The Advisor

siag

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Unfair dismissal applications lodged via telephone only require minor details

Brett Ellis v Esso Australia Pty Ltd [2015] FWC 45 (6 January 2015)

The Fair Work Commission has ruled that unfair dismissal claims lodged via telephone which comply with procedural rules are valid regardless of whether they provide comprehensive details regarding the claim. This enables dismissed employees to provide additional information in support of their application outside of the 21 day time limit for lodging an application which does not require the employee to obtain an extension of time in exceptional circumstances.

Esso Australia dismissed the employee on 25 September 2014. The employee's representatives made a telephone application for an unfair dismissal claim on 15 October 2014 and filed a completed application on 21 October 2014. Esso Australia objected to the application arguing it was not made within 21 days of his dismissal.

Esso Australia argued that no valid application was made on 15 October 2014 because the employee did not specify the remedy sought and reasons why the dismissal was unfair. Esso Australia argued it was disadvantaged because it was not put on notice about the claim against it, which included its ability to manage its workforce and the possibility of reinstatement. It further argued that allowing an employee to make an incomplete telephone application enabled the 21 day time limit to be circumvented and in effect, obtain an extension of time without the Commission determining if exceptional circumstances existed to grant such an extension.

The Commission rejected Esso's argument, stating that the Fair Work Commission Rules 2013 (Rule 9) allowed Mr Ellis to make his application by telephone and that he was not required to provide an answer to all the questions in the prescribed form, such as the grounds of his application or remedy sought. Deputy President Gooley outlined the necessary procedure that includes an obligation for the Commission to include the information provided by the telephone application in a form which the employee was required to sign and return within 14 days of receipt.

Deputy President Gooley determined that an employee is not limited by the matters contained in their application upon final determination at hearing. She concluded that the telephone application process merely allows unfair dismissal applications to be lodged in a "quick, flexible and informal manner".

What does this mean for employers?

- Employers need to be aware that an application made by telephone requires additional steps which can be completed by the employee outside of the 21 day time limit in accordance with the Commission's procedural rules.
- The quick and efficient nature of the telephone lodged applications has the potential to see the number of applications rise.

Employer found to have breached own policy in botched HR investigation

Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177 (22 December 2014)

The Full Court of the Federal Court of Australia has allowed an employee's appeal and found that the employer's policy formed part of the employment contract, which the employer breached by failing to comply with the policy. The policy related to complaint procedures and gave the employee the option to make a formal complaint which would lead to an investigation of the complaint. The employer's policy provided an investigation process to be followed.

The employee, who was a sailor aboard one of the employer's supply vessels, requested to be relieved from duty following a fall out with the Captain. After disembarking the vessel, the employee sent an email to the employer alleging that the Captain had subjected her to "relentless and targeted bullying" and that the inappropriate behaviour was "a matter for Farstad management to address." Farstad treated this email as a formal complaint and commenced an investigation without complying with its policy and providing the employee with her options. At the same time, the Captain raised concerns about the employee's performance. As the employer began investigating, the two matters became intertwined.

At first instance the employee's claim included breach of policy, in addition to unlawful discrimination under the *Sex Discrimination Act 1984* (Cth). She argued that she had been treated less favourably because of her sex. Justice Marshall dismissed her claim, ruling that no discrimination had occurred and that the policy did not form part of the employment contract.

On appeal, the employee only pursued her breach of contract claim. She alleged that the policy formed part of her employment contract and that the employer had breached her employment contract by failing to comply with the policy.

In determining that the policy formed part of the employment contract, the Full Court noted that the policy was subject to an education program for new employees, and provided to employees at the same time as the contract of employment, and that there was reinforcement of policies on a regular basis.

The Full Court stated that "while some parts of the policy may have been aspirational and some parts directive, Farstad's obligations in relation to dealing with serious complaints of sex discrimination and bullying were contractual promises given in exchange for employees being obliged to comply with the behavioural requirements imposed on employees by the policy."

Having determined that the policy formed part of the employee's contract of employment, the Court found the employer had breached their own policy by:

a) Treating the employee's complaint as "formal" when the complaint in question did not meet the policy's necessary requirements to be considered formal. The Court stated the more appropriate course of action, as foreshadowed in the policy, was to meet with the employee and advise her of her options;

b) Failure to properly document the investigation; and

c) Failure to "carefully and systematically investigate" the complaints of the employee once the employer determined to treat her complaint as "formal".

The Court stated "a formal complaint should not be inferred by receipt of an email from an employee which makes no reference whatsoever to the policy… and does not specify details of a formal complaint."

Further, the Court found that the investigation "had the capacity to indicate a partiality towards [the Captain] and something of a prejudgement of the issues", demonstrated by the employer interviewing the Captain before the employee once it had decided to treat the complaint in a formal nature. Highlighting the inadequacies in the investigation, the Court referred to the improper notice of interview given to the employee, ambushing the employee with the Captain's complaints against her and focusing on the Captain's complaints which led to the employee's complaints being ineffectively examined.

The Court stated that the investigation should have kept the two matters separate. Although it was appropriate to investigate the performance issues of the employee, this should have occurred via the procedure set out in their enterprise agreement. It was also appropriate, had a formal complaint been made, to investigate in accordance with the policy. However, not only was no formal complaint lodged, the standard under the policy, had it been lodged, was not met by the employer.

What does this mean for employers?

- Employers should review contracts of employment and policies and consider whether policies could give rise to contractual obligations and entitlements.
- Employers need to be careful when drafting HR policies to ensure that the language does not unintentionally impose obligations on the employer or incorporate policies into the employment contract.
- Employers, where required, should comply with the terms set out in their policies.
- When conducting formal investigations, employers must follow basic principles of procedural fairness, ensuring that each allegation is properly and impartially investigated.
- Employers should separate investigations of misconduct allegations from those that relate to performance issues.

Bullying 'at work' defined by the Fair Work Commission

Sharon Bowker, Annette Coombe, Stephen Zwarts v DP World Melbourne Limited, Maritime Union of Australia (Victorian branch) and others [2014] FWCFB 9227 (19 December 2014)

Three employees from DP World Melbourne sought anti-bullying orders against their employer and the Maritime Union of Australia (MUA), who, together, argued that the allegations should be dismissed on the basis that the conduct did not occur while the employees were 'at work.' The three employees, however, contended that conduct occurs 'at work' if the conduct has a substantial connection to work. The Full Bench of the Fair Work Commission considered the wording of section 789FF of the *Fair Work Act 2009* (Cth) and what was intended by the words 'at work'.

The Full bench of the Fair Work Commission held that 'at work':

- encompasses alleged conducting occurring 'at a time when the worker is "performing work"';
- is not limited to the physical workplace;
- includes any time when the worker performs work, regardless of their location or time of day.

Importantly, the Full Bench stated that 'at work' includes the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised by their employer.

In this matter, the Full Bench determined that social media posts made outside of work hours can constitute 'bullying at work' because the behaviour continues for as long as the comments remain on Facebook. The Full Bench concluded that the worker did not need to be 'at work' when the comments were made, and it would suffice if the worker accessed the comments later while 'at work.'

What does this mean for employers?

- Bullying is not confined to the physical workplace alone, and can occur in any location at any time, provided there is a temporal link to the employee's work or engagement in employer authorised activities.
- The anti-bullying provisions of the Fair Work Act 2009 (Cth) can include regulation of conduct engaged in outside the work place and work hours that falls within the definition of 'at work';
- Employers should review their Bullying Policy and Social Media Policy to ensure that it encapsulates that such inappropriate conduct is not limited to the physical workplace or hours of work.

Off duty employee not unfairly dismissed

Applicant v Employer [2015] FWC 506 (16 February 2015)

An unfair dismissal application of an employee that allegedly groped a bartender at a hotel where the employee was staying for work has been dismissed by the Fair Work Commission.

The employee argued that his behaviour was not a valid reason for dismissal, as it did not relate to his employment relationship. In support of this position, the employee submitted that the alleged conduct occurred outside of work hours, involved a hotel employee rather than a work colleague and was therefore unlikely to cause serious damage to his employer's reputation and interests.

In response the employer gave evidence that it regularly used the hotel to accommodate employees for work-related activities, and that the relevant enterprise agreement, mandated that the employer pay for work-related travel and accommodation, rather than providing a travel allowance for employees to use at their discretion. The incident occurred at the hotel where the employee was accommodated and was being paid for by the employer.

The employer noted the warning issued to the employee after he had caused damage to one of the hotel rooms on a prior occasion, again whilst the employer was paying for the accommodation. The warning provided that the conduct had brought the employer into disrepute and warned that any further instance of misconduct by the employee would "almost certainly" lead to termination of employment. In making decision, Commissioner Cloghan stated that although the employee was not at his workplace when the incident took place, in the circumstances he was still required to behave in a way that was consistent with the expectations of his employer and the conditions of his employment.

The Commissioner determined that the employee was only in the hotel bar as a result of his employment relationship, and that his conduct was detrimental to the reputation and interests of the employer because of the regular relationship with the hotel. Accordingly, in preferring the employer's evidence in support of the incident, the Commission found that there was a valid reason for termination of the employment.

What does this mean for employers?

- Employers should review the scope of their workplace behaviour policies to ensure that they cover all work-related circumstances, including those occurring outside of the usual place of work (eg. work events, training courses, off-site).
- Employers must ensure that employees are aware of, and provided training in relation to, acceptable standards of behaviour whilst outside of the workplace.
- Employers should also be aware that they may be vicariously liable for conduct of employees occurring outside the usual place of work.

Redundant or not?

UGL Rail Services Pty Limited v Janik [2014] NSWCA 436 (19 December 2014)

The recent NSW Court of Appeal decision of *UGL Rail Services Pty Limited v Janik*, involved consideration of whether a senior executive had been made "redundant" from his position following a restructure of the company's operations. The former employee, Mr Janik, claimed that in the circumstances he had a contractual entitlement to redundancy compensation.

At first instance, Mr Janik successfully argued that the redistribution of the collective functions, duties and responsibilities of his position to other positions (including the newly created position of GM Passenger Sales) had resulted in the abolition of his role and leaving him with no duties to discharge. Accordingly, in reviewing the terms of Mr Janik's employment the court found that his employment contract entitled him to specific payments having been "made redundant whilst employed in this position."

In overturning the primary judge's decision, the Court of Appeal held that because enough of Mr Janik's duties had been transferred to a new manager, his position had not actually been made redundant. The court reviewed the position descriptions for both Mr Janik's former role, and the new position of GM Passenger Sales and found that approximately 70% of the duties contained in the position descriptions were common.

On this basis, the Court of Appeal held that Mr Janik's position had not been abolished and continued to exist, as his replacement had subsequently performed the duties of the role.

What does this mean for employers?

- The reallocation of some duties from a position, or change of title, does not necessarily result in a redundancy, even if the incumbent is not appointed to that new position. It is a question of fact as to whether the duties are still being performed and therefore the position remains in existence.

- Employers should carefully review the wording used in their contracts and/or policies which describe when a redundancy will occur, as they may differ from the standard definition of redundancy contained in the Fair Work Act 2009 (Cth) and effect when contractual entitlements are payable to employees.

- Care should be taken when proceeding with restructures to determine the extent of an employer's liability for potential redundancy and/or other termination entitlements.

Summary dismissal

Smith v Aussie Waste Management Pty Ltd [2015] FWC 1044 (12 February 2015)

The summary dismissal of a garbage truck driver has been ruled unfair by the Fair Work Commission, despite finding that the employee swore directly at the company's managing director during a phone call.

Although the employee had used expletives, Deputy President Wells stated that swearing should be considered in the context that the workplace operates in, and in these particular circumstances it was not uncommon for explicit language to be used in the workplace. Despite confirming that the employee's conduct should not be tolerated in the workplace and warranted a warning or counselling, the Commission ruled that the employee's conduct did not constitute serious misconduct or warrant summary termination. Of particular significance was the fact that no third party observed the discussion and arguably therefore the conversation did not undermine the managing director's authority in the workplace.

Compounding the situation was the company's failure to allow the employee the opportunity to meet with management to explain his behaviour, prior to the company deciding to terminate his employment. Although the small size of the employer and its lack of industrial relations expertise was taken into consideration, it was found to have failed to afford the employee basic procedural fairness.

What does this mean for employers?

- Employers should review the scope of their workplace behaviour policies to ensure that they cover all work-related circumstances, including those occurring outside of the usual place of work (eg. work events, training courses, off-site).
- Employers must ensure that employees are aware of, and provided training in relation to, acceptable standards of behaviour whilst outside of the workplace.
- Employers should also be aware that they may be vicariously liable for conduct of employees occurring outside the usual place of work.

Successful Fair Work Ombudsman prosecution for unpaid work experience

Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA 140, 29 January 2015

The Fair Work Ombudsman (FWO) has prosecuted Crocmedia Pty Ltd for failing to pay two interns the required minimum wage. The case is the first to reference a 2013 report on unpaid work by Professors Andrew Stewart and Rosemary Owens of Adelaide University Law School commissioned by the FWO *(The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia - Experience or Exploitation?).*

Both of the interns were initially engaged on a three-week vocational placement (an exception under the *Fair Work Act 2009*) at Crocmedia. At the conclusion of this period, the interns continued to provide services to Crocmedia on a casual basis and were considered 'volunteers' by the company. This arrangement continued for a year in the case of one employee and six months in the case of the other, as they worked as producers for radio programs broadcast on the SEN radio network. Under the arrangements Crocmedia paid a flat payment per shift deemed a 'reimbursement for expenses', rather than paying regular wages with loadings and payslips.

Judge Riethmuller noted the Crocmedia's cooperation with the investigation and corrective action taken to pay the employees in full, but stated that it "could not avoid the proposition that it is at best, dishonourable to profit from the work of volunteers, and at worst, exploitative."

In line with the findings in the Stewart and Owens report, Judge Reithmuller found that the failure to pay the employees for the initial work experience period and failure to pay minimum wages for the subsequent period each amounted to a breach of the Act. As the monies paid to the employees had been characterised by Crocmedia as "expenses", the employees were entitled to receive the wages they should have been paid for both periods in full (in addition to the amounts already received) totalling approximately $22,000, in addition to the imposition of a penalty of $24,000.

What does this mean for employers?

- Workers who undertake work experience on their own initiative and whose work is akin to that being performed by paid employees will not be completing a "vocational placement" for the purposes of the Fair Work Act 2009.
- Systematic use of unpaid interns as a cheap labour substitute will be considered a breach of the Act
- Unpaid work placements and internships are less likely to involve employment if they are mainly for the benefit of the person, the periods of engagement are relatively short, and there is no significant commercial gain or value for the business derived from the work.

SIAG NEWS

SIAG welcomes Olivia Pels to the Legal Team

We take this opportunity to welcome Olivia Pels, Lawyer, to the SIAG Team.

Olivia has experience in advising and representing clients in employment disputes and litigious matters before the Fair Work Commission and State and Federal courts and tribunals.

Olivia's experience across employment law includes:

- Disciplinary Action and Termination
- Performance Management
- Employment DIsputes and Claims
- Litigation
- Dispute Resolution
- Redundancy
- Representation and Advocacy

Olivia is focused on delivering practical outcomes, strategy and solutions for her clients.

SIAG Breakfast Seminar

Last week SIAG hosted a breakfast seminar featuring The Hon Sussan Ley MP, Minister for Health and Sport, as a guest speaker.

The Minister's topic of presentation was *Future Directions in Health*, and was followed by a question and answer forum. The Minister also took the opportunity to speak with guests individually.

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siag training : development

A WorkSafe Approved Training Course WorkSafe VICTORIA

Health and Safety Representative Initial OHS Training Course

siag is offering the 5 day Health and Safety Representative Initial OHS Training Course across a range of industries. The program is interactive, informative and gives an understanding of the OHS imperatives of this role.

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

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.

Under section 67 of the Victorian OHS Act 2004 an emploter, if requested, must allow an elected HSR and elected Deputy HSR to attend a WorkSafe approved HSR Initial OHS Training Course on paid time, pay the cost of the course and any other associated costs. Section 67 also allows HSRs to choose the approved training course they attend in consultation with the employer.

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

Initial (5 Day) Occupational Health and Safety Course for HSRs, Managers and Supervisors					
	$790 per person (plus gst)				
	Day 1	**Day 2**	**Day 3**	**Day 4**	**Day 5**
Feburary Course	Wednesday 4/2/15	Wednesday 11/2/15	Wednesday 18/2/15	Wednesday 25/2/15	Wednesday 4/3/15
May Course	Thursday 7/5/15	Thursday 14/5/15	Thursday 21/5/15	Thursday 28/5/15	Thursday 4/6/15
August Course	Thursday 6/8/15	Thursday 13/8/15	Thursday 20/8/15	Thursday 27/8/15	Thursday 3/9/15
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 OHS (1 Day) Refresher Course for HSRs. Please contact SIAG 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

Contact **siag** on **1300** SIAGHR (1300 742447) for more information

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