

# Employment law update

February 2015

## EMPLOYMENT LAW

# Leave accruals continue whilst on workers compensation

A recent decision by the Federal Circuit Court of Australia has now clarified that, in New South Wales at least, employees continue to accrue annual leave when they are absent from work and receiving workers compensation payments.

Section 130 of the *Fair Work Act (FWA)* provides that an employee is not entitled to take or accrue any leave if the employee is absent from work because of illness or injury for which they are receiving workers compensation payments under a Commonwealth, State or Territory law (**Compensation Period**), UNLESS permitted by that law to take or accrue any leave during the Compensation Period.

The relevant provision of *NSW Workers Compensation Act 1987 (WCA)*, section 49, does not expressly permit an employee to take or accrue leave during a Compensation Period. However, it does allow workers to continue to receive payments of weekly compensation, without deduction, during periods where they are also entitled to receive paid annual leave.

Until the decision of Justice Emmett in *NSW Nurses & Midwives Association –v- Anglican Care* [2014] FCCA 2580, NSW employers had reasonable grounds to believe that employees were not entitled to take or accrue annual leave during a Compensation Period.

Although her Honour accepted that the WCA did not in itself create an express right to receive annual leave payments during a Compensation Period, she adopted a “beneficial construction” of Section 49 which permitted employees to accrue annual leave during a Compensation Period as required by the FWA.

Justice Emmett found that Section 49 of the WCA “expressly provides the opportunity for the worker to receive both workers compensation and accrue annual leave” and accepted “that a liberal approach to statutory interpretation is appropriate when dealing with legislation aimed at protecting the safety of workers and providing for compensation for injured workers”.

As a result of her Honour's decision, NSW employees accrue annual leave (and potentially other leave entitlements) during a Compensation Period, and have had that entitlement since the commencement of the FWA. This entitlement also applies to employees in other states and territories in which such "beneficial construction" is available.

## IMPACT ON OTHER STATES AND TERRITORIES

If the reasoning in this decision is followed in other states and territories, then it will have significant ramifications outside New South Wales.

The relevant legislation in Victoria and Western Australia is similar to that in New South Wales, allowing an employee who takes annual leave to continue to receive payments of weekly compensation at the same level (section 185(4) *Workplace Injury Rehabilitation & Compensation Act 2013* (Vic) and section 80 *Workers Compensation & Injury Management Act 1981* (WA)).

In Queensland and South Australia, the relevant legislation already permits employees to take or accrue leave while they are receiving workers' compensation payments. Hence, annual leave already accrues and the NSW decision does not impact in these states (section 119A - *Workers Compensation & Rehabilitation Act 2003* (QLD); section 40(2) - *Workers Rehabilitation & Compensation Act 1986* (SA)).

In Tasmania, the relevant legislation contains provisions that prevent "double dipping", so that workers cannot receive weekly payments of compensation and paid annual leave simultaneously (section 84 *Workers Rehabilitation & Compensation Act 1988* (Tas)).

There are no relevant provisions in the *Northern Territory Workers Rehabilitation & Compensation Act*.

## PROPOSED LEGISLATIVE CHANGES

The "Fair Work Amendment Bill 2014", currently before Federal Parliament, proposes to remove an employee's entitlement to take or accrue leave while receiving workers compensation, regardless of whether permitted or allowed by a compensation law.

However, as the proposed amendment will only apply in relation to a Compensation Period beginning after the commencement of the Amendment Act, NSW employees will be entitled to take or accrue annual leave until this Bill is passed.

NSW employers should review their employment records to ensure that they have not, and do not continue, to inadvertently breach the FWA by not properly accruing leave for employees during a Compensation Period.

Employers in Victoria and Western Australia should be aware that a similar decision may be handed down in their states.

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