STEVENS & ASSOCIATES LAWYERS

December 2019

# A VISION IN THE WORKPLACE

**This edition includes:**

- A roundup of our Christmas Breakfast Seminar that was held on Friday 6 December.
- A summary of new requirements for employers that pay annualised salaries to certain award-covered employees.
- A Federal Circuit Court case against the Mariners Football Club for over $60,000 in unpaid wages and damages.

## Season's Greetings

Stevens & Associates would like to wish you, our valued clients, and your families a safe and happy holiday season. Our office will be closed from midday on Tuesday, 24 December 2019 and will re-open on Monday, 6 January 2020. Have a very Merry Christmas! We thank you for all your support this year and look forward to working with you again in the New Year!


## Christmas Breakfast Seminar Roundup

Thank you to everyone who attended our Christmas Breakfast Seminar on Friday, 6 December 2019. We trust everyone enjoyed the breakfast and opportunity to mingle and network with other clients.

Angharad Owens-Strauss' presentation offered a simplified refresher on the termination process. Angharad covered the key issues of: redundancy, underperformance and what constitutes serious misconduct. Her presentation emphasised the importance of affording employees procedural fairness at all stages of the termination process and highlighted timely case law to reinforce this point.

Jane Murray's presentation was on managing and mitigating the post-employment risks that can follow the termination of an employee. This served as a reminder to employers of their obligations in relation to:

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workplace surveillance, garden leave, and explored the considerations applied by the courts when considering post-employment restraints.

If you have any questions arising out of the Breakfast Seminar, please don't hesitate to contact us.

## Important Update – Annualised Salaries – New Obligations for Employers

As part of the four yearly review of modern awards which we briefly summarised In our November edition of Vision in the Workplace, the Fair Work Commission (**FWC**) has handed down a decision which affects employers paying annualised salaries to employees covered by modern awards.

Employers who currently pay annualised salaries to certain award-covered employees will need to take steps to ensure they are compliant with these onerous requirements by 1 March 2020.

**HR/Payroll Requirements**

There are also a number of requirements to ensure that employees are at all times adequately compensated, including:

- Keep a record of finishing times of work, and any unpaid breaks taken, for the purpose of conducting calculations and reconciliations;
- Records must be signed or acknowledged as correct by employee each pay cycle; and
- Annual reconciliation from the commencement of the arrangement (or on termination of employment) calculating what the employee would have been paid under the Award compared to the annualised wage actually paid, reconciliation payments of shortfalls must be completed within 14 days.

**Advisory Requirements**

Employers must advise employees in writing of:

- The annualised salary that is payable to them;
- Which specific clauses of the Award apply to them, and is satisfied by payment of the annualised salary;
- How the annualised salary has been calculated (including specification of each separate component of the annualised wage and any

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overtime or penalty assumptions used in the calculation);

- The outer limit number of ordinary hours which would attract payment of penalty rates under the award in a pay period or roster cycle; and
- The outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle

**Penalties for non-compliance**

Where an employer fails to comply with the terms of a modern award annualised wage clause, and particularly where an annualised salary is not sufficient to compensate for hours actually worked by an employee, employers will be exposed to the risk of underpayment claims and potential penalties for breaches of the modern award.

The Fair Work Ombudsman Sandra Parker has made underpayment a core focus of the agency.

It is therefore integral that businesses that employing workers on annualised salary arrangements ensure their compliance with the new legislation prior to 1 March 2020.

If you have any questions in relation to whether the new legislation will affect your workforce and/or any compliance questions relating to the new legislation please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

## Validity of Internships to be put to the test

A talented young football player, Mark Moric, is taking legal action in the Federal Circuit Court against the Mariners Football Club (**the Club**) for more than $60,000 in unpaid wages and damages.

Mr Moric alleges that he worked for free for almost four months under what the Club labelled as a 'trial period'. He also claims that within weeks of the trial period commencing he was promised a professional contract valued at $30,000 a year, was promoted on the Club twitter account, webpage and played a number of pre-season games. Despite this, no contract eventuated from these alleged promises.

Mr Moric's claim includes damages for the unpaid work leaving him "deeply depressed" and doubting his future playing football.

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**Internships in Australia**

There is a potential for this case to have wide ranging implications for the legality and practicalities around unpaid internships in Australia, not just for professional sport.

Research conducted in 2016 found that 58% of people in Australia aged 18 to 29 years old had done unpaid work in the previous 5 years, and that much of the work was legally questionable.

In order for unpaid work to be lawful there must be no employment relationship in the arrangement.

**Legality of Unpaid Internships**

When looking at whether an employment relationship exists, the true nature of the arrangement should be considered, not just how the parties have chosen to describe it. The Fair Work Ombudsman provides some guidance on the factors that ought to be taken into consideration:

1. **What is the nature and purpose of the arrangement?** Was it to provide a learning experience for the worker, or for the worker to assist in the ordinary operation of the business? If the unpaid worker is conducting productive work rather than learning/training, it is likely an employment relationship exists.

2. **How long is the arrangement for?** The longer the unpaid arrangement exists, the more likely that the worker is an employee. However, short arrangements can still constitute an employment relationship.

3. **How significant is the arrangement to the business?** Is the work usually performed by paid employees? Does the business require the work to be done? The more fundamental that the work is to the ordinary functioning of the business, the more likely it is that the arrangement is an employment relationship.

4. **What are the person's obligations?** In some cases, a person may be required do some productive work to aid their learning. An employment relationship is unlikely to be found in these circumstances if the role is primarily observational, and, the activities are primarily related to the learning experience of the worker, rather than the operation of the business.

5. **Who benefits from the arrangement?** The main benefit from a genuine unpaid work arrangement should flow to the person undertaking the role. If the business or organisation is gaining a significant benefit from the person's work, an employment relationship is more likely to exist.

We look forward to the abovementioned case proceeding to hearing as it may set an important precedent on the legality of unpaid work, trials and internships in Australia.

If you have any questions about the legality of unpaid internships and whether an unpaid arrangement in fact constitutes employment, please do not hesitate to


contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.