

## Can an employee take or accrue leave while on Workers Compensation payments?

A recent decision<sup>1</sup> by the Full Bench of the Federal Court of Australia has put an end to the debate surrounding the issue of whether an employee is entitled to accrue and/or take leave while on Workers Compensation payments.

### History

Debate has raged for some time over this issue. In 1950 the High Court of Australia ruled that an employee was not entitled to be paid annual leave as well as Workers Compensation<sup>2</sup>. Various States and Territories moved to reverse this ruling, by legislation, shortly after.

With the introduction of 'Work Choices'<sup>3</sup> by the Howard Government in 2005 the legal landscape became one of no entitlement to the take or accrue leave while on compensation payments unless another workers compensation law permitted it.

The Rudd Government introduced the *Fair Work Act 2009 (Cth)* ('FWA') which, essentially, continued the same legislative theme.

### The Debate

The FWA<sup>4</sup> provides that an employee is not entitled to take or accrue leave during a period of Workers Compensation payments unless it is permitted by a compensation law (it should be noted that parental leave is not affected by this section).

The *Workers Compensation Act 1987 (NSW)*<sup>5</sup> ('WCA') provides that compensation is payable even though the worker received or is entitled to leave pay under an Act, award, industrial agreement or employment contract as if they had not received the leave payment. At the most basic level, the National Employment Standards found in the FWA provide for payments in relation to public holidays, annual and long service leave.

The debate, as commonly occurs, centred on the precise meaning of the words of both Acts and whether the word 'permitted' found in section 130(2) of the FWA meant that a compensation law needed to specifically state that the accruing or taking of leave while on compensation payments was permitted.

The Court was asked to decide whether the above combination of legislation meant the word 'permitted' did require a positive statement in the relevant compensation law. If so, a worker would not be entitled to take or accrue the leave.

---

<sup>1</sup> *Anglican Care v NSW Nurses and Midwives Association* [2015] FCAFC 81

<sup>2</sup> *Thompson v Armstrong & Royse Pty Ltd* (1950) 81 CLR 585

<sup>3</sup> *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*

<sup>4</sup> s130

<sup>5</sup> s49

## The Decision

The Court looked at the introduction of the FWA and its predecessors the *Workplace Relations Act 1987* and *Workplace Relations Amendment (Work Choices) Bill 2005*. The Court concluded that the Federal Government, at the time of *Work Choices*, intended workers compensation legislation of the Commonwealth, States or Territories would not be affected<sup>6</sup>.

Attention focused on the reason for compensation laws in providing that leave could be taken during compensation payment periods. The Court determined that legislation had been introduced to reverse the effects of an Australian High Court decision<sup>7</sup> that workers who had been paid annual leave while absent due to a compensable illness were not entitled to the compensation payments during that period.

The Court found that the word 'permitted' used in section 130(2) of the FWA did not require a positive statement from the compensation law to permit the accruing or taking of leave. All that was required was the compensation law to '*not prevent, prohibit or restrain those things*'<sup>8</sup> and further found '*While it is no longer sufficient that the compensation law does not prevent the simultaneous enjoyment of the two, it is not necessary that the compensation law provides for the payment of the leave benefit*'<sup>9</sup>.

## Other factors

Some jurisdictions have limitations in their compensation laws which may affect a workers entitlement to accrue and take leave while on compensation payments. For instance, in New South Wales, for an injury resulting in 20% or less impairment compensation payments terminate at 5 years; South Australian legislation provides that the employer is no longer liable to grant annual leave for a worker who has received total incapacity payments for 52 weeks.

## Conclusion

A worker in New South Wales who is absent from work with a compensable illness will be entitled to accrue and take leave while maintaining the right to be paid compensation payments.

Most other jurisdictions in Australia have similar provisions for accruing and taking leave while on compensation payments.

Should an employer not permit accruing or taking of annual leave while a worker is absent during a compensable illness, the employer would be in breach of the FWA and liable to prosecution and heavy fines.

---

<sup>6</sup> Supplementary Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005*, Schedule 1, Item 71.

<sup>7</sup> *Thompson v Armstrong & Rose Pty Ltd* (1950) 81 CLR 585

<sup>8</sup> *Anglican Care v NSW Nurses and Midwives Association* [2015] FCAFC 81 per Jessup J at 19

<sup>9</sup> *Ibid* per Bromberg and Katzmann JJ at 64

## hilliard and berry solicitors

If you would like further assistance, please do not hesitate to contact our Workplace Relations Team on (02) 8324 7500.

1 December 2015

Mark Meletopoulo  
Solicitor