Work Online website. For more information on the Statement and your employees' rights under the FW Act, please contact Nick Stevens or Megan Bowe.

### **Foregoing Penalty Rates Clauses Fail the 'No Disadvantage Test'**

Fair Work Australia ('**FWA**') has recently delivered two (2) Decisions failing clauses against the No Disadvantage Test ('**NDT**') that give employees the choice of foregoing overtime and other penalty rates in exchange for electing their preferred Hours of Work.

In the First Decision, Commissioner Greg Smith held that for such an approach "*to be acceptable, it must rely on the subjective belief of the employee rather than the objective testing of the Award against the Agreement*" and this clearly "*undermines the standards fixed in awards and the basis for determining the No-Disadvantage Test.*"

Further, Commissioner Greg noted that such a clause potentially undermines the operation of the National Employment Standards ('**the NES**') as it "*can extend the concept of a 38 hour week.*" Accordingly, Commissioner Greg held that if such clause is used to "*encourage employees to volunteer to work those hours so that overtime costs are avoided then it does work more strongly against the concept of a 38 hour week.*"

The Agreement in question was not approved as Commissioner Greg stated. the "*issue in this area of employment, is so fundamental to the operation of the safety net and the NES that that the agreement must be rejected as failing the No Disadvantage Test*".

In the Second Decision, a number of agreements being lodged by the same bargaining representative contained a 'Preferred Hours Arrangement' Clause ('**the Clause**') which stated that where an employee "*elects to work preferred hours*" or shift swaps, they will be paid a preferred hours rate which excludes late night and weekend penalty rates.

Commissioner Whelan did not approve the agreements holding that inclusion of "*a general provision which removes penalty provisions from the employees' rate of pay on the basis that they have nominated certain hours during which they are available to work*" does not pass the NDT. To further justify, Commissioner Whelan noted that "*if an employer requires work to be performed during those hours and the employee is able to perform that work, then that is a normal incident of employment and not a special arrangement*".

If you would like any more information on enterprise agreement making, the NDT or the new Better Off Overall Test, please contact Nick Stevens or Megan Bowe.

### **Demoting a Parent held to be Effective Dismissal**

The Federal Magistrates Court of Australia has held that an employee who was requested to work in a more junior position upon her return from maternity leave was effectively dismissed by her employer.

The Employee took maternity leave in October 2007. Upon her return in April 2008, the Employee was informed that her previous Centre Manager position was unavailable but was informed that the "*Second in Charge position was available*", which the Employer acknowledged was of a "*lower*" position than that of Centre Manager. Furthermore, the Employer stated that the Employee was not reinstated into her previous position because "*she failed to perform her duties satisfactorily, leading to that Centre not receiving accreditation.*"

The Employer alleged that the Employee had left the centre she worked at in a "*very disorganised*" state upon taking maternity leave and as such needed "*a lot further training*" to be Centre Manager. Additionally, the Employer stated that the Employee had "*inexperience and lack of knowledge in that area.*"

Federal Magistrate Lucev found that the Employee "*was entitled to return to her position as Centre Manager...on the termination of her maternity leave.*" Furthermore, Federal Magistrate Lucev found that the Employer, by refusing to reinstate the Employee to her former position and rather reinstating to the lower position of Second in Charge, had dismissed the Employee.

Although the Employer alleged its conduct was a result of an assessment of the Employee's performance, the Court held that the Employer's reasons for its treatment of the Employee were "*entirely spurious.*"

This case highlights the need to manage employees prior to their commencement of parental leave as failure to do so may result in constructive dismissal. For assistance in managing your employees before and after leave, please contact Nick Stevens or Megan Bowe.

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