

NEWSLETTER

NOVEMBER 2010

Cornwalls' E&IR Team

We would like to take this opportunity to thank you for choosing the E&IR team for all of your employment-related queries in 2010 and look forward to a continuing relationship in 2011.

We hope you enjoy our practical guide to resignations in this month's issue, and with no December issue we hope you have a nice break over the Christmas period and a safe and happy New Year.

And for those of you who do not have a shut down in December, we will be on hand to deal with any E&IR issues throughout!

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Blog outburst warranted dismissal

Fair Work Australia has found that an employee's 'highly offensive' blog and her refusal to modify or remove it was a valid reason for the termination of her employment.

In early 2009, the employee made a complaint against a manager, alleging sexual harassment. After lodging the formal complaint, the employee went on sick leave and did not return (except to participate in two meetings related to her complaint).

During the investigation of the complaint it was uncovered that:

- emails containing pornographic photographs were distributed by the employee herself;
- the employee had sent an email indicating she had some form of personal relationship with the manager;
- the employee had sent the manager an email contradicting her claim and expressing an appreciation for the constant flirting; and
- other staff refuted her version and suggested she had instigated some of the flirting.

Senior management found the allegations were not made out and she was asked to return to work. However, the following day, the employee wrote a blog on social-networking site 'MySpace' about the outcome of the investigation, stating that:

- her employer blamed 'the victim' and was attempting to 'bully' her out of the company;
- the investigation was 'corrupt' and 'sought to ensure that evidence was tampered with, was controlled and was biased'; and
- the company's values were 'absolute lies' and 'absolute mockeries of what they stood for'.

Despite the employer's request that she remove the blog, the employee did not remove the post or return to work.

Commissioner Thatcher said the blog was in effect 'an attack on the integrity of the management' of the company and that the criticism of corruption was of such a nature and degree that it could not simply be brushed aside. He rejected the employee's claim that her blog, which contained her photograph and name, was anonymous. The Commissioner accepted that although the employee may have been 'convinced' that she was sexually harassed (and therefore perhaps understandably had made a heat-of-the-moment decision to post such comments about her employer) – her refusal to remove or modify it constituted a valid reason for termination.

Resignation – some practical pointers for employers

An employee may end their employment by choice or by default. Termination by choice, or resignation, occurs where an employee gives



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notice to an employer of his or her intention to terminate the contract of employment. For the resignation to be effective, it must be a clear statement of the employee's intention to resign and must nominate a specific date as the last day of employment.

Things employers should know about resignation

Get it in writing

While an oral resignation may be effective to terminate the employment relationship (unless the contract of employment says otherwise), it is preferable to receive a resignation in writing.

You may accept the verbal resignation of the employee, however you should ask for confirmation in writing. A request for an employee's resignation in writing may help you to avoid any 'heat of the moment' exceptions later.



Intention to terminate

Resignation requires a deliberate act of the employee of submitting either an oral or written resignation. Unless you consider that the employment has been abandoned, you cannot presume the employee has resigned without evidence of a clear intention to do so.

Employers should exercise care in circumstances where the resignation occurs in a heated or stressful situation, or where the employee has been effectively 'squeezed out'.

Courts have found resignations to be ineffective where they arose from heated or stressful circumstances (eg in the midst of an argument). Therefore, employers should be wary of accepting resignations in these situations – rather you should give the employee sufficient time to calm down and then clarify with them whether or not they meant to resign.

In addition, resignations that are not voluntarily made will not be considered genuine. For example, an ultimatum issued by an employer to 'resign or be fired' will usually not be considered valid, even if the employee purports to resign. Other scenarios to be wary of include when an employee resigns because:

- the employer varied their employment duties, remuneration, conditions of work, and in some cases even their title or reporting lines. If such alterations could constitute a 'demotion', the employee may be able to claim constructive dismissal; or
- the employer, or manager of the employer, 'makes life miserable' for them. It is not sufficient if an employee is miserable in their employment, rather there must have been a deliberate act (or acts) by an employer that were intended to force an employee to

leave, such as levelling unfair criticisms against the employee or denigrating the employee.

Another issue to consider is: who was the real and effective initiator of the resignation? Courts view this as relevant.

Resignation is final

Once notice is given by the employee it cannot be unilaterally withdrawn by the employee. It may only be withdrawn by agreement with the employer.

Notice

The period of notice required is determined by any applicable industrial instrument or the individual's contract of employment. Most modern awards reflect the same notice periods contained in the *Fair Work Act 2009* (Cth) (**Act**) (without the employee having to provide additional notice based on the employee's age).

If there is no notice period in the contract of employment or industrial instrument, an employee must give 'reasonable notice' and this will vary depending on the circumstances.

The parties may then agree that:

- the employee works the notice period; or
- the employee finishes immediately and the employer pays the employee in lieu of notice (provided this option is found within the contract of employment OR the parties have agreed to this); or
- the employee works any lesser period of notice as determined



between them.

Termination payments

Employees are generally entitled to a notice payment. However, if an employer requires the employee to work the notice period and the employee refuses, the employer does not have to pay the employee for the period of notice.

Employees are also entitled to payment of accrued annual leave on termination under the National Employment Standards (**NES**) contained in the Act or in accordance with an applicable award.

For non-award employees, the NES provide for annual leave credits to be paid based on an employee's 'base rate of pay', which excludes incentive-based payments and bonuses, loadings, penalties, monetary allowances and the like.

Employees employed under a modern award are generally entitled to receive annual leave pay at their rate of ordinary pay, which is usually calculated on the employee's actual rate of pay. This may include allowances, loadings and penalties, and any other wages payable under the contract of employment (including any over award payment).

In some circumstances, the employee may also be entitled to a payment with respect to accrued long service leave.

And when it's all over... References

Employers are generally under no obligation to provide a reference or a statement of service (unless an industrial instrument specifies otherwise). If you do choose to give a reference or statement, you should be careful not to make any misleading statements about the employee to the prospective employer or provide a 'bad' character reference: either could potentially lead to a claim against you.

Checklist for employers

When an employee resigns it is advisable you:

1. Get a written notice of resignation (make sure the notice specifies the final date of employment).
2. Ensure the employee intends to resign and understands the consequences of resigning (this is especially important if the resignation was made under heated or stressful circumstances).
3. Check sufficient notice has been given (or that an earlier leaving date has been agreed to).
4. Send a copy of the notice to your HR/accounts department (ensuring all necessary authorities are notified if required; for

example, some authorities such as superannuation providers and workers' compensation insurers require formal declarations and forms).

5. Respond to the employee's resignation by completing a formal, written acknowledgement of their resignation – this acknowledgment should confirm their last day of employment and include any administrative details about termination payments.
6. Ensure termination payments are accurate and timely.

What is required of employers can vary depending on the provisions of any applicable modern award, enterprise agreement or contract of employment, which may state notice requirements and termination payment entitlements. You need to be aware of the requirements under these instruments to ensure you fulfil your legal and contractual obligations

Enterprise agreement making: limits on cashing out annual leave

'Cashing out' occurs where an employee elects to receive payment for a period of annual leave accrued without actually taking the time off work. The *Fair Work Act 2009* (Cth) (**Act**) provides that an enterprise agreement may include terms providing for the cashing out of annual leave (so long as the employee has a minimum entitlement of four weeks' accrued leave remaining after the cashing out). Despite this, Fair Work Australia (**FWA**) has recently rejected three agreements that conditionally permitted the cashing out of annual leave.

Commissioner John Ryan held the cashing out terms of an enterprise agreement did not sit outside of the agreement for the purpose of the



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'Better Off Overall Test' (**BOOT**). He said FWA does not have to simply approve agreements that meet the minimum statutory requirements for the process of cashing out annual leave under the Act. He thought the lack of limits on making and granting requests for cashing out meant the agreements were not about providing real and tangible benefits to employees which enhanced their leave entitlements, but rather they were about reducing leave accruals to the extent permitted by the Act.

Passing the BOOT

Commissioner Ryan rejected arguments that if an employee freely chose to cash out annual leave and they retained a four-week accumulation, this constituted a benefit for the purpose of assessing the agreement's terms against the BOOT. FWA was required to consider the overall effect of the agreement on the employees covered by the agreement.

Commissioner Ryan found that the cashing out provision 'as a general proposition' operated to disadvantage employees. He acknowledged that

the very real practical outcome of the operation of the simple cashing out of leave provisions was that the employee could be employed for the entire life of the agreement without ever having any paid annual leave. Thus, although cashing out annual leave could provide a short term benefit to the employee, this would likely come at a long term cost. He noted that, without restrictions, employees could effectively cash out leave so as to never have a real and effective break from work.

Enterprise agreement making can be complex. One agreement with a cashing out provision may pass the BOOT, while another may fail. Each agreement is unique to the situation of the employer, employees and workplace. What seems to be apparent is that FWA will not pass an agreement which contains a cashing out provision without more than the statutory limits. More will be required. This may include such things as mandatory shut down periods that ensure employees take time off, or managing leave so that employees do not have excessive amounts of unused accrued annual leave.

For employers

In deciding whether to include a cashing out provision, employers need to ensure there is a real and tangible benefit to the employee – resulting in the employee being better off overall. Any attempt to limit the amount of leave taken will not on its own be successful.

As this case demonstrates, enterprise agreements can be complex documents with various restrictions imposed by the Act and case law. We recommend you seek legal advice before drafting an EA that will govern your current and future employees' employment.

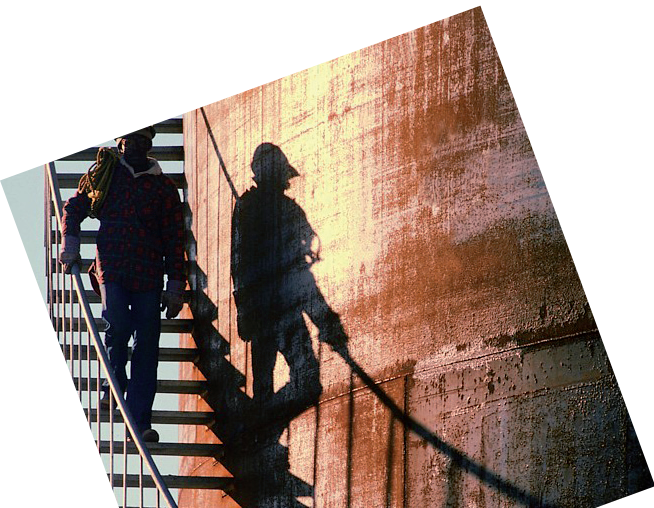
The Cornwall's E&IR team is experienced and has helped numerous companies have their EAs approved by FWA.

FWA Annual Report released

The first annual report of Fair Work Australia (**FWA**) has been released.

We have summarised some of the main statistics relating to the work of the new body below:

- Termination of employment claims have more than doubled in the last two years under the new federal workplace system, with 13,054 applications being made during the period.
- The vast majority of termination claims were finalised at, or prior to, conciliation (11,823 or 93%).
 - Of the termination of employment applications determined by FWA (or the AIRC prior to the establishment of FWA in this role), 67 were dismissed on their merits, 111 for being out of time, 228 for lack of jurisdiction, and 11 for being frivolous, vexatious or lacking in substance.
- Ninety-two per cent of conciliations were conducted by telephone (with an 81% settlement rate).
- The average time elapsed between lodging unfair dismissal applications to finalising conciliations was 24 days.
- Dispute notifications (including notifications under dispute-settling procedures in agreements) increased by 62% to 1,445. One-third of these related to bargaining.
- FWA suspended or terminated industrial action 28 times during the year, this number being slightly higher than it was in 2008-



2009 but significantly lower than the 220 recorded by the AIRC in 2007-08.

- There were 254 general protections disputes not involving dismissal; because this was a completely new area, it will be interesting to see whether these numbers are typical in the future.
- Over 7,400 applications were lodged for approval of an enterprise agreement.
- The average time taken for agreement approval was 32 days.
- FWA's helpline received 147,012 inquiries during the period, up by 247% from the previous reporting period (for the AIRC). The majority of calls logged were from employees.

What is clear from the above statistics is that dispute resolution continues to be a very important part of FWA's role. It will be interesting to see whether these trends continue.

Possible imprisonment for work bullies

Premier John Brumby has floated the idea that, if re-elected, he will request the Law Reform Commission to investigate stronger penalties for work bullies.

Workplace bullying became a headline issue after the suicide death of Brodie Panlock and subsequent action against her employer and the bullies.

However, law reform currently being undertaken nationally may address Mr Brumby's concerns.

The new Work Health and Safety Bill (**Bill**) provides imprisonment terms of up to five years for individuals (including workers) who breach a health and safety duty involving recklessness and a risk of death or serious illness or injury. Furthermore, individuals may face a fine of up to \$300,000 in addition to a prison term.

No imprisonment penalties will be available against workers who are involved in a breach of a health and safety duty which does not involve recklessness.

Maximum penalties prescribed by the Bill are shown in the table below.

Category	Involving	Maximum penalty for an individual	Maximum penalty for an officer or person conducting a business or undertaking	Maximum penalty for a body corporate
1	Recklessness and risk of death or serious injury/illness	\$300,000 or 5 years' imprisonment or both	\$600,000 or 5 years' imprisonment or both	\$3m
2	Risk of death or serious injury/illness	\$150,000	\$300,000	\$1.5m
3	A failure to comply with a safety duty but without the aggravating factors of recklessness or high level risk	\$50,000	\$100,000	\$500,000