IR POLICY AND GOVERNANCE UPDATE

INTRODUCTION
In this week's bulletin we remind members about some recent legislative amendments, provide an update on Fair Work Information Statements, some updates on Queensland WHS laws, a synopsis of current statistics on the Australian economy and unemployment figures, and review two recent decisions of interest.

RECENT LEGISLATIVE AMENDMENTS
Further to previous advisories we remind members of some of the legislative amendments that came into effect from 26 August 2024 as follows.

Fixed term contract changes
From 26 August 2024, the laws around using fixed term contracts has changed. A fixed term contract can no longer have an option to:

- extend or renew the contract so the period of employment lasts for longer than 2 years, or
- extend or renew the contract more than once.

There are potential exceptions to these rules that mean the limitations may not apply. Additionally, employers must give every employee engaged under a new fixed term contract a copy of the Fixed Term Contract Information Statement (detailed below).

Right to Disconnect
From 26 August 20204, employees of non-small business employers now have the right to refuse to monitor, read or respond to contact (or attempted contact) outside their working hours, unless doing so is unreasonable. The laws will come into effect for small business employers from 26 August 2025.

The amendments to the Fair Work Act, and a new provision within Awards, establish a statutory right for employees to disconnect from work communications outside of normal working hours, unless that refusal is unreasonable.

This new right does not necessarily give an employee carte blanche to not respond to their employer or a client, particularly if it is a requirement under the employees job description and or contract of employment. Further, the amendments do not affect an employer's ability to contact employees over their availability for a shift or in an emergency, or otherwise where the inherent requirements or nature of the job requires an employee to be on call or contactable.

When determining whether an employee's refusal is unreasonable, there are several factors that must be considered. We encourage employees and employers to discuss any out of hours contact and set expectations that suit the workplace and the employee's role.

Definition of Casual Employee
From 26 August 2024, a new definition of casual employee now applies. Under the new definition, a casual employee is someone who:

- starts employment and where there is an absence of firm advance commitment to ongoing work, and

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- is entitled to a casual loading or specific pay rate under an award, enterprise agreement or employment contract.

Determining whether an employee is casual will be based on the practical reality of the relationship, rather than merely any contractual terms.

Casual Conversion Pathway
From 26 August 2024 the casual conversion pathway will change. Under the legislative amendments the onus will be on the employee to request conversion to permanent status. The employee will need to have been employed for at least 6 months, or 12 months if in a small business, and the employer must consult with the employee and has 21 days to respond to the request. Any rejection of such a request must include a reason that is based on fair and reasonable business related grounds.

FAIR WORK INFORMATION STATEMENTS UPDATED
Further to previously advised, there have been numerous amendments to the Fair Work Act and that have taken effect from 26 August 2024. These amendments resulted in the Fair Work Information Statement being updated.

Members should ensure the provide employees with the current version, along with any other required Statements such as the Casual Employment Information Statement, or the Fixed Term Contract Information Statement. Copies of the new Statements can be found on the Fair Work Ombudsman website here.

QUEENSLAND WORK HEALTH AND SAFETY LEGISLATIVE AMENDMENTS - SEXUAL HARASSMENT
In addition to the Federal Respect@Work amendments last year, members in Queensland have a new layer of WHS compliance relating to sexual harassment in the workplace. From 1 September 2024 the Queensland Work Health and Safety (Sexual Harassment) Regulations 2024 commenced. This amending regulation includes:

- sexual harassment and sex or gender-based harassment are specifically recognised in the WHS Regulations as psychosocial hazards.
- the amended WHS Regulations dictate particular matters organisations must have regard to in determining the control measures to have in place to control risks of sexual harassment or sex or gender-based harassment at work;
- organisations are specifically required to review and, as necessary, revise the control measures if a person reports sexual harassment or sex or gender-based harassment at work.

Commencing 1 March 2025:

- PCBUs must have a written prevention plan to manage risks from sexual harassment or sex or gender-based harassment at work, which complies with the requirements set out in the WHS Regulations.
- The requirements include that the prevention plan state each identified risk, identify the control measures to be implemented for each risk, identify the matters the PCBU considered in determining the control measures, describe the consultation undertaken by the PCBU and

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set out the specific procedure for dealing with reports of sexual harassment or sex or gender-based harassment at work.
- PCBUs must take steps to ensure workers are aware of the prevention plan and how to access it, and must review the plan as soon as practicable after reports are made, on request by a health and safety rep or otherwise very 3 years.

More information, assistance, tools and resources to implement related prevention plans can be located here.

STATE OF THE AUSTRALIAN ECONOMY

National accounts data released last week evidence Australia's economy grew by 0.2% in the June quarter, and 1% over the last year, according to the Australian Bureau of Statistics (ABS). It is the weakest rate of annual growth Australia has recorded in years, in seasonally adjusted terms. With high inflation and high interest rates keeping some households under immense pressure, economic growth in the June quarter was being driven by increased spending by governments and foreign students and visitors, whereas household spending and consumption was hit hard.

However, since the slowdown in economic activity is tracking in line with the RBA's forecasts, the RBA Board won't be making any sudden interest rate moves after last week's numbers. At the moment, underlying "trimmed mean" inflation is running at an annual pace of 3.8%, which is above the RBA's 2-3% target range. The RBA expects that number to keep falling to 3.5% by the end of this year, and to 3.1% by June next year.

UNEMPLOYMENT FIGURES

Australian Bureau of Statistics data released recently evidenced the unemployment rate climbed to 4.2% in July. Although the unemployment rate increased by 0.1 percentage points in each of the past two months, the record high participation rate and near record high employment-to-population ratio shows that there continues to be a high number of people in jobs, and looking for and finding jobs. In seasonally adjusted terms, in July 2024:

- unemployment rate increased to 4.2%.
- participation rate increased to 67.1%.
- employment increased to 14,469,600.
- employment to population ratio increased to 64.3%.
- underemployment rate decreased to 6.3%.
- monthly hours worked increased to 1,961 million.
- full-time employment increased by 60,500 to 10,010,600 people.
- part-time employment decreased by 2,300 to 4,459,000 people.

On analysis, these figures evidence that although there is an increase in unemployment rates the labour market remains relatively buoyant, but with demand and supply being better aligned.

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DECISIONS OF INTEREST

Employee defying employer directions

In a recent decision of the Fair Work Commission, it was held that an employee's termination was fair due to the employee consistently defying the employer's directions, including refusing to participate in a performance improvement plan and rejecting attempts to address concerns about her behaviour.

Following complaints about the employee's conduct and performance, the employer initiated a 1 month performance improvement plan and directed the employee to participate in online meetings and work in the office rather than from home. However, the employee refused, replying that this was 'completely unnecessary and unlawful' and raised numerous complaints, alleging the workplace was unsafe and her team had caused her mental health issues. However, without any medical evidence or details to substantiate her allegations, the employer proceeded with the performance improvement plan.

Despite multiple efforts by the employer to address her concerns, the employee continued to refuse to comply with management directives, persistently claiming the performance improvement process was invalid, and accusing the employer of micromanagement, gaslighting and victimisation. She then instructed managers not to contact her again! This conduct led to the employer informing the employee that she had repudiated her employment contract, and therefore her employment would end immediately.

Importantly, while the Commission determined that the employee had been dismissed, (rather than repudiating her employment contract), it held that the employee's dismissal wasn't unfair, given the employer's directives were both lawful and reasonable, and the employee had been provided with ample opportunities to respond and provide evidence supporting her health claims and inability to comply with the performance plan.

This decision is a useful reminder of the employer's right to manage employees' performance and an employee's obligation to follow fair, lawful and reasonable directions.

Removal of casual from roster

In a recent jurisdictional objection decision of the Fair Work Commission it was held that the removal of a casual employee from the work roster constituted dismissal.

The employee, engaged casually for a beauty services company since 2020, had worked regular shifts between Monday and Friday, with alternating shifts on weekends. After returning to work after admission in hospital following a domestic violence incident, the employee became concerned she was not being offered any shifts. Her employer failed to provide any explanation as to why this occurred.

The employee claimed she had been permanently removed from the shift roster amounting to a dismissal, partly due to her absence from work as a result of the domestic violence incident. Conversely, the employer denied dismissing the employee because she had taken leave or that she had been dismissed at all. The employer argued she was not guaranteed any work as a casual employee and the reduction in the shift allocation was based on business needs only.

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In dismissing the jurisdictional objection, the Commission determined the employee had been dismissed. The Commission held the Applicant's employment was brought to an end by the conduct of the employer which resulted directly or consequentially in the termination of her employment. That conduct was the deliberate decision, without discussion or explanation, to remove the Applicant from all future shifts. Had the employer not taken the action it did, the employee would have remained in the employment relationship.

This decision is a reminder that employers should clearly communicate with casual employees about the availability of work. A sudden unexplained change in regular shift patterns for casual employees may constitute dismissal.

CONTACT

Any Industrial Relations Member who has a related query should contact the HR Hotline on 1800 835 167 or contact Charles Watson, GM – IR, Policy and Governance via email: charles@visualmediaassociation.org.au