



DECEMBER 2020 NEWSLETTER

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Note: The views of the contributors are not necessarily those of ALERA SA

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PRESIDENT'S MESSAGE



Dear Members

Signing off for 2020 and planning for 2021.

The main member-facing activities of our association are the seminars.

Earlier this month we hosted a webinar by Sydney-based barrister Penny Thew. Penny presented a well-structured and current analysis of general protections cases. Breaking the issue down to its elements will be equally insightful for applicants and respondents.

Penny's presentation will be available on the ALERA SA website. (www.alerasa.com.au).

With the growing familiarity with on-line fora, in 2021 we intend to trial seminars in dual mode, that is a face to face presentation in the traditional format which can be live streamed (sans conviviality). I will now leave you all to your frenzied windup and eventual downtime.

Glen

Glen Seidel, President – ALERA SA

Fair Work Commission clarifies when “other employment” will be acceptable

By Lachlan Chuong and Kylie Dunn, DMAW Lawyers

In the recent decision of *Lee Crane Hire Pty Ltd v Sneek, Kennedy and Wiemers* [2020] FWC 4792 the Fair Work Commission (FWC) considered what constitutes ‘other acceptable employment’ in the context of determining whether redundancy pay is payable to a departing employee.

Facts

The employer, Lee Crane Hire, operated a mobile crane hire business. The head office and one depot were located in Gladstone, Queensland. The other depot was located 120km away in the rural town of Biloela.

Following the closure of the Gladstone depot, a number of permanent employees were informed that they had two alternative options to choose from:

- they could continue in full-time employment, but would need to work at the new head office located in Biloela; or
- they could remain working in Gladstone, but would need to convert from full-time to casual and would not have guaranteed hours of work.

Three employees refused both options and Lee Crane Hire terminated their employment on the ground of redundancy.

Section 120 of the *Fair Work Act 2009* (Cth) (FWA) permits an employer who is obligated to pay redundancy pay to an employee under the National Employment Standards to apply to the FWC for an order to reduce the amount of redundancy pay payable (down to zero) if the employer obtains “other acceptable employment” for the employee.

Lee Crane Hire applied to the FWC to reduce the amount of redundancy pay to nil on the basis that it had obtained “other acceptable employment” for the employees in question.

Findings

The FWC confirmed that the concept of “other acceptable employment” is to be determined objectively rather than solely by reference to the views of the affected employees.

A number of factors are relevant to the issue of whether an alternative position is “acceptable”, including:

- the location of the position;
- remuneration and fringe benefits that apply to the position;
- hours of work;
- seniority and job security; and
- the affected employees’ carer and family responsibilities.

An employee’s refusal of an alternative position because of their personal preference may indicate that the position is not acceptable.

The FWC held that neither of the two options presented to the employees in question constituted acceptable alternative employment.

Although the nature of the work to be performed by the employees would remain the same, the FWC considered that there were significant objective differences between each of the two options and the employee’s existing positions such that both options were unacceptable.

With respect to the first option, the FWC considered that the requirement for an employee to travel 120kms was a significant burden (notwithstanding Lee Crane Hire would be paying for the employees’ travel costs). The FWC gave particular consideration to the employees’ family responsibilities which were such that travel to that degree would be impractical.

In relation to the second option, the FWC considered that the requirement to transition to casual employment and the associated loss of paid leave entitlements and job security were similarly perilous to the employees.

The FWC concluded that Lee Crane Hire had not offered acceptable employment to the employees and was required to pay out their respective redundancy entitlements in full.

Takeaways

This decision emphasises the importance of having in place well drafted employment contracts which provide a high level of flexibility to vary employees' duties, work location and hours of work.

The decision also illustrates the factors that will be relevant to the assessment of whether an alternative role will be deemed "acceptable" in all the circumstances. Businesses wishing to minimise their redundancy pay obligations should have regard to these factors when considering restructuring.

COVID-19 and Christmas parties - yet another challenge for employers

By Lachlan Chuong and Kylie Dunn, DMAW Lawyers



As 2020 officially draws to a close, the annual Christmas party is fast approaching. For many businesses, this year's party is an opportunity for staff to reconnect and re-build team morale after periods of remote working and months of virtual interactions.

While not all businesses may decide (or be able) to host an end of year function this year, and some may choose to host an event virtually, those who are proceeding with their usual plans for Christmas will face extra considerations in addition to their usual work health and safety obligations against the backdrop of COVID-19.

Work health and safety is never far away

Most employers need little reminding that the duties and responsibilities owed to employees, both at common law and under specific work health and safety legislation, extend to authorised work functions and staff Christmas events, including those held away from the workplace and outside of normal working hours.

The consumption of alcohol at Christmas parties heightens the risk of liability arising from misbehaviour, and it is recommended practice for businesses to take the following precautionary steps in the context of arranging and hosting a Christmas function:

- specify a clear start and finish time for the function and confirm that any 'afterparties' facilitated or attended by staff before, during or after those times are not authorised by the employer;

- nominate a designated 'responsible person' to be in charge of supervising the event and monitoring the supply and consumption of alcohol;
- consider whether there is sufficient food in proportion to the available alcohol;
- consider implementing a cut-off time for the service of alcohol or a drink limit;
- inform all employees of the expected standard of behaviour prior to the event including reminders of any relevant firm policies with respect to sexual harassment, bullying and discrimination; and consider organising ways for staff and other guests to get to and from the function.

Christmas and COVID

In addition to these usual considerations, businesses throwing a Christmas party in 2020 will need to take additional steps in respect of the specific risks arising from COVID-19, including:

- ensuring that the function venue complies with any density requirements with respect to the number of people who can attend and allows guests to maintain social distancing;
- considering whether food can or ought to be shared communally;
- using canned drinks or small bottles to avoid passing around beverages;
- having hand sanitiser available and encouraging guests to use it;
- staying up-to date and monitoring compliance with current COVID restrictions, such as limitations on dancing or vertical consumption of alcohol;
- complying with any COVID-19 safety plans and ensuring that all guests check-in when arriving at the venue if required; and
- reminding all guests to stay home if they feel unwell.

Employers should also respect any decision by an employee to not attend the Christmas party due to any personal concerns they may have.

Industrial relations reforms proposed in the Fair Work Act (Supporting Australia's Jobs and Economic Recovery) Bill

On 9 December 2020, the Commonwealth Government introduced its *Industrial Relations Reforms - Supporting Australia's Jobs and Economic Recovery* package and introduced the [Fair Work Act \(Supporting Australia's Jobs and Economic Recovery\) Bill](#) into the Australian Parliament.

Specific reforms cover five key areas of Australia's industrial relations system:

- Award simplification
- Greenfields agreements
- Casual employment
- Enterprise agreements
- Compliance and enforcement

A series of fact sheets on these reforms are available here:

<https://www.ag.gov.au/industrial-relations/publications/industrial-relations-reform-fact-sheets>