

Article Information

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Accrual of leave during workers compensation absence

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In the case of *NSW Nurses and Midwives Association v Anglican Care [2014] FCCA 2580*, Judge Emmett of the Federal Circuit Court held that in New South Wales, workers are entitled to accrue annual leave whilst absent from work and receiving workers compensation payments.

Unhappy with the decision, the NSW Nurses and Midwives Association (Association) appealed the decision of Judge Emmett to a Full Bench of the Federal Court of Australia.

Unfortunately for the Association, it was again unsuccessful, with all three members of the Federal Court dismissing the appeal, and endorsing the reasoning of Judge Emmett.

The Federal Court agreed with Judge Emmett's interpretation of the Fair Work Act (read in conjunction with the New South Wales Workers Compensation Act), that the Workers Compensation Act "permitted" an employee to take and accrue leave whilst that person is receiving workers compensation, by reason of the fact that it did not prevent employees from taking or accruing leave.

Notably, the Federal Court made reference to provisions of the predecessor legislation of the Fair Work Act (being the Workplace Relations Act), which the Association conceded had the effect of allowing employees to accrue and take leave in such circumstances.

As the Federal Court could see no intention of the Parliament (including in the explanatory memorandum) to make such a drastic change to the effect of the legislation, it held that even though there was a change between the wording in the Fair Work Act and Workplace Relations Act, the beneficial interpretation afforded by Judge Emmett was the correct one.

The Federal Court also acknowledged that the Workers Compensation Act is legislation that deals specifically with workers compensation, rather than leave entitlements. On that basis, it was reasonable to infer that the use of the word "permit" in the Fair Work Act could not have had the intended effect of requiring the workers compensation legislation to specifically deal with the accrual or taking of leave.

The Federal Court also relied on the references made in the Workers Compensation Act which provide that an employee's workers compensation payments under that Act are not affected, simply because the employee may be taking paid leave at the same time.

Therefore in summary, absent any future statutory amendment to vary the effect of the Fair Work Act, employers in New South Wales should be particularly mindful of this decision (as should employers in other states and territories with like legislation).