

“VISION IN THE WORKPLACE”

Issue Forty-eight, May 2010

In this edition of *Vision in the Workplace*, we report on the release of the *Paid Parental Leave Bill 2010 (Cth)* which introduces Australia's first government-funded paid parental leave scheme. We also provide you with developments in the interpretation of Individual Flexibility Arrangements. We also take a look at the recent superannuation changes introduced by Modern Awards and report on a recent case from the Supreme Court of Victoria where an employer was ordered to pay an employee who was dismissed before the expiry date of their fixed term contract, \$580, 808 in damages. Finally, we are pleased to confirm that Stevens & Associates Lawyers will be hosting a Breakfast Seminar on Thursday, 10 June 2010 to outline various issues arising from the, almost twelve (12) months of, the “Fair Work” industrial relations system.

Paid Parental Leave Bill Released!

Since March 2008, we have been reporting on the Productivity Commission's public inquiry into paid maternity, paternity and parental leave (**‘the Inquiry’**). The Inquiry has now been concluded and the *Paid Parental Leave Bill 2010 (Cth)* (**‘the Bill’**) was released on 12 May 2010.

As we have previously reported, the Bill introduces Australia's first government-funded paid parental leave scheme which is available to the primary carers of a child born or adopted on or after 1 January 2011 (**‘the Scheme’**). The Scheme will provide primary carers of a child with a maximum of up to eighteen (18) weeks paid parental leave, calculated at the national minimum wage, currently \$543.78 per week (**‘the Entitlement’**). Further, the Entitlement can be taken before, after or at the same time as unpaid parental leave under the National Employment Standards.

The Family Assistance Office will advise employers if they have an obligation to make payments in accordance with the Scheme and, funding for the Scheme will be provided to employers prior to making any payment. Employers may opt to provide the Entitlement from 1 January 2011, otherwise, the Entitlement takes effect from 1 July 2011, with employees able to claim payment from the Family Assistance Office in the intervening period.

Furthermore, the Bill allows more than one (1) person to claim the Entitlement, if for example, the primary carer of the child changes. In other words, where the primary carer of the child returns to work before the eighteen (18) week period is over, the other parent may then be able to claim the remainder of the Entitlement.

The Bill also empowers the Fair Work Ombudsman to commence investigations and proceedings where employers are found to have contravened the civil penalty provisions of the Bill. Further, penalties apply where employers have breached these civil penalty provisions of the Bill. Penalties of up to a maximum of \$6,660 for individuals and \$33,000 for corporations can be imposed.

For more information on the Bill and your obligations under the same, please contact Nick Stevens or Megan Bowe.

Further Individual Flexibility Arrangements Ruling

You may recall from our March/April 2010, *Vision in the Workplace Newsletter* that Commissioner John Ryan of Fair Work Australia (**‘FWA’**) had ruled that Individual Flexibility Arrangements (**‘IFAs’**) are limited in their application (**‘the First Decision’**). This month, a Full Bench, of FWA comprised of President Giudice, Senior Deputy Harrison and Commissioner Blair (**‘the Full Bench’**)

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STEVENS & ASSOCIATES

LAWYERS

invites you to a special breakfast seminar
at The Grace Hotel, Sydney
on 10 June 2010.

**“Almost one year on, what
have been the implications
of the Fair Work Act?”**

Free Breakfast Seminar

for our clients to discuss and review the
implications of the *Fair Work Act 2009 (Cth)*,
since its introduction on 1 July 2009.

Where: The Marra Room
The Grace Hotel
Level 2
77 York Street, Sydney

When: Thursday, 10 June 2010

Time: 7:00am for 7:30am – 9:00am
Breakfast included

**Please contact David Wells on (02) 9222
1691 or email dww@salaw.com.au
by Thursday, 3 June 2010
to book your seat.**

Bookings Essential as seats are filling up!

have overturned the First Decision. In overturning the Decision, it seems as though the Full Bench has broadened the application of IFAs. The First Decision ruled that a flexibility term enabling an employer and its employees to enter into an IFA to vary the terms of their proposed enterprise agreement could not be valid as the *Fair Work Act 2009 (Cth)* enables IFAs to vary the effect of an agreement as opposed to its terms.

Whilst the Full Bench acknowledged that Commissioner Ryan was correct in deliberating that the word effect "is intended to convey the fact that while the operation of a term of the agreement can be varied by IFA...to alter some of the legal rights of the parties to the arrangement, the terms of the agreement as such are not varied", they also stated that the purpose of the terms of the agreement should also be considered. The Full Bench stated that "an approach which takes into account the purpose of the provision is to be preferred" especially given that that enterprise agreements are not a "product of careful drafting by experienced Parliamentary drafters" and as such, "it is not appropriate to apply such high standards when interpreting enterprise agreement."

Furthermore, the Full Bench stated that a "liberal approach" to the interpretation of this clause should be adopted as the Model Flexibility Term, set out in the *Fair Work Regulations 2009 (Cth)*, itself uses the term "vary the effect of". Drawing their attention to the word "effect", the Full Bench stated that Commissioner Roe placed "too much weight" on its use. Accordingly, the Full Bench clarified that the word "effect" illustrates that the "operation of a term in an agreement can be varied by an individual flexibility arrangement", that is, some of the legal rights of the parties to the arrangement are varied but the terms of the agreement itself are not.

It is also critical to note that the Full Bench went on to state that "a term which does not provide for change in the effect of any terms of the agreement cannot be a flexibility term."

If you would like further information of drafting enterprise agreements, interpreting Modern Awards and/or the approval of Enterprise Agreements by Fair Work Australia, please contact Nick Stevens or Megan Bowe.

Superannuation Changes

The Modern Awards which commenced application on 1 January 2010 prescribe default superannuation funds, where employees have not nominated a superannuation fund of choice. What is critical to note is that, previous default funds nominated by employers may no longer be default superannuation funds under an applicable Modern Award.

Accordingly, Employers will need to identify the Modern Award which applies to certain employees, ascertain which superannuation funds have been prescribed under the same as a default superannuation fund and, redirect superannuation payments to those default funds.

Notwithstanding the above, where employers have been making contributions to a default superannuation fund prior to 12 September 2008, then contributions to this default fund can continue. Further, contributions which are forwarded to employees pursuant to the 'choice of fund' rules are also allowed to remain.

If you would like advice on whether you are making superannuation contributions to a correct fund, please do not

Dismissed Employee has been Awarded \$580,808 in Damages

Justice Stephen Kaye of the Supreme Court of Victoria has awarded an employee who was dismissed before the expiration of his fixed term contract (**'the Contract'**) \$580,808 in damages.

The employee was employed under the Contract which stated that the employment will "commence on 19 February 2007 and terminate three years after". The Contract stated that if the employment was terminated by the employer, the employer will pay the employee "the balance owing" under the Contract.

The employer terminated the employment in November 2008, during the Contract's currency (**'the Termination'**). The employee argued that the Termination was a breach of the Contract, as the employee was meant to be employed for three years. The employee also argued that the employer breached an implied term of trust and confidence between the parties, on the grounds that the Termination was "capricious, unfair and unreasonable". The employee sought damages for loss of opportunity to be re-employed by the Employer on the conclusion of the three year term.

In response, the employer stated that it did not breach the Contract as the employer was "entitled to terminate the Contract before the end of the three year term, by paying the balance owing" to the employee under the Contract. Further, the employer also denied that it had breached any implied term of trust and confidence. Taking into account the employee's background circumstances such as his move from Sydney to Melbourne for his role under the Contract, Justice Kay rejected the employer's arguments stating that the employer "breached the Contract...by unilaterally terminating the [employee's] appointment on 10 November 2008" and such breach amounted to "repudiation" of the Contract.

The employer argued that "damages for loss of opportunity to renew a contract of employment are not recoverable in any action by an employee for wrongful termination by the employer". However, Justice Kay, relying on a number of previous cases, stated that the employee "may claim damages for loss of opportunity to renew a contract of employment which has been wrongfully terminated by the employer." Nonetheless, Justice Kay stated that he was not satisfied that the Employee "would have had any reasonable prospect at all of having his appointment...renewed" and thus would not allow the employee to claim damages for loss of opportunity. Notwithstanding this, the employee was able to make alternative claims for damages.

In accordance with the Contract, the employee would be entitled to the following if terminated for any reason: remuneration payable up to and including the date of termination, accrued annual leave and long service leave as at the date of termination, and any other payments required under the Contract or law. Further, the Contract also stated the employee would be entitled to notice and redundancy pay if the employer could not redeploy the employee into a comparable suitable position. Accordingly, the employee was awarded, by the Court, \$580,808 for the same.

Turning to the employee's claim that the employer breached the implied term of trust and confidence between the parties by exercising a unilateral right of termination, Justice Kay stated that in light of his conclusion that the employer "did not have a right to unilaterally terminate" the employment, it was "not necessary" to reach a conclusion in this regard.

If you would like further information on drafting employment agreements and/or dismissing employees please contact Nick Stevens or Megan Bowe.

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