NEWSLETTER

cornwallstodart
ENHANCING SUCCESS

MAY 2011

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

This month we welcome two new trainees, Sally Bast and Josh Gurgiel, to the E&IR team. Sally completed a Bachelor of Laws/Bachelor of Arts at Monash University and undertook a seasonal clerkship with Cornwalls back in 2008, and has reached her final rotation before admission.

Josh completed a double degree in Commerce (Marketing)/Law at Monash University in 2009, before embarking on a 9-month backpacking trip around Europe and the United States. Josh undertook a seasonal clerkship at Cornwall Stodart in December 2009 and is delighted to have joined the E&IR team as part of his traineeship.

We are also pleased to have Tracey O'Neill providing consulting services for us. Tracey is a highly experienced lawyer who has practised in E&IR for over 20 years, working in both England and Australia. Tracey's expertise includes advising on all areas of E&IR law, litigation (including discrimination and harassment claims), and workplace policies and procedures. She is also skilled at conducting training and seminars for clients on various E&IR topics.

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*Click on image to view Tracey's profile

Occupational health and safety legislation update

It would seem as though it is one step forward, two steps back for the model Work Health and Safety (**WHS**) legislation. South Australia (having been the first state to attempt to introduce the harmonised laws) has shelved its *WHS Bill 2011*, while New South Wales (having been slow on the uptake) is now barrelling ahead.

On 5 May 2011, the new O'Farrell Coalition Government introduced into the NSW Parliament the *WHS Bill 2011* which, when enacted, will replace the *Occupational Health and Safety Act 2000* (NSW) (**OHS Act**) from 1 January 2012. However, surprisingly the government has also introduced the *Occupational Health and Safety Amendment Bill 2011* (**OHS Amendment Bill**) to amend the current OHS Act, so as to enact what are considered to be the 'core' changes contained in the model legislation, including:

(a) modifying the primary duties that require the duty holder (eg the employer) to 'ensure' the safety, health and welfare of employees and others affected by their operations, to duties that require the duty holder to ensure these aspects 'so far as is reasonably practicable';

(b) changing the reverse onus of proof – the obligation will now be on the prosecutor to prove that the defendant did not take all reasonable steps;

(c) replacing the current deeming provision for officers' liability – the current OHS legislation will now include the proactive duty for officers to exercise due diligence; and

(d) removing the union's right to prosecute.

The government's intention is that changes (a) – (c) will take effect from the date the amending Act is enacted (which is clearly intended to be before 1 January 2012), and (d) will take effect on the day the Bill was introduced (ie 5 May 2011).

Employers in NSW should be aware that they will probably be subject to the effects of the harmonised legislation much sooner than anticipated, and should be considering how these changes will need to be accommodated.

Unsurprisingly the introduced changes have sparked outrage from the unions. Both in SA, where unions are criticising the government for its failure to get the Bill passed, and in NSW for passing it too quickly (and denying the unions the opportunity to prosecute for OHS breaches).

Parliament passes amendments to Sex Discrimination Act

The lower house voted in favour of the *Sex and Age Discrimination Legislation Amendment Bill 2010* (**Bill**) on Tuesday (24 May), giving life to the federal government's amendments to the Sex Discrimination Act. The new legislation extends protection from discrimination for family responsibilities to both women and men in all areas of work; provides greater protection from sexual harassment for workers and students; ensures that protections from sex discrimination apply equally to women and men; and establishes breastfeeding as a separate ground of discrimination. It also creates the position of Age Discrimination Commissioner in the Australian Human Rights Commission, to commence in July. The Bill initially included amendments to enhance protections against indirect discrimination on family responsibility grounds, however the opposition successfully opposed these amendments in the senate and ultimately had them removed from the new legislation.

Administration of paid parental leave

With just four months having passed in the scheme and over 40,000 paid parental leave (**PPL**) applications already made, employers should be preparing to administer the PPL payments from 1 July 2011.

Employers will not be required to determine who is eligible for parental leave pay. However, there are a number of employer responsibilities that you should be aware of. Once you are notified that you have an employee who is eligible, you will be required to:

- provide your bank account details and your employee's usual pay cycle details to Centrelink;
- provide the parental leave pay to the relevant employee as part of their usual pay cycle and for the period advised by Centrelink (when the funds have been transferred to your nominated bank account);
- withhold tax from parental leave pay under the usual PAYG withholding arrangements;
- include payment details in the total amounts on your employee's annual and part-year payment summary;
- provide a record of the payment to the employee (usually a payslip) no later than 1 working day after the pay has been transferred; and
- keep written financial records of receipt of funds and of the pay provided to your employee (for a minimum of seven years).

Employers may also consider registering for an AUSkey and with the Centrelink Business Online Services in order to receive letters and payment advices online.

There is a very good chance that at some point you will be required to administer the PPL scheme. You can prepare yourself for this upcoming change by ensuring you are aware of your obligations. The E&IR team can provide you with further advice about PPL.

Changing employee entitlements

In the recent case of *Aiezza v Victorian Workcover Authority*, Victorian Deputy Chief Magistrate Peter Lauristen awarded a Victorian Workcover Authority occupational hygienist almost $30,000 in damages after she was stripped of her entitlement to private use of a company car. Since 2000, the authority had supplied the employee with a vehicle that could be used for both personal and work related purposes, under the authority's 'Tools of the Trade' (**TOT**) guidelines. Over the course of her entitlement, the employee had passed up several professionally satisfying employment opportunities due to the financial attraction of the TOT vehicle arrangement. In April 2010, she was informed by the employer that she was no longer eligible for such an entitlement and consequently was forced to purchase her own vehicle.

The authority claimed that the employee had fallen short of the minimum level of work related use dictated by the TOT guidelines, and therefore was no longer entitled to use the vehicle. The court found that there had been 'widespread noncompliance with the...rule' over the course of the entitlement period, and both the employer and the employee continued to act against the wording of the original contract. Therefore, the hygienist could rely on 'estoppel by convention', because

she was under the assumption that 'the arrangement would persist for as long as she continued in that role or, at least, a role requiring the use of a car to fulfil her work functions'. The Magistrate ruled that to terminate such a private use arrangement would 'do injustice to [the hygienist's] conscious denial of employment opportunities', and ordered the Victorian Workcover Authority to compensate the employee for vehicle running costs until August 2017 – six years after the end of her last vehicle's three years of expected service.

Employers should be careful to monitor the specific entitlements offered to employees to ensure the conditions upon which the agreements are based are complied with. A failure to adequately supervise a benefit offered can result in the creation of an estoppel by convention if the employee has relied on that representation to their detriment. Unless the agreement specifically states otherwise, a unilateral revocation of an employee's entitlement could amount to a breach of such an agreement. Accordingly, employers should pay careful attention to the implementation of employee entitlements from the outset and regularly communicate their expectations to the employees in order to safeguard themselves from culpability should such entitlements warrant removal.

Managing employees on sick leave

How to manage an employee absent on sick leave can be a thorny issue for employers. A careful balance must be maintained between the health of the employee and the business' need to know when the employee will return to work.

The Victorian Supreme Court of Appeal recently examined this issue in a case that should be heeded by all employers. The court upheld a decision to award compensation to a teacher despite finding:

(a) her injury (deterioration of a pre-existing psychiatric condition) was the result of employment and significant non-employment related factors; and

(b) the employer did not deliberately intend to bully or harass the teacher when it contacted her to enquire about her health. It was instead the employee's perception of the contact that was important, altered as it was by her 'paranoid view of the world'.

Facts of the case

When Ms Askwith was employed by St Mary's School (**School**), she had a long history of psychiatric ill health. Her psychiatric condition worsened while employed by the School, resulting in time off work and her eventual inability to work. She claimed compensation through WorkCover on the basis that her employment was a significant contributing factor to the deterioration of her mental health, which resulted in injury in the course of her employment.

What did the School do that caused injury to this teacher? The court found there was a 'factual basis' for her perception that the School:

- made invasive and threatening telephone calls to her while on sick leave;
- made intrusive enquiries into the state of her physical health;
- put her under unfair strain and pressure to finalise reports on the last day of term;
- unreasonably interfered with her attendances on her terminally ill father; and
- engaged in various other minor matters that caused her stress when she was unwell.

It is important to remember that an employer must take its employees as it finds them. In this case it was irrelevant that the above factors would not have resulted in injury to a stable and healthy employee. It was also irrelevant that, as the judge noted, the '...school's behaviour from a business point of view was perfectly reasonable'. The relevant factor was that this teacher's peculiar vulnerabilities meant the dealings she had with the School were stressful for her and she perceived that she was being bullied and harassed.

The School denied liability, arguing her condition was the result of other non work factors, such as her personality, physical illnesses and recent death of her father. While the trial judge found these factors were significant, the employment was also found to be a significant contributing factor to the worsening of her condition. Accordingly, Ms Askwith was entitled to WorkCover compensation.

Practical tips:

1. Beware of applying a 'one method fits all' approach in handling and contacting employees absent on sick leave.
2. If you are aware of the type of illness an employee is suffering from – take this into account in your contact with the employee.
3. If you are struggling to understand what is wrong with the employee – ask the employee to consent to your contacting his/her doctors directly or consider whether you should organise your own assessment of the employee's condition.
4. Seek legal advice. Management of employees on sick leave is an issue that arises regularly and the consequences of getting it wrong can be time consuming and expensive.

('*Managing employees on sick leave*' authored by **Clare Hudson, Cornwall Stodart**)

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Workplace Relations Highlights (Watch this Space)

The controversy continues between Bendigo TAFE and Barclay (reported by CS in 'Employer beware: the need to justify action against union-associated employees' and 'Employer in breach of adverse action provisions for taking prejudicial action against "unionised" employee'). Bendigo TAFE has applied to the High Court for special leave to appeal the Full Federal Court's ruling, which deemed that the TAFE had taken adverse action against a unionised employee when it disciplined him over an email he had sent to union members at the workplace. The court is yet to set down a hearing date.

Comcare has released guidelines and tools for employers and workers as part of its anti-bullying campaign. The materials are aimed at preventing workplace bullying. You can find more information at Comcare's website.

The Queensland Court of Appeal has overturned a ruling relating to an employer's duty of care to prevent sexual molestation of an employee. The victim, Ms Sapwell, was employed as an optometry technician and receptionist within an optometry practice, when an elderly man sexually assaulted her in a small workroom at the back of the practice. At first instance, the primary judge accepted that the employer had breached its duty of care to exclude customers from a work space not visible to the general public, and awarded damages in the amount of $390,558.82. The Court of Appeal unanimously overturned the decision, holding that the primary judge had used hindsight in order to formulate the duty imposed on the employer, and there was no evidence to warrant the conclusion that such an attack would occur except by way of an entirely random act of violence. The court commented on the insufficiency of any potential practical action that could have been taken to prevent such an attack, and ruled that there was no evidence that any breach of duty caused the damage.