NEWSLETTER

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Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

Despite it being early into the New Year, the ball has started rolling at a great pace in human resources and the employment sphere generally. In this newsletter, we discuss a number of the very significant amendments to the *Fair Work Act 2009* (Cth) (**FW Act**), Facebook faux-pas, employee spending on company credit cards, employees behaving badly and a round-up of the decisions that the Fair Work Commission (**Commission**) has been making.

We ran a successful Workplace Bullying Forum at the end of last year; not long after, the Commission commenced its new bullying jurisdiction. Further information is included in the 'E&IR at a glance' section of this newsletter. There will certainly be more to report on this area in the coming months.

Lastly, our most recent HR Forum on exiting employees involved collaboration with PPB Advisory's forensics team. We wish to extend our sincerest thanks to Barry Foster and Peter Morris of PPB Advisory, our co-presenters. Our next HR Forum will be on the FW Act reforms and will be held on Thursday 8 May 2014.

For more information on any aspect of this newsletter or for general queries, please contact any member of our E&IR team on +61 3 9608 2233.

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E&IR at a glance

- The *Fair Work Amendment Act 2013* (Cth) took effect in its entirety on 1 January 2014. The changes this instrument makes to the FW Act are significant and are discussed in the first article below. Further changes have been heralded with the introduction of the Fair Work Amendment Bill 2014 late last month (see here: http://cornwalls.com.au/sharing-knowledge/legal-updates/fair-work-act-reforms.aspx).
- In the first month of the Commission's new anti-bullying jurisdiction, it received a total of 44 bullying complaints. Commission President Iain Ross J said that typically the Commission receives fewer applications for individual-based rights disputes such as unfair dismissals and general protections in the first two months of the year. The FW Act dictates that the Commission has only 14 days to start to deal with applications once they have been lodged. Justice Ross confirmed the Commission's intention of 'progressing matters promptly and in a practical, efficient and fair manner'. The first substantial order was also made this month, further details of which are included in this newsletter.
- The Australian Bureau of Statistics has announced that unemployment in December 2013 rose by 0.1 per cent, an increase of 8,000 people to a national total of approximately 722,000 people. The rise in unemployment is attributed to a decrease in the demand for male and female full-time employees and male part-time employees.
- According to new Canadian research, 'presenteeism' (the act of employees attending work when they are unwell) costs employers significantly more than absenteeism. According to the research, employees do not operate at the normal rate of productivity and are generally disengaged from their place of work. Other potential indirect costs include exacerbating their health problem/s, making other employees sick and making customers and/or clients sick.
- Safe Work Australia reported that the number of infringements issued by work health and safety regulators has decreased by 37 per cent in the last year. The number of prohibition and improvement notices issued has also dropped by approximately 13 per cent. Safe Work Australia also warned employers and workers against common work-related injuries and reminded labourers, transport workers and tradespeople (who had the highest incidence of serious injury) to remain vigilant and aware of their obligations.

Getting healthy in 2014!

WorkSafe Victoria is distributing **Healthy Workplace Kits** with a view to enhancing the health and wellbeing of Victorian workplaces. Participant workplaces can sign in as guest users and utilise the free resources to establish goals, design and implement a program, and evaluate and improve that program. Further information can be accessed at:

http://healthyworkplacekit.com.au/

Facebook faux-pas

With over 350 million members worldwide, Facebook is a force that every employer must reckon with. In December last year, two cases about employees who were dismissed following derogatory comments posted on their Facebook profiles were decided with differing outcomes. As a result, further guidance was given to employers about the criteria that should be taken into account when considering action after an employee's derogatory social media comments.

Case 1: appeal of 'the Linfox case'

The Full Court of the Federal Court of Australia dismissed an appeal by Linfox Australia Pty Ltd (**Linfox**), ruling in favour of a truck driver who was dismissed for serious misconduct after he posted deprecating comments about his managers on his Facebook profile page. In his defence to the claim, the employee likened his Facebook comments about two managers at Linfox to those that he would express in a café or pub conversation. Commissioner Roberts (with whom the Full Bench of the Commission and the Federal Court at first instance agreed) held that comments posted in an electronic form leave a permanent written record 'which can be read at any time into the future until they are taken down by the page owner'. For this reason, they are not the same as comments made among friends in a pub.

Despite this, the Full Bench of the Commission (with whom the Federal Court agreed) held that even if the truck driver's Facebook comments were a valid ground for his dismissal, in the circumstances of this case the dismissal was harsh, taking into account:

- his long period of employment at Linfox;
- his age and limited job prospects;
- the circumstances of the publication of the comments, in particular his belief that his profile on Facebook was protected by maximum privacy settings, that only his 'friends' could view the comments and that he never intended the comments to be communicated to his managers;
- that the conduct occurred outside the workplace and work hours;
- that some of the derogatory comments made on his Facebook profile were not actually made by the employee, but by his 'friends';
- that Linfox didn't take action against other employees who took part in the conversations; and

- that the employee was remorseful and acknowledged how 'foolish' his actions were.

While this case turned on its own facts, there will be instances where such conduct will provide a valid reason for termination (as was the case below).

Case 2: status update lands employee in hot water

The Commission upheld the decision of an employer to dismiss a customer relationship manager for making 'grossly offensive and disgusting' comments on his Facebook profile page about an employee who had not yet begun work at the company. In his post, the manager likened his employment at the company to anal rape and spoke about sexually harassing the new employee. The manager had received warnings from the company in the past for inappropriate comments on various organisations' websites.

Deputy President Sams condemned the employee's very 'warped' rationalisations for his conduct and held that no policies or codes of conduct need to be consulted to appreciate how inappropriate his comments were and that they were likely to cause the target employee hurt and humiliation. Deputy President Sams also stressed that while the manager was perfectly entitled to hold and express views about any organisation he pleased, he was not free to do so in a manner that negatively impacted on his employer's business. The manager's application, along with his defence that he did not understand how Facebook worked, was rejected by the Deputy President due to his youth and the frequency with which he used the social media site.

For employers

The appropriate response to employees who post derogatory comments about their employment or fellow employees on social media is not always clear. It is very useful to have policies in place that detail the employer's expectations of staff with respect to social media, because these policies can guide an employer's response to an incident and help protect the employer in the face of an unfair dismissal claim

Legislative changes in effect as of 1 January 2014

Four major changes to the FW Act came into effect on 1 January of this year, briefly summarised below.

1. The consultation requirement

All modern awards must now contain a provision requiring employers to consult employees about any changes to their regular rosters or ordinary hours of work. The Commission has issued a decision varying all modern awards as described in our January Alert (http://cornwalls.com.au/sharing-knowledge/legal-updates/new-consultation-requirement.aspx). Employers are now required to:

- provide the employee/s affected and their representative/s (if any) with information regarding the proposed change (for example, information about the nature of the change and when that change is expected to commence);
- invite the employee/s and their representative/s (if any) to express their views about the impact of the proposed change/s on their lives, including on their family and caring responsibilities; and
- consider any of the views put forth by the employee/s

or their representative/s (if any) about the impact of the proposed change/s.

2. Bullying claims at the Commission

A worker who reasonably believes that he/she is being bullied at work is able to apply to the Commission for an order to 'stop the bullying'. Significant points to note about this amendment are:

- the definition of worker is very broad and extends beyond the traditional employer/employee relationship;
- the bullying must be a repeated action and there must be a risk that it will continue;
- the Commission has 14 days from when the application is bought by the worker to 'start to deal' with the application; and
- the Commission cannot award compensation.

Bullying claims may also still be dealt with under the federal and state work health and safety regimes.

We recommend that employers review and update their anti-bullying policies in the wake of these significant changes. It is also essential that managers are well-trained in implementing company procedures to handle complaints of workplace bullying.

3. Right of entry

A number of changes were made to the union right of entry provisions in the FW Act. However, the government has introduced new legislation seeking to repeal the changes made and introduce further amendments (more information can be found at http://cornwalls.com.au/sharing-knowledge/legal-updates/fair-work-act-reforms.aspx, so watch this space).

4. General protections claims

Changes introduced also enable the Commission to hear a general protections claim by way of arbitration where an initial conference at the Commission does not resolve the dispute involving a dismissed employee. However, a hearing by way of arbitration will be conditional on the employer's consent. The remedies available to the employee include reinstatement, compensation and damages for lost remuneration.

General manager dismissed after spending on the company credit card

Background

The Federal Circuit Court of Australia has found in favour of a general manager of a hardware company who was summarily dismissed for personal spending on his company credit card while on a work trip to Europe and North America. The manager was employed on a verbal contract and no notice period was specified in his agreement. He had been with the company for 13 months before his summary dismissal. His employer also withheld his final week of wages.

The decision

Justice Simpson held that this decision came down to a question of fact. His Honour found that there was no basis for the summary dismissal of the manager because the owner of the company had informed him that the credit card was for his personal use during the trip and that he would be reimbursed on his return. Justice Simpson held that, because the contract was verbal, its terms were to be found in conversations between the parties leading up to the manager's engagement, and included those terms that would be implied as a matter of law (such as a reasonable notice term).

His Honour held that six months was a reasonable termination notice period based on:

- the manager's $60,000 salary;
- the length of his employment;
- the manager's age;
- his seniority;
- his duties; and
- the likelihood of him finding other suitable employment.

The manager was awarded $35,808 in damages, which comprised his unpaid salary, superannuation, annual leave and the six months' notice he was due.

For employers

Notably, Simpson J stated that 'reasonable notice' for senior managers would generally be at least six months' notice even when they have been in their job for only a short period of time. His Honour also stated that it is 'not permissible at common law' to suspend employees without pay, even when it is thought that the employee may have breached their contract of employment. Justice Simpson also held that if an employer suspends a worker,

'it must be on the basis that the employee continues to be paid their full entitlements'.

Employers should be aware that in the absence of an express notice term in the employment contract, the courts are prepared to imply much longer notice periods for dismissed senior employees than the statutory minimum notice periods. In determining what a reasonable notice period is, the factors listed above will generally be taken into account. It is critical that employers maintain up-to-date written contracts of employment with all employees, but particularly for more senior employees. We recommend that employers seek advice prior to standing down an employee as part of an investigation into potential misconduct.

Employer awarded costs due to bad behaviour of former employee

A former employee of a shipping company was ordered to pay his former employer $9,782.93 in costs due to the 'exceptional circumstances' of the case following his failed unfair dismissal application.

Facts

In May and June 2013, the employee was one of several employees of the company who was made redundant and who subsequently initiated a blockade at the company's shipping terminal at Port Melbourne lasting a fortnight. He later challenged the redundancy. However, among other things, the employee did not comply with the Commission's orders to produce documents. It was also alleged that the employee abused the processes of the Commission.

The decision

Commissioner Bissett rejected the unfair dismissal claim, but did not make a ruling on the question of the abuse of Commission process question. Despite this, Commissioner Bissett held that this was an exceptional case due to the employee's 'persistent failure' to comply with, or demonstrate some form of compliance with, the rules of the Commission. She awarded costs to the employer for the unfair dismissal claim only.

Comment

Commissioner Bissett stressed in her order that the awarding of costs by the Commission 'should not be an ordinary occurrence', but rather one that is reserved for cases where a party shows great disdain for the Commission's processes and/or the other party.

For employers

Ordinarily, the Commission is a no-cost jurisdiction and it is very unusual for the Commission to make orders on costs. However, this case demonstrates that where an applicant seriously undermines the Commission's processes, the Commission may be prepared to do so

Cases roundup

First substantial anti-bullying order made

The Commission has handed down its first substantive order under its new anti-bullying jurisdiction, ordering – among other things – that the employee (the subject of the application) have no contact with the complainant alone, make no comment about the complainant's clothes or appearance and not send any emails or texts to the complainant (except in emergency situations), as well as prescribing the times that both employees are to be at the employer's premises (specifically, the complainant was ordered not to arrive at work before 8.15am, while the other employee was ordered to complete any exercise at the employer's premises before 8.00am).

Victorian government wins appeals on Building Code

The Full Court of the Federal Court upheld both of the Victorian government's appeals against Federal Court decisions which found that it had breached the general protections provisions of the FW Act by requiring contractors to comply with the Victorian Building Code and Guidelines. Having been fined $53,000 in total for the contraventions, the Victorian government appealed both cases. The Full Court set aside the penalties and held that a state's building code does not 'authorise, forbid, or mandate any particular conduct by anyone'.

Putting your back into it – $1.4m damages for injury

The Supreme Court of the Australian Capital Territory has awarded a workshop manager damages of $1.4m for injuries sustained while lifting heavy machinery into a van. In November 2007, the manager was loading a pressure cleaner weighing over 100 kilograms into a van with two co-workers when it rolled towards him and he was forced to take the full weight of the machine. He damaged his back and subsequently suffered a psychological injury. The company accepted that with regard to the use of weight bearing machinery, there had been no meetings with staff, no written policies at the time, no process of induction for trainees and no risk assessment carried out. The court held that the company had breached its duty of care to the manager in not employing these processes and awarded damages on the basis of out-of-pocket expenses, past and future economic loss and other damages.

Worker's dishonesty justified their dismissal – further case law on trust and confidence

A Hunter Valley mine operator was dismissed by his employer due to his dishonesty following a positive drug test where traces of methamphetamines were discovered in his sample. When the mine operator was questioned about the positive result, he lied and claimed he had only taken 'cold and flu' tablets. Later he admitted to having taken a recreational drug at a party on the weekend before he was tested. He was dismissed because of his dishonesty, which 'destroyed the relationship of trust and confidence' between the parties. Deputy President Lawrence upheld the company's decision, stating that the employee's dismissal was appropriate due to the serious breach of the relationship of trust.

Calling your manager a w**ker – not a valid reason for dismissal

The financial controller of a property company who referred in an email to all staff that his manager was a 'w**ker' and attached a mock-up of his manager's resume, listing 'excessive masturbation' under the 'hobbies and interests' section of the document, has had his unfair dismissal application accepted. Deputy President Asbury held that, while such conduct would generally be considered serious misconduct resulting in termination, the employee's conduct was consistent with the culture of this workplace. The Commission heard that the company's employees, including and in particular management, regularly disseminated highly offensive material including hardcore pornography. Such behaviour from staff had never resulted in dismissal before and despite the fact that the financial controller was earning more than the unfair dismissal cap, he was covered by an enterprise agreement and thus able to bring the claim. Since reinstatement was not a viable resolution, Deputy President Asbury awarded compensation to the employee of $62,000.

Cleaning up your act: employment contract scams

A very significant penalty was recently imposed on a company and its director for employing unfair employment contracts. The company was alleged to have deliberately underpaid a South Korean citizen by classifying him as a contractor rather than as an employee. Justice Lloyd-Jones held that the employment contract must have been prepared by someone with a 'deliberate intention to circumvent the legislative framework'. His Honour ordered that the company repay the employee what he was owed and fined the company $47,520 for breaching the FW Act. A personal penalty of $9,504 was also imposed on the director of the company.

Sham contracting

Businesses that engage contractors, particularly for lengthy periods of time, should periodically review the nature of the relationship to assess whether the arrangement remains appropriate. Businesses that incorrectly classify (intentionally or not) an employment relationship as a contractor relationship may be in breach of taxation laws, superannuation laws, workers' compensation laws and employment laws.

The FWO is increasingly prepared to prosecute businesses that engage in sham contracting arrangements.

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Workplace Relations Highlights (Watch this Space)

Employee's LinkedIn accounts held to be employer's property

In the United Kingdom, a former employee who had set up her LinkedIn account while working at a publishing company was ordered by the court to hand her login details to her former employer. In this case the employee was a long-term employee of the company and was required by her employer to set up a LinkedIn account. However, she was also able to use the account for personal reasons. When she left the company with two other employees to begin a rival company, her former employer accused her of trying to solicit its clients, using its confidential material to her advantage and promoting her own business. The High Court held that the employee's LinkedIn account was the property of the employer. This is also an increasing issue in Australia and we recommend that employers think through how social media like LinkedIn will impact on their business – particularly in the case of departing employees – and put in place appropriate policies and comprehensive restraints to protect themselves.

App-tastic for small businesses!

The Australian Taxation Office (**ATO**) is launching an app for small businesses in an effort to reduce the compliance burden on employers when trying to work out the superannuation obligations they owe to their employees. This app may be downloaded on Googleplay, the AppStore and from the Windows Phone Store.

Anti-picketing laws

New anti-picket laws have been passed in Victoria. The laws expand section 6 of the *Summary Offences Act 1966* (Vic) to provide that picketers will be subject to the power given to police and protective services officers (**PSOs**) to direct individuals to move on if they are breaching the peace or endangering the safety of others in a public place. This provision previously excluded individuals involved in pickets, demonstrations or protests. The laws are set to default commence on 1 September 2014 (if the amendments are not proclaimed earlier).