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COVID-19 & What this Means for Employees

Wednesday 20 May 2020

The Law Institute of Victoria is proud to sponsor Law Week 2020

LAWWEEK
18-24 MAY 2020

Presenter Profile

Chair: KATE SHERIDAN

Kate Sheridan is the Principal Director at Sheridan Legal, with over 25 years' experience in a combination of private practice and corporate roles.

Kate has provided a range of employment and industrial relations assistance, principally in Victoria, South Australia and NSW, to a variety of industries that include: manufacturing, aviation, health, insurance, mining, steel distribution and banking.

Kate is also a co- Chair of the Law Institute's Workplace Relations Committee



Zana Bytheway, Executive Director, JobWatch

Zana Bytheway is the Executive Director of JobWatch, an employment rights legal centre which assists Victorian, Queensland and Tasmanian workers.

Zana has a Bachelor of Law and Bachelor of Arts and was admitted to practice in 1986.

Zana is a qualified mediator, Co- Chair of the Law Institute's Workplace Relations General Committee. She is a Board member of the Federation of Community Legal Centres and Committee member of the RMIT Legal Practice Program Advisory Committee. She is an Advisory Committee member for the Woor-Dungin Criminal Record Discrimination Program.

Zana is also a Mentor for the Monash University JD Mentor Program, Melbourne University Mentor Program, Secondary Schools Program, and the LIV Mentor Program



John O'Hagan, Lawyer, Job Watch

John's interest in industrial relations began in the late 1990s when he became the MEAA delegate at Circus Oz, where he was Musical Director.

John is admitted to practice in the Supreme Court of Victoria and the High Court of Australia, and advises, assists and represents employees to enforce their rights under the Fair Work Act and anti-discrimination law.

In his work at JobWatch, John also supervises the JobWatch Telephone Information Service, and has witnessed first-hand the immediate effects of the COVID-19 pandemic on Australian workers. The service has provided information to the public on the JobKeeper scheme from the moment it was announced.



Schedule

12.50–1pm

Login to Zoom Platform

1–2pm

COVID-19 & What this Means for Employees

This session aims to explore some of the challenges and issues facing employees, including:

- Can employees be stood down, directed to work from home, have their hours reduced or directed to take leave?
- What is a 'genuine redundancy'?
- JobKeeper eligibility
- Working from home and OH&S.

Presenters:

- Zana Bytheway, Director of JobWatch
- John O'Hagan, Lawyer at JobWatch

Chair: Kate Sheridan, Co-Chair of the Workplace Relations General Committee

2pm

Seminar close



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Welcome and Acknowledgment of Country

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.

What will be covered in this webinar *

- What is the JobKeeper scheme?
- Which employees are eligible for JobKeeper payments?
- JobKeeper provisions of the *Fair Work Act 2009*
- Stand down, redundancy
- General protections and discrimination
- Working from home and Occupational Health & Safety (OHS)
- Questions

**The information in this presentation is of a general nature & is not intended to be legal advice*

What is the JobKeeper scheme?

- Temporary wage subsidy scheme open to businesses impacted by Covid-19
- Support employers to maintain a connection with their employees
- Government providing eligible employers with \$1,500 per fortnight per eligible employee
- Employers can top up the payment
- Subsidies start from 30 March and will end on 27 September 2020
- The FW Act was amended: new Part 6-4C added
- JobKeeper provisions started on 9 April 2020 and will end on 28 September 2020

Which Employees are eligible for JobKeeper payments?

- Employed as at 1 March 2020
- At least 16 years and over as at 1 March 2020
- Must be currently employed. Can include:
 - Employees dismissed because of redundancy post -1 March 2020
 - Employees on stand down
- Australian citizens, Australian permanent residents & special category 444 visa holders
- Employee must not be receiving JobKeeper from another employer
- PFT, PPT & regular & systematic casuals with more than 12 months' service as at 1 March 2020
- Cannot be receiving workers' comp for total incapacity
- Cannot be on Government paid parental leave

JobKeeper provisions of the Fair Work Act

- They enable employers who are entitled to JobKeeper payments for their employees to:
 - Issue *JobKeeper enabling directions*; and/or
 - *Make agreements* with employees to change days/times of work and take annual leave
- Give the Fair Work Commission powers to deal with disputes about the JobKeeper provisions

JobKeeper enabling directions

- Employers can direct employees to work fewer hours or not at all (*Jobkeeper enabling stand down*)
- Employers can direct employees to change duties or location

JobKeeper enabling stand down directions

- Direction must be safe
- Employee cannot be usefully employed for their normal days or hours because of Covid-19
- Employee must be paid greater of JobKeeper payment or any wages earned during the JobKeeper enabling stand down period
- Direction is not operative when employee is on paid or authorised unpaid leave

JobKeeper enabling directions about duties or location



- Direction must be safe
- Duties/new location must be reasonably within the scope of the business operations
- If change to duties:
 - Must be within employee's skill & competency
 - Employee must have any required licenses or qualifications
- If change to location:
 - Location must be suitable
 - Employee not required to travel unreasonable distance

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Rules about JobKeeper enabling directions



- Direction must not be unreasonable in all of the circumstances (direction may be unreasonable depending on its impact on any caring responsibilities)
- Employer must have information to lead employer to reasonably believe that the direction is necessary to continue the employee's employment
- Direction must be in writing with more than 3 days' notice (less if employee genuinely agrees)
- Consultation (with employee or representative) is required before the direction is issued
- Provided rules are complied with, employee must comply with a JobKeeper enabling direction
- Any period when an employee is subject to a JobKeeper enabling direction counts as service and employee continues to accrue leave entitlements

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Agreements to change days/times of work

- Employer may ask employee to make an agreement about performing duties on different days or at different times
- Employee must consider & not unreasonably refuse the request
 - Agreement must be in writing
 - When the agreement is made the employer must qualify for JobKeeper
 - Performance of the duties on those days/ at those times must be safe & reasonably within the scope of the employer's business operations
 - Agreement must not reduce the employee's number of hours of work

Requests to take annual leave

- Employer may request employee to take annual leave provided the employee will be left with at least 2 weeks' annual leave
- Employee must consider & not unreasonably refuse the request
- Employer and employee may also agree in writing to the employee taking twice the annual leave at half pay

FWC's new powers

- FWC may deal with a dispute about the operation of Part 6-4C of the FW Act
 - By arbitration, mediation or conciliation, or by making a recommendation or expressing an opinion
 - On application by employee, employer, employee/employer organisation
- FWC must take into account fairness between the parties FWC may make any order it considers desirable to give effect to a JobKeeper enabling direction; it may set aside a JobKeeper enabling direction; it may substitute a different JobKeeper enabling direction; or it may make any other order that it considers appropriate
- Any FWC order made will cease to have effect at the start of 28 September 2020

Dispute provisions FWC

- A dispute about a JobKeeper enabling stand down direction (to not work, or work for a lesser period of work or a reduced number of hours compared with the employee's ordinary hours of work)
- A dispute about a direction about performance of duties of work
- A dispute about a direction about location of work (including working from home)
- A dispute about a request to make an agreement about change to an employee's days or times of work
- A dispute about a request that an employee take paid annual leave
- A dispute about a request to engage in secondary employment, a request for training or a request for professional development
- Other

Stand down

When are stand downs because of COVID-19 lawful?

- **Section 789 GDC(1)(c):** JobKeeper stand downs are authorised only when the employee cannot be usefully employed
 - ...because of changes to business attributable to:
 - (i) the COVID-19 pandemic; or
 - (ii) government initiatives to slow the transmission of COVID-19
- **Section 524(1)(c):** Stand downs are available when the employee cannot usefully be employed because of “a stoppage of work for any cause for which the employer cannot reasonably be held responsible”.
- NB: MA/EA may override s 524

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Stand down

Case law on s524

“[T]here needs to be a temporal connection between one of the circumstances arising and the standing down of an employee because the employee cannot usefully be employed. The words “because of” in s.524(1) are used to indicate a causal link between the occurrence of a circumstance and the absence of useful employment.”

- Deputy President Gostencnik, *CEPU v FMP Group (Australia) Pty Ltd* (C2013/3921, C2013/3923)

- The stoppage of work itself must be caused by something beyond the employer’s control – e.g. a natural disaster, not a decision by the employer.
- An employer’s economic decision to cease operations due to slackness of trade would not satisfy this condition.

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Stand down

Consequences of unlawful stand down

- Businesses ordered to close, or which have been directly prevented from operating by COVID-19, could likely stand down employees under s.524.
- Businesses whose operations have become uneconomic due to COVID-19, would likely not be able to lawfully stand down employees under s. 524.
- FWC has power to arbitrate in stand down disputes (Form 13)
- Unlawful stand down can give rise to employee claims for
 - Underpayment of wages
 - Unfair dismissal (constructive)
 - Redundancy

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Redundancy

Consultation requirements and entitlements

Employers may decide to make certain positions redundant due to Covid-19 related downturns in business, but:

- Failure by an employer to consider the availability of JobKeeper as an alternative to redundancy may mean they have failed to satisfy consultation requirements in an applicable MA/EA: *Australian Municipal, Administrative, Clerical and Services Union v Auscript Australasia Pty Ltd* [2020] FWC 1821.
- An employer may not succeed in applying under s.120 FWA to reduce redundancy pay due to financial hardship, where JK is available as an alternative to redundancy: *Worthington Industries Pty Ltd v Ablahad* (2020) FWC 1912.

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Redundancy

Genuine redundancy and unfair dismissal

- Genuine redundancy (s.389) is a “defence” against UD, if:
 - a) the position is no longer required to be done because of operational changes, and
 - b) it would not be reasonable to redeploy the employee elsewhere in the business, and
 - c) The consultation requirements in an applicable MA/EA in the event of a redundancy have been complied with.
- The decision in *Auscript* suggests that the availability of JobKeeper as an alternative to redundancy or dismissal may assist employees claiming unfair dismissal to argue that redundancies are not genuine.

General protections

New workplace rights

- Section 789GY adds to the workplace rights protected under s.340 FWA:
 - s.789GD (wage condition)
 - the rights to agree or not agree to JobKeeper requests
 - the right make JobKeeper requests
- Employees are protected from adverse action, including dismissal or selection for redundancy - *even if a genuine redundancy* - if the action is taken, even partly, because of workplace rights, including these new ones.

General Protections

Other existing protections

Other protected attributes relevant to COVID-19 include:

- Coercion, undue influence or pressure, misrepresentation (ss 343-345)
- Temporary absence due to illness of less than 3 months (s.352)
- Under s.351:
 - age,
 - physical or mental disability,
 - family or carer's responsibilities,
 - pregnancy

Employer has an “inherent requirements” defence to s.351.

Discrimination

- Unlike the general protections, discrimination law imposes positive obligations on employers, e.g. to make reasonable adjustment for employees with disabilities, and to accommodate carer responsibilities (e.g. s.19 *Equal Opportunity Act 2010*).
- These soften the effect of the “inherent requirements” defence. For example, employees dismissed because they cannot attend the workplace due to additional carer responsibilities due to school closures, or because of risks due to health vulnerabilities, may be able to make a UD or discrimination claim if the employer has not first complied with these obligations.
- Section 789GZ FWA expressly provides that the JobKeeper amendments operate subject to anti-discrimination law, as well as the general protections and unfair dismissal.

OHS

In the employer's workplace

Section 789GZ FWA also expressly provides that the JobKeeper amendments operate subject to any Australian law as far as it deals with health and safety obligations in employment, or workers' compensation.

- Infection control guidelines (e.g. social distancing rules) are now relevant to OHS obligations.
- Employees have rights at common law and, e.g., under s.28 *Occupational Health and Safety Act 2011* to refuse unsafe work.
- Interaction with disability discrimination law (reasonable adjustments) where employees have health vulnerabilities.

OHS

Working from home

- It may be a lawful and reasonable direction to work from home, especially if this is done to comply with OHS law.
- Jobkeeper directions may be to work in a different location, provided this is safe – this may include working from home.
- WorkCover insurance covers WFH, but there is uncertainty about
 - The limits of employer responsibility for ensuring home workspaces are safe
 - The boundaries between work and private activity in home workspaces.

Working from home

Where employer is requiring attendance at workplace

Employees have a right under the FWA to request flexible working arrangements for:

- Parents and carers
- People with disabilities
- People 55 or older
- People experiencing family and domestic violence

Employer obligations to make reasonable adjustments for disability and accommodate carer responsibilities under discrimination law are also relevant.

Questions?

1. Under the JobKeeper scheme, can an employer lawfully require an employee to take annual leave during a working week? For example, one day a week is taken as annual leave, and the remaining days the employee is paid to work from home?
2. Scenario: Your employer has only offered some employees the option to apply for JobKeeper payments, and you have missed out. You think you may be eligible for JobKeeper. What are your options?
3. Is it lawful for an employee to request to work from home until a vaccine is developed? Can an employer lawfully direct an employee to return to work, say in the office environment?

Questions?



4. Given that some students are learning from home, with some schools are not yet fully operational – is it lawful for an employee to work from home on a continued basis?
5. Scenario: An employer has stood down some of its employees, using the s.524 stand down provisions under the Fair Work Act. The employer made this decision without first considering if those employees could have performed work elsewhere. Has the employer breached any responsibilities under the Fair Work Act? What legal options does an affected employee have?
6. Can an employer legally require an employee to have their temperature taken at work, or to use the COVID-19 tracing app?

Questions?



The staggered return to face-to-face schooling in Victoria between 26th May to 9th June this year, raises some interesting questions with regards to the asymptomatic nature of covid-19 in children, and the potential risk this poses for employees within the school environment.

Whilst there has been a large number of covid-19 tests undertaken in Victoria, there is no information as to the demographics of those being tested - including what numbers of school-age children have been tested (and found to be covid-positive and covid-negative).

How do we secure this information, to enable all concerned to make an informed decision about the potential risks? Does the lack of this knowledge reduce the liability of the employer should a teacher contract covid-19 within the workplace?

For More Information and Where to Go for Help



- JobWatch - (03) 9662 1933 (Melbourne Metro) 1800 331 617 (Country VIC, QLD, TAS)
<http://jobwatch.org.au/>
- Fair Work Ombudsman – 13 13 94
<https://www.fairwork.gov.au/>
- Fair Work Commission - 1300 799 675
<https://www.fwc.gov.au/>
- Victoria Legal Aid - 1300 792 387
 - <https://www.legalaid.vic.gov.au/>
- Australian Council of Trade Unions – 1300 362 223
<https://www.actu.org.au/>
- Victorian Trades Hall Council - (03) 9659 3511
Young Workers Centre: 1800 714 754
Migrant Workers Centre: (03) 9659 3516
<https://www.weareunion.org.au/>

