NEWSLETTER

cornwallstodart
ENHANCING SUCCESS

SEPTEMBER 2011

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

This month we welcomed trainee Nick Amore into the team. Nick completed a Law/Commerce degree at Deakin University and commenced his traineeship with Cornwalls in February. Nick enjoys motorbike and trail motorbike riding, barracks for Collingwood and played football for several years. Nick previously worked for six years in both the timber and construction industries.

We are pleased to announce that Sally Bast has been admitted, and has taken a position within Cornwall Stodart's Property & Finance group. Sally has contributed a great deal to the E&IR team, and although we are sad to be saying goodbye to her, we know she will be a great asset to the firm. Congratulations Sally!

Louise Houlihan
Partner and Head of E&IR
Phone (direct) **+61 3 9608 2273**
Mobile **+61 409 835 809**
Email **l.houlihan@cornwalls.com.au**

Tracey Davies
Partner
Phone (direct) **+61 3 9608 2177**
Mobile **+61 412 164 030**
Email **t.davies@cornwalls.com.au**

*Click on images to view profiles

No legal professional privilege for Black Saturday investigation reports

The Victorian Supreme Court has ordered electricity distributor Powercor to provide its investigative reports into the Black Saturday bushfire to plaintiffs for inspection, having failed to convince the judge that the reports were protected by legal professional privilege.

Pre-litigation investigation reports only attract legal professional privilege when they are obtained for the 'dominant purpose' of:

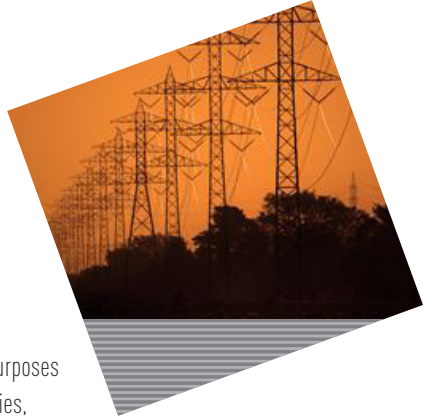
- providing legal advice; and/or
- using the reports in anticipated legal proceedings.

In this case, the plaintiffs claimed that a faulty power line owned and maintained by Powercor caused a fire to the north west of Coleraine, damaging several hundred hectares of farming land and severely injuring a farmer. Powercor's General Counsel commissioned several reports into the bushfire, which they listed in their discovery. However, they refused to permit the plaintiffs to inspect the reports on the basis that they were covered by legal professional privilege, claiming the reports were obtained for the dominant purpose of allowing its in-house solicitor to provide it with legal advice and to use the reports in anticipated legal proceedings against it.

However, the judge found that Powercor had failed to adequately explain the reasons why it obtained the reports in view of the plurality of purposes for which it needed them, including:

- to comply with an internal written procedure for the reporting and investigation of asset failures;
- to discharge its statutory duty to provide a report of the incident to Energy Safe Victoria;
- the likely need to use them to make an insurance claim; and
- the likely need to use them to attend to maintenance issues.

Judge Robson also suggested there was no evidence that Powercor relied on any other source of information (other than the reports) when dealing with issues raised by the Royal Commission.



It is clear, and the plaintiffs conceded, that at the time the reports were sought, prepared and provided to Powercor, legal proceedings were anticipated. Moreover, Robson J conceded that one of the important purposes for which the reports were to be used was the provision of legal advice to Powercor. However, his Honour was not satisfied that this was the 'dominant purpose'.

Advice for employers:

There are many situations where it is advisable to commission an expert to provide a report on an incident – notably OHS incidents. Recent cases highlight the importance of engaging external lawyers to advise on the incident and commission investigative reports.

General Manager award coverage bid fails

A former manager of a national recruitment firm was prevented from pursuing her unfair dismissal claim after the company she worked for succeeded in objecting to her eligibility.

An employee is generally protected from 'unfair dismissal' if at the time of dismissal the person has completed a minimum engagement period and one or more of the following applies:

- a modern award covers the person;
- an enterprise agreement applies to the person in relation to the employment; or
- the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold (currently $118,100).

The employee was employed in the position of General Manager (**GM**) at the company's Brisbane office and earned an annual salary of $160,000. The company argued that the GM, who earned above the high income threshold, was not covered by either a modern award or an enterprise agreement, and accordingly was not a person protected from unfair dismissal. However, she contended that her employment was within the Level 5 classification under the *Clerks – Private Sector Award 2010*, and that she was therefore covered by a modern award for the purposes of unfair dismissal.

The award classifies Level 5 clerks as those 'engaged wholly or principally in clerical work, including administrative duties' and who are subject to 'broad guidance and direction'.

Findings

Fair Work Australia (**FWA**) upheld the company's objection, saying it was 'difficult' to see how the GM's role could be classified as that of a Level 5 clerk. Although FWA noted that many of her duties were administrative in nature (and some could be seen to correspond to those described in the Award), those duties went significantly above and beyond the duties of an employee under that classification. Senior Deputy President Kaufman stated, 'it is unhelpful, and contrary to the established authorities on this point, to look at an employee's job function in isolation for the purpose of determining award coverage'. The primary purpose of the GM's job was that of a person employed in a managerial position with a great deal of authority as to how the company's business was to operate. Accordingly, the GM was not wholly or principally engaged in clerical work, and was not covered by the Award.

For employers

Employers should note that, for the purposes of determining whether an award applies, they should always look to the entirety of the employee's job functions, as well as to the primary purpose for which that person is employed.

Employers owe financial duty of care to workers

A Queensland District Court has accepted that an employer did have a duty to take 'reasonable care to avoid causing foreseeable financial loss' to a worker, but that a breach of this duty did not have the effect of causing financial loss in the circumstances of the case.

Facts

The employee was engaged with a labour-hire organisation on a part-time basis. At the time of her engagement, she was given several forms to complete including an 'AMP Insurance Questionnaire', which provided for insurance benefits for Total and Permanent Disablement (**TPD**) in the amount of $100,000.

The employee completed the form but there was a delay in lodging her application, which meant she was not approved for coverage until after she had ceased employment due to ongoing illnesses. The worker made a claim for the TPD benefit but the claim was rejected because she had not been approved for coverage when her employment ended.

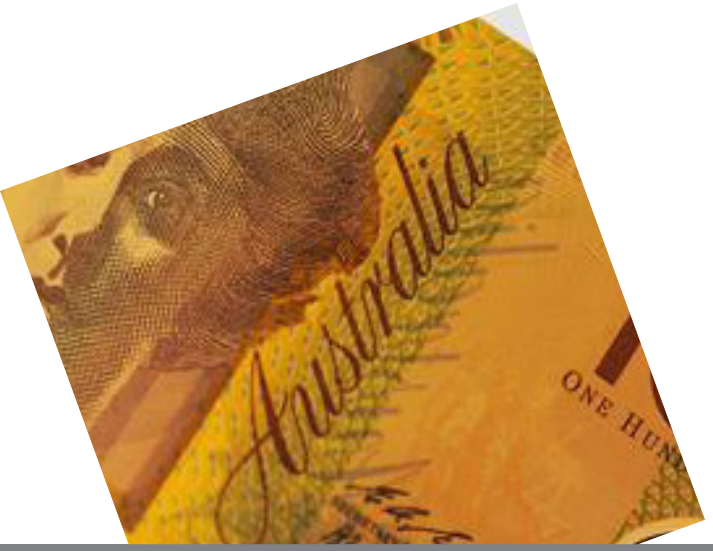
The employee began proceedings against her former employer, alleging that the employer – contrary to its representations and in

breach of its duty of care, fiduciary duty or contractual duty – did not forward the forms to AMP before she ceased work, which caused the worker financial loss. The company denied the claim, saying that it did not owe a duty of care of the kind alleged by the worker.

The findings

Justice Farr was not persuaded that the worker's disability fell within the definition contained in the PDS and thus decided the case must fail; nevertheless, he went on to discuss the existence of a duty of care. His Honour confirmed that an employer has a duty to act reasonably to avoid foreseeable financial loss to an employee, and this was a foreseeable financial loss because:

- the employer had advised the employee that it was compulsory for its employees to take out TPD and death insurance;
- the policy was one specifically negotiated by the employer with AMP for the benefit of the employees;
- the employer assumed the responsibility to forward the insurance questionnaire to AMP in a timely manner;
- the employer knew that the employee was relying on it to do so and had not informed the employee that it had not done so;
- the employee was vulnerable to economic loss as the result of the employer's failure to fulfil its undertaking to send the form in a timely way;
- the employer knew of this vulnerability;
- it was objectively foreseeable that if the insurance questionnaire was not sent in a timely way, the employee could suffer economic loss;
- there is no question of indeterminacy of loss; and
- no explanation was provided for the company's failure to process the questionnaire in a timely way.



The judgment did not go into a detailed examination of the existence or otherwise of a contractual or fiduciary duty owed to the employee. Suffice to say that if such a duty (of mutual trust and confidence) existed, she herself may have damaged that relationship through providing dishonest answers in her questionnaire.

Conclusion

Justice Farr concluded that AMP would not have paid out the TPD benefit, even if the paperwork had been submitted promptly, because the employee's disability had become permanent outside of the insurance policy's requirements.

(S)ex marks the spot!

Recent case – it's business time!

The Federal Court is currently grappling with whether sexual intercourse with an acquaintance should be considered an 'ordinary incident of life'. A federal government employee was injured when a glass fitting fell on her while she was intimately engaged with a gentleman, sustaining injuries to her face and consequently suffering a psychiatric injury. The woman had been sent to a country town in New South Wales to stay the night ahead of a work-related meeting the next morning, and therefore claims that the accident occurred 'during the course of her employment'. Both the government's workplace safety body, Comcare, and the Administrative Appeals Tribunal (**AAT**) rejected the woman's compensation claim, stating that her sexual activity with 'an acquaintance that had no connection with her work' was a 'frolic of her own' and 'took her outside the course of her employment'. While her actions were entirely consensual and legal, both authorities did not accept this conduct was 'related to her employment' and observed that it could not be seen to be 'positively supported by her employer'.

Sleepless in 'South Wales'

In the High Court case of *Hatzimanolis v ANI Corp Ltd [1992]*, the court stated that 'an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval within an overall period or episode of work, [rather] than when it has been sustained in the interval between two discrete periods of work'. According to the reasoning of the court, an employee who is placed in a foreign environment (such as a motel) by their employer for work related purposes will be deemed to be carrying out one

continuous period of work. In the absence of gross recklessness on the employee's behalf, employers will be liable for injuries sustained by the employee within that overall period.

A life less 'ordinary'?

In order for the employee to receive compensation for her sexually induced injuries, she must prove that they were sustained during such a continuous period of work. The AAT in its judgment conceded that if her injuries were sustained during 'showering, sleeping or eating', then she might have been entitled to compensation, as they are deemed to be 'ordinary incidents of life'. The employer submits that regardless of the intimacy of the setting, whether in one's own home or in a motel room in Dubbo, sexual intercourse cannot be considered an 'incident' expected to occur within one's hours of employment, and therefore severs the nexus between continuous work periods.

Whether the court will find in the employee's favour will depend on what they consider a 'normal', 'everyday' act, and whether they believe that physically expressing one's love (or boredom) is akin to making a cup of tea in the morning?

The times they are a-changin'

Employers need to be increasingly aware of the potential culpability they face for accidents occurring off-site. In a recent hearing in the AAT, a Telstra employee successfully obtained financial compensation from her employer for injuries sustained while working at her home office in Brisbane. Authorities appear to be more readily prepared to award compensation to those employees suffering injuries away from their employer's premises. Regardless of whether injuries sustained through sexual activity on a business trip will attract compensation, one lesson remains evident for employers: encourage employees not to mix business with pleasure!

Think before you post – Facebook anti-work rant gets worker sacked

We reported in our **February newsletter** on some of the pitfalls of the use of social media. This issue is again at the forefront following a recent decision of Fair Work Australia (**FWA**), which upheld the sacking of an employee who posted an aggressive anti-work rant on his Facebook page. The interesting aspect of the case was that the employee posted the comments from his home computer, outside work hours. Deputy President Swan accepted that the separation between home and work is now less pronounced than it once used to be.

Facts of the case

The employee, fed up with issues regarding his pay, posted offensive comments about his employer and the Operations Manager, who was responsible for payments to employees. The company terminated the employee's employment on the basis of serious misconduct.

The comments were undisputed, but the employee said that he never intended for the threatening comments to be seen by the Operations Manager. Moreover, his privacy settings were at the highest level and very few people could see the comments. However, he was aware that other work colleagues, who were his Facebook 'friends', could see the comments and this was precisely what happened.

The company's Employee Handbook required employees not to 'use offensive language, resort to personal abuse or threaten or engage in physical contact'. The employee was clearly in breach of the policy and Her Honour said the fact that the comments were made on the employee's home computer, out of work hours, was irrelevant. The comments were read by work colleagues and it was not long before the Operations Manager was advised of what had occurred. However, Her Honour also said that even in the absence of the employer's Handbook (warning employees of the company's views on matters like this), it would nevertheless be a matter of common sense that an employee could not write and therefore publish insulting and threatening comments about another employee in the manner in which this occurred.

Accordingly, although the employee was frustrated over his pay issues, the manner of his threat and the words used were sufficient reason for dismissal on the grounds of serious misconduct.

For employers

The case affirms an employer's right to enforce policies and sanction an employee even where the policy breached is outside the workplace and/or work hours. Although posting offensive and threatening comments on Facebook forms reasonable grounds for disciplinary action, even termination, it is obviously preferable to manage this risk and avoid such incidents altogether.

Employers should:

- consider the ways in which your employees use social media in and outside the workplace, and assess what steps your business has taken to minimise potential issues;
- review your social media policies currently in place (and if you do not have one, consider adopting one!);
- ensure employees understand the policies; and
- inform employees of what is acceptable and what is off-limits in terms of their blogging and postings – issues such as anonymous blogging and mentioning an employer should be protected against.

Alternative avenues for dealing with offensive comments about the employer

Under Australian law, adverse comments by an employee could also amount to a breach of the duty of good faith, because such conduct involves an employee acting in a manner contrary to the employer's interests. However, there have been few decided cases on this issue. This may be something that becomes more prevalent in the future, with increased use of social networking sites.

Want to republish any of this newsletter?

If you would like to republish any part of this newsletter in your staff newsletter or elsewhere please contact our Marketing team on **+61 3 9608 2168**

Disclaimer

Workplace Relations Highlights (Watch this Space)

Australia has ratified three new International Labour Organization (**ILO**) conventions covering asbestos, OHS and part-time workers. Australia's compliance with the conventions will now be regularly reviewed by the ILO. Ratification also signifies to the international community Australia's commitment to ILO standards and processes.

Did you know that companies convicted of employing illegal workers face fines of up to $66,000 per illegal worker? The Visa Entitlement Verification Online (**VEVO**) service is available to employers to check the relevant identification details of prospective employees, with their consent, to quickly confirm whether the worker is eligible to work in Australia. Employers should ensure workers have a valid and current visa to work in Australia, or risk significant penalties.

A CFMEU official has had his fine halved for acting in an improper manner when he abused and threatened managers on a building site. The Full Court of the Federal Court of Australia determined that the conduct was not 'of a kind which would bring it into the borderline sentencing territory reserved for the most serious cases' and consequently was 'manifestly excessive'. The fine was thus reduced to $3,000 [*Setkor v Gregor (No 2)* [2011] FCAFC 90].

The federal, state and territory governments have agreed to reform the national vocational education and training (**VET**) system. A reform agenda will be developed and considered by all governments in early 2012.