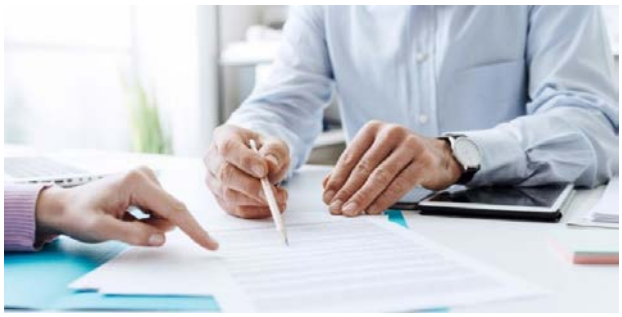
STEVENS & ASSOCIATES LAWYERS

April 2022

A VISION IN THE WORKPLACE

Our August edition of Vision includes:

- The Implied Term of Reasonable Notice
- Fair Work Recovers Nearly Half a Billion Dollars in Wages; and
- Employment status of gig workers: Deliveroo Australia Pty Ltd v Diego Franco.



The Implied Term of Reasonable Notice

Recently, the District Court of NSW added to the several cases dealing with the much-discussed topic of reasonable notice and whether it is displaced by s 117 of the Fair Work Act 2009 (Cth) (**FW Act**). The case provides some certainty that the common law term of reasonable notice, implied by law, is not displaced by the statutory minimum notice period under section 117 of the FW Act.

The Case – *Daigle v SCT Operations* [2022]

The plaintiff, Luc Daigle, claimed that the defendant, SCT Operations Pty Limited, did not give 24 months' notice of termination. The plaintiff claimed 99 weeks' pay in lieu of notice (104 weeks less the 5 weeks paid).

If there is no express term regarding notice of termination in an employment contract, a period of reasonable notice may be implied. However, the defendant maintained that the plaintiff was paid the whole of his entitlement to payment in lieu of notice, that being 5 weeks as calculated according to s 117 of the Fair Work Act 2009 (Cth) (**the Act**). The minimum period of notice of termination under section 117 of the FW Act is a scale based on the employee's length of service, with a maximum of five weeks' notice available for employees over 45 years old and who have more than five years' service. Here, the defendant advanced an argument that where the notice period is not expressly provided, the notice period within the NES ought to be the implied term of reasonable notice. This argument was not accepted by the Court.

The plaintiff's claim for loss and damage was made up of the alleged failure to pay the quarterly instalment of the Performance Bonus in sum of $94,452, and the amount of $263,238.53 made up of superannuation and pay in lieu of notice entitlements, totalling $357,690.53. The defendant

denied the whole of the plaintiff's claim of entitlements.

The Outcome

The Court held that the minimum rights to notice periods within section 117 of the FW Act do not preclude the general rule at common law that if the contract of employment makes no express provision of notice, the law will imply a term of reasonable notice. The Court further held that section 117 of the FW Act does not grant a right for employers to rely on the minimum notice periods in the instance they fail to expressly specify the relevant notice in an employee's contract of employment. As such, this provision of the FW Act is intended to protect employees, rather than provide employers with a 'fail safe' should their contracts not set out express notice periods.

The Court held that a term of reasonable notice, in the circumstances, was 8 months pay minus notice paid and money earnt during that period.

The Court also upheld a claim as to the bonus. It was held that the defendant's unilateral alteration of the bonus clause to amount to a breach of contract. The reasons for this were that the plaintiff had already 'earnt' the bonus under the existing provisions, and by the defendant attempting to introduce a new term, the defendant attempted to withhold the bonus owing to the plaintiff.

The plaintiff is entitled to damages as follows:

1. Bonus payment in the sum of $94,452.00
2. Payment in lieu of notice in the sum of $63,782.50
3. Excess above car allowance deduction in the sum of $31,408.00
4. Balance: $126,826.50

Takeaway

The legal position on the interaction between the implied term of reasonable notice and section 117 of the FW Act remains to be determined by an appellate court. However, this decision provides clear guidance on the relevant principles and considerations and is an important addition to the authorities on the complex issues of reasonable notice and bonus.

This case also serves as a timely reminder to employers of the legal risks presented to businesses when employment contracts are incomplete and the importance of ensuring employment contracts contain express terms relevant to the individual employee. Employers who use 'template' or 'boilerplate' contracts run the risk of uncertainty and legal liability with respect to the same.

If you have any questions about drafting comprehensive employment contracts or matters involving an implied term of reasonable notice, please do not hesitate to contact **Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.**

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Fair Work Recovers Nearly Half a Billion Dollars in Wages

Earlier this month, the Fair Work Ombudsman (**FWO**) announced that a record $532 million in unpaid wages and entitlements had been recoverec for more than 384,000 workers in 2021-22.

Background and Summary

Following extensive efforts by the FWO to create an environment that encourages large corporations to prioritise compliance, the sum of recoveries was more than three times that of last year's record and benefitted five times the number of workers across the nation. In addition to this, more than half of the recoveries – almost $279 million – came from large corporate employers.

The extent of this issue spans across numerous industries and business sizes. In June 2022, the FWC took Woolworths to court in relation to "major underpayments" of its salaried managers. However, Woolworths is just an example of major employers that have underpaid their workers, including Wesfarmers, Qantas, the Commonwealth Bank, Super Retail Group, Michael Hill Jewellers and the Australian Broadcasting Corporation.

Current Response

Kristen Hannah, Deputy FWO (Policy and Communication), announced these figures in a speech to the Policy-Influence-Reform (PIR) conference in Canberra, saying they were "good news" for workers and compliant businesses.

She went on to state that "the FWO's strengthened compliance and enforcement approach has seen another record amount of back paid wages for Australian workers in the last financial year…this is a great result for the workers who have been reunitec with their withheld wages, and also for the businesses that pay correctly and are no longer at a disadvantage as a result."

Currently, the FWO has approximately 50 investigations underway into large corporates that have self-reported underpayments, including some of Australia's largest companies. The FWO has also pledged to continue to assist small businesses by providing more than 1200 written pieces of tailored technical advice to employers.

Takeaway

Our firm offers Modern Award audits to ensure compliance and conducting a proactive review such

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as this is encouraged to avoid underpayment prosecution by the FWO. It is important to note tha even if you pay your employees above award rates, this does not guarantee that the engagement is award compliant.

If you have any questions about wage underpayment, award compliance generally or our firm's Modern Award Audit procedure, please do nc hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

Employment status of gig workers: Deliveroo Australia Pty Ltd v Diego Franco

n a significant decision on the employment status of gig workers, a Fair Work Commission (**FWC**) full bench has quashed a ruling from last year that found a Deliveroo rider to be an employee.

Background

In May 2021, a FWC tribunal found that Deliveroo rider Diego Franco was an employee and not a contractor and therefore eligible to protection from unfair dismissal.

This was a landmark decision at the time and was anticipated to greatly impact the gig economy, with the Transport Worker Union stating that it had "huge implications for gig workers in Australia".

Since this initial finding in May 2021, the High Court decision in *Construction, Forestry, Maritime, Mining And Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations & Anor V Jamsek & Ors* [2022] HCA 2 (**Personnel and Jamsek**) was handed down. Personnel and Jamsek was significant because it confirmed that the terms of written contracts have authority in determining the nature of workplace relationships between parties.

The Case

Deliveroo Australia appealed the decision made in May 2021, arguing that Diego Franco was a contractor.

Given the decision in Personnel and Jamsek, it was required to focus on the contractual rights and obligations of the parties under Deliveroo's Supplier Agreement rather than undertaking a

broader assessment of how the relationship between Deliveroo and Mr Franco operated in practice.

In assessing, these contractual obligations, the full bench found that Mr Franco's relationship with Deliveroo was that of a contractor and not an employee.

As such, Deliveroo delivery riders are not entitled to award rates of pay, sick or annual leave, or protections against unfair dismissal.

The Takeaway

This ruling has demonstrated the application of the case of Personnel and Jamsek and has emphasized the importance of employment contracts in defining whether a worker is a contractor or employee.

Employers should take this into consideration when drafting employment contracts for their employees and contractors to ensure their legal statuses are properly defined.

For assistance in drafting employment contracts, please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.