

NEWSLETTER

OCTOBER 2011

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

Our team news is short and sweet this month. Tracey Davies, Partner, celebrated her birthday (Happy Birthday Tracey!) and Lorraine Buckley, Legal Assistant, celebrated her 3 year anniversary with Cornwalls. Congratulations Lorraine!

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Discrimination cases round-up

There is no shortage of discrimination cases around at the moment; we have selected a couple that we thought were particularly important for employers.

Adverse action breach without intent: at lower end of the scale

The Federal Magistrates' Court has substantially reduced the penalties agreed between the Fair Work Ombudsman and an employer after it found the breaches of the adverse action provisions were at the lower end of the scale and that the information the employer obtained from the Fair Work info line was 'profoundly unclear'.

The employer engaged a qualified hairdresser as a trainee after the employee made clear in his interview that he had a permanent disability. He was paid \$10 an hour, which was substantially less than the award rate he was entitled to. Federal Magistrate Emmett accepted that the employer 'sought to trial [the employee] both in respect of his ability to perform the work and his competence' after being informed of the employee's injury, and also that the employer honestly believed the hairdresser had not completed the requisite 1,000 hours that would have attracted the higher award rate.

The fact that the employer did not intend to deliberately take advantage of the employee was crucial. Her Honour said that while contravening adverse action laws by discriminating on the basis of disability constituted 'serious offences', the seriousness of the particular conduct should be determined by reference to the 'most serious conduct imaginable that would attract the maximum penalty'.

The info line provided by Fair Work cannot generally be relied upon for legal advice. Where employers are uncertain, they should seek advice on appropriate rates from a legal professional [*Fair Work Ombudsman v Drivecam Pty Ltd* [2011] FMCA 600].

On suitable comparators

The Victorian Supreme Court has set aside a VCAT ruling and ordered the case be heard again after finding that VCAT wrongly rejected a discrimination claim, saying that the tribunal ignored the established principle that courts would interpret human rights legislation, such as equal opportunity laws, 'as beneficially as their language will permit'.

The employee suffered bipolar disorder and on two occasions experienced severe depression requiring hospitalisation as a result of 'unreasonable pressure and hours of work'. After both periods of illness, she received workers' compensation payments and between the two episodes of depression was placed in the hospital's return to work



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program. However, after the second incident she was refused entry into the return to work program and was eventually terminated. An internal email from the employer's OHS manager to his supervisor said it would be best to get the employee off the organisation's books, rather than have to rehabilitate her.

At first instance, the employee sought to be compared to other injured or ill employees who had been given access to a return to work program. VCAT dismissed the employee's claim, stating that in this type of case it was impossible to identify a suitable comparator. However, Justice Bell found the correct interpretation of the equal opportunity legislation would mean that 'where age, physical features, sex or such disability discrimination is alleged, the comparator may be someone of different age, features, sex or impairment. In each case, such a comparator answers the description of "someone without that attribute".'

Justice Bell held that no Victorian worker would be protected from disability discrimination by the state's equal opportunity laws if the tribunal's interpretation was left to stand [*Collier v Austin Health & Ors* [2011] VSC 344].

Withdrawal of job offer on medical grounds not discriminatory

The NSW Administrative Decisions Tribunal has found a company not guilty of unlawful disability discrimination after withdrawing a job offer on the basis that the worker had various medical conditions that would have prevented her from performing the essential physical aspects of the role. The worker was the preferred candidate for a position, however she was informed that her offer of employment was conditional upon her satisfactorily completing a pre-employment medical examination.

Following a medical examination, the company was informed by the attending doctor not to employ the worker on the grounds that there was a 'high risk' of a workers' compensation injury, including an aggravation of her existing conditions. The worker had a knee condition, making her incapable of kneeling, crouching, climbing or undertaking tasks involving repetitive work. She also had a neck injury and suffered from a number of other medical conditions, including hypertension, diabetes, high cholesterol, congenital hearing loss in one ear and morbid obesity.

In accepting the doctor's medical advice, the company advised the worker she was unfit to safely perform an essential part of the job, and the job could not be modified appropriately. The tribunal accepted the evidence of the doctor, saying that his evidence was not that the worker could not at that time perform the requisite site visits, but

that if she was required to carry out the type and extent of site visits that formed an essential part of the position, she would have a significantly increased risk of injury and/or deterioration of her knee, as well as an increased risk of aggravating her other medical conditions.

The tribunal found the worker had been discriminated against, however it nonetheless determined that the proven discrimination was not unlawful because the worker's disabilities rendered her unfit to perform the inherent requirements of the role with reasonable safety to herself. Knowing of her disabilities, it would have been unreasonable on the employer's part to require her to carry out all site visits on all sites and in all conditions.

The worker's complaint was dismissed.

For employers

Employers should clearly set out the requirements for medical examination and assess any opinions on an ability to work practically. An employee must be able to perform the inherent requirements of the particular employment with reasonable safety to the individual concerned and to others with whom that individual will come into contact in the course of employment. Whether it is reasonable to withdraw an offer of employment will depend heavily on the nature and size of the risks that are said to arise.

Harmonisation regulators

The Workplace Relations Ministers' Council has endorsed the National Compliance and Enforcement Policy (**Policy**), which will focus on regulators and assisting compliance with the Work Health and Safety



Act in the event of an alleged breach. The aim of the Policy is to ensure consistent enforcement of the Work Health and Safety Act and Regulations across all jurisdictions.

According to the Policy, the criteria that will guide enforcement decision-making include:

- the actual or potential consequences of the breach;
- the culpability of the duty holder (by assessing how far below acceptable standards the conduct falls and the extent to which the duty holder contributed to the risk);
- the compliance history and attitude of the duty holder;
- whether it is a repeat offence or if there is a likelihood of the offence being repeated; and
- any mitigating or aggravating circumstances.

The model of regulation is similar to that which currently operates in Victoria, with the regulator seeking to use a mix of positive motivators and deterrents to encourage compliance. It is acknowledged that it is not possible for OHS regulators to investigate all issues of non-compliance; however, OHS regulators will be more likely to investigate employers that have been issued improvement notices in the past.

There can be serious legal consequences for failing to ensure a safe workplace. Employers should familiarise themselves with the new laws and this Policy.

The Policy has been made available to the public on [Safe Work Australia's website](#).

Workplace gender reporting the key to unlocking government tenders and funding

Changes to the current Equal Opportunity for Women in the Workplace Act (**EOWW Act**) may dramatically affect the ability of businesses with over 100 employees to gain government work and receive government funding.

Amendments to the EOWW Act were announced by the Federal Minister for the Status of Women, Kate Ellis, in March 2011, including renaming the EOWW Act as the Workplace Gender Equality Act (**WGE Act**).

The announced amendments affect organisations that employ over 100 people, which will be required to prepare annual reports on gender equality outcomes.

The reports must be signed off by both the CEO and employee representatives of the organisation before being submitted to the new Workplace Gender Equality Agency.

The WGE Act will allow parliament to name and shame those organisations that do not comply with the new Act.

However, the real hit to organisations will be the prohibition on the federal government to award tenders and provide funding, including grants and industry assistance programs, to non-compliant organisations.

Currently, the federal government provides 80,000 contracts totalling \$4 billion. The proposed amendments prohibit the federal government from awarding tenders and funding to organisations that do not comply with the new reporting requirements.

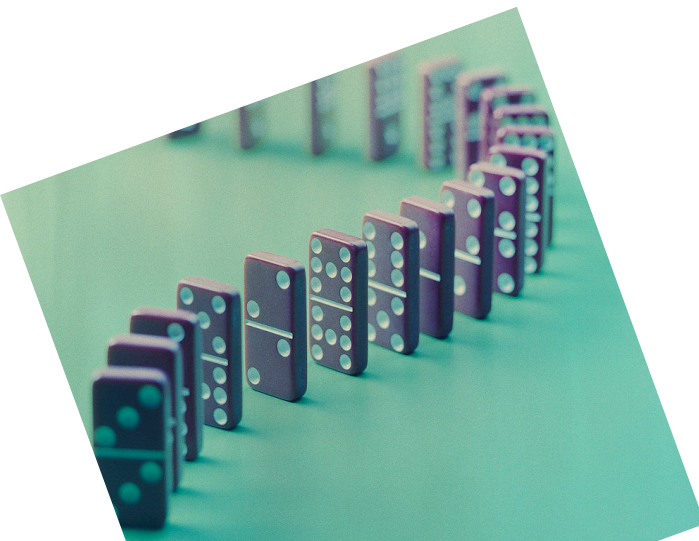
The new amendments enshrine pay equity and require reporting on:

- gender compositions of the organisation and the Board;
- employment conditions; and
- flexible work practices for men and women.

The reports aim to provide the federal government with tangible outcomes achieved in organisations regarding workplace equality and pay equality. The reports are also able to be accessed by shareholders and employees.

It was further announced that regular spot-checks will be used as a weapon to ensure the submitted reports coincide with the day to day operations of the organisations.

The reforms are expected to be introduced over 4 years, with annual reporting to become mandatory by 2013. The proposed legislation is set to be introduced to parliament in October.



No consultation about alternative duties leads to non-genuine redundancy

Fair Work Australia Commissioner John Ryan has found that the redundancy of an employee was not genuine because the employer did not consult or offer the employee alternative employment, including offering a lower paid position.

In *Margolina v Jenny Craig Weight Loss Centres Pty Ltd* [2011] FWA 5215, the employer mistakenly assumed that a Modern Award did not apply to an employee who was made redundant.

The employee fell within the coverage of a Modern Award that required the employer to consult with the affected employee about redeployment within the organisation.

The employer argued that management thought the employee would be 'insulted' if she was offered a lower paid position.



The Commissioner said the employer failed to comply with the Modern Award and should have consulted the employee about redeployment within the organisation, including in a lower paid role.

An employee who sustained an injury during a lunch-break has been denied compensation

In *Green v Comcare* [2011] AATA 639 the AAT confirmed that injuries which occur during a recess are only compensable if they occur at the employee's place of work.

The employee left the employer's building for lunch and slipped outside the front of the building, injuring her knee.

The employee claimed her injury was sustained during the course of her employment and sought workers' compensation.

The AAT denied workers' compensation on the basis that the injury was not incurred at the employer's place of business, reiterating that the injury must occur at the employer's place of business if suffered during 'an ordinary recess'.

A truck driver's breath led to an unfair dismissal

A Victorian truck driver sacked on the suspicion of being under the influence of alcohol on the job has received over \$10,000 in compensation because his employer did not afford him the opportunity to respond to the suspicion.

Fair Work Australia (FWA) ruled that the truck driver's dismissal was unfair because he was not afforded procedural fairness. This was despite FWA determining that it was reasonable to send the worker home on the day and that it would be negligent on the employer's

behalf to allow an employee suspected of being under the influence to drive a truck.

On 19 March 2011 the truck driver (**Applicant**) entered his usual place of work to drive a heavy rigid vehicle. Current road safety laws in Victoria require truck drivers to have a blood alcohol content (**BAC**) of 0.00% (as specified in s52(1A) of the *Road Safety Act 1986* (Vic)).

The Applicant clocked in and filled out his usual paperwork, including a certification that he had a BAC of 0.00%. A number of co-workers smelled alcohol on his breath. The Applicant was then told he would not be able to work; he responded by saying 'yeah well I had a big night last night'.

Two days later, the Applicant's employment was terminated and he was paid one week's pay in lieu of notice.

On the evidence presented to FWA, Commissioner Bissett found that it was reasonable to assume the Applicant had a BAC in excess of 0.00% and that the employer was within its rights to send the Applicant home.

However, Commissioner Bissett held that the Applicant had a right to know when he was sent home that his employment might be terminated. He should have been given an opportunity to respond to the allegation so he could defend it or offer a reasonable explanation.

Commissioner Bissett said: 'procedural fairness requires that the employee be advised of the likely consequences of their conduct so that they may take action to defend themselves. This is not something to set aside without good reason'.



It was held that the 'lack in procedural fairness in advising the Applicant that his employment may be terminated and the absence of an opportunity to provide evidence that he did not have a BAC over 0.00% makes the decision of the Respondent [employer] unjust'. Therefore the Applicant's termination was considered unfair.

Accordingly, procedural fairness is paramount and caution must be taken before a decision is made to terminate an employee summarily – even where it is found that an employee was under the influence of alcohol at work.

Employer not entitled to claw back mistaken redundancy payment to executive

The Victorian Supreme Court has ordered that a redundancy payment mistakenly paid to an executive by an employer cannot be claimed back.

In the case of *TRA Global Pty Ltd v Kebakoska* [2011] VSC 480, an employer mistakenly believed the former executive was covered by an award and was therefore entitled to a redundancy payment to the value of \$27,000.

The employee relied on two defences, with Justice Osborn concluding that it was 'inequitable' for the employee to 'bear the cost of expenses which would have been covered by unemployment benefits if the mistake had not been made'.

Accordingly, the employer was unsuccessful in seeking reimbursement from the former executive.

Workplace Relations Highlights (Watch this Space)

Victoria has called on the Commonwealth government to postpone Occupational Health and Safety harmonisation (currently set to commence on 1 January 2012). The Assistant Treasurer, Gordon Rich-Phillips, said the Victorian government supports the harmonisation of OH&S laws, but asked the Commonwealth to defer the implementation of the national OH&S harmonisation for 12 months. The proposed postponement has also received support from Western Australia.

Work Safe Week runs from 17 October to 27 October 2011 in Victoria. Work Safe Week is an annual initiative by WorkSafe Victoria that gives Victorian businesses the opportunity to learn about the latest health and safety advancements in the workplace. WorkSafe Victoria holds a number of events throughout Melbourne and regional Victoria, which you may register to attend by accessing the WorkSafe Victoria website.

An appeal against proposed amendments to the General Retail Industry Award has failed. The appeal was lodged by the Shop, Distributive and Allied Employees Association (**SDA**) and rejected by the full bench of Fair Work Australia on 14 September 2011. The appeal sought to prevent proposed amendments to the Retail Award that would allow employers to hire secondary school students on a casual after-school shift for a minimum of 90 minutes. The SDA has now appealed to the Federal Court.

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