# NEWSLETTER

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APRIL 2011

# Employment & Industrial Relations Newsletter

## Cornwalls' E&IR Team News

Congratulations to Jane O'Brien, who was admitted to practise law on 27 April 2011. Jane and two fellow Cornwalls' employees attended the Supreme Court for the formal Admission Ceremony and to sign the Roll.

In addition, this month E&IR Senior Associate Clare Hudson celebrates four years with the firm. Well done Clare!

In other news, Virginia Sadler finishes up with us this month, having accepted a role as Legal Counsel within the HR Advisory Team of the Coles Group (part of Wesfarmers). We would like to take this opportunity to thank Virginia for all her hard work over the past few years and wish her success in the future.

*Click on image to view Tracey's profile

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## Workplace bullying under new laws

Earlier this month, the *Crimes Amendment (Bullying) Bill 2011* (**Bill**) was introduced into parliament. Under the proposed legislation, workplace bullying will be considered stalking and will carry a maximum penalty of 10 years' imprisonment.

### Brodie's case

The changes in the law were prompted by the suicide death of 19-year-old waitress Brodie Panlock, after humiliating and relentless bullying by her co-workers.

The company that owned the café which Ms Panlock worked at, its sole director and three employees at the café have all subsequently been convicted and fined for breaches of the *Occupational Health and Safety Act 2004*. The fines totalled $335,000.

### Changes to the law

The proposed legislation, if passed, will add workplace bullying to the *Crimes Act 1958*. The purpose of the Bill is to extend the offence of stalking to apply to situations of workplace bullying. Parliament has extended the range of behaviours covered under the stalking definition so that the provisions will cover behaviour that is often described as bullying.

If implemented, the legislation will:

- extend the definition of stalking under the *Crimes Act 1958* to include threats, abusive and offensive words, or acts, that form part of the bullying course of conduct;
- broaden the definition of conduct that could constitute stalking to include any conduct that could reasonably be expected to cause the victim to engage in self-harm;
- amend the necessary fault element for stalking to include the intention to cause a person to engage in self-harm; and
- include a definition of mental harm that includes psychological harm and suicidal thoughts.

As part of the proposed changes, intervention orders will also become more readily available to bullying victims.

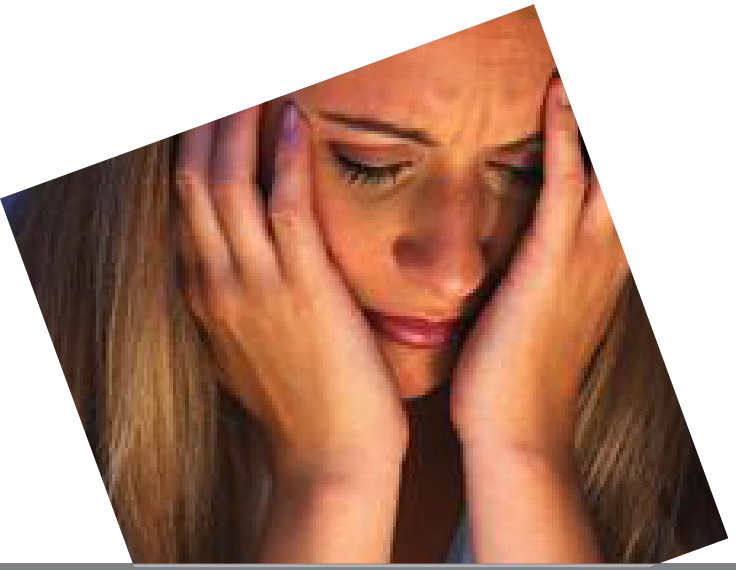
### Employer obligations

The proposed changes to the *Crimes Act 1958* demonstrate that employers need to maximise efforts to prevent bullying in the


workplace. Employers should ensure their policies and procedures for dealing with bullying complaints are current and available to their employees.

The employer in Brodie Panlock's case allowed three work colleagues to continue their malicious bullying. The Magistrate commented during the hearing that the bullying was of the 'worst category, yet nothing was done to stop it'.

Employers must ensure that they are creating an environment where workplace bullying will not be tolerated. However, employers need to tread carefully in this area, because termination of accused bullies may give rise to unfair dismissal claims if they are not handled properly. We recommend you seek advice before dismissing an employee accused of bullying.



## Employer efforts 'rewarded' in redundancy case

Fair Work Australia (**FWA**) has recently rewarded the efforts of an employer for their role in finding six redundant employees alternative employment. The reward came as a 50% reduction in the severance payout entitlements of the employees.

In September 2010, transport employer KGT Freight Management decided it was no longer viable to continue a contract with DHL and sought to make redundant the six employees required to fulfil that contract. However, the employees were reengaged shortly afterwards by the companies that took over the contract with DHL.

KGT applied to FWA to have the amount of redundancy payable reduced on the basis that it had obtained other acceptable employment for the employees.

FWA found that KGT's Operations Manager had met with the Transport Manager of DHL on several occasions and the primary reason for these meetings was to ensure that the employees were all given new jobs with DHL, or alternatively its contractors. The evidence suggested that KGT had obtained acceptable alternative employment for the employees because it had encouraged DHL to employ the six employees, which DHL then communicated (on KGT's behalf) to the two contractors.

Commissioner Williams commented that, 'it would be unhelpful to future employees who may be made redundant to discourage employers from taking positive action to obtain acceptable alternative employment by setting unreasonably high thresholds of effort to be demonstrated before an employer is rewarded with the possible benefits available under section 120'.

However, he also recognised that there had been some detriment suffered by the employees, namely that the employees' entitlements and prior service with KGT would not be transferred over to their new employer. Accordingly, FWA decided it would be appropriate that the amount of redundancy be reduced by 50%.

### Summary for employers

- Under s120 of the *Fair Work Act 2009* (Cth), employers may apply to FWA to vary the amount of redundancy payable if the employer 'obtains other acceptable employment for the employee'.
- The term 'obtain' in this context, is not intended to impose an absolute test on the employer's ability to 'obtain' alternative employment, but rather, refers to an action that causes alternative employment to become available to the redundant employee – in other words, the employer must be a strong moving force towards the creation of the available opportunity (citing *Derole Nominees Pty Ltd and The Australian Chamber of Manufacturers* (1990)).
- This case makes it clear that the actions employers must take to be considered a 'strong moving force' towards the creation of acceptable alternative employment, will depend on the circumstances of each case (however, even an indirect role can be sufficient).

## Two decisions on the high income threshold

The *Fair Work Act 2009 (Cth)* (**Act**) provides that employees who earn over the high income threshold are generally prohibited from making an unfair dismissal claim against an employer.

However, under the Act an employee who earns in excess of the threshold will not be precluded from lodging an unfair dismissal claim if that employee is covered by an award or an enterprise agreement.

Fair Work Australia (**FWA**) has twice ruled on these provisions during the past month, first on calculating the relevant threshold amount and second on whether a manager was an award employee in order to enliven the Act's protection.

### Performance bonus and overtime not included (*Mallows v Touchbase Asia Pacific Pty Ltd t/a Touchbase Asia Pacific* [2011] FWA 1695)

In this case, FWA permitted an employee to proceed with an unfair dismissal claim, despite the fact that her overall remuneration was above the $113,800 high income threshold.

Justice Boulton held that it was 'clear' the combined total of the employee's annual salary and car allowance were below the threshold and that her performance bonus and overtime payments (which tipped her over the edge) would not be included, because they were not payments for which the amount could be 'determined in advance'.

Understanding how to calculate an employee's 'earnings' is essential in assessing whether a former employee can bring an unfair dismissal application against your company. Payments where the amount cannot be determined in advance are not included in the calculation. This decision confirms that such payments include bonuses and overtime (except guaranteed overtime).

### Associate manager not covered by Award (*Farland v Canon Information Systems Research Australia Pty Ltd t/a CiSRA* [2011] FWA 1913)

In this case, both parties accepted that the employee's package exceeded the remuneration cap, but asked FWA to determine whether he was nonetheless able to proceed with an unfair dismissal application because the manager was covered by the Professional Employees Award 2010.

Commissioner McKenna found that although there was evidence indicating the employee's day-to-day role was concerned primarily with undertaking technically focused work, which could fall under the award's classifications, it was equally true that the employee had responsibilities and functions which were exercisable exclusively by the company's managers and not non-managerial employees. The Commissioner acknowledged that while not any one matter, in and of itself, demonstrably leads to the conclusion that the applicant was a managerial employee, the evidence and submissions, taken collectively, lead her to the opinion that the employee's role was managerial not just in name, but also in substance.

Consequently, FWA dismissed the application, finding the manager was not covered by the award, and this (along with his level of remuneration) meant he was not protected from unfair dismissal.

Employee titles and remuneration may be relevant in determining the issue of whether the employee is a managerial employee. However they are not, without more, determinative of whether an employee is an award-covered employee rather than a managerial employee who is not covered by the award. These matters must be considered in conjunction with other matters (such as the employee's position within the organisation's structure, their role, functions and managerial-type interactions).

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## Workplace Relations Highlights (Watch this Space)

An important federal court ruling confirms that employees who are victims of adverse action can be compensated for hurt and humiliation (*Australian Licensed Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333). The court found it had the power to make the award and ordered that the worker receive $7,500 for hurt and humiliation (as part of an $85,000 compensation award).

Fast food chain Hungry Jack's has been ordered to pay a penalty of $100,500 for underpaying hundreds of Tasmanian workers, which was 30% of the maximum penalty for the offences.

A 75-year-old Sydney bus driver has been awarded $25,323 after his complaint of age discrimination was substantiated by the NSW Administrative Decisions Tribunal. The Tribunal was satisfied that the actions taken by the employer, including the worker's dismissal, were not prompted by concerns for the ageing employee's performance, but by the perception that he was 'getting too old'. The company was also ordered to provide the worker with a written apology for the acts of discrimination (*Talbot v Sperling & Investments Pty Ltd (formerly Mount 'N' Beach Safaris Pty Ltd)* [2011] NSWADT 64].

A British teacher on a section 457 visa was found to have been unjustly fired for use of the f-word in teaching English as a second language to adults at a college in Sydney (*Webster v Mercury Colleges Pty Ltd* [2011] FWA 1807). FWA ruled that the dismissal was unreasonable, considering the age of the students involved in the exercise to 'educate students in appropriate and inappropriate usage' of the word in wider society, and the fact that the lesson was not a significant proportion of the lessons taught by the teacher (one 20 minute lesson out of a 20 hour week).

A nurse who was dismissed after she altered her WorkCover medical certificate has been reinstated. FWA said her conduct warranted no more than a warning and not summary dismissal for fraud and corruption. Deputy President Sams said the nurse's explanation was plausible and highlighted the importance of establishing the true position (ie procedural fairness) (*Hammond v Australian Red Cross Blood Service* [2011] FWA 1346).

A government employee has been stripped of his worker's compensation following a ruling by the Supreme Court of Tasmania (*State of Tasmania v Clifford* [2011] TASSC 10). The worker was suspected of supplying pornographic DVDs to detainees at a youth detention centre, in breach of the State Service Code of Conduct. However, before he was able to present for an interview concerning the allegations, he presented a medical certificate for incapacitation arising from work-related stress, and claimed weekly payments of compensation. Justice Blow rejected the premise that an absence of direct evidence of the worker's alleged misconduct made the investigation 'unreasonable'.

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