NEWSLETTER

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Employment & Industrial Relations Newsletter

Welcome

In this month's newsletter we consider the case of a bullied retail worker awarded almost $600,000 in compensation and a case determined in the South Australian Magistrates Court where the fines imposed for a workplace incident were covered by an insurance policy.

In our cases roundup section, we have summarised a number of interesting cases decided during the month, including a case that involved the solicitation of a company's clients via LinkedIn, as well as a determination by the Federal Circuit Court that the Commonwealth's Privacy Act is not a 'workplace law' for the purposes of general protections claims.

We will be watching the Fair Work Commission (**Commission**) closely for a decision on junior retail award rates. The matter was heard in Sydney on 15-17 July 2013. Further information is contained in our 'watch this space' section.

Our next HR Forum is on 8 August 2013 on drafting and enforcing 'Restraints of Trade'. Limited spaces are still available. If you are interested in attending this free forum, please contact events@cornwalls.com.au.

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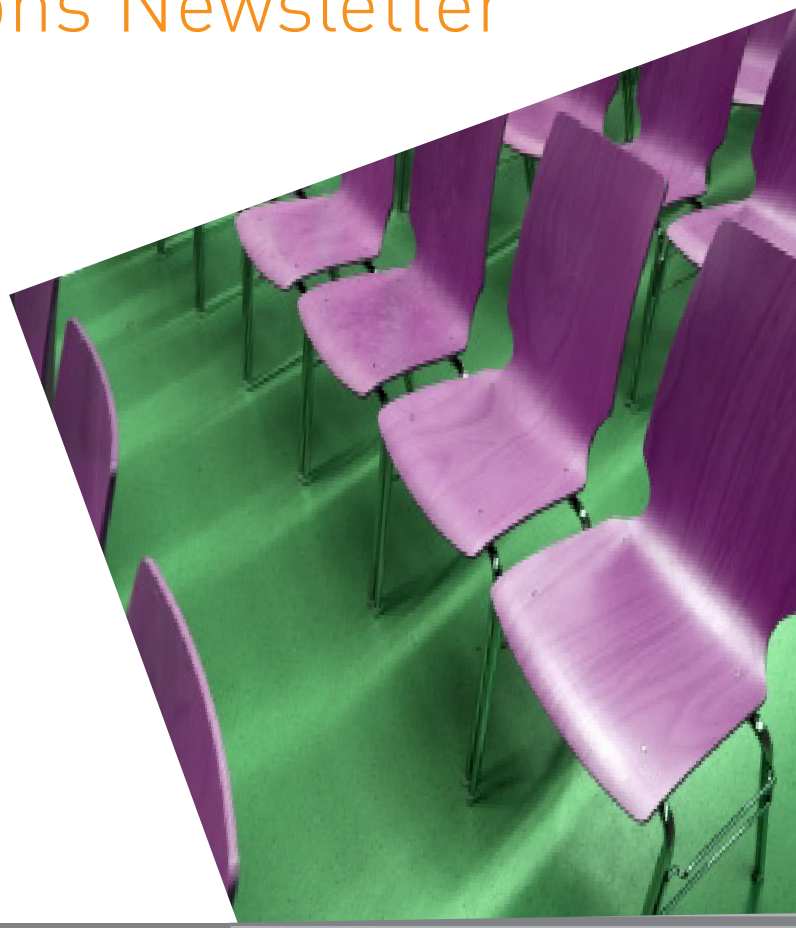

June at a glance

- The final tranche of changes to the *Fair Work Act 2009* (Cth) (**Act**) passed through parliament (including introducing the right for an employee claiming to be bullied at work to apply to the Commission for an order relating to the bullying (note, these amendments will not come into effect until 1 January 2014)).
- The government's amendments to the *Migration Act 1958* (Cth) were passed. Among other things, the amendments introduce a labour market testing requirement for employers seeking to sponsor 457 visa holders and give Fair Work Ombudsman inspectors power to monitor compliance of employers with sponsorship obligations.
- The *Australian Jobs Act 2013* (Cth) was also passed ostensibly 'to guarantee Australian businesses a share of major infrastructure and resource projects'. Under the *Australian Jobs Act 2013* (Cth), all projects worth $500 million or more must complete Australian Industry Participation Plans, regardless of their location or industry sector.
- The *Fair Work (Registered Organisations) Amendment Act 2012* (Cth) received royal assent. The Act seeks to increase the financial accountability of registered organisations of employers and employees and their office holders.
- Federal sex discrimination laws were broadened – discrimination on the grounds of 'sexual orientation, gender identity and intersex status' are now included as protected attributes.
- The federal government also announced that the Australian Human Rights Commission would conduct an inquiry into pregnancy at work and parents' experiences of returning to work after parental leave.
- The New South Wales government handed down its budget – relevantly, the payroll tax threshold was increased to $750,000 (meaning a number of businesses will now be exempt from payroll tax). However, it also announced the abolition of payroll tax indexation (there are now no states that index their payroll tax threshold).

No bull – $600,000 compensation for retail worker

The Supreme Court of Victoria recently ordered a company to pay almost $600,000 in damages after it failed to act on its observations that a manager was bullying a sales assistant. The manager's bullying behaviour included throwing a calculator and a book at the sales assistant, as well as subjecting her to sarcasm, hostility and rudeness.

Background

The manager began bullying the retail worker soon after she commenced employment at the bookshop in late 2002. In early 2003, she telephoned a member of the board and notified him and the other board members of 'conflict' she was experiencing with the manager.

Having become aware of the conflict, the board informed the worker that they would implement policies in the workplace to deal with the problem. However, no such policies were ever implemented and matters came to a head when a major conflict occurred between the two workers in 2007. As a result, the worker suffered a breakdown and became depressed and anxious.

The decision

Justice Dixon was scathing of the board's failure to act on the worker's complaints. Minutes from a board meeting as far back as 2003 showed that the board had discussed the possibility that a failure to provide a functional workplace would expose it to the risk of WorkCover claims and be in breach of its obligations to provide a safe workplace for its employees. Further, the board made repeated misrepresentations to the worker that it was in the process of implementing policies (when in actual fact, little or no progress had been made).

His Honour went on to find that prior to her employment with the company, the worker did not suffer from any pre-existing or unrelated psychiatric condition or impairment or have any non-work related stressors. The extent of her psychiatric injury was extremely onerous and deleterious and would have been mitigated if her complaints had been acted upon earlier.

The worker's pecuniary loss was assessed at $292,554.38, with damages for pain and suffering and loss of enjoyment of life assessed at $300,000.00.

For employers

This case serves as a reminder that employers have a positive duty to take reasonable steps to deal with potential bullying and harassment in the workplace and highlights the consequences of inaction.

Employers should develop and maintain a policy regarding bullying and harassment in the workplace, train employees on the policy and ensure complaints of bullying are investigated and acted upon in accordance with such policies.

Fining the loophole – director and company fines covered by insurance

The South Australian Magistrates Court recently handed down record fines of $200,000 each to a South Australian employer and its director. The fines regarded a workplace incident in which a rigger employed by the company was killed when he was struck by a 1.8 tonne steel beam. However, the fine imposed on the company and its director was covered by an insurance policy with an excess of $10,000.

As a matter of public policy, a term of a contract that provides an indemnity against criminal liability is void at law, meaning that an insurance policy purporting to cover criminal penalties would be unenforceable against the insurer (so that if the insurer decides not to pay out, the insured cannot enforce the invalid contract). However, the relevant laws do not (as yet) actually prohibit directors entering into such policies with insurers.

This case has once again enlivened the issue of such insurance policies, and may mean authorities push for punitive options that cannot be insured against, such as imprisonment.

The case

The company was charged with one breach of s 19(1) of the *Occupational Health, Safety and Welfare Act 1986* (SA) (**Act**) for having failed to ensure, so far as was reasonably practicable, that two riggers were safe while at work. Its director was prosecuted for a breach of s 61 of the Act for having failed to take reasonable steps to ensure compliance by the company of its OHS obligations.

Industrial Magistrate Lieschke handed down a fine of two thirds of the maximum allowable penalty of $300,000 to both the company and the director, for a first offence involving very serious breaches of the Act.

Despite the fines, the director ended up paying only $10,000, which represented the excess payable under a general insurance policy taken out by the company, which included indemnification of its director against any fines incurred for criminal conduct.

Regarding the insurance policy, Industrial Magistrate Lieschke noted that a key principle of acceptance of responsibility for criminal conduct is, among other factors, an acceptance of the court's punishment. By taking out such an insurance policy, the company and its director had essentially taken steps to avoid having to accept most of the legal consequences of their criminal conduct.

Notwithstanding that the parties had entered early guilty pleas, his Honour refused a reduction in penalty due to the fact that the director had sought and been granted an indemnity against the fine. Industrial Magistrate Lieschke noted, in scathing terms, that it is not the intention of the criminal law for insurers to indemnify offenders for fines and penalties imposed for any offences committed. If indemnity is granted, it is doubtful whether the aims of the criminal justice system can ever be achieved.

Implications of this case

Insurance policies that indemnify against pecuniary penalties for breaches of occupational health and safety laws have long been controversial. It is possible that the legality of such policies will be reviewed in light of this case.

A consequence of having such cover can be, as it was in this case, that more substantial penalties are imposed in addition to penalties that cannot be insured against such as imprisonment or adverse publicity orders.

Cases round-up

Valid dismissal of designer soliciting clients via LinkedIn

The Fair Work Commission (**Commission**) has found that an interior designer in the ACT was validly dismissed by his employer after he attempted to actively and deliberately solicit the employer's clients via LinkedIn in order to set up his own commercial design business.

Commissioner Deegan accepted that the designer, who was specifically prohibited under the terms of his employment contract, from undertaking or providing services that competed with those of his employer, had breached his employment obligations and engaged in conduct that amounted to serious misconduct.

Minority rules – Commission refuses to terminate expired EA

The Commission has rejected an application by an employer to terminate an expired enterprise agreement despite evidence that seven of the employer's nine employees had agreed to move to individual agreements. The two remaining employees had both backed the Australian Services Union's (**ASU**) decision to oppose the application on public interest grounds.

Commissioner Lee ruled that terminating the agreement would not be against the public interest. However, the legislation also required him to consider the interests of each employee and not just the majority.

Although one of the two employees had subsequently withdrawn their support for the ASU's position, the ninth employee had not. Commissioner Lee stated that terminating the agreement would disadvantage this employee and that this weighed against a decision to terminate the agreement.

New cabin crew union does not fly

The Commission has ruled that a range of communications, including Facebook 'likes', did not constitute 'expressions of support of the requisite kind'. Vice President Watson rejected iCabin Crew Connect's (**iCCC**) bid to obtain union registration to represent Virgin Australia's domestic cabin crew. His Honour also rejected iCCC's decision to exclude Virgin employees on maternity and long-service leave from its calculation of the number of eligible employees required to attain 51% cabin crew support of its registration. iCCC had argued that the employees were excluded on the basis that they would be difficult to contact; however, Vice President Watson held the majority support requirement was based on all eligible employees.

Proportionate response to picketer throwing projectile

The Commission has found that a decision by a company to summarily dismiss an employee after an internal investigation found that the employee throwing a projectile at a car carrying non-union members through a union picket line was a 'proportionate' response.

Senior Deputy President Richards held that, on the balance of probabilities, the employee had thrown a projectile at the car in breach of the company's charter of conduct. His Honour said the charter's reference to the requirement to maintain a workplace free from bullying and harassment also 'extended to freedom of association matters'.

Privacy Act is not a 'workplace law'

The Federal Circuit Court has ruled that the *Privacy Act 1988* (Cth) (**Privacy Act**) is not a 'workplace law' within the meaning of the *Fair Work Act 2009* (Cth) (**FW Act**).

The court considered the Privacy Act in the context of a general protections claim. The employee argued that her employment had been terminated because she had exercised a workplace right under the Privacy Act when she refused to provide a copy of her passport and electronic signature to a third party engaged by the employer to conduct pre-employment background checks.

In dismissing her claim, Judge Riley held that the Privacy Act imposed obligations on prospective employers, which were incidental to, but which did not 'primarily concern the regulation of the relation between employers and employees'.

Leave without pay or just leave

The Commission has ruled that an employee who took leave without pay, rather than resigning, to travel overseas was not unfairly dismissed when there was no position available for her on her return.

In rejecting her unfair dismissal application, Deputy President Gooley accepted the manager's evidence that the employee had been informed, in accordance with the company's leave without pay

policy, that the availability of her position on her return could not be guaranteed and that, if the position was not open, she would not be entitled to a redundancy payment.

Firefighter's mental illness was a 'mitigating factor'

A full bench of the NSW Industrial Relations Commission has overturned the finding that the dismissal of a NSW firefighter (who shoved a colleague against a cupboard in an unprovoked attack) was not unfair because he suffered from a mental illness at the time of the incident.

The firefighter and his union had chosen not to rely on the mental illness, which had not been diagnosed at the time of the incident, in their response to a workplace investigation. However, the full bench concluded that the member should have considered what part the illness played in the firefighter's actions once the evidence was before her. It found that, in considering the potential harshness of the dismissal, the member should have taken mental illness into account as a 'mitigating factor'.

Public holiday work request was reasonable

The Commission has held that a company complied with the FW Act in rostering workers to work on public holidays, despite union arguments that the request was not reasonable. In making its determination, the Commission said there was nothing in the FW Act to support a proposition that employees can only be requested to volunteer to work on public holidays or that work on public holidays is prohibited.

Workplace Relations Highlights (Watch this Space)

The federal government is supporting an application by the Shop, Distributive and Allied Employees' Union to vary the General Retail Industry Award (**Award**) and abolish lower rates of pay for 20-year-old retail workers as part of the Commission's two-year interim review of modern awards. Under the Award, wages for 20-year-olds are currently 90% of those of adult workers. However, almost 93% of 20-year-old retail sector workers are covered by enterprise agreements and are already entitled to a full adult wage. No decision has yet been handed down by the Commission.

The federal opposition has promised to cut the regulatory burden on the Australian economy as part of a plan to boost productivity. A policy statement, released in early July, commits a coalition government to achieving cost savings of $1 billion a year by using a public sector deregulation model developed by the Victorian government. Under the proposal, model cuts would be achieved by:

- linking the remuneration and re-appointment of senior federal public servants to proven reductions in red tape;
- allowing small businesses to make superannuation payments directly to the ATO, rather than individual superannuation funds; and
- moving the administration of the paid parental leave scheme from employers to the Family Assistance Office.