The Advisor

December 2015 Edition

Facebook "de-friending" found to constitute workplace bullying

***Rachael Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird [2015]* FWC 6556**

Ms Roberts applied to the Fair Work Commission (**FWC**) for a stop-bullying order (**Application**) against her employer, VIEW Launceston (**VIEW**) and two employees James Bird, Principal and Co-director and Lisa Bird, Sales Administrator. Ms Roberts was a real estate agent employed by VIEW and alleged 18 separate incidents of unreasonable behaviour between November 2013 and January 2015 constituted workplace bullying, including:

1. In response to Ms Roberts signing for a postal delivery, Mrs Bird acted aggressively, rudely and said "I am telling you both now, Rachael is not to sign for items and it is to stop as from now" and Ms Roberts alleged the conduct belittled and humiliated her;

2. Mrs Bird deliberately delayed performing any administration work involving Ms Roberts' property listings to make Ms Roberts look unprofessional;

3. Mrs Bird behaved unreasonably toward Ms Roberts when she said in response to Ms Roberts' verbal offer to answer the telephone "well yes" in a rude and hostile manner;

4. Mrs Bird behaved unreasonably and damaged Ms Roberts' reputation with a client when Mrs Bird referred the client's account to debt collection, despite Ms Roberts arranging for the account was to be held until the property sale was achieved;

5. Ms Roberts was treated differently to other employees in the workplace by Mrs Bird when she would not acknowledge her in the morning and would deliver other staff photocopying or printing to them, but not to Ms Roberts;

6. Mrs Bird either ignored Ms Roberts in the office or spoke to her, at times, in an abrupt way and generally treated her differently to other employees;

7. In September 2014, Mr Bird and another VIEW employee, made inappropriate comments to her that were embarrassing and humiliating by making suggestive comments about Ms Roberts having a sexual relationship with a female client, who was known to be a lesbian;

8. Mrs Bird had a belittling attitude toward Ms Roberts and would make unreasonable comments to her including "I don't have to answer to you Rachael";

9. Mrs Bird acted in a belittling and aggressive way towards Ms Roberts on 29 January 2015 during an impromptu one-on-one meeting called by Mrs Bird, during which Mrs Bird made comments to Ms Roberts that she was a "naughty little school girl running to the teacher" because Ms Roberts had discussed workplace concerns with Mr Bird. After the meeting, Mrs Bird deleted Ms Roberts as a Facebook friend.

The conduct resulted in Ms Roberts claiming she was unable to sleep, being depressed and anxious, resulting in medication prescriptions and psychological treatment. Ms Roberts had not been in the workplace since 20 February 2015 after being certified unfit for duties and subsequently filed a WorkCover claim. She had not returned to work since that time when filing the Application.

In response to the Application, VIEW implemented an anti-bullying policy and denied there was a continuing risk of Ms Roberts being bullied in the workplace. However, in addressing the allegations, the respondents did not suggest that Ms Roberts was being performance managed or that any of Mrs Bird's conduct was reasonable management actions.

In finding the above allegations to be substantiated, the FWC found the conduct engaged in by Mrs Bird was repeated, unreasonable behaviour directed toward Ms Roberts, caused a risk to health and safety and constituted bullying within the meaning provided by section 789FD of the Fair Work Act 2009 (Cth) (Act).

Further, the FWC rejected the Respondent's submission that as VIEW had implemented an anti-bullying policy and manual there was no risk that Ms Roberts would be subjected to future bullying behaviour. While the FWC considered it was able to make orders to stop the bullying of Ms Roberts at work pursuant to section 789FF of the Act, it referred the matter to conference between the parties to discuss those orders.

What does this mean for employers?

- Separate incidents may be considered in their entirety by the FWC when considering if a respondent has engaged in workplace bullying.
- The implementation of anti-bullying policies may not satisfy the FWC that an employee will not be exposed to an ongoing bullying in the workplace.
- An employer's action may not constitute workplace bullying in breach of the Act if they can establish that action taken is "reasonable management action."
- As provided by the FWC's Anti-bullying benchbook, if satisfied an employee has been, and will continue to be, exposed to workplace bullying, the FWC may make orders requiring:
  - the individual or group to stop the specified behaviour;
  - regular monitoring of behaviours by an employer;
  - compliance with an employer's anti-bullying policy;
  - the provision of information and additional support and training to workers; and
  - a review of the employer's workplace bullying policy.

Australia Post's failure to enforce discrimination policies leads to finding of vicarious liability

Murugesu v Australian Postal Corporation & Anor [2015] FCCA 2852

Mr Murugesu commenced providing delivery driver services as a contractor in late 2007 through his company Ruban Pty Ltd to Australia Post (**AP**). Mr Murugesu's ethnic origin is Tamil, he was from Sri Lanka and described himself as having dark skin. Mr Murugesu alleged AP employee John Boyle, who was usually responsible for organising Mr Murugesu's truck loads, commenced discriminating against him from around early 2008 by making racially derogatory comments. The comments included "black bastard", "you black bastards should do the slave jobs", "go back to Sri Lanka" and "go back by boat."

In 2010, employee Debra Currie observed the conduct at AP's warehouse and wrote an email to AP about the treatment of Indian and Muslim drivers and referred to Mr Murugesu as often having problems.

Mr Murugesu commenced proceedings in the Federal Circuit Court (**Court**) alleging:

1. He had been discriminated against by Mr Boyle in breach of section 18C of the Racial Discrimination Act 1975 (Cth) (RD Act) based on Mr Murugesu's race, colour, national or ethnic origin; and

2. AP was vicariously liable for Mr Boyle's actions as he had made numerous complaints to AP about Mr Boyle's conduct, which had not acted on his complaints.

The defence for AP and Mr Boyle:

1. Substantially denied or did not admit Mr Murugesu's allegations;

2. Alleged Mr Boyle said "kiss my white arse" in response to Mr Murugesu stating "you could kiss my black arse";

3. Denied any complaints were made to the persons identified by Mr Murugesu;

4. Denied liability to the claim; and

5. AP claimed, alternatively to its denial of the claim, that it had taken all reasonable steps to prevent Mr Boyle from doing any act that might amount to unlawful discrimination by training him in relation to its policies and procedures, including in relation to harassment and discrimination.

Mr Boyle admitted to the Court that he often told Mr Murugesu to "kiss my arse" in the workplace. When assessing Mr Murugesu's evidence, the Court considered he was not the kind of person who would use words attributed to him by AP and Mr Boyle. The Court found that Mr Boyle did make racially inappropriate comments to Mr Murugesu, however with less frequency than was alleged in the claim. The Court considered Mr Boyle's comments were grossly offensive and contained an element of race in breach of the RD Act.

The Court accepted Mr Murugesu did make complaints to AP employees, and further, found that there was a "curious lack of engagement" with the complaints by AP and its response to the complaints was inadequate. Specifically:

1. The Court found the complaint made by Mr Murugesu to Ms Currie, subsequently conveyed by Ms Currie by email to AP, was "defused to a point where nothing occurred";

2. Complaints made by Mr Murugesu to four AP employees were "met with scepticism" and showed "a pattern in these circumstances of failure to address the complaints…"

AP submitted it took all reasonable steps to prevent its employees acting unlawfully, being an exception to vicarious liability under the RD Act. The Court found that the training regimes and toolbox talks held with employees by AP were "exemplary" and showed, prima facie, that AP is opposed to any form of racial and unlawful harassment in employment.

However, despite having appropriate education and training for its policies in place, the Court found that the management of AP did not enforce the policies or provide an effective response when complaints were raised. Accordingly, the Court considered that AP did not take reasonable steps to avoid being found vicariously liable for the conduct of Mr Boyle and contravened the RD Act. The Court reserved its decision in relation to remedy.

What does this mean for employers?

- Employers:
  - may owe obligations under anti-discrimination legislation to contractors, in addition to employees; and
  - can be found to be vicariously liable for the actions of their employees and agents in breach of anti-discrimination legislation.

- Employers should take steps to prevent their employees and agents engaging in unlawful behaviour, and thereby minimising their exposure to vicarious liability, by:
  - implementing and maintaining appropriate workplace conduct policies;
  - ensure training is provided to employees in relation to their policies and procedures; and
  - when complaints are received, follow and apply their policies in dealing with, and responding to, inappropriate workplace conduct.

Dismissal for "reckless" safety breaches insufficient to avoid reinstatement order

Peter White v Asciano Services Pty Ltd t/as Pacific National [2015] FWC 7466

Mr White commenced employment as a Train Driver by Asciano Services Pty Ltd (**Asciano**) in 2005 and was employed pursuant to an enterprise agreement (EA). On 24 November 2014 Mr White was dismissed because:

1. In summary, during a train trip between Broken Hill and Parkes, Mr White as driver:
   a. Left his co-driver, Mel Burton, behind when she left the train to use the toilet, despite Ms Burton advising him "don't leave without me";
   b. Allowed the train to speed, Ms Burton to walk outside the train while it was in motion, and Ms Burton to smoke on the train (Incident);

2. And the Incident demonstrated:
   a. A reckless violation of Asciano's policies and procedures, including the Code of Conduct;
   b. A lack of general commitment to work safely;
   c. He took no action in relation to the multiple incidents of serious safety breaches which occurred during the journey on 24 November 2014;
   d. He failed to take responsibility or acknowledge wrongdoing in relation to the Incident;
   e. He did not understand his basic responsibilities to work safely as a driver;
   f. He did not understand the obligations of a Driver Trainer to educate others to work safely

Asciano dismissed Mr White for misconduct and Mr White filed an unfair dismissal application with the Fair Work Commission (**FWC**), arguing his dismissal was harsh for reasons including his unblemished employment record and inconsistent treatment by Asciano in relation to safety incidents. Specifically, Mr White submitted that Ms Burton received two warnings and was placed on a performance improvement plan in relation to the Incident.

Asciano conducted an investigation into the Incident, including interviewing Ms Burton. The FWC reviewed the evidence provided by Ms Burton and found the investigation report did not state Ms Burton told Mr White "don't leave without me" when she exited the train. Asciano conceded during the arbitration that the words had been incorporated into the report in error, which it specifically relied upon to terminate Mr White.

Further, the FWC allowed Mr White to tender in evidence driver feedback forms which confirmed it was common practice for drivers, although disapproved of by Asciano, to use the toilet while the train was in motion. Accordingly, the FWC considered that as Mr White did not know Ms Burton had left the train, and it was common for drivers to use the toilet while the train was in motion, it could not constitute a breach of Asciano's policies and was not a valid reason for termination.

While the FWC accepted that Mr White had sped during the journey, it considered the 885 instances of speeding during the 11 hour journey to be "overstated" and exaggerated Mr White's culpability, given that the same speed can be recorded multiple times during a journey. Further, the FWC held that Asciano should have reviewed Mr White's driving on other routes to establish whether there was a habit of speeding. Because Asciano did not conduct that review, the only evidence before the FWC was the speeding on 24 November 2014. The FWC considered Mr White's actions were a one off incident and given his unblemished 9.5 years of service, the speeding was given unnecessary weight as a reason for termination.

The FWC also considered that Ms Burton was "at least as culpable" as Mr White for speeding, and she was not dismissed from her employment which supported the dismissal being unreasonable. In relation to Ms Burton to smoking on the train, the FWC considered that Asciano's policy was expressed as to personal responsibility to comply and that it was "nonsense" to suggest Mr White had breached the policy by Ms Burton's conduct.

The FWC found the allegations of leaving Ms Burton behind and allowing her to smoke on the train were not unsubstantiated, however the speeding allegation was substantiated and would constitute a valid reason for dismissal. The FWC made minimal criticisms of Asciano's procedure.

In considering all circumstances, the FWC determined that Mr White's dismissal was harsh and unreasonable in breach of the Fair Work Act 2009 (Cth) (Act). Mr White sought reinstatement to his employment which was opposed by Asciano because he had failed to show insight or contrition for his actions, and it was not confident Mr White would not engage in the behaviours again. In reinstating Mr White to his employment, the FWC relied upon matters including:

- Mr White's conduct was not wilful, deliberate or reckless;
- some reasons for dismissal could not be proved;
- Mr White's 9.5 years of unblemished service with no safety infringements;
- Mr White's acknowledgement he did speed and was remorseful for his actions;
- Ms Burton was equally as culpable but not dismissed;
- the insufficient evidence provided by Asciano to prove its loss of trust and confidence in Mr White.

The FWC ordered Asciano pay Mr White compensation for loss of income, and that he be reinstated to his employment.

What does this mean for employers?

- Employers should ensure they are able to objectively prove the reason(s) relied upon to dismiss an employee.
- Differential treatment of employees, in circumstances where their liability and/or misconduct is equal, may render a dismissal in breach of the Act.
- Employers must consider an employee's employment history, including conduct and performance issues, when determining whether dismissal is appropriate disciplinary action.

Smoke free workplace policy found to be lawful direction to employees

Construction, Forestry, Mining and Energy Union v Glencore Mt Owen Pty Ltd [2015] FWC 7752

In January 2015, Glencore Mt Owen Pty Ltd (**Glencore**) banned smoking at its Mt Owen complex (**Complex**), which includes open cut mines and the coal handling preparation plant (**CHPP**). About 31 Glencore employees who work at CHPP are employed pursuant to the Mt Owen Mine Enterprise Agreement 2010 (**EA**) which includes a dispute resolution clause for disputes in relation to the application of the EA, in the course of employment or under the National Employment Standards.

The Construction, Forestry, Mining and Energy Union (**CFMEU**) made an application to the Fair Work Commission (**FWC**) to deal with the dispute as to whether the direction given by Glencore to its CHPP employees was reasonable. The CFMEU accepted Glencore's direction to ban smoking was a lawful, but disputed it was a reasonable direction.

In determining whether the direction was reasonable, the FWC considered many factors including:

The nature of the employment and impact of the direction on employees who smoke. CFMEU witness evidence stated it would require a 16 minutes round trip for a CHPP employee to drive off Glencore's premises during a break to have a cigarette. Witness evidence on behalf of Glencore agreed it would be difficult, but not impossible, to have a cigarette during a break and employees would need to seek permission before leaving the premises.

Only three of 31 CHPP employees smoke, and none had taken up Glencore's offer to assist them to quit smoking or sought permission from their supervisor during a break to have a cigarette. The FWC accepted that some employees would encounter difficulty to get through an entire shift without being able to smoke in the workplace.

Risks associated with smoking and the employer's legislative obligations concerning occupational health and safety in the workplace. The FWC accepted that smoking is a health hazard to the smoker and through passive smoke to others, for which there is no safe level of exposure. Smoking gives rise to a fire risk and there is no legal obligation for an employer to provide smoking areas in the workplace. Employers who allow smoking in the workplace may be exposed to litigation from employees and the public who suffer from passive smoking.

The FWC considered Glencore's statutory obligation to eliminate risks to health and safety, or if not possible, minimise those risks as far as is reasonably practicable. Further, it considered an employer should, if reasonably able, put in place measures to eliminate risks. The FWC considered Glencore could issue the direction as the ban it eliminates fire and passive smoking risks, and health benefits to smokers as they will smoke less cigarettes.

Previous directions at the Glencore complex as to restrictions on smoking in the workplace. The FWC considered Glencore had given previous direction to employees in relation to permitted smoking areas in the workplace in an attempt to minimise the risk to employees arising from passive smoking.

Practices elsewhere in the Glencore group of companies. Glencore witnesses gave evidence that it had implemented full smoking bans at five of six open cut mines owned by its group of companies in the Hunter Valley, which supported the reasonableness of the direction to employees at the Complex.

Changing attitudes towards smoking in the workplace and public places. The FWC considered that the trend toward smoke-free workplaces and public places provide support for the reasonableness of the direction, however the nature of the CHPP employment where employees could not readily leave the workplace to smoke, weighed marginally in favour of reasonableness of the direction.

The terms of the EA. The EA provides it is an objective "to produce a health and safety culture where the highest standard is an unquestionable priority of all employees and where every employee is committed to the end" and the FWC considered the ban seeks to establish the "highest standard" and supported the reasonableness of the direction.

Employee support for, or opposition to, the direction. Complex employees raised the idea of banning smoking in the workplace, and no evidence was adduced to the number of employees who supported or opposed the direction. The FWC considered that because none of the three smoker employees made a complaint to Glencore about the ban, it was a neutral consideration as to the reasonableness of the direction.
Consultation with employees. The FWC considered Glencore's extensive consultation process with employees from June 2013 prior to making its decision to support the reasonableness of the direction.

Notice prior to implementation of the direction. The six months' notice provided to Glencore employees prior to the implementation of the ban supported the reasonableness of the direction.

Offer of ongoing support to employees. Glencore offered support to employees through a range of quit smoking programs which supported the reasonableness of the direction.
In giving weight to those considerations, the FWC determined Glencore's direction to ban smoking at the Complex to be lawful and reasonable.

What does this mean for employers?

- The lawfulness and reasonableness of directions issued to employees by employers should be considered in the context of the employment relationship.
- The imposition of a smoking ban may be lawful and reasonable, provided it is appropriate in the context of the employment relationship.
- Employers should be aware of the possible impacts of a smoking ban on their workforce if considering implementing such a direction, including taking steps to mitigate the impact of the direction on their employees.

Compensation and reinstatement awarded for employee despite dismissal for racist comments

Joseph Johnpulle v Toll Holdings Ltd T/A Toll Transport [2015] FWC 3830

The Fair Work Commission (**FWC**) has reinstated an employee when determining his unfair dismissal claim despite making racist comments in the course of his employment. Mr Johnpulle commenced employment with Toll in 2008. An incident occurred on 7 February 2015 where Mr Johnpulle was accused by his colleague Mr Karzi of making "*racist, sectarian and inappropriate" comments about his religion, race and "tried to attribute the universally acknowledged criticisms of the conduct being undertaken in the Middle East to that of Mr Karzi and his heritage*" (**Incident**). Mr Karzi complained to Toll and Mr Johnpulle denied the allegations.

During the investigation of the Incident, a complaint was made against Mr Karzi by another employee, Mr Monda. Toll did not investigate Mr Monda's allegation against Mr Karzi. Toll interviewed Mr Johnpulle in relation to the Incident as part of a "*fact-finding exercise*" and not as part of a disciplinary process. When considering to take disciplinary action against Mr Johnpulle, Toll referred to three previous incidents in 2014 and claimed that combined, Mr Johnpulle showed a disregard for Toll's policies and code of conduct. Toll terminated Mr Johnpulle for serious misconduct.

The FWC found Mr Johnpulle made the comments alleged to Mr Karzi, and those comments formed a valid reason for his termination. The FWC stated "*it is no longer appropriate for employees to 'stir up' or 'take the Mickey' out of their colleagues based on their sex, religion, culture or heritage in order to get a reaction.*" Further, the FWC found Mr Johnpulle was notified of the reason for his termination and given an opportunity to respond to that reason. In relation to the allegations prior to 7 February 2015, the FWC found they were of lesser severity than the Incident and were resolved through a "*shop floor resolution*" where Mr Johnpulle acknowledged making the comments and indicated he would not make them again.

However, when considering the investigation and disciplinary process, the FWC found the process was flawed in that Mr Monda was not interviewed. When considering whether the termination was in breach of the Act, the FWC considered Toll's reliance on revisiting previous settled disputes to terminate Mr Johnpulle., its inconsistent actions in advising Mr Karzi that concerns in relation to his conduct were settled but applied a different standard to Mr Johnpulle, and that Toll made a "*quantum leap*" from an informal verbal warning to termination for serious misconduct given Toll's claim of Mr Johnpulle's escalated and continued inappropriate conduct.

The FWC found that because Mr Johnpulle:

- Had not received a formal warning for his ongoing inappropriate conduct;
- Was not treated in a consistent manner compared with other Toll employees;
- Was terminated after a flawed investigation,

That he was not afforded a fair go all around. Accordingly, the FWC reinstated Mr Johnpulle and ordered Toll pay him a further seven weeks compensation for loss of income (less notice paid), and that he be issued with a final warning in relation to the Incident to remain on his file for 12 months.

What does this mean for employers?

- Employers should avoid reliance on previous resolved conduct matters when taking new disciplinary action against employees
- A procedurally deficient investigation may render a dismissal harsh, unjust or unreasonable in breach of the Act, even where a valid reason for termination exists
- Employers should investigate allegations raised during an investigation process, including allegations made against a complainant or the investigation may be considered flawed
- An employee may be reinstated although they have been summarily terminated for breach of a code of conduct

"Knee jerk" dismissal for accessory to murder charge found to be unfair

***James Deeth v Milly Hill Pty Ltd [2015]* FWC 6422**

Mr Deeth made an application to the Fair Work Commission (**FWC**) alleging he had been unfairly dismissed by Milly Hill Pty Ltd (**Milly Hill**), which engages in wholesale and retail meat sales. Mr Deeth was in the third and final year of his butchery apprenticeship at the time of his dismissal.

On 23 September 2014, Mr Deeth was charged with being an accessory after the fact to murder. Mr Deeth's father advised Jamie Latham, manager of the store where he worked, that Mr Deeth was in custody and would not attend for work. On 24 September 2014, Mr Deeth was granted bail and on 25 September 2014, Peter Strelitz, Milly Hill director, contacted Mr Deeth's mother to discuss concerns that the criminal charge may impact on Milly Hill employees and business reputation. On 26 September 2014, Mr Strelitz advised Mr Deeth's mother that his employment had been terminated.

Milly Hill relied upon the following reasons to terminate Mr Deeth's employment:

1. Other employees at the retail store would resign if Mr Deeth remained employed, and the business would become unviable; and

2. Customers would boycott the retail store if Mr Deeth remained employed, and its profitability would suffer.

In response to the application, Milly Hill submitted it was a small business employer and that the dismissal was consistent with the Small Business Fair Dismissal Code (**Code**). Milly Hill called two employees to give evidence about Mr Deeth's mood and appearance deteriorating in the weeks leading up to the dismissal, including that he had engaged in threatened aggression towards unidentified people including him sharpening his knife aggressively in the workplace.

The FWC referred to relevant case law relating to the Code, requiring it to be satisfied that:

1. Whether, at the time of the dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediately dismissal; and

2. Whether that belief was based on reasonable grounds, which incorporates the concept that the employer has carried out a reasonable investigation into the matter.

The FWC accepted that Mr Strelitz believed Mr Deeth's actions were sufficiently serious to justify immediate dismissal, but found that the dismissal was a "knee-jerk reaction" to news of the charge which was "fuelled by reports of customer and employee dissatisfaction."

However, the FWC did not accept that Mr Strelitz had reasonable grounds for his belief as he did not conduct a reasonable investigation into the matter. The FWC rejected that Mr Strelitz's actions in obtaining legal advice constituted an investigation into the situation, and that Mr Strelitz was only a passive recipient of the customer reports of dissatisfaction, rather than receiving the feedback through active investigation. Accordingly, the FWC held the dismissal was inconsistent with the Code.

When considering the matters contained in section 387 of the Fair Work Act 2009 (Cth) (Act), the FWC found that:

a. An the circumstances of the retail store operating in a small country town, Mr Deeth's threatened aggression prior to being charged, and that the work involved the use of sharp knives, Milly Hill had a valid reason to dismiss;
b. Mr Deeth was not notified of his termination until after it took effect and was communicated by Milly Hill to his mother;
c. Mr Deeth was not afforded the opportunity to respond to the reason for termination;
d. The termination process "was at best deficient";
e. Mr Deeth was two-thirds through his apprenticeship and had been unable to secure alternative employment to allow him to complete his apprenticeship;
f. Milly Hill did not consider whether it could have retained Mr Deeth's employment and mitigated its perceived risks in relation to its business;

and that Mr Deeth's dismissal was harsh and unjust, but not unreasonable. The FWC considered that reinstatement was inappropriate and ordered six weeks' wages be paid by Milly Hill to Mr Deeth as compensation.

What does this mean for employers?

- Having a valid reason to terminate will not be compliant with the Act, unless an appropriate procedure is followed in effecting the termination, including:
    - offering an employee the opportunity to respond to the reasons for their dismissal; and
    - conducting appropriate investigations where appropriate.
- Employees who are employed by small business employers are not precluded from protection from unfair dismissal.
- Small business employers must ensure they comply with the Small Business Fair Dismissal Code when terminating employees.
- Employers should consider possible actions to mitigate the effect of a dismissal, depending on the facts and circumstances of the employment.

Deductions made by State of Victoria for laptops unreasonable and unlawful

Australian Education Union v State of Victoria (Department of Education and Early Childhood Development) [2015] FCA 1196

From 1 July 2009 until 29 November 2013, the State of Victoria, through the Department of Education and Early Childhood Development (**DEECD**), operated a scheme through which the DEECD provided laptops to teachers (**Program**). Pursuant to the Program, the DEECD made fortnightly deductions between $4 and $17 from teacher's salaries, totalling $20million in deductions during the period.

The Australian Education Union (AEU) challenged the lawfulness of the deductions and commenced proceedings in the Federal Court of Australia (**Court**) seeking that the deductions be repaid. In determining the application, the Court reviewed the circumstances relating to a sample group of teachers (**Group Teachers**).

Section 323 of the Fair Work Act 2009 (Cth) (Act) requires employers to pay to employees amounts payable in relation to the performance of work. Section 324 of the Act provides that a deduction from such amounts may be made if the deduction is authorised:

- In writing by the employee and is principally for the employee's benefit;
- By the employee in accordance with an enterprise agreement;
- By or under a modern award of Fair Work Commission (**FWC**) order; or
- By or under a law of the Commonwealth, a State or Territory, or court order.

Section 325 of the Act prohibits an employer from requiring an employee to spend any part of an amount payable to them in relation to the performance of work, if such requirement is "unreasonable." Section 326 of the Act provides that any term of an enterprise agreement, modern award or contract which permits a deduction that is for the benefit of the employer and is "unreasonable in the circumstances" shall have no effect.

In response to the application, the DEECD submitted that the deductions were permitted by section 324 of the Act in so far as they:

1. Constituted salary packaging arrangements pursuant to their relevant enterprise agreements (EA) and authorised by teachers; and
2. Were otherwise authorised by a State law, in the form of a Ministerial Order made on 19 December 2012 which purported to sanction any contractual deduction arrangement entered into between the teacher and the DEECD.

In relation to the Group Teachers, the Court found that the deductions were not salary packaging arrangements, because the laptops were not provided as "remuneration for their services" and therefore were not authorised by the EA or the Act. The Court further held that section 324 did not apply to authorisations retrospectively given by a State law, and rendered the relevant part of the order inoperative (overall) ruling the terms of the teachers' employment contracts permitting the deductions "unreasonable in the circumstances."

When considering the application of section 326 of the Act, the Court considered that the deductions for the cost of the laptop were largely made in the absence of a genuine choice of the teacher to participate in the Program, and hence unreasonable, because:

- The contribution to the cost was set at an excessive rate;
- The deductions were made not principally for the benefit of the teachers concerned; and
- The value of the benefits actually received by the teachers (personal use of the laptops) did not provide a countervailing justification.

The Court deferred the matter for the AEU and DEECD to consider its reasons and consult before further steps were undertaken in relation to the matter.

What does this mean for employers?

- Deductions authorised by an employee's terms and conditions of employment, such as by relevant industrial instruments (including awards and enterprise agreements) and employee contracts and letters of offer, must meet the requirements contained in the Act to be lawful.
- Predominantly, employers must ensure any deduction from an employee's pay is authorised in writing by the employee and be principally for their benefit.

Employer failure to prove inherent requirements and reliance on incorrect evidence results in unlawful termination

Dziurbas v Mondelez Australia Pty Ltd (Human Rights) [2015] VCAT 1432

Mr Dziurbas commenced proceedings in the Victorian Civil and Administrative Tribunal (**VCAT)** alleging he had been discriminated against by his former employer Mondelez Australia Pty Ltd (**Mondelez**) in breach of the Equal Opportunity Act 2010 (Vic) (**EO Act**).

From March 1984 to October 2013 Mr Dziurbas, a Polish immigrant with limited English skills, worked at Mondelez's Cadbury Ringwood plant as a confectioner.

In September 2011 Mr Dziurbas injured his elbow at work and subsequently performed modified duties pursuant to his accepted WorkCover claim until January 2013. During the course of the WorkCover claim, Mr Dziurbas suffered from non-work related hernia trouble which limited his work capacity. Mr Dziurbas' ceased work on 24 June 2013 to undergo surgery and took eight weeks' leave for recovery.

In September 2013, Mr Dziurbas' general practitioner certified him as fit for all duties, contrary to medical certificates provided one month prior indicating that he could only work subject to restrictions. Mondelez sought a medical report to clarify the inconsistency, and in October 2013 received a medical report from Dr Baker certifying that Mr Dziurbas could not return to work on full duties.

On 23 October 2013 Mr Dziurbas attended a meeting with Mondelez and was advised his employment was terminated. Mondelez confirmed by letter that Mr Dziurbas no longer had the capacity to undertake the inherent requirements of confectioner and terminated his employment. Mr Dziurbas was told during the meeting there were no other positions available for him at either Mondelez's Ringwood or Scoresby factories. Mondelez's human resources consultant gave evidence before VCAT that the termination letter was prepared prior to the meeting, but not signed until after the discussion.

Mr Dziurbas alleged Mondelez breached the EO Act by dismissing him because of his disability. Mondelez responded that Mr Dziurbas was unable to undertake the genuine and reasonable requirements of his role even if reasonable adjustments were made, and accordingly it had not breached the EO Act.

In determining the claim, VCAT found the dismissal was unfavourable treatment within the meaning of section 8 of the EO Act. Further, VCAT found that Mondelez made its decision to terminate Mr Dziurbas' employment based on Dr Baker's medical report and believed that Mr Dziurbas was unable to return to work without risk of further injury. In making this finding, VCAT found that the primary reason for termination fell within the definition of disability provided by the EO Act and, accordingly, Mondelez had directly discrimination against Mr Dziurbas.

VCAT then considered the exception in section 23 of the EO Act which provides that discrimination against an employee on the basis of their disability will not be unlawful in circumstances where:

- The employee requires adjustments in order to perform the genuine and reasonable requirements of the employment and:
    - the employee could not, or cannot, adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made; or
    - the adjustments are not reasonable having regard to the facts and circumstances set out in the EO Act.

Mondelez submitted that the genuine and reasonable requirements of a confectioner require each staff member be capable of performing all aspects of the role so that, in order to avoid injury, staff could be moved between tasks approximately every 30 minutes, and Mr Dziurbas could not lift weights greater than 5kg meaning he could not safely undertake a number of the required tasks.

When considering the medical evidence, VCAT determined that while Mr Dziurbas would not be able to undertake all tasks required of him and work for the duration of the shifts on a sustained basis without having pain and incapacity, it was reasonable for Mondelez to seek further medical evidence to clarify the change in position from Mr Dziurbas' general practitioner.

VCAT went on to hold that:

- Dr Baker's medical report had been prepared from misinformation provided about Mr Dziurbas' duties and time spent working on specific machines; and
- While Mondelez believed Mr Dziurbas was unable to resume what it believed to be his full time duties without risk of further injury, it was incorrect about the nature of the pre-injury confectioner role and that there were no adjustments which could be made to allow Mr Dziurbas to fulfil that role.

Mondelez was required to prove Mr Dziurbas could not perform the requirements of the employment adequately, and the relevant time was in October 2013 when it was considering termination of employment. VCAT held that:

continued...

Employer failure to prove inherent requirements and reliance on incorrect evidence results in unlawful termination - continued

- Mr Dziurbas was not given the opportunity to comment on the proposed reasons for termination during the October 2013 meeting;
- Mr Dziurbas was not given the opportunity to review Dr Baker's report, and was unaware of the opinion he could not return to full duties, which prevented Mr Dziurbas suggesting any adjustments to allow him to return to duties;
- Because Mondelez operated under an incorrect belief about the requirements of the Confectioner position, it could not demonstrate it had turned its mind to whether Mr Dziurbas could adequately perform the position with adjustments;
- Mondelez failed to adduce evidence as to
  - A comprehensive description of the genuine and reasonable requirements of the confectioner position;
  - Mr Dziurbas' actual capacity and limitations as at October 2013;
  - An analysis of the reasonableness of the adjustments; or
  - Demonstrate that even with adjustments, Mr Dziurbas could not adequately perform the reasonable and genuine requirements of Confectioner.

Mr Dziurbas sought over $230,000 for lost wages, long service leave, superannuation and retirement benefits. VCAT awarded Mr Dziurbas $20,000 for injury to feelings and reserved its decision as to other compensation orders.

What does this mean for employers?

- A dismissal because of an employee's inability to perform their role, because of a disability or illness, will prima facie be in breach of anti-discrimination legislation.
- Discrimination on the grounds of disability my not be lawful if employers can establish that:
  - that the employer cannot reasonably accommodate modifications required to allow the employee to adequately perform the requirements of their position;
  - that even with modifications, the employee cannot perform the requirements of their position.
- Employers should ensure they provide employees with sufficient information and opportunity to address the employer's proposed action in relation to their employment, before making any decision.

Recent updates and 2016 forecast

Annual Leave Changes

The Fair Work Commission (FWC) ruled in September 2015, as part of the four-yearly modern award review, that employers will have the right to direct workers to take annual leave if they accrue more than eight weeks leave. The FWC included safeguards in its model term including that:

- Before directing an employee to take annual leave, or an employee gives notice of leave to be granted, the employer and employee must seek to confer and genuinely try to agree upon steps that will reduce or eliminate the excessive annual leave accrual;

- The direction must not:
  - Leave the employee with not less than six weeks' annual leave accrual;
  - Be for a period of not less than one week;
  - Require the leave to be taken less than eight weeks after the day of the direction;
  - Require the leave to be taken more than 12 months after the direction is given; or
  - Be inconsistent with leave arrangements agreed between the employer and employees;

- An employee may require that leave is granted.

In December 2015, the FWC will hear submissions as to the insertion of model annual leave terms into hospitality, mining and heath sector awards. Submissions in opposition to the inclusion of the term will lead to reduced flexibility for employers.

Recent Amendments to the Fair Work Act

The Senate recently passed amendments to the Fair Work Act 2009 (Cth) (Act) which took effect on 26 or 27 November 2015. Those amendments include:

- Imposing an obligation on employers to discuss with employees a refusal to grant an extension to unpaid parental leave, prior to confirming the refusal and reasons in writing;

- Establishing a new process for negotiation of greenfields agreements by:
  - Extending good faith bargaining to the negotiation of these agreements; and
  - Providing an optional six-month negotiation timeframe for the parties to reach agreement (following which an employer can apply to FWC for approval of its agreement).

- Providing new requirements to prevent employees from taking protected industrial action unless bargaining has commenced (either voluntarily or because a majority support determination has been made);

- Requiring the Fair Work Ombudsman to pay interest on unclaimed moneys pursuant to section 559 of the Act (NB – this provision is yet to come into effect).

2016 forecast

Fair Work Ombudsman National Campaign

The Fair Work Ombudsman (FWO) has announced a national campaign which will investigate employer compliance with employment obligations, specifically focusing on the health care and social assistance industries.

The FWO identified that (on average) more than 3,000 calls a month are made to their info line from employees within these industries, and since 2010 more than $7 million has been recovered for 5,300 underpaid employees within these industries.

The new campaign will focus on allied health, medical services and residential care covered under the following awards:

- Aged Care Award;
- Clerks Private Sector Award;
- Health Professionals and Support Services Award; and
- Social, Community, Home Care and Disability Services Industry Award.

Employees under these awards include (but are not limited to) cleaners, receptionists, disability support workers, kitchen staff, medical receptionists and nursing assistants.

FWO inspectors will investigate up to 600 employers over the coming months. They intend to review compliance with minimum hourly rates, penalty rates, allowances, loadings, and meal breaks, as well as record-keeping and pay-slips obligations.

Productivity Commission's Final Report

On 21 December 2015 the Productivity Commission released its Final Report on Australia's industrial relations system, providing recommendations including:

- Sunday penalty rates to be brought in line with Saturday penalty rates for certain employees in hospitality, entertainment, retail restaurants and cafes;
- Allowing employers to vary an award for a group of employees by way of "enterprise contract", rather than negotiating individual flexibility arrangements with each employee;
- Introducing a "no disadvantage" test to replace replacing the "better off overall" test;
- an increase in maximum penalties for unlawful industrial action; and
- Compensation is only payable for unfair dismissal claims where an employer has dismissed an employee without reasonable evidence of performance or conduct issues, and removing reinstatement as the primary remedy.

The Government, through Employment Minister Michaelia Cash, has suggested that any changes would be taken to the next federal election after public consultation.

Domestic and Family Violence Leave

The Shorten Labor Government has announced paid domestic and family violence leave will become a workplace right if it is elected to government. Labor intends to amend the National Employment Standards contained in the Fair Work Act 2009 (Cth) to provide:

- Up to five days of paid domestic and family violence leave for permanent employees; and
- Up to five days unpaid domestic and family violence leave for casual employees.

It is intended the leave entitlements will allow victims to attend appointments including in relation to legal advice, court appearances, counselling and medical appointments and related appointments, including obtaining legal advice, counselling and medical appointments and relocation arrangements.

Proposed Further Amendments to the Fair Work Act

In early December 2015 the Turnbull Government introduced legislation into the House of Representatives seeking to incorporate provisions excluded from the 2015 amendments. The Fair Work Amendment (Remaining 2014 Measures) Bill 2015 seeks to make amendments to the Act including:

- The obligation for employers to pay untaken annual leave at termination as provided by the applicable industrial instrument;
- Preventing an employee from taking or accruing leave under the Act during a period in which they are absent from work and in receipt of workers compensation:
- Requiring individual flexibility arrangements (IFA) under an award or enterprise agreement to include:
  - A statement by the employee setting out why they belief the IFA meets their genuine needs and results in them being better off overall than if no IFA were entered into;
  - Reference to the IFA being terminated by either party giving 13 weeks' notice in writing or at any time by agreement of both parties in writing;
- That an employer does not contravene a flexibility term of a modern award or enterprise agreement in relation to an IFA if, at the time the arrangement was made, the employer reasonably believed the requirements of the terms were complied with;
- Providing a minimum number of matters under an enterprise agreement (EA) that can be varied by an IFA, including overtime and penalty rates, allowances, leave loading and when work is performed;
- Provide that an IFA that does not meet the requirements of the Act is taken to provide the IFA can be terminated by either party giving written notice of not more than 28 days or at any time by agreement of both parties in writing;
- A transfer of business does not occur if:
  - The new employer is an associated entity of the older employer when the employee becomes employed by the new employer; and
  - Before the termination of the employee's employment with the old employer, the employee sought to become employment by the new employer at the employee's initiative;
- Right of entry permits including:
  - Allowing a permit holder to enter premises to hold discussions with employees and who wish to participate in discussions, where the permit holder's organisation represents the employee's industrial interests where:
    - An enterprise agreement (EA) applies to the work performed on the premises and the organisation is covered by the EA; or
    - If:
      - An EA applies to the work but does not cover the organisation; or no EA applies to the work; and
      - A member, or prospective member, of the permit holder's organisation performs work on the premises and whose industrial interests the organisation is entitled to represent;
      - Has invited the organisation to send a representative to the premises of the purpose of holding those discussions.
  - Requiring a permit holder to comply with reasonable requests by the occupier of the premises to conduct interviews in particular rooms, and follow a particular route to reach a particular room;
  - Requiring the Fair Work Commission (FWC) to take into account, where appropriate, the impact of the entries on the employer or occupier of premises, when dealing with a dispute;
  - Repealing the definition of accommodation arrangement and transport arrangement;
  - Including power for the FWC to issue invitation certificates;
- In exercising its power to dismiss an application under the Act by reason of its substance or an applicant's conduct, the FWC:
  - Is not required to hold a conference or hearing, to the extent the matter involves contested facts;
  - Must invite parties to provide information that relates to whether the power should be exercised (invitation), and take into account that information;
  - Is empowered to hold a hearing as a result of receiving that information;
  - Give the parties written notice of the invitation and specify the time for compliance with the invitation.

Stay tuned to the Siag circulars for industrial relations and employment law updates.

We wish you a very Merry Christmas and a safe and happy New Year.

We take this opportunity to express our sincerest appreciation for your continued support throughout the year.

We look forward to working with you in the year to come.

from Brian and the SIAG team

siag training : development

A WorkSafe Approved Training Course

WorkSafe VICTORIA

Health and Safety Representative Initial OHS Training Course

To exercise powers and right as an HSR effectively, it is essential HSRs (and Deputy HSRs) receive training. This training course aims to provide the HSR with the appropriate skills, knowledge and confidence to represent the people they work with and to help make their workplace safer.

Throughout the year Siag offers the HSR Initial OHS Training Course (5 days). This is a WorkSafe approved course, and can be run in groups at your organisation or for individuals as part of our public program held at Siag's head office.

The learning objectives of the course are:

- Interpreting the occupational health and safety legislative framework and its relationship to the HSR
- Identifying key parties and their legislative obligations and duties
- Establishing representation in the workplace
- Participating in consulting and issue resolution
- Represent designated work group members in any OHS risk management process undertaken by appropriate duty holder/s
- Issuing a Provisional Improvement Notice (PIN) and directing the cessation of work

Entitlement

Under the OHS Act 2004 (section 67) all elected HSRs and deputy HSRs are entitled to undertake WorkSafe Victoria approved OHS training for HSRs and choose their training provider in consultation with their employer. SIAG is approved to deliver the HSR Initial OHS Training Course.

Venue: 16/75 Lorimer Street, SOUTHBANK. VIC 3006

Time: 9am - 5pm

HSR Initial OHS Training Course (5 days) 2016

	$850 per person (plus gst)				
	Day 1	**Day 2**	**Day 3**	**Day 4**	**Day 5**
Feburary Course	Tuesday 16/2/2016	Tuesday 23/2/2016	Tuesday 1/3/2016	Tuesday 8/3/2016	Tuesday 15/3/2016
May Course	Thursday 5/5/2016	Thursday 12/5/2016	Thursday 19/5/2016	Thursday 26/5/2016	Thursday 2/6/2016
July Course	Thursday 14/7/2016	Thursday 21/7/2016	Thursday 28/7/2016	Thursday 4/8/2016	Thursday 11/8/2016
September Course	Wednesday 7/9/2016	Wednesday 14/9/2016	Wednesday 21/9/2016	Wednesday 28/9/2016	Wednesday 5/10/2016
November Course	Friday 11/11/2016	Friday 18/11/2016	Friday 25/11/2016	Friday 2/12/2016	Friday 9/12/2016

SIAG also offers the HSR Refresher OHS Training Course (1 Day)
Please contact SIAG on 1300 SIAGHR (1300 742447)
for more information.

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