

IR POLICY AND GOVERNANCE UPDATE



INTRODUCTION

In this week's Bulletin we look at some of the current economic indicators, recent amendments to the New Zealand Fair Training Act, and a synopsis of matters relevant to when an employer is considering terminating an ill or injured employee, and the Victorian Government is considering legislation that could limit the use of NDA's in workplace sexual harassment claims.

AUSTRALIAN UNEMPLOYMENT RATE FALLS AGAIN

The seasonally adjusted unemployment rate fell to 3.4 per cent in July 2022, according to data released by the Australian Bureau of Statistics. The fall in unemployment in July reflects an increasingly tight labour market, including high job vacancies and ongoing labour shortages, resulting in the lowest unemployment rate since August 1974.

Additionally:

- > The unemployment rate fell for men (down 0.2 percentage points) to 3.4%, and remained steady at 3.4 % for women.
- > Youth employment (those aged between 15 and 24 years) increased further into July, increasing by 13,000 people (0.7%), the third consecutive increase.
- > In line with the fall in employment, and continued illness-related worker absences, seasonally adjusted hours worked fell by 0.8% in July 2022.
- > The underemployment rate decreased by 0.1 percentage points to 6.0%.
- > The youth underemployment rate increased by 0.1 percentage points to 14.1%.
- > The underutilisation rate, which combines the unemployment and underemployment rates, fell by 0.2 percentage points to 9.4%, its lowest level since April 1982.

CPI AND INFLATION

Annual CPI inflation increased to 6.1% in the June quarter, due to higher dwelling construction costs and automotive fuel prices. Annual trimmed mean inflation, which excludes large price rises and falls, increased to 4.9%, the highest since the ABS first published the series in 2003. Goods accounted for 79% of the rise in the CPI this quarter, reflecting high freight costs, supply constraints and prolonged strong demand.

Additionally, automotive fuel prices rose for the eighth consecutive quarter. Price pressures continued to flow through to consumers following an oil price shock caused by the Russian invasion of Ukraine, coupled with ongoing easing of COVID-19 restrictions strengthening global demand. While a cut in the fuel excise of 22 cents per litre on 30 March 2022 resulted in fuel price falls in April, price rises were seen in May and June. The average unleaded fuel price in the month of June surpassed the previous record high monthly average seen in March.

It is understood that ahead of the federal budget in October, the Prime Minister is considering whether to extend the fuel excise reduction beyond September, but remains adamant the cut is a temporary measure. Nevertheless, we await the RBA's monetary policy decision on 6 September and its effects on interest rates.

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AMENDMENT TO THE NEW ZEALAND FAIR TRADING ACT

The *Fair Trading Amendment Act 2021* came into effect this month and places new obligations on businesses and provides new protections for consumers and small businesses. Commerce Commission Chair Anna Rawlings says the changes include the addition of a new prohibition against ‘unconscionable conduct’ which is business activity that substantially departs from Aotearoa New Zealand’s generally accepted or expected standards of business conduct, for example commercial conduct that goes against good conscience.

The Commerce Commission can take action to stop you using an unfair term in a standard form consumer contract. The *Fair Trading Act* allows us to apply to the court for a declaration that it is unfair. If the Court declares that a term is unfair, it is an offence under the *Fair Trading Act* to apply, enforce or rely on it and your business could be prosecuted.

Businesses are also protected from unfair terms in standard form small trade contracts – these are ‘take it or leave it’ contracts such as many power or phone service agreements. Many standard commercial supply agreements may also be standard form small trade contracts.

There are three significant new protections to address unfair practices:

1. unfair contract terms provisions are extended to cover standard form small trade contracts;
2. unconscionable conduct in trade is prohibited; and
3. people will be able to direct uninvited direct sellers to leave or not enter their residential property.

It is important that businesses and consumers understand the implications of these changes. The Commerce Commission has released guidance on the amendments which can be found [here](#).

TERMINATING AN ILL OR INJURED EMPLOYEE

It is unfortunate, but there will be occasions where an employer has no other option but to terminate an ill or injured employee. It is one of the most fragmented areas of workplace relations to manage due to the individual circumstances being experienced by the employee their particular role within your company, and the needs of your company. Employers have numerous legislative obligations placed in them depending upon whether the illness or injury was work-related or otherwise.

For example, section 352 of the *Fair Work Act* prohibits an employer from dismissing an employee because the employee is temporarily absent from work because of an illness or injury. Specifically, the *Fair Work Regulations 2009* provides that an employer must not dismiss an employee who is absent for a period of up to three months, after having exhausted all personal leave. This three-month period can also be assessed from a series of absences over a 12-month period, resulting from one or more injuries or illnesses.

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Additionally, if the illness or injury is work related each state and territory has workers compensation related legislation and requirements that will apply. Each state or territory scheme requires an employer to focus on returning the employee back to work and make 'reasonable' adjustments. Each scheme generally prohibits an employer from dismissing an employee on the grounds that they are not fit for employment due to having suffered a work-related injury. This protection is generally afforded for a period of six months after the employee first becomes unfit to work due to the injury.

Further, and depending upon the circumstances, the termination of an ill or injured employee can potentially constitute a breach of disability discrimination legislation if the illness or injury constitutes a disability. This is regardless of whether that person has been absent for a period of three or six months, or even longer. To defend such a claim an employer will need to be able to establish that the employee is unable to carry out the 'inherent requirements' of the job.

The right approach will depend upon the individual circumstances of the employee and the business. Any decision to terminate an ill or injured employee should be made after a complete assessment based on all available medical information and opinion, discussions with the employee, and a consideration of all related risks. As always please contact me to discuss your particular circumstances.

VICTORIA CONSIDERS LIMITING THE USE OF NON-DISCLOSURE AGREEMENTS

Generally, in employment related matters, a non-disclosure agreement is a legally enforceable confidentiality agreement whereby consideration is provided to the complainant in settlement of a matter. In exchange, the complainant agrees not to discuss the matter publicly or take legal action against the organisation.

The Victorian Government has in principle accepted recent recommendations made by a Ministerial Taskforce on Workplace Sexual Harassment recommending prohibiting or limiting the use of non-disclosure agreements in workplace sexual harassment matters.

However, the Victorian Government noted that there would need to be a careful balancing between the interests of both parties in regard to any related reforms. This is an important point as NDA's can be used beneficially for all parties concerned, allow alleged victims to remain anonymous at their own request, have details remain confidential that could embarrass all related parties. We await any proposed legislation on this issue and whether other state and federal jurisdictions take up this issue.

The Victorian government did not back a Taskforce recommendation that would have allowed unions to mount civil cases, including group claims, where businesses had failed to provide workplaces free from harassment.

Additionally, the Taskforce's report addressed the need to treat gendered violence and workplace sexual harassment as an occupational health and safety issue. This means that harassment in the workplace will be covered by the *Occupational Health and Safety Act 2004*. The Victorian WHS

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regulator, WorkSafe, has been given greater funding (\$7 million) over the next three years to prevent and respond to gendered violence and sexual harassment.

CONTACT

Any Industrial Relations Member who has a related query should contact Charles Watson, GM – IR, Policy and Governance at The Real Media Collective via email charles@thermc.com.au or mobile: +61 428 568 032.

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