State of Australian Compliance Report Q1 and Q2 2023

Key Updates on Relevant Employment and Workplace Legislative Changes and Major Case Law Developments in Australia

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Contents

Paid Family & Domestic Violence Leave

Category:
Update to legislation

Related legislation:
Fair Work Act (Cth) 2009

Summary: The Fair Work Act 2009 has been amended to provide 10 days paid leave on account of family and domestic violence in a 12-month period of employment.

In July 2022, the Government introduced the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Bill) which then passed through Parliament in October of 2022. The Albanese Government recognised the far-reaching effects of family and domestic violence, which impact millions of Australians each year—not only does this serious social issue impact victims in their homes, but it intrudes on workplaces.

Family and domestic violence leave is now a paid entitlement and has been extended to 10 days of paid leave each year for entitled employees. For large businesses, the leave entitlement came into effect **1 February 2023** and for small businesses that employ less than 15 people, the change will come into effect **1 August 2023**.

The changes can be summarised as follows:

a. employees, including permanent and casual employees, are now entitled to ten days of paid family and domestic violence leave in a 12-month period;
b. employees will receive payment when on leave at their full rate of pay for the hours they would have worked had they not taken the leave (for a casual employee, the 'full rate of pay' includes their hourly rate, inclusive of the casual loading); and
c. the definition of family and domestic violence leave has been extended to include conduct of a current or former intimate partner of an employee.

In accordance with the Fair Work Act 2009, paid family and domestic violence leave:

a. is available in full at the start of each 12-month period of the employee's employment; and
b. does not accumulate from year to year; and
c. is available in full to both part-time and casual employees.

An employee is eligible for paid family and domestic violence leave if:

a. the employee is experiencing family and domestic violence; and
b. the employee needs to do something to deal with the impact of family and domestic violence; and
c. it is impractical for the employee to do that thing outside the employee's ordinary hours of work.

Family and domestic violence is defined as violent, threatening, or other abusive behaviour by a close relative of an employee that:

a. seeks to coerce or control the employee; and
b. causes the employee harm or to be fearful.

Paid Family & Domestic Violence Leave

The definition of 'close relative' has now been extended to include an employee's current or former intimate partner.

Employees who request to take a period of family and domestic violence leave must provide their employer with the following evidence:

a. that they are experiencing family and domestic violence; and

b. they need to do something to deal with this impact; and

c. that it is impracticable for them to do it outside of their working hours.

The evidence must be such that it has satisfied the employer that the employee is taking the leave for the permitted purpose. An example of such evidence could include a court order requiring the employee to attend a custody hearing.

When employees provide their employee with such evidence, the employer is obligated to take all necessary steps to ensure the information is treated confidentially. This does not limit an employer from disclosing such information if the disclosure is required by law or is necessary to protect the life, health or safety of the employee or another person.

Pay Slips

In addition, employers are now prohibited from including information on an employee's payslip that relates to family and domestic violence leave. That is, payslips must not mention the leave, including the taking of the leave and the leave balance. The purpose is to protect employees who access family and domestic violence leave from harm if the person harming the employee learns that the employee has accessed the leave. Instead, employers must state family and domestic violence leave as either "special leave", "miscellaneous leave", "other", or simply as just "leave" on an employee's payslips.

With these changes now law, every Australian business will no doubt be impacted, and it is important that businesses review their policies and procedures to ensure they remain compliant with the change.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

Category:
Update to legislation

Related legislation:
Fair Work Act (Cth) 2009

Summary: On 2 December 2022, the Australian Government passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. This legislation amends the Fair Work Act to change a number of existing rules and introduces a range of new workplace laws. It is said that the changes are set to deliver Australian workers "a better deal and a better future."

The passage of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 marks the most extensive industrial relations reform seen since the introduction of the Fair Work Act 2009 (FW Act) some 13 years ago, and the impact of this legislation is significant. While further industrial relations reform (such as on 'same job, same pay', among other topics) is expected to follow later in the year, the reforms passed are significant and will substantively impact how Australian employers structure and manage their workforces and set terms and conditions of employment.

We outline below a brief overview of the key changes and how the changes will impact both employers and employees alike.

1. Gender Equity

Job security and gender equity are now primary objects of the FW Act. The premise is to promote fair wages and equal remuneration for work of equal value.

The inclusion of gender equity as an object of the FW Act will set a clear expectation that the Fair Work Commission must take into account the need to achieve gender equity when performing all its functions, including in setting minimum wages, considering changes to awards, and in all other decisions it makes.

The changes will be supported by establishing a pay equity expert panel and a caring and community sector expert panel within the FWC along with a dedicated research unit.

2. Prohibiting Pay Secrecy

I. Disclosing Pay and Workplace Conditions

In line with the primary objective of gender equity, there is now a new positive right for employees, as well as prospective employees, (regardless of any contractual term) to disclose (or not disclose) information concerning their own remuneration structure to others. It is hoped that openness and transparency in the workplace will eliminate pay bias between genders or other groups.

Relevant terms and conditions in relation to an employee's remuneration include the number of hours an employee is contracted to work and any information concerning bonus payments.

Since these new rights constitute workplace rights, employers must not engage in adverse action against an employee for choosing to disclose or not disclose their remuneration or for asking another employee about their own remuneration.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

Adverse action can include anything from demotion, disciplinary action or termination.

These new rights apply from **7 December 2022**:

a. if an employee and employer enter into a new employment contract on or after 7 December 2022, or

b. for existing employment contracts where the contract doesn't include pay secrecy terms inconsistent with the new workplace rights.

Where an employee's existing contract has pay secrecy terms that are inconsistent with the new workplace rights, and the contract is changed after 7 December 2022, the new workplace rights apply to the employee after the contract is changed.

II. Pay Secrecy Terms

From **7 June 2023**, pay secrecy terms inconsistent with the new workplace rights described above cannot be included in employment contracts or other written agreements that were entered into on or after 7 December 2022.

For enterprise agreements, awards, or other fair work instruments, any pay secrecy terms have no effect and can't be enforced after 7 December 2022. This applies regardless of whether the instrument was made before, on or after this date.

3. Unlawful Job Ads

From **7 January 2023**, job advertisements cannot include pay rates that would breach the FW Act or a fair work instrument such as an award or enterprise agreement.

This means that job ads cannot include pay rates that undercut employees' minimum entitlements.

These requirements apply from 7 January 2023, regardless of when the ad was originally posted. This means that even if the ad was posted in 2022, the requirement applies to that ad from 7 January 2023.

4. Prohibiting Sexual Harassment in Connection with Work

The newly introduced provision in the FW Act will be modelled on the clause contained within the Sex Discrimination Act but will be slightly broader as it will extend to prospective workers. The provision will provide that a person (the first person) must not sexually harass another person (the second person) who is:

a. a worker in a business or undertaking;

b. seeking to become a worker in a particular business or undertaking; or

c. a person conducting a business or undertaking;

if the harassment occurs in connection with the second person being a worker, person seeking to become a worker in a particular business or undertaking, or a person conducting a business or undertaking.

The prohibition also includes sexual harassment perpetrated by third parties, such as customers or clients.

The definition of "worker" is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

Employers will be vicariously liable for any sexual harassment perpetrated by their employees or agents if the harassment was done in connection with the employment or engagement. This ensures an aggrieved person can obtain a remedy from the principal in addition to, or instead of, the perpetrator and is consistent with the approach to addressing sexual harassment under the *Sex Discrimination* Act, ensuring a coherent federal framework.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

However, an employer would not be vicariously liable if the employer proves that it took all reasonable steps to prevent the employee or agent from engaging in sexual harassment. Employers who fail to take all reasonable steps to prevent workplace sexual harassment may be held to be vicariously liable as well as be subject to enforcement action in accordance with the new positive duty that has been inserted in the Sex Discrimination Act.

In relation to dealing with sexual harassment disputes, applications can be made for the Fair Work Commission (FWC) to deal with a dispute and aggrieved individuals may make joint applications. The intent of this is to provide the FWC with flexibility to deal with multiple parties together where appropriate, for example, if there is a common perpetrator or principal or the sexual harassment occurred in the same business or undertaking.

The prohibition of sexual harassment in connection with work, and the FWC dispute function commenced **6 March 2023**.

5. Anti-discrimination and Special Measures

From **7 December 2022**, three new protected attributes at work now include:

a. breastfeeding;

b. gender identity; and

c. intersex status.

This means employers are prohibited from taking adverse action against current or future employees because of these attributes.

6. Unpaid Parental Leave Changes

From **6 June 2023**, employers will have new requirements to follow when responding to employee's requests for an extension of unpaid parental leave.

The employer must provide an employee a response within 21 days of an employee making a request to extend their unpaid parental leave. An employer can only refuse the request if:

a. the employer has discussed and genuinely tried to reach an agreement;

b. the employer has considered the consequences of the refusal; and

c. the refusal is on reasonable business grounds.

7. Limit of Fixed-Term/ Maximum-Term Contracts

Limits on the use of fixed-term and maximum-term contracts come into effect **6 December 2023.**

Employees can now only be engaged pursuant to a fixed-term or maximum-term contract for a maximum of 2 years and such contracts for the same role can only be renewed once. This means if an employee is on a fixed-term contract for two years, the employer cannot extend this. However, if an employee is on a fixed-term contract for 1 year, the employer has the ability to extend this contract for an additional year.

Exceptions to this include:

a. the employee has specialised skills that the employer does not have, but needs, to complete a specific task;

b. the employee is engaged as part of a training arrangement (for example, an apprentice or a trainee);

c. the employer needs additional workers to do essential work during a peak period, such as for fruit picking or other seasonal work;

d. the employer needs additional staff members during an emergency, or needs to replace a permanent employee who is absent for personal or other reasons, for example parental leave, sabbatical, or long service leave, or absence relating to workers' compensation;

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

e. the employee earns over the high-income threshold for the first year of the contract;

f. the employer is reliant on government funding to directly finance the employee's position either in whole or in part–the employer must receive the funding for more than two years, and there must not be any reasonable possibility that the funding will be renewed;

g. the employee is appointed under governance rules of a corporation or other association, where those rules specify the length of time that the appointment can be in place; and

h. the employer is permitted to enter into the fixed term contract by a term specified in a modern award that covers the employee.

Employers will also be required to issue employees engaged on a fixed-term or maximum-term contract with a Fixed Term Contract Information Statement in addition to the Fair Work Information Statement.

8. Flexible Working Arrangements

From **6 June 2023**, the right to request flexible working arrangements will also apply to:

a. employees, or a member of their immediate family or household, experiencing family and domestic violence; and

b. employees who are pregnant.

Employers now have new obligations to follow before they can refuse a request from an employee for a flexible working arrangement. Employers will have to:

a. discuss the request with the employee;

b. make a genuine effort to find alternative arrangements to accommodate the employee's circumstances;

c. consider the consequences of refusal for the employee; and

d. provide a written response that includes:

- an explanation of the reasonable business grounds for refusing the request and how these grounds apply to the request; and
- other changes the employer is willing to make that would accommodate the employee's circumstances or that says there aren't any changes.

Reasonable business grounds include:

a. the new working arrangements requested would be too costly for the employer;

b. there is no capacity to change the working arrangements of other employees to accommodate the request;

c. it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the request;

d. the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity; and

e. the new working arrangements requested would be likely to have a significant negative impact on customer service.

The FWC will be able to hear and make orders about disputes about flexible working arrangement requests if the parties can't resolve the dispute at the workplace level.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* also makes significant amendments to enterprise bargaining including adopting the following changes:

1. Enterprise Agreement Pre-Approval Process

From **6 June 2023**, the prescriptive pre-approval requirements of agreement making will be replaced with one broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

Safeguards will be introduced, including the FWC publishing a statement of principles which will contain guidance for employers on how they can ensure employees have genuinely agreed to the agreement.

Such safeguards will include that employees have been informed of the bargaining process, their right to be represented and the terms of the enterprise agreement have been sufficiently explained.

This change is hoped to encourage enterprise bargaining and also eliminate circumstances where the FWC has been forced to reject enterprise agreements because of technical or procedural deficiencies that did not affect how employees voted on the agreement.

For there to have been genuine agreement, the FWC would need to be satisfied that the employees requested to vote on the agreement have a sufficient interest in its terms and are sufficiently representative, having regard to the employees the agreement is expressed to cover. This amendment is in response to the One Key decision.

2. Initiation of Bargaining

From **7 December 2022**, an employee now is able to initiate bargaining simply by writing to their employer via a bargaining representative.

The FWC can make a bargaining order following a request, even where the employer has refused to agree to bargaining.

3. Better Off Overall Test

From **6 June 2023**, the better off overall test (BOOT) will now be applied as a global assessment instead of by a line-by-line comparison between the proposed agreement and the relevant modern award.

Other BOOT changes will include:

a. the FWC to give consideration to the views of specified persons, including primary consideration to any common views expressed by the specified bargaining representatives, when applying the BOOT;

b. the FWC to only have regard to patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time (no longer does the FWC need to consider hypothetical work patterns);

c. the FWC has the power to directly amend or excise a term in an agreement that does not otherwise meet the BOOT (where currently an employer is offered the option of giving an undertaking amending the effect of a term); and

d. the BOOT can be reassessed (on application to the FWC) if there has been a material change in working arrangements or the relevant circumstances were not properly considered during the approval process (referred to as the reconsideration safeguard).

Under the new reforms, the FWC would apply the BOOT only having regard to patterns or kinds of work, or types of employment if they were reasonably foreseeable at the relevant time (not in reference to any prospective engagement type).

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

If these things change, or employees' circumstances were not properly considered, the reconsideration process provides an important mechanism to have the BOOT reassessed to ensure employees are not left worse off. The intention of the reconsideration process is to permit adjustments to the bargained outcome to the extent necessary to address the FWC's concerns, not to reduce the entitlements or interfere with the working arrangements for employees who are not affected by the concerns, or unnecessarily disrupt the operations of the enterprise.

4. Intractable Bargaining

If either party to the bargaining can demonstrate that they are unable to come to an agreement, the FWC will now have the power to issue an intractable bargaining declaration. Following any post-declaration negotiation period, the FWC can make a workplace determination to resolve any matters on which agreement has not been reached by the parties.

5. Sunsetting of Zombie Agreements

All agreements made before the commencement of the FW Act in 2009 that are still in operation will automatically sunset (or terminate) **7 December 2023.**

Parties to an agreement can apply to the Commission to extend the sunset date for the agreement by up to four years at a time. Applications need to meet certain conditions, for example, that bargaining is occurring for a proposed replacement agreement or employees would be better off under the zombie agreement.

Employers who have employees covered by these agreements need to let those employees know, in writing, that the agreement will be terminating 7 December 2023 unless an application for extension is made to the Commission. The written notice needs to be provided before 7 June 2023.

6. Supported Bargaining

From **6 June 2023**, the FWC will be required to make a Supported Bargaining Authorisation if it is satisfied that it is appropriate for the relevant employers and employees to bargain together when considering:

a. the prevailing pay and conditions in the relevant industry/sector, including whether low rates of pay prevail in the industry or sector;

b. whether the employers have clearly identifiable common interests (which may include geographic location, the nature of the enterprises to which the agreement will relate, the terms and conditions of employment in those enterprises, and whether they are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory); and

c. whether the likely number of bargaining representatives is manageable.

A supported bargaining authorisation cannot be made unless a union represents at least some of the employees who would be covered.

Employees of each employer to be covered must vote as a separate cohort. If a majority of employees of one employer do not 'vote up' the agreement, then that employer will not be covered by the agreement. A highly controversial element of the Supported Bargaining area is that once an agreement is made under a Supported Bargaining Authorisation, employers can later be added as parties to the agreement involuntarily. A union can apply to the Commission to add an employer to the agreement. The Commission would need to be satisfied that the majority of employees want to be covered by the Agreement, but importantly there does not need to be a ballot conducted to demonstrate this majority support it can simply be shown through the use of petitions.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

7. Single-Interest Employer Authorisations

Under the current system, single interest authorisations are quite limited, in that they can only be used for franchise groups, related bodies corporate or where a Ministerial Declaration has been issued.

However, from **6 June 2023**, if a union makes an application for a Single-Interest Employer Authorisation, they don't need employer agreement but rather need to show that a majority of employees who are employed by the employers want to bargain. Again, this doesn't require a ballot and is likely to be able to be demonstrated via a petition. It also allows for a situation where a larger employer can be used by the union to carry the vote over a number of smaller employers.

However, where employers and employees are covered by a current enterprise agreement, or the employer has already agreed in writing with an employee organisation to bargain for a replacement single-enterprise agreement, such employers cannot be compelled to bargain for a single interest employer agreement. The Commission also has discretion to refuse to include an employer in an authorisation or add the employer to an agreement if:

a. good faith bargaining is already occurring;

b. there is a history of effective bargaining between the parties; and

c. less than nine months have elapsed since the nominal expiry date of the previous such agreement.

In addition, small business employers cannot be added without their consent, with a small business being a business with fewer than 20 employees.

8. Termination of Enterprise Agreements After Nominal Expiry Date

From **7 December 2022**, the FWC is required to terminate an enterprise agreement upon application if it is satisfied that one of the following applies:

a. its continued operation would be unfair for the employees covered by the agreement; or

b. it does not, and is not likely to, cover any employees; or

c. all of the following apply:

- the continued operation of the agreement poses a significant threat to the viability of the business;
- terminating the agreement is expected to reduce the risk of terminations of employment due to redundancy, insolvency or bankruptcy; and
- if the agreement has terms about termination entitlements, the employer or employers it covers guarantees the termination entitlements to the Commission.

In deciding whether to terminate an agreement, the Commission needs to consider the views of the employer or employers, employees or unions it covers. The Commission also needs to consider whether:

a. bargaining for a proposed replacement agreement to cover the same or substantially the same employees as the existing agreement is occurring; and

b. the termination would adversely affect the employees' bargaining position.

Respect@Work

Category:
Update to legislation

Related legislation:
Sex Discrimination Act 1984

Summary: Anti-Discrimination and Human Rights Legislation Amendment **(Respect at Work)** Act 2022 (Respect at Work Act) amends the Sex Discrimination Act 1984 **(SD Act)** to impose a positive duty on employers to eliminate sexual harassment in the workplace.

The global conversation around the prevalence of sexual harassment in the workplace, and the institutional structures that perpetuate it, reached a fever pitch in 2017. The devastating impacts of behavioural misconduct would no longer be disregarded. The real-life and social media campaigns for awareness and policy change, as well as the troubling first-person accounts, dominated the news cycle and evinced an unprecedented public appetite for systemic change.

In June 2018, the Sex Discrimination Commissioner Kate Jenkins announced the National Inquiry that would later lead to the Respect@Work Report (Report). This was seen as a groundbreaking, world-first response to the growing issues and movements around workplace sexual harassment. The Inquiry purported to investigate the true extent of the previously hidden nature of sexual harassment in the workplace, assess the harms to society and the costs to business and community, and ultimately produce recommendations for addressing these issues at a federal level.

The Report's findings were based upon the fourth *National Survey on Workplace Sexual Harassment*, which revealed that one in three Australian workers of all genders had experienced sexual harassment in the previous five years. The identified sexual harassment behaviours range from sexually suggestive comments, intrusive questions and pressure for intimate encounters to non-verbal leering and gesturing, inappropriate physical contact and sexually explicit items in the workplace. Crucially, almost half of respondents reported the same type of harassment happening previously at the same workplace. The Report estimated the cost to employers as $3.8 billion in 2018 alone as a result of high staff turnover, negative impacts on workplace culture, increased absenteeism and loss of productivity.

On 12 December 2022, the Respect at Work Act commenced and strengthens the legal and regulatory frameworks relating to sex discrimination and shifts the system to focus more on preventative efforts to eliminate sexual harassment in Australian workplaces. Key changes arising from the Respect at Work Act include the following:

1. Positive Duty

The key reform of the Respect at Work Act is the introduction of a positive duty in the SD Act that requires employers to take reasonable and proportionate measures to eliminate certain forms of unlawful sex discrimination, including sexual harassment, as far as possible.

Respect@Work

The positive duty on employers to protect people from sex discrimination in the workplace means that businesses are now required to actively stamp out workplace behaviours which have the potential to result in an offensive, intimidating or humiliating environment for people of one sex. The prevention calls for employers to take 'reasonable and proportionate measures' to eliminate sex discrimination and sexual harassment. The meaning of 'reasonable and proportionate measures' are adaptable, and will vary depending on the size, nature and circumstance of the business, and its financial and non-financial resources. Some examples include:

a. implementing policies and procedures (though this alone will not be enough);

b. collecting and monitoring data (large to medium-sized businesses should conduct staff surveys);

c. providing appropriate support to workers and employees; and

d. delivering training and education around the unlawful conduct on a regular basis.

2. Hostile Workplace Environments

The SD Act now also prohibits conduct that subjects another person to a workplace environment that is hostile on the grounds of sex. This provision broadly covers any conduct that occurs in the workplace, including by clients and contractors. The protection does not require that the conduct is directed at a specific person but instead prohibits conduct that results in an offensive, intimidating and humiliating environment for people of one sex, for example a mechanic hanging pictures of naked women around the workplace. The test here is whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct being offensive, intimidating or humiliating to a person of the sex of the second person by reason of their sex or characteristics to do with their sex.

3. Harassment Definition

The definition of harassment under the SD Act has also changed. There is no longer a requirement for the alleged wrongdoer to have engaged in unwelcome conduct of a "seriously demeaning" nature. All that is now required is that the unwelcome conduct was of a "demeaning" nature. This lowers the threshold requirements for a finding of harassment on the ground of sex.

4. Australian Human Rights Commission Powers

The Respect at Work Act also empowers the Australian Human Rights Commission (AHRC) to inquire into systematic and unlawful discrimination. That is, the AHRC can unilaterally initiate action to address unlawful discrimination rather than waiting on individuals to make a complaint. The AHRC will be able to:

a. prepare and publish other guidelines for complying with the positive duty and promote understanding and public discussion of the positive duty;

b. conduct inquiries into a person's compliance with the positive duty and provide recommendations to achieve compliance

c. give a compliance notice specifying the action that a person must take, or refrain from taking, to address their non-compliance; and

d. apply to the federal courts for an order to direct compliance with the compliance notice.

The new powers of the AHRC will not commence until **12 December 2023.**

Importance of Keeping Accurate Records

Category:
Case Law: *Fair Work Ombudsman v Quickpoint Pty Ltd [2022]* FedCFamC2G 991

Summary: A court has fined the director of a Japanese restaurant almost $25,000 after finding that he "reverse engineered" pay records provided to the FWO and asked a short-changed employee not to "sell him out".

In December 2020, the Fair Work Ombudsman (FWO) filed an application claiming that the restaurant and its sole director had contravened provisions of the Fair Work Act 2009 (FW Act) which included making and providing of false and misleading time and wage records which concealed that two employees had not been paid their entitlements under the FW Act.

Both employees received flat rates between $15 and $16 per hour, well below their minimum entitlement. After being told of the FWO investigation, the employer within days provided the employees with 18 and 27 pay slips respectively, and further supplied the FWO with records of hours and payment summaries. The amount the employees were paid, as noted on the summaries, had been reversed engineered, with false hours, so that the amount they were paid would appear as legitimate.

Put simply, the employer recorded a reduced number of hours worked by their employees so that a calculation of those hours as against the award rates would equal the amount of money that was actually paid to the employees.

It was found that the employer attempted to manipulate and threaten the employees by saying, "If things go bad there may not be a shop to work in" and "Don't sell me out."

The Judge found that the actions in this case were calculated and very serious.

Given that the frequency of underpayments in the hospitality industry made the need for general deterrence "high", the Judge penalised the director $24,580 out of a maximum $50,400 and Quickpoint Pty Ltd $168,415 out of a maximum $378,000.

Factors to Take Into Consideration When Affecting a Dismissal

Category:
Case law: *Trevor Purves v Queensland Rail Transit Authority T/A Queensland Rail* [2022] FWC 3343

Summary: The FWC has reinstated a Queensland Rail trackworker sacked for breaching the organisation's zero alcohol policy when he blew 0.025 in a random workplace alcohol breath test, finding the dismissal harsh because of his unblemished 39-year tenure, his age and limited education.

Mr Purves was dismissed from his employment of 39 years after returning a positive alcohol reading with a breathalyser test. Queensland Rail has a zero tolerance for alcohol in the system of rail workers due to the high safety risks that come with the position and the area of work.

Mr Purves stated that the night before the random drug and alcohol test, he left the depot at 3pm and then between 3:30 and 7:45pm he drank half a bottle of Johnnie Walker scotch mixed with coke before having a light microwave dinner and went to bed between 8.30-9.30pm. Mr Purves claimed that he had followed this nightly routine for years and had passed every other random breath test.

Queensland Rail undertook an investigation and a 'show cause' process before terminating Mr Purves' employment.

The FWC accepted that Queensland Rail had a valid reason for dismissal and that the process had been procedurally fair but found the dismissal disproportionate to the misconduct and that the employer failed to take into account mitigating circumstances, or the "very significant adverse impact" on Mr Purves.

The FWC considered Mr Purves age (63 years old), his limited literacy skills and ability to obtain other employment, his long-standing unblemished service record, the financial and personal impact on him and his family, and Mr Purves' genuine belief that he would have a zero BAC.

The Commission acknowledged Mr Purves' remorse and ordered that Mr Purves be reinstated to his former position and awarded him 50% back-pay, including superannuation and continuity of employment.

This case is a timely reminder that the FWC has the discretion to consider any other matter it sees fit, including the employee's personal circumstances, to assess the proportionality of a dismissal. Employers should also have regard to such factors in mind when considering a termination.

Employer Facing Potential Jail Time Over Alleged Underpayments

Category:
Payment compliance

Summary: A restaurant in Victoria is facing criminal prosecution over allegations that it withheld thousands of dollars' worth of wages from its employees. This case marks the first criminal charges for wage theft brought against an employer in Australia.

Wage Inspectorate Victoria has laid Australia's first criminal wage theft charges against a business and its owner, while warning it intends to bring further matters to court.

The Inspectorate has filed 94 criminal charges in the Magistrates Court of Victoria against the restaurant and its owner. The charges against the restaurant are the first criminal wage theft charges laid under the Victorian Wage Theft Act (Act) and the first in any Australian jurisdiction.

The Inspectorate has alleged that the restaurant and its owner dishonestly withheld over $7,000 in employee entitlements, including wages, penalty rates and superannuation, from multiple young former staff members. Under the Act, individuals can be sentenced up to 10 years in jail, while companies face fines in excess of $1 million.

The matter was listed for mention in the Broadmeadows Magistrates' Court on February 21.

The wage theft laws commenced 1 July 2021 making it a crime for Victorian employers to dishonestly underpay their workers or withhold their entitlements. In particular, it is a crime for an employer in Victoria to:

a. deliberately and dishonestly underpay employees;

b. deliberately and dishonestly withhold wages, superannuation or other employee entitlements;

c. falsify employee entitlement records to gain a financial advantage; and

d. avoid keeping employee entitlement records to gain a financial advantage.

Companies that break the laws can face fines of more than $1.1 million, while individuals can be jailed for up to 10 years.

Victoria's wage theft laws target employers who deliberately and dishonestly withhold wages and other worker entitlements. Honest mistakes made by employers who exercise due diligence in paying wages and entitlements are not considered wage theft.

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From outsourcing your HR case management so your business can instantly scale your team to unlimited and untimed workplace advice around the clock, the team at HR Assured can tailor a solution that meets your business's needs, seamlessly integrating with any standing HR functions.

So, why HR Assured?

- You can access their pool of talented workplace relations specialists to seek advice 24 hours a day, seven days a week, 365 days a year.
- Specialised case management services where HR Assured acts as an extension of your internal HR team.
- If a workplace claim is made, HR Assured will stand by you with their Advice Promise, which includes representation (by FCB Workplace Law), plus the paying of damages if a claim does surface (T&Cs apply).
- A complete Workplace Health and Safety (WHS) management system.

HR Assured provides advice and support for businesses across many industries and ones just like yours. Read about how they've helped their clients here.

If you'd like to know more about HR Assured and what this industry-leading HR & WHS solution can do for your business, email horton@hrassured.com.au or phone 1300 201 451.

About WorkForce Software

WorkForce Software is the first global provider of workforce management solutions with integrated employee experience capabilities. The company's WorkForce Suite adapts to each organisation's needs—no matter how unique their pay rules, labour regulations and schedules—while delivering a breakthrough employee experience at the time and place work happens.

Enterprise-grade and future-ready, WorkForce Software is helping some of the world's most innovative organisations optimise their workforce, protect against compliance risks and increase employee engagement to unlock new potential for resiliency and optimal performance. Whether your employees are deskless or office workers, unionised, full-time, part-time, or seasonal, WorkForce Software makes managing your global workforce easy, less costly and more rewarding for everyone.

Learn more about WorkForce Software at www.wfsaustralia.com