STEVENS & ASSOCIATES LAWYERS

May 2022

A VISION IN THE WORKPLACE

Our May edition of Vision includes:

- Large Penalty for Adverse Action;
- Family Domestic Violence Leave Changes
- Labor's Industrial Relations Policy – Federal Election 2022.

Labor's Industrial Relations Policy – Federal Election 2022

In light of the Labor Party's recent win in the Federal Election last month, here is a summary of some of the Labor Party's key Industrial Relations Policy promises they brought forward in their campaign:

Wage Rises to Match Inflation

During his campaign, now Prime Minister Anthony Albanese promised to back wage growth to match the rate of inflation. With inflation last reported at 5.1%, and nominal wage growth only at 2.4%, Australians have been experiencing a decline in wages in real terms. Therefore, Albanese confirmed in a press conference that minimum wage growth should at reach 5.1% because "*people should not go backwards*" when living costs were on the rise. This sentiment was supported by economist, Angela Jackson, who indicated that such low wage growth may result in weakened consumer sentiment and lower spending in the economy.

However, this policy promise has sparked considerable criticism from the opposition and employers concerning the economy and increased costs for businesses. Australian Chamber of Commerce and Industry Chief Executive Andrew McKellar maintained that "*small business cannot afford it*" and pointed out that such a large spike in wage growth has potential to feed back into inflation, hence exacerbating the original issue. The Australian Industry Group instead called for a modest 2.5% increase in the minimum wage.

Job Security

Another one Labor's central IR focuses was to make jobs more secure in a time where casual work, gig work and short-term contracts are becoming increasingly popular. Labor has committed to amending the definition of 'casual employment' in the *Fair Work Act 2009* (Cth) so that employees working regular shifts for a defined period will be considered part-time or full-time staff.

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In their policy statement, 'Secure Australian Jobs', Labor maintained that "*the Fair Work Commission will have to put job security at the heart of its decision-making*". However, this has spurred a response from many among the opposition and within the IR industry pointing out that "secure work" is an ambiguous term with no official definition.

Employment Summit

Albanese announced that he will convene an employment summit, where Unions and businesses will meet this September to discuss how to improve Australia's industrial relations. Albanese described it as a chance to "*identify barriers to full employment, tackle job insecurity and create a new agenda for national productivity*".

The agenda of these forums will likely centre around reforms in enterprise bargaining, legislation on wage theft, simplification of the better off overall test, job security, and wage growth.

Criminalising Wage Theft

Labor have confirmed that they intend to will consult with states and territories, unions and employers to develop laws that criminalise wage theft nationwide.

Wage theft costs Australian workers an estimated $1.35 billion every year. It happens across industries – from construction to health care, from retail to accommodation – and disproportionately affects vulnerable workers like women, young people, and migrants.

The Fair Work Ombudsman's frustration over big employers self-reporting underpayments to employees was made clear in a recent Senate committee report. The FWO lamented the procession of corporates self-disclosing and says it emphasised the "*widespread nature of wage theft in Australia*".

Wage theft accusations have been levelled at some of Australia's biggest employers and best-known brands, among them Wesfarmers, Coles and Woolworths, Qantas, National Australia Bank and the Commonwealth Bank. Not-for-profit organisations also haven't escaped. Allegations have been levelled at the Australian Broadcasting Corporation, The National Library of Australia, and even government departments.

Same Job, Same Pay

Federal IR minister, Tony Burke has put closing the gender pay gap at the forefront of his agenda.

Fresh from being sworn in this morning as the Albanese Labor Government's minister for employment and workplace relations, Burke singled out the gender pay gap as a "*top priority*".

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"*Women should not be paid less than men – it's that simple,*" he said.

Among Labor's gender equity policies heading into the recent federal election, the party said it would strengthen the FWC's ability to order pay increases for workers in low paid, female dominated industries.

Prime Minister Anthony Albanese has also confirmed that he will set about implementing an agenda that includes putting in place all of Sex Discrimination Commissioner Kate Jenkins' remaining recommendations in her Respect@Work report and bringing forward its policy to extend and increase child care subsidies and its aged care policy, which supports an unspecified pay rise in the female-dominated sector. Jenkins in part recommended amending the Sex Discrimination Act's objects to include achieving "*substantive equality between women and men*".

Department of Employment and Workplace Relations

The Albanese Government has created a new Department of Employment and Workplace Relations, reversing the Morrison Government's 2019 decision to shift IR into the Attorney-General's Department.

The new department will be created to implement and administer the Government's workplace relations, jobs, skills and training agenda.

These changes will take effect on 1 July 2022.
If you have any questions about these reforms and proposals may affect you or your business, please do not hesitate to contact Nick Stevens, Daphne Klianis or Josh Hoggett. For regular news updates, articles and tips follow our LinkedIn.

Family Domestic Violence Leave Changes

Millions of Australians will be entitled to 10 days' paid domestic violence leave (**FDV leave**) per year under a landmark decision by the Full Bench of the Fair Work Commission (**FWCFB**) handed down on Monday, 16 May 2022. The entitlement will be in addition to the unpaid 5 days' unpaid FDV leave that all workers are currently entitled to under the National Employment Standards (**NES**).

The historic provisional decision affects over 2.6 million people employed under modern awards, and likely to set a precedent for all employed Australians, the FWCFB has held workers should be able to access the leave on a yearly basis at their base rate of pay.

It is critical to note that the Labor party have previously stated that it supports 10 days' paid leave but is yet to provide further details on their policy.

What will FDV Leave look like?

The FWCFB has proposed that paid FDV Leave would:

- be paid at the employee's 'base rate of pay' as defined in the FW Act;
- accrue progressively in the same way personal/carer's leave accrues under the NES (however it is subject to a 'cap' whereby the total accrual does not exceed 10 days at any given time); and
- not apply to casuals.

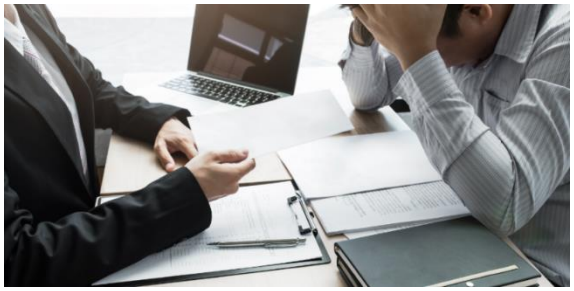
Additionally, the definition of family and domestic violence has been adopted from the NES as violent, threatening or other abusive behaviour by a close relative (as defined in the FW Act) of an employee.

Commission Supports Changes

"*Paid FDV leave provides significant assistance to those experiencing FDV*," the FWCFB held in its historic decision.
"Such leave helps individuals to maintain their economic security; to access relevant services, and to safely exit to a life free from violence."

In a rejection of concerns put forward by business groups, the FWCFB said take-up of the 10 days' paid FDV leave entitlement would likely be low, "*which suggests that such costs are unlikely to be substantial*"

"Employers are already paying the cost of FDV – through increased absenteeism and lost productivity. Paid FDV leave will assist in reducing that cost," the FWCFB stated. The parties have until 17 June 2022 to provide a draft model FDV leave term in accordance with the provisional views expressed by the FWCFB. The FWCFB is expected to hand down its draft directions in relation to the FDV Leave on 1 July 2022.



Large Penalty for Adverse Action

The Federal Circuit and Family Court of Australia (**FCFCA**) has recently awarded almost $100,000.00 in damages and penalties to an employee for their employer's unlawful adverse action. Judge Riley found that the company Asaleo Personal Care Pty Ltd (**the Company**) placed the sourcing manager (**Mr Lees**) on a performance review and then dismissed him because he made a complaint about his employment, contravening section 340 of the Fair Work Act (**the FW Act**).

Background

Mr Lees was employed by the Company from 20 October 2014 until 12 March 2020, when his employment was terminated on the grounds of misconduct.

The issues between the parties began when the Company undertook a restructure in March 2019. Mr Lees made a complaint and sought a 'formal redundancy' from the Company as he believed the restructure had made substantial changes to his position. Following this, Mr Lees made a further six complaints in relation to his employment as well as an application for an order to stop bullying in the Fair Work Commission.

Mr Lees was issued with a draft performance improvement plan (**PIP**) and the Company scheduled a time to meet with him to discuss. However, before the meeting, Mr Lees informed the Company's management team that he would be refusing to participate in the PIP process. This refusal ultimately formed the basis for his dismissal on the grounds of misconduct effective in March 2020. Mr Lees was paid 2 months' pay as notice in lieu of service.

Mr Lees subsequently filed an adverse action claim with the FCFCA, as well as a claim for a redundancy payment and claims for breaches of his employment contract on the basis of the Company failing to conduct annual performance reviews or providing him with the opportunity to participate in the bonus scheme.

The Decision

Adverse Action claims feature a reverse onus of proof, the Company was therefore required to demonstrate that the adverse action against Mr Lees was not taken for a prohibited reason. There was no debate over whether Mr Lees had exercised his workplace right to make a complaint,

and that his complaints had been made genuinely, in good faith and for a proper purpose.

The Company argued that the implementation of the PIP did not constitute adverse action. However, the FCFCA concluded that in being presented with the PIP Mr Lees' position, *"had been altered to his prejudice"*, and accepted that the purpose of the PIP was likely to set up Mr Lees for dismissal. Accordingly, the PIP involved a detrimental alteration of Mr Lees position and therefore constituted adverse action.

The FCFCA also held that the Company took adverse action for a prohibited reason against Mr Lees in terminating his employment. The Court found that Mr Lees conduct did not warrant a PIP, and even if the conduct did warrant a PIP, there were a range of options other than termination that the Company could have taken rather than dismissing Mr Lees from his employment.

Substantial Penalties Awarded

Judge Riley viewed the dismissal and the imposition of the performance management plan as two "*discrete and separate*" contraventions that should each have a different penalty applied, rather than an involving a single course of conduct. Judge Riley also imposed two pecuniary penalties on the Company, $22,050 for the performance improvement plan and $44,010 for unfairly dismissing the manager.

In the hearing to determine compensation, damages and penalties, the Company and Mr Lees agreed on the sum of $22,552.80 plus interest for economic loss. Judge Riley awarded $7500 for non-economic loss relating to the "*severe impact on [**Mr Lees'**] mental health and wellbeing"* including "*sleeplessness, irritability and withdrawing from social situations*".

Judge Riley also considered the lack of contrition on behalf of the Company when determining the appropriate penalty and the need for specific deterrence given "*the contravening conduct in this case was entirely deliberate and undertaken by senior management*". She continued that "*general deterrence is also necessary, because employers generally need to be reminded that adverse action for prohibited reasons will have consequences, even where that action is undertaken in an elaborate scheme*."

Takeaway

This case serves as a cautionary tale for companies, which demonstrates that adverse action disguised as a performance review process will be heavily penalised by the courts, with nearly $100,000 in compensation awarded to the former employee in this instance.

Performance review processes such as the PIP must only be used for genuine reasons and not as an excuse to terminate employees. Companies ought to consider other, more informal, processes

prior to implementing a formal performance review process such as a PIP.

Companies must also practice due care particularly where employees have made complaints in relation to their employment. Where adverse action is taken against an employee, it must be taken for genuine reasons. Companies must be able to demonstrate this in court due to the reverse onus of proof that applies in these cases. If you have any question about managing employee complaints, employee performance or dealing with adverse action cases more generally, please do not hesitate to contact Nick Stevens, Daphne Klianis or Josh Hoggett.