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Client Update

Shaping the future of insurance law

A practical guide on managing EPL exposures caused by COVID-19 for insurers, insureds and brokers

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AT A GLANCE

- Insurers should reassess the quantum exposures of existing claims as the assumption of long-term employment can no longer be maintained in assessing future economic loss.
- EPL insurers are more likely to be exposed to higher risks of claims from employees who continue to work or be employed, rather than from people who are made redundant or stood down.
- Businesses directed to close by Governments should be able to rely on stand down provisions, but debate remains about whether employers can rely on stand down for a general economic downturn.
- To reduce the risk of EPL claims, all business should obtain the express written consent of each employee to work reduce hours or remuneration during the period of the crisis.

The Coronavirus is having a significant and immediate impact on the entire workforce. Unfortunately, there are daily stories of mass redundancies, closures of businesses and stand down of workers.

This guide is designed as a practical guide for EPL insurers, insureds and brokers on meeting the insurance challenges created by the virus.

MANAGEMENT OF EXISTING EPL CLAIMS

Reassess quantum exposures

For EPL insurers, the impact of the coronavirus has created the immediate need to reassess the quantum exposures of existing claims. In most dismissal claims the significant component of compensation is usually "future economic loss."

In the employment sense, future economic loss is the amount of remuneration the employee would have earned had they remained in employment with the employer.

The usual argument is that, but for the unfair or unlawful dismissal, the applicant would have remained employed by the business for a significant period. Due to the impact of coronavirus that assumption of long-term employment can no longer be maintained.

This will mean that claims for future economic loss will need to be heavily discounted and reduced by applicants, the courts and the Fair Work Commission (FWC).

Expect business as usual from FWC and the Courts

The FWC is a tribunal that long ago adopted the technology to conduct telephone hearings and most members of the Commission have considerable experience in dealing with matters by telephone or video link. As a national tribunal, the FWC is also able to quickly and efficiently allocate resources to where they are needed throughout Australia. To date, it has largely been "business as usual" for the FWC. Matters are generally progressing in a timely fashion using telephone mediations and/or hearings.

The Federal Circuit Court of Australia (which hears most adverse action matters) also continues to operate. All court-based events (e.g. directions hearing) are being conducted by telephone. Trials can still proceed in person, subject to an eight person in court cap. Accordingly, adverse action matters will still proceed although it is likely that there will be considerable delay in listing of mediation and trial dates.

Consider compensation orders

For unfair dismissal claims, Section 392(2)(a) of the *Fair Work Act 2009* (Cth) compels the FWC to consider the impact of any compensation order on the viability of the business. To date, this provision has not been widely used. However, given the economic climate businesses face, current claims should consider making a submission for reduction in compensation due to the current economic circumstances.

It is unknown how the FWC will deal with such submissions in circumstances where an insurer may be covering the liability. However, the section will have significance to any insured where the amount of compensation is within the deductible or excess.

FUTURE EPL CLAIMS

Although there will be an unprecedented number of redundancies, it is not anticipated that these redundancies will lead to a large spike in unfair dismissal claims. To fall within the definition of "genuine redundancy" for the purposes of the *Fair Work Act 2009* (Cth) the employer must show:

a) there was an operational reason unrelated to an employee's capacity or performance that required the employer to terminate the employment,

b) the employer complied with any consultation obligations in the Award or Enterprise Bargaining Agreement (EBA), and

c) there are no reasonable re-deployment obligations.

In the current economic environment, most employers will easily be able to satisfy the requirements in a) and c). Due to the speed of the impact of the virus, employers may not have complied with their consultation obligations in the relevant industrial instrument. However, non-compliance of a consultation obligation does not render a dismissal automatically unfair.

It is anticipated that the FWC will show considerable leeway regarding the issue of consultation compliance. A very short period of consultation with staff is likely to suffice. Even if an employer has not complied the FWC may be reluctant to rule that the dismissal was unfair and/or award any significant amount of compensation. Accordingly, it is not envisaged that there will be a large rush of employees filing unfair dismissal cases.

Some employees or their representatives may run claims in the Federal Circuit Court alleging breaches of an industrial instrument for an employer's lack of consultation. Given these claims will be run as a breach of industrial instrument prosecutions they are unlikely to trigger liability under an EPL policy.

WHAT ARE THE NEW RISKS FOR EPL INSURERS?

Reduced hours and pay

Ironically, an EPL insurer may be exposed to higher risks of claims from employees who continue to work or be employed.

Many businesses are continuing to employ permanent staff but have reduced their hours or pay. Permanent employees have a set number of agreed hours that are to be worked each week (e.g. a full-time employee is contracted to perform 38 hours per week).

As a matter of contractual law, the employment contract cannot be varied unilaterally and without the consent of the employee. Where an employer purports to unilaterally reduce hours or remuneration without the employee's consent, they will be in breach of contract. This means that an employee can sue later for the loss or damage they sustained due to the reduction of pay by the unilateral change to hours or remuneration.

Most EPL policies provide for coverage for the "adverse changes" in the terms and conditions on a person's employment. A unilateral change of hours or remuneration may fall within this definition.

Section 386 of the *Fair Work Act 2009* provides for a "deemed dismissal" where a person is "demoted". A demotion can include a significant reduction in duties or remuneration even if the person remains employed. This leads to the somewhat strange result that an existing employee who has experienced reduced hours or pay may be able to later bring an unfair dismissal claim even though they remain currently employed by the same employer.

Stand down provisions

One area of considerable controversy is the use of the "stand down" provisions in the *Fair Work Act*. Generally speaking, an employer is entitled to "stand down" an employee due to a stoppage of work for any cause for that the employer cannot reasonably be held responsible and when an employee cannot be usefully employed. The consequences of a stand down are that the employee remains employed but are not entitled to any pay.

The provisions have not been widely used in the past and there is little case law regarding their use in this situation. Debate remains about whether employers can rely on stand down for a general economic downturn.

Businesses that the government has directed should close, such as pubs, restaurants and cafes, and those in industries affected by government directions, such as airlines, will be on safer grounds to rely on stand down.

However, for other industries, such as retail, wholesaling and manufacturing, the use of the stand down provisions is not without risk. Building unions have already threatened to sue if stand downs are implemented in the construction industry.

If an employer is found to have unlawfully relied on the stand down provisions then they are exposed to claims for wrongful dismissal of employment, deemed demotion and/or an adverse change in the terms and conditions of the employee's employment that would likely fall within the coverage of most EPL policies.

THE KEY ISSUES FOR EPL INSURERS

Existing EPL claims will continue as normal, although insurers should consider quantum estimates based on the significant challenges applicants will now have in seeking large amounts for future economic loss.

The trend in employers reducing remuneration, reducing hours of work and/or standing down employees is likely to lead to an increase in EPL claims. Due to the mass number of workers who are experiencing a reduction in hours or a reduction in pay, or who are being stood down, it is likely we will see large class actions against large employers backed by litigation funders.

THE KEY ISSUES FOR INSUREDS

Most insureds will be anxious to reduce their labour costs as soon as possible. The options of redundancies or allowing the employee to take their leave may not be attractive for many small to medium businesses because of the cash flow issues that may create.

To reduce the risk of EPL claims, all business should obtain the express written consent of each employee to work reduce hours or remuneration during the period of the crisis (this is not necessary for casual workers). There is a significant difference in law between an employer acting unilaterally and one that has their employees' consent to employment condition changes. Silence or lack of protest from an employee is not consent.

It is worth noting that there are avenues in the *Fair Work Act 2009* (Cth) to apply to the FWC for exemptions or reductions for the amounts of severance pay companies would otherwise have to pay if they cannot afford that liability.

Most business will be governed by a Modern Award. Those Award conditions are set during times when it is assumed that the economy is growing and functioning normally. Businesses will need time to recover from the coronavirus impacts and Modern Award conditions may impose a significant cost burden that challenges business recovery.

The FWC has the power to approve EBAs that reduce Modern Award conditions and labour costs for a period of up to two years where there are "exceptional circumstances", including extreme financial distress. The FWC may grant relief to employers from the burden of paying entitlements like penalty rates, loadings and overtime as it is in the public interest to keep as many people employed as possible.

Recently, the Australian Hotels Association (with the consent of the Union) applied to vary the Hospitality Award so that an employer could unilaterally reduce full-time and part-time employees' hours and/or force them to take annual leave at half the normal rate. The application was filed, heard and decided by the FWC within a 24-hour period, resulting in an approved variation to the Modern Award.

All business owners may want to consider implementing an EBA that provides similar relief and flexibility to give the business room to move with labour costs to aid survival and recovery.

THE KEY ISSUES FOR BROKERS

There will be a natural temptation for insureds to unilaterally impose reduction of hours and/or pay. Brokers need to actively educate their customers about the risks of such decisions and encourage all business owners to consult, and seek the agreement of, their employees before unilaterally forcing changes without notice.

Although employees may not protest about forced reductions in the current environment there have been cases where an employee has successfully recovered compensation for the entire period of their reduced hours and/or pay. In the some of the cases this has been for two years.

Given the government announcements that the current measures could be in force for at least six months, claims for unlawful changes to terms and conditions of employment could be for considerable amounts that are far higher than what their exposure may have otherwise been in the unfair dismissal jurisdiction.

Need to know more?

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