

HOW HEATWAVE CONDITIONS IMPACT YOUR OBLIGATIONS AS AN EMPLOYER.

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2016 was the hottest year on record in Australia. January/February has seen regional centres record their hottest days with temperatures approaching the high 40's in Victoria, NSW and Qld.

Therefore now is an opportune time to revisit the issue of employer obligations to staff engaged in physically challenging activities in enclosed environments or the outdoors.

Legislative framework:

Under the *Fair Work Act 2009* employees can be sent home if there is no useful work for them to do, due to:

- Equipment breakdown;
- Natural disaster (including floods, tropical cyclones or bushfires);
- Industrial Action.

Concurrently, employers are obliged to provide weekly employees with leave of absence without loss of pay if the employee is engaged in '*Community Services*', (e.g; SES members or Volunteer Firefighters). This obligation arises under the universal '*National Employment Standards*' (NES).

The right to "*stand down*" is tempered by the terms of either an Enterprise Agreement or a Modern award, which would otherwise apply to the particular workplace.

In the absence of specific provisions in an award or Enterprise Agreement, as a general principle, if an employer stands down an employee because of the impact of a natural disaster on their business (or excessive heat), they don't have to make *inclement weather payments* ('*inclement weather*' being defined as when it is unsafe or unreasonable for an employee to work because of severe weather conditions).

The terms of a '*Common Law contract*' do not override the employer's duty of care to provide a safe working environment on all occasions. Therefore even though a published company policy may be intended to broadly define the operational envelope in which the employee is expected to work; ultimately, a Court will determine what is (was) "*reasonable*", based on the totality of the facts presented to it. Unfortunately, this usually arises at the point of death or injury to the employee, and or, others that they are responsible for.

What best to do:

As indicated, an employee is not entitled to be paid during a 'stand down'. However, an employer can choose to consider other options that will allow an employee to be paid.

The employer could, if they so choose:

- Let the employee(s) take a period of paid leave, such as Annual Leave*;
- Allow work at another location (such as from home or another worksite);
- Perform other duties that they are competent to perform;
- Drawn-down accruals of 'Time Off In Lieu of Overtime' (TOIL) – as prescribed in an award or Enterprise Agreement.*

(* Does not apply to casual employees).

Any short-term arrangement put in place to avoid a disruption to an employee's income stream, should be confirmed in writing as soon as practicable, after the event, so as to avoid any future disputes as to accruals or entitlements.

It is recommended that you put in place an *action plan* that can be implemented with little notice; ensure that all employees (current and prospective), are fully versed on what will happen in the event of a heatwave, fire, flood, storm or other natural disasters.

Further, ensure that individuals with authority to act, are clearly identified and the appropriate (quickest), means to contact them if & when an emergency arises. Regularly review the contents of the plan to ensure that it meets the operational needs of the organisation.

Make this plan an integrated element of your OH&S policies and procedures.

Finally, if in doubt in regard to your specific obligations - get advice, either through a practitioner, such as HMT Consulting (www.hmtconsulting.com.au), or the Fair Work Ombudsman (www.fairwork.gov.au).