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Employment & Industrial Relations Newsletter, June 2013

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Welcome note

In this newsletter we have considered two key decisions in employment law relating to general protections disputes and reasonable management action. In addition, we have prepared an article outlining some of the major changes that take effect on 1 July 2013.

We have also summarised a number of interesting decisions in our 'cases roundup' from unfair dismissals to sweetheart deals with unions.

We receive many requests for advice regarding restraints of trade. Accordingly, we have decided to present our next HR Forum on 8 August 2013 on drafting and enforcing 'Restraints of Trade'. Anyone interested in attending this free forum is encouraged to respond early.

May at a glance

- The Fair Work Ombudsman (**FWO**) announced that employers will now receive a written copy of an employee complaint at the start of the complaint resolution process in an attempt to encourage a cooperative approach to resolving disputes.
- The Fair Work Commission (**FWC**) revealed that a new record for adverse action applications had been set in the period January to March 2013, with the third quarter report stating that 888 claims were lodged. There were 3501 unfair dismissal applications in the same period.
- The Coalition released its IR policy - for further details see our alert /sharing-knowledge/legal-updates/coalition-releases-long-awaited-workplace-relations-policy.aspx
- Safe Work Australia (**SWA**) published a new guide on 'How to determine what is reasonably practicable to meet a health and safety duty', including an explanation on how much weight employers can place on costs when deciding whether or not to adopt a hazard control.
- ACT Work Safety has also launched two new guidance notes on the 'Supervision of Apprentices' and 'Supervision for Electrical Apprentices' - the guidance notes state that managers who fail to properly supervise apprentices performing high-risk work could receive heavy fines under the recklessness provisions contained in the model Work Health Safety (**WHS**) Act.

Young workers are at a higher risk of being injured than more experienced workers. Almost 15,000 young workers have been seriously injured in Victoria over the past 5 years. Employers should consider a worker's age as a risk factor when identifying hazards and controlling risks in the workplace.

- The Australian Taxation Office (**ATO**) sent out a summary outlining employers' super requirements up until 2019 to over 850,000 Australian businesses.
- The final report for the Australian Law Reform Commission's inquiry into the legal barriers to older persons participating in the workforce

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was released. The report makes 36 recommendations, including extending the right for older persons to request flexible working arrangements.
- The Victorian Equal Opportunity and Human Rights Commission published a guideline aimed at helping employers to be proactive in preventing discrimination against transgender employees.
- Queensland's average workers' compensation premium rate was announced and will remain at 1.45 per cent of payroll in 2013-14.
- Changes were announced to Australia's Public Service Code of Conduct, which comes into force in July - the changes mean public servants could be dismissed for making disparaging comments about their workplace on social media.
- A public hearing was held in the lead up to Australia's proposed formal ratification of an International Labor Organization Convention aiming to ensure the effective abolition of child labour and to set the minimum age for admission to employment (all Australian jurisdictions currently comply with this Convention).

Are you prepared for the EOFY?

With the end of financial year fast approaching, most employers are probably right now considering the balance sheet. However, the new fiscal year signals changes, among other things, to key employee entitlements, which employers should be aware of.

A number of important changes that take effect from 1 July 2013 are summarised below:

- the super guarantee rate will increase from 9 per cent to 9.25 per cent;
- the existing upper age limit for super guarantee contributions will be removed so that employees aged 70 years and over will be entitled to receive super guarantee contributions;
- the new national minimum wage of $622.20 per week (or $16.37 per hour) will come into effect (for further information, see our alert /sharing-knowledge/legal-updates/annual-wage-review.aspx);
- the modern award minimum rates will increase by 2.6 per cent. All employers must ensure that an award-covered employee's base rate of pay meets or exceeds the new minimum rates of pay contained in the relevant award;
- the high income threshold in unfair dismissal cases will increase to $129,300 and the compensation limit will be $64,650 (for further information, see our alert /sharing-knowledge/legal-updates/'high-income-threshold'-for-unfair-dismissals-increased.aspx);
- the filing fee for unfair dismissals and general protections applications will increase to $65.50; and
- for Western Australian employers, the WA IRC has awarded a flat-dollar $18.20 per week increase to workers on state award wages (which also takes effect 1 July).

Reasonable management action must be timely and efficient

A Victorian human services worker has been awarded weekly payments and reasonable medical expenses after suffering psychological injury as a result of lengthy management processes and investigation into her own serious misconduct.

The worker was employed by the Department of Human Services as a Disability Development and Support Officer. During an outing in early 2010, she was transporting four residents with physical and mental illnesses when she (and two other supervisors) knowingly left one of the residents on the roadside, 76 kilometres away from his residential unit.

An investigation of the incident found that the worker had engaged in serious misconduct, during which time the worker was stood down on full pay. It took 7 months for the employer to notify her of the outcome of the investigation. She was later permitted to resume work at another location

(approximately 14 months after she was first stood down).

The worker complained that the protracted investigation and disciplinary processes had caused her to suffer psychological injuries, namely, adjustment disorder with mixed anxiety and depressed mood.

The court found that the management action was undertaken in an unreasonable manner because there was excessive delay in notifying the worker of the outcome of the management action and the Department had no satisfactory explanation for the delay.

For employers

Under the *Accident Compensation Act 1985* (Vic), a worker is not entitled to compensation for injury arising from reasonable management action undertaken in a reasonable manner. This case demonstrates that reasonable management action must be undertaken in a timely and efficient manner and employers must inform employees about the outcome of management action in a timely manner.

Employers should ensure that management processes, including investigations into employee misconduct, are timely and efficient and avoid unjustifiable delay even when employees have been suspended with full pay.

Redundancy was unlawful adverse action

The Federal Court has held that an employer contravened the general protections provisions of the *Fair Work Act 2009* (Cth) (**Act**) by dismissing an employee from her employment for reasons including that the employee had exercised workplace rights. In imposing a penalty of $37,000 on the employer and ordering reinstatement, the court warned employers against using redundancy 'as a pretext for getting rid of an unwanted employee'.

The final judgment handed down by the Federal Court's longest serving member, Justice Peter Gray, is a cautionary tale for businesses going through redundancy processes.

Facts

In this case, the employer argued it dismissed the employee on the basis that her position was redundant. However, the employee claimed the redundancy was not genuine and the dismissal was effected because she had exercised or proposed to exercise workplace rights, including making written complaints of bullying, intimidation and stigmatisation, in breach of the general protections provisions.

In general protections disputes, a reverse onus applies in that the Act creates a statutory presumption that action was taken for the alleged prohibited reason unless the person who took the action can prove otherwise.

Decision

Although the relevant sections recognise that an action may be taken for more than one reason, his Honour stated that a party seeking to rebut the presumption must show, on the balance of probabilities, that an alleged improper reason was not the reason why the action was taken. Justice Gray considered that the employer had failed to give explicit evidence that none of the reasons alleged by the employee were behind the dismissal and accordingly the employer had not satisfied the reverse onus.

His Honour said that rebutting the presumption will usually require providing evidence of the actual reason for the decision. However, that even if such evidence is provided, the presumption that the action was taken for an improper reason will not be rebutted unless there is evidence that there were no additional reasons or that the actual reasons did not

include the alleged improper reason(s).

Justice Gray also found that the employer breached its enterprise agreement when it failed to comply with its provisions regarding voluntary redeployment.

This case has muddied the waters surrounding general protections disputes. Recent High Court authority suggested direct evidence from the decision-maker that was reliable and accepted was sufficient to resist a claim. However, this case asserts that isn't enough and a decision-maker must also expressly deny the allegations.

For employers
The definition of a 'workplace right' is broad and includes an entitlement or responsibility under a workplace law, or the ability to make a complaint or enquiry about an employee's employment.

This case demonstrates that employers should ensure they implement transparent criteria for selecting employees for termination, based on proper reasons and that the redundancy is otherwise not a 'sham'. We recommend that you seek advice prior to terminating an employee by way of redundancy, particularly if you are aware of a history of conflict with the employee.

Cases roundup

Disciplinary process was adverse action
The Federal Court has found an employer took adverse action against an elected safety representative by investigating his attempts to exercise a workplace right by tagging as unsafe two defective forklifts, which led to his suspension and a final written warning. The court held that the employer and its managers breached the *Fair Work Act 2009* (Cth) (**Act**) when they exposed the safety representative to a disciplinary process.

Justice Bernard Murphy rejected the company's claim that its investigation was an impartial fact-finding exercise to consider allegations of misconduct, conducted in good faith, and therefore did not constitute adverse action. His Honour said the suspension itself involved adverse action because it 'resulted in a deterioration in the advantages otherwise enjoyed by the representative in his employment' and said further that the final written warning was adverse action because it reduced the security of his future employment.

Building 'sweetheart' deals with unions
The Federal Court has given a green light to construction companies making 'sweetheart' deals with unions, after it ruled against the Victorian government's strict building Code (which banned such practices as imposing restrictions on outside labour and setting minimum pay rates for subcontractors).

The CFMEU launched proceedings in the Federal Court claiming its agreement with Lend Lease was legal under applicable federal laws and the court found that the government had not acted lawfully when it attempted to ban Lend Lease from bidding for work on state government contracts because of the agreement.

The court determined that the Victorian government had breached the Act by threatening not to use Lend Lease on a new hospital project in Bendigo, because it had discriminated against Lend Lease workers who were entitled to the 'benefits' of a four-year agreement (approved by the Fair Work Commission (**FWC**)) struck between the builder and the CFMEU.

The state government has now declared the Code no longer applies to conduct lawfully engaged in under valid enterprise agreements between

builders and unions. This decision is being appealed.

Only private use of company car counts towards high income threshold

The FWC has permitted an employee to proceed with his unfair dismissal claim, after rejecting his employer's claim that his car allowance pushed his remuneration above the high income threshold. In the employee's tax return for the 2011-2012 financial year, he claimed 92% business usage and 8% (or $1,440 of the allowance) for personal use of his car. The FWC held that only the 8% was part of the employee's remuneration for the purpose of the high income test, notwithstanding that his employer had deducted income tax and paid superannuation contributions on an incorrect understanding that the employee's gross salary was $128,000. Senior Deputy President Drake said that the employer's mistake did not convert a payment that would otherwise not be part of an amount calculated as earnings into a payment which is part of that figure.

Alleged bullying/sexual harassment victim's unfair dismissal claim rejected

The FWC has rejected a worker's claim that she was forced to quit her job because her employer would not investigate her complaints of sexual harassment and bullying, instead finding that the worker had resigned from her employment before her employer had a chance to deal with her complaints.

The worker took sick leave due to stress in January, then resigned two weeks later, after her psychiatrist suggested she 'could not return to work' because her 'health could not take it'. The FWC held that the worker was not forced to resign but had acted on the purported advice of a psychiatrist not to return to work (noting that while she may have been unfit to return to work, that did not mean she was forced to resign). It further noted that the employer had taken immediate steps upon her complaint to investigate the allegations.

Record mesothelioma award quashed

A former labourer suffering from mesothelioma has had his record $1.3 million damages award quashed by the NSW Court of Appeal finding that the Dust Diseases Tribunal had erred in calculating the worker's gratuitous domestic services entitlements. The court remitted the matter to the tribunal to recalculate his entitlement.

Buses and phones don't mix

For the second time in six months, the full bench of the FWC has upheld the dismissal of a bus driver for using a mobile phone while in control of a bus. Deputy President Booth found that the driver had been validly dismissed for breaching company policy on mobile phone use and the road rules.

Estate compensated, employer fined

The former employer of a woman who died three years ago has been fined more than $53,000 and ordered to pay $19,000 in unpaid wages to her estate. In his judgment, Federal Circuit Court of Australia Justice Michael Jarrett criticised the company and its director, and said that 'a clear message needs to be sent to employers generally that underpayment of wages and entitlements is unacceptable'.

No extension of time for manager sacked for misconduct

A male manager dismissed for having sex with his co-worker applied for an unfair dismissal remedy almost six months out of time after he became aware that he was treated differently to his female youth worker colleague (who had been offered a chance to resign). However, the FWC was not convinced this satisfied the exceptional circumstances criteria and his application was dismissed.

Pre-paid annual leave in question

The FWC has now twice ruled that a clause in an enterprise agreement allowing for the pre-payment of annual leave and personal leave in a 'loaded' rate contravenes the National Employment Standards (despite a full bench majority passing a similar clause previously). The FWC has relied on a decision of the Federal Court which held that a company could not under an AWA substitute a monetary payment for a paid personal/carer's leave entitlement. A Fair Work Act review panel has said that it is unclear whether parliament intended for agreements to provide prepayment of leave in this manner and that the government should monitor developments in this area, with a view to amending legislation at a later stage if necessary.

CFMEU fined for coercing employer

The Federal Court has fined the Victorian branch of the CFMEU's construction and general division and six organisers and delegates a total of $115,000 for coercing a construction company to reinstate an employee by taking unlawful strike action. The court endorsed the fines agreed by the parties and said that the CFMEU's strategy had ignored other lawful means for the union achieving the same ends.

Watch this space

The federal government has delayed the start date of new anti-bullying provisions in the *Fair Work Amendment Bill 2013* (Cth) until 1 January 2014, following the Coalition's withdrawal of support for the proposed amendments. Under the proposed provisions, a worker who reasonably believed that they had been bullied at work could apply to the Fair Work Commission (**FWC**) for an order that the bullying cease. The Bill proposes that employers who fail to comply with FWC orders for bullying to cease could face fines of up to $51,000 (for a corporation).

The *Migration Amendment (Temporary Sponsored Visas) Bill 2013* (Cth) was introduced into parliament by the Immigration Minister Brendan O'Connor on 6 June 2013. The Bill will require employers to prove that they tried to recruit locally before sponsoring overseas workers on 457 visas. Employers of 457 visa holders will be required to allocate between one and two per cent of their total payroll to training local staff and 457 visa holders for the duration of the sponsorship.

The federal government has agreed to establish a national asbestos exposure register. Further, the *Asbestos Safety and Eradication Agency Bill 2013* has passed through parliament.

In 2010, Fair Work Australia (now Commission) recommended that a national scheme for portable long service leave be investigated. Following on from this, a new report, entitled 'The case for a national portable long service leave scheme in Australia' has been released, which examines the feasibility of introducing a nationally consistent portable long service leave scheme that would cover casual, full-time and part-time employees. Parts of the construction industry already operate a portable leave scheme and the Australian Council of Trade Unions has announced it is investigating ways to expand the scheme to other industries.

As reported in May, Queensland workers' compensation legislation is changing. The *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013* passed through parliament and will replace the current definition of a 'worker' in the *Workers' Compensation and Rehabilitation Act 2003*. Employers and workers should review their workers' compensation obligations following this change.