

NEWSLETTER

NOVEMBER 2013

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

In this newsletter we discuss the recent decision of the High Court in the controversial 'motel sex case'. We also review two interesting unfair dismissal cases. The first involves the unfair dismissal of a casual employee. The second, in the context of considering the appropriateness of reinstatement as a remedy for unfair dismissal, provides further insight into the types of behaviour that might constitute a breach of the mutual trust and confidence obligation.

We have also summarised various key decisions ranging from fining individual workers for illegal strike-action, to overseas redeployment obligations in a redundancy, to directors' liability for underpayments and other breaches.

Our next HR forum is on 'workplace bullying' and will, among other things, cover the new federal anti-bullying laws coming into effect on 1 January 2014. The forum takes place on 5 December 2013. Anyone interested in attending this free forum is encouraged to respond early.

For more information on any aspect of this newsletter or for general queries, please contact any member of our E&IR team on +61 3 9608 2233.

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E&IR at a glance

- Eric Abetz was appointed as the new federal Minister for Employment and will oversee occupational health and safety and industrial relations laws. Brendan O'Connor was also appointed as the new federal Shadow Minister for Employment and Workplace Relations.
- The Australian Securities and Investments Commission (ASIC) announced that company directors with a history of failed companies may be under surveillance in an effort to crack-down on phoenix companies. ASIC says it plans to remove directors who have been involved in two or more failed companies. The surveillance program will focus on the building and construction, labour hire, transport, security and cleaning industries.
- Following the public comment period for the second draft of the bullying code, Safe Work Australia (SWA) has confirmed it is unlikely to proceed with the model Code of Practice on workplace bullying and will almost certainly replace it with a workplace guide on bullying. Meanwhile, SWA Codes of Practice on excavation work and managing risks of plant have been released, and a new Code of Practice on the storage and handling of dangerous goods has taken effect in Victoria.
- SafeWork SA published an alert encouraging employers or officials at the workplace to require proof of identity and check the credentials of any unknown person accessing the workplace after two people attended a South Australian construction site pretending to be SafeWork SA inspectors.
- In Queensland, a number of WHS Regulations and the

transitional arrangements (due to expire at the end of this year) are likely to be further delayed/extended until 31 December 2014.

- Following Geelong Football Club's endorsement of the program, the Victorian government is encouraging businesses to sign up to its 'Healthy Together Achievement Program'. The program offers practical advice to help organisations create healthier workplaces. Further details can be found at <http://www.achievementprogram.healthytogether.vic.gov.au/>
- The NSW government has introduced legislation to effectively address, among other things, the loophole concerning whether the District Court has jurisdiction to hear WHS prosecutions, and has confirmed that it can hear the disputes (this issue has been holding up WHS prosecutions in NSW for months).

Each October is Safe Work month. Various safety awards were issued throughout the month. However, as Safe Work month concluded, we were reminded that 140 people have been killed at work across Australia since the start of this year.

Just like the chandelier, the motel sex case comes unstuck

The High Court has overturned the controversial decision of the Full Court of the Federal Court of Australia to award compensation to a commonwealth government employee who was injured while having sex in a motel she was staying in during a two-day work trip to regional New South Wales.

Facts

The employee had stayed overnight at a local motel booked by her employer. While at the motel, she had engaged in sexual intercourse with an acquaintance, during which a light-fitting above her bed was pulled down, striking the employee and causing her physical injuries and a subsequent psychological injury. The employee sought compensation, arguing that her injuries occurred 'in the course of' her employment.

Earlier decisions

As previously reported in our September 2011 newsletter (see: <http://cornwalls.com.au/sharing-knowledge/legal-updates/eir-september-2011-newsletter.aspx>), the Administrative Appeals Tribunal (AAT) held that the employee's injuries were unrelated to her employment and that she was not entitled to compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Act). However, its decision was overturned by the Federal Court of Australia, and the Federal Court's decision was upheld by the Full Court on appeal.

The Full Court considered that the employee's injuries occurred in a brief 'interval or interlude' during an overall period of work;

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therefore they arose in the course of her employment. It said that the interval or interlude existed primarily because the employer had induced or encouraged the employee to spend the night at the motel. It was considered irrelevant that the employer had not encouraged her to engage in the particular activity that caused her injury.

The High Court decision

However, the High Court held that in such circumstances, the injury must be connected to an inducement or encouragement by the employer. It further said that the connection required something more than simply being induced or encouraged to be at that place. The relevant question was: 'Did the employer induce or encourage the employee to engage in that activity?' On the facts in this case, the majority said 'no'.



Comment

In other words, an employer is not 'the insurer' of an employee for the whole time an employee is present in a particular place. To attract liability for an employee who is injured while engaged in an activity at a certain place, in the ordinary course, the employer needs to have encouraged or induced the activity.

Addressing a common misunderstanding about terminating casual employees

Some employers hold the mistaken belief that a casual employee can be terminated for any reason and without notice, and that the employee cannot apply for an unfair dismissal remedy. However, casual employees who are employed on a regular basis and have a reasonable expectation of ongoing work are, in certain circumstances, entitled to an unfair dismissal remedy. In a recent case before the Fair Work Commission (**Commission**), an employer was found to have unfairly dismissed a casual worker because complaints regarding her behaviour (which formed the reason behind her termination) were not sufficiently serious to justify dismissal, and the Commission awarded the employee compensation.

Facts

The employee was employed by the company for a period of just under 12 months between February 2012 and February 2013. The employee was terminated because, according to her employer, she was disruptive, insubordinate and difficult to manage. It said that her performance as a customer service consultant was one of the worst it had ever experienced. The company claimed it had warned the casual worker on three previous occasions that her

behaviour and attitude were not at the required standard, and advised her of what she needed to do to improve those aspects of her performance. However, no records existed to evidence poor performance in her role and the worker was in fact praised in a quality assurance meeting shortly before her dismissal.

The decision

In considering the facts, the Commission found that the company's principal reasoning for terminating the employee's employment was that it held an erroneous belief that a casual employee with less than twelve months' service did not have recourse to any unfair dismissal remedy. In addition, the company was under a misapprehension that a casual employee could merely be dismissed because management 'had the right to decide which casuals they employ and which casuals they let go'.

Comment

Employers should bear in mind that a casual employee who:

- has satisfied the minimum employment period; and
- is employed on a regular basis; and
- has a reasonable expectation of continuing employment,

is entitled to make a claim for unfair dismissal. Accordingly, employers who terminate casual employees in these circumstances will only be able to successfully defend an unfair dismissal application if they can demonstrate that they had a valid reason to terminate the casual worker and that they followed a fair process.

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Surreptitiously recording your boss doesn't invite trust and confidence

The Commission has found that an unfairly dismissed worker could not be reinstated after he secretly recorded conversations with his employer, saying that such an act had 'struck at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship'.

Facts

The worker was employed by the meat processing company from May 2007 until 8 February 2013 when he was dismissed. The basis on which the company summarily terminated the worker's employment was 'due to ongoing and persistent threats made to

numerous staff and management over a considerable period of time'.

The decision

The Commission had little issue with concluding that there was in fact no valid reason for the dismissal. An email from the company's HR Advisor revealed that the company had agreed to terminate the worker's employment on whatever basis it could. No evidence was given to show the worker was warned about his performance and the worker was given no opportunity to respond to the allegations made against him (nor was he given the opportunity to have a support person present).

Notwithstanding the favourable outcome for the worker, the Commission determined that it could not grant the remedy sought in terms of reinstatement because the worker had made surreptitious recordings of his conversations with his managers. The Commission noted that, while it was curiously permissible to tape private conversations in Queensland and Western Australia where one party to the conversation consents and it is reasonably necessary for the protection of the lawful interests of that principal party, such an act in circumstances of workplace disciplinary action was probably not considered by the legislature. Deputy President Sams, in refusing to reinstate the worker, said he considered 'such an act to be well outside the normal working environment and contrary to the well-understood necessity for trust and fidelity in the relationship between employee and employer'.

The Commission said that while the recording was not the reason behind the termination, an action permitted in the wider community does not prevent the same action from providing a

potentially valid reason for dismissal. That is, it might form the future basis for disciplinary action, up to and including dismissal, and have wider implications in breach of contract cases where mutual trust and confidence obligations are now said to exist.

Cases roundup

Individual workers fined \$1m for illegal strike

Construction workers who defied AIRC orders not to strike on Woodside's Burrup Peninsula gas project almost five years ago have been individually fined by the Federal Court for breaching the *Building and Construction Industry Improvement Act 2005* and the *Workplace Relations Act 1996*. The unlawful industrial action taken by the workers was described by Justice Gilmour as a 'concerted exercise aimed at disrupting the performance of work, in order to exert pressure on [the company] to make redundancy/severance payments'. The court fixed the fines according to the exact number of days the particular worker was on strike, with a maximum penalty of \$10,000 for the 85 workers involved in all of the breaches. The total fines amounted to over \$1 million. Adverse costs orders were also made against the workers.

Waste not, want not

The Fair Work Commission (**Commission**) has fined a Gippsland Waste company \$10,000 after it defied orders made by the Commission to reinstate and compensate an unfairly dismissed employee. In its defence, the company explained that it had lost both its Victorian contracts, and while it maintained a skeleton staff of six, no jobs remained available. The Commission found that the company's decision to refuse to meet its obligations was



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not out of necessity, but was a deliberate choice. As a result, the Commission fined the company \$10,000 and directed that the penalty be paid to the company's former employee.

FWO pursues director – and wins

The Fair Work Ombudsman (FWO) has won proceedings against the director of a computer training software company after he permitted staff to work knowing that the business could not pay their wages. The Federal Circuit Court awarded 80% of the maximum penalty on each count, totalling \$52,800 (to be divided between the employees in appropriate proportions).

Fined nearly \$125,000 for disability discrimination

A Sydney medical practice and its directors (both doctors at the practice) have been fined almost \$125,000 for underpaying their

visually impaired receptionist, while they were receiving a wage subsidy for her through the Disabled Australian Apprentice Wage Support program. The Federal Circuit Court found that the company and directors breached disability discrimination provisions of the *Fair Work Act 2009* (Cth) when they underpaid the receptionist because of her disability. When asked to 'make good' on the underpayments, the directors initially refused – and only made up the underpayments after the court action had commenced.

Heavy lift costs \$820,000

The ACT Supreme Court has awarded more than \$820,000 in damages to a subcontractor who seriously injured his back while conducting an awkward lift. It found that the employer failed to adequately assess the risks of the lift before the task was undertaken when it did not check the size and weight of the item being lifted. It said 'the risk of injury should have been apparent to someone in the position of the [employer], as should the likely seriousness of the harm which might flow'.

Stand-down within employer's control

The Commission has ruled that an employer is not permitted to stand-down employees pursuant to the stand-down clauses in its enterprise agreement during a period of scheduled maintenance. In this decision, the enterprise agreement contained provisions akin to those in the *Fair Work Act 2009*, whereby the employer was permitted to stand-down its employees without pay in circumstances where its employees could not be 'usefully employed' because of, among other things, 'any stoppage of work through any cause for which [the employer] could not reasonably be held responsible'. The Commission decided that scheduled maintenance is not the kind of activity for which an employer could

not reasonably be held responsible.

Redeployment O/S

The Commission has rejected the unfair dismissal claim of a former senior mechanical designer who argued that his redundancy was not genuine because his employer could have redeployed him overseas. The Commission said it was generally not reasonable for a company to redeploy an employee to an overseas location, considering such things as relocation costs and other difficulties that arise with overseas entities within a company group where, for example, 'those entities operate their own distinct human resource functions, policies and procedures, and there is no overriding central managerial control'.

Federal Court declares legal advice a 'workplace right'

The Federal Court has ruled that a betting agency breached the general protections provisions when it warned an employee that she would be sacked when she threatened to seek legal advice regarding unpaid commissions. The court found that a person's workplace right to make a complaint or inquiry under a workplace law or in relation to his or her employment extended to seeking advice.

Medically fit condition requisite potentially an adverse action

A company has escaped an adverse action claim for requiring an employee to provide evidence that she was fit to return to work prior to signing a new contract. The court found that AIAEI had required the applicant to do so: first, because the particular role was a fixed term vacancy and the applicant still retained



permanent part-time employment; and secondly, to protect the school from any potential liability should the applicant fail to 'comply with appropriate medical restrictions, and thereby exacerbate the injury and make a claim'. The court found that the employee's carpal tunnel syndrome or ability to make a compensation claim were not the reasons behind AIAEI's decision to require her to sign a new contract, and logically she was not injured because of her failure to sign a contract for a fixed term.

Workplace Relations Highlights (Watch this Space)

Transport news

The Heavy Vehicle National Law has been further delayed and it is uncertain when the laws will take effect. The National Heavy Vehicle Regulator said it needs to conduct more tests of its IT system for access permits.

The coronial investigation into Victoria's Kerang train disaster has also recommended that, among other things, employers in the road transport sector be required to undertake a weekly inspection of vehicle brake pads and push rod extensions.

Commonwealth intervenes in Vic appeal against Federal Court's finding on enforcement of construction code

The federal government has intervened in support of the Victorian government's appeal against the Federal Court's decisions in *CFMEU v State of Victoria* [2013] FCA 445 and *CFMEU v McCorkell Constructions Pty Ltd (No 2)* [2013] FCA 446 that the enforcement of its construction code contravened the Fair Work Act's prohibitions on adverse action and coercion.

The federal government notified the court of its decision to intervene, stating it was in the public interest that the Commonwealth make submissions about the correct interpretation of those provisions.

Restaurant Industry Award decision

The Commission has rejected an application by the Restaurant and Catering Association, Baking Industry Association of Queensland and VECCI to reduce penalty rates and minimum award wage rates for restaurant and catering workers. However, in its decision, the Commission noted that the four-yearly award review (which commences next year) was the more appropriate forum for determining whether Sunday work should attract higher penalties than Saturday work. The decision is being appealed.

Equal pay

The Pay Equity Unit of the Fair Work Commission (**Commission**) has published a draft report to inform the Commission about matters that might need addressing and the type of evidence required in an equal remuneration proceeding. The finalised report is to be made available on the Commission's website on 6 December 2013.

Changes around Australia on workers' compensation

There has been movement in Queensland, Western Australia, South Australia, New South Wales and Victoria on the workers' compensation front.

Importantly, the proposed *Workplace Injury Rehabilitation and Compensation Bill 2013* has combined Victoria's workers' compensation legislation. The Bill, among other things, provides

an avenue for Victorian employers who are dissatisfied with their premium notices and WorkCover's subsequent review decision, to challenge their premium rates at the Victorian Civil and Administrative Tribunal. The legislation passed through parliament and is due to take effect on 1 July 2014.

Prevalence, nature and consequences of discrimination relating to pregnancy at work and on return to work: review

As foreshadowed in our July newsletter, the Australian Human Rights Commission has commenced its review into pregnancy at work and parents' experiences of returning to work after parental leave. Employers wishing to make a submission are encouraged to visit: <http://www.humanrights.gov.au/supporting-working-parents-pregnancy-and-return-work-national-review-women-and-men>

September 3 was 'Equal Pay Day'. This day marks the period of extra days in the current year that women need to work to achieve the same wages that men earned during the previous financial year. The Australian Bureau of Statistics reports that the gender pay gap is around 17.5%.

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