

Article Information

Service: Employment & Labour

Remobilising your workforce under JobKeeper - from hibernation to “covid-normal”

We consider options available to businesses re-mobilising workforces during the COVID-19 pandemic and lessons from a recent decision of the Fair Work Commission

Over the course of the COVID-19 pandemic to date, employers have scrambled to put their businesses and their workforces into “hibernation” to preserve their business in a very difficult environment. However, many are now emerging from that hibernation and looking to the future, and wondering – can the new JobKeeper provisions in *Fair Work Act 2009 (FW Act)* support my business as we move towards “covid-normal”? How much flexibility do businesses have in relation to the working hours of staff who are returning to work after a period of stand-down?

JobKeeper enabling stand-down direction

Under section 789GDC of the FW Act, an employer who is eligible for JobKeeper can direct an employee not to work on particular days when he or she would usually work, work a lesser period of time than the employee would ordinarily work on particular days, or work reduced hours compared with his or her ordinary hours of work. Businesses also retain the right to stand-down staff under the “traditional” industrial stand-down provision, section 524 of the FW Act, if there is a complete stoppage of work for which the employer cannot reasonably be held responsible.

Standing-up with varied days and/or hours

As the covid-19 pandemic has evolved, many businesses have stood-down staff using both the JobKeeper provisions and section 524 of the FW Act. However, many are now considering their options for resuming their business operations and returning staff to work, even at reduced levels to what they had worked prior to covid-19. Often, businesses will need to vary their operations in order to trade in the current environment.

Many employers are therefore looking to return employees to working different days and hours than they worked before the covid-19 pandemic. Section 789GG of the FW Act permits an employer to request that an employee who is entitled to JobKeeper payments work at different hours or different times than they had previously worked, and the employee must consider that request and not unreasonably refuse it.

This provision, which creates important flexibility for employers to vary their operations during the covid-19 pandemic, has recently been tested in the case of *Transport Workers’ Union of Australia Queensland Branch v Prosegur Australia Pty Ltd* [2020] FWC 3139.

In that case, due to a downturn in business caused by covid-19, Prosegur reduced the number of hours which were worked by staff across the board, but sought to apply this fairly to full-time, part-time, and long-term casual employees by having all employees work at least 25 hours per week. This had the result that, at times, some casual employees worked more hours than they had prior to the commencement of the covid-19 crisis. The Union sought to retain a greater proportion of hours for permanent and part-time employees rather than having them allocated to casual employees, and complained that it was unreasonable to request casual employees to work more hours than they had previously worked when permanent staff were suffering a reduction of work.

However, Deputy President Sams noted that the employer had the “*unenviable task [of trying] to balance equity and fairness for employees with the business needs*” And ultimately disagreed with the Union’s submission that the employer’s direction was unreasonable. He stated, “*absent other factors going to an unreasonable request, it will be unreasonable for an employee to refuse a request to increase his or her hours of work compared to their ordinary hours of work*”.

Lessons for employers

- Just as many employers looked to the JobKeeper amendments to the *Fair Work Act 2009 (FW Act)* earlier in the year for flexibility to keep their businesses afloat, many are now looking to those same provisions to support the re-mobilisation of their workforces in a modified way.
- Section 789GDC of the FW Act, which is part of the JobKeeper amendments to that Act, provides flexibility for eligible employers to request employees to agree to work different days and hours, and such a request cannot be unreasonably refused by the employee.
- The recent decision of *Transport Workers' Union of Australia Queensland Branch v Prosegur Australia Pty Ltd* [2020] FWC 3139 confirms that the onus is on the employee to establish the unreasonableness of the request if they refuse to comply with such a request.
- The case also confirms that in appropriate circumstances employers may be entitled to request employees to work more hours than they would ordinarily work, request casual employees to work a minimum number of hours, or allocate hours to casual employees even where permanent employees are working reduced hours.

The decision in *Prosegur* confirms that:

- an employee or their union will need to identify particular reasons to support a submission that an employer's request that he or she work different hours or days is unreasonable in order to refuse it - the onus of proof in this regard is on the employee, and not on the employer;
- it is not inherently unreasonable to request an employee to increase his or her hours of work compared to their ordinary hours of work (absent some other factor making the request unreasonable);
- it is not inherently unreasonable to request that a casual employee work a minimum number of hours and;
- it is not inherently unreasonable to allocate hours to a casual employee in favour of a part-time or permanent employee; and
- employers should note that there is a process set out in the FW Act which must be followed for a JobKeeper direction to be legally effective.

If you would like to discuss the decision in *Prosegur* or your business' options for establishing a "covid-normal" environment with your workforce, including your business' options for workforce management when the JobKeeper scheme ends in September 2020, please contact a member of our Employment Relations Team.