STEVENS & ASSOCIATES LAWYERS

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A VISION IN THE WORKPLACE

In this edition of *Vision in the Workplace* we examine a recent Federal Court of Australia ('**FCA**') decision that has clarified the circumstances in which an employer can deduct public holidays from employees' leave balances, and another recent FCA decision that considers when employers may reasonably and lawfully direct employees to attend a medical assessment. Finally, former Sex Discrimination Commissioner and Lawyer Elizabeth Broderick visited Stevens and Associates this month for a breakfast catch up.

Paid Leave During Public Holidays - On leave or not?

A recent Full Federal Court of Australia ('**FCA**') decision has clarified the intention and scope of sections 89 and 98 of the *Fair Work Act 2009* (Cth) ('**FW Act**'), which ostensibly seek to preclude employers from deducting public holidays from annual leave or personal/carer's leave balances, when such public holidays coincide with a period of paid annual leave or personal/carer's leave. The decision is of particular interest to employers with a current enterprise agreement that incorporates leave entitlements in excess of the minimum entitlements contained in the National Employment Standards ('**NES**').

The dispute was predicated on whether the employer, Glendell Mining Pty Ltd ('**Glendell**') made unlawful deductions from the employee, Mr Noyes' annual leave and personal/carer's leave balance for six public holidays that fell on days during which Mr Noyes was on paid leave.

The Construction, Forestry, Mining and Energy Union ('**CFMEU**') on behalf of Mr Noyes argued that the contested deductions were made in contravention of sections 89 and 98 and of the FW Act (being part of the NES) which provide, respectively, that where a public holiday occurs during the period in which an employee is absent during a period of "*paid annual leave*" or personal/carers' leave, the employee is taken not to have been on paid leave on the public holiday. Further, the CFMEU contended that making the deductions amounted to a breach of section 44 of the FW Act which precludes employers from contravening provisions of the National Employment Standards ('**NES**').

Glendell submitted that because Mr Noyes' annual leave entitlement was derived from an enterprise agreement that provided for additional annual leave of in excess of the NES entitlement, section 89 of the FW Act did not apply and was intended only to apply to annual leave taken in accordance with the FW Act.

The FCA accepted Glendell's submissions (in part) and held that given "*paid annual leave*" is defined in the FW Act, it is appropriate to infer that subsequent references to "*paid annual leave*" in the FW Act are properly read as being directed to the minimum entitlement consistent with the definition. Accordingly, the FCA held that section 89 of the FW Act did not have any application to the component of Mr Noyes' annual leave that exceeded his minimum entitlement to paid annual leave pursuant to the FW Act, but would have applied to the portion matching the NES entitlement (which can be deduced from the employer's records).

The FCA applied the same reasoning when construing section 98 of the FW Act and held that where an employee

takes personal/carer's leave in accordance with an enterprise agreement, only the portion of such leave equivalent to the NES entitlement is affected by section 98.

If you are seeking more assistance relating to the interaction between enterprise agreements and NES entitlements please contact Nick Stevens, Megan Cant or Jane Murray on (02) 9222 1691.

Direction to Attend Medical Assessment: When & How?

In a recent decision of the Federal Court of Australia ('**FCA**') [1] the Full Bench of the FCA held that BHP Coal ('**the Defendant**') was entitled to dismiss a boilermaker ('**the Employee**') who refused to attend a company ordered medical appointment, which was intended to assess his fitness to return to work. In 2011 the Employee suffered a shoulder injury while at work and took extended sick leave for the purpose of undergoing surgery and recovery. The Employee's doctors cleared him as "it to return to normal duties however, BHP directed the Employee to see an additional specialist before returning to work. The Employee refused to attend and BHP subsequently dismissed him for failure to comply with a reasonable and lawful direction. In reaching its decision, the FCA considered section 39 of the *Coal Mining Safety and Health Act 1999* (QLD) ('**the CMSH Act**') which imposes an obligation on coal mine workers to comply with health and safety procedures intended to ensure that individuals and other miners are "*not exposed to unacceptable levels of risk*". The FCA accepted that the Employee's superintendent ordered the additional medical check in response to identifying a potential risk arising from the Employee's return to work. While the FCA accepted the Employee's contention that the legislation acted to "*curtail the right to personal liberty*", it held that the Act directly authorised BHP to take "*any reasonable and necessary course of action*" to ensure the safety of its workers.

Whilst this decision applies specifically to the employment relationships affected by the CMSH Act, employers often grapple with the issue of when they can reasonably direct employees to attend a medical assessment.

Employers have a strict common law duty to ensure the health and safety of their employees at work and must take reasonable care to protect employees from foreseeable injury arising during their employment. Similar obligations exist under work health and safety legislation, including the *Work Health and Safety Act 2011* (NSW), which imposes a duty of care on employers to employees in the "*provision and maintenance of a work environment without risks to health and safety*". Accordingly, if an employer has a legitimate and genuine concern that an employee is unfit to perform the necessary inherent requirements of their job, potentially placing themselves or others as risk, an employer may be able to require an employee to attend a medical assessment.

This was demonstrated in *Burns v Sacred Heart Mission Inc* [2014] FWC 3188 in which the Fair Work Commission ('**FWC**') denied an unfair dismissal claim, and held that an employer was *"entitled to direct an employee to obtain a medical report"*, provided the direction was reasonable and that an entitlement to do so could be derived from either an implied term in the employment contract that each party

will do all that is necessary to enable the other to have the benefit of the contract, or as a result of a legislative work health and safety obligation.

In order to ensure a direction to attend a medical appointment is lawful and reasonable, and that there is a genuine need for the same, employers should consider:

- Whether there is a genuine indication that examination is necessary, for example, prolonged absences from work or absences without explanation or evidence of an illness which relates to the capacity to perform the inherent requirements of the job?
- Has sufficient medical information has been provided from a medical practitioner to the employer which explains absences and demonstrates fitness to perform duties?
- Whether the relevant work/workplace is inherently dangerous?
- Does the employee's illness/injury legitimately impact (or risk impacting) others in the workplace?
- Has the employee agreed to an assessment to be conducted by a practitioner selected by the employer?
- Is the medical assessment truly aimed at independently determining whether the employee is fit for work? [2]

The above should be carefully considered before directing an employee to attend a medical assessment to mitigate the exposure to an unfair dismissal, discrimination or adverse action claim. It is important that employers conduct this process in a reasonable, transparent and fair manner.

If you have any questions about the "when" and "how" of directing employees to attend a medical assessment, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray on (02) 9222 1691.

[1] *Grant v BHP Coal Pty Ltd [2017] FCAFC 42*
[2] *Cole v PQ Australia Pty Ltd* [2016] FWC 1166 (29 February 2016)

Elizabeth Broderick Visit

Stevens & Associates were recently visited by Elizabeth Broderick AO, Australia's former Sex Discrimination Commissioner and Lawyer for a breakfast catch up. We enjoyed discussing a wide range of topics including: the potential for harmonising discrimination legislation, predicted trends for female participation in the workforce and the potential for a bill of rights in Australia.

Liz also spoke about her role as founder of Male Champions of Change, an organisation which aims to encourage influential men (particularly in business), to "step up beside women" and take action on gender inequality on a global scale.

We would like to thank Liz for spending her time with the firm and for passing on her wealth of knowledge at the breakfast catch up.