March Edition

Hi

Welcome to our Vision in the Workplace

Our March edition of Vision includes:

- Key Takeaways from Wipro v State of NSW: Long Service Leave and Out-of-State Work Experience;
- Chief of Staff's Bid to Keep Job + Unreasonable Hours ; and
- Federal Government to Introduce Criminal Wage Theft Laws.

Key Takeaways from Wipro v State of NSW: Long Service Leave and Out-of-State Work Experience

The recent NSW Court of Appeal decision in *Wipro Limited v State of NSW* has departed from the longstanding interpretation of the *Long Service Leave Act 1955* (NSW).

The Background

The employee in this case the applicant sought to claim long service leave pay after working for 11 years at Indian IT corporation, Wipro. He worked at Wipro's Indian entity for 6 years and then worked in NSW for nearly 5 years before resigning from his employment.

Wipro refused to pay the employee a long service leave payment on the basis that the applicant did not work long enough in NSW to claim leave.

If the employee's period of service in India was recognised as continuous service with Wipro in NSW, the employee would have been entitled to long service leave. If the service in India was not recognised, the employee would not receive any long service leave.

The Decision

The question for the court was whether to recognise the period of service completed in India for the purpose of long service leave.

The Court held that the employee's service in India would not be recognised as a part of his continuous service to Wipro in NSW, as the period of service in India was not "substantially connected" to his work in NSW. As a result, it was found that the employee was not entitled to any long service leave and the employee's case was dismissed.

Key takeaways

The judgement is important for any employee who has worked outside of NSW for some time during their employment at a company, whether overseas or within Australia, and wishes to claim long service leave. The Court of Appeal has held that these employees will not have their outside of NSW service recognised when their long service leave is calculated. The exception to this is if the employee can demonstrate that they had a "substantial connection" with NSW at that time.

There are a number of factors that can be considered in determining whether an employee had a "substantial connection" with NSW during their out of state service. Such factors may include:

• Whether the employment contract was prepared in NSW,

• Whether the employee was being directed by a NSW employer,

• Consideration of a secondment agreement where an employee was seconded to a related entity outside of NSW,

• Whether the out of NSW work was intended to be for a short period of time,

• If there was a team member in NSW to report to or have responsibility for.

In order for this "substantial connection" to be factored into long service leave, it needs to be assessed at the time the employee is still employed and not retrospectively after the employee is terminated.

These changes mean that NSW is aligned with Victoria state regulations after the decision in *Infosys Technologies Ltd v State of Victoria* (2021) ('*Infosys*'). In *Infosys*, a similar finding was made for a worker who served part of their employment with a company overseas, and the rest of their employment was served in Victoria. The overseas period of service was not counted for the purposes of determining the long service leave entitlement under Victorian long service leave legislation.

If this article raises any questions for you, please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett who will be able to provide you specific advice in line with the state based long service leave legislation and relevant case law.

Chief of Staff's Bid to Keep Job + Unreasonable Hours

On 3 February 2023, the Federal Court (“the Court”) heard a bid by Teal MP Dr. Monique Ryan’s chief of staff, Sally Rugg to keep her job until it finishes dealing with her claims that the Federal Government sacked her for refusing to work unreasonable extra hours and subjected her to “hostile conduct”.

Background

The working relationship between Ms Ryan and Ms Rugg deteriorated due to a number of incidents, the Court was told, including when Ms Rugg was reprimanded by her boss and given a formal warning for travelling home on a plane while positive for COVID-19 in November 2022.

In addition to this, Rugg alleges Ryan asked her to work more than 70 to 80 hours a week. That included: “both days of the weekend”; 12-hour days in parliamentary sitting weeks; and eight or nine hours in the office on non-sitting days, with very early morning and late nights answering media inquiries, emails and writing briefs.

Rugg’s barrister Angel Aleksov outlined that her salary of $136,000 plus parliamentary allowance of $30,000 was not enough for the additional hours she was working. He also told the Court that Ms Rugg was "pushed or jostled into resigning" after refusing to do community engagement work for Dr. Ryan, on top of her existing work.

Dr. Ryan said that she disagreed “with any suggestion that I required or expected Ms

Rugg to work that number of hours" and "never once" directed her to. She also denies any hostile conduct. Lawyers for Dr Ryan and the Commonwealth say the working relationship needs to end and that it would not be suitable for Ms Rugg and Dr Ryan to work together again because their relationship had suffered "a fundamental and irreparable breakdown".

Decision

Justice Debra Mortimer said she had never "seen a case like this" – of an employee seeking an interim injunction to keep their job in what both Ms. Rugg and Dr. Ryan accepted was an "intense, personal working relationship".

Justice Mortimer suggested the full case could take two weeks to hear and may require evidence about what "reasonable hours" staffers in parliament work, including evidence from "staffers of other politicians". She further questioned how "two people who have different views" about what reasonable hours are can be "ordered to continue to work together".

On Tuesday 7 March 2023, Justice Mortimer dismissed Rugg's urgent applicant, stating that Rugg failed to prove she wanted to continue working for and support Dr Ryan, because her evidence was more focused on her own career. She further stated "I do not see how this is the conduct of a person who wishes to return to work closely and professionally with Dr. Ryan".

Takeaway

This case highlights the Fair Work Act's maximum weekly hours provisions and adverse action protections, as well as the right to refuse to work unreasonable hours enshrined in clauses 31 and 32 of the Commonwealth Members of Parliament Staff Enterprise Agreement 2020-23. A review of Commonwealth parliamentary work practises in November 2021 found that Parliament does not meet workplace standards and identified long and irregular hours as a factor that can exacerbate the aggressiveness in the workplace and negative experiences of workplace culture.

If this raises any questions for any employers or employees, please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett who will be able to provide you specific advice.

Federal Government to Introduce Criminal Wage Theft Laws

The Federal Government is currently in talks with unions, employer groups, and states and territories to develop new federal criminal wage theft legislation. These proposed laws will introduce prison sentences for the worst cases of employer wage theft and complement criminal wage theft laws that have already been implemented in Victoria and Queensland since 2021.

Making wage theft a criminal matter is intended to convey a strong message to employers that compliance with workplace entitlement laws should be an ongoing priority of their businesses. This strong stance follows a slew of recent underpayment claims brought by the Fair Work Ombudsman against employers including Coles and Woolworths, where the Ombudsman have sought to highlight the importance of correct wages.

The Government's proposed wage theft legislation is expected to be comprehensive and will cover a range of offenses relating to the minimum wage, penalty rates, and overtime. Potential criminal charges will also extend to employers who falsify records, fail to keep accurate records, or make misleading statements about their employees' entitlements.

However, employers should not think that penalties for underpayment are not already enshrined in law. The '*Secure Jobs, Better Pay*' legislation introduced last year included provisions banning job advertisements displaying rates of pay lower than the relevant Modern Award.

Key Takeaway

Correctly paying employees is more important now than ever before. It is important for

employers to be paying their workers appropriately under the relevant Modern Award. This means not only paying the legal minimum hourly rate, but also the correct overtime pay and any relevant allowances. Employers must also ensure they are keeping accurate pay records.

Employers are encouraged to seek legal advice prior to engaging any new workers. If you have any questions about overtime wages or modern award compliance, please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

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