

CG Workplace - January Bulletin

Regardless of the time of year, managing employees is something that is continuous and ongoing. As always, changes to the law and significant court and commission decisions impact significantly on how day-to-day duties and tasks are managed.

Set out in the box below is a brief update on recent developments in employment law to enable you to start the New Year ensuring that your employee management practices are spot on. For those wanting further information, please keep reading beyond the box.

1. Redundancy – an important update

The full bench of the Australian Industrial Relations Commission recently held that the commission is not required to consider the validity of the decision to make an employee redundant, but only whether the employer's decision was all or in part based on a "genuine operational reason".

This effectively means the focus for redundancies has changed from looking at the process for selecting the position (and person) to be made redundant to now focusing on the reasons for the decision.

2. Ill or injured employees – an important change to the management process

A recent decision of the Federal Magistrate's Court has concluded that workers compensation is 'paid sick leave'. This has created significant difficulties for managing ill or injured employees, particularly where a decision to terminate an injured employee who has been absent for longer than 3 months (either consecutively or 3 months over a 12 month period) is made.

Incorrectly managing this issue may be costly and time consuming for all employers.

3. Work Choices Compliance Update

As you are no doubt aware, the Office of Workplace Services has stated that it intends to focus on businesses in the Darling Down's region to ensure employers are keeping the necessary employer records outlined in the Work Choices legislation.

The Work Choices legislation identifies new record keeping provisions relating to (for example):

- hours worked by employees and base annual salaries;
- general employment records;
- pay slips;
- leave (including personal, annual and other types of leave);
- superannuation contributions; and
- termination of employment.

CG Law is able to conduct Work Choices compliance audits for your business. Please contact us for further information relating to this service.

Redundancy – an important update

Mr Carter worked at Village Cinemas Australia Pty Ltd for 19 years. He was described as a “*well-performing manager*” and managed Village Cinema’s Doncaster cinema. He had never been disciplined for under performance.

For unexplained reasons, on 15 June 2006, Village Cinema’s were issued with a notice to vacate its Doncaster complex and on 1 August 2006, the cinema closed. Prior to the closure, Mr Carter was informed that his position was redundant and that his employment would be terminated.

Mr Carter subsequently pursued a claim for unfair and unlawful termination on the basis that the real reason for the termination of his employment was not the closure of the Doncaster complex, but (inter alia) the fact that he had asked for and was refused by Village Cinema’s to take long service leave. Mr Carter contended that this was not a “*valid*” reason for the termination of his employment and was ultimately ‘unfair’.

Village Cinemas, pursuant to the *Workplace Relations Act* 1996 (Cth) brought a motion to dismiss the part of Mr Carter’s application that his employment was terminated in a manner that was unfair.

In doing this, Village Cinema’s was relying on the part of the Act which says that the AIRC does not have jurisdiction to hear a complaint for unfair dismissal (regardless of the number of its employees) if the decision (or part of the decision) to terminate an employee’s employment was based on a “*genuine operational reason*”.

An “*operational reason*” includes, for example, reasons of an economic, technological or structural nature relating to the employer’s business. “*Genuine*”, it appears, has been given its literal meaning of “*real, true, not counterfeit*”. This obviously means that the “*operational reasons*” must be real or true and not manufactured to avoid the ramifications provided by the Act.

The Full Bench of the AIRC concluded that the closure of the cinema was ultimately the reason for the termination of Mr Carter’s employment.

Mr Carter diligently argued that whilst the decision to make his position redundant is very closely linked to the decision to terminate his employment, the 2 are separate and distinct. That is, the reasons for the decision to make his position redundant was an “operative reason”, however the decision to terminate the employment is not. The Full Bench rejected this argument and stated that:

“To accept such an interpretation would, in our view, require an inquiry into the circumstances of the termination such that the Commission is required to determine the appropriateness of the termination rather than ascertaining whether the termination of the employment of the particular employee was for genuine operational reasons or reasons that included genuine operational reasons. This, it seems to us, is precisely the type of inquiry that the Parliament sought to avoid when it created the statutory bar to bringing applications for relief in s.643(8).”

This means that the genuine operational reasons are now the most important (and in some cases the only) issue to be considered in making a position redundant. The difficulty for employers will be to ensure that before making a position redundant, it has the necessary documentary evidence to establish the genuineness of its decision, the fact that the decision was based on operational reasons and not based on grounds which are unlawful.

The lessons for employers are:

- 1. Employers ought to ensure that in deciding whether to make an employee's position redundant, they focus only on genuine operational reasons;**
- 2. Any decision relating to making a position redundant must not be made on grounds (or include consideration of grounds) that are unlawful.**

Ill or injured employees – an important change to the management process

A recent decision of the Federal Magistrate's Court has created further, major considerations for managing ill or injured employees. On 15 January 2007, in *Lee -v- Hills Before & After School Care* [2007] FMCA 4, Federal Magistrate Raphael concluded that "absence on paid Workers Compensation leave" fits the definition of paid sick leave contained in the *Workplace Relations Regulations* 1996 (Cth).

Although this may not seem a major issue, the ramifications of this conclusion are far reaching.

The Work Choices legislation confirms that an employer, regardless of the number of its employees, must not terminate a person's employment (or make their position redundant) for reasons that are 'unlawful'. An 'unlawful' reason for terminating a person's employment includes (inter alia):

“(a) *temporary absence from work because of illness or injury within the meaning of the regulations;*”

Effectively, this means that if an employee has complied with the relevant notice provisions for taking sick leave and is absent from work, then their employment must not be terminated. The Regulations provide that if a person is absent from work for more than 3 months and is not on 'paid sick leave', then the regulations dealing with temporary absence from work do not apply.

Before the *Hill's Decision* a person who was receiving workers compensation benefits was thought not to be on 'paid sick leave', but absent from work on extended unpaid sick leave. In practice, this meant that after an employee was absent for 3 or more months (or for a cumulative total of 3 months over a 12-month period) an employer could terminate their employment without being at risk of being pursued for an unlawful termination claim based on 'temporary absence from work'.

(Of course discrimination and protection of injured employee provisions contained in the State workers compensation legislation would need to be considered, however those risks could be thoughtfully and carefully managed).

This may not now be the case. The *Hill's Decision* has deemed Workers Compensation payments to be a "special form of sick pay". That is, paid sick leave. This means that the 'temporary absence from work due to illness or injury' protections contained in the Work Choices legislation apply to all employees who are receiving Workers Compensation payments, regardless of the length of their absence from work.

The practical effect is that if you decide to terminate a person's employment in circumstances where they are absent from work and receiving workers compensation payments then you are at greater risk of falling foul of the unlawful termination provisions. This, in my experience, is a very costly and time consuming error.

This issue creates some important lessons for employers:

- 1. Employers ought to consider carefully in their employment agreements the relevant notice requirements for employees taking sick leave. Further, employers ought to carefully monitor compliance as a failure to comply may result in the employee falling outside the 'temporary absence from work' provisions.**
- 2. Employment agreements ought to be reviewed to ensure provisions for clarifying issues such as the meaning of paid and unpaid sick leave and permanent incapacity are addressed.**
- 3. Before terminating an employee's employment who is absent from work due to illness or injury you ought to seek clarification as to the risks associated with that decision as the fallout may be costly.**

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