



# WORKPLACE LAW UPDATE

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## FAIR WORK ACT AND MODERN AWARDS

**Decision on transitional provisions and absorption:** Fair Work Australia ('FWA') has recently [ruled](#) that overtime is not included in the transitional provisions set out in the modern awards relating to rates of pay and that employers are generally permitted to absorb modern award increases into over-award payments. Under the transitional provisions of the modern awards; minimum wages; casual and part-time loadings; Saturday, Sunday, public holiday, evening and other penalties; and shift allowances are subject to phasing in which will commence as of 1 July this year. However, in relation to the issue of overtime, FWA held that payments for working overtime are not penalty payments and as such do not fall within the term 'other penalties'. This ruling reflects the view of the Fair Work Ombudsman as contained in its '[Guidance Note on Transitional Arrangements in Modern Awards](#)'. FWA further clarified the issue of absorption of over award payments, which was subject to differing interpretations by the Fair Work Ombudsman, unions and employer groups. The modern awards provide that the monetary obligations imposed on employers by a modern award may be 'absorbed' into over-award payment and that nothing in the modern awards requires an employer to maintain or increase any over-award payments. FWA held that employers are permitted to absorb modern award increases into their employees' existing over award payments provided that the employer is not otherwise obliged to maintain the over award payments. This view prevails over the recently published opinion of the Fair Work Ombudsman in its 'Guidance Note on Transitional Arrangements in Modern Awards' which held that such over-award payments could only be absorbed with the consent of the employee. The rulings of FWA on absorption and overtime payment have provided employer's with much needed clarification regarding the interpretation of these modern award provisions which have been subject to differing interpretations by the Fair Work Ombudsman, employer groups, and unions.

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### About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry ([VECCI](#)). Your business does not need to be a VECCI member to engage our services.

## TERMINATION OF EMPLOYMENT

**Long service makes termination harsh:** In [Mohamed Ahmed v Webforge NSW Pty Ltd](#), an employee's record of 15 years' service was considered in determining whether he had been unfairly dismissed for breaches of workplace safety. The employer had adopted a workplace safety policy, aiming to eliminate injuries in the workplace. The employee had been employed as a team leader and was responsible for the

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### Smart Company Articles

Peter Vitale is a regular contributor to [www.smartcompany.com.au](http://www.smartcompany.com.au). Feel free to browse the site and view his articles.

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supervision of other employees with specific accountability for safety. His employment was terminated after he had used a steel bar to re-align panels produced by a welding machine which was in breach of the safety polices. The employer had taken the view that it had no choice but to dismiss the employee given the employer's commitment to workplace safety and that the employee's accountability for safety in his job. It was found that the termination was harsh because the employer had not considered alternatives to dismissal given that he had been with the employer for over 15 years and had a record with the employer. It was further held that although alternatives to dismissal may have been 'both few and unpalatable' to the employee, these nevertheless should have been considered. Accordingly, the employee was found to have been unfairly dismissed and was awarded with compensation equal to 9 weeks' pay. The case illustrates that there are cases in which FWA will make a finding that a dismissal is harsh based on factors which are personal to the employee. This is so even though there might otherwise be a valid reason for termination and procedural fairness has been observed.

## TERMINATION OF EMPLOYMENT

**What are the inherent requirements of the job:** In [J Boag and Son Brewing Pty Ltd v Allan John Button](#), a Full Bench of Fair Work Australia (FWA) has overturned an earlier Tribunal decision, finding that in determining whether an employee can carry out the inherent requirements of a job, the employer should consider the usual duties for which the employee was originally engaged rather than the employee's modified position. The employee had developed a hernia, which was related to a congenital urological condition, and was medically advised not to carry or lift heavy weights. As such, the employee was assigned modified duties by his employer which involved the assistance of his work colleagues. The employer's workers' compensation insurer refused to accept any risk or liability for this particular employee given his condition. After carrying out an assessment of the employee and finding that he was still unable to lift heavy weights and therefore unable to carry out the inherent requirements of the full position, the employer terminated the employee. The employee then made an unfair dismissal claim against the employer. At first instance, it was held that the employee could carry out the inherent requirements of the modified position and as such had been unfairly dismissed. However, on appeal, the Full Bench examined the inherent requirements of the employee's original position, rather than the modified position, finding that the employee did not have the capacity to perform all the inherent requirements of the job. The employer therefore had a valid reason for the termination. In addition, the Full Bench held that the termination was not harsh, unjust or unreasonable in the circumstances. For the purposes of avoiding an unfair dismissal claim, this case illustrates the importance of employers having a clear understanding of the inherent requirements of an employee's job and ensuring that any modification of duties is not considered to alter the duties specified under the contract of employment.

## POST EMPLOYMENT RESTRAINTS

**Directors can't take clients:** In [BDO Group Investments \(NSW-Vic\) Pty Ltd & Ors v Ngo & Ors](#) the Victorian Supreme Court enforced employment and contractual restraints against 2 directors of the BDO

Group to prevent them from resigning and joining a rival accounting practice. The two directors had entered into an employment contract, sale of business agreement and a unit holders' deed as part of a merger between BDO Kendalls and other separate BDO practices. As part of the merger, they had received a share of \$75 million for the sale of the goodwill of the Victorian business and then became directors of the BDO Group. Although the law is generally opposed to restraints of trade in employment contracts, the Court held that the restraints could be enforced for a number of reasons, including:

1. The parties had equal bargaining power;
2. The parties had entered into a contract for the sale of goodwill for valuable consideration; and
3. The BDO Group had offered to continue to pay the directors their full entitlements and had given them the option of continuing to work.

In determining this case, the Court was further influenced by the significant adverse effect that unrestrained departures of directors and staff could have on the goodwill of the business which it acquired. This decision highlights the factors that Courts may take into consideration when determining whether to enforce employment restraint clauses and the greater scope for employers to enforce restraints when protecting the goodwill of a business which has been purchased is in question.

## **FAIR WORK ACT COMPLIANCE: PRACTICAL TIPS FOR EMPLOYERS**

**Prepare your business for the new industrial relations landscape:** [CCI Lawyers](#) can assist employers in understanding and complying with new obligations under the Fair Work Act.

For further services offered by CCI Lawyers, visit our [website](#) or contact us on (03) 8662 5400.

## **FEEDBACK**

**What workplace law issues confront your business?** [Click here](#) to provide us with your suggestions or feedback about the areas of workplace law you would like to know more about in future issues of "Workplace Law Update".

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