Workplace Relations Update

Covering all things legal to do with people - Employment, Industrial Relations, Health & Safety, Privacy, Disputes, Investigations & Litigation.

February Edition

I hope you had a great Christmas and new year period. We are refreshed and looking forward to working closely with our clients to achieve their goals in the year ahead.

- **Shane Entriken**, Partner

The latest legal updates you should know:

- **High Court endorses Aldi Enterprise Agreement.**
- **Toll reputation - employee to return uniform.**
- **Fixed term contract employees and long term casuals given scope to pursue unfair dismissal claims.**
- **Do you accrue annual leave during a workplace lockout?**
- **Bird Attack in Carpark – Employer liable for injury.**

Upcoming Event

21 February 2018

Employment Law "Must Knows" for 2018

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Get in Touch!

Shane Entriken
D/+61 (8) 9216 7141
sentriken@allionpartners.com

Andrew Jonklaas
D/+61 (8) 9216 7124
ajonklaas@allionpartners.com

Lauren Baker
D / +61 (8) 9216 7131
lbaker@allionpartners.com

ALDI HIGH COURT ENDORSEMENT

The High Court has endorsed Aldi's approach to their Greenfields Enterprise Agreement but directed the case to the FWC Full Bench to re-determine the correct application of the Better Off Overall Test.

Case Brief: *Shop, Distributive & Allied Employees Association v ALDI Foods Pty Limited [2017] FCA 6* (13 January 2017)

The Enterprise Agreement was originally approved by Deputy President Bull in the Fair Work Commission (FWC) and later upheld by the FWC Full Bench.

On appeal, the Full Federal Court found the FWC had failed to address the circumstances of genuine agreement by the employees covered under the Enterprise Agreement. The unions argued that the Enterprise Agreement failed the Better Off Overall Test (BOOT).

The Full Federal Court decision found 17 Aldi managers were not actively working when they voted and therefore were not sufficiently 'covered by' the Enterprise Agreement.

The High Court granted special leave to hear the matter particularly on the grounds regarding coverage and the application of the BOOT. Counsel of Aldi argued the legislation did not intend to distinguish between employees actually working and those who were engaged to work in the business. Chief Justice Kiefel and Justices Bell, Gageler, Keane, Nettle, Gordon and Edelman found Aldi's approach to be the correct interpretation as otherwise it 'requires one to read into the provision words that are not there.'

In reaching their decision on coverage, the High Court noted the requirement of a genuine agreement should be viewed as to 'whether the agreement covers all employees who may in future have the terms and conditions of their jobs regulated by it.' The High Court found the Full Federal Court's interpretation 'strained' the construction of s186(2)(a) of the *Fair Work Act 2009* (Cth)(FW Act).

Justice Gageler delivered his own judgement to address the coverage matter. He noted the differences between a Greenfields Agreement (where there is no existing agreement) and a non-Greenfields Agreement. Justice Gageler noted that non-Greenfields Agreements must be genuinely agreed by employees who were employed at the time of the agreement and who are covered by it.

In reviewing the application of the BOOT, the High Court agreed with the Full Federal Court in finding the FWC had incorrectly applied the BOOT test and that this constituted jurisdictional error. The High Court concluded that there were no reasons to suggest the employees were better off overall and there had been no direct engagement by the FWC to compare the agreement and the modern award. The FWC had only relied on the comparison clause set out in the Enterprise Agreement. The Full Bench of the FWC did not reconsider the decision of Deputy President Bull and therefore were also in error.

The High Court has directed the matter back to the FWC Full Bench for redetermination of the BOOT decision.

What does this mean for employers?

- This decision will receive some focus in our next client briefing on 21 February 2018 and has major implications for employers by way of strategic agreement options.

TOLL SET TO HAVE ROGUE EMPLOYEE RETURN UNIFORM

The Federal Circuit Court has given the ex-employee of Toll one week to return their uniform after misrepresenting themselves as a current employee during right-wing activist displays.

Case Brief: ***Toll Transport Pty Limited & Ors v Neil Luke Erikson, MLG2651/2017***

The ex-employee had been wearing the Toll uniform during his outspoken campaigns against same-sex marriage, Muslims and Toll (the **Company**), misrepresenting himself as a current employee of the Company.

The Company sought permanent orders for damages for injurious falsehood, breach of contract and compensation for contraventions of the Enterprise Agreement. The Company believed the ex-employee was wearing the Company uniform deliberately as revenge for ending his employment.

The ex-employee claimed he was dismissed for his involvement in the Bendigo Three case where he was fined $2,000 for filming a staged and fake beheading.

Judge Jones ordered the ex-employee to return the uniforms within one week, banned him from publishing videos, photographs and other online statements with unaffiliated people wearing the Company uniform, and ordered him to remove the videos of his alleged dismissal, his calls to boycott the Company and other accusations against the Company.

What does this mean for employers?

- It is not uncommon to have disgruntled ex-employees and therefore employment contracts should be drafted to contemplate and counter mischievous post-employment behaviour.

FIXED TERM CONTRACTS AND LONG TERM CASUALS GIVEN SCOPE TO PURSUE UNFAIR DISMISSAL CLAIMS

The Fair Work Commission Full Bench has quashed a May decision and has invited the ruling in *Department of Justice v Lunn* to be re-examined by the courts.

Case Brief: ***Saeid Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162 (8 December 2017)***

The original application involved a teacher who had spent 11 years of continuous service with the employer on fixed-term outer limit contracts. The employee was not offered another contract on the basis the employer had concerns regarding his performance. The employee had not had an opportunity to respond to any concerns.

At first instance, Commissioner Hunt had considered herself to be bound by the decision in *Department of Justice v Lunn* (**Lunn**) to determine whether there had been a dismissal.

The employee appealed the decision (among other grounds of appeal) stating the Lunn case had been incorrectly decided, or alternatively that it did not apply to the FW Act.

The FWC Full Bench held Commissioner Hunt had incorrectly relied on Lunn in reaching her decision. In quashing the ruling, Vice President Hatcher and Commissioner Saunders considered the expression, 'termination of employment at the initiative of the employer' to be artificially constrained in Lunn and did not take into account the relevant circumstances that may apply. Deputy President Colman found that despite this, Commissioner Hunt had reached the correct conclusion and asked for the appeal to be dismissed.

The Full Bench decision focused on the circumstances of fixed term contracts and stated that the focus of the inquiry should be a 'reference to termination of the employment relationship, not by reference to the termination of the contract of employment.' The Full Bench stated that this was particularly pertinent with fixed-term contracts where termination occurs at the conclusion of the contract.

The case has been referred back to Commissioner Hunt for redetermination.

What does this mean for employers?

- The decision in Navitas means that there is now less certainty for employers who use maximum term contracts. Where the terms of the maximum term contract reflect a genuine agreement that the employment relationship will not continue after a specified date, then there will still be no termination at the initiative of the employer, assuming there are no other actions the employer has taken to end the employment relationship.

DO YOU ACCRUE ANNUAL LEAVE DURING A LOCKOUT?

The Fair Work Commission has found employees involved in a 74 day lockout in 2017 did not accrue annual leave during this time.

Case Brief: ***Construction, Forestry, Mining and Energy Union And Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Carter Holt Harvey Woodproducts Australia Pty Ltd T/A Carter Holt Harvey [2018] FWC 6* (16 January 2018)**

In determining the meaning of s22 of the FW Act regarding leave accumulation, Deputy President Gostencnik held the period of protected lockout did not constitute service for the accrual of annual leave or long service leave and instead was to be classified as an unpaid authorised absence pursuant to section 22(2)(b) Fair Work Act.

Deputy President Gostencnik found the presence of s22(2)(b) of the FW Act meant it was incompatible with annual leave for service under s87 of the FW Act.

Deputy President Gostencnik found that the non-accrual of leave during the lockout period was consistent with the provisions under the National Employment Standards, the state Long Service Leave Act and the relevant enterprise agreement. However, he found that the lock out period did not interrupt an employee's period of continuous service.

What does this mean for employers?

- Employers should be aware that during scheduled lockouts, employees will not accrue annual leave or personal leave, but that the lockout will not interrupt an employee's period of continuous service.
- If an enterprise agreement applies, it is important to understand its position in relation to lock out periods or situations involving unpaid authorised absences.

EMPLOYER LIABLE FOR CAR PARK BIRD ATTACK ON EMPLOYEE

A well-known supermarket chain has been ordered to pay an employee's compensation claim after an unsuccessful bid to the New South Wales Compensation Commission.

Case Brief: ***Smith v Woolworths Ltd [2017] NSWWCC 290 (5 December 2017)***

The employee was attacked by a native pee wee when she was walking in the employer's carpark to her shift at a shopping centre in May 2017, sustaining serious injuries to her right eye which required surgery.

The employer argued that the incident in which the injury occurred, had nothing to do with the worker's employment, that the employee had not crossed the boundary of the employment premises, and that her employment was not a substantial contributing factor to her injury.

In the Workers Compensation Commission, Arbitrator Harris clarified that 'an employer does not escape liability to pay workers' compensation entitlements simply due to the fault of another party', that the employee's injury was during the course of her employment because she had parked her car in the staff car park signifying the end of her journey to work and finally that she was 'extremely unlikely' to have been attacked 'had she not been in the course of her employment…'. Further, it was found that the employer knew that bird attacks were occurring in the carpark, but chose to do nothing about it.

What does this mean for employers?

- Employers may be liable for workers compensation claims outside of the traditional premises of employment, even where the injury occurs because of something such as a bird attack.
- The journey to work will extend to the time the employee parks their car, particularly where they park their car in an employer's carpark.