MAY 2019 NEWSLETTER

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Note: The views of the contributors are not necessarily those of ALERA SA

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VICE PRESIDENT'S MESSAGE

Dear Members

It has been a busy start to the year for ALERA SA. In February Professor Andrew Stewart presented a typically thought-provoking and engaging seminar on how the Federal Court's ruling in *WorkPac Pty Limited v Skene* [2018] FCAFC 131 (WorkPac v Skene), has highlighted the potential for the many Australians who work as regular or long-term casuals to have a dual status for the purpose of labour regulation. Professor Stewart also relevantly touched on the likely future approach of both major political parties to the issue of casual employment, if they are elected as the next government.

Then in April, Craig Stevens and Justice Greg Parker covered the nuances of public sector employment. Justice Parker spoke about constitutional and general administrative law principles, particularly in the context of executive employment. Craig spoke about the legislative and ethical framework and touch on other complexities that are unique to public sector employment.

Both seminars were well attended and very well received by ALERA SA members.

In terms of future topics of interest to be covered by ALERA SA, one area we view as being of major importance in 2019 in following on from this Saturday's Federal Election, will be the future direction of Industrial Relations from a policy/reform agenda as set by whichever party is successful. To this end, we are excited to announce that Dr Jim Stanford, Economist and Director of the Centre for Future Work, based at the Australia Institute will be presenting to ALERA SA members on Monday August 19 2019.

In addition to Dr Stanford's presentation, please keep your eye out for future ALERA SA announcements regarding seminars to be run in conjunction with the Fair Work Commission.

Enjoy this newsletter!

Justin Ward
Vice President ALERA SA

Wage Theft: Devastating for young workers in South Australia

Written by
Rachael Seaforth - Coordinator Young Workers Legal Service
Maddie Sarre - Volunteer Advisor, Young Workers Legal Service

Wage theft refers to the deliberate underpayment or non-payment of a worker's full entitlements, including superannuation. Wage theft can manifest in many ways however the most common incidences noted by the Young Workers Legal Service (**'YWLS'**) involve failure to pay penalty rates, misclassifications, sham contracts, unpaid internships and work experience and the non-payment of superannuation entitlements.

YWLS is a not for profit legal service that provides free information, advice and representation to workers under the age of 30 in South Australia. We deal with a vast range of workplace issues however matters relating to wage theft are by far our most frequently occurring issue.

Over the past five year period, we have recorded a 17% increase in matters relating to wage theft, with over 70% of the clients we have represented having being underpaid. Recently the McKell Institute published *The Economic Impact of Wage Theft in South Australia* (2019). This report identified that the around 1 in 5 workers in South Australia are impacted by wage theft to varying degrees, demonstrating that wage theft is endemic and rising.

Recently, the issue of wage theft has been given more attention, particularly with formation of the Legislative Council's Select Committee on Wage Theft ('**The Committee**') to which the YWLS have contributed both written and oral submissions for. Recently the Queensland State Government also investigated the issue.

Wage theft can have significant financial and non-financial impacts both directly for the workers and more broadly from an economic perspective. Clients frequently report on the stress they experience over the underpayment itself and the process required to recoup their entitlements. In extreme cases clients have reported having to work in excess of 60 hours per week, for days or weeks at a time, because of the low pay and an inability to afford basic necessities. This not only is a risk for health and safety in the workplace, but also increases the individual's risk for anxiety and depression along with other physical illnesses.

Long term, the impact of not receiving the full superannuation entitlements is alarming. In the report *Unpaid Super -How does your electorate fare?* (2017) IndustrySuper estimated that workers who are not paid correct superannuation can have up to a 47% less at retirement age when compared to those who had received their full entitlements.

Recommendations for change

At YWLS, we see two major problems contributing to wage theft. One common characteristic noted in our Service is a lack of awareness regarding workplace rights and entitlements. One recommendation put before The Committee is for an education campaign targeting South Australia's youth in schools, TAFEs and universities.

Another issue we note is at the heart of wage theft is a lack of deterrence for dodgy business practices. In this respect we have recommended to The Committee for the criminalisation of wage theft. In our view one particularly appealing aspect of this is a criminal conviction for those deliberately avoiding their lawful liabilities. This can go behind the corporate veil and the long-lasting consequences of a conviction will mean that those found guilty can be disqualified from managing a corporation, their travel capacity can be limited, and they may be restricted in their ability to work in certain industries.

Annual leave loading: a disconnect between superannuation laws and the Fair Work system?

By Peter Healey, Senior Associate (Employment & Industrial Relations) at Cowell Clarke

Since 12 March 2019 employers and employees have been reaching for their relevant modern awards or enterprise agreements to see whether the annual leave loading clause expressly sets out the reason or rationale for the loading being paid to employees when on leave.

No doubt nearly all were disappointed and confused their award or EA provided no indication.

The catalyst for this disappointment and confusion was a publication released by the Australian Taxation Office ("**ATO**") on whether superannuation is payable on leave loading.

As a starting point the *Superannuation Guarantee (Administration) Act 1992* ("**SG Act**') requires employers to pay employees superannuation based on their 'ordinary time earnings'.

The definition of 'ordinary time earnings' in the SG Act highlights that it intends to capture the amount an employee would earn for their ordinary hours of work. That intention is also set out in the *Superannuation Guarantee Ruling 2009/2* ("**SGR**") which is a non-binding ruling issued by the Taxation Commissioner as guidance on the interpretation of 'ordinary time earnings'.

For a long time the SGR has addressed annual leave loading in the following terms: *annual leave loading is not considered ordinary time earnings if it is demonstrably referable to a notional loss of opportunity to work overtime* (see paragraphs 35 and 238 in particular).

The requirement that the loading be 'demonstrably referable' to a loss of opportunity to work overtime is noteworthy when considered against the very purpose for the introduction of annual leave loading in the 1970s. The purpose of introducing annual leave loading was to compensate employees for the loss of opportunity to earn overtime while on annual leave.

The ATO has in the past published advices where it has seemingly treated this original purpose as sufficient to consider the largely standard 17.5% loading as not part of 'ordinary time earnings' and therefore not attracting any payment for superannuation purposes.[1]

The ATO publication of 12 March 2019 signifies a departure from simply relying on the original purpose of annual leave loading. In particular the publication states that moving forward "*[r]elying on historical opinion of the initial purpose of annual leave loading won't be enough…*".

Instead moving forward the ATO wants to be satisfied that there is written evidence setting out the purpose for the payment. The publication indicates this could be satisfied in 3 ways: (1) the wording in the award or EA clarifies the reason for paying the entitlement, or (2) other written evidence of the mutual understanding of the parties to the agreement, or (3) in the absence of this written evidence the parties obtain evidence now of the intent of the payment. Here lies the disconnect with the Fair Work system.

The ATO publication acknowledges that "*most*" awards do not state the reason for the annual leave loading entitlement. My review of the 120 or so modern awards created in 2010 suggests that none of the awards set out the purpose of the loading with any real clarity or certainty.

I have for obvious reasons not reviewed the thousands of enterprise agreements that have been approved, but it is fair to say that most would unlikely state why leave loading is paid.

Accordingly if the ATO wants written evidence within the awards or EAs themselves to be satisfied of the purpose the leave loading is being paid then it is unlikely in my view to find it.

Therefore the first form of written evidence suggested by the ATO is unlikely to exist.

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[1] See e.g., ATO advice #1012709113999.

There are very real difficulties with the second form of written evidence raised in the ATO publication (being evidence of the mutual understanding of the parties). Those difficulties are:

- The Fair Work Commission is the author of the modern awards. Accordingly the understanding or intent behind these awards is potentially the intent of the FWC. Although various bodies were involved in making submissions as part of the award modernisation process it is difficult to search for any mutual understanding between those bodies given the FWC had ultimate power to determine what was and was not included in an award. Absent a statement or decision of the FWC about why it has included annual leave loading in awards, it is unlikely the necessary evidence exists.

- In relation to enterprise agreements, the query must be raised as to whose intention or understanding is relevant? It is the bargaining representatives that negotiate the proposed EA, so it is their understanding or intention? The workforce ultimately votes to approve the EA, so is their understanding or intention? Again though the FWC approves the EA (and has authority to decline to approve an agreement if it does not comply with the *Fair Work Act 2009*) so is the understanding and intention of the FWC a relevant consideration? There are complexities to obtaining a mutual understanding.

- As a generality it may also be that those persons involved in negotiating an enterprise agreement did not speak about the express reasons for including the loading in an EA.

If the ATO wants written evidence of the understanding of the parties that may not be available or alternatively there is no certainty about whose understanding is relevant.

This likely puts most employers and employees in a position where they need to obtain evidence (as per the third category) as to the intention of paying annual leave loading.

It seems there is a disconnect between superannuation laws and the Fair Work system. The industrial relations system introduced annual leave loading for a specific purpose in the 1970s. However the ATO does not consider that to be enough. It wants evidence of express words in the awards (which simply do not appear to be there) or enterprise agreements (which are unlikely to be there) or evidence of the mutual understanding (whose understanding?).

This presents as an issue that will gain more attention moving forward as employers seek to understand their superannuation liabilities following the ATO publication on 12 March 2019.

Reminder to ensure the terms of an enterprise agreement are more than just explained to employees

By Kaye Smith, President, ALERA SA

The *Fair Work Act 2009* (Cth) (**FW Act**) establishes the criteria that must be satisfied by the Fair Work Commission before approval of an enterprise agreement. Section 180(5) of the FW Act provides that the employer must take all reasonable steps to ensure that the terms of the agreement, and the effect of those terms are explained to the relevant employees, before obtaining their 'genuine agreement.'

The FW Act's criteria regarding whether employees have 'genuinely agreed' to the terms of an enterprise agreement was scrutinised in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (**One Key decision**).

In 2015, One Key Workforce Pty Ltd (**One Key**) determined it would make an agreement with its three employees and took the following actions prior to the vote:

- sending emails to employees with copies of the proposed agreement and 11 incorporated Awards;
- discussing the terms of the agreement with each employee;
- emailing employees with a summary of the terms and effect of the proposed agreement; and
- phoning employees to clarify any questions.

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The Enterprise Agreement was approved by Commissioner Roe in October 2015. However, on 8 November 2017, Justice Flick overturned the decision approving the agreement on the basis that One Key:

- failed to take all reasonable steps to sure the terms of the agreement (and their effect) were adequately explained to employees; and
- relevant employees did not "genuinely agree" to the agreement.

Of particular concern to Justice Flick was the fact that while the three employees were (at that stage) One Key's only employees, the enterprise agreement was capable of covering a vast range of employees who would otherwise have been covered by 11 different Awards.

On appeal, the Full Federal Court found the Commission could not have been satisfied that One Key took all reasonable steps and that therefore, the agreement should not have been approved. The Full Federal Court was particularly concerned that One Key only attempted to bargain with a small portion of the employees who were to be covered by the agreement and in doing so, failed to ensure the three employees understood the true impact of the agreement.

Important consideration for employers

This case acts as a reminder that in seeking approval of an enterprise agreement, employers are required to do more than simply declare that the terms of the agreement and their effect have been explained to employees.

Employers should ensure employees understand what it is they are being asked to agree to and help them understand how wages and conditions may be affected if the agreement is approved. In seeking the Commission's approval, employers should ensure they are able to prove employee's understanding of the terms and the effect of the terms, if required. Please click the link below to view the full decision:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2018/77.html

Caution required when terminating the employment of an employee with mental health issues

By Kaye Smith, President, ALERA SA

The decision of *Robinson v Western Business Solutions (Australia) Pty Ltd* [2018] FCA 1913 (**Robinson**) highlights that terminating the employment of employees absent from work for health-related reasons may expose employers to liability.

Facts

Mr Robinson worked as a Client Executive for Western Union and was absent from work with medical certificates for approximately seven months due to work related stress, anxiety and depression.

Western Union tried to contact Mr Robinson about his return to work status throughout the period he remained absent and requested he attend an independent medical assessment.

Western Union initially provided several dates for Mr Robinson to attend an independent medical assessment, however Mr Robinson repeatedly refused to attend the independent assessment, instead requesting Western Union contact his own General Practitioner and Psychologist.

Once Western Union informed Mr Robinson that the request he attend an independent medical assessment was a lawful and reasonable direction, Mr Robinson agreed. In March 2017, Western Union informed Mr Robinson it would advise of a new date to attend a medical assessment, however it failed to do so.

On 8 May 2017, Mr Robinson's employment was terminated with the company stating:

> "*Given you cannot give any indication as to when you will return to work, your unreasonable failure to cooperate with the Company's attempts to obtain up-to-date, specialist medical advice and in light of the Company's serious concerns about your capacity to return to work, the company has decided to terminate your employment*."

Arguments

Mr Robinson claimed Western Union took adverse action 'because of' his mental disability. Mr Robinson claimed this constituted a breach of section 351 of the *Fair Work Act 2009* (**Fair Work Act**).

Western Union argued Mr Robinson's employment was terminated because he could not perform the inherent requirements of his position, pursuant to section 351(2)(b) of the Fair Work Act.

Decision

The Court found Western Union took adverse action against Mr Robinson because of a 'manifestation' of his mental disability. The Court held the company's adverse action was highlighted in the termination letter by the reference to concerns for his capacity to return to work.

The Court also held that Western Union could not rely on the 'inherent requirements' exception in the Fair Work Act as there was a lack of evidence to support the allegation he could not perform the inherent requirements of his position. The Court made clear its support for the view that an identification of the 'inherent requirements' of a position are not necessarily determined by the express terms of the contract of employment. The Court recognised the difficulties in "*defining precisely the outer limits of what constitute the "inherent requirements" of a position".*

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The facts of this case, as with others considering the notion of ‘inherent requirements’, were critical to the ultimate finding arrived at by the Court. The evidence supported only that the employer had ‘concern’ about the capacity to return to work. No decision as to the Applicant’s actual capacity had been made and he was ultimately dismissed after repeated attempts to attend an independent examination. This meant the ‘inherent requirements’ exception could not apply.

What this means for employers

This case highlights that employers should exercise caution when managing employees absent from work for health-related reasons.

If an employee is unwell and absent from work for a prolonged period, employers should obtain independent medical advice in relation to the employee’s ability to perform the inherent requirements of their position and be clear about what is understood to be ‘inherent’ about the aspects of the position.

Please click the link below to view the full decision:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2018/1913.html?context=1;query=[2018]%20FCA%201913;mask_path=