NEWSLETTER

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Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

Next month the E&IR team will be saying goodbye to trainee Josh Gurgiel, who will be rotating into our Commercial Property and Banking & Finance teams, and E&IR will be welcoming Nick Amore.

This month both Jane O'Brien and Clare Hudson celebrated their birthdays, and Sally Bast celebrated one year with the firm. Happy birthday and well done ladies! Next month Sally will be attending the Supreme Court of Victoria to be admitted to practise law; from all the team – good luck and congratulations on all your hard work!

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Incompetent handling of harassment claim costs company

A worker has been awarded workers' compensation for stress after the Victorian County Court found his employer's handling of harassment allegations was dilatory and inappropriate. The worker alleged there were several episodes during the course of his employment that he found stressful, two of which are of particular interest from an employment perspective.

The conflict of interest incident

The employee, a credit control manager, was questioned in late 2004 regarding attempts he had made to help a struggling client by referring him to a 'multi-level marketing company' the employee was involved with. The employer later developed a conflict-of-interest policy in January 2005 and issued the employee with a final written warning. The court found the employer's actions to be unreasonable because they effectively disciplined the employee for breaching a company policy that did not exist at the time of the alleged violation.

The sexual harassment allegations

Further stressful events for the employee were the allegations of sexual harassment made against him and the consequential investigation. Despite the employer's own policies stating that complaints of harassment were to be resolved as close as possible to when they occurred, the employee was called upon in December 2005 to face a complaint of sexual harassment alleged to have occurred in March 2005. Hence he was questioned some nine months after the alleged event.

The employer concluded that he had likely harassed the female employees, notwithstanding there was little evidence for such a conclusion. The employee was later confronted with allegations of harassment made by several other female staff, and the employer told him it 'had formed the view' that he had engaged in a 'pattern of behaviour…consisting of uninvited and unwanted physical contact with female staff members'.

The employee was eventually dismissed after allegations of stalking were made against him. The company terminated his employment before the conclusion of an independent investigation.

Judge Parrish found these actions were again unreasonable because:

- the employer had acted contrarily to its own policy;
- there was no other witness to the alleged harassment at the Christmas party, and the partner of the employee asserted that no such action had occurred; and
- the employer confronted the employee about further allegations of harassment in a letter to the employee, advising that each of the allegations was found 'more likely than not' to have occurred, and the employer acted with inappropriateness in having formed a view about such allegations.

For employers

In determining that the employer's conduct was unreasonable in each of the above instances, the court awarded the employee workers' compensation for stress.

This case highlights the potential minefield that can face employers when confronted with allegations that an employee has been sexually harassed by his or her workmates. Ensuring that an appropriate policy is in place and following the letter of that policy is an employer's best defence in such situations.

The Skype's the limit

Background

In a landmark victory for 'social networkers' across Australia, a landscape architect was recently awarded $171 (less applicable tax) by Fair Work Australia (**FWA**) for an unfair dismissal action brought against his former employer. The worker was terminated one day before he was scheduled to finish working for the company, having tendered his resignation three weeks earlier.

The employee claimed he was unfairly dismissed by his employer, who terminated his employment based on allegations of 'theft of hundreds, if not thousands of dollars worth of paid time' through his excessive use of the company's internet for personal reasons during work hours.

The company claimed the employee had recorded over 3000 transactions on an internet chat line (not devoted to landscaping) in the three months leading up to the termination, and this had significantly affected his productivity and amounted to conduct that justified early termination. However, no evidence of such conduct could be provided by the company at the hearing.

The decision

It was found that the employer had failed to discuss the allegations with the employee prior to issuing him with a letter of early termination, and had not provided him with an opportunity to respond to these accusations. FWA found that the employer's conduct amounted to a 'harsh, unjust or unreasonable' termination of the employee's employment.

FWA did not rule out the possibility that excessive personal internet use might be grounds for dismissal.

For employers

This decision does not give employees an unmitigated green light to 'Facebook', 'Skype', 'Tweet', 'Chat' or indulge in any other internet-related verbs. Any conduct that may be seen to waste employers' resources to the point of 'theft' should not be tolerated by employers and should be disciplined accordingly. However, as emphasised by FWA in this instance, such allegations must be supported by adequate evidence.

The full court in the federal court decision of *Edwards v Giudice* [1999] held that if a 'termination of employment is based on misconduct of the employee it must be determined that the conduct occurred'. Employers should not make damning accusations or terminate a person's employment unless they have sufficient means by which to support the alleged grievances.

Where an employee's behaviour is seen to warrant termination, an employer should still consult the offender and offer them an opportunity to respond to the allegations laid upon them. Of course, consulting should be done within reason; if an employee is found to be selling counterfeit Japanese Yen from within the business premises, an employer should not be expected to sit them down for a cup of tea and a casual chat. Having said this, in the FWA case of *Said v Jokar* [2011], Ashbury C stated that even if an employer has

reasonable grounds for believing that an employee has engaged in serious misconduct worthy of termination without warning, the matter may still require some discussion with the employee, 'particularly where the facts in question...are capable of some other explanation'.

Conclusion

The employer may have avoided culpability in this matter had he offered the applicant an adequate warning and personally discussed the issues surrounding his employment. It is advisable for employers to have written policies in place regarding the use of the employer's IT systems and setting out the employer's expectations regarding personal use of these systems. In this case, if the employer had have had a written policy restricting the personal use of its IT systems and could demonstrate that the employee had breached that policy, the employer would have been much better placed to successfully defend the unfair dismissal claim.

Hence, this decision serves as a reminder that employers should take the necessary steps to comply with all the requirements of s387 of the *Fair Work Act 2009* – including, for example, notifying the employee of the reason for the dismissal, giving the employee an opportunity to respond (where appropriate), and warning the employee of possible dismissal due to unsatisfactory performance. Following these steps will help ensure that a dismissal cannot be deemed as 'harsh, unjust or unreasonable'.

While the employee was not able to attend the hearing to celebrate this monumental triumph over his employer, his sister appeared on his behalf via Skype. One assumes she will pass on to him whatever remains of the $171 after tax, thereby ensuring that justice has prevailed.

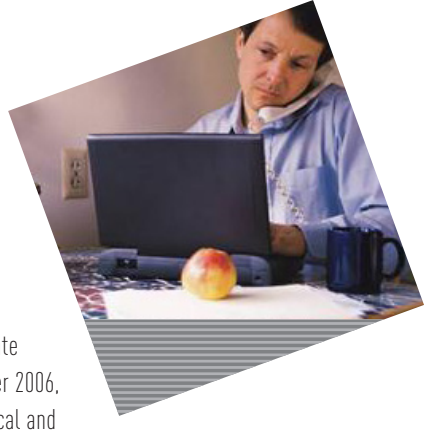
There's no (work)place like home

Increases in working from home

If 'home is where the heart is', then employers need to start monitoring their workers' cardiac health with greater scrutiny. In today's globalised business environment, an increasing number of large organisations are choosing to utilise home-based work areas to lower their overheads and provide for employees who prefer to work from the comfort of their own homes. However, this arrangement can have adverse consequences for employers.

Recent case – injuries sustained at home

In a recent hearing in the Administrative Appeals Tribunal (**AAT**), a Telstra employee successfully obtained financial compensation from her employer for injuries sustained while working at her home office in Brisbane.



The employee fell down the internal stairs of her townhouse on two separate occasions between August and October 2006, and consequently suffered both physical and psychological damage. The main issue in contention in the appeal was whether the injuries arose out of (or in the course of) her employment with Telstra.

The decision

The AAT held that these injuries were sustained while she was performing work-related duties, and ordered Telstra to pay for her medical costs and expenses, as well as compensation for her loss of income.

In reaching its decision, the AAT cited the High Court decision of *Hatzimanolis v ANI Corp Ltd* [1992], stating that 'an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude within an overall period or episode of work, [rather] than when it has been sustained in the interval between two discrete periods of work'. Both falls suffered by the worker were seen to have occurred during 'intervals' that formed part of continuous work periods, and therefore constituted 'injuries' within the meaning of s4(1) of the *Safety, Rehabilitation and Compensation Act 1988*.

For employers

This decision should raise some alarm bells for employers. It indicates that, while some employees might perform their work tasks from the privacy of their own homes, their health and safety is still the responsibility of their employer.

The *Occupational Health and Safety Act 2004* states in section 21(1) that 'an employer must, so far as is reasonably practicable, provide and maintain...a working environment that is safe and without risks to health'. While the High Court in *Hatzimanolis v ANI Corp Ltd* acknowledged that employers should not be held accountable for injuries sustained by employees who choose to slide down staircase banisters on roller-skates while drinking boiling hot tea and carrying scissors (albeit not quite in those words), it confirmed that, in the absence of such gross misconduct, it is the employer's duty to ensure the home office is a safe working environment.

Employers cannot protect their employees against every possible danger inherent in an office, but they can implement certain measures to maximise their safety. For example:

- conducting thorough inspections of their employees' home workstations to ensure these areas comply with occupational health and safety standards; and
- conducting safety training to educate employees on the dangers inherent in their specific work environments.

By exercising the appropriate caution and managerial prudency, employers can help ensure that employees who work from home remain protected from harm. After all, they might be out of sight, but they should not be out of mind!

Workplace Relations Highlights (Watch this Space)

The Federal Magistrates Court has declined to hear an adverse action claim because the dispute the court was asked to resolve was broader than the one initially taken to Fair Work Australia (**FWA**) for conciliation. The court said the union bringing the claim needed to return to FWA to specifically deal with the additional issues in dispute, before the claim could be escalated [*CEPU v Active Tree Services Pty Ltd* [2011] FMCA 535].

The Federal Magistrates Court has issued a costs order against an employer and supervisor held to have breached the *Racial Discrimination Act 1975* when the supervisor told a 'weak and unfunny' racist joke in an Aboriginal worker's presence. The company and the supervisor were ordered to pay half the labour hire worker's court costs in addition to the $5000 damages they were previously ordered to pay. However, the worker has to pay the costs of three employees he made unsuccessful claims against, after he failed to prove there was systematic discrimination in the workplace [*Trapman v Sydney Water Corporation & Ors (No 2)* [2011] FMCA 533].

The Fair Work Ombudsman (**FWO**) has been criticised for its heavy-handed approach to a small business owner accused of failing to provide payslips for a 6-week period. The breach took place within a month of the *Fair Work Act 2009* (**Act**) coming into force and FM Lloyd Jones said it was not surprising that a small, under resourced owner-operator business was not fully conversant with the provisions of the Act. FM Lloyd Jones said the appropriate approach would have been to provide suggestions on how the business' systems could be improved to meet the obligations under the Act [*FWO v Ballina Island Resort Pty Ltd & Anor* [2011] FMCA 500].

Queensland's State Industrial Relations Minister has hinted that Queensland may follow in Victoria's footsteps and introduce gaol terms for workplace bullies. A special reference group has been set up to examine how workplace bullying is being dealt with in other parts of Australia and internationally. No legislation has as yet been drafted but, if it comes to pass, employers in this jurisdiction should keep themselves informed of how this impacts their workplace.

FWA has reinstated a truck driver who was dismissed after receiving three warnings for alleged unsafe driving and site safety breaches. The warnings were issued following his refusal to complete safety competency tests and paperwork while acting as a delegate of the TWU. The Commissioner took into account the driver's brief but controversial history as a delegate, his prior good driving record, the doubts surrounding his alleged speeding and the driver's remorse. The Commissioner said he would not 'wish by this decision to be taken to in any way be undermining the [company's] approach to safety issues at work', which he regarded as sensible and appropriate.