ISSUE 4
FEBRUARY 2001

Newsletter of
Mullins & Mullins
Lawyers and Notary

M&M at work

Bending the Rules

The trend towards flexible work practices

by Sam Kane

The issue of flexible work practices is now firmly on the agenda and is expected to stay for some time to come.

Flexible work practices are concerned with how, when and where work is done. They range from working from home or telecommuting (i.e. working from a remote location using electronic means), to part time work, job sharing and flexible working times. These flexible practices are increasingly being introduced by employers as a recruitment and retention strategy, with lower staff turnover leading to savings to the organisation.

Flexible work practices are of significant importance to employers considering employment arrangements for staff returning from maternity leave, many of whom request flexible work arrangements for a period. The issue arises as to whether an employer is required to adopt such flexible work practices if requested.

There are decisions at both State and Federal level throughout Australia, which indicates that, a failure by an employer to reasonably consider, trial or implement flexible working arrangements upon return from maternity leave or similar circumstances may constitute unlawful discrimination. An examination of the leading decisions follows:

Hickie v Hunt & Hunt (Human Rights and Equal Opportunity Commission, 1998)

Ms Hickie was a solicitor and contract partner at the law firm Hunt & Hunt. Ms Hickie alleged that, upon her return from a period of maternity leave on a part time basis, she was left with a significantly smaller practice than before her maternity leave, group meeting arrangements excluded her and no accommodation was made for her part time working hours. Her partnership contract was subsequently not renewed. The Commission found that there had been indirect discrimination on the ground of sex against Ms Hickie and that the effect of the firm's decision was to impose on her a condition that to maintain her position in the firm it was necessary for her to work full time. The condition was likely to disadvantage women and was therefore discriminatory. Ms Hickie was awarded $95,000 in damages.

Bogle v Metropolitan Health Service Board (Western Australia Equal Opportunity Tribunal, 2000)

Ms Bogle was a registered dental nurse employed by the Board for a significant period. Prior to taking maternity leave she was employed in the senior position of Charge Nurse. Upon her return to work Ms Bogle requested to return to the position of Charge Nurse on a part time 'job share' basis. The Board responded that the position could not be job shared but did not give reason other than that the position had always been a full time one. She was given the option of returning to work either in a full time capacity as Charge Nurse, or in a part time capacity in a more junior position. The Tribunal found that a higher proportion of men, people without family responsibilities or who were not married were able to comply with the requirement or condition to work full time. It then found that the requirement to work full time was not reasonable, as management had failed to conduct any proper analysis or evaluation of Ms Bogle's proposal to job share. The Board was ordered to reinstate Ms Bogle and to implement (either on a trial basis or permanently) job sharing for her position.

State of Victoria v Schou (Victorian Supreme Court, 31 August 2001)

In a decision which departs from the previous authorities, the Victorian Supreme Court recently overturned a decision of the Victorian Civil and Administrative Appeal Tribunal (VCAT) which found there had been discrimination against Ms Schou.

Ms Schou had worked for 18 years as a Hansard Reporter and sub-editor, who are required to attend and report on parliament during all sittings. When her child developed an illness, she found difficulty balancing her full time work load with her role as parent and carer. The employer agreed to allow Ms Schou to work from home 2 days per week and to install a modem for this purpose. The employer did not implement the arrangement and Ms Schou resigned. VCAT found that there had been indirect discrimination against Ms Schou on the basis of her status as a parent and carer, as the installation of the modem was agreed to and the costs modest.

The Victorian Supreme Court determined that there had been an error of law, as it was incorrect to consider the reasonableness of the modem proposal, rather than the reasonableness of the requirement for Hansard sub-editors to work on site. The court then went on to liken Ms Schou's proposal as a request for a 'favour' which had not been granted to other employees and stated that she did not suffer detriment as she was treated no differently to other sub-editors.

The court set aside the decision of VCAT, and referred the matter back to the Tribunal to consider the issue of whether the requirement to attend was reasonable.

Conclusion

Whilst the Schou decision appears to depart from previous authority, it is arguable that the decision is distinguishable from other cases. It is clear however from the line of authorities that a refusal of an employer to give reasonable consideration to a request for flexible work arrangements upon return from maternity leave (or in similar circumstances), may expose them to liability under Anti-Discrimination Laws. It is advisable for organisations to give serious consideration to its policies and practices on flexible work arrangements, and to consider carefully and reasonably any proposals put to them by employees.

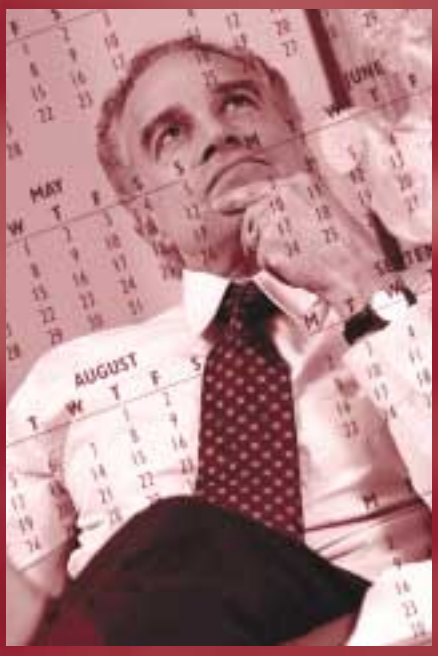
Long Service Leave

by Kate Williams

Employee Long Service Leave entitlements have been amended with the introduction of the *Industrial Relations and Another Act Amendment Act 2001* (Qld). The amendments, which commenced on 3 June 2001, reflect the trend towards employees remaining for significantly shorter periods of service with a single employer. It is the access to the entitlement which has changed, rather than the rate of accrual.

Prior to the amendments, employees were entitled to 13 weeks long service leave on full pay after 15 years continuous service, with a pro rata entitlement upon termination of employment after 10 years. The new legislation provides for an entitlement of 8.6667 weeks leave after 10 years continuous service, with pro rata entitlements if employment terminates after 7 years.

The Act also has in place transitional arrangements, pertaining to employees whose continuous service began before the commencement of the Act, to phase in this new entitlement. For the purposes of working out when an existing employee may take long service leave, only two thirds of an employee's continuous service completed before 3 June 2001 counts as continuous service. Hence, an employee who has been employed for 10 years prior to 3 June 2001, will be recognised as having 6.67 years service for the purposes of assessing long service leave entitlements.



The employers' role i

By Cameron Seymour.

Businesses which minimise expenses are more profitable. Workers Compensation premiums are affected by claims history and the amount of damages paid. Active involvement in the management of Workers Compensation claims can assist employers in keeping their Workers Compensation premiums in check.

Here are some pointers on how employers can assist in the defence of a Common Law action:-

1. When a worker suffers injury and claims compensation, thoroughly investigate the circumstances of the incident. If there is any doubt how the incident occurred, notify WorkCover. WorkCover may appoint loss adjusters to investigate the claim. If the claim is not allowed at that stage the worker cannot claim damages at a later stage;

2. If a compensation claim is accepted but information comes to the employer's attention that the claim is fraudulent, notify WorkCover immediately. Be aware however that WorkCover can only make decisions on real evidence, not hearsay;

3. If the worker decides to claim damages (as opposed to compensation) the worker must serve a Notice of Claim for Damages on the employer. It is important that the employer notifies WorkCover as soon as the Notice of Claim for Damages is served. WorkCover will then appoint loss adjusters to investigate the claim and lawyers to defend the claim;

Privacy Act Exposed

By Sam Kane

On 21 December 2001 a number of amendments to the *Privacy Act 1988* (Cth) were introduced which are relevant to how individuals and organisations keep records and exchange information in the conduct of their businesses. The amendments introduced ten National Privacy Principles (NPPs) outlined below. In this article we consider how the legislation will effect employers.

Who does the Act apply to?

The amendments will now apply to all organisations with an annual turnover of more than $3 million and to health service providers. There are certain exemptions to this and organisations should obtain advice as to whether they are bound by the Act.

What are the National Privacy Principles?

The 10 National Privacy Principles ('NPPS') are briefly summarised as follows:

1. Collection

NPP1 relates to the collection of personal information by an organisation. An organisation must only collect personal information where it is relevant to one or more of its primary functions and the way it is collected must be lawful and fair. If possible, information should be collected directly from the individual to whom it relates. At the time of the collection, the organisation should tell the individual from whom information is sought the:

- identity of the organisation seeking the information;
- access arrangements;
- purpose of collection;
- usual recipient of information;
- any legal requirements; and
- consequence of failure to provide information.

2. Use and Disclosure

NPP2 governs how an organisation may use and disclose personal information in its possession. There are restrictions on the way in which an organisation may use or disclose personal information where that use or disclosure is for a purpose other than the primary purpose for which it was collected.

3. Data Quality

NPP3 relates to the quality of the data held by an organisation. The organisation must take reasonable steps to ensure data is accurate, complete and up to date.

4. Data Security

NPP4 requires an organisation to take reasonable steps to ensure that the personal information it holds is secure and to destroy and de-identify personal information which is no longer required.

5. Openness

NPP5 requires an organisation to be open about what personal information it holds and its policy on its management of personal information.

6. Access and Correction

NPP6 permits access to and correction of personal information held by an organisation by the individual to whom the personal information relates.

7. Identifiers

NPP7 prohibits the use of identifiers assigned by a commonwealth agency such as Medicare and tax file numbers.

8. Anonymity

NPP8 states that individuals must have the option of not identifying themselves when entering into transactions with organisations, if it is lawful and practicable to remain anonymous.

9. Transborder Data Flows

NPP9 regulates the transfer of personal

n defending WorkCover claims

4. Employers should fully co-operate with the loss adjusters and lawyers. The loss adjusters may ask for documents or information which is difficult to track down. It is important that effort be made to provide the requested information to give the lawyers every chance to defend the action. In cases where it is inevitable the worker will succeed efforts can be made to ensure the amount of damages recovered is reasonable. WorkCover's lawyers will be able to advise what evidence or leads they need to defend that part of the claim;

5. Keep lines of communication open between you and WorkCover's lawyers. Employers should ask to be kept advised of the progress of a claim. It is a necessary part of the process that WorkCover makes an offer to the worker. In some cases, that offer will be nil. If WorkCover does not accept the worker's offer, and the worker does not accept WorkCover's offer, the next stage is for WorkCover's lawyers and the worker's lawyers to attend a compulsory conference. Employers should ask to attend the conference as workers often make fresh allegations at the conference which can be addressed by the employer. It is often beneficial for the employer to see how these cases can be resolved at a conference and understand the process which has occurred up to, and following the conference.

6. If in any doubt, the employer should ask WorkCover's lawyers to explain the process, and the evidence. The lawyers job is to get the best result for WorkCover. That involves looking at not only the evidence which supports the employer, but also the evidence which supports the worker and consider what a Court may decide if faced with the same evidence. Often a settlement of a claim reflects a compromise between contradictory evidence in order to save extra costs associated with defending a matter, or the risk that a worker's evidence will be accepted wholly in favour of the employers evidence. WorkCover's lawyers can explain these risks to you. A modest settlement at a compulsory conference will have less impact on an employers premium than a large judgement given by a Court at trial.

---

information held by an organisation in Australia about an individual to someone in a foreign country.

10. Sensitive Information

NPP10 limits the ability of an organisation to collect sensitive information (i.e. information about an individual's racial or ethnic origin, political opinions, religious beliefs and so on).

'Personal information' means information or an opinion, whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This is a very broad definition, and could for example include an employee's address or date of birth.

Employee Records Exemption

The Act also provides certain exemptions from its application, including information relating to:

- a current or former employment relationship; and
- an employee record held by an organisation relating to the individual.

'Employee record' is defined as a 'record of personal information relating to the employment of an employee', including information relating to the employee's health or any of the following:

- engagement, training, discipline or resignation of the employee;
- the termination of the employee's employment;
- the terms and conditions of the employment of the employee;
- emergency and personal contact details;
- the employee's performance or conduct;
- hours of work;
- salary or wages;
- membership of professional body or trade union;
- leave entitlements; or
- the employee's taxation, superannuation or banking affairs.

The result of this exemption is that the ten NPPs will not apply to employee records and that employers will still be able to collect, retain or use personal information of employees, provided they are not used for commercial purposes or other purpose not directly related to the employment relationship. This is not to detract from the implied duties of trust and confidence owed by an employer to an employee.

The exemption may not apply to all activities of existing employees, for example, records an employer keeps in relation to the monitoring of employee's email or internet use, or telephone use or other employer surveillance of employees, unless they are retained on an employee's record (eg for disciplinary purposes).

Significantly, the exemption applies only to existing and past employees and does not apply to prospective employees (or to contractors, workers on secondment or employees from a related company). This means that an employer will be bound to follow the ten NPPs in obtaining information relating to prospective employees, including obtaining references. In practical terms, this may mean that information disclosed on an employment application form must only be used for the purpose of determining whether that person is suitable for employment. An employer may not be able to obtain references from previous employers or sources not nominated by the candidate as a referee, without first advising the candidate that you intend to gather that information or reference for the purpose of determining their suitability for the position.

It is also arguable that, in the event that a potential employer obtained a negative reference from a previous employer and made a record of that discussion, the employee would be entitled to request a copy of the information held and may even challenge its accuracy. That information may then even by used by that employee for the purposes of commencing litigation against the previous employer giving the negative reference.

In terms of obtaining references, it would generally prudent in any event to be up front with all prospective candidates in terms of what reference checks are to be conducted, included advising if you intend to consult those not nominated as referees, before gathering that information.

Conclusion

The Act establishes the office of the Privacy Commissioner to investigate and make determinations in relation to breaches of the Act. If employers are to avoid complaints to the Privacy Commissioner, it is essential that they have in place effective privacy policies and consider carefully the implications of this legislation when dealing with recruitment and employee issues.

Are You Being Reasonable?

Notice Requirements for Termination of Employment.

By Joseph Carey

A recent decision of the Victorian Supreme Court has emphasised the importance for employers of non-award employees to specify within their employment contracts the period of notice required for termination of employment.

If there is no notice clause in the employment contract, the minimum notice periods for termination in Queensland are set out in the *Industrial Relations Act 1999* (Qld). The Act provides a sliding scale of notice periods ranging from one week if an employee's service is less than one year to four weeks notice if the period of work is in excess of five years. A week's notice must be added if the employee is above 45 years of age and has completed at least two years continuous service with the employer. Similar provisions to these can be found in most industrial awards or agreements.

In circumstances where no industrial award applies and where contracts of employment are silent as to the notice required for termination of employment, an employee is entitled to 'reasonable notice' of termination. Failure to give 'reasonable notice' will entitle an employee to commence a common law action for wrongful dismissal. In certain circumstances, the minimum notice periods established by the Act may not be adequate to constitute 'reasonable notice'. What constitutes 'reasonable notice' varies according to the circumstances of each case, taking into account factors such as the employee's length of service, salary level and the seniority of the position. The question is particularly relevant in the case of senior executives with significant salaries or periods of service, who may be entitled to notice periods of up to twelve months.

In the 2001 Victorian decision of *Rankin v Marine Power Pty Ltd*, a director of a company, Mr Rankin, was dismissed for budget excesses after nineteen years of service. The company offered him three and a half months notice upon termination. As Mr Rankin's contract of employment was not written, there was no specified period of required notice of termination. The Court therefore determined that a 'reasonable' period of notice must be given and determined that 12 months notice was reasonable in the current circumstances.

As the purpose of the notice period is to allow the dismissed employee to find similar work, persons who hold specialised or senior positions may require longer notice periods to do so. In finding that Mr Rankin was entitled to twelve months notice, the Court examined a number of factors to determine what constituted reasonableness. Initially, it was noted that the director was in a very senior position, and had given a significant degree of service to the company over nineteen years. He was also on a salary package of nearly $200, 000 per annum and was 49 years old. Additionally, the Court recognised that senior positions such as directors were not the most readily available jobs, and the circumstances of his dismissal would not aid his future employment prospects. The culmination of these factors was to view the three and a half months notice as insufficient for a person in Mr Rankin's position.

When determining reasonable notice, it is apparent from the decision that employers must consider such factors as the position's salary and importance, as well as the employee's length of service, professional standing, age, qualifications and experience. Further factors which may affect the notice period would be the time expected to find another similar position, prospective pension rights as well as the time period the employee could have reasonably expected to remain at the job.

It is important to note though, that such 'reasonable' periods of notice will not be required in cases of gross misconduct by an employee, such as acts of dishonesty or assault on a fellow employee. In these cases, the worker may be summarily dismissed.

The result of cases such as Mr Rankin's, serves as a warning to employers of the importance of having written contracts of employment for all non-award employees with appropriate notice periods specified within those contracts. Failure to do this may lead to an employee commencing proceedings for wrongful dismissal and defending such actions could come at a high price to the employer.

Editorial

By Patrick Mullins

Cameron Seymour and I are both Queensland Law Society Accredited Specialists in Personal Injury law. We act for the statutory insurer, WorkCover Queensland, and for Queensland's leading self-insurers under the *WorkCover Queensland Act 1996*. In this issue of M&M at Work Cameron outlines ways in which employers can assist in the defence of damages claims under the WorkCover legislation. This will be of interest to all employers. Samantha Kane deals with the Privacy Act including the implications for employers providing references for former employees. There are some handy hints for employers to limit their exposure to potential claims in this area. Our cover story deals with the important area of the provision of flexible work practices. The challenge facing all employers is to respect the demands of family commitments. The degree to which these commitments are respected seems related to the degree of loyalty employees have to their employers and it is intimately connected to the issue of work/life balance we are all trying to achieve.

Mullins & Mullins
LAWYERS AND NOTARY

Level 22 Central Plaza One
GPO Box 2026, Brisbane Q 4001
345 Queen Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: skane@mullins-mullins.com.au