PIGOTT STINSON LAWYERS

This is the first edition of our new quarterly workplace relations newsletter. Our aim is to cover topical human resources and employment matters and to keep you abreast of significant changes to the law.

We want this newsletter to assist you in your business so please feel free to contact us and suggest topics for future editions.

We also take this opportunity to update you on some changes at Pigott Stinson.

Leonie Kyriacou returned from maternity leave in March 2011 and resumed her role as partner and head of the employment law group, a position she shares with her senior partner John Ralston.

With Leonie's separate commercial law practice and John's long standing role as the senior partner in the Clubs group (with significant expertise in company law) they bring a practical commercial perspective to workplace relations issues.

The workplace relations group also includes Ray Travers, senior associate. Together with John, Ray also works in the Clubs group. Ray acts in a wide range of employment matters and has significant expertise in discrimination and defamation law in both club and commercial employment contexts. Ray and Leonie work closely together on the full range of employment and industrial matters.

The newest addition to the team is Michelle Khoury. Before joining Pigott Stinson, Michelle worked in a general law practice, specialising in employment and industrial law with a focus on unfair dismissals and disputes arising from the termination of employment. We are delighted to welcome Michelle to our team.

Can employees refuse to work on a public holiday?

As the holiday season approaches it is important to remember that employers do not have an unfettered right to require employees to work on public holidays.

The National Employment Standards in the *Fair Work Act 2009* (Cth) state that employees are entitled to be absent from work on a public holiday. An employer can request that an employee work on a public holiday if the request is "reasonable" and an employee can refuse that request if the *"refusal is reasonable"*.

There are a list of factors that must be considered in determining whether a request, or refusal, to work on a public holiday is reasonable. The factors include the nature of the workplace, type of employment and work performed; personal circumstances and family responsibilities; expectations that an employer will make the request; entitlement to overtime and penalty rates for working that day; and notice in advance of refusing the request.

Some guidance can be found in a recent decision of Fair Work Australia.

In a case involving a truck driver, it was found that his refusal to work on a public holiday was reasonable. He had compelling reasons for his refusal and he did not regularly work public holidays.

The employer operated recycling and waste collection services 7 days a week all year round. So, it was not unreasonable for the employer to request that certain staff members work on public holidays. Years earlier the truck driver had made it known to his employer that he needed to transfer to a job where he did not have to work weekends and public holidays due to his wife's medical condition. He received the transfer and had not worked on public holidays for a period in excess of 12 months. Fair Work Australia found that working on public holidays did not fall within the scope of his usual duties. Fair Work Australia upheld the employee's right to refuse to work on a public holiday.

Important Points

As employers must only make reasonable requests of employees to work on a public holiday, you should:

- give plenty of notice to staff;
- articulate the reasons for your request;
- avoid making requests of employees who have significant responsibilities outside work;
- avoid asking employees who have given you compelling reasons as to why they cannot work on public holidays;
- ask for reasons if an employee refuses to work as requested. Consider those reasons before making any further demands;
- consider offering incentives such as a day off in lieu at a later time. The substitution of public holidays is permitted under most modern awards.

(Steven Pietraszek v Transpacific Industries Pty Ltd T/A Transpacific Cleanaway [2011] FWA 3698)

The Paid Parental Leave Scheme (Scheme) has been in place now for over 6 months.

Since 1 July 2011 employers are required to make payments to employees under the Scheme although the payments continue to be funded by the Federal Government.

With new employer responsibilities now in place, it is a good time to review employer obligations to ensure compliance.

Managing the Paid Parental Leave Scheme

Snapshot of the Scheme

In summary, the Paid Parental Leave Scheme provides payments for parental leave after the birth or adoption of a child to eligible employees. These payments are based on the national minimum wage (currently $589.30 per week) for a period up to 18 weeks.

From 1 July 2011, the payments are made by the employer to the employee after the employer receives funding to cover the payments from Centrelink.

Eligible employees may be full-time, part-time, casual, seasonal or self employed.

Eligible employees must:

– be engaged in continuous paid work for 10 of the 13 months immediately before the birth or adoption of the child;

– have worked for at least 330 hours during that 10 month period;

– have no gap greater than 8 weeks between 2 consecutive working days;

– have an adjusted taxable income for the year of $150,000 or less;

– satisfy the Australian residency test;

– be the primary carer of the child;

– not return to work during the relevant period;

– not be entitled to the baby bonus; and

– not have a partner or former partner that is entitled to the baby bonus.

An employee will still be eligible if their child is stillborn or dies.

Employer Requirements

Employers must register their details including their ABN with Centrelink.

Employers are notified by Centrelink if an employee is eligible under the Scheme. An employer has just 14 days to dispute Centrelink's decision.

If the decision is not disputed, the employer must:

– provide the parental leave pay to their employee at the same time as the employer would ordinarily pay wages (eg, weekly, fortnightly, monthly);

– withhold tax from the parental leave pay;

– provide the employee with a record of the payments made (usually on the payslip) within 1 working day of the payment;

– include details of the total payments on the payment summary for the employee for the relevant year; and

– keep written records of amounts paid to employees and received from Centrelink.

Employers must keep Centrelink informed of any changes, updates or errors with payments.

Other useful information

– No payment needs to be made to an employee until funds are received from Centrelink.

– Superannuation is not paid in respect of these payments.

– Employees do not accrue additional leave while on parental leave.

– The Scheme does not automatically replace existing employer funded schemes. Employers may need to introduce changes to their existing scheme if they wish to take advantage of the government funded payment.

High Income Employees can opt out of Awards

It is often assumed that if an employee is paid in excess of an award, the award does not apply to that employee. This assumption is wrong.

If employees perform the type of work described in an award and no enterprise agreement or high income guarantee applies (as described below), they will be covered by that award no matter how much you pay them.

For example, a secretary manager (CEO) of a registered club may earn in excess of $150,000 and yet will still be covered by the *Registered and Licensed Club Award 2010*. Similarly, expert clerical or human resources staff may be paid a significant salary and yet still be covered by the Clerks – Private Sector Award 2010.

Significant risks exist for employers who fail to comply with the provisions of an applicable award even where an employer has paid their employee a salary well above the award. Employees can make claims for unpaid overtime, penalty rates, allowances and other benefits notwithstanding the salary they are paid. For high income salary employees, the base rate of pay used to calculate these entitlements is likely to be based on their salary calculated as a hourly rate as opposed to the base rate of pay in the award. For example, overtime under the award may be double time using say $18.00 per hour as the base rate of pay. The base rate of pay for an employee earning a salary of $120,000 maybe as much as $61.00 per hour.

There are some steps that employers can take in these situations to protect themselves.

Importantly, the *Fair Work Act 2009* (Cth) allows an employer and a high income employee to reach a special form of agreement to opt out of certain award entitlements.

Guarantee of Annual Earnings

If an employee is covered by a modern award, an employer may undertake to pay their employee an amount of earnings, during a set period of time, which is equal to or more than the "high income threshold".

On 1 July 2011, the high income threshold under the *Fair Work Act 2009* (Cth) increased to $118,100 per annum.

If the employee accepts that undertaking freely and without coercion, then the relevant modern award will not apply to that the employee during the period that the amount of earnings paid to the employee is equal to or exceeds the high income threshold.

The form of agreement between the employer and employee must comply with the *Fair Work Act 2009* (Cth) and set out precisely the undertaking given by the employer.

For employees earning under the high income threshold but over the applicable award entitlement, there are fewer options. This article does not cover those options and specific legal advice should be sought in relation to each case.

Benefit to Employers

The obvious benefit to an employer of giving a guarantee of annual earnings is that the range of obligations in an applicable modern award (for example, penalty rates, special allowances, rostering requirements) will cease to apply to the high income employee for the relevant period. Accordingly, this protects the employer from a high income employee later making a claim for additional entitlements under the modern award.

Important Points

- If you have employees earning over the high income threshold, investigate whether or not a modern award covers their type of work.
- If there is coverage by a modern award, consider entering into a guarantee of annual earnings to prevent the application of that modern award.
- The high income threshold increases in July each year. If as a result of this annual increase the rate paid to an employee slips below the high income threshold, the modern award will apply even though there is in place an existing guarantee of annual earnings.
- The existence of a guarantee of annual earnings does not remove an employee's right to bring an unfair dismissal claim.
- There are numerous conditions in Fair Work Act 2009 (Cth) which must be met before a guarantee of annual earnings will take effect.

No Hugs at Work

When you consider what amounts to sexual harassment in the workplace, there are some obvious examples. Most employers would not tolerate an employee giving an unwanted kiss to a co-worker or making overtly sexual advances. But what about hugging? Is that sexual harassment? Is an employer liable if an employee gives a co-worker a cuddle?

Recently, the Victorian Civil and Administrative Tribunal considered this issue and held that unwelcome hugs in the workplace did amount to sexual harassment.

Mr Sammut was a case manager employed by a not-for-profit organisation in Victoria. Mr Sammut's employment was terminated. After termination of his employment, Mr Sammut claimed that while employed he had been the subject of sexual harassment by a female co-worker (also a case manager) and that his employer was vicariously liable for that harassment. The primary conduct of harassment complained of was hugs.

Mr Sammut's complaint was made pursuant to the *Victorian Equal Opportunity Act* which prohibits sexual harassment and makes an employer vicariously liable for that harassment in circumstances where the employer did not do enough to prevent the harassment from occurring. Similar prohibitions against sexual harassment in the workplace exist in the NSW *Anti Discrimination Act*.

In defending Mr Sammut's claim, the employer argued that it was "huggy" workplace where colleagues often gave each other "friendly embraces" and that Mr Sammut welcomed such embraces.

The employer also argued that because it had a range of policies in place to prevent sexual harassment in the workplace it was not vicariously liable for the conduct of its employees which breached those policies.

Like the NSW legislation, the Victorian law is not directed at mutual consensual conduct.

For sexual harassment to occur the relevant conduct must be unwelcome and it must occur in circumstances in which a reasonable person, having regard to all relevant matters, would have anticipated that the other person would be offended, humiliated or intimidated.

In this case, the Tribunal accepted Mr Sammut's evidence that he had asked his co-worker to stop hugging him and that the type of hugs given were "intimate" embraces not just a pat on the shoulder.

In this context, the hugs were held to constitute unwelcome conduct of a sexual nature.

The Tribunal also found the employer to be vicariously liable for the acts of its "huggy" employees. While the employer had a range of anti-harassment policies in place it did not take any other precautions to protect Mr Sammut.

The Tribunal held that the employer should have taken steps to ensure its employees understood and abided by the anti-harassment policies. It was not enough to have the policies; the employer had to implement them in the workplace.

In respect to the submission that the workplace culture included mutual consensual touching and hugs, the Tribunal held that this was no excuse for tolerating conduct that is unwelcome to some and which may otherwise constitute harassment.

Sammut v Distinctive Options Limited (Anti-Discrimination) [2010] VCAT 1735 (14 September 2010).

Things to Remember

Employers must:

- have appropriate policies covering workplace harassment;
- ensure all employees understand these policies;
- where appropriate, have workplace training around important workplace policies;
- respond quickly to employee complaints in accordance with any workplace policies;
- take complaints seriously; and
- monitor workplace culture because what is acceptable to some employees (including touching and banter) may be offensive or unwanted by others.

CONTACT
John Ralston j.ralston@pigott.com.au
Leonie Kyriacou l.kyriacou@pigott.com.au
Ray Travers r.travers@pigott.com.au
Michelle Khoury m.khoury@pigott.com.au

Level 3, 10 Barrack Street Sydney 2000
GPO Box 3380, Sydney 2001
DX 125 Sydney
Tel (02) 8251 7777 **Fax** (02) 9262 4288
www.pigott.com.au