SIAG Pty Ltd
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THE ADVISOR

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in this edition

FAIR WORK COMMISSION RELEASES ANTI-BULLYING CASE MANAGEMENT MODEL AND BENCHBOOK

The Fair Work Commission has released a draft anti-bullying case management model and confirmed Commissioner Peter Hampton as the new anti-bullying Panel Head. The Fair Work Commission (FWC) has also released the draft Anti-Bullying Benchbook and is seeking public comment in the lead up to the jurisdiction taking effect on 1 January 2014.

In a recent press release issued by the FWC, President Justice Ian Ross said it was important employers and employees understood the scope of the jurisdiction and the remedies the Commission may order.

Justice Ross made it clear that the "new anti-bullying jurisdiction is not an avenue to provide compensation to those who have been subjected to bullying; and nor is it about penalizing employers. It is directed at preventing workers from being bullied at work."

The Anti-Bullying Case Management model provides the steps for making an application to the FWC regarding bullying. The steps are as follows:

1. An employee lodges an application with the FWC

2. Within 14 days of being lodged, the application is checked to ensure it is complete and valid. Whilst the Commission is required to deal with an application within the 14 days, this does not necessarily mean that the matter will be listed for hearing or conference within 14 days.

3. The application is served by the commission on the employer (s)/ principal (s) and responses are sought.

4. Once an application is filed the FWC anti-bullying team will seek to contact all relevant parties to obtain sufficient information to enable the Panel Head to determine how the FWC should deal with the application.

5. In determining the terms of any order the Commission will take into account disputes and grievance procedures available to an employee at the workplace, any investigation currently underway or the outcome of any completed investigation and other relevant matters.

6. Where the Commission is satisfied that the employee has been bullied in the workplace by an individual or a group of individuals; and there is a risk that the employee will continue to be bullied at work by the individual or group, then the Commission may make any order it deems appropriate.

7. A report will be made to the panel head by the anti-bullying team outlining whether the matter involves any potential jurisdictional issues, the nature of the alleged conduct and whether it may be suitable for mediation

8. The panel head makes a decision as to whether the matter will be assigned to a commission member and, if so for what purpose (e.g. mediation or determination.)

Whilst the Commission's jurisdiction will not make

FAIR WORK COMMISSION RELEASES ANTI-BULLYING CASE MANAGEMENT MODEL AND BENCHBOOK - continued

orders that involve financial settlements or penalties, employers should be aware that contravention of an order of the Commission to stop bullying could expose the employer to civil penalties. Further because the Commission must find that a risk of bullying conduct will continue by the same individual or group before the FWC can make an order it effectively eliminates the possibility of retrospective complaints.
Employers should ensure that their processes and policies for dealing with bullying are up to date and that relevant managers and employees are trained and aware of their responsibilities.

The introduction of the new Commission jurisdiction will exist concurrently with existing obligations under the Occupational Health and Safety Act and employers should familiarize themselves with these provisions.

The Anti-bullying Benchbook provides summaries of relevant legislation and case law relevant to the Commission's jurisdiction regarding bullying. Justice Ross said that "while it would take some time for the jurisdiction and associate case law to develop, the Anti-bullying Benchbook and Case Management Model were the first steps in informing potential parties of the Commission's procedures and relevant legislative provisions.

Anti-bullying jurisdiction case management model, Fair Work Commission, 20 November 2013

COVERT SURVEILLANCE LEADES TO SUMMARY DISMISSAL BEING FOUND UNFAIR

The Fair Work Commission has reinstated a council parks and grounds supervisor after finding that his employer had relied on a report from covert surveillance that was targeted at alleged drug-related activity of another employee was substantially and procedurally unfair.

Wyndham Council had engaged private investigator LKA Group last year to probe reports of drug-related activities by employees during working hours. LKA Group had contracted an investigator to go under cover as an "employee" within the council. The Fair Work Commission was told the investigator was unable to work directly with the target of the surveillance during his assignment, but decided to report on the activities of other employees, including the supervisor.

The investigator had included in his report to LKA Group that the supervisor had said to one of his subordinates that he didn't care what he did, "just don't get caught" and "don't make me explain why you are doing nothing." The report also included descriptions of the supervisors approach to directing his subordinates. The Council dismissed the supervisor following receipt of the LKA report based on the alleged statement made to the subordinate and his failure to properly supervise his team.

During the unfair dismissal hearing, Wyndham Council also sought to rely on the supervisor's failure to comply with its procurement policy, they noted however, that this compliance failure only became apparent after the supervisor was sacked.

Commissioner Cribb in considering the case found that the supervisor's evidence was more credible than that of the investigator, dubbed Witness X for the case, noting that an "impartial" investigator's evidence would be preferred over that of an employee in case of a conflict, however Witness X appeared to "have an axe to grind" in respect to the supervisor and also wanted to "teach LKA a lesson in how to do a professional job."

Commissioner Cribb found in respect to the three reasons why the supervisor was dismissed that it was probable that the supervisor did not say the words attributed to him by Witness X contained in the LKA Report. Commissioner Cribb also found that although the supervisor was responsible for his subordinates not performing duties properly, a number of factors resulted in a finding that this reason was not a valid reason for the supervisor's dismissal.

Commissioner Cribb also noted that it was relevant that the report was the result of a covert investigation into another employee, stating that "Witness X took it upon himself to record the activities of employees who were not the subject of his brief" and that the supervisor's dismissal amounted to collateral damage.

Using the basis of the Federal Court's *Lane v Arrowcrest Group* decision, Commissioner Cribb found that Wyndham Council could not rely on alleged breaches

COVERT SURVEILLANCE LEADES TO SUMMARY DISMISSAL BEING FOUND UNFAIR - continued

of its procurement policy to justify the supervisor's dismissal. Commissioner Cribb concluded that there was no valid reason for the supervisor's dismissal and found that there were significant defects in the council's procedure.

Given the conflicting accounts of both the supervisor and the investigator about the alleged statement to the subordinate, Commissioner Cribb found that it was the Council's obligation to further investigate the issue, including by asking the subordinate for his version of events. Further the commissioner said that the Council's failure to follow its conduct and performance management policy was of great concern and the reliance of the Council on the contents of the LKA Report showed procedural flaws in the process.

Commissioner Cribb reinstated the supervisor with the council, but not in an advisory position given her findings that he did not adequately oversee the work of one of his direct reports. The supervisor will receive his lost remuneration after providing the commission with an update of any earnings received since the dismissal.

Leyshan v Wyndham City Council (2013) FWC 7094 (14 October 2013)

FWC MAKES RULING ON THE RESPONSIBILITY FOR STAND-DOWNS

The Fair Work Commission has ruled that an aviation contractor is responsible for work stopping temporarily because of scheduled maintenance on one of its helicopters in a decision that has wider implications for stand-down provisions in enterprise agreements and the Fair Work Act.

Australian Helicopters Pty Ltd wanted to stand-down two pilots and several air crewmen during a three month period starting in mid-September while the helicopter underwent its three yearly heavy maintenance check. The company had made arrangements for a replacement helicopter to provide services to its clients, but the aircraft required lower staffing levels.

The Australian Federation of Air Pilots (AFAP) on behalf of the pilots and the Australian Manufacturing Workers Union (AMWU) for the support crew notified disputes to the Fair Work Commission under their enterprise agreements with the company, opposing the planned stand-downs.

Under Clause 15 of the *Australian Helicopters Aircrew Enterprise Agreement 2013* Australian Helicopters can only stand-down employees without pay during stoppages for which it "cannot reasonably be held responsible." Whilst Clause 12 of the *Australian Helicopters Pilots Enterprise Agreement 2010* provided for a similar provision, it did not include the word "reasonably", however Commissioner Simpson said nothing in the case turned on this distinction.

The key element in justifying a stand-down is the existence of circumstances beyond the employers control. Section 524 of the Fair Work Act provides that an employer may, stand-down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

(a) Industrial action
(b) A breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
(c) A stoppage of work for any cause for which the employer cannot reasonably be held responsible

Section 524, however, does not apply if an enterprise agreement specifically deals with stand-downs for stoppages beyond an employer's control. Australian Helicopters Pty Ltd argued that the heavy maintenance was outside its control and responsibilities.

The company said the "rate of effort" of the aircraft was therefore outside its control and the rate determined the scheduling of the heavy maintenance. AMWU acting on behalf of the pilots and crew, argued that the heavy maintenance was a routine and planned procedure which was based on the aircraft manufacturers specifications. The union argued that the maintenance was a normal part of running the business, and the company wasn't just responsible, it was "singularly responsible." The AMWU also argued that the Australian Helicopters Pty Ltd was seeking to offset its maintenance costs by cutting employee's wages.

Commissioner Simpson said it was clear that maintaining

FWC MAKES RULING ON THE RESPONSIBILITY FOR STAND-DOWNS - continued

the aircraft was the company's responsibility under its contractual obligations. Civil aviation legislation also made it clear that the maintenance function was a central responsibility of the company, "as it is with all aviation operators." The evidence, Commissioner Simpson said was clear that the maintenance of the relevant aircraft was the responsibility of the company and that the company did exercise some degree of control over the number of flying hours of the aircraft given it had minimum hours in its contractual arrangement, ongoing consultation occurs between the manager and the clients on these matters, and it is also bound to ensure it complies with safety obligations concerning the number of hours flown.

The Commissioner found that the heavy maintenance was the employer's responsibility and that it knew well in advance and planned for it accordingly. Commissioner Simpson said that in these circumstances the employer "cannot credibly argue the stoppage is one that either cannot, or cannot reasonably be held responsible."

Further Commissioner Simpson rejected an argument by the union that the employees should be paid various accommodations, travel and meal allowance during the stand downs.

Australian Federation of Air Pilots v Australian Helicopters Pty Ltd (2013) FWC 7863 (15 October 2013)

FAIR WORK COMMISSION FINDS THAT DISMISSAL OVER TEXT MESSAGE IS UNFAIR

The Fair Work Commission has found that a brewery worker was unfairly dismissed when he received a text message terminating his employment after sending a text asking when he would be paid.

The brewery worker was employed as a Yard and Maintenance Man on 24 July 2012. Three weeks before his dismissal, the company, Duckstein Brewery commenced trading six days per week, the brewery worker extended his working hours to 6 hours per day. On 6 March 2013, the employee enquired to his employer via text message as to when he would received his first fortnightly pay consisting of 72 hours per fortnight. The employee then unsuccessfully tried to telephone his employer's wife. The brewery worker than sent another text to his employer enquiring about his pay and received the following text:

"Don't bother coming in tomorrow, I have decided to make alternative arrangements. I don't like the way you talk to us and don't need it in my life."

In considering whether the dismissal was unfair under Section 385 of the Fair Work Act, Commissioner Danny Cloghan found that the employee would not have predicted that his text would result in his dismissal. The company had not appeared at the unfair dismissal hearing and the brewery worker had not asked for reinstatement, which the commissioner ruled would have been inappropriate in any event.

Sheppard v Rivershow Pty Ltd (2013) FWC 7829 (4 October 2013)

PREGNANCY OVERTAKES DISABILITY AS THE TOP WORKPLACE DISCRIMINATION COMPLAINT

Pregnancy has surpassed disability as the top workplace discrimination issue in Australia. Figures released by the Fair Work Ombudsman (FWO) have shown that of the 235 complaints the agency has received during the 2012-2013 period, more than a quarter of those complaints were made by pregnant women. People with disabilities made up 21 per cent of the complaints, whilst those with family or caring responsibilities made up 11 per cent.

Sex Discrimination Commissioner Elizabeth Broderick said it showed employer attitudes must change. She stated that the key message is that "pregnancy discrimination is still alive and well in Australian workplaces."

The FWO findings go hand in hand with a record penalty imposed by the Federal Circuit Court on a chain of Victorian bargain stores for discriminating against a pregnant employee. The case which was brought to the Federal Circuit Court by the Fair Work Ombudsman concerned Felix Corporation Pty Ltd-which operates GV Bargains stores throughout regional Victoria and an employee who was discriminated against between December 2010 and April 2011. After the employee, a part time shop assistant told her employer that she was pregnant, she was directed to take two weeks of unpaid leave. When she refused to do so her rostered shifts were cut from an average of 26 hours to less than 10 a week and she was told to look for another job when she asked for more hours of work.

The employer had told the employee that it was tradition in China that women do not work when they were pregnant and she did not want her working in the store. The employee was asked to obtain medical certificates stating that she was suitable to work at the store, however after complying with these requests, the employee was offered some additional hours of work but resigned in what the Federal Circuit Court amounted to a constructive dismissal.

The conduct by the employer breached the discrimination provisions of workplace laws. Under the Fair Work Act section 351 it is unlawful to discriminate against employees on the grounds of pregnancy, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer responsibilities, religion, political opinion, national extraction or social origin.

Pregnancy discrimination can occur by failing to let an employee take parental leave, refusing to leave a job open while on leave, demoting an employee during pregnancy and refusing to promote an employee on the grounds of pregnancy.

The Federal Circuit Court imposed a fine of $40,920 on Felix Corporation Pty Ltd and a further $7,656 and $5,016 on the owner managers of the company. Further the company was ordered to pay the employee $7,197 for economic and non-economic loss suffered. The penalties are the highest secured by the Fair Work Ombudsman for legal action relating to discrimination.

The findings of the Fair Work Ombudsman Annual report and the results of the Federal Circuit Court case highlight the need for organisations to ensure that their policies and procedures covering this area are up to date and compliant with the relevant legislation.

Annual Report 2012-2013, Fair Work Ombudsman

Record penalties imposed in pregnancy discrimination matter, Media release, Fair Work Ombudsman, 8 November 2013.

FEDERAL CIRCUIT COURT THROWS OUT SYMANTEC DISCRIMINATION CLAIM

The Federal Circuit Court has thrown out a discrimination claim against Symantec for dismissing an employee for taking parental leave. Symantec had made two women redundant after it decided that it no longer wanted to manage its Asia-Pacific and Japanese operations from Australia. Both women had argued that the company had made them redundant because of the prohibited reason of their family or carer responsibilities, rather than the restructure.

The manger in this case, had taken approved parental leave from June 2011. On 9 January 2012 the manager sent an email to her employer in which she discussed the possibility of resuming work on 1 February 2012 on a part time basis. On 30 January 2012, the employer informed the manager that he was not able to accommodate her return to work on a part time basis. The employer had been given the task of formulating and making recommendations with respect to cost cutting initiatives and these recommendations included making the manager's position redundant. In February 2012 the employer confirmed to the manager that her position was being made redundant.

The manager argued before the Federal Circuit Court that Symantec dismissed her because she had been on parental leave for the last 8 months and therefore the company had taken adverse action against her on the grounds of family and carer responsibilities. The manager further argued that the company breached the Fair Work Act because it had not offered her an alternative position in Singapore. The employee alleged that her dismissal contravened s 84 of the Fair Work Act.

Section 84 states that on ending unpaid parental leave, an employee is entitled to return to:

(a) The employee's pre-parental leave position; or
(b) If the position no longer exists-an available position for which the employee is qualified and suited nearest to status and pay to the pre-parental leave provision.

However, Judge Manousaridis of the Federal Circuit Court accepted the evidence of Joseph Ong, Symantec's regional director, that he made his decision to make the manager redundant because the company "no longer required the position the manger occupied immediately before she commenced her parental leave."

In considering whether there was an adverse action claim or not Judge Manousaridis found that the reasons in "Mr Ong's mind when deciding whether to terminate her employment did not include her being on parental leave and it could be argued on the probabilities that, even had she not taken parental leave, Mr Ong would have arrived at the same conclusion and for the same reasons."

In regard to section 84 of the Fair Work Act the Court made the observation that the position claimed to be available by the manager was "available" for the purposes of s 84. However because, the employee did not give evidence about whether she would have accepted the position had it been offered to her and offered no explanation why she had no such evidence, Judge Manousaridis ruled that the position was not one which was nearest in status and pay to the position the employee occupied immediately before she went on parental leave. This was supported by the fact that the position attracted less pay and less responsibility than the pre-parental leave role.

Turnbull v Symantec (Australia) Pty Ltd (2013) FCCA 1771 (1 November 2013)

FEDERAL COURT FINES QANTAS FOR BREACHING ITS CONSULTATION OBLIGATIONS

The Federal Circuit Court has fined Qantas $41,250 for breaching its consultation and information-sharing obligations when it introduced a new line maintenance system that led to the redundancy of 30 Licensed Aircraft Mechanical Engineers (LAME's).

In 2012, the Fair Work Commission had made a workplace determination setting employment conditions for aircraft engineers employed by Qantas. The *Licenced Aircraft Engineers (Qantas Airways) Limited Workplace Determination 2012* requires Qantas to consult with employees on any major changes to the organisation that are likely affect employees and provide the union, ALAEA with all relevant information about the change.

ALAEA made an application to the Fair Work Commission claiming that the introduction of the new line maintenance system constituted a contravention of Clause 11 of the *Licensed Aircraft Engineers (Qantas Airways) Limited Workplace Determination 2012*. Whilst ALAEA had accepted that Qantas had communicated with them to a certain extent about the changes in early 2012, it never had the opportunity to discuss with Qantas whether it was really necessary to make 30 positions redundant.

Judge Kenneth Raphael penalised Qantas for failing to consult with the union and employees upon its decision to make approximately 30 LAME positions redundant and thus the respondent was in breach of Clause 47.2 of the *Licensed Aircraft Engineers (Qantas Airways Limited) Workplace Determination 2012* and therefore Qantas was in breach of s.280 of the Fair Work Act 2009. Judge Raphael disagreed with Qantas's argument that their communications with ALAEA showed that they were actively seeking to consult with the union to mitigate the effects of the new maintenance system. Judge Raphael found that Qantas had approached the consultations as a means of finding out which employees would be prepared to accept voluntary redundancy packages.

Judge Raphael held that the penalty for the breach should be at the higher range as it involved a "deliberate action by a large corporation failing to honour its obligations under a WD which resulted in the loss of thirty positions. The judge said that the penalty was to deter "both Qantas from repeating this error and the other parties from adopting it."

The Australian Licenced Aircraft Engineers Association v Qantas Airways Limited (No2) (2013) FCCA 1696 (28 October 2013)

FAIR WORK COMMISSION UPHOLDS COMPANY'S DISMISSAL OF WORKER FOR SMOKING POT

The Fair Work Commission has upheld the dismissal of a worker who failed to follow safety procedures and tested positive to cannabis. The applicant had been dismissed from BIS Industries at BHP Billiton's Bell Bay manganese smelter after the Kress machine that he was operating spilled a load of molten 1000 degree centigrade slag when the pot containing it detached from the machine. The tyres on the front of the Kress machine had also caught fire.

The applicant had leapt from the machine and used a fire extinguisher to put out the flames. The applicant also alerted the relevant employees who quickly arrived on the scene and extinguished the remaining fire with sand. Following the incident the applicant was subjected to a mandatory drug and alcohol test. The test was conducted by breathalyser and oral swab and returned a negative reading for alcohol but a reading for cannabis indicated a positive result.

The applicant had stated that he had smoked a joint of cannabis around 6 or 7pm the evening prior to the incident. The results were sent to a laboratory for further testing. On 21 March 2013, the results of the laboratory test were received by the employer. The test was positive for cannabis at a level of 17 nanograms per millilitre.

On the 22 March 2013 the applicant attended a meeting and was informed that he had breached the respondent's drug policy and his employment had been terminated. The employer also claimed that its investigation had excluded any mechanical failure as the cause of the molten slag spill.

The company's limit for cannabis is 10 nanograms and told Commissioner Deegan who was overseeing the case that it treats results below 10 nanograms in the same manner as a blood alcohol test below 0.05 and issues a warning. The company had given evidence that a drug and alcohol policy had been put in place at the Bell Bay site where the incident occurred since 2008 and the issue had been addressed in its enterprise agreements since 2002. The agreement prohibited employees being "adversely affected" by drugs and alcohol.

The applicant had argued that the pot of molten slag had slipped due to a malfunction of the locking system, a problem that had occurred previously.

The applicant had stated that he had previously tested positive for marijuana in a urine test conducted as part of a regular medical in 2006. He acknowledged receiving alcohol and drug training about 3 years ago but did not recall any part of that training involving reading the policy or the penalties applicable to a positive drug test. The applicant had assumed it would be similar to a positive alcohol reading which was a "stepped procedure" with counselling after a positive reading and dismissal only after a third offence. He acknowledged that Kress operators were required to have a zero alcohol reading.

The applicant claimed that he believed that the drug and alcohol policy had a "three strike position" following his positive drug test in 2006 and could not recall any drug or alcohol training since that provided 3 years earlier. Commissioner Deegan accepted that the respondent had a valid reason to dismiss the applicant as the 2008 drug and alcohol policy that was introduced provided that an employee who returned a positive drug test whilst at work would have their employment terminated unless there were exceptional circumstances.

Further Commissioner Deegan found that the applicant had been aware of the drug and alcohol test and the employee had no reason to believe the company had a "three strikes policy."

Allan Carter v BIS Industries Limited (2013) FWC (24 October 2013)

SEEKING LEGAL ADVICE IS A WORKPLACE RIGHT

The Federal Court has ruled that a betting agency employee's ability to seek legal advice about unpaid commissions was a "workplace right" and that when she threatened to exercise this right, her employer took adverse action against her by threatening to sack her.

The applicant had told the company's chief executive on September 20, 2011 that she would seek advice from her solicitor if she was not paid commissions owed to her under her contract of employment. The chief executive replied by stating that if "you take that avenue then you will be fired."

The applicant claimed under section 340 of the Fair Work Act that the company had taken adverse action against her when they threatened to sack her.

Section 340 (1) of the Fair Work Act provides that:

(1) A person must not take adverse action against another person:
  (a) Because the other person:
    (i) Has a workplace right; or
    (ii) Has, or has not, exercised a workplace right; or
    (iii) Proposes or proposes no to, or has at any time proposed or proposed not to, exercise a workplace right; or
  (b) To prevent the exercise of a workplace right by the other person.

Betezy had argued that s341 (1) (c) of the Fair Work Act required the existence of a statutory, contractual or grievance procedure provision containing a right to make a complaint or inquiry.

Justice Chris Jessup found that under s 341 (1) (c) (ii) an employee should be able to have recourse to his or her solicitor without fear if repercussions in the nature of "adverse action" being taken by the employer. Justice Jessup found that the chief executive's threat to fire the applicant amounted to a contravention of s 341 (1) (a) (iii) of the Fair Work Act.
The employee also made a successful claim for four years of unpaid commissions on net wagering revenue, with the court rejecting Betezy's argument that the contractual entitlements which were set out in two agreements were too uncertain.

Justice Jessup had said that the employer's record-keeping had made it difficult to calculate the amounts owing and that the failure to maintain adequate records was itself a breach of the employees contract in two ways.

In the first instance, it was an express term of the two commission agreements that Betezy provide audited statements of betting transactions to the employee to help her verify the commission owing to her, but it had failed to do so. Further Betezy had breached its "implied duty of co-operation which exists as between parties to a contract of this kind," and by failing to do so it was necessary to enable the employee to have the benefit of the agreement.

Justice Jessup ruled that the employer pay the employee compensation in the sum of $37,557.76 for the contravention of s 340 of the Fair Work Act 2009.

Murrihy v Betezy.com.au Pty Ltd [2013] FCA 908

FEDERAL COURT REJECTS LINFOX'S CHALLENEGE TO A FWC RULING ON FACEBOOK SACKING

The Full Court of the Federal Court has rejected Linfox's claim of jurisdictional error regarding a determination by the Fair Work Commission in favour of a driver who was fired for posting derogatory or offensive comments.

Linfox had appealed against the Full Bench decision of the Fair Work Commission which had found that Commissioner Roberts had made no appealable error in his decision in 2011 that the driver had been unfairly dismissed. The Full Bench of the Fair Work Commission concluded that having carefully considered the evidence and material before the Commissioner, that the decision that there was no valid reason for termination was *"reasonably open to him in the circumstances of the case and having regard to the context in which the conduct occurred and an overall assessment of the gravity of the conduct."*

The Full Bench of the FWC had found that the Commissioner had taken particulars into account when reaching his conclusion that the dismissal of the driver was harsh and unjust. This included that the driver had an exemplary employment record with Linfox over a long period of time, that the driver believed that his Facebook page was set on the maximum privacy settings, that he believed that the comments posted on his page could only be viewed by himself and his friends, that the conduct complained about had occurred outside of workplace hours and that some of the offensive statements posted on the Facebook page were not made by the driver and that Linfox did not take action against other employees who had taken part in the Facebook conversations.

The Full Bench concluded that it had been persuaded that there were no errors of fact or law in Commissioner Roberts determination that the driver was unfairly dismissed. Linfox appealed the full bench of the Fair Work Commission's decision at the Full Court of the Federal Court of Australia claiming that there was an appealable error in the decision and orders of Commissioner Roberts and that this existed "as a matter of jurisdictional fact."

Justices Dowsett, Flick and Griffiths ruled that Linfox Australia Pty Ltd 's appeal against the Full Bench's decision exposed no error , "let alone a jurisdictional one." Linfox had made several grounds for appeal including that there was a failure to address a submission that there was inconsistent evidence from the driver, that there was a failure to deal with submissions as to whether the driver gave truthful answers during his interview and the conclusion that the driver's work history was such that his dismissal was harsh in the circumstances.

The Justices found that none of the submissions relied upon by Linfox exposed anything other than a challenge to the factual merits of the decisions made by both the Commissioner and the Full Bench. The Full Court found that the attempts to find an error ignored constraints imposed by s 400 (2) of the Fair Work Act which states that an "appeal from a decision made by the FWC in relation to a matter arising, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact." The Full Court found that Linfox therefore ignored the constraints imposed by the need to discern jurisdictional error on the part of the Full Bench.

Linfox Australia Pty Ltd v Fair Work Commission (2013) FCAFC 157

VCAT FINDS THAT VICTORIA POLICE DOES NOT BREACH DISCRIMINATION LAWS

The Victorian Civil and Administrative Tribunal has found that Victoria Police's policy regarding grooming does not breach discrimination laws because it is authorised by the state's Police Regulation Act.

The policy that banned ponytails, buns, beards, goatees, soul patches and other facial hair other than "clean, tidy and neatly trimmed sideburns and moustaches" was challenged by sixteen officers. The Victorian Equal Opportunity and Human Rights Commission intervened in the case on behalf of the officers who claimed that they had been unlawfully discriminated against when they were threatened with disciplinary action if they failed to tidy themselves up.

The main applicant in the case Michael Kuyken argued that he had been discriminated against under section 8 of the *Equal Opportunity Act 2010* (EOA) and that the Tribunal should adopt the ordinary meaning of "physical features" under the Equal Opportunity Act 2010 to include facial hair.

Tribunal member Julie Grainger found that the Equal Opportunity Act's definition of "physical features" in s 4 extended to facial hair following the earlier decision in *Fratas v Drake International Ltd t/a Drake Jobseek*. Fratas v Drake referred to a case in which DP McKenzie held that hair was a bodily characteristic, as was baldness and facial hair under the *Equal Opportunity Act 1995,* which was superseded by the EOA 2010.

Mr Kuyken, the applicant had argued that had Victorian Parliament intended to exclude facial hair from the definition of "physical features" it could have done so when it drafted the Equal Opportunity Act 2010, given the decision made in *Fratas v Drake* regarding physical features.

Grainger agreed with this submission and found that the broad interpretation of "physical features" is the most compatible with human rights, particularly the right to equal and effective protection against discrimination as required by Section 32 of the *Victorian Charter of Human Rights and Responsibilities*.

Grainger also found that whilst the introduction of the new grooming standard "alone" did not constitute unfavourable treatment of the officer, the threat of disciplinary action if the officers did not comply with the policy amounted to discrimination under the Equal Opportunity Act 2010. The definition of direct discrimination contained in section 8 includes "proposed unfavourable treatment" and Grainger found that section 18 which specifically states an "employer must not discriminate against an employee" should be read as including a prohibition against discrimination by proposing to subject an employee to any other detriment. Whilst Tribunal member Julie Grainger found that the threat of disciplinary action amounted to discrimination she dismissed all sixteen claims made by the officers, as Victoria Police's conduct was "authorised" by s5 (2) of the *Police Regulation Act* under s75 of the *Equal Opportunity Act*.

Section 75 of the Equal Opportunity Act states that a "person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of (a) an Act, other than this Act; or (b) an enactment, other than an enactment under this Act."

Grainger found that the discrimination was permitted under section 75 of the EOA 2010, because it was authorised by section 5(2) of the Police Regulation Act. Section (5)(2) (c) gives Chief Commissioner Lay the power to determine standards of grooming and acceptable clothing accessories for members of Victoria Police. The Tribunal also found that the Chief Commissioner did not discriminate against the officers as the enforcement of the policy was authorised under section 17 of the Police Regulation Act which enabled the Chief Commissioner to enshrine it in standing orders.

Kuyken v Lay (Human Rights) [2013] VCAT 1972

HIGH COURT TO DECIDE ON MUTUAL DUTY OF TRUST AND CONFIDENCE

The High Court has granted special leave to appeal the decision of the Full Court of the Federal Court in Commonwealth Bank of Australia v Barker (2013) 214 FCR 450, which held that a term imposing obligations of trust and confidence on employers would be implied by law in all contracts of employment in Australia unless they were inconsistent with the express terms of the contract.

In the majority judgement in August, Justices Jacobson and Lander found that the Commonwealth Bank had breached the implied contractual term when it failed to consider redeployment opportunities for one of its executive managers prior to dismissing him. Justice Jessup dissented , holding that the implied term had not made its way into Australian law, and the bank hadn't breached it in any event.

The appeal is likely to be heard in early 2014.

COMING IN 2014

SIAG WILL BE LAUNCHING ITS NEW WEBSITE IN 2014!!

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Merry Christmas and Happy New Year

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training : development

A WorkSafe Approved Training Course

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siag is offering the 5 day OH&S representative course to HSRs and Deputy HSRs across a range of industries. The program is interactive, informative and gives an understanding of the OHS imperatives of this role.

The program is approved by WorkSafe and can be run in groups at your organisation or for individuals as part of our public program held at **siag's** Melbourne office.

Some of the topics covered include

~ Occupational health and safety legislation, codes, and standards
~ Identify, assess and control hazards present in the workplace
~ Carry out workplace inspections on a regular basis
~ Identifying risks
~ Investigating injuries, illnesses and incidents
~ Communicate effectively with all parties involved in occupational health and safety
~ Negotiation, consultation and collaboration to achieve issue resolution.
~ Keeping and maintaining basic health and safety records

For expressions of interest, fill in the form below.

Venue: 16/75 Lorimer Street
SOUTHBANK
VIC 3006

Cost: $730 plus GST per person

Contact **siag** on **(03) 9644 1400**, or email **info@siag.com.au** for more information

Expression of Interest: Initial (5 Day) OHS Course for HSRs, Managers and Supervisors

Please fill in the form below and return to: **16/75 Lorimer Street, Southbank VIC 3006** or fax to: **(03) 9644 1490**

Name: .....

Address: .....

.....

Phone Number: .....

Email: .....

Preferred intake: .....

Refund policy.
**Cancellations 21 days or more from commencement date receive full refund.
**Cancellations 14 days from commencement date receive 50% refund.
**Cancellations 7 days or less from commencement date receive no refund.