IRS

Industrial Relations Society of South Australia Inc

NEWSLETTER

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PRESIDENT'S MESSAGE

Dear Members

Hopefully, you will have received an email recently, containing a link to a survey, inviting your views on a proposal to change the name of the Industrial Relations Society of South Australia to the Australian Labour and Employee Relations Association SA. Depending on the results of that survey, a proposal to change the name of the Society may be put to members at the next Annual General Meeting.

The Committee of Management is actively planning seminars on topics of interest for members and publicity about future seminars will be distributed in the near future.

The past few months have been an active period at the national level. Deputy President, Kaye Smith, Committee Member, Peter Hampton and I have participated in lengthy discussions about the purpose and structure of our peak national body, the Australian Labour and Employee Relations Association. Hopefully, this debate will lead to structural improvements as well as greater sharing of the wealth of information held by State and Territory constituent Societies; with members in other constituent States or Territories.

Best wishes

Craig Stevens

President

NOTE

The articles in this Newsletter do not represent the views of the Industrial Relations Society of South Australia.

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

IRSSA is now calling for articles for its quarterly newsletter. Articles can be on any topical industrial relations matter and typically should be approximately 400 - 500 words. If you are interested in submitting an article for the September newsletter please contact Justin Ward, IRSSA Newsletter Editor. Justin's email is justin.ward@sa.gov.au

Is your generous bonus scheme really discretionary?

By Julia Swift, Special Counsel, Cowell Clarke

Many employers have bonus schemes in place which are designed to encourage and reward outstanding performance. It is of course common for such schemes to be stated to be at the discretion of the employer so that the employer can decide not to pay a bonus for any reason. Usually these bonus schemes are also not included in the contract but are set out in a separate policy which is specifically stated not to form part of the employment contract.

All of this would make you think it would be very difficult for an employee to enforce an entitlement to such a bonus, right? But the answer, confirmed in the recent case of *Russo v Westpac* [2015] FCCA 1086, is - not always.

Russo's employment contract with Westpac stated that:

> '*you may be invited, from time to time, to participate in a variable reward scheme…The eligibility to be considered for and the payment of any variable reward or incentive payment is at the absolute discretion of Westpac*'.

During his employment, Russo had been invited to participate in the General Investment Incentive Plan. The eligibility for payment under the Plan was determined in accordance with plan guidelines and rules which were expressly stated not to form part of the contract.

The Plan was also subject to the Westpac Variable Reward Scheme Rules which provided that:

> '*All variable reward payments under any scheme are made at the complete discretion of Westpac including the discretion not to make a variable payment in any year'*.

Not surprisingly, Westpac argued that Russo was not entitled to a bonus on the basis that the documents showed that the bonus was expressly agreed not to have contractual force and in any event had been expressly agreed to be at the complete discretion of Westpac. Westpac's defence was based on a detailed, technical legal analysis of what the Court referred to as the 'matrix of documents'.

However, the Court found that there was substantial disconnect between the 'idyllic employment environment', as thoroughly expressed in the matrix of documents, and what occurred in reality. Ultimately, the Court determined that the 'contractual matrix' provided that Russo's entitlements would be determined in accordance with Westpac's various documents.

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The issue was then whether Westpac was nevertheless entitled to exercise its discretion to not award any bonus to Russo. In this regard, the Court held that an employer's discretion to award a bonus must not be exercised capriciously, arbitrarily or unreasonably and must be exercised honestly and conformably with the purposes of the contract.

Although there may be legitimate reasons for exercising the discretion not to pay, such as financial stringency or misbehaviour, what is not permitted is an unreasoned, unreasonable, arbitrary refusal to pay anything, come what may.

As Westpac admitted to serious flaws in the performance review process it undertook in relation to Russo (which affected his entitlement to a bonus), the Court accepted that Westpac had not exercised its discretion reasonably and Russo was therefore entitled to the bonus.

The lesson for employers is to ensure that any refusal to pay a bonus can be defended as reasonable and to ensure they have evidence of sound, defensible reasons to support any such refusal.

The Federal Circuit Court has awarded an employee $170,000 after his employer breached the National Employment Standards (NES) by making unpaid parental leave available only to 'primary' caregivers.

By Kaye Smith, Vice President

In *Scullin v Coffey Projects (Australia) Pty Ltd* [2015] FCCA 1514, Mr Paul Scullin alleged that his employer, Coffey Projects had breached the *Fair Work Act 2009* ('**FW Act**') by contravening:

a. section 340 by taking adverse action against him in circumstances where that he was entitled to the benefit of the NES including 12 months unpaid parental leave (See Sections 67 and 70 of the FW Act);
b. section 351 by discriminating against him, by taking adverse action against him because of his family responsibilities to care for his twins;
c. section 345 by knowingly or recklessly making a false or misleading statement about the workplace rights of the applicant;
d. section 44 by contravening provisions of the NES; and
e. the terms of his contract of employment.

In January 2011, Mr Scullin applied to take leave for up to 12 months to care for his expected twins. His application to take the leave was made in accordance with the company's Parental Leave Policy. This policy formed part of Mr Scullin's terms of employment. The Policy required employees to be *'the child's primary care giver'*; whereas the FW Act requirement is that the employee '*has or will have a responsibility for the care of the child'*. His application for unpaid leave was rejected.

Mr Scullin, on the advice of his Manager and the Policy determined that he would not be the primary care giver and consequently did not apply for unpaid parental leave.

On the basis of advice given to him about his entitlements given by his Manager Mr Scullin commenced a mix of paid and unpaid leave rather than the continuous period of unpaid parental leave he had wanted.

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On his return to work, Coffey Projects required Mr Scullin to work as a casual or part-time employee and did not return him to full time work. Under the NES Mr Scullin was entitled to both unpaid parental leave and importantly, had the right to return to full time work (See Section 84 of the FW Act). He agreed to the part time role in the in the circumstances.

Coffey Projects later terminated Mr Scullin's (part time) employment for redundancy. The termination payment was calculated and paid on the basis of his part time contacted hours.

Mr Scullin alleged that the respondent took adverse action against him by (among other things):

- misrepresenting his right to take parental leave;
- rejecting his application to extend leave on the (erroneous) basis that he was not the primary care giver;
- not returning him to his pre-leave position and/or duties, or if that no longer existed, a position nearest in status and pay to that pre-leave position;
- remunerating him on the basis of casual or part-time employment; and
- failing to pay him the total remuneration package of $202,020 per annum, inclusive of minimum superannuation contributions, in accordance with the Employment Agreement.

Mr Scullin did not challenge the validity of his selection for redundancy, but said that if he had been returned to full time work in accordance with his rights, his redundancy pay figure would have been based on a higher calculation.

Findings of the Court

- there was a breach of Mr Scullin's entitlement to unpaid parental leave (See Section 76 of the FW Act). Mr Scullin was denied the right to take unpaid parental leave, and consequently, denied the right to return to his full-time position when his leave finished (See Section 84 of the FW Act). That loss to him was the difference in his pay, between when Mr Scullin returned to work after finishing his leave on 1 May 2012 and 31 May 2013, when his position was made redundant. This amount was agreed between the parties to be $109,000;
- Mr Scullin was also entitled to $9000 in accrued annual leave and an additional $51,000 in severance pay as a full-time employee instead of the payout he received as a part-time employee;
- The Company had not 'recklessly' or 'knowingly' denied Mr Sculling his right to unpaid parental leave. The Court accepted that its HR Manager had provided advice to his Manager based on a policy developed prior to her employment, and which she did not appreciate was in breach of the NES by mistake;
- The Court did not accept Mr Scullin's argument that Coffey Projects had taken adverse action against him by requiring him to work part-time, then making him redundant because he had family responsibilities. The redundancy was attributed to the post-GFC downturn in the building industry.

Learnings

This case demonstrates the importance of keeping lawful, up to date policies that employers review for compliance with industrial laws, and apply correctly. Regularly training employees, especially those in management roles responsible for enforcing workplace policies, is essential.

Fair Work Commission update for practitioners

Enterprise agreements benchbook

A new Enterprise agreements benchbook is available on the Commission's website. The benchbook has been designed to assist parties who are bargaining for, and making, an enterprise agreement. The benchbook contains plain English summaries of key principles of bargaining and agreement making case law and how these have been applied in Commission decisions.

Updated Anti-bullying benchbook

A revised Anti-bullying benchbook is also now available on the Commission's website. The benchbook has been updated to reflect the recent decisions of the Commission dealing with various aspects of this jurisdiction.

The new and revised benchbooks join the Commission's existing General protections benchbook and Unfair dismissals benchbook.

Notice of employee representational rights guide

A new Notice of employee representational rights guide is available on the Commission's website, setting out the requirements that employers must follow.

In the initial stages of the enterprise bargaining process, an employer is required to provide employees with a Notice of Employee Representational Rights (the Notice). The *Fair Work Act 2009* states that the Notice must contain the content prescribed by the *Fair Work Regulations 2009* and that it must be provided within the prescribed timeframe. The Commission can not approve an enterprise agreement if the Notice does not comply with these requirements.

Practice notes

The Appeal proceedings practice note provides a general explanation of appeal rights, and sets out the procedures followed by the Commission when listing, hearing and determining appeals.

The Fair hearings practice note provides procedural guidance and information about the conduct of hearings before the Commission, including the responsibilities of Commission Members, applicants, respondents and their representatives.

Amendments to the Rules

Amendments to the Fair Work Commission Rules 2013 took effect from 1 January 2015.

The amendments were made following a decision by the President of the Commission to separate the previous Form F8—General Protections Application into two forms:

- Form F8—General Protections Application Involving Dismissal
- Form F8C—General Protections Application Not Involving Dismissal.

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The amended Rules also make the wording of service and lodgment requirements for a number of forms consistent, and remove the requirement for a response to be lodged in relation to a dispute under s.739 of the Fair Work Act.

Updates to five additional forms were approved in April 2015:

- Form F10—Application for the Commission to Deal with a Dispute in Accordance with a Dispute Settlement Procedure
- Form F17—Employer's statutory declaration in support of an application for approval of an enterprise agreement
- Form F34—Application for a Protected Action Ballot Order
- Form F35—Application for Variation of a Protected Action Ballot Order
- Form F36—Application for Revocation of a Protected Action Ballot Order.

You can access all forms on the Commission's website.

Vale Susan Hudson

It is with sadness that we advise members of the Society of the passing of Susan Hudson. Susan was for about four years, between 1994 and 1998, the provider of secretariat services to the Society and many members from that time would recall her friendly and professional manner. Susan also regularly attended Society events in more recent years.

Susan worked within the Industrial Relations Court and Commission of SA (IRCC) from 1994 having coming from the office of the then Minister for Labour, Hon Bob Gregory MP. Susan acted in the role of Personal Assistant to various Registrars and Deputy Registrars including Roger Hughes, John Correll, Gillian O'Dea and Chris McDonell.

In later years, Susan undertook various other roles including as a Dispute Resolution Assistant within the Workers Compensation Tribunal (WCT) and Accounts Coordinator in IRCC/WCT Corporate Services branch. Susan was also the PA to Minister Hon Karlene Maywald MP between 2004 and 2005.

Susan achieved a great deal in her all too short 50 years and passed away in early June this year following a battle with cancer. She will be sadly missed by her friends and colleagues at the IRCC, WCT and IRSSA.

(This item was provided by Commissioner Peter Hampton with the assistance of John Correll, Registrar IRCC and WCT)

Fair Work Commission - Improving public value - Future Directions 2014–15 pilot program update

Recently, the President of the Fair Work Commission, Hon Justice Iain Ross AO, released an update in relation to a number of pilot programs being conducted by the Commission. The following extracts summarise the announcement. The full version is available from the Commission's website: https://www.fwc.gov.au/about-us/news-and-events/update-2014-15-future-directions-pilot-programs

The Fair Work Commission serves the community through the provision of an accessible, fair and efficient dispute resolution service for employment relations matters. Over time the tribunal has undergone changes to its name, functions and structure and endures by successfully adapting to these changes.

Future Directions is the Commission's ongoing change program of initiatives designed to adapt and improve services in a contemporary environment and to meet the shift in the nature of the Commission's work from primarily dealing with disputes of a collective nature to more individual rights-based matters. This program will assist the Commission to improve its performance, efficiency and the quality of its services, making it easier for both the 'one time' and regular users to effectively engage with the Commission.

A further challenge the Commission faces, along with most public organisations, is to continue to deliver quality services to the Australian community efficiently and effectively within the resources allocated to it. In short, how do we deliver improved services at a lower cost? The Commission is committed to meeting this challenge by directing its resources to where they will deliver the best outcomes and by operating in a manner consistent with best practice in Australian tribunals and courts. A series of pilot programs have been conducted in 2014–15 to trial and test new ways of delivering services to meet this challenge.

In 2014–15 the Commission began three pilot programs to test different ways of delivering its services in dispute resolution (general protections claims involving dismissal), enterprise agreement approval and determining permission to appeal applications.

The aim of the pilots has been to better utilise the Commission's resources by trialling the efficacy of administrative staff performing non-determinant work and freeing up Members for more complex matters. The permission to appeal pilot will be reviewed in October this year. The general protections and agreement approval pilots have recently been reviewed by Inca Consulting, led by its Director Murray Benton, in association with Dr George Argyrous, Senior Lecturer in Evidence-Based Decision-Making, University of NSW. The key findings and the full reports are available on the Commission's website.

Changes announced to the Federal Government's Paid Parental Leave Scheme

By Kylie Dunn, Committee Member

As part of the Federal Budget, the Federal Government announced that it proposes to amend the legislation underpinning the Government's paid parental leave scheme to prohibit employees from being able to access parental leave payments from both the Government and their employer. It is proposed that, from 1 July 2016, employees will no longer be permitted to access the government-funded paid parental leave scheme if their employer provides a more generous scheme.

Current parental leave regime

Under the National Employment Standards (**NES**), employees with at least 12 months service may, subject to satisfying relevant qualifying criteria, be entitled to take up to 24 months unpaid parental leave. In October 2010, the Federal Government introduced the *Paid Parental Leave Act 2010* (Cth) (**PPL Act**) which entitles eligible employees to receive government-funded parental leave payments for up to 18 weeks at the National Minimum Wage (currently $640.90 per week).

Many employers have policies which provide for eligible employees to receive parental leave payments in certain circumstances. Such a policy may operate independently of, or in conjunction with, the Government scheme. For example, a policy may provide that where an employee qualifies for parental leave payments under the Government scheme the employer will provide "top up" payments up to the employee's ordinary wage. Alternatively, the policy may provide for employees to take a period of 18 weeks leave under the Government scheme followed by a further period of leave during which the employee will be paid directly by their employer at a particular rate.

Proposed changes to Government parental leave scheme

The Government's proposed changes to the PPL Act are expected to take effect from 1 July 2016 and have been introduced in response to concerns about the number of employees who are said to be 'double dipping' by accessing both entitlements. At this stage it is proposed that all employees' entitlements to paid parental leave will be capped at the level provided by the Government scheme ($11,536.20, being 18 weekly payments of $640.90). The effect of this is that:

- employees will no longer be eligible to access the government-funded paid parental leave scheme if their employer provides a more generous scheme;
- employees who receive benefits less than this will be entitled to "top up" payments from the Government to a maximum of $11,536.20;
- employees who do not receive any paid parental leave from their employers will continue to receive their current entitlement under the Government scheme.

Implications for employers

In the event that the PPL Act is amended in line with the Government's recent announcement, employers will need to consider the potential impact on the operation of their own parental leave policies and terms of any enterprise agreements and contracts of employment. Going forward, employers who offer generous parental leave entitlements to their employees may be eligible for less government-funding which could have significant consequences for employers' costs.

In deciding to terminate or vary any existing parental leave schemes, employers should bear in mind their obligations with respect to notice and consultation requirements.

Proposed changes to paid parental leave strip entitlements from working mothers

By Michael Irvine, Associate, Andersons Solicitors

Whether you loved her or hated her, there is little denying that one of former Prime Minister Julia Gillard's greatest reforms was the introduction of Australia's first Paid Parental Leave ("PPL") scheme in 2010. The scheme passed Parliament in mid-2010 and became operational in January 2011.

The union movement had been fighting for a strong PPL in Australia for decades, and before its successful passage in Parliament, Australia was one of the few developed nations that did not have a federally mandated and regulated PPL scheme (even now politicians including Presidential candidate Hillary Clinton are still fighting for the introduction of PPL in the United States).

The 2010 Australian scheme comprised of very complex legislative reforms (which will not be discussed in detail in this blog, suffice to say that the *Paid Parental Leave Act 2010* comprised of more than 300 sections in addition to detailed regulations). Basically, it allowed working mothers to receive 18 weeks of salary paid at the Federal Minimum Wage (which was raised to about $660 per week before tax in June 2015, and was approximately $570 per week when the law was introduced). This payment coincided with the birth or adoption of a child.

If, for example, a woman was earning $30,000 per year and fell pregnant, she'd be entitled to 18 weeks paid leave at the minimum wage, and a woman earning $80,000 per year would also be entitled to 18 weeks pay at the minimum wage. Women earning over $150,000 annually were precluded from accessing the entitlements.

When Labor was in government, the Liberal/National Opposition argued that Labor's scheme did not go far enough. In fact, the then Opposition Spokesperson for Women, Sharman Stone, heavily criticised Labor's legislation arguing that the 'poor-relation scheme offering only 18 weeks of the minimum wage does not go near covering the household expenses of two-income families working hard to pay their mortgage and the cost of living'.

However, others argued that the scheme struck a good balance between the workforce, the Government and the business community, and it would encourage higher participation of women in the workforce during arguably their most productive years.

Importantly, the scheme was also designed to supplement any entitlements provided by the employer. For example, if the specific employment contract or agreement afforded a worker a certain amount of parental leave, the worker could still access the 18 week PPL. Employers would offer its own form of parental leave in an attempt to attract and retain women workers and encourage a good work-life balance, but this was never meant to be offset against the Government scheme. Any employer benefit was *in addition* to the Government scheme.

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In other words, some new mothers only had access to the 18 week Government scheme, but some new mothers did better if their own employer provided them with additional weeks of paid leave. The Labor Government wanted employers to top-up and compliment the PPL. In fact, section 3A(3) of the *Paid Parental Leave Act 2010* confirms that *'The financial support provided by this Act is intended to complement and supplement existing entitlements to paid or unpaid leave in connection with the birth or adoption of a child.'*

When Tony Abbott was fighting for the Prime Ministership in 2013, one of his biggest policy announcements concerned a vast expansion of PPL entitlements. Under his proposal, women would have access to 6 months of leave paid at their full wage. In other words, a woman earning $150,000 per year could receive $75,000 in Government funded PPL payments. This obviously would have been a far cry from Labor's scheme with a maximum entitlement of around $11,000 over a period of about 4 months.

Tony Abbott went to the electorate as a champion for women's workforce participation and he argued that 'a fair dinkum Paid Parental Leave scheme will strengthen the economy and provide much needed assistance to families when they need it the most ... We are proud of this policy: it helps women, it helps families and it will strengthen the economy'. The scheme would be funded by an increased tax on big business.

Many argued that the $75,000 safety net was excessive, so the policy was tweaked following the Coalition's victory when Prime Minister Abbott reduced the maximum entitlement to $50,000. However, months and years went by without his signature policy being introduced into the new Parliament. So what has happened with PM Abbott's commitment to significantly enhance PPL entitlements? Not only has he decided not to proceed with his pre-election core promise to introduce his own generous PPL scheme, but he has in fact stripped away entitlements from working mothers. A conservative estimate is that 80,000 new mothers will be adversely affected by the announcements in the May 2015 Federal Budget regarding Parental Leave.

PM Abbott has attacked many new mothers and his Government Ministers have commented that many of these mothers are 'rorters' or 'fraudsters' simply for taking advantage of the 18 weeks PPL as well as their employer funded scheme. They have made allegations of fraud and rorting notwithstanding the fact that some Government Ministers' wives claimed both the PPL and employer benefits when they had their babies.

But this change of policy direction regarding Parental Leave appears to be a poorly considered thought bubble. Under the new proposal, why would an employer offer their employees paid parental leave if this means the employees will lose access to the Government scheme? There would be absolutely no incentive for employers to offer Paid Parental Leave – they might as well tell employees 'just access the Government PPL, you'll receive the same money as if we pay you directly'. Alternatively, some smart employers will simply offer different incentives to new parents (like a bonus payment at the time of birth, or a return to work incentive) which will allow the employee to access the PPL whilst still receiving some financial benefit from the employer.

So why has the Abbott Government performed a complete 180 from their pre-election commitment to provide 6 months of wages up to $75,000 to a policy that leaves new mothers worse off than the existing scheme? Why is he now criticising mothers for 'double dipping' into the PPL and employer scheme even when this was the exact intention of the law when it was introduced in 2011?

In any event, it is unclear whether this controversial policy change will pass through our difficult Senate.