IR POLICY AND GOVERNANCE UPDATE

INTRODUCTION

In this week's Update we review the current unemployment figures, provide details on the Fair Work Commissions new 'model terms' for enterprise agreements, and review a decision of interest and its possible effects on members.

UNEMPLOYMENT RATES

The latest data from the Australian Bureau of Statistics (ABS) has revealed the unemployment rate for January has increased by 0.1 percentage points from the previous month – drawing the number to 4.1%.

According to the ABS, some of the increases in unemployment are reflected in a wide range of Australians with jobs waiting around to either return to work or begin employment in January. The data also highlighted that monthly hours worked fell by 0.4% in January 2025, reflecting a higher-than-usual number of Australians working fewer hours in January.

NEW MODEL PROVISIONS FOR ENTERPRISE AGREEMENTS

The current position under the Fair Work Act is that enterprise agreements must include a flexibility term, a consultation term and a term about dealing with disputes in accordance with various requirements prescribed by the Act. In the absence of any of these terms, the agreement is taken to include the applicable current 'model term' as determined by the Act and drafted by the Commission. Alternatively, the parties to an enterprise agreement can negotiate such terms so long as they are not defective when compared against the requirements of the Act.

Under the Federal Governments 'Closing the Loopholes' amending Act, it required the Fair Work Commission to make new 'model terms' for use in enterprise agreements. These included a:

- flexibility term for enterprise agreements.
- consultation term for enterprise agreements.
- term about dealing with disputes for enterprise agreements.

For those members that have enterprise agreements in their workplaces, and will be renegotiating them in the future, the Full Bench of the Commission has finalised these new model terms, the new model provisions are operative from 26 February 2025, and we make them available here.

Of some interest is the ACTU and related unions sought the model consultation clause be amended so its requirement be triggered by an employer introducing a 'proposed change'. However, the Commission held the view that such an amendment would trigger the consultation requirement based on an indefinite and uncertain position of an employer, thereby leading to complications and impediments. Therefore, it was appropriate the previous reference to when a "definite decision" has been made by an employer has remained in the new model consultation clause.

DECISION OF INTEREST

In an adverse action related decision of the Federal Court late last year, it was held unreasonable for an employer to require an employee to work 40 hours per week.

By way of background, the employee was employed as a retouching specialist with a post-production company, paid an annual salary, and the Graphic Arts, Printing and Publishing Award

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applied to her employment. The employees contract required the employee to work a standard 40 hours per week and that additional overtime may be required. The 40 standard hours were paid as "ordinary hours", and her payslips demonstrated she was not paid any overtime penalty rates for working more than 38 hours per week.

Upon termination the employee claimed her employer contravened section 62 of the Fair Work Act by requiring her to work 40 hours per week for a continuous period over six years and failing to pay overtime rates for hours worked in excess of 38 ordinary hours per week. The employer claimed they had offset any overtime rates within the annual salary.

The Court ruled in this case that the additional 2 hours per week were unreasonable because they were:

- Required on a consistent and ongoing basis, rather than being incidental or an occasional necessity.
- Not compensated for in any form – there was no financial payment or recognition for the additional work. The Court held that the employer could not offset its obligation to pay overtime rates under the Award due to the absence of any communication, understanding, or agreement between the parties.
- Essentially, the employment contract did not clearly state the additional 2 hours overtime were required to be worked each week.

Key takeaway

Members who require an employee to work additional hours in excess of "ordinary hours" must:

- Not categorise "additional hours" as "ordinary hours".
- Be able to justify the 'reasonableness' of a requirement to work additional hours on such a regular basis, and that related discussions were held with the employee and agreement was reached.
- Ensure an Award covered employee is being appropriately compensated for working any additional hours i.e. overtime paid at overtime rates.
- Ensure contracts of employment for employees on annualised salaries are drafted appropriately and clarify that their salaries compensate them for all hours worked. For Award covered employees in particular, the contract should clarify the required weekly overtime is reasonable and related overtime rates of pay have been incorporated into the annualised salary for working the additional hours.
- Keep records of all related discussions and any workings that determined particular rates of pay specifically compensate and offset for working overtime.

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