Covid-19 Related FWC Cases

With the many changes that have occurred over the last few months we have seen some quick and reactive introduction of legislation to help businesses deal with and cope during the pandemic. This has also seen come cases come before the FWC challenging the interpretation of this new legislation and how it has been applied within the workplace. Below is a brief summary of some of these cases that we have come across.

Request for information to assess Covid-19 risk deemed lawful and reasonable

In a recent case (*Knight v One Key Resources (Mining) Pty Ltd 2020*) an employee was dismissed for failing to follow a reasonable and lawful direction to complete a survey to enable the business to ascertain any potential exposure to Covid-19 for all employees in the workplace.

The employee declined to complete the survey on grounds of privacy. The employer issued him with a warning letter and an email, they then dismissed him for refusing to comply with the direction.

The employee submitted that the direction was in breach of the Australian Privacy Principles (APPs).

Despite the employee's objection, he did not at any point ask that the employer explain how the information would be used or how it would be used to assess his health risk. It was claimed by the employer that the information was necessary to allow them to fulfil their obligations under work health and safety legislation to protect itself and its employees from risk.

The FWC was satisfied that the employer had valid reason for dismissal, as it was not a request for sensitive health information. It also did not ask for a description of any symptoms that may indicate the employee had contracted Covid-19, it was a simple request for travel information.

This meant that the direction to complete the survey was a lawful and reasonable direction and dismissal for not complying after being warned was not unfair.

The Commissioner noted that if he was wrong, given the circumstances of the pandemic at the relevant time, it is likely that the collection and use was authorised because it was unreasonable to obtain the employee's consent, and the employer reasonably believed that collection was necessary to lessen or prevent a serious threat to life, health or safety of an individual, or to the public health and safety.

Australian Information Commissioner's position on request for information

The Australian Information Commissioner on 18 March 2020 advised employers in relation to their rights to request information from employees during the Covid-19 pandemic. This allowed employers to collect information from employees or visitors in relation to Covid-19, as long as they only collected as little information as was reasonably necessary for managing or preventing Covid-19. Including information that is needed to identify risks and implement appropriate controls to manage or prevent Covid-19, as stated by the Department of Health, for example:

- If the individual or a close contact has been exposed to a known case of Covid-19, and
- If the individual has recently travelled overseas and to which countries.

Under the APPs in Schedule 1 of the *Privacy Act 1988 (Cth)*, health information usually attracts greater protection, however some of these requirements do not apply if the information is being collected, used and disclosed to lessen or prevent a serious threat to life, health or safety of any individual. If

this applies you can collect, use or disclose the information if it is unreasonable or impractical to obtain the individual's consent to the collection, use or disclosure.

Adapted from Portner Press

JobKeeper direction upheld as reasonable, practical

In a recent case the FWC has rejected that an employer's JobKeeper enabling direction was unreasonable as it disproportionately affected permanent workers and it also required some casuals on JobKeeper to work more hours.

Earlier in the year and leading up to the direction, the business had experience a 30-40% reduction in work and a 65% decrease revenue compared to before Covid-19, specifically in their Moorooka Depot in Queensland which reduced by 35%.

In April and again in June, the employer told the Moorooka depot employees that due to this reduction in work they would all be offered a minimum 25 hours work per week.

The Transport Workers' Union of Australia Queensland Branch (TWU), applied to the FWC on behalf of the employees, with the argument that the JobKeeper enabling direction was invalid as the employer didn't consult employees.

They further claimed that the direction unfairly and disproportionately affected permanent employees as full time employees regularly worked up to 50 hours per week and part time employees up to 30-35 hours per week.

It requested that the FWC commission set aside the direction and instead order the employer to:

- direct a proportionate percentage reduction in hours for all employees, so the financial burden was shared equally
- not require any employee to work more hours in a week/fortnight than they did pre-covid-19
- genuinely consider requests for secondary employment; and
- genuinely consider employees' requests not to work certain days, or to work reduced hours.

Deputy President Peter Sams found that the employer engaged in genuine consultation as:

1. the employer met on two occasions with the TWC to discuss the directions, making it "difficult to accept" the Union was not simply arguing it found the directions unreasonable.

2. the employer sought feedback from employees about the directions, however, over the five-week proposal period, only received a few enquiries and no formal objection.

It was also found that the JobKeeper enabling direction was not unreasonable as:

1. on a rolling average basis, all full- and part-time employees were working more than 30 hours a week, and no casual employees were. "Thus, it cannot possibly be said that permanent full- and part-time employees are working 25 hours a week.

2. full-time employees' weekly hours are close to or exceed minimum award hours of 38 hours a week.

The TWU's request for employees not to be required to work *more* hours than they did pre-Covid-19 raised a general question as to whether it was unreasonable for an employer to require employees to increase their hours of work on different days or at different times, Deputy President Sams said.

In examining the Government's intentions in introducing Part 6-4C (Coronavirus Economic Response) into the Fair Work Act, specifically section 789GG, Deputy President Sams said he didn't believe Parliament intended to prohibit an *increase* in employees' hours of work compared to their ordinary hours, as it did in prohibiting a *reduction* in hours of work.

"Given all the changing variables, it seems entirely reasonable to me that while some employees might work more hours than 25, and others less, that the stated intention of providing as far as practicable, a minimum of 25 hours for all employees, is the only balanced, rational and practical decision to have been made."

Deputy President Sams noted that early in the dispute, the TWU proposed that all permanent employees remain on their pre-Covid-19 hours, with whatever was left being allocated to casual workers.

He said this was a "rather curious proposition", given the ACTU's current campaign to have all affected casual employees paid JobKeeper payments and continue to work.

"In my view, any enabling direction in the current circumstances, which guarantees that permanent employees retain their pre-Covid-19 hours, with the result that long term, regular casual employees receive few, or no hours at all, would not only be unfair and unreasonable, but contrary to the spirit of legislative purpose of the Covid-19 amendments."

Transport Workers' Union of Australia Queensland Branch v Prosegur Australia Pty Limited [2020] FWC 3139 (17 June 2020).

Adapted from HR Daily

Recommendation to continue JobKeeper support casual worker

The Fair Work Commission has recommended that an employer continue a casual worker's JobKeeper payments, despite acknowledging it has no jurisdiction to deal with eligibility disputes.

In April 2020 Eagle Heights Mountain Resort became eligible to receive JobKeeper and the casual worker was enrolled in the scheme. The worker's typical fortnightly hours were around 19 hours resulting in approximately $600 per fortnight pay.

As the JobKeeper payment was substantially higher than the worker's usual payment, the employer told the worker in May that JobKeeper was not "free money" and requested he work an additional 9.5-hour shift each week. Due to university commitments the worker declined, and the employer told him it would remove him from the scheme.

The worker applied to the Commission to deal with the dispute, but Commissioner Jennifer Hunt said it had no power to do so as it wasn't related to the operation of Part 6-4C (Coronavirus economic response) of the Fair Work Act.

The employer had "no sound basis" to remove the worker from the JobKeeper scheme because he refused to work additional hours, she said and recommend the employer pay the casual worker $1,500 per fortnight for all eligible JobKeeper fortnights up until 27 September 2020, and obtain reimbursement from the ATO.

Further, it hadn't removed any other workers from the scheme, despite claiming it was considering doing so because it was difficult to pay them $1,500 a fortnight and await reimbursement, she found, noting this was a "ridiculous proposition".

Commissioner Hunt added the worker could have grounds to apply to the FWC to deal with a non-dismissal dispute under section 372 of the Act, and dismissed his application.

Guerin v Horndale Pty Ltd T/A Eagle Heights Mountain Resort [2020] FWC 3918 (28 July 2020)

Adapted from HR Daily