



# Workplace Update

February 2010 edition

## **JULIA SAYS.... “TOUCH YOUR TOES”**

Was one of your New Year’s resolutions to be more flexible? If not, you need to quickly get your yoga mat out or else the first flexible work request you receive this year might get you tangled. Worst case? You end up in tears before Fair Work Australia facing an adverse action claim (with the added *coup de grace* of a reverse onus) and a potential penalty of up to \$33,000. Hasta La Vista good intentions and any more of the ‘kaizen’ logic.

Under the National Employment Standards (NES) of the *Fair Work Act 2009* (“the Act”), which took effect on 1 January 2010, all eligible national system employees have a new right to request flexible working arrangements. This right to ask for flexibility is covered by only two sections of the Act but those two sections open Pandora’s Box.

There is also a much greater reach of the NES than many employers thought toward the end of 2009. The NES now touch many employers in States, such as NSW, where the respective governments agreed that employees of employers, other than the public sector and local councils, could access the new NES (and other rights) under the *Fair Work Act* from 1 January 2010.

## **THE BASICS**

Employees who have completed 12 months service (including some casuals) who are the parent of, or care for, a child under school age or a child under 18 with a disability, can make a flexible work request.

The request must be in writing and must set out the reasons for and details of the change sought, for example, changes in hours of work, changes in patterns of work or changes in location of work.

The Act requires employers to respond to requests within 21 days stating whether the request is refused or granted. If refused, reasons must be given noting that requests can only be refused on reasonable business grounds.

“Reasonable business grounds” is not defined but according to the explanatory memorandum to the Act would include:

- the effect on the business of granting the request including the financial impact of doing so or the impact on efficiency, productivity and customer service;
- the inability to organise work among existing staff; or
- the inability to recruit a replacement employee or the impracticality of arrangements that would need to be put in place to accommodate the request.

We believe that this list will grow as the case law develops out of Fair Work Australia as to what does or does not constitute reasonable business grounds.

### **WHAT IF THE EMPLOYEE DOESN'T LIKE YOUR DECISION?**

This is where it starts to get tricky. The NES themselves don't provide any right of appeal against an employer's decision not to grant a flexible work request. Employees will need to get inventive and the most obvious course of action is an adverse action claim under the general protection provisions of the Act, or an action seeking interim orders to stop a decision made by the employer which *may* have an adverse impact being implemented.

For example:

- an employee may allege he/she has been discriminated against on the basis of carer's responsibilities if a flexible work request is refused; or
- an employee who makes a flexible work request (whether granted or refused) and is subsequently dismissed, demoted, performance managed (or otherwise adversely acted against) may allege that a reason for the adverse action was the exercise of the workplace right of making a flexible work request.

The onus falls on the employer to prove that the decision to refuse a flexible work request was not made on discriminatory grounds or that subsequent action taken against the employee was in no way motivated by the flexible work request.

Fair Work has power to make wide ranging orders including the granting of injunctions, imposing penalties (up to \$33,000 per breach for corporations), ordering reinstatement or compensation.

Whilst employees may have rights under the various anti discrimination statutes, in our view the new rights introduced by the Act and NES pose far greater risks and penalties for employers because they are easier to access and the onus shifts to the employer from day one.

You also need to think long and hard about the disputes clause in your next enterprise agreement. Whilst the clause is mandatory for approval of an agreement by Fair Work Australia, the right to have any decision you make about flexible work requests scrutinised by Fair Work Australia is optional. We would suggest you think long and hard about exactly what matters you want reviewed by an independent umpire under your disputes clause.

### **WHAT SHOULD YOU DO?**

- Educate your managers about employees' rights before, during and upon termination of employment to ensure no discriminatory or other adverse action is taken at any stage of the employment process;
- Ensure you have in place policies and procedures for dealing with flexible work requests and that these are followed consistently and fairly;
- Document and keep records of all requests for and responses to flexible work requests including the rationale behind any decisions made so that these can be produced if these decisions are questioned in the future;
- Document and keep records of any decisions made that may adversely affect an employee (and the rationale behind them) so that you can prove they were not made for a prohibited reason; and

- Call us if you have any concerns about any of these issues or need assistance drafting the relevant policies and procedures.

**For further information, please contact:**



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