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Secure Jobs and Better Pay – key provisions to commence 6 June

Employers are reminded that on 6 June 2023, some of the key provisions of the *Secure Jobs Better Pay Act 2022* (**Act**) will commence.

Enterprise Bargaining

The new bargaining framework will introduce two streams for multiple employer agreements: 'supported bargaining' and 'cooperative workplace agreements'.

The supported bargaining stream covers those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively.

In the cooperative workplace agreements stream, the Act introduces a broader basis for multi-employer bargaining in any sector under amended "single-interest" employer authorisations.

Employers with clearly identifiable common interests will be likely to be compelled to bargain together and the test will include whether the operations and business activities of the employers are 'reasonably comparable'.

Small businesses with under 20 employees will be exempt from this bargaining stream, but employers with over 50 employees will face a reverse onus, in that they will be required to prove that they are not a common interest employer if they are to avoid being included in a single interest employer authorisation. The Fair Work Commission (**FWC**) may exclude employers from multi employer bargaining in this stream if they are already bargaining in good faith, have a history of effectively bargaining, and less than 9 months have passed since the nominal expiry date of their current enterprise agreement.

Also from 6 June 2023, the FWC will have the power to bring bargaining to an end in the new 'intractable bargaining' jurisdiction.

The FWC will have the ability to determine any outstanding matters by arbitration where there is otherwise no reasonable prospect of the parties reaching agreement. In arbitrating a workplace determination, the FWC will, among other things, be required to:

- take into account the interests of the employers and employees who will be covered by the workplace determination;
- exercise its powers in a manner that is fair and just; and
- ensure that the workplace determination would, if it was an enterprise agreement, meet the BOOT against the relevant modern award.

Better Off Overall Test

The FWC's Better off Overall Test (**BOOT**) assessment will become a global assessment instead of a line-by-line comparison between the proposed enterprise agreement and applicable modern award. The FWC will also have the power to amend an agreement where this is necessary to address a concern that it does not otherwise meet the BOOT.

Flexible Work Requests

The Act has introduced new rules relating to requests for flexible work arrangements and new provisions empowering the FWC to resolve disputes concerning such requests.

The circumstances in which an employee may request a flexible work arrangement have been expanded to include:

- an employee who is pregnant; or
- an employee, or a member of their immediate family or household, experiences family and domestic violence.

The Act also imposes a new obligation on an employer who receives a request for a flexible working arrangement to meet with the employee to discuss their flexible work request.

If an employer intends to refuse the flexible work request, the employer will be required to provide their reasons in writing.

Secure Jobs and Better Pay – key provisions to commence 6 June - continued

The employer will also be required to consider and inform the employee in writing if there are any other changes in working arrangements that they would be willing to make to accommodate the employee's circumstances.

A dispute resolution procedure will commence for circumstances where an employer has:

- Refused a flexible work request; or
- Not provided a written response to a flexible request within 21 days; and
- The parties have been unable to resolve the dispute through discussion at the workplace level.

The Act stipulates that where a flexible working arrangement dispute arises, conciliation should be the first avenue of dispute resolution (unless exceptional circumstances apply).

If conciliation is unsuccessful, or if 'urgency is required', the FWC will have the power to deal with a dispute 'as it considers appropriate' or through mandatory arbitration under which it can make binding decisions.

Unpaid Parental Leave

Employees will have a new right to request an extension of their unpaid parental leave for a further period of up to 12 months following the end of the first period.

Employers will have an obligation to discuss an employee's request to extend unpaid parental leave, and also need to consider and inform the employee in writing within 21 days if there is any other period of extension they would be willing to agree to. If the employer refuses a request, the employer will need to provide reasons in writing within 21 days of the request.

If a request is refused, the employer may only do so if there are 'reasonable business grounds' and will also need to provide reasons in writing, and advise if there is any other period of extension they would be willing to agree to.

The Act has now defined that 'reasonable business grounds' will include:

- When the request is too costly for the employer;
- When there is no capacity to change working arrangements of other employees to accommodate the extension;
- Where it would be impractical to change the working arrangements of other employees or recruit new employees to accommodate the extension;
- When the extension would likely result is significant loss in efficiency or productivity; or
- When the extension would likely have a significant negative impact on customer service.

The changes also provide employees access to dispute resolution procedures in the FWC, where there is a refusal to grant an extension. The FWC will be able to resolve a dispute by conciliation, mediation or mandatory arbitration if there are exceptional circumstances.

Given these provisions now form part of the National Employment Standards, any contraventions of these provisions may expose an employer to a maximum penalty of $82,500 (or $825,000 for a serious contravention).

ALP Law Reform Agenda – consultation process closed

The Albanese Government is planning further reforms to the Fair Work laws in 2023 and has concluded a consultation period on the proposed reforms.

Whilst no bills have yet been tabled in Parliament, given the speed at which reforms moved in 2022 with both the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* and *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* becoming law, it is to be expected that legislation will come before Parliament before the end of the year.

The seven following amendments are being considered

1. **Insert a right to superannuation in the National Employment Standards**

   Overview

   Underpayment and non-payment of superannuation guarantee contributions has been identified as an issue.

   Currently, the *Fair Work Act* (**FW Act**) contains no explicit requirements for an employer to make minimum superannuation guarantee contributions, therefore no corresponding right for all national system employees to directly pursue unpaid contributions.

   Modern awards must contain a term requiring employers to make sufficient superannuation contributions on an employee's behalf. Enterprise agreements may also contain clauses relating to superannuation. Employees covered by such terms can apply to a court for an order in relation to a contravention of the term and may be awarded compensation equal to the superannuation guarantee amount and interest. However, this enforcement mechanism does not apply to all employees.

   Considerations

   The Government made an election commitment to amend the FW Act to include a right to superannuation in the National Employment Standards (**NES**).

   Including an obligation to make superannuation guarantee contributions in the NES would expand the number of national system employees with a right to pursue their employer directly for unpaid superannuation. This would be in addition to existing enforcement channels for superannuation provided by the Australian Taxation Office (**ATO**).

   The ATO would still have primary responsibility for ensuring compliance with the Superannuation Guarantee and associated obligations.

   The ATO has broad regulatory powers to recover unpaid super, including through strengthened director penalty notices, the use of security bonds, and dedicated expert staff and resources with significant investment having been made to systems and data, including Single Touch Payroll.

   The Fair Work Ombudsman (**FWO**) would continue to be able to pursue unpaid superannuation in a complementary role to the ATO and consistent with its existing standing to recover unpaid superannuation under a modern award, enterprise agreement, or other industrial instrument.

2. **Reform of the 4-yearly review of superannuation default fund provisions**

   Overview

   Modern awards must contain a term that requires an employer to make superannuation contributions to a 'default' superannuation fund for the benefit of an employee who has no chosen superannuation fund. The Fair Work Commission has a legislative obligation to conduct 4-yearly reviews of such default fund terms under Division 4A of Part 2-3 of the FW Act. In 2014, the Fair Work Commission constituted an expert panel under section 620(1A) of the FW Act for the purposes of a 4-yearly review of default fund terms. However, the Full Federal Court found that the expert panel was not properly constituted. As a result, the Commission has never completed a review of default fund terms.

   The main process through which default fund terms can be varied under the FW Act is the 4-yearly review, as required by Division 4A of Part 2-3. Outside of this process, the Fair Work Commission has only limited capacity under the FW Act to update such terms. It may rely on the general power to remove ambiguity or uncertainty or to correct an error (section 160), or the power to vary the default fund term in relation to a superannuation fund specified in the term in relation to a standard MySuper product, in limited circumstances (section 159A).

   Considerations

   Default fund terms in modern awards continue to play an important role in the superannuation system, ensuring that superannuation contributions are made to an appropriate fund even where an employee does not inform their employer of their chosen fund or does not have a stapled superannuation fund.

ALP Law Reform Agenda – continued

A relevant consideration is the potential for any amendments to the FW Act unnecessarily duplicating processes of other government agencies which have direct regulatory oversight of superannuation, including the Australian Prudential Regulation Authority.

3. **Clarify the application of Fair Work Act protections to temporary migrant workers, including those working in breach of migration laws, noting that this can be a consequence of exploitation**

Overview

In its 2019 Report, the Migrant Workers' Taskforce (**the Taskforce**) cited research that there was a common misconception amongst migrant workers that Australian workplace laws and conditions do not extend to them. Specifically, the Taskforce cited confusion about whether existing workplace protections under the FW Act apply to foreign citizens who perform work without having valid work rights attached to their visa. The Senate Standing Committee on Education and Employment inquiry into the then *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**SJBP inquiry**) also cited submissions that indicated that there was conflicting case law on this issue.

Considerations

The proposed amendment is confined to the applicability of the FW Act, consistent with the recommendation of the Taskforce and the SJBP inquiry.

The policy intent of the FW Act is, and remains, that the Act does apply to all temporary migrant workers in Australia, irrespective of migration status. The proposal is designed to make this policy intent clearer, while strengthening the legislative basis for the current practices of the FWO who acts on the basis that the FW Act applies to workers irrespective of their migration status.

Any immigration consequences for breaches of the *Migration Act 1958* would continue to be dealt with under the Migration Act framework. The 'Assurance Protocol' in place between the Department of Home Affairs and the FWO would remain unaffected by this proposal. This mechanism is designed to enable visa holders to seek assistance from the FWO without fear of visa cancellation even if they have breached their work-related visa conditions.

4. **Provide stronger access to unpaid parental leave so families can share work and care responsibilities**

Overview

The Government committed to improving unpaid parental leave provisions as an outcome of the Jobs Summit. The Government's P*aid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022* (**PPL Bill**) will amend the *Paid Parental Leave Act 2010*, including to enable parents to access the full paid parental leave entitlement (100 days) flexibly down to a single day.

Legislative amendments would align the entitlement to flexible unpaid parental leave in the FW Act with the forthcoming changes to paid parental leave. The Paid Parental Leave Act 2010 does not provide a leave entitlement but requires an eligible person to not be working during their paid parental leave period. Employees will commonly access their unpaid parental leave entitlement to allow them to be absent from the workplace and access their paid parental leave entitlement. Subject to the passage of the PPL Bill, parents will be able to access their full paid parental leave entitlement (100 days) flexibly. Without amendment, only 30 days of flexible unpaid parental leave would be available under the FW Act.

In addition, the FW Act currently contains restrictions about when flexible unpaid parental leave can be accessed, with current provisions having the effect of requiring flexible unpaid parental leave to be taken after a period of continuous unpaid parental leave and forfeiting access to continuous blocks of unpaid parental leave once a flexible unpaid parental leave day is taken.

The unpaid parental leave provisions are also complex and contain rules that may restrict choice for families and increase complexity for employers, such as provisions restricting employee couples from taking more than 8 weeks of unpaid leave at the same time.

Considerations

The proposed changes to the unpaid parental leave framework are intended to complement the paid parental leave scheme to ensure parents can access their parental leave entitlement as intended.

It will be imperative to balance the need to accommodate flexibility for employees and an employer's need to plan their workforce needs.

ALP Law Reform Agenda – continued

5. Clarify that when a workplace determination comes into effect, the enterprise agreement will no longer operate

The FW Act is intended to operate so that when a workplace determination comes into operation any previous enterprise agreement will cease to apply. A proposed amendment would include a specific interaction rule between workplace determinations and enterprise agreements that removes any doubt about the operation of the FW Act in this regard.

6. Making pay deductions for authorised purposes an easier process for workers and businesses

Issues

Currently the deductions process – set out at section 324 of the FW Act – authorising employers to make deductions from an employee's salary for their benefit (for example, deductions made as a salary sacrifice to pay health fund or union fees) does not allow an employer to make a deduction when the amount of the deduction varies, including where it varies by a nominal amount or reduces, without a new written authorisation.

The proposed change would allow an employee's initial written deduction authorisation to specify that the amount of a deduction can be varied from time to time. Employees will be able to choose to specify an upper limit for permitted deductions on their authorisation, either as a dollar amount or a percentage, within which the deduction can be varied without requiring a new written authorisation, as is currently required for any change to the deduction amount.

Employers would also be required to notify employees about changes to the amount deducted under a valid authorisation, and whether an upper limit had been surpassed and the deduction therefore not paid.

Considerations

The proposed amendments seek to reduce difficulties for employers processing deductions and employees seeking deductions, without reducing protections for employees. This would include, where appropriate, prescribing certain requirements in regulations rather than in the FW Act.

Macquarie Bank Decision

(*Wardman v Macquarie Bank Limited* [2023] FCAFC 13)

After appeals from five separate decisions between Macquarie Bank and a variety of its former employees, Bromberg, Wheelahan and Snaden JJ of the Federal Court heard these appeals jointly, due to the decisions containing many of the same appellants and the same respondent. The initial decisions resulted in Macquarie Bank (**The Bank**) being found to owe over $1.37 million to former employees, in addition to a further $330,000 in fines. However, this is likely to be reduced in large part after the recent appellate decision.

Facts and Background

The case involved the correct payment under the contracts of employment for many former Macquarie Bank advisors. Their salaries were based upon a fixed salary component, in addition to a commission. This structure was known as Basic Cost Responsibility (**BCR**), which the Bank claimed represented each employee's total cost of employment, including annual remuneration, superannuation, fringe benefits tax, payroll tax, workers' compensation insurance premiums, salary continuance insurance premiums and, for some employees, goods and services tax. The BCR was originally set at $60,000 per annum in 2010, before increasing to $65,000 per annum in 2015, and later to $70,000 per annum in 2020.

An employee's annual salary was paid in 12 equal monthly instalments, half in advance, and half in arrears. If, in a given month, an employee earned a commission that was less than their BCR package for that month, they received no commission payment. Further, any shortfall between the commissions earned and the BCR payment would be rolled forward to the next month, which would be offset against the next month's commission payment. In the case that the financial year ended with remaining shortfall, this was either rolled forward into the new financial year, reduced to zero in accordance with an employee's employment contract, or offset against an annual bonus that an employee may have received. Additionally, the monthly instalment was paid to each employee whether or not they were at work or on some form of approved paid leave.

Leading up to the initial decisions, the employees claimed payment that was due to them under the *Banking, Finance and Insurance Award 2010* (**the Award**), including the minimum weekly rates of pay, payments on account of leave, leave loading, and payments on account of public holidays.

Judge Street, in his initial decisions, found that the employees were not entitled to receive minimum weekly rates of pay on top of the BCR package, but found that the employees were underpaid in relation to annual, personal and compassionate leave, in addition to leave loading and public holidays.

Two advisors were also found by Judge Street to have waived their right to pursue a claim for entitlements, due to clauses in their deeds of release which were found to prevent the employees from pursuing a claim. Because of this finding, the primary judge also ordered the two employees to pay the Bank's costs of defending their claims, after characterising the claims by the employees as having been brought without reasonable cause.

Decision

In compiling the appeals from the various decisions, Wheelahan J set out the issues in eight questions which were as follows:

1. Is the remuneration that was paid by the Bank to the employees to be characterised as comprising commission only, as the employees submitted?
2. Did the Bank discharge its obligations under the Award and the FW Act to pay wages or salary, and to make payments on account of leave, annual leave loading, and public holidays?
3. Do cl 7 and cl 14 of the Award preclude the Bank from relying upon the regular monthly payments that were made to the employees under the BCR package to discharge its Award obligations to pay wages at the minimum rates fixed under cl 13.1 of the Award, and to make payments on account of leave, annual leave loading, and public holidays?
4. Did the terms of the various deeds of release that are in issue defeat the claims of the relevant employees?
5. Did the primary judge err in ordering the third and seventh applicants in the *Wardman* proceeding to pay the Bank's costs of defending their claims on the ground that for the purposes of s 570 of the FW Act their proceedings had been instituted without reasonable cause?
6. Was the primary judge in error in not holding that *Sandford* and *Edwards* were in breach of their deeds of release thereby engaging an obligation of repayment?
7. Did the primary judge err in by failing to give reasons for determining that interest should be calculated from the commencement of the proceedings, rather than from when the money claims accrued?
8. Did the primary judge make the errors that are alleged by the Bank in his Honour's assessment of penalties?

In answering these questions, the court found consistently with Judge Street, the employees were not entitled to

Macquarie Bank Decision - continued

(*Wardman v Macquarie Bank Limited* [2023] FCAFC 13)

payment of minimum weekly award wages on top of the BCR.

As to the questions of the annual leave, personal/carer's leave, compassionate leave and public holidays, the court found that Judge Street was in error in holding that the Bank had not paid this. Instead, the court found that there was sufficient correlation between the monthly salary payments with no deduction for leave or public holidays and the statutory obligation to maintain the base rate of pay during periods of leave or in respect of public holidays. Therefore, it was found that the monthly salary payments were effective in discharging these statutory obligations.

However, for the majority of the employees, it was found that the Bank had failed to pay the annual leave loading on the wage rate of 17.5%. This was due to there being nothing that indicated that the normal monthly payments which comprised annual leave also contained the additional annual leave loading, or that the monthly payments did anything to discharge the obligation under the Award to pay the annual leave loading.

However, for three employees who had employment agreements that included a 'set-off' clause, the court found that the Bank had not failed to pay their annual leave loadings. This was because the set-off clause provided that the employees were to receive over-award payments that were to be set-off against entitlements, which included specific reference to loadings.

As for the two employees who were held to have waived their right to pursue a claim for entitlements, this decision was overturned by the court, as Wheelahan J held that Judge Street was in error by giving insufficient attention to the whole of the deeds of release. In giving more careful attention to the deeds, Wheelahan J decided that the terms of the deeds were ineffective to preclude the claim for entitlements. Thereby, these employees were not ordered to pay the bank's costs of defending their claims.

As for the further errors that the Bank alleged, while most claims were to be remitted to the primary judge for re-assessment, Judge Street initially claimed that the unpaid entitlements were to be paid by the Bank to the employees within 14 days, and in doing so, he was found by Wheelahan J to be in error.

Following the reasoning of the court, a number of decisions were remitted to the primary judge, including the amounts payable to the employees in relation to annual leave loading and the appropriate amounts payable to the employees who were found to have originally waived their right to pursue a claim for entitlements. Further, the primary judge was to re-consider whether any, and if so what, pecuniary penalties should be made against the bank, and in reconsidering all the penalties and amounts payable to the employees, refer back to the court's reasoning.

What does this mean for employers?

Employers must always be mindful that paying 'over award' does not mean that an award's obligations can be dispensed with.

Where an employer pays wages that are above minimum award or enterprise agreement rates, and wishes to use contractual set-offs, clear and express drafting is a crucial protection from wage underpayment claims.

Fair Work Act Penalty Decision

(*Fair Work Ombudsman v Route 45 Pty Ltd* [2023] *FedCFamC2G 83* (10 February 2023)*; Fair Work Ombudsman v RS Diners Pty Ltd* [2023] FedCFamC2G 84 (10 February 2023))

In these proceedings, which were decided in conjunction by Judge Karl Blake of the Federal Circuit and Family Court, the fines imposed upon the respondents in each case were greatly reduced from the amounts that were originally imposed by the Fair Work Ombudsman (**FWO**).

Facts and Background

In each case, the first respondent was a restaurant, directed by the second respondent, Mr Stathakopulos, who was the sole director and secretary of each restaurant.

The FWO began investigating the practices of each restaurant in 2019, due to the actions of Mr Stathakopulos, which involved failing to pay employees for overtime, penalty rates, and annual leave loading. Each restaurant also deliberately falsified payslips. Because of this, the FWO issued compliance notices to each restaurant, which each restaurant failed to respond to, in addition to failing to remedy the issues behind the compliance notices.

Therefore, the FWO initially imposed fines to the respondents to the extent of $214,000 combined to the restaurants, and $40,000 combined to Mr Stathakopulos. However, these penalties were then reduced by the FWO by $43,000 in total to $171,000 regarding the restaurants, and $7,000 in total to $33,000 regarding Mr Stathakopulos, after hearing Mr Stathakopulos' testimony, that he was broke and was contemplating suicide.

Decision

The court began by clarifying the correct application of the 'course of conduct' principle, which allows for grouping of contraventions that are under s536 of the Fair Work Act (FWA). This section of the FWA contains subsections that impose penalties regarding the provision of payslips under subsection (1), and regarding the provision of false or misleading payslips under subsection (3). Given that the compliance notices for these provisions were given in relation to multiple employees, these were to be grouped together such that the respondents were liable for one count of each, as opposed to multiple counts of each subsection due to the restaurants failing to comply with each subsection for multiple employees.

The reasoning for this grouping was that each compliance notice was served on the same date, and each notice also required steps to be taken by the same date.

In addition, due to the second respondent not being able to deal with the notices, as a result of mental health issues, this was found to be one course of conduct, as the failure to comply with the notices arose from one transaction.

The court then turned to the issue of specific and general deterrence. It found there was no need for specific deterrence, as the respondents were no longer operating a business, and were unlikely to do so in future.

Regarding general deterrence, the court found that although the FWO did not give evidence that the restaurant industry was more rampant with failures to comply with compliance notices than other industries, there is a need for general deterrence amongst employers.

While the court did not need to balance the need for general deterrence with the incapacity of the respondents to pay penalties, the court held that there were three factors that should be considered.

Firstly, that size is relevant to general deterrence, as other potential contraveners are likely to take notice of penalties imposed on similar size companies. Secondly, that a penalty should not be any more than is necessary to achieve the purpose of deterrence, as anything beyond that would be oppressive. And thirdly, that penalties in relation to individuals such as Mr Stathakopulos need to be tempered by personal considerations.

Applying this approach, Judge Blake reduced the fines imposed on the restaurants to $57,240 in total, and the fines imposed on Mr Stathakopulos to $8,262.

However, Judge Blake then also applied the totality principle, and found that in totality, for all the fines for the contraventions, the penalties were excessive and not just or appropriate in all the circumstances. Accordingly, he reduced these new total penalties by 50%, to $28,650, in the case of the restaurants, and by 60%, to approximately $3,305, in the case of Mr Stathakopulos.

What does this mean for employers?

This decision is an indication of how the courts will approach the quantum of penalties for FWA contraventions, and also highlights that no employer is immune from the FWO's regulatory activities – regardless of size.

Western Sydney Migrant Resource Centre - Decision

(*Eptesam Al Bankani v Western Sydney Migrant Resource Centre Ltd* [2023] FWC 557)

This case, decided by Deputy President Easton of the Fair Work Commission (**FWC**), involved an unfair dismissal claim by a former employee of the Western Sydney Migrant Resource Centre (**WSMRC**). She was accused of contravening the WSMRC Procedure Manual by deleting client data from a work phone known as the on-call phone.

Facts and Background

The Applicant, Ms Al Bankani, had held the position of Specialist Intervention Services Acting Manager. She was the only WSMRC employee providing Specialised and Intensive Services to support refugees classified as having high or complex needs by the Commonwealth, also known as Tier 3 clients. Prior to Ms Al Bankani taking leave, she held two phones, one of which was her on-call phone, that was provided to her to take calls from Tier 3 clients when they called between 5:00 pm and 9:00 am. Her other phone was her work phone, which she used during her normal work hours from 9:00 am to 5:00 pm. While Ms Al Bankani directed clients to call on her on-call phone after hours, Ms Al Bankani stated that clients called her on her regular work phone when they were making an after hours call.

Before she commenced her leave, Ms Al Bankani handed her on-call phone to a colleague, who was to take after hours calls while she was on leave. Before she handed over the on-call phone, she deleted phone call and text message data, which was ultimately the reason for her dismissal. This was because, in the WSMRC Procedure Manual, the deletion of any records or data off the on-call phone was prohibited, as those records and data pertained to clients.

While Ms Al Bankani signed a document stating that she had read and understood the procedure in 2019, Ms Al Bankani required an interpreter when giving evidence in the proceedings, as English was not her first language. Furthermore, Deputy President Easton held that if a single breach of the policy, such as Ms Al Bankani's breach, was regarded by WSMRC as serious misconduct, then WSMRC should have made this unambiguous in the procedure, and they should have also made this obvious to employees through clear and regular messaging.

Decision

The FWC was required to determined whether the dismissal was harsh, unjust or unreasonable. Despite WSMRC not being able to prove that Ms Al Bankani deleted client data, given there was a possibility that she did, the FWC held that this conduct amounted to a valid reason for dismissal.

The FWC also determined that WSMRC had notified Ms Al Bankani of their valid reason, which they did by letter, and that she had been given an opportunity to respond. However, the Deputy President found that there were other matters to consider, which were:

(a) Ms Al Bankani breached the literal terms of the Procedure Manual, but the terms of the procedure are long, complex, legalistic and did not fairly and clearly put Ms Al Bankani on notice of WSMRC's requirements under the procedure manual;
(b) There was very little evidence of WSMRC ensuring that its employees read and understood the WSMRC procedure manual;
(c) WSMRC's procedures regarding mobile phones and IT were haphazard;
(d) The consequences of Ms Al Bankani's conduct were not serious in the circumstances, because there was a very low risk that the on-call phone contained client records; and
(e) WSMRC had access to materials that most probably would have proved or disproved Ms Al Bankani's explanation, but they did not investigate those materials.

Considering these matters, the Deputy President found that the dismissal was harsh, unjust and unreasonable. In dismissing Ms Al Bankani, the FWC found that there were no sinister motivations for her dismissal, but that the WSMRC made a bad judgment call to dismiss her as swiftly as they did. In making this decision, the FWC stated that employer policy documents and manuals must be accessible, understandable and reasonable in their terms, indicating that it was these other factors that were relevant to his decision.

The remedy applied from this decision was the reinstatement of Ms Al Bankani in her prior role. The FWC also attempted to determine the losses Ms Al Bankani suffered for the period between her being dismissed and her reinstatement. Furthermore, the FWC also needed to determine if Ms Al Bankani took appropriate steps to mitigate her loss, and in doing so, they found that her evidence fell short of this standard. Therefore, Deputy President Easton decided to reduce the payment to Ms Al Bankani for her losses between her dismissal and reinstatement by 25%.

Western Sydney Migrant Resource Centre - Decision - Continued

(*Eptesam Al Bankani v Western Sydney Migrant Resource Centre Ltd* [2023] FWC 557)

What does this mean for employers?

The significance of this decision is twofold. First, it highlights that it is crucial to a fair process when considering terminating the employment of an employee who has access to the unfair dismissal jurisdiction – and is a reminder that reinstatement is the FWC's primary remedy where appropriate.

Second, in focusing on the employer's policies, the decision is a good lesson that policies must be clear, and that the consequences of non-compliance must be understood by all employees who are covered.

Brisbane Quarters Decision

(*Mr Cody Jackson v The Trustee for L & L Chua Family Trust No 17 T/A Brisbane Quarters* [2023] FWC 268)

Facts and Background

The Applicant, Mr Jackson, was employed by Brisbane Quarters hostel for 7 months, as a casual guest services attendant, while also living at the hostel in a caretaker capacity. He claimed that he had been dismissed in contravention of the general protections provisions of the Fair Work Act (**FW Act**), alleging that Brisbane Quarters in fact dismissed him because of his temporary absence due to his mental health.

The Respondent raised a jurisdictional objection that Mr Jackson had resigned from his position and had not in fact been dismissed.

Decision

To determine how the employment relationship ended, the meaning of 'dismissal' was considered under s.386 of the FW Act, that is, that an employee was dismissed if 'the person's employment with his or her employer has been terminated on the employer's initiative.'

In determining this, Commissioner Wilson said that it must be shown that the act of the employer results directly or consequentially in the termination of the employment, and that the employment relationship is not voluntarily left by the employee. To ascertain this, he considered all of the circumstances, including the conduct of both the employer and the employee.

The Applicant asserted that he was at times, 'forced to assume further responsibilities that he was not originally employed for,' and he also made complaints about the Regional Manager being 'constantly absent from the work site'.

However, the Respondent stated that the Applicant's extra responsibilities were taken on of his own accord, and these responsibilities involved the Applicant putting 'undue stress on himself'.

The Applicant then stated he had a 'mental breakdown due to the stress of his increased workload,' and immediately requested two weeks off, which was approved by the General Manager. However, this approval was denied by the Respondent.

The Respondent submitted that after the Applicant had requested leave, revelations from other staff about the Applicant came to light of 'plotting and rumour spreading'. The employer consequently decided to inform the Applicant that they no longer had hours for him.

The Applicant alleged that the general manager told him in a phone call that he was dismissed, and that it was due to his mood being 'up and down' and that he was 'constantly butting heads' with the regional manager. However, the Respondent denied these claims, instead claiming that they told the Applicant that he may have further work available to him if he improved his attitude and focused only on his assigned duties.

The Respondent therefore submitted that there was no dismissal, as reducing an employee's hours to zero simply dispensed with the employee such that he had no recourse under the FW Act's unfair dismissal or general protections provision.

Ultimately, Commissioner Wilson found that this notion by the Respondent was misconceived, as on either party's version of events, it was clear that the Applicant's employment ended with the phone call. It was also held that irrespective of which words were used, the intention conveyed by the Respondent was that the employment relationship was intended to be ended.

Therefore, it was held that the Applicant's employment was terminated at the initiative of the employer, which constitutes a dismissal. Given this ruling, it was deemed that the s.365 application should be returned to the general protections team for a conciliation.

What does this mean for employers?

If an employer wishes to cease the engagement of a casual employee, they must do so for a lawful reason. Casuals will have access to the FWC's general protections jurisdiction, and cannot be dispensed with for an unlawful reason, simply by reducing their hours to zero.

FWO v Darren Crouch & Associates

(*Fair Work Ombudsman v Darrell Crouch & Associates Pty Ltd* [2023] FedCFamC2G 80)

Decided by Judge Lucev of the Federal Circuit and Family Court of Australia, this case concerned Fair Work Ombudsman (**FWO**) proceedings against a real estate agency employer, Darrell Crouch & Associates Pty Ltd (**DC & Associates**), and an individual, Darrell Crouch, the Managing Director of DC & Associates, for a failure to comply with a compliance notice. While the Respondents sought a nominal penalty of $1, this was rejected, and the fines totalled $14,985 to DC & Associates, and $2,997 to Mr Crouch.

Facts and Background

In early 2021, the FWO issued a compliance notice to DC & Associates, concerning a failure to pay a former employee his full entitlement to a payment in lieu of the minimum period of notice of termination.

Under the *Real Estate Award*, DC & Associates had 7 days after the day of termination in which to pay the employee all amounts due to him under the National Employment Standards (**NES**), including minimum notice or a payment in lieu.

The FWO investigation initially involved 2 phone calls to Mr Crouch on 2 December 2020 and 8 December 2020, and an email that the FWO claimed they sent to Mr Crouch. In the phone call on 2 December 2020, the FWO informed Mr Crouch that they would send him an email, although the FWO mistakenly sent the email to the former employee instead of Mr Crouch. The FWO then subsequently called Mr Crouch on 11 January 2021, in which they discussed whether the employee had received his full entitlements, and Mr Crouch stated that he had. The FWO then told Mr Crouch that they may pursue a compliance notice. With no further action by Mr Crouch, the compliance notice was issued on 22 January 2021, and it required specific compliance by 26 February 2021.

The FWO called Mr Crouch on 2 February 2021 and 10 February 2021 to remind him of the compliance notice. The FWO also sent Mr Crouch an email on 10 February 2021, to which Mr Crouch replied on 11 February 2021 and stated that they were 'unable to comply' with any requests from the FWO. The FWO then responded, offering assistance in complying with the compliance notice, on 11 February 2021, and then called, texted, and emailed Mr Crouch on 17 February 2021, reminding him about the compliance notice.

DC & Associates failed to comply with the compliance notice by the due date, and the FWO commenced legal proceedings on 30 April 2021. After the commencement of the proceedings, DC & Associates complied with the compliance notice and wrote a letter to the FWO on 14 June 2021, apologising for the inconvenience caused from the failure to comply.

Decision

The Respondents challenged the requirement for the compliance notice that the FWO had formed a 'reasonable belief' that DC & Associates had contravened the Fair Work Act (**FW Act**). This was because the Respondents found the FWO's investigation 'amateurish and inappropriate'.

However, the court found that a request for assistance from the former employee to the FWO, a payslip from the former employee that demonstrated that he was not paid correctly, and a failure by Mr Crouch to give an explanation as to why they considered that the employee was paid correctly, was a sufficient basis for the FWO to form a reasonable belief.

The Respondents also argued that the error of the FWO to send the email to the former employee instead of DC & Associates caused such annoyance that the Respondents ignored the seriousness of the compliance notice. The court found that this was a minor administrative error, and that the circumstances that led to the Respondents' failure to comply with the compliance notice were entirely of their own making.

In the submissions for the penalties that would be appropriate, the Respondents submitted that either no penalty or a nominal penalty of $1 would be suitable. The judge found that this demonstrated a lack of contrition on behalf of the Respondents, in addition to a failure to appreciate the gravity of their conduct.

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The court concluded by assessing the need for both specific and general deterrence, and it found that both were appropriate.

The court held that fines for 55% of the maximum penalty were appropriate, with a 10% reduction for the Respondents' admission of liability. This amounted to a $14,985 penalty for DC & Associates, and $2,997 for Mr Crouch in his individual capacity, as a person who was involved in the contravention.

What does this mean for employers?

Employers must understand their legal obligations under the FW Act and comply with every obligation. This includes obligations under industrial instruments such as modern awards and enterprise agreements, as well as the FW Act itself (including the NES, employee records, pay slips and other obligations).

The FWO is increasingly using compliance notices as a mechanism to enforce employer compliance. Employers should seek to understand and comply with their obligations before the FWO considers issuing a compliance notice. The issuing of a compliance notice triggers a series of steps that can result in litigation, in which the FWO seeks the imposition of financial penalties to deter other employers/individuals from failing to comply with their obligations.