

July 2007

Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

New Fair Pay Commission Ruling

The Australian Fair Pay Commission has released its July 2007 Wage-Setting Decision. This is the second major ruling by the Commission, following its inaugural decision in October 2006.

The new decision makes adjustments to minimum wages in the federal system that will take effect from **1 October 2007**. The Commission has:

- > lifted the standard federal minimum wage (FMW) by 27 cents to \$13.74 per hour, an increase of 2%;
- > granted a similar increase of 27 cents per hour for all pay scale rates of up to \$18.42 per hour;
- > for pay scales above \$18.42 per hour, awarded a lower increase of 14 cents per hour.

For full-time workers, this is equivalent to an increase of either \$10.25 per week or, for those on the higher pay scales, just \$5.30 per week.

All other minimum rates, including junior rates, trainee wages and piece rates, will also increase by around 2%.

As with the previous ruling, the new decision only affects federal system employers who are subject to the Australian Fair Pay and Conditions Standard set by Part 7 of the Workplace Relations Act 1996. And even for those employers, this does not mean an increase for employees who are already receiving wages that are higher than the new minimum rates.

The Commission has made one major exception, for drought-affected farm businesses. Those in receipt of an Exceptional Circumstances Interest Rate Subsidy will be able to defer any pay scale increase for up to 12 months, although they will still have to comply with the new FMW.

There will also soon be a decision on the Commission's review of piece rates in the real estate sector.

One major exercise the Commission is yet to undertake is to review junior wage rates. It is now saying it will do this as part of the broader process of "rationalising" the thousands of existing pay scales. An issues paper has been promised for September, but there is no indication as to how long the Commission expects the rationalisation process to take.

Similarly, while the Commission has started consulting with "key stakeholders" over the publication of pay scales, so that employers can have some certainty as to the minimum rates they are meant to observe, no date has been set for any to appear.

One thing the Commission has done, on the other hand, is to commit to conducting annual wage reviews, with decisions to be announced in July each year and to become operative the following October.

Workplace Relations Fact Sheet Released

As reported in our June 2007 edition, recent amendments to the *Workplace Relations Act 1996* require the Workplace Authority to issue a Workplace Relations Fact Sheet containing information about the Fair Pay and Conditions Standard, protected award conditions, the fairness test, and the role of the Authority and the Workplace Ombudsman.

The Fact Sheet has now been released, and can be downloaded at the Workplace Authority's website (www.workplaceauthority.gov.au).

Federal system employers are obliged to give a copy of the Fact Sheet to all of their existing employees (including managers) by 20 October 2007. However, all new workers employed from 20 July 2007 onward must receive the Fact Sheet within seven days of commencement.

There are fines of up to \$110 per employee affected for employers who fail to take reasonable steps to provide copies of the Fact Sheet to their workforce.

New Fairness Test Additional Information Forms

The Workplace Authority has also published two "Fairness Test Additional Information Forms" – one for collective agreements and one for Australian Workplace Agreements. These forms need to be completed and submitted to the Authority at the time of lodging any new workplace agreement.

The forms are intended to assist the Authority in applying the new "Fairness Test" introduced by the Stronger Safety Net amendments.

The forms require employers to extract details from the workplace agreement that are relevant to the fairness test process to assist the Authority with the quick assessment of new agreements. Employers who lodge a large volume of workplace agreements may find the process of completing the forms somewhat of a burden, which should be taken into account when allocating time to the agreement-making process (noting, in particular, that an employer is required by law to lodge any workplace agreement within 14 days of it being signed).

The forms can be downloaded at the Workplace Authority's website (www.workplaceauthority.gov.au).

Salary Cap Increase for Unfair Termination Claims

The salary cap for unfair termination claims has been adjusted in line with annual indexation requirements. As of 1 June 2007, non-award employees who wish to bring an unfair termination claim in the Australian Industrial Relations Commission must now receive remuneration no greater than \$101,300 per annum. This reflects a 3.2% increase, the previous cap having been \$98,200.

Employees covered by awards or workplace agreements are exempted from the cap, and may make an unfair termination claim regardless of the level of their remuneration (subject to any other limitations on the bringing of such a claim).

The prohibition on unfair termination claims imposed by the cap does not prevent high income earners from bringing claims in the common law courts (see article below), and employers must be cognisant of the alternative actions that such employees may be able to bring when considering termination.

Nine Month Notice Period Implied where no Express Notice Period Stated in Contract

The recent decision of Justice Moynihan in *Taske v Occupational & Medical Innovations Ltd* [2007] QSC 118 serves as a reminder for employers about the risks of terminating employees, even where the employee is prohibited from bringing an unfair termination claim in the industrial tribunals.

Occupational & Medical Innovations Ltd (OMIL), a medical equipment company, summarily dismissed its Chief Executive Officer, Mr Taske, for serious misconduct. Due to his high salary, Mr Taske was prohibited from bringing an unfair termination claim in the Australian Industrial Relations Commission, so he commenced proceedings in the Queensland Supreme Court instead, claiming that there had been a breach of his contract.

The employment contract was partly written and partly oral, but there was no express term about a notice period on termination. As will be the case with most employment contracts (unless there is an express term to the contrary), Justice Moynihan found that it was an implied term of the contract that the employment was terminable on "reasonable notice", or without notice in the event of serious misconduct.

Mr Taske was summarily dismissed on the basis of three allegations made by OMIL: bullying (grabbing a male colleague's genitals); inappropriate and intimidatory conduct and the risking of OMIL's relationship with an international client. OMIL alleged that the allegations constituted serious misconduct, giving sufficient grounds for summary dismissal. Justice Moynihan, however, did not agree.

His Honour found that the incident involving the male colleague was horseplay and not intentional, that

the allegation of intimidatory conduct was merely a misunderstanding by another employee and that Mr Taske's conduct did not in fact endanger OMIL's relationship with the cited client. Consequently, his Honour held that Mr Taske was entitled to reasonable notice under the implied term of his contract.

In determining what constituted reasonable notice, his Honour took into consideration the fact that Mr Taske held a senior position with a high salary, that his age, qualifications and experience limited the prospect of him obtaining an equivalent position and that his employment, but for the dismissal, would likely have continued for some years. His Honour decided that a period of nine months' notice was reasonable in the circumstances.

The outcome of this wrongful dismissal claim highlights the importance of being alert to the possibility of breach of contract claims when an employee is unable to bring an unfair dismissal claim. To protect against a claim for reasonable notice, it is important to include an express notice provision in contracts of employment rather than potentially leaving it to the courts to determine the period of time which will be considered "reasonable".

New Penalties for Employers and Agencies using Illegal Workers

Commencing in August 2007, there are substantial penalties for agencies who refer, or employers who knowingly or recklessly employ, people who are not authorised to work in Australia or who are working in breach of their visa conditions. The penalties apply only in relation to employees commencing employment after 1 August 2007.

Employing companies face fines of up to \$66,000 per illegal worker. Individuals convicted of an offence face fines of up to \$13,200 and two years' imprisonment. Where an illegal worker is being exploited, the penalties increase to \$165,000 for companies, and fines up to \$33,000 and/or imprisonment for individuals.

For these purposes "work" includes:

- > employing a person under an employment contract;
- > using a contractor under a contract for services;
- > allowing someone to work by leasing transport (such as a taxi) to the person with the intention that they use it to provide a transportation service;

- > leasing premises or space such as a brothel room, with the intention that the person use it to provide sexual services.

Penalties for employing illegal workers apply only to those who have a legal relationship with the worker. This means head contractors are not liable when a subcontractor employs an illegal worker. Nor is a company liable when a labour hire company has provided an illegal worker.

Aggravated offences occur where the worker is being exploited and the employer either knows or is reckless about the exploitation. A worker is exploited if the worker is in circumstances of forced labour, sexual servitude or slavery.

It is recommended that robust recruitment processes are used to ensure that employment is only offered to those people who hold visas with current working rights. The currency of those working visas should be checked periodically to ensure their continued employment remains legal. The Department of Immigration and Citizenship provides a facility on its website called "Entitlement Verification Online (EVO)" which enables employers to check the visa status of overseas workers by entering the person's name and passport number. The Department's website is www.immi.gov.au, or you can obtain further information by contacting the Employment Relations Department at Piper Alderman.

Probationary vs Qualifying Periods

The *Workplace Relations Act 1996* provides for both probationary periods, and qualifying periods, for newly employed workers. Whilst most employers are aware of how a probationary period works, the concept of a "qualifying" period is less widely comprehended. As qualifying periods usually afford more protection for employers, it is a concept worth understanding.

Probationary periods and qualifying periods both operate to the same ultimate effect – any worker who is terminated within either period is prohibited from commencing an unfair termination action against their employer. However, there are some important differences.

A probationary period must be agreed to by a worker before their employment commences. This will usually involve it being explicitly set out in a worker's employment agreement. The period can be for up to

three months without qualification, but if it is to be for more than three months it must be “reasonable” having regard to the nature and circumstances of the employment.

A qualifying period, however, operates automatically for the first six months of employment for all workers. There is no need to include a reference to it in the worker’s contract, but the period can be shortened or removed completely if specified in writing. It can also be lengthened by agreement in writing, but as with probationary periods only where it is “reasonable”.

The immediate advantages of a qualifying period over a probationary period are:

- > an employer has the benefit of the default six month qualifying period even if they have not agreed to a probationary period with a worker prior to employment (a common example being where the parties do not have a written agreement);
- > an employer can have the benefit of a six month qualifying period as of right, whereas extending a probationary period beyond three months can only occur where “reasonable”.

**So which should an employer choose?
The decision of Commissioner Raffaelli
in *Nelson v Westpac Banking Corporation*
[2007] AIRC 214 confirms that an
employer can rely on both, as they both
operate simultaneously without affecting
the operation of each other.**

In that case, Mr Nelson filed an unfair dismissal application after his termination from the position of Branch Manager at the Alice Springs branch of Westpac. Mr Nelson was employed as Branch Manager for five-and-a-half months. In response Westpac filed a motion to dismiss the claim on the basis that there was no jurisdiction because Mr Nelson had not completed the six month qualifying period pursuant to sections 643(6) and (7) of *The Workplace Relations Act*.

Mr Nelson’s employment agreement provided for a three month probationary period but was silent on a qualifying period. He argued that his three month probationary period was in essence his qualifying period and that if he were to have a six month qualifying period it would have been reflected in his agreement.

Commissioner Raffaelli referred to two pre-WorkChoices decisions of the Full Bench of the Australian Industrial Relations Commission, both of which supported the view that probationary periods and qualifying periods were distinct concepts. Commissioner Raffaelli held the Act made it clear that a probationary period and a qualifying period were different and that in the absence of a written agreement to shorten the six month qualifying period, an express agreement for a probationary period that is less than six months long cannot constitute an agreement to shorten the qualifying period.

Therefore, employers will have the protection of the default six month qualifying period:

- > even if they have agreed to a probationary period (regardless of the length of time of the probationary period); or
- > even if they have failed to reach agreement on a probationary period.

However, as the duration of a qualifying period can be amended by express agreement, employers must be careful not to use language that could be seen as abrogating the qualifying period in their employment agreements.

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