

Employee Relations News

Edition 24

9 June 2015



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Greg has over 25 years' experience in Human Resource Management and Employee/Industrial Relations, with qualifications in IR and HR, Training & OH&S systems. EBA's, unfair dismissals and policies/employee handbooks are a speciality. For further information, please see my LinkedIn profile: https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

In this edition:

- FWC hands down its annual pay increase.
- Applicant accuses FWC commissioner of bias (fail).
- Out-of-time "fails" escalate to the Full Bench of the FWC.

FWC hands down its annual pay increase¹

On 2 June 2015 the FWC handed down its latest pay increase. This decision, of 165 pages, and considered 428 citations, considered a number of factors including economic conditions and unemployment figures and how this bears with living conditions.

"The Fair Work Act requires the Fair Work Commission's Expert Panel to conduct and complete a review of the national minimum wage and minimum wages in modern awards in each financial year. The decision we are issuing today deals with the 2014–15 Annual Wage Review. The decision directly affects over 1.86 million employees in Australia who are reliant upon minimum rates of pay."

"The principle of equal remuneration is a factor in favour of an increase in the NMW and modern award minimum wages. The increase we have determined is consistent with the promotion of social inclusion through increased workforce participation and is also compatible with the need to encourage collective bargaining."

The increase:

- National Minimum Wage increased by 2.5% to \$656.90 (ie up \$16.00) per 38 hour week, or \$17.29 per hour.
- All modern award minimum wages by 2.5 per cent. Weekly wages will be rounded to the nearest 10 cents.
- Increases effective on 1 July 2015.

¹ Annual Wage Review 2014–15 [2015] FWCFB 3500 (C2015/1). JUSTICE ROSS, PRESIDENT; SENIOR DEPUTY PRESIDENT WATSON; SENIOR DEPUTY PRESIDENT HARRISON; COMMISSIONER HAMPTON; MR COLE; PROFESSOR RICHARDSON; MR GIBBS. 2 JUNE 2015

The increases do not apply in the following circumstances:

- There is an EBA in place.
- The wages (including the increase) being paid are in excess of the modern award rate.
- Noting that employers are unable to mount an “incapacity to pay” argument (employer were able to this under the previous Act).

Applicant accuses FWC commissioner of bias (fail)²

The Commissioner in this matter provided a comprehensive decision, citing practice notes, legislation and High Court decisions on why he should not excuse himself from hearing of this matter (an “unfair” dismissal).

The Applicant, quoting from *the Fair Hearings Practice Notes*:

Wrote to the Commissioner and the President, Justice Ross:

“I believe that the Commissioner ... did not do an equal treatment, followed a discriminatory attitude towards me and did not give me procedural fairness. The Commissioner’s impartiality is central to fair hearing. I also strongly believe that this Commissioner, Wilson may not bring an impartial mind to the matter and ... request that the matter may be referred back to the Relevant Panel Head for allocation to another member so that I may get a fair, just and impartial proceedings, hearing and fair disposal of this dispute. If this application is not allowed I will be put to irreparable loss and injury.”

President responded (by email):

“... if you believe that Commissioner Wilson is demonstrating bias in relation to your unfair dismissal matter, then the appropriate course is for you to make an application to the Commissioner in the first instance submitting that he should disqualify himself from hearing the matter. Such a course will provide an opportunity for other interested parties to be heard in relation to your application.

“If you are dissatisfied with the Member’s decision then lodging an appeal is the appropriate course particularly if you believe that you have not been afforded procedural fairness or if you believe that the Member made an error in his decision.”

The Commissioner made a number of references, such as:

From the Practice Notes:

“Impartiality and apprehended bias: The Commission’s impartiality is central to a fair hearing. Bias, whether actual or apprehended, is inconsistent with the Commission’s obligation to provide a fair hearing.

“The general principle is that a Member should not deal with a matter if in all the circumstances a fair minded observer might have a reasonable apprehension that the Member might not bring an impartial and unprejudiced mind to the case before him or her.”

² Joseph v Plenty Valley Community Health Ltd U2014/10943 [2015] FWC 3599 Wilson C Melbourne 27 May 2015

From the High Court:

"The High has made clear that Members should not too readily agree to disqualify themselves. As the High Court has observed:

"...Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

From the Fair Work Act:

"The Commission must act in a manner that:

- is fair and just;*
- is quick, informal and avoids unnecessary technicalities;*
- is open and transparent; and*
- takes into account equity, good conscience and the substantial merits of the case."*

Out-of-time "fails" escalate to the Full Bench of the FWC

Not dissimilar to waiting for a tram (wait a long time and three turn up in a row), there have been a number of recent full bench decisions relating to applicant disgruntlement with being rejected on jurisdictional grounds (ie outside of the 21 day limit to lodge an application for an unfair dismissal).

The Act provides (paraphrasing):

- The application must be made within 21 days after the dismissal took effect; or within such further period as the FWC allows...
- The FWC may allow a further period for the application to be made if it is satisfied that there are exceptional circumstances, taking into account:
 - the reason for the delay; and
 - whether the person first became aware of the dismissal after it had taken effect; and
 - any action taken by the person to dispute the dismissal; and
 - prejudice to the employer (including prejudice caused by the delay); and
 - the merits of the application; and
 - fairness as between the person and other persons in a similar position.

The meaning of "exceptional circumstances" was considered in *Nulty v Blue Star Group Pty Ltd* where the Full Bench said:

"In summary, the expression "exceptional circumstances" has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a singular occurrence, even though

it can be a one off situation. The ordinary and natural meaning of "exceptional circumstances" includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon."

The recent cases being:

Case 1³:

- Unfair dismissal filed one day outside 21 day time limit.
- Appellant submitted that delay was the result of a medical condition.
- Medical evidence was sought after the time frame for lodgement passed.
- Appellant sought permission to appeal arguing the Commission at first instance failed to consider significant facts, misinterpreted evidence and ... incorrectly placed emphasis on the appellant 'shopping around' when it was due to health issues.
- Full Bench found that the evidence was properly considered and ...no error in original decision identified.
- Permission to appeal refused.

Case 2⁴:

- Application for relief for unfair dismissal filed **three days** outside 21 day time limit.
- Appellant submitted that delay was the result of difficulty accessing legal advice and in lodging application electronically.
- Appellant sought permission to appeal, arguing that the Commission failed to consider...the mental health of his son.
- FB commented that the appeal process not intended as an avenue for an unsuccessful party to rerun their case.
- Permission to appeal refused.

Case 3⁵:

- Lodged an unfair dismissal application **eight days** out of time.
- Reason given for the delay was that appellant was waiting for former employer to provide her with incident reports and was consulting doctors about her injury and taking medication.
- Found the appellant had not demonstrated any error in the decision of the Commission at first instance.
- Permission to appeal refused.

Until next time...

Greg Reiffel
Principal Consultant

³ Appeal by Underwood against the order of Sams DP of 4 February 2015 [PR560721] Re: Terra Firma P/L t/a Terra Firma Business Consulting C2015/1839 [2015] FWCFB 3435 Catanzariti VP Watson VP Gostencnik DP Sydney 25 May 2015.

⁴ . Appeal by Tweed against decision and order of O'Callaghan SDP of 12 March 2015 [[2015] FWC 1681] Re: The Trustee for Furnlunga No 2 Trust t/a Harvey Norman Furniture Noarlunga C2015/2297 [2015] FWCFB 3443 Catanzariti VP Watson VP Gostencnik DP Sydney 26 May 2015

⁵ Appeal by Vickery against order of Drake SDP of 18 March 2015 [PR562112] Re: Affinity Education Group Ltd t/a Village Kids Bentley Centre A C2015/2397 [2015] FWCFB 3479 Catanzariti VP Watson VP Gostencnik DP Sydney 27 May 2015