Snapshot of Employment and Workplace Relations Law Developments in 2018

Legislation update

Fair Work Act 2009 legislative changes

In December 2018 the following legislative changes were enacted:

- *Right to unpaid domestic violence leave enshrined in the National Employment Standards*

The Fair Work Act has recently been changed to give all employees covered by it (including casuals and part time employees) up to 5 days' unpaid leave where the employee is experiencing family or domestic violence, and needs to do something to deal with the impact of that that cannot practicably be done outside of work hours. Employees are to be automatically credited with 5 days' unpaid domestic violence leave at the commencement of each 12 months of employment, and the leave does not accrue from year to year.

- *4 yearly reviews of modern awards scrapped*

As of 1 January 2019, the lengthy, time consuming and expensive requirement for modern awards to be reviewed on a four yearly basis has been scrapped. However, reviews currently under way will continue. Going forward, applications to the Fair Work Commission to vary, make or revoke modern awards can be made pursuant to section 158 of the Fair Work Act, and the Commission will retain the right to vary, make or revoke modern awards in furtherance of the modern awards objective described in the Act.

- *Minor procedural or technical legal errors no longer necessarily an impediment to enterprise agreement approval*

Other recent amendments to the Fair Work Act make it clear that minor departures from the express requirements within the Act concerning the giving, content and form of notices of representational rights and legislative agreement pre-approval steps, will no longer be an impediment to the Fair Work Commission's powers to approve an enterprise agreement provided the Commission is satisfied the relevant employees will not be disadvantaged by the error(s).

New Victorian long service leave legislation

Victoria's new *Long Service Leave Act 2018* commenced on 1 November 2018 and replaced the 1992 Act of the same title. Among the key changes are the right to take long service leave after 7 years' continuous service rather than after 10 years. Click here http://www.bartlettworkplace.com/blog/an-employers-quick-reference-guide-to-the-new-victorian-long-service-leave-legislation-5 for a comparison of the old and new provisions.

- *Labour hire licencing laws*

In 2018, Queensland's labour hire licencing laws commenced, and Victoria also passed its own labour hire licencing laws (with the Victorian scheme yet to take effect). The labour hire licencing schemes establish State-specific licensing regimes (among other things) requiring labour hire providers to register with and be subject

to the relevant authority, and labour hire users to utilise licenced providers, with an ultimate aim of protecting labour hire workers from exploitation. The Government in South Australia, on the other hand, is taking steps to repeal its labour hire licencing laws passed by the previous Government.

Modern Award developments in 2018

- *Flexible working arrangements*

As of 1 December 2018, modern awards include new rules around requests for flexible working arrangements. Specifically, employers of modern award-covered employees are required to make a genuine attempt to reach an agreement with employees on requests for flexible working arrangements, and must provide detailed reasons for refusing requests for such arrangements. In addition, employers are required to specify any alternative arrangements they can provide, with workers being able to dispute whether the correct process has been followed. The new model term serves as a supplement to the flexible work provisions in section 65 of the Fair Work Act and reflects growing workplace trends.

- *Unpaid family and domestic violence leave entitlements*

Modern awards have been updated to include a new clause entitling employees to take 5 days' (non-cumulative) unpaid family and domestic violence leave each year. Under the entitlement which took effect on 1 August 2018, family and domestic violence is defined as violent, threatening, or other abusive behaviour by an employee's family member that seeks to coerce or control the employee or otherwise causes them harm or fear. Employees will be entitled to this leave by reason of needing to deal with the impact of family and domestic violence where it is impractical for them to do so outside of ordinary working hours.

- *Boost to penalty rates for retail casuals*

The Commission has decided to increase casual retail workers' penalty rates for both weekday evening shifts and Saturdays, while reducing rates for Sunday shift workers. The changes will be phased in over a period of three years. Specifically, Saturday penalty rates for casual retail employees working between the hours of 7am and 6pm will increase from 25% to 50% in three specific stages, by March 2020. Penalty rates for casuals performing weekday evening work will also similarly increase in three stages by March 2020. Conversely, Sunday penalty rates will be reduced from 200% to 175% for full-time shift workers, and from 225% to 200% for casual shift workers.

- *Casual conversion right – see below*

Casual employment developments

- *Casual conversion - award covered employees*

In August 2019, as part of the Modern Award review process, the Commission determined that a casual conversion term was to be introduced into each modern award that did not already have a term dealing with the subject, to operate from 1 October 2018. In that regard, the Commission also determined form of a model conversion clause.

It would be prudent for employers with employees whose employment is governed by awards into which the conversion clause has been inserted, to familiarise themselves with the terms of the clause and they should note that the clause requires the employer, in relation to those of its casual employees who were engaged before the clause began to operate, to provide them with a copy of

the provisions of the conversion clause immediately (if not already done), and in relation to casual employees first engaged after the clause began to operate, to do that within 12 months after their first engagement.

- *Proposed new casual conversion NES*

The current Federal government has also recently announced that it will seek to enact legislation that introduces a new National Employment Standard providing for regular casual employees to request conversion to full-time or part-time employment, with it being indicated that the right of an employer to refuse an employee's request to convert on reasonable business grounds (as found in the model casual conversion clause determined by the Commission) to be reflected in the proposed legislation.

- *Workpac decision – when is an employee a casual employee for NES standards*

In August, the Full Court of the Federal Court gave its decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 placing an authoritative interpretation on the expression '*casual employee*' in the section of the Fair Work Act (s.86) which excludes casual employees from the benefit of the NES annual leave entitlements conferred by that Act. Leave to appeal the decision to the High Court was not sought.

Because of the particular meaning the Court gives to the expression 'casual employee' and the test it lays down for determining whether an employee is a casual employee for NES purposes, the decision has significant ramifications for some employers who employ employees as casuals.

In short, the result of the decision is that in some, perhaps many, cases employees to whom the label 'casual employee' is applied and who have therefore been considered to be excluded from NES annual leave entitlements and other NES leave, termination and redundancy entitlements, are not actually casual employees for NES purposes. The consequence of that being that they therefore do have those NES entitlements. Under the decision it is clear that this can be so even in cases where the employee has been paid a distinct casual loading on the basis that they do not have those entitlements. For a full discussion of the decision see http://www.bartlettworkplace.com/blog/who-is-an-authentic-casual-employee-and-therefore-not-entitled-to-nes-benefits-enjoyed-by-an-ongoing-employee.

The decision has prompted a variety of responses in various forms and from different quarters of the workplace relations community and politics. Without referring to all of them, the responses have included:

- An announcement by the Government in early December that it would introduce a new regulation directed establishing an employer right to offset identifiable casual leave loading payments against NES leave entitlements in cases where an employee who has been treated as a casual employee for NES purposes is found not to be a casual employee for those purposes and therefore to be owed money on that account.

- The institution of proceedings in the Federal Court by the employer involved in the Skene proceeding in which that employer seeks declaration that another of its employees who was employed as a casual employee, was a casual employee under the general law and for NES purposes. An application has been made by the employer to have that proceeding determined by a Full Court. The Federal IR Minister has intervened to support that reference with the relevant union and a plaintiff class action firm seeking by intervention to oppose the reference. Developments in that proceeding will be keenly watched.

‘A good gig?’ – Developments in the ‘new’ economy

It is trite to say that the term “gig economy” has become somewhat of a cultural phenomenon in recent years. Current estimates suggest that over one million Australians work on a freelance or project basis. Companies such as Uber, Menulog, Deliveroo and Airtasker are often credited by commentators as having effectively flipped a centuries-old employment and industrial relations model on its head. Though there is not much widely gathered data on the size of the gig economy, Unions NSW recently estimated that it adds around $504 million to New South Wales’ economy annually. And the gig economy appears to be spreading – through online marketplaces such as Expert360 and Commtract – to traditional white-collar management roles as well.

But with innovation comes challenge; and one of the key challenges for the gig economy is figuring out how it fits within Australia’s current legal framework. At the heart of the issue is the proposition that most, if not all, persons engaged through the gig economy are contractors rather than employees.

In June this year the Fair Work Ombudsman announced that it was taking legal action against Foodora, arguing that it breached the sham contracting provisions of the Fair Work Act because it knowingly or recklessly engaged three riders as contractors, when in fact they were employees. It was thought that the outcome would clarify the position at law in Australia for participants in the gig economy, particularly for delivery riders. Unfortunately, in August Foodora went into voluntary administration. Without approval from the Federal Court or the administrator, the Ombudsman’s sham contracting case could not continue and it was forced to drop the legal action.

However, at around the same time, former Foodora rider Josh Klooger brought an unfair dismissal claim on related grounds after he was fired for speaking out against the company. He claimed he was not an independent contractor but rather an employee and sought compensation for the circumstances of his dismissal. Despite the company’s financial position, that case went ahead. In November, the Fair Work Commission found in Mr Klooger’s favour, agreeing that he was in fact an employee and that the circumstances of his dismissal were unfair (see *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836). Commissioner Cambridge concluded:

> In this instance, the correct characterisation of the relationship between the applicant and the respondent is that of employee and employer. The conclusion that must be drawn from the overall picture that has been obtained, was that the applicant was not carrying on a trade or business of his own, or on his own behalf, instead the applicant was working in the respondent’s business as part of that business. The work of the applicant was integrated into the respondent’s business and not an independent operation. The applicant was, despite the attempt to create the existence of an independent contractor arrangement, engaged in work as a delivery rider/driver for Foodora as an employee of Foodora.

The Fair Work Commission was particularly critical of Foodora, noting the way in which its culture pitted riders against each other in competition for shifts as well as the way in which the company reduced its riders’ rates for deliveries over time.

The effect of this decision is obviously significant for those engaged in the gig economy. The administrators of Foodora admitted that they “*more likely than not*” owed workers up to $5 million because of misclassifying them as independent contractors. The Transport Workers’ Union National Secretary, Tony Sheldon, remarked of the decision: “*This is a business*

model used by these app-based companies to steal workers' rights."

Given the long-standing legal principles that were applied by the Commission, any clear shift to support the gig economy contracting model would most likely require legislative intervention. At this stage, no such intervention is on the horizon. In fact, the opposite. A recent Senate Committee report regarding the "Future of Work, and the Future of Workers" recommended legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to workplace protections. In addition, Labor has promised to regulate the gig economy if it wins the next election, though it has not proposed any specific measures in this regard to date.

So, does this spell the death of the gig economy? It is of course too early to determine. Natalie James, then the Fair Work Ombudsman, said as much in relation to the sham contracting action against Foodora: "*We're not in a position to put an entire business model before the courts, we can only look at particular relationships, but of course a case like this will be informative for others in the market … what will the implications be? That depends on what the court finds. I shouldn't and can't really speculate on the impact of a decision*."

In the interim, companies must examine the particular relationships they have with their workers and make their own determinations, cognisant of the legal risks.

Other significant decisions

Check out Bartlett Workplace's website for our blogs on important decisions throughout the year.