STEVENS & ASSOCIATES LAWYERS

January 2020

A VISION IN THE WORKPLACE

This edition includes:

- A casual employee working three days a week is deemed "regular and systematic" by the Full Bench of the Fair Work Commission.
- BHP penalised by the Federal Court for requiring employees to work "unreasonable overtime".

Casual employee working three days a week deemed "regular and systematic"

The Full Bench of the Fair Work Commission has overturned a tribunal ruling made by Deputy President Mansini which prevented a casual employee from pursuing an unfair dismissal claim against her previous employer Bed Bath N' Table.

Casual employees are not entitled to make an unfair dismissal claim unless they have worked on a regular and systematic basis and have a reasonable expectation of the work continuing.

The casual employee had been working three days per week for 8 months as a casual Sales Assistant at Bed Bath N' Table when she was dismissed.

The First Decision

The Deputy President ruled that the employee was not eligible to make an unfair dismissal claim on the basis that her work was not regular and systematic. The Deputy President reviewed the employee's work roster and established that "no pattern was able to be identified" to support an indication of regular and systematic work due to the significant variation in the shift length and rostered days.

The Full Bench Decision

The Full Bench disagreed, ruling that her work was regular and systematic, and that she had a reasonable expectation of such work continuing, based on the following factors:

1) The frequency and regularity of her shifts, being 3 or 4 days almost every week until her termination;
2) She was employed under an ongoing and single written contract in which there was a detailed job description; and
3) She was subject to a monthly availability roster system whereby she had to indicate her availability in advance.

The Full Bench subsequently upheld the employee's appeal and the unfair dismissal claim will now be heard by the Commission.

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The Takeaway

When engaging casual employees, variations to the number of days of the week, the specific days of the week or the length of shifts they are allocated to work is not necessarily sufficient to establish that work is not regular and systematic.

This decision is yet another reminder to carefully characterize employment and to periodically review arrangements to ensure employees are labelled "casual" are just that.

BHP employees worked "unreasonable overtime"

The Federal Court of Australia has ruled that BHP breached a 'reasonable overtime' clause within its enterprise agreement by requiring workers to work in excess of 8 additional overtime hours per week.

The agreement provided for a 35-hour working week but included a provision allowing the Company to "require employees to work reasonable overtime", noting that 104 hours of overtime a year is "generally considered reasonable".

The employees worked on a roster system which required them to work 455 hours of overtime per year (or over 8 hours per week).

At First Instance

The Federal Court held that the agreement afforded BHP with the discretion to direct workers to work beyond "reasonable overtime" so it was unnecessary to consider whether the overtime hours actually worked by the employee were reasonable.

On Appeal

The Full Federal Court disagreed and held that the use of the wording "reasonable" imposed a limit on the amount of overtime BHP could require workers to work and that the clause did not only provide BHP with an entitlement but was "also protective of the interests of employees".

BHP acknowledged that under its previous rostering system employees' un-rostered overtime ranged from 8 hours to 636 hours per year for some workers, before the introduction of a new rostering system limiting this to 455 hours per year.

The CMFEU argued on behalf of the employees that the requirement to work 8.75 hours of overtime per week was unreasonable on the basis that this amount was

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435% of the 104-hour benchmark for "generally reasonable" overtime provided by the agreement.

Justice Collier agreed and criticised BHP stating that she was "unable to identify how it could possibly be argued that 455 hours of overtime can be considered reasonable or even generally reasonable when measured against the agreed benchmark".

Justice Collier held that this conduct constituted a clear breach of section 50 of the *Fair Work Act 2009* pertaining to contraventions of an enterprise agreement, and penalties will be issued.

The Takeaway

Non-compliance with an enterprise agreement is a breach of the *Fair Work Act 2009.* Employers must ensure that they are complying with any applicable enterprise agreements, particularly with respect to requiring employees to work reasonable overtime.

If you have any questions about what constitutes 'reasonable overtime', whether under an enterprise agreement, award or under the *Fair Work Act 2009* – or questions about eligibility for unfair dismissal or the unfair dismissal process generally, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.