

CG WORKPLACE – MAY BULLETIN (SPECIAL EDITION)

Following on from our most recent CG Workplace News Alert, we have set out further information relating to the new Fairness Test in this “Special Edition” to ensure you have up to date information to assist you in managing your staff.

The Fairness Test

As previously stated, the Fairness Test has been introduced to protect certain award conditions for employees who earn less than \$75,000 per annum. The Fairness Test will be applied to all applicable workplace agreements (that is, AWAs and Collective Agreements) which aim to remove protected award conditions for employees. The basic obligation for employers is that they will be required to fairly compensate the employee for negotiating away their protected award conditions.

For your information, the protected award conditions are:

- penalty rates, including public holidays and weekends;
- shift and overtime loadings;
- monetary allowances;
- annual leave loadings;
- public holidays;
- rest breaks; and
- incentive-based payments and bonuses.

The Workplace Authority (or the old Office of Employment Advocate) is now required to conduct the Fairness Test. This will be done by taking into account both the monetary and non-monetary compensation offered to an employee in a workplace agreement and comparing those entitlements with the value of the protected award conditions which have been relinquished and which would have otherwise been payable to the employee under the relevant award.

Presumably, if the value of the non-monetary and monetary conditions contained in the workplace agreement is equal to the value of the relinquished protected award conditions, then the workplace agreement will pass the Fairness Test. This will be confirmed upon review of the amending legislation.

The Fairness Test will be conducted in a similar way to the old no-disadvantage test, although there are some technical differences. The table below sets out the similarities and differences of the Fairness Test to the old no-disadvantage test.

Similarities	Differences
The Workplace Authority will compare the value of the monetary compensation offered to the employee in a workplace agreement with the financial value of the benefits the employee would otherwise have been entitled to if they had retained their entitlement to the protected award conditions.	The Workplace Authority will compare the value of the non-monetary compensation (in addition to monetary compensation) offered to the employee in a workplace agreement with the value of the benefits the employee would otherwise have been entitled to if they retained their entitlement to the protected award conditions.
The employee will usually be compensated for protected award conditions with a higher rate of pay for each hour worked.	In establishing what fair compensation is, the Workplace Authority will consider the employee’s work obligations, such as,

	whether the employee would be required to work shifts or on weekends.
	The Workplace Authority may consider issues such as the industry, location and economic circumstances of the business and the specific circumstances or employment opportunities of the employee.
	The Workplace Authority may consider all relevant working arrangements and entitlements, including family friendly conditions.

The Government has stated that the Fairness Test will apply to all workplace agreements lodged on or after 7 May 2007. This means that employers and employees who are currently in the process of creating an agreement will need to factor in the Fairness Test in circumstances where the agreement is aimed at varying or removing any or all of the protected award conditions.

Agreements lodged before 7 May 2007 will not be affected.

The Practicalities

It is understood that the Fairness Test will be enforced in the following manner.

If an agreement does not pass the Fairness Test, the Workplace Authority will provide advice to the employer and employee on:

- why the agreement is not fair;
- how it could be amended to meet the Fairness Test; and
- the amount of any back pay payable to the employee as compensation for removing or varying any protected award conditions.

The employer and employee will have 14 days to make the agreement fair. If the necessary amendments are not made, then the relevant industrial instrument (such as the applicable Notional Agreement Preserving State Award) will apply until an agreement is formed which passes the Fairness Test.

There is no indication as yet as to whether any fines will be issued to employers who lodge agreements that do not meet the Fairness Test.

The Workplace Authority will also offer a pre-lodgement assessment of proposed agreements against the Fairness Test to assist employers to make fair and clear agreements from the start. Employees will be able to access independent advice and pre-check agreements before signing their workplace agreements.

No doubt the devil in the Fairness Test will be in the details contained in the applicable legislative amendments. The difficulty we foresee will be (for example) the ability of the Workplace Authority to properly weigh up the value of the non-monetary benefits against the actual monetary benefits of the disposed protected award entitlements.

It is understood that the amending legislation will be published shortly and more

information relating to the Fairness Test will be issued at this time.

If you have any questions relating to the Fairness Test and its impact on your employment agreements, or any other information, then please do not hesitate to contact:

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