The Advisor

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Dismissal for uniform theft insufficient to avoid reinstatement

Sione Amiatu, Franke Ioane and Marcello Mastroianni v Toll Ipec Pty Ltd T/A Toll [2015] FWC 3924

The Fair Work Commission (FWC) has ordered the reinstatement of employees despite their dismissal for theft. The Applicants worked at Toll's Altona Road depot when they found a box containing Toll employee uniforms. CCTV recorded the Applicants removing clothing items which Toll considered their actions constituted theft and serious misconduct. Toll commenced an investigation and disciplinary action against the Applicants, who were suspended and advised Toll may refer the matter to police.

The Transport Workers' Union of Australia (TWU) represented the Applicants during the investigation and prior to meeting with them, proposed on their behalf to Toll that they resign. After the Applicants were interviewed by Toll, they met with the TWU and wrote resignation letters as dictated to them by the TWU organiser. Toll provided the Applicants with a statement of their entitlements at termination which were prepared prior to receiving the resignations. The Applicants were not paid notice by Toll.

In response to the Applicants unfair dismissal applications, Toll made a jurisdictional objection that there was no dismissal as required by the Fair Work Act 2009 (Cth) (Act). When determining the jurisdictional objection, the FWC was required to consider whether the resignations were at Toll's initiative by reason of its conduct and therefore constituting a 'dismissal.'

The FWC found the TWU was an 'energetic advocate' of resignation and had no authority from the Applicants to suggest to Toll they resign. The FWC referred to Toll witness evidence of its concern to get the best outcome for its business and that obtaining the Applicants resignations was in its interest. Additionally, the FWC considered Toll's advice to the Applicants they would be terminated, the Police called and its encouragement of resignation through the TWU weighed against its jurisdictional objection. The FWC found that although the Applicants resigned, the termination was at Toll's initiative and were dismissals within the meaning of the Act.

As Toll's jurisdictional objection was dismissed, the FWC considered the merits of the unfair dismissal applications and whether there was a valid reason for termination. In assessing the allegation of theft, the FWC had to determine whether the Applicants possessed dishonest intentions as an element of the theft allegation. The FWC was not satisfied Toll had established the Applicants actions as dishonest, rather finding their conduct was 'misguided.' The FWC relied upon the Applicants actions of wearing the appropriated clothing to and from work the following day as evidence they had not acted dishonestly or with an intention to permanently deprive Toll of the uniforms. Toll alternatively argued a valid reason for dismissal was the Applicants failure to follow its uniform procedure however the FWC considered that reason to be insufficient for termination, warranting warning or reprimand instead.

The FWC reviewed Toll's procedure in effecting the dismissals and found that Toll had failed to comply with the procedure outlined in the applicable enterprise agreement. Further, the FWC determined the dismissals were disproportionate to the conduct and therefore harsh and in breach of the Act.

When the FWC considered whether ordering a remedy was appropriate, Toll argued it had lost trust and confidence in the Applicants as a result of their actions. The FWC dismissed Toll's argument and found the Applicants acted openly and transparently in relation to the allegation. The FWC ordered compensation for two of the Applicants and that each Applicant be reinstated to their employment with Toll.

What does this mean for employers?

- An employee's resignation may be found to be at an employer's initiative and constitute a dismissal when considering the factual circumstances leading up to the resignation
- Employers should be aware that the more serious an allegation against an employee, the greater the obligation for it to be satisfied that the allegation is proved based on available evidence
- Employers must be satisfied, when dealing with theft allegations, that the employee acted dishonestly and with an intention to permanently deprive the employer of property
- A loss of trust and confidence in a former employee may not be sufficient to prevent an order for reinstatement from a court or commission when considering a termination claim

Real estate agency ordered to pay compensation for unreasonable performance management action

Lynn Masson-Forbes v Gaetjens Real Estate Pty Ltd [2015] FWC 4329

The Fair Work Commission (FWC) has awarded an employee compensation because of her employer's unreasonable performance management actions.

In November 2010 the employee commenced with Gaetjens Real Estate (Gaetjens) and at the time the employment ceased, she was employed in the position of General Manager Sales & Corporate Development. In early 2013 the employee's duties included marketing the firm as a sales agent for older clients and receiving and developing sales leads to be provided to her colleagues for finalisation. Throughout 2013 sales were below budget and the employee received inconsistent directions from Gaetjens regarding her sales and marketing duties.

In February 2014 Ken Gaetjens (Ken) wrote to the employee in relation to its sales concerns and revised her 2014 sales targets from 16 to 20. Soon after Ken's son Michael Gaetjens (Michael) assumed responsibility for the business strategy and in April 2014 Michael met with the employee to discuss her sales to date. Michael then wrote to the employee confirming her target was two settled sales per month. The employee alleged the target of 2 settled sales per month was never agreed and newly imposed on her by Michael.

Michael sought to meet with the employee in late May 2014 to conduct a performance review. The employee became overwhelmed, required hospitalisation and did not attend the meeting. She commenced a period of pre-scheduled annual leave, continued on personal leave and made a WorkCover claim. During her absence Gaetjens removed her profile from its website.

The employee returned to work in November 2014 and Gaetjens represented her as a sales employee, removed her direct reports, increased her sales targets without consultation and intended to commence performance management. Gaetjens claimed the target increase was because the employee would only focus on sales. The employee advised Gaetjens she needed time off to undertake duties in her position as President of the Real Estate Salesperson's Association of South Australia (RESA). Gaetjens objected to the employee taking time off work to perform RESA duties as they did not form part of her employment.

On 21 November 2014 Michael issued the employee with a written warning about her performance. On 24 November 2014 the employee resigned effective 30 January 2015 referring to unreasonable criticism and expectation, Gaetjens was trying to make her work conditions untenable, that her working conditions may exacerbate her illness and she was being subjected to intimidation and bullying tactics. Gaetjens accepted the resignation but advised the employment would end on 1 December 2014.

The employee made a general protections claim alleging she was subjected to adverse action because she was dismissed by forced resignation or alternatively by Gaetjens bringing forward the termination date. The employee alleged the dismissal was because she exercised her workplace right to take personal leave and/or because she was a member of an industrial association (RESA) or engaging in industrial activity in breach of the *Fair Work Act 2009* (Cth) (Act).

To defeat the claim, Gaetjens needed to prove to the FWC satisfaction that it did not subject the employee to adverse action because of an unlawful reason in breach of the Act. The FWC found the employee was forced to resign by Gaetjens by reason of its conduct being the changes in performance expectations without consultation and that her complaints were met with 'indifference' by Michael. The FWC considered the forced resignation and moving the termination date forward constituted a dismissal and adverse action within the meaning of the Act.

When considering Gaetjens reasons for taking the adverse action, the FWC referred to the performance management of the employee in November 2014 and the increase in annual sales from 16 to 48 as "*punitive*" and did not account for her five month absence from work. The FWC relied upon Michael's inability to provide a "*convincing explanation*" as to why the employee's targets were changed and did not accept the argument that the targets were aspirational rather than expectation. The FWC found Gaetjens failed to discharge the onus to prove the adverse action was taken for lawful reasons and determined it was taken because of the employee's personal leave and industrial activity. The FWC ordered compensation for economic loss of $17,541 and damages of $3,000.

What does this mean for employers?

- The reasonableness of performance management processes may be considered when a court or the FWC is assessing whether an employer is motivated by unlawful reasons in breach of the Act
- Where an employee has resigned, bringing forward the employee's nominated termination date may render the termination at the employer's initiative
- A failure by an employer to prove adverse action has been taken for lawful reasons will result in a finding the employer has breached the Act
- Employers must ensure they can establish that any action taken against employees, which could constitute adverse action in breach of the Act, has been take only for lawful reasons

Maximum compensation awarded for dismissal without valid reason or procedural fairness

Leyla Moghimi v Eliana Construction and Developing Group Pty Ltd [2015] FWC 4864

The Fair Work Commission (FWC) has awarded maximum compensation to an employee who was unfairly dismissed in breach of the Fair Work Act 2009 (Cth) (Act). Ms Moghimi was employed as a full time architectural draftsperson by Eliana Construction and Developing Group (Eliana) from 2 June 2014. Ms Moghimi moved to Australia from Iran in 2013, was the only woman in the design team and while her domestic partner worked at Eliana they did not interact in the performance of their duties.

From 19 December 2014 until around 19 January 2015 Ms Moghimi took a period of leave and travelled overseas. Upon returning to Australia, Ms Moghimi was the victim of domestic violence where her phone was taken by her partner. As a result of police attendance, her partner was excluded from the home and an intervention order issued against him requiring he not approach or remain within 3 meters of her however allowed them to continue to work in the same office.

Ms Moghimi was unable to work on 19 and 20 January 2015 because of the impact of the domestic violence and as she had no phone, she was unable to advise Eliana of her absence. Ms Moghimi stated she advised a colleague through Facebook and asked they advise Eliana of her absence.

Mr Sowiha, director of Eliana, received a text message from Ms Moghimi's partner on 19 January 2015 advising they would not be at work that day. On 21 January 2015 Ms Moghimi advised her manager Mr Yassa by telephone she would return to work the following day. Mr Yassa was already aware of the domestic incident and intervention order. Mr Sowiha gave evidence he was not aware of either and arranged to meet Ms Moghimi and Mr Yassa on 22 January 2015.

On 22 January 2015 Ms Moghimi returned to work and around lunchtime a managers meeting was held. Mr Sowiha later met with Ms Moghimi and advised her she could not work in the office with her partner because he "*could not protect*" her and suggested Ms Moghimi work from home. Ms Moghimi advised this was not an option as her partner had taken "*everything*."

Mr Sowiha said Ms Moghimi gave him an ultimatum that he could employ either her or her partner. Mr Sowiha said he would not terminate Ms Moghimi's partner however during the arbitration he could not explain during why Ms Moghimi's partner could not work from home.

After the meeting Mr Spasevski, Eliana's legal counsel, approached Ms Moghimi and said it would be easier to find alternative employment if she resigned. Mr Spasevski provided her with a resignation letter which she signed because she felt she had no real choice.

When considering Eliana's jurisdictional objection that Ms Moghimi resigned, the FWC found that Mr Sowiha dismissed Ms Moghimi during the lunch meeting on 22 January 2015, and that Mr Spasevski later suggested it would benefit her if she resigned. Accordingly, the FWC found Ms Moghimi had been dismissed within the meaning of the Act.

In assessing the valid reason advanced by Eliana, the FWC found Ms Moghimi's non-attendance at work on 19 and 20 January 2015 did not constitute misconduct as she had a valid reason for her absence. Further, the FWC found the reason for the dismissal was that Eliana believed the intervention order meant that Ms Moghimi could no longer work in the office. The

FWC considered this was not a valid reason for termination. Additionally, the FWC found when considering Eliana's procedure that Ms Moghimi was not given an opportunity to respond to the reason for dismissal and that her vulnerable position as a recent migrant facing a domestic violence situation rendered the termination harsh.

Reinstatement was not sought by Ms Moghimi. The FWC considered Ms Moghimi would have continued in her employment for at least 12 months but for her dismissal. When considering all relevant factors, including remuneration earned since the dismissal, contingencies and loss, the FWC ordered Eliana pay the maximum compensation payable of $27,500 (26 weeks' pay).

What does this mean for employers?

- An employee's personal circumstances and domestic situation may render a termination harsh and in breach of the Act
- Employers must have a valid reason to terminate and undertake a procedurally fair process in effecting the termination to successfully defend an unfair dismissal claim
- A resignation may be found to constitute a dismissal where the employee had no choice but to resign as a result of the employer's actions

"Cavalier approach" to Award obligations leads to penalty for employer

Kennewell v MH & CG Atkins T/A Cardinia Waste & Recyclers [2015] FCA 716

The Federal Court of Australia has imposed a penalty on an employer for its "*cavalier approach*" to compliance with its award obligations. Mr Kennewell commenced employment with Cardinia Waste in March 2014 as truck driver. After receiving his first pay, Mr Kennewell researched his entitlements under the *Waste Management Award 2010* (Award) and became concerned he was not being paid appropriate penalty rates including over time and casual loading.

In April 2014 he raised his concerns with Cardinia Waste and believed his employer would escalate and address the issues. He again raised concerns in late April 2014 and was advised by his supervisor "*they get rid of people who make problems*..." in relation to pay. Mr Kennewell agreed to work on the Anzac day public holiday and believed he was entitled to a higher payment for minimum shift entitlements under the Award. Mr Kennewell asked his supervisor whether he was a casual or permanent employee, what penalty rates applied and advised if his supervisor could not resolve the issues he would elevate the matter to the "*Fair Work Commission.*"

Later that day Mr Kennewell's supervisor told him he was being terminated for performance reasons. Mr Kennewell responded that it was "*odd*" he raised pay concerns that morning and was then being terminated. The supervisor then referred to Cardinia Waste "*getting quiet now*" and that he was "*following orders*." Mr Kennewell recorded the conversation. The following day Mr Kennewell returned to the workplace to collect his belongings. He recorded a further conversation with his supervisor where he stated Cardinia Waste had terminated three or four employees in the past who had raised issues.

Mr Kennewell commenced court proceedings alleging he had been dismissed in breach of the general protections provisions of the *Fair Work Act 2009* (Cth) (Act) because he exercised his workplace rights by querying his employment status and rates of pay.

Several Cardinia Waste employees gave evidence of their concerns in relation to Mr Kennewell's performance in that he was inefficient, disappeared while at work, refused to wear high-visibility clothing, performed his duties unsafely and was disrespectful towards and damaged the property of customers. In summary, Cardinia Waste alleged claimed Mr Kennewell was dismissed for serious misconduct and unsatisfactory performance. On behalf of Cardinia Waste, Michael Atkins gave evidence that he was unfamiliar with the Award, that previous employees had raised concerns about entitlements which had been settled on confidentiality terms and despite these matters, he did not attempt to familiarise himself with the Award.

Mr Atkins was the decision maker on behalf of Cardinia and denied knowledge of Mr Kennewell's complaints and inquiries and further, denied terminating Mr Kennewell because of his exercise of workplace rights. The Court did not accept Mr Atkins' denial he was not aware of Mr Kennewell's complaints and that he would have no knowledge of Award provisions. The Court considered it "*highly improbable that the temporal proximity of Mr Kennewell's renewed complaints and the termination was purely coincidental*" and that his complaints were a substantive and operative reason for his dismissal and that Cardinia Waste had breached the Act.

The Court declined to order reinstatement and instead ordered Cardinia Waste pay compensation of loss of income. Additionally, the Court considered Cardinia Waste adopted a "*cavalier approach*" towards compliance with the Award and Mr Kennewell's complaints. Cardinia Waste was ordered to pay a pecuniary penalty of $7,500 payable to Mr Kennewell for its breaches of the Act.

What does this mean for employers?

- Employers should familiarise themselves with their obligations under relevant industrial instruments
- Employers must take employee complaints in relation to entitlements seriously and should address those concerns when raised by employees
- Where an employer cannot prove they had a lawful reason to terminate an employee, they may be exposed to orders for compensation and penalty by a court
- A court will consider an employer's attitude towards compliance with industrial instruments when exercising its discretion to impose a penalty for breach of the Act

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

Over $170,000 awarded in compensation for government breach of anti-discrimination legislation

Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW) [2015] FCCA 1827

The Federal Circuit Court of Australia has awarded an employee over $170,000 for her employer's breaches of the *Disability Discrimination Act 1992* (Cth) (Act). Ms Huntley commenced proceedings alleging the State of NSW, through the Department of Police and Justice (Department), discriminated against her in breach of the Act.

Ms Huntley was employed by the Department as Probation and Parole Officer (PPO). In June 2009 she was diagnosed with Crohn's disease which required Ms Huntley to have frequent bathroom access and was restricted to travel where there was immediate access to a bathroom. Ms Huntley's Crohna's disease rendered her unable to perform the field work duties of PPO.

From August 2009 the parties made an informal arrangement to accommodate her disease where Ms Huntley perform modified duties. In March 2010 the Department advised the arrangement could not continue because of the constraints on its operations without identifying the constraints. Ms Huntley was referred for medical assessment to determine other suitable roles and was deemed permanently unfit for the PPO position. The Department advised Ms Huntley she could "*medically retire*" or apply for redeployment. Ms Huntley declined the two positions offered by the Department as being incompatible with her physical needs based on her disability.

In July 2010 Ms Huntley applied for a Corrections Intelligence Group (CIG) position. Her sick leave record was disclosed and she discussed her disability needs during the application process. Ms Huntley was offered the CIG position and commenced in September 2010. She was soon diagnosed with Idiopathic Hypersomnolance and her request to work from home was refused by the Department without justification. In February 2011 Department employees corresponded about Ms Huntley's sick leave but did not discuss their concerns with her. In May 2011 the Department advised Ms Huntley the CIG position contract would not be extended due to her illness and sick leave record and she would return to the PPO position. The Department told Ms Huntley she could medically retire or undertake further medical assessment. Ms Huntley declined to medically retire and the Department advised it was not willing to consider transferring her to alternative positions.

The meeting caused Ms Huntley to suffer a major depressive disorder and a second medical assessment determined she was permanently unfit for the PPO position. From May to July 2011, the Department paid Ms Huntley her accrued entitlements without her consent. In November 2011 the Department advised Ms Huntley was deemed unsuitable for a position because of her disabilities and it would be "*high stress*" despite no medical report referring to stress. In June 2012 While the Department claimed it was not required to secure an alternative position for Ms Huntley.

In response to Ms Huntley's claim, the Department stated the PPO adjustments were 'temporary' and field work duties were an inherent requirement of the PPO position which she could not perform.

The Court found the Department assessed Ms Huntley's employment and disability on a factual basis inconsistent with medical evidence, which stated that after a graduated return to work, Ms Huntley was able to perform the duties of a full time office position. The Court was critical of the Department as it was determining the inherent requirements of the PPO position through a present day analysis of documents rather than the analysis that should have been made at relevant times. The Department did not produce evidence of what relevant managers considered as to the requirements of the PPO position or reasonable adjustments to be made.

The Court found the Department focussed on "d*ealing with a person whom they saw had an illness which necessitated long, disruptive and unplanned absences from work which impacted on the efficiency of the work of the office, and impacted on other staff.*" The Court referred to the Department's failure to implement any doctor recommendations, opted to keep Ms Huntley on leave and found no reasonable adjustments were considered as required by the Act. Accordingly, the Court held the Department discriminated against Ms Huntley by failing to make reasonable adjustments for the PPO position, failed to consider (and therefore make) reasonable adjustments for the CIG position and in determining she was unfit for the PPO position.

The Court ordered the Department re-credit Ms Huntley's leave entitlements and pay compensation for pain and suffering and breach of contract of $75,000, and over $98,000 for lost wages, leave entitlements, superannuation, loss of promotion opportunities and psychologist costs.

What does this mean for employers?

- Employers may breach anti-discrimination legislation for failing to reasonable accommodate an employee's disability
- Employers should obtain, rely on and apply medical advice and recommendations when considering the impact of an illness or disability on an employee's performance of their position
- When obtaining such medical evidence, an employer should identify the inherent requirements of a position to be assessed

Penalties imposed on employer and senior employees for breaching the Fair Work Act

Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors [2014] FCCA 721; Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors (No. 2) [2015] FCCA 2129

The Federal Circuit Court has ordered penalties against an employer and individual employees for breaching the *Fair Work Act 2009* (Cth) (Act). The Fair Work Building Industry Inspectorate (FWBII) commenced proceedings against Baulderstone and its employees (Employee Respondents) alleging respondents had contravened the general protections provisions of the Act.

The FWBII alleged the Employee Respondents made a Baulderstone employee (Mr Teariki) sign two documents, one stating he would resign as Safety Officer at the Edmund Barton Building Project (EBB Project) for which he received a salary, and another stating he would be engaged as an employee at the ANU Student Accommodation 3 Project (SA3 Project) where he would receive wages under an enterprise agreement (EA). The FWBII alleged by that action, Baulderstone through the Employee Respondents, took adverse action against Mr Teariki because he was not a member of, and had ceased being a member of, the CFMEU. The FWBII claimed the Employee Respondents were knowingly involved in Baulderstone's breaches of the Act meaning they had also breached the Act.
Additionally, the FWBII alleged Baulderstone, through the Employee Respondents, represented to Mr Teariki he had to cease employment under the salary contract, he had to resign from that contract and would receive more money under the EA. The FWBII submitted each representation related to a workplace right, were false and misleading and recklessly or knowingly made to be false or misleading in breach of the Act.
In response, Baulderstone:

- Denied adverse action was taken because Mr Teariki was not dismissed and he was not worse off being employed under the EA;
- Argued if adverse action occurred it was authorised by the Act as Baulderstone would have breached the Act had Mr Teariki not signed documents to ensure he was covered by the EA;
- Denied its actions were associated with Mr Teariki's CFMEU membership, rather its reason was he commenced work on the SA3 Project and had to be covered by the EA;
- Denied misrepresentations were made or related to workplace rights.

The Court found that the Employee Respondents were concerned about Mr Teariki's cessation of CFMEU membership, their actions gave him no choice but to sign the documents and they insisted he resign his salary contract. Further, the Court found through those actions Baulderstone prejudiced Mr Teariki through the loss of his contract which constituted adverse action because it altered his position to his prejudice in breach of the Act. The Court was not persuaded that Baulderstone's actions were not associated with CFMEU membership.

While the Court accepted the Employee Respondents evidence without reservation, it considered the evidence given did not exclude the real possibility that an unlawful reason motivated Baulderstone's actions. When determining whether the Employee Respondents were knowingly concerned in Baulderstone's breach of the Act, the Court found that two of the Employee Respondents had acknowledged the adverse action taken against Mr Teariki was for reasons including his CFMEU membership and found they personally had contravened the Act. The Court also found two representations made to Mr Teariki were false and in breach of the Act.

In determining the appropriate remedy, the Court found Mr Teariki suffered no compensable loss with respect of Baulderstone's breaches of the Act. The Court then considered whether penalties should be imposed against Bauldersone and two Employee Respondents and found Baulderstone's actions were "*deliberate and concerted*" and the Employee Respondents were acting under direction of the company.

Because the Court found the actions of Baulderstone were a decision of a senior manager, implemented under direction by senior managers, to coerce an employee and it then attempted to conceal its reasons for its actions, a penalty of $25,000 was imposed against Baulderstone. By reason of their knowing involvement in Baulderstone's breaches of the Act, the Court fined two of the Employee Respondents $3,500 each.

What does this mean for employers?

- Employers may breach anti-discrimination legislation for failing to reasonable accommodate an employee's disability
- Employers should obtain, rely on and apply medical advice and recommendations when considering the impact of an illness or disability on an employee's performance of their position
- When obtaining such medical evidence, an employer should identify the inherent requirements of a position to be assessed

Morning sickness forms part of the definition of disability for anti-discrimination claim

Bevilacqua v Telco Business Solutions (Watergardens) PL (Human Rights) [2015] VCAT 269; Bevilacqua v Telco Business Solutions (Watergardens) PL No. 2 (Human Rights) [2015] VCAT 693

Ms Bevilacqua was employed as a Sales Consultant in a Telstra store owned by Telco Business Solutions (Telco) when she discovered she was pregnant and notified Telco. After learning of her pregnancy, she attributed her recent ill health to morning sickness from which she continued to suffer. Telco agreed Ms Bevilacqua's role would change to Effective Floor Manager so she could avoid long client transactions and allow her to rush to the toilet if needed however it did not alleviate Ms Bevilacqua's ongoing ill health.

As Ms Bevilacqua had previously suffered a miscarriage, and continued to suffer morning sickness, pursuant to her doctor's advice she requested Telco reduce her hours to 28 per week. Telco refused on the basis of the current staff availability, its view that the request was permanent and that its operations would not allow her role to be performed part time. She subsequently tendered her resignation and ceased employment.

Ms Bevilacqua alleged she had been discriminated against in breach of the *Equal Opportunity Act 2010* (Vic) (Act) on the basis of her pregnancy, including her morning sickness, and failed to make adjustments for her disability bring her morning sickness. Ms Bevilacqua commenced proceedings against Telco in the Victorian Civil and Administrative Tribunal (VCAT).

Bevilacqua alleged she was discriminated against and treated unfavourably during her employment for incidents including:

1. Telco management advising it was "*sick of this*" and that she better "*come in*" after advising she was too unwell to attend work;
2. Telco management stating "*you'll be fine, you're not that far along*" when asking Ms Bevilacqua to lift a box of shopping bags;
3. She would on occasion receive text messages from the Store Manager while on the toilet asking when she would return to its shop.

Ms Bevilacqua claimed Telco's actions caused her to develop post traumatic stress disorder accompanied by depression and anxiety.

When considering the attributes relied upon by Ms Bevilacqua, VCAT considered her morning sickness constituted a 'disability,' as well as falling within the 'pregnancy' attribute within the meaning of the Act.

VCAT found Telco's employees made the comments alleged by Ms Bevilacqua, and by reason of those comments, Telco directly discriminated against Ms Bevilacqua because of her pregnancy and disability. Telco was found to be vicariously liable for the discriminatory actions and comments of its employees. VCAT found Telco breached the Act by directly discriminating against Ms Bevilacqua because she had taken sick leave and because of her pregnancy and disability.

For its contraventions of the Act, VCAT ordered Telco pay Ms Bevilacqua $10,000 as damages for the hurt and humiliation she suffered resulting from its discriminatory actions and comments.

What does this mean for employers?

- An employer can be found be vicariously liable for discriminatory conduct engaged in by their employees
- Protected attributes for the purpose of unlawful discrimination includes symptoms of that attribute, for example morning sickness being an extension of the pregnancy attribute
- Compensation for unlawful discrimination is not limited to loss of income and may include an award of compensation for hurt and humiliation
- Employers should ensure all employees are provided with training to ensure their workplaces are free from discrimination

siag training : development

A WorkSafe Approved Training Course

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)					
	$790 per person (plus gst)				
	Day 1	**Day 2**	**Day 3**	**Day 4**	**Day 5**
November Course	Friday 20/11/15	Friday 27/11/15	Friday 4/12/15	Friday 11/12/15	Friday 18/12/15

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