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Employment & Industrial Relations Newsletter, March 2013

Posted on: 8 Mar, 2013 | Contact: Louise Houlihan

In this newsletter we discuss the key legal issues of unpaid work arrangements, a warning from the Federal Court on consultation with workers about workers' compensation decisions, proposed new bullying laws, a new decision on performance management and adverse action, and some new anti-discrimination laws. We have also included a new section giving you a snapshot of the previous month in E&IR.

Our next HR seminar titled 'Employing people: you're the one that we want' will encompass the legal issues in hiring and will take place on 18 April 2013. Invitations will be sent shortly. Anyone interested in attending this free seminar is encouraged to respond early.

We hope you have a great 2013!

February at a glance

- The Fair Work Commission (**FWC**) began publishing decision summaries. The pilot program is to run over the next six months in the hopes of extending the accessibility of FWC decisions involving 'important issues of principle'. The summaries will be made available on the FWC's website.
- The government's new Building Code took effect on 1 February 2013. It codifies the current 'Implementation Guidelines for the National Code of Practice for the Construction Industry'.
- Australia's heavy vehicle laws are on the verge of nationalisation after the *Heavy Vehicle National Law Amendment Bill 2012* passed the Queensland parliament. The new laws provide a universal interpretation of when drivers should take rest breaks and harmonise state and territory road regulations.
- The Fair Work Ombudsman (**FWO**) has announced that it is implementing a new, proactive strategy aimed at ensuring that court penalties and back-payments are recouped.
- The FWO also commenced a national education and compliance campaign focusing on the pharmacy industry. An industry handbook has been produced outlining the rights and responsibilities of employers in the industry.
- The Northern Territory has amended its Criminal Code to create a new offence of assaulting a worker. The offence carries a maximum penalty of seven years in jail where the victim suffers harm.
- Industrial relations has played a prominent role in this month's media with the release of the country's first major report on unpaid work. For further information, see our article in this newsletter.
- Lastly, a new appointment has been made at Safe Work Australia (SWA). SWA announced that Ann Sherry AO would replace outgoing Tom Phillips as the new chair of SWA. February also saw the appointment of a new Federal Safety Commissioner, Alan Edwards.

Don't close your ears to the courts' warning on compensation decisions

The Federal Court has rejected an employer's claim that the Administrative Appeals Tribunal (**AAT**) did not have jurisdiction to grant a former employee workers' compensation for hearing aids, holding that

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implicit refusals to make a determination on a component of a claim is a 'decision' for the purposes of an employee's appeal.

The employee suffered hearing loss from noise he was exposed to at work over a 31-year period. Two doctors had concluded that the employee required hearing aids.

The employee made a workers' compensation claim for his impairment and the supply of the hearing aids. Although a 'decision-maker' of the employer concluded that the employer was liable for the employee's whole person impairment and hearing loss, it did not consider the issue of compensation for the cost of the hearing aids.

The matter was reconsidered by another 'decision-maker' of the employer, who also failed to refer to the hearing aids claim.

The employee appealed to the AAT. The AAT concluded that the employee should be compensated for the hearing aids. However, the employer contended that the AAT did not have jurisdiction to review the claim because they had not made a reviewable decision about the devices.

Justice Steven Rares held that once the employer had made a decision to accept liability, the employee had a straightforward claim for compensation for both permanent impairment and the supply of hearing aids.

His Honour said that 'to all appearances, both decision-makers seemed to have made a decision not to pay compensation for the supply of hearing aids'. By failing to state expressly that the claim for compensation for the supply of hearing aids remained unresolved and under consideration, the employer, in the circumstances, conveyed that the claim had been implicitly rejected. The court considered this implicit rejection was a 'decision' for the purposes of the employee's appeal to the AAT.

This decision serves as a **warning to employers to ensure** all elements of a workers' compensation claim are considered and communicated to the injured employee, or face possible court action.

Noise in a workplace is a problem when it has the potential to damage employees' hearing. Noise-induced hearing loss is an irreversible condition. Victoria's noise exposure standard is a level of 85 dB(A).[1]

New ruling on adverse action

The Federal Court has ruled that an employer did not breach the general protection provisions of the *Fair Work Act* when it performance-managed and disciplined an employee after he made a written complaint about his managers.

Following the retail store manager's complaint, he alleged that the company's actions in:

- writing him warning letters;
- considering a possible transfer of his employment;
- requiring him to sign a performance management contract;
- refusing him time-off-in-lieu; and
- undermining his authority by having his work supervised,

amounted to adverse action, forcing him to resign his employment.

Justice Barker considered that the evidence did not support a view that the actions taken by the company were by reason of, or on account of, the existence of the employee's workplace right to complain or the fact that he had exercised that right.

His Honour determined that the alleged adverse actions and the decision of the employee to resign 'arose out of legitimate management and workplace issues' to which the company was 'entitled, if not obliged, to respond'.

His Honour observed that, like the decision in *Board of Bendigo Regional Institute of TAFE v Barclay* [2012] HCA 32, it was an error to presume the fact that the retail store manager had exercised his workplace right to complain, 'was necessarily a factor that had something to do with everything that adversely affected the appellant thereafter and which could not be dissociated from the action or actions taken against him'.

Justice Barker said there could be little doubt that the company had real concerns about the manager's performance and there was nothing in the evidence to suggest that any of the dealings by the company's representatives were motivated in any respect by the workplace right possessed by the manager. Accordingly, the manager's appeal failed.

However, the difficulty with adverse action cases is that each case turns on its facts. Justice Barker made the observation that while there may be some cases where on the facts a different conclusion might be drawn and a different inference available, on the evidence presented in this case the remedial steps taken were designed to achieve good management outcomes. We recommend that you follow a proper performance management process in order to better position yourself to defend a general protections claim.

New bullying laws

The federal government has announced a proposal to introduce legislation that targets workplace bullying.

Workplace Relations Minister Bill Shorten said ideally the legislation would take effect from 1 July 2013. The proposed amendments would:

- permit workers to make a complaint to the Fair Work Commission (**FWC**);
- require the FWC to list the matter for consideration within 14 days and refer it to state or territory OHS regulators if necessary;
- adopt a new definition of 'bullying, harassment or victimisation';
- recognise that bullying does not include reasonable management practices conducted in a reasonable manner; and
- provide for substantial civil penalties or fines for workplace bullies and complicit or complacent employers of up to $33,000.

It is not clear whether attendance by employers at the FWC's 'consideration' of the matter would be optional or mandated.

However, it would appear that bullying complaints could be brought directly against the individuals concerned, as well as the employee's employer.

Details of the proposed changes are likely to be made available in the near future, with amended legislation taking effect from July this year. However, employer groups are expressing concerns about the changes, which they fear will result in a rise in speculative bullying claims. Members of the FWC have suggested that the FWC does not have the resources to implement the new bullying jurisdiction.

Employers are advised to review their performance management processes and ensure managers who may be involved in performance management are appropriately trained on your processes.

Cracking down on unpaid work arrangements

Following the release of Australia's first major report,[2] commissioned by the Fair Work Ombudsman (**FWO**), into unpaid work, the FWO has announced a new focus on educating employers about the legitimacy and legality of schemes for unpaid work.

The report concluded that significant numbers of Australian workers were performing unpaid work - much of it likely to be in breach of the *Fair Work Act*. The report identified a number of key industries, including: Hair & Beauty, Hospitality, Cafes & Restaurants, and Professional Services.

Adelaide University Law School Professors Andrew Stewart and Rosemary Owens' key findings included that:

- unpaid trials were common (especially for younger workers) and found across a range of industries;
- 'internships' had become increasingly common, with businesses using unpaid interns to do work that in many other instances would have been performed by paid employees; and
- some workers (particularly international students and graduates), were paying agencies to place them in unpaid internships.

Unpaid work is lawful if it is a genuine work experience, vocational placement or volunteering arrangement. However, if the work is not a genuine vocational placement, work experience or volunteer arrangement, the unpaid worker may be in an employment relationship with your business, and entitled to be paid wages and other employment benefits. Further, if you engage workers in unpaid work placements you may be risking substantial penalties for non-compliance with your obligations under the *Fair Work Act*. This article addresses the types of unpaid work arrangements and the suitability of unpaid work.

Unpaid work and the *Fair Work Act*

There is only one exemption from paying workers under the *Fair Work Act* - that is, a person on 'vocational placement'.

A worker on 'vocational placement' is not considered an employee if the placement is -

- undertaken with an employer for which a person is not entitled to be paid any remuneration; **and**
- undertaken as a requirement of an education or training course; **and**
- authorised under a law or an administrative arrangement of the commonwealth, a state or a territory.

Work experience - school children

This type of arrangement is generally entered into between a business and a school to allow a student to observe and undertake on-the-job experience without payment. Whether a student is a bona fide work experience person will depend on a number of factors, such as the degree of control of the student's activities and whether the student performs work to the business' advantage. As a general rule, unpaid work experience is unlikely to be considered employment if the student is primarily observing the workplace. We recommend that employers only engage students participating in a recognised 'work experience program' and obtain a letter from the student's school, detailing the nature of the work experience.

Unpaid trials & internships

An unpaid work trial is generally used to find out whether an applicant is suited for a job. However, as a general rule, unpaid work trials are unlawful and employers should pay an applicant for any trial work they have performed.

If an internship does not meet the criteria of a 'vocational placement', the employer needs to consider whether the worker is an employee. A key factor is whether the employer and the worker intended to create a legally binding employment relationship, which will involve a consideration of:

- the purpose of the arrangement - generally arrangements that are mainly for the benefit of the worker are less likely to involve employment relationships;
- the length of time - the longer the period of placement, the more likely there is an employment relationship;
- the workers' obligations - although a worker may perform some productive activities during a placement, if the worker is required or expected to do productive work, there is a greater likelihood that there is an employment relationship;
- the commercial gain or value for the business - if there is no significant gain for the business derived out of the work, then it is less likely to be considered an employment relationship; and

- whether the placement was entered into through a program sanctioned by a university or vocational training organisation, which is an indicator that there is not an employment relationship.

Volunteers

Whether a person is a genuine volunteer will depend on the individual circumstances of each situation, and can involve complex legal issues. However, this is not to suggest that people cannot offer their services voluntarily to assist in a not-for-profit organisation. It is essential that the person has agreed not to be paid for any work performed and that the arrangement is at the volunteer's own free will (there cannot be any element of coercion in the relationship).

Lodging as compensation

Free lodging in lieu of wages for the performance of work is a dangerous arrangement for an employer. In a recent unfair dismissal hearing, the Fair Work Commission (**FWC**) found that a worker, who had performed farm work without payment in return for lodging for nearly two years, was an employee.

Despite the owner and operator of the cattle farm's submissions that the worker was an independent contractor, Deputy President Sams had no difficulty in establishing an employment relationship based on the level of control exercised by the owner over the manner in which the worker worked on the farm. The FWC said that taking away the farm assistant's only recompense (namely the cottage accommodation he shared with his wife) was akin to withdrawing the payment of wages, with the intention of bringing the employment relationship to an end, and the worker was therefore entitled to pursue a remedy for unfair dismissal.

Although this case was in the context of an unfair dismissal remedy, the employer is also likely to be in breach of their obligations to pay minimum wages, superannuation, and other employee benefits and may face a claim for the back-payment of these entitlements.

Conclusion

Even where unpaid work is a legitimate arrangement, employers may still have legal obligations under workers' compensation laws, occupational health and safety laws, child labour laws, and discrimination laws. We recommend that you review your worker arrangements to identify any potential liabilities you have regarding the utilisation of unpaid workers.

New requirements under the *Workplace Gender Equality Act 2012*

Some major developments have occurred in federal equal opportunity laws in recent times. One of the developments is the passage of the *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**), which replaces the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (**EOWW Act**).

Under the WGE Act, all non-public sector employers with 100 or more employees are required to provide a public report to the Workplace Gender Equality Agency (**WGE Agency**) each year. To assist employers, the implementation of reporting requirements will be phased in over two years.

In 2012-13, transitional reporting will be in place and employers are required to lodge a report comprising a workplace profile in the same format as under the EOWW Act. Employers must also comply with new notification and access requirements (which relate to notifying and/or making reports available to employees, members, shareholders and employee organisations).

From 2013-14 onwards, employers will be expected to comply with wholly new reporting requirements. Employers will be required to report against standardised gender equality indicators including:

- the gender composition of the workforce;
- the gender composition of governing bodies of relevant employers;

- equal remuneration between women and men;
- availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees with family or caring responsibilities;
- consultation with employees on issues concerning gender equality in the workplace; and
- any other matters specified by the Minister in a legislative instrument.

Employers will also be required to meet minimum standards, which represent the standards needed to improve gender equality outcomes over time. These standards are yet to be set by the Minister.

Employers will continue to be required to comply with the new notification and access requirements.

The consequences of non-compliance remain largely the same. Non-compliant employers face being 'named and shamed' by their inclusion in the Agency's annual report to the Minister and may be ineligible to tender for federal government contracts and some state procurement frameworks, or receive some commonwealth grants.

Employers need to prepare for the changes, particularly noting the requirement to disclose your report to your employees, relevant unions and shareholders in addition to the Agency this year.

Employers also need to consider the new gender equality indicators and how your organisation will gather data for the 2013-2014 reporting period.

Another major change in the anti-discrimination area is the government's proposal to consolidate all federal anti-discrimination legislation into one statute, which we will detail in next month's newsletter.

Watch this space

With the federal government announcing the September federal election, the IR policy debate has really heated up. The government has proposed a second tranche of amendments to the *Fair Work Act 2009* (Cth), including:

- a right for workers experiencing family violence to request flexible working arrangements. Details of the amendment should be finalised soon;
- parental leave entitlements, including an increase to the entitlement for parents taking unpaid leave together from three to eight weeks and to provide that women who take unpaid special maternity leave prior to giving birth are not penalised by a reduction in their unpaid parental leave entitlements;
- giving bullied workers a right to seek redress through the FWC - for more insight into this proposal, read our related article in this month's newsletter;
- incorporating a new duty in award and agreement model consultation clauses for employers to genuinely consult employees before changing rosters or working hours; and
- right of entry provisions under the Fair Work Act are also set to be reviewed, but OHS-related entry laws are unlikely to be affected.

The federal coalition has tabled the *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2013* to introduce criminal offences for misbehaving union officials. Tony Abbott has announced that if elected, he would seek to establish a commission to manage and enforce the bill.

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[1] www.worksafe.vic.gov.au
[2] *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia* by University of Adelaide Law School Professors, Andrew Stewart and Rosemary Owens

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