Re-hiring Employees Terminated After 1 March 2020 What Are My Obligations?

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This article has been prepared to provide guidance on the scenario:

- My employee was employed as at 1 March 2020; and
- Fits the eligibility requirements for JobKeeper; but
- Their employment was terminated due to the COVID-19 related closures on 23 March 2020.

Question: I want to re-hire them – what are my industrial relations considerations?

Answer:

There are several considerations to keep in mind, and you should weigh them up before deciding whether to re-hire an employee on the basis of trying to provide them access to the JobKeeper scheme.

It is not mandatory for an employer to re-hire an employee whose employment was terminated due to the redundancy of their position.

The below information is only a general summary of re-hiring considerations.
If you have a scenario that you're not sure about, you should seek further advice, and can contact the ER Department to discuss your specific circumstances.

JOBKEEPER "ELIGIBILITY"

The *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* ('the JobKeeper Rules') state that:

- If an employee was permanently employed on 1 March 2020, they are eligible under the JobKeeper rules if they are subsequently re-employed.
- If an employee was a casual as at 1 March 2020 and is re-hired following a termination of employment after that date, they must have been regularly and systematically employed for at least 12 months (as at 1 March 2020) to meet the definition of an eligible employee under the JobKeeper rules.

However, in either case, the employee will only be eligible for payments relating to fortnights in which they were actually employed (this can be at any time in the fortnight, they don't have to have been employed for the full 2 weeks).

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CONTINUITY OF SERVICE: CONSIDERATIONS

1. Long Service Leave under the Industrial Relations Act 2016 (the 'QLD IR Act')

Under the QLD IR Act, termination of employment does not break service where the employee is re-employed within 3 months of the termination, however the period for which the employee was not employed does not count toward their service for the purpose of determining their long service leave ('LSL') entitlement.

If an employee is re-hired within 3 months, but was already paid a long service leave payment when their employment originally ended, an employer will need to consider:

1. **RECOGNISING THE PAYMENT MADE AT TERMINATION:** If an employee's employment was terminated, they were paid their LSL entitlements at this time, and they were then re-employed within 3 months of the date of the original termination, the employee cannot 'double dip' and receive the same LSL entitlement twice.

   You should document that the employee had already been paid part of their LSL entitlement (including the value of it) so it can be recognised when assessing future LSL entitlements as they fall due. However as noted above, you will need to still count their prior service during the first period of employment as required by the QLD IR Act. This is because their service won't be reset to zero (with the re-hiring) despite them having received a LSL payment.

   This is important to understand, because you will need to ensure the employee will accrue future LSL entitlements correctly. For example, an employee can access an additional amount of LSL whilst still employed, after reaching 15 years of continuous service.

2. **SEEKING THE REPAYMENT OF LSL PAID AT TERMINATION:** Should you seek an employee's agreement to repay LSL paid on termination so that the employee's LSL entitlement is 're-credited', please be aware that they are not legally compelled to agree to repay these monies.

   Please note, if you decide to enquire with the employee about repaying the LSL entitlement, you should not attempt to agree on the employee having a portion of their wages deducted to repay the entitlement. This could be considered a potential breach of the permitted deductions provisions in the *Fair Work Act 2009* ('FW Act').

   If you want to discuss with an employee whether they would mutually agree to repaying a prior LSL payment, this should be via the employee paying money to the employer within a reasonable timeframe (eg supposing that they have not spent it on things like mortgage payments, utility bills etc). You will need to assess the circumstances and confirm a reasonable repayment arrangement in writing.

The Employment Relations Department will not be able to assist with specific wording for a repayment arrangement, as you will need to make a judgement on what is reasonable in your specific circumstances, taking into account your discussions with the employee.

2. Entitlements under the Fair Work Act 2009 (the 'FW Act')

Continuous service is defined in section 22 of the FW Act. It is an important consideration in terms of assessing eligibility for certain entitlements under the FW Act, and also when an employee will accrue paid leave on any period of continuous service. As defined in the FW Act, certain absences will be excluded from falling into the category of continuous service but may not break service.

Unlike the QLD IR Act, it can be viewed that a termination of employment and gap in employment of any period of time (e.g. even 1 day's break between employment contracts) constitutes a break in the employee's service under the FW Act.

The FW Act does not explicitly attempt to cover the scenario of an employer making a decision to re-hire an employee due to the JobKeeper Payment scheme. However, as per the above, it could be viewed that if there was a break in employment prior to re-engaging the employee, that:

- If entitlements were paid out to the employee associated with their original employment ending, the payment still validly stands, and
- The employee's service for the purposes of the FW Act was broken due to the termination of employment, and their service starts afresh with the re-engagement.

Can I discretionarily recognise a re-hired employee's continuity of service for the purposes of the FW Act and modern awards?

Yes. An employer can exercise this discretion.

Although the view can, as per above, be that service is broken, it is recognised that some employers might wish to reach an alternative discretionary agreement with an employee about recognising service from their previous employment for FW Act purposes.

However, it should be made clear in writing to employees:

1. That this is not something that the business is statutorily required to do; it is being done as a show of good faith on a discretionary basis;

2. Which specific employment entitlements this agreement will affect, and the legislation that these entitlements are derived from (see below discussion under the heading 'clarifying the details of service recognition');

3. The business' decision will not affect the date their employment is recorded to have actually re-commenced. In this regard, consider also confirming what your agreement with the employee is as to the break in employment between the 2 engagements.

   For example, if there was a gap of 2 weeks, are you agreeing that this 2 week period won't *break* service, but is not counting *as service* for the purposes of the FW Act? If it does not count as service, entitlements will not accrue during that 2 week period.

CLARIFYING FOR WHAT PURPOSE IT IS TO BE RECOGNISED

Access to Protections / Entitlements in the FW Act

There are several entitlements under the FW Act that will only apply where an employee has attained a certain amount of continuous service. If you, as an employer, intend to discretionarily recognise an employee's prior service from their last employment contract, you will want to clarify with that employee the details of this.

For example, if you were to confirm to a re-hired employee that you will just be recognising previous service for the purposes of the FW Act in general, it could be considered that you will be recognising*:

- **Access to unfair dismissal:** by recognising prior service ie from the first period of service and for the break in employment, collectively the time served could be sufficient for an employee to be eligible to lodge an Unfair Dismissal claim with the Fair Work Commission.

  NOTE:
  1. An employee (including a casual employee) of a business other than a small business must have accrued continuous service equivalent to the minimum employment period ('MEP') of 6 months prescribed under section 383 of the FW Act at the time of their dismissal to be eligible to lodge an unfair dismissal claim;
  2. Where the employer meets the definition of a small business as defined in the FW Act (i.e. does the employing entity employs less than 15 employees, taking into account employees of any associated entities), then the MEP is 12 months.

- **Access to unpaid parental leave and the return to work guarantee:** under section 67 of the FW Act, an employee (including an eligible long term casual employee) must have accrued at least 12 months' continuous service at the date of birth, expected date of birth or placement date of the child to be eligible to access unpaid parental leave and the return to work guarantee.

  By recognising prior service, collectively the time served could be sufficient for an employee to be eligible for unpaid parental leave.

- **Flexible working arrangement requests:** under section 65 of the FW Act, an employee (including an eligible long term casual employee) must have accrued at least 12 months' continuous service, prior to being entitled to make a formal flexible working arrangement request.

  By recognising prior service, collectively the time served could be sufficient for an employee to be eligible to request a flexible working arrangement.

- **Casual conversion requests:** a casual employee employed on a regular and systematic basis for at least 12 months may make a request under the *Hospitality Industry (General) Award 2010* ('HIGA') to have their employment converted to permanent employment, and the employer can only refuse this request on reasonable grounds.

  By recognising prior service, collectively the time served could be sufficient for an employee to be eligible to request conversion to permanent employment

** note – the above list is not warranted to be exhaustive.*

Leave Accruals and (Future) Termination Entitlements

Furthermore, you should also clarify with the employee what you want to agree on, in relation to leave accruals, termination entitlements, and any associated payments made at the termination of the employee's original employment.

Consider:

1. Did you originally make a redundancy payment to the employee, or pay them unused annual leave entitlements? If you request that the employee pay either of these entitlements back because they are being re-hired, and they agree to, you should document the arrangement in writing to avoid the risk of future disputes.

   As noted above in relation to long service leave, similarly with FW termination payments, you should *not* attempt to agree on the employee having a portion of their wages deducted to repay the entitlement, as this could be considered a potential breach of the permitted deductions provisions in the FW Act.

   If you want to discuss with an employee whether they would mutually agree to repaying a termination payment, this should be via the employee paying money to the employer within a reasonable timeframe. You will need to assess the circumstances and confirm a reasonable repayment arrangement in writing.

   The ER Department will not be able to assist with specific wording for a repayment arrangement, as you will need to make a judgement on what is reasonable in your specific circumstances, taking into account your discussions with the employee.

If you make a decision to discretionarily recognise an employee's service under the FW Act but you're unable to reach an agreement for the employee to repay their redundancy pay and/or unused annual leave payment, you could potentially let the employee know that service is discretionarily recognised in relation to the FW Act, *except for* redundancy pay and/or annual leave accruals.

2. What is going to happen in relation to the employee's continuous service regarding notice of termination, if their employment later ended (again) after being re-hired?

   There may be situations where the employee wasn't provided payment in lieu of notice originally, and actually worked the notice period. In which case, obviously you cannot attempt to ask them if they would agree to pay back an entitlement which they didn't get in a monetary form!

   Alternatively, perhaps you did provide an employee payment in lieu of notice. If you make a decision to discretionarily recognise an employee's service under the FW Act, but you're unable to reach an agreement for the employee to repay the payment in lieu of notice you provided at the date of their previous termination, you could potentially let the employee know that service is discretionarily recognised in relation to the FW Act, *except for* termination pay.

3. Under the National Employment Standards, unused personal/carer's leave is not paid out on termination of employment. By recognising prior service, the employee could expect that you will be recognising and 'recrediting' their unused personal / carer's leave entitlement that they originally lost at the date of their prior termination.

Given the above complex issues associated with a decision to potentially try 're-credit' an employee's service, it would be strongly suggested that if you made a discretionary choice to attempt this process, that you take an 'one in, all in' approach to recognising employee service in relation to a prior period of employment.

Otherwise, you will need to be prepared for the fact that the record-keeping associated with your employee's entitlements may be based off a variety of time periods and there might be an increased risk of a dispute with an employee due to confusing/competing time periods in relation to entitlements.

OTHER RISKS ASSOCIATED WITH RE-HIRING AN EMPLOYEE…

"The redundancy was not genuine if they have re-hired me".

The above is relevant for the purposes of an Unfair Dismissal Claim at the Fair Work Commission, and the situation is: an employee who was employed on 1 March 2020 was later dismissed due to redundancy of their position. They have now been re-hired and immediately stood down (so as to receive the JobKeeper payment).

That employee might, depending on the circumstances, challenge the genuineness of their position being made redundant in the first place.

Employers should bear this risk in mind when assessing whether to re-engage recently terminated employees and consider if they are able to confidently demonstrate that the original termination was a 'genuine redundancy' as defined in the FW Act.

SUMMARY

There are a number of considerations for employers thinking about re-hiring employees, who were otherwise JobKeeper Payment eligible employees that were terminated due to the redundancy of their position at some time after 1 March 2020.

This article has been prepared to provide guidance on many of those considerations in an attempt to highlight that re-hiring an employee is not a simple process.

Financial QHA members are encouraged to contact the employment relations team to discuss their specific situations in more detail.