



# Employment Law Matters

Welcome to the October 2019 edition of the Employment Law Matters newsletter

**In this month's edition:**

- Can employers legally collect and store employees' sensitive data?
- Consultation: Is a dismissal harsh, unjust or unreasonable without it?
- Managing the risk of workplace bullying - A renewed focus on psychosocial risks
- Litigation or mediation? The pros and cons
- Enforceable Undertaking update
- Industrial manslaughter laws tested in first charges
- It's official: All permanent employees are entitled to 10 working days of paid sick leave - for now
- NZ: Employment Court decisions reinforce urgent need for Holidays Act reform
- NZ: Problems with work visas for employees of non-accredited labour hire companies
- NZ: Compensation for employee availability
- NZ: A guide to employee participation plans or share schemes

**Regulator and decisions insights:**

- The latest Fair Work decisions
- The latest news from the Fair Work Ombudsman
- The latest Employment Court of New Zealand decisions

**Events:** up to the minute insights and education

**Can employers legally collect and store employees' sensitive data?**

Ever wondered if your employer is storing your personal data and information? A recent decision by the Fair Work Commission Full Bench has analysed closely whether employers can legally collect and store their employees' data. There are many reasons why an employer may find it useful to collect and store employee data, such as personal contact details, emergency contacts, health information or records. And where companies implement and encourage a 'Bring Your Own Device' (BYOD) policy that allows employees to use their personal phones, laptops and tablets to engage in work activities. Click [here](#) for analysis of the recent Fair Work Commission Full Bench decision, courtesy of **Coleman Greig**.

**Consultation: is a dismissal harsh, unjust or unreasonable without it?**

Does an employee have to be consulted, in accordance with an applicable industrial instrument, about their impending termination? According to a recent decision<sup>1</sup> by the Fair Work Commission (FWC), not necessarily. But what about the obligation under the industrial instrument to consult with an employee before terminating their employment? Deputy President Binet (DP Binet) said that a failure to comply with such a requirement will not necessarily render the dismissal harsh, unjust or unreasonable, particularly in circumstances where "consultation is highly unlikely to negate the operational reasons for the dismissal or lead to any other substantive change". To review the background, employer's argument and the commission's approach click [here](#). Article courtesy of **Lander & Rogers**.

### **Managing the risk of workplace bullying - A renewed focus on psychosocial risks**

In light of WorkSafe's renewed focus on psychosocial risks and the courts' toughening stance on breaches of the OHS Act involving workplace bullying, employers should take steps to implement and/or review their existing workplace bullying and harassment policies. A failure to adequately respond to and protect employees from the risks associated with workplace bullying has the potential to create significant exposure for employers – even if workplace bullying policies are in place but not enforced. This article examines the recent trend in Victoria – and nationally – of prosecutions by regulators for failures to prevent workplace bullying, and the practical steps that employers can take to mitigate the associated risks – please click [here](#). Courtesy of **MinterEllison**.

### **Litigation or mediation?**

When a dispute arises, it's far too common for parties to "lawyer up" before they've looked at the dispute from multiple angles and figured out the right way to resolve it. It's no secret that litigation is time consuming, emotionally wearing and costly. The costs associated with going to court will likely be disproportionate to the nature, size, significance, and value of the claim to be resolved. The first step to resolving your dispute is to pair your problem with the right dispute resolution technique, whether that's still litigation, or an alternative such as counselling, facilitation, conciliation, or mediation. To review the pros and cons of mediation as an alternative click [here](#). Courtesy of **FCB Workplace Law**.

### **Enforceable Undertaking update**

Recently there has been a spike in the number of prosecutions commenced. This has led to an increase in the number of entities seeking to enter into enforceable undertakings, and in turn, an increase in the number of enforceable undertakings. This article looks at the recent flurry of enforceable undertakings (EU's) accepted by regulators across the country, how EU's in NSW are now commonly stretching the \$1m mark, and analyses the trend in other jurisdictions. Article courtesy of **MinterEllison** – please click [here](#).

### **Industrial manslaughter laws tested in first charges**

A Queensland company has been charged with industrial manslaughter in what might become the first conviction for industrial manslaughter under the Work Health and Safety Act 2011. Companies found guilty of industrial manslaughter in Queensland can be fined up to \$10 million. Individuals found guilty of the lesser charge under a category 1 offence can be sentenced up to five years imprisonment. For information why Queensland's WHS Prosecutor decided to take action click [here](#). Article courtesy of **Australian Business Lawyers & Advisors**.

### **It's official: all permanent employees are entitled to 10 working days of paid sick leave - for now**

In late September The Fair Work Ombudsman released advice that all permanent employees are entitled to 10 days of paid personal/carer's leave for each year of employment. This is a major departure from calculating personal/carer's leave entitlements in hours, which is the approach currently taken by most employers and employees. Click [here](#) for details: Key developments; The Mondelez case; Mondelez's argument; The AMWU and the shift workers' argument; The Full Court's decision; & Key actions for employers. Article courtesy of **Lander & Rogers**.

### **New Zealand: Employment Court decisions reinforce urgent need for Holidays Act reform**

The latest decisions from the Employment Court on the outdated Holidays Act 2003 (Act) reinforce our view that significant change to New Zealand's holiday pay system must be treated as a matter of urgency by the Government. Employers have consistently ranked this issue as their top employment law priority, but reform continues to stay off the immediate legislative agenda. Click here for information regarding recent Employment Court cases, the Government taskforce, and where to from [here](#). Article courtesy of **Simpson Grierison**.

### **New Zealand: Problems with work visas for employees of non-accredited labour hire companies**

Immigration New Zealand (INZ) seem to be taking a renewed interest in temporary work visa applications that are submitted for employees to join a business where the technical employer of the individual is a Labour Hire Company. There is a specific accreditation scheme in place for Labour Hire Companies who are operating in the region of Canterbury supplying migrant labour into the constructions sector, however, there is no such mandatory accreditation to be able to place employees under labour hire contracts in regions outside of Christchurch. In due course, at some point in 2021 (exact date to be released) mandatory accreditation for all Labour Hire Companies will be put in place nationally. For more information click [here](#). Article courtesy of **Lane Neave**.

### **New Zealand: Compensation for Employee Availability**

An Employment Court decision has confirmed if employers want their employees to be available outside of their normal working hours, then they must pay for their availability, even if they don't do any extra hours. Article courtesy of **Chapman Employment Relations** – click [here](#).

### **New Zealand: Law guide - Employee participation plans**

This guide introduces you to the different types of employee participation plans or share schemes (EPPS or Schemes) which are implemented in New Zealand to provide employees with a stake in the employer's business.

The guide also details some of the issues to consider when implementing an EPP. Provided by **Simpson Grierson**. Click [here](#).

## REGULATOR INSIGHTS

For the latest **Fair Work Commission** decisions click [here](#).

For the latest news from the **Fair Work Ombudsman**, click [here](#).

For the latest **Employment Court of New Zealand** decisions click [here](#)

## EVENTS | FOR CURRENT, PRACTICAL AND EMERGING UP TO THE MINUTE INSIGHT

Be sure to attend the following market leading events in Australia & New Zealand

### [Managing Ill & Injured Employees Workshop](#)

Manage your legal HR risks, workplace mental health scenarios, return-to-work & rehabilitation processes

**Brisbane** 12 November; **Melbourne** 19th November; **Perth** 20th November; **Sydney** 21st November

### Women in Leadership Summits

[Perth](#): 2-3 December 2019

[Brisbane](#): 2-4 December 2019

[Melbourne](#): 4-6 December 2019

[Wellington](#): 4-6 December 2019

### HR Law Masterclass conference 2020

Up to 10 Lawyers presenting on all key HR risk topics in 1 day.

[New Zealand](#): **Wellington** March 3; **Auckland** March 5

**Australia**: March 2020 launching soon. **Sydney** March 11; **Melbourne** March 17; **Perth** March 19; **Brisbane** March 24; **Canberra** March 26.

### [Performance Management Processes & Risks Workshop 2020](#)

Preceding the HR Law Masterclass Conference NZ

**Wellington** March 2; **Auckland** March 4

### Workforce analytics & HR data

Revolutionising human resources through workforce analytics & HR data insights

[Sydney](#): 19-20 February 2020

[Auckland](#): 26-27 February 2020

Please email us to register interest: [info@employmentlawmatters.com](mailto:info@employmentlawmatters.com)

*\* Information in this newsletter and on the EmploymentLawMatters.com site should not be considered legal advice. For legal counsel please contact the author of articles, or the firm they represent.*