

EMPLOYEE RELATIONS UPDATE – MAY 2004

PRO - RATA LONG SERVICE LEAVE – WHAT CONSTITUTES A DOMESTIC OR OTHER PRESSING NECESSITY?

Since the introduction of pro-rata long service leave on termination of employment after 7 years continuous service, employers have been grappling with the concept of what constitutes a 'domestic or other pressing necessity'. A recent case in the Queensland Industrial Relations Commission ('the Commission') assists us in understanding this concept.

The Industrial Relations Act 1999 ('the Act') provides that employees who have completed 7 but less than 10 years continuous service are entitled to pro rata long service leave only if:

- The employee's service is terminated by their death;
- The employee terminates their service because of their illness or incapacity or because of a domestic or other pressing necessity;
- The employer dismisses the employee for a reason other than the employee's conduct, capacity or performance; or
- The employer unfairly dismisses the employee.

In April this year, the Commission made a decision in relation to the *Australian Workers Union of Employees, Queensland (for Caroline Deacon) AND Parmalat Australia Ltd*, which was a case that asked the Commission whether the employee was entitled to pro-rata long service leave on the grounds of domestic necessity.

Mrs Deacon resigned after being employed by Parmalat Australia for nine years and two months. At the time of her resignation, she held the position of 2IC to the Canteen Supervisor. Mrs Deacon resigned her employment because her husband had started work with a horse trainer on the Gold Coast after his employment in Brisbane was made redundant. As a result of his long work hours, Mr and Mrs Deacon decided to move to the Gold Coast. Mrs Deacon attempted to commute to work in Brisbane but was not an experienced driver and found the experience stressful. She eventually resigned and despite a request by Mrs Deacon, Parmalat determined not to pay pro-rata long service leave on the strength of their impression that the major motivator for the resignation was a lifestyle change.

The Commission determined that Mrs Deacon had resigned her employment due to a "domestic" necessity and was entitled to payment of pro-rata long service leave. In making this decision, the Commission confirmed that the questions to be asked are:

- 1) Was the reason claimed for termination one which fell within the section?
- 2) Was such a reason genuinely held by the worker and not simply colourable or a rationalisation? (ie. did they invent the reason for the sole purpose of claiming the pro-rata benefit)
- 3) Although the reason claimed may not be the sole ground which actuated the worker in her decision to terminate, was it the real or motivating reason for it?

- 4) Was the reason such that a reasonable person in the circumstances in which the worker found herself placed might have felt compelled to terminate her employment?

The Commission was satisfied that the move to the Gold Coast was brought about by factors beyond Mrs Deacon's control. Her desire to live with her husband of 22 years and her discomfort at driving between the Gold Coast and South Brisbane five days per week were found to be the real reasons for the resignation.

Employers should ensure that all reasonable consideration is given to employee reasons for 'domestic or other pressing necessity' and that any adverse allegations regarding such a reason are put to the employee for their response before the employer refuses a request. The term "domestic or other pressing necessity" needs to be considered in a practical way.

Further Information

Employers should also be aware that the Workplace Bullying Taskforce has now finalised their advisory standard which will take effect from 1 June 2004. All employers should be aware of the contents of the advisory standard. MJSP will be offering training sessions of one (1) hour duration to update employers on the new provisions. Should you wish to attend, please contact Kylie Reed on (07) 3839 1233/0414 353540 or admin@mjsp.org, to register your interest.