STEVENS & ASSOCIATES LAWYERS

April 2022

A VISION IN THE WORKPLACE

Our September edition of Vision includes:

- Stevens & Associates Breakfast Seminar Announcement;
- Paying an Employee above the Legal Minimum and the Obligation to pay Entitlements; and
- NRL Referee's Sidelining Upheld by the Fair Work Commission.

Stevens & Associates Breakfast Seminar

We are excited to announce that Stevens & Associates Lawyers will be hosting our biannual Breakfast Seminar on Friday 18 November. The Seminar is a great opportunity to learn about current employment law issues that may affect you or your business and to mingle and network with other clients.

Our senior solicitor, Peter Hindeleh, will speak about two landmark High Court cases that confirmed the importance of contracts in employment law and what this means for businesses moving forward.

Our firm's solicitors Daphne Klianis and Josh Hoggett will address mental health in the workplace. The rules of ensuring health and safety, avoiding discrimination, ensuring privacy and avoiding adverse action claims will be explained.

For anyone interested in joining the Seminar, please RSVP by emailing Daphne Klianis, dhk@salaw.com.au or phone (02) 9222 1691 by Friday, 4 November 2022 to book your seat(s).

Venue: The Four Seasons Hotel Sydney Studio 3, 199 George Street, Sydney NSW 2000 Parking available upon request (charges apply)

When: Friday, 18 November 2022

Time: 7:15 for 7:30 am start to approx. 9:00 am (guests are welcome to stay and network until 10:00 am). The seminar will begin with an opportunity to network before breakfast is served with the presentations to follow. Breakfast Included

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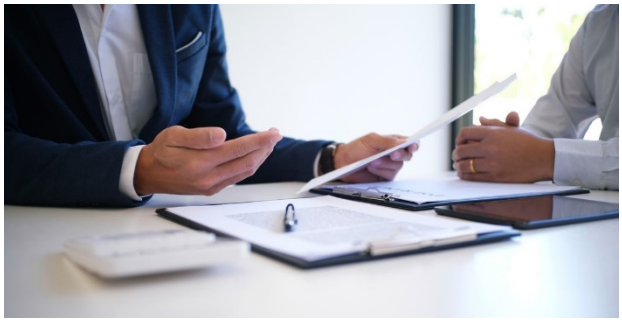

Paying an Employee Above the Legal Minimum and the Obligation to Pay Entitlements

Employers often pay their employees wages in excess of those stated in a modern Award. But does this automatically absolve the employer from any obligation to pay entitlements such as allowances and penalty rates? This area is somewhat fraught, but in short the answer is generally "NO".

The Background

In Chinese Australian Services Society Ltd v Sun [2022] FCCA 1293 (**CASS v Sun**), a Sydney language school learnt a hard lesson when the Federal Circuit and Family Court of Australia (at trial) and Federal Court (on appeal) found that an employee earning above award rates of pay was still entitled to receiv Saturday penalty rates.

The school advanced two arguments in support of it position that an employee's rate of pay should be considered when determining an employee's entitlement to receive award wages and allowances

1. The employee was paid a "salary package" under the terms of clause 14 of the Social, Community, Home Care and Disability Services Industry Award (2010) (**SCHADS Award**), which was inclusive of all allowances under the SCHADS Award (**First Argument**); and

2. Payment of wages in excess of the minimum rates specified in the SCHADS Award discharged its obligation to pay Saturday penalty rates (**Second Argument**).

Justice Snaden of the Federal Court rejected both arguments.

With respect of the First Argument, His Honour noted that Clause 14 of the SCHCDS Award applied only to "salary", as provided for in clauses 14 to 17 of the SCHCDS Award. Since penalty rates for Saturday work appeared at clause 26 of the Award, they were not captured by the salary packaging clause.

As to the Second Argument, His Honour noted that the school could not demonstrate that the employee's salary had been paid with the agreed purpose of set off the Saturday penalty rates. The employee's contract did not contain a set off clause to this effect. Furthermore, the employee never executed an individual flexibility arrangement which set out what allowances were included in her salary

Consequently, His Honour found that the school had contravened the SCHCDS Award by failing to pay Saturday penalty rates.

Takeaway

Employers must be careful to not assume that paying their workers above regular award rates does not automatically mean their workers are not being underpaid. As such, employers must be cautious to observe penalty rates, overtime, and other loadings specific to the Modern Award applicable in their industry.

Stevens & Associates Lawyers offers a Modern Award Audit Package which is designed to ensure businesses are adhering to all requirements set out in their applicable Modern Award to avoid any wage underpayment claims.

For employers and employees seeking guidance on worker entitlements to penalty rates, overtime and other loadings specific to their applicable Modern Award, do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

NRL Referee's Sidelining Upheld by the Fair Work Commission

The recent Full Bench of the Fair Work Commission (**FWC**) decision concerning a National Rugby League Referee, Tim Alouani-Roby (**the Employee**) has clarified the application of maximum term contracts, and whether employees engaged under the same have a right to access the general protections/adverse action jurisdiction of the FWC.

The Full Bench upheld the finding that the Employee could not pursue his dismissal dispute due to his engagement on successive maximum term contracts being expired, rather than his employment being terminated – which is a necessary condition to give rise to jurisdiction to make an adverse action claim against the NRL.

At First Instance

Deputy President Cross determined that the Appellant was engaged under a series of *"under a series of maximum term contracts based on its "genuine operational requirements",* and that the contract's terms reflected the genuine agreement of the parties that the employment relationship would end when it expired.

Accordingly, the Deputy President concluded that the Appellant's employment ceased through the effluxion of time upon the expiry of the contract, and that he was not dismissed within the meaning of s.386(1)(a) of the Fair Work Act 2009 (**FW Act**) and dismissed the general protections application.

As such, it was found that the NRL had not initiated the dismissal of the Employee and therefore he could not claim he was dismissed for a reason protected by the adverse action provisions of the FW Act.

The Employee subsequently applied for permission to appeal and appeals from a Decision of Deputy President Cross (**the Initial Decision**) issued on 12 November 2021. In the Decision, the Deputy President upheld a jurisdictional objection in response to a general protections application involving dismissal, made under s. 365 of the FW Act by the Employee, against the National Rugby League Limited (**NRL**) and other officers of the NRL.

The Full Bench Decision

The FWC allowed an appeal due to the case raising important questions about the application of s 386 of the Act in the context of maximum term contracts, a highly contentious area of employment law. In its decision, the Full Bench clarified that the legal issue addressed on appeal was whether the Employee was dismissed for the purposes of s 386 of the Act and not whether the NRL had engaged in any conduct that would amount to adverse action. The bench noted that even if they found that adverse action had been taken, they do not have the discretion to "*extend remedies for dismissal to persons who have not been dismissed*."

The Full Bench upheld the decision given in the first instance judgement, finding that the NRL did not take any positive steps to terminate the Employee's employment but rather acted passively and let his contract expire. At the same time, it was

held that the Employee *"accepted the contract which gave him a further year of employment and was warned that it was unlikely that he would receive another contract past 30 November 2020".*

The decision also accepted that the Deputy President Cross' earlier decision that use of maximum term contracts were appropriate, and they had a 'legitimate purpose' to use maximum term employment contracts.

The Full Bench dismissed the Employee's appeal.

The Takeaway

This case demonstrates that employers may benefit from implementing maximum term contracts when appropriate in order to avoid claims of unfair dismissal and adverse action. However, we always advise that employers contact us before engaging employees on successive maximum term contracts, as in many instances it is arguable that the employee does have a right to unfair dismissal and/or adverse action on the basis they were dismissed by the employer.

This is a highly contested area of employment law which has been the subject of many legal disputes. If you are an employer who engages maximum term employees and you do not intend on renewing their contract, you will need to ask yourself whether your contracts, engagement and dismissal of employees may be subject to a claim before the FWC.

We recognise that is a particularly difficult area of the law to navigate for our clients, as always, if you have any further questions about maximum term contacts, please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

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Level 4, 74 Pitt Street, Sydney | T : +61 2 9222 1691 | www.salaw.com.au