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PRICEWATERHOUSECOOPERS LEGAL



Employer superannuation update

Recent tax changes

On 1 July 2007 the regime for taxation of superannuation significantly changed. Employers are likely to benefit, however many employees may face additional (and most likely unexpected) tax liabilities. Employers should understand the changes and be able to communicate the implications to employees, particularly where salary sacrifice or employment termination payments (“ETPs”) are proposed.

Tax on employer contributions

From 1 July 2007:

- the age based deduction limit is abolished and all employer superannuation contributions are deductible to the employer
- employer contributions up to a “concessional limit” (\$50,000 for members aged up to 50 years, and \$100,000 if aged over 50 years), are taxed at 15 per cent
- employees are required to pay tax on contributions which are above the concessional limit, at 31.5 per cent
- contributions over the concessional limit count towards an employee’s non concessional limit, and
- employees pay tax on contributions over the non-concessional limit at 46.5 per cent.

Given the potential liability for employees, employers should:

- review policies around calculation of employer contributions, and
- communicate with employees about the changes, as employees will need to assess their own likely tax position for the tax year.

Defined benefit funds

Grandfathering rules mean that excess contributions over the concessional limit will be ignored if:

- a member joined the DB fund on or before 5 September 2006, and
- plan rules have not subsequently changed.

Employers offering DB funds should:

- determine notional contributions for each employee, test against the concessional limit, and, where top up by salary sacrifice is offered, determine if there is any left to top up within the limit

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- take care when changing DB plan rules to avoid disentitling members to grandfathering, and
- review relevant policies.

Employment termination payments

From 1 July (subject to grandfathering rules below), ETPs cannot be rolled into superannuation. Such payments must be taken in cash. The pre-1983 portion of the ETP is tax free; and post- 1983 is taxed at up to 31.5 per cent to a concessional tax limit of \$140,000, with any balance taxed at 46.5 per cent.

Grandfathering rules allow ETPs to be rolled over into superannuation up until 30 June 2012, if:

- entitlement arises under written contract, law or “instrument”
- entitlement was in force just before 10 May 2006, and
- the payment amount, or formula for calculation of the payment amount, is specified.

Grandfathering allows significant tax benefits to employees. The pre-1983 component is still tax free but the post 1983 receives concessional tax treatment up to \$1 million.



Employers should:

- review existing contracts to determine if ETPs qualify for grandfathering
- scrutinize proposed ETPs to determine tax liability, and
- carefully word any contractual changes to retain grandfathering eligibility.

Death and disability payments

ETP tax rules apply to death and disability insurance payments made outside a superannuation fund. Such payments may have been tax free prior to 1 July 2007. Tax liability may be imposed even where an employee's dependants or estate are the policy beneficiaries.

Employers who provide death and disability insurance should:

- determine if payments are caught by the new rules and review approach;
- discuss with insurer, and
- communicate with employees about the implications.

Superannuation guarantee payments

From 1 July 2008, superannuation guarantee payments must be 9 per cent of “ordinary time earnings” (which includes contractual entitlements such as bonuses, commissions and shift allowances – see for example SGR 94/4). Employers who are currently using a lower earnings base may face increased costs and administration, and should ensure that the changes are planned for, to ensure compliance on 1 July. Again, employers should consider appropriate communication to employees.

Dismissal update

A number of recent decisions highlight the importance to employers of following a robust process before dismissing employees. The new federal government's industrial relations policy indicates there will be significant changes to the law regulating dismissals, the likely effect of which will be an increase in the number of employees who are able to bring dismissal claims. If new laws are passed with that effect, it will be even more important for employers to ensure they follow a fair and reasonable process before deciding to dismiss employees. Recent decisions are summarised below.

Need to separate work place investigations from disciplinary interviews

An employee won an unfair dismissal claim even though there was a valid reason for his termination after the employer's investigation into a serious safety incident “morphed” into a disciplinary interview and the employee was dismissed.

The employee, who had been involved recently in two previous safety incidents, was working as a shunt pilot moving a railway car when the car rolled under its own momentum some 100 metres and crashed into another stationary rail car, a serious incident which could have had fatal consequences.

The employer investigated the incident and interviewed the employee a number of times. At the end of that process, the employee was accused of negligence and not working in a safe manner, following which he was dismissed along with another employee who was responsible for directing during the shunt. At no stage during the interviews did the employer specify precisely those acts or omissions which were said to justify termination of employment. The evidence indicated that the employee considered the interviews were part of the employer's normal investigation of the incident rather than a disciplinary process.

The day after the incident in question, the employee had been required to complete another shunt and the interviews took place approximately two weeks later.

Although the employee was given an opportunity to comment before he was

dismissed, the Australian Industrial Relations Commission held that this did not make the dismissal fair because the employee did not know precisely what he was accused of and therefore could not respond in a meaningful way.

Despite finding the dismissal to be unfair, the Commission did not order the employee to be reinstated or re-employed because the employer had lost trust and confidence in the employee's capacity to function responsibly in a heavy manufacturing environment. Taking into account all relevant factors, including the employee's 22 years service, his age of 59, his good record and that his behaviour was not wilful, the Commission ordered that he be paid compensation in lieu of reinstatement.

The decision highlights the need for employers to carefully distinguish between investigation of workplace incidents and any disciplinary consequences following from the investigation. Natural justice requires that a person know what he or she is accused of and be given an opportunity to respond before a decision adverse to their interests is made. In this case, the Commission held that that had not occurred.

“Punishment” must fit the “crime”

An employee who had been dismissed for unauthorised computer use, won her unfair dismissal claim even though her actions were in breach of her employer's policies.

The employee was dismissed for unauthorised access of the computer database operated by her employer, which contained information including photographs of fellow employees. The employee said she accessed the personal information of other employees to see what the photos of the employees looked like and she admitted that she had made a “silly mistake”.

The employee sought reinstatement which was declined but she was ordered compensation. The Industrial Relations Commission of NSW found the dismissal to be unfair due to:

- the employee's unblemished record during her 28 years of employment
- the information obtained was not distributed to any third party, and
- the limited number of times the employee gained unauthorised access to the computer database.

The Commission did not order the employee's reinstatement because she had originally denied some of the initial allegations against her and she had taken unauthorised alternative employment during her period of suspension. Consequently, her employer had lost trust and confidence in her and this was held to be sufficient to justify not ordering the employee's reinstatement or re-employment.

The decision emphasises the importance of ensuring that disciplinary action for misconduct is proportionate to the offence. In the circumstances of this case the Commission considered the decision to dismiss was disproportionate to the employee's misconduct, taking into account all relevant factors including the seriousness of her actions and her long service with the employer.

Be careful when giving reasons for dismissal

In another decision (which is subject to appeal), the Australian Industrial Relations Commission held that an employee who was “*belligerent, obstructive and on some occasions offensive in her conduct*” had been unfairly dismissed because her dismissal was based on her alleged unfitness for work due to a psychiatric



condition rather than her offensive workplace conduct.

The employee was dismissed following several periods of medical leave. While the employee's three treating doctors considered her unfit for work during these periods due to stress and anxiety they disagreed with the doctor engaged by her employer, who diagnosed the employee with a probable paranoid personality disorder. After three reports that concluded that the employee was fit for work provided she continued psychiatric treatment, a fourth report by the doctor engaged by the employer found that the employee was unable to carry out the inherent

requirements of her job. Consequently, the employer dismissed the employee.

The Commission found the dismissal was harsh on the basis that the doctor's diagnosis was made without seeing the employee in person. The Commissioner preferred the evidence of the employee's three treating doctors who rejected the diagnosis of paranoid personality disorder. The Commission found that the employer had no valid reason for terminating employment based on the employee's medical incapacity for work.

However, the Commission said that had the employee been dismissed

for misconduct, the outcome might have been different. Before the employee was dismissed her position became redundant. During attempts by the employer to redeploy the employee she insisted on recording all conversations and receiving written answers to questions while dealing with the employer's career centre. The employee was hostile and defensive towards suggestions she should improve her resume. She also questioned the expertise of her "career coach", poked out her tongue at a fellow employee, gained unauthorised access to confidential areas of the workplace and accused another officer of touching himself inappropriately in front of her. The Commission found that the employee's misconduct was of *"the worst possible kind in terms of its obstructive purpose and destructive effect on her employment relationship"*. Consequently, the Commission held that reinstatement would be entirely inappropriate, but ordered compensation instead.

Final determination of the matter awaits the outcome of the appeal. Subject to appeal, the decision highlights the importance of employers dealing with examples of employee misconduct where the circumstances warrant it.

Genuine operational reasons exemption

An employee who was dismissed for operational reasons because his employer wanted to employ someone cheaper to do similar work, has had his unfair and unlawful dismissal claims rejected for the second time by the Australian Industrial Relations Commission. At first instance the employer's argument that the termination was for genuine operational reasons was upheld but that decision was overruled on appeal. On appeal a full bench held that the original decision did not make clear that the "operational reasons" test had been correctly applied and the matter was reallocated to another Commissioner for rehearing.

At the rehearing, the Commission held that the evidence established that among the reasons for the employee's dismissal were genuine operational reasons relating to economic and structural factors. The Commission said that even though personal animosity of the employee's manager was probably also a factor in the decision to dismiss, this was not relevant in the circumstances. All that was required, in the Commission's review, was that the decision to dismiss included genuine operational

reasons of an economic and structural nature. The Commission held on the facts of the case that was so and the jurisdictional objection to the employee's claim was upheld. Applying the full bench decision in the *Village Cinemas* case, the Commission said that it was irrelevant that there may have been alternatives to termination such as renegotiation of the employee's functions, a consensual variation to his employment contract and a reduction in remuneration. All that is required is whether the reasons for termination include reasons that were genuinely economic and structural in nature.

This decision indicates the importance of the "genuine operational reasons" exemption from statutory dismissal claims. Given the new federal government's policy to amend dismissal laws, and specifically to remove the operational reasons exemption, it can be anticipated that if legislative changes are made in line with that policy, similar cases will be decided very differently in future.

Unlawful dismissal for complaining to union

An employer who was held by the Federal Court to have unlawfully dismissed an employee for reasons

including that the employee had contacted his union about allegations of bullying and harassment at work by a manager, has been ordered to pay:

- \$4,000 penalty to the employee
- compensation for lost wages of \$27,643, and
- superannuation contributions of \$2,924.31,

as well as reinstating the employee.

The original decision by the Federal Court finding the employer had unlawfully dismissed the employee for reasons that included the employee contacting his union was held to be a breach of section 659(2)(e) of the *Workplace Relations Act 1996* (Commonwealth). The decision was based on the court's conclusion that the union was a "competent administrative authority" within the meaning of section 659(2)(e). The court based this conclusion on its finding that the union was authorised under the relevant enterprise agreement and under law, e.g. occupational health and safety legislation, to deal with the employee's complaint of bullying and harassment. The court, however, indicated that unions would not be a competent administrative authority in every case. The conclusion would depend on the relevant facts, including

the union's legal capacity to deal with employee complaints.

The court's decision is subject to appeal. Depending on the outcome of the appeal, dismissing an employee for reasons including the fact that the employee complained about an employer or the conduct of its management may be unlawful, exposing the employer to litigation, financial compensation orders and penalties.

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