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Admission of sham contracting arrangement results in $124,000 in penalties

Fair Work Ombudsman v Australian Sales & Promotions Pty Ltd & Anor [2016] FCCA 2804

The Federal Circuit Court (**FCC**) has imposed substantial penalties on a company and its director for breaching the sham contracting provisions of the Fair Work Act 2009 (Cth) (**Act**). Australian Sales & Promotions (**ASAP**) provided fundraising services to charities, including direct solicitation of donations from the public. Paul Ainsworth was the sole director of ASAP and a company called PMA.

In 2013 Thomas Beckitt was engaged by ASAP as a Fundraiser. ASAP's arrangements included that persons engaged to undertake fundraising activities were engaged by PMA, which required Mr Beckitt to be engaged as a contractor. Mr Beckitt worked an approximate 9 hour day and was paid $50 per day plus commission. Later in the engagement, Mr Beckitt became a team leader and received $67 per day. These amounts were subject to deductions for PAYG tax, public liability insurance and fees.

In June 2014 the Fair Work Ombudsman (**FWO**) commenced proceedings against ASAP for falsely representing to Mr Beckitt that he was engaged as an independent contractor thereby failing to pay minimum wages and casual loading and failing to keep employee records. The FWO also named Mr Ainsworth as a respondent to the proceedings as being accessorily liable for ASAP's contraventions. In the course of the proceedings, the parties agreed that Mr Beckitt was engaged as an employee including because of the:

- training provided by ASAP to Mr Beckitt, to perform the duties as he had no prior experience, including following scripts;
- requirement for Mr Beckitt to attend ASAP's premises at the commencement of working day to ascertain his work location and report his progress during the day;
- requirement to wear a uniform which identified with organisations who engaged ASAP;
- set hours Mr Beckitt worked and provision of an iPad to assist with performing duties;
- daily direction, supervision and control by ASAP, and as team leader, issuing directions to team members as required by Mr Ainsworth;
- contractual obligations upon ASAP in relation to the performance of Mr Beckitt's work;
- weekly regular payments and the absence of invoices;
- personal performance of the duties and the inability to delegate the work;
- absence of Mr Beckitt working for other persons during his engagement, and that he was not operating a business of his own.

The parties also agreed that ASAP was the relevant employer, not PMA. As a result of those acknowledgments, ASAP admitted it:

- had contravened section 357 of the Fair Work Act 2009 (Cth) (Act) by misrepresenting the employment as an independent contracting arrangement;
- was required to comply with the National Minimum Wage Order regarding remuneration paid, and that Mr Beckitt had been underpaid $5,092.66 and contravened section 293 of the Act;
- had failed to pay casual loading resulting in an underpayment of $171.90 an a contravention of section 293 of the Act;
- breached section 325 of the Act by requiring Mr Beckitt to spend monies payable to him in relation to the performance of his work;
- failed to keep employment records in accordance with section 535 of the Act.

Further, Mr Ainsworth admitted he was directly or indirectly knowingly concerned in, a party to, or otherwise involved in ASAP's contraventions, and was therefore accessorily liable for ASAP's contraventions in accordance with section 550 of the Act. ASAP and Mr Ainsworth had rectified the contraventions that resulted in an underpayment of $7,853.40.

The FCC then considered whether it was appropriate to order ASAP and Mr Ainsworth to pay penalties for the admitted contraventions. The FWO provided evidence of Mr Beckitt and other FWO employees regarding the proceedings. Whereas the respondents did not submit any evidence. In determining the appropriate penalty, the FCC took into account the:

- previous conduct of ASAP, with similar proceedings brought in 2012 whereby ASAP was found to have denied five employees entitlements by obtaining their services as independent contractors;
- nature and extent of the conduct and loss, finding that the amount of money which was denied was significant to Mr Beckitt, whose purpose in coming to Australia was largely frustrated by ASAP's conduct;
- deliberate attempt through PMA by ASAP to enjoy the financial benefit of employing Mr Beckitt as an independent contractor; and
- absence of evidence that ASAP and Mr Ainsworth had changed their practices and would not repeat them.

The FCC commented that the Act exists as a 'safety net' to ensure minimum entitlements for employees and ASAP and PMA's failure to keep necessary records was harmful to ASAP. The FCC did apply a 15% discount to the penalties due to the co-operation of ASAP and Mr Ainsworth during the investigation and the repayment of the underpayment identified. Total penalties of $100,000 and $24,000 were ordered by the FCC to be paid by ASAP and Mr Ainsworth respectively, payable within 28 days.

What does this mean for employers?

- Employers must take care when seeking to engage persons or entities pursuant to independent contracting arrangements.
- The interposition of artificial relationships contrived to remove any direct engagement, and therefore a company's responsibilities, may expose an employer to increased penalties for any substantiated breaches of the Act.
- Employers should be aware that the maximum penalties prescribed by the Act apply per breach, regardless of the quantum of loss an employee may have suffered as a result of that breach.

Fair termination requires opportunity to respond

Gerard Roelofs v Auto Classic (WA) Pty Ltd T/A Westcoast BMW [2016] FWC 4954

Mr Roelofs was employed as the Financial Controller for Westcoast BMW (**Westcoast**), a BMW subsidiary and commenced employment in 2005. After his dismissal in 27 July 2015, Mr Roelofs commenced unfair dismissal proceedings in the Fair Work Commission (**FWC**) to challenge his dismissal.

At the commencement of employment, Mr Roelofs signed Westcoast's Policy and Procedures Manual (**Policy**) which stated disciplinary action may be taken for misusing internet services. During his employment, Mr Roelofs worked closely with Jennifer Jeffrey, Accounts Co-ordinator and on one occasion, Ms Jeffrey observed an explicit image of a naked woman sitting on a bed, apparently on webcam, on Mr Roelofs' computer. A similar incident occurred a few weeks later. Ms Jeffrey raised the incidents with management, who subsequently reviewed Mr Roelofs' internet history and found thirty-three instances of accessing pornographic material in the month of January 2015. Mr Roelofs admitted to accessing inappropriate material and was issued with a first and final warning for the misuse of the internet service by accessing inappropriate website whilst at work, which included advice that he "*cease immediately the misuse of the Internet service.*"

In the months following the warning, Ms Jeffrey began accessing Mr Roelofs' computer to check his internet history. Ms Jeffrey found a website had been accessed called "*Wunderlust, Wildly Beautiful Women in Nature*" which showed women in lingerie and bikinis. She also observed notes on Mr Roelofs' notepad which indicated he had been recording the time that she was away from her desk, and that he was being forwarded all of her emails. On 21 July 2016 Ms Jeffrey submitted a formal complaint against Mr Roelofs.

In assessing the complaint, Westcoast reviewed Mr Roelofs' internet history and determined he had "*gone from looking at pornography to looking at lifestyle type stuff….because he could no longer access pornography*". On 27 July 2016, Westcoast's Dealer Principal, Darrin Brandon, arrived unannounced at Mr Roelofs' office, advised a formal complaint had been received from an employee which alleged he had accessed pornographic material, that Mr Roelofs had contravened the Policy and was being dismissed. Mr Roelofs was not asked whether he had accessed the site or whether there was an explanation for his conduct. Mr Roelofs was provided with a letter which stated the reasons for termination as serious misconduct.

Section 387 of the *Fair Work Act 2009* (Cth) (**Act**) outlines the criteria to be considered by the FWC when determining whether a dismissal is harsh, unjust or unreasonable. The FWC found that having already received a first and final warning, Mr Roelofs should have been aware that further misuse of the internet could result in his dismissal. The FWC accepted that the use of the computer to access a swimsuit website amounted to misuse, and was a valid reason for dismissal.

Mr Brandon gave evidence that the decision to dismiss Mr Roelofs was made before the discussion with him on 27 July 2015. Although Mr Brandon advised Mr Roelofs of the complaint against him, he was not advised of what website he had accessed nor notified of the reasons relied upon by Westcoast for his dismissal. The FWC found that in order to provide procedural fairness, Mr Roelofs ought to have been given a copy of the relevant internet history, identifying the swimsuit website. Further, the FWC found that Mr Roelofs was denied a real opportunity to respond to the concerns regarding his conduct which amounted to more than a 'technical failure' of process, as the failure to afford this opportunity may have resulted in a different outcome regarding his employment. During the arbitration, Mr Roelofs provided evidence that his computer had been infected by a virus which may have accessed the website, and the FWC found that if a fair process had been undertaken, Mr Roelofs may have been able to provide evidence to contradict the allegations against him. The FWC determined that procedural fairness was not afforded to Mr Roelofs and his dismissal was unjust in breach of the Act.

The FWC further commented that while Westcoast did not have dedicated human resource management, it is expected of a medium to large employer to undertake a proper procedure and that the absence of HR specialists was a 'business choice' which did not excuse its conduct.

Having found that the dismissal was in contravention of the Act, the FWC accepted evidence that reinstatement was inappropriate as Mr Roelofs' position was not replaced following the dismissal. When assessing whether an order for compensation should be made, the FWC determined that had Westcoast undertaken a proper procedure, that procedure would have taken no longer than two weeks, however a decision may not have been made to dismiss Mr Roelofs. The FWC accepted Westcoast's evidence that if the dismissal had not occurred, Mr Roelofs' position may have been made redundant within three months, and notwithstanding redeployment options being considered, he may have received an addition six months remuneration including redundancy entitlements. The FWC adopted the middle ground and determined the employment would have continued for a further four months, however deductions were made as Mr Roelofs had mitigated his loss since dismissal. The FWC therefore ordered Westcoast to pay Mr Roelofs $25,341.13 as compensation for loss of income.

Lessons for Clubs

- even if preliminary considerations of an employee's conduct or performance indicates there is a valid reason to dismiss, the procedure undertaken could undermine whether a valid reason exists.
- a procedurally deficient process, even where there is a valid reason for dismissal, may result in a dismissal being harsh, unjust or unreasonable and in breach of the Act.

Employer fined $52,000 for making employee redundant whilst on maternity leave

Jaye Heraud v Roy Morgan Research Ltd (No. 2) [2016] FCCA 1797; Jaye Heraud v Roy Morgan Research Pty Ltd [2016] FFCA 185

The Federal Circuit Court (**FCC**) has ordered a pecuniary penalty against employer, Roy Morgan Research Ltd (**Roy Morgan**), payable to Ms Heraud of $52,000, plus compensation for taking adverse action against her in contravention of the Fair Work Act 2009 (Cth) (**Act**). The FCC held that the employer had taken adverse action against Ms Heraud when refusing her request for flexible working arrangements on return from maternity leave and bringing forward the termination of her employment by way of redundancy.

Ms Heraud commenced employment with Roy Morgan in September 2012 as the National Customised Operations Director (**NCOD**), and commenced maternity leave in September 2013 to cease at the beginning of July 2014. During this period of maternity leave, in response to a revenue loss, Roy Morgan began developing and implementing an organisational restructure of its core business operations resulting in numerous redundancies. On 11 June 2014, Ms Heraud was informed by Roy Morgan that her position as NCOD would be made redundant effective 27 June 2014 and offered Ms Heraud a redeployment opportunity to work in its Research Centre. Ms Heraud subsequently made a request regarding flexible working arrangements. Following the request, Roy Morgan retracted the redeployment offer and informed Ms Heraud that her flexible working request was not approved. Ms Heraud's employment was subsequently terminated on the basis of redundancy, despite another employee continuing in her pre-maternity leave position. Ms Heraud argued that Roy Morgan refused to return her to her substantive position at the end of her maternity leave because she had requested a flexible working arrangement to return to a work part-time.

In August 2014 Ms Heraud commenced proceedings to challenge her dismissal, referring to several complaints against Roy Morgan culminating in seven forms of adverse action. Ms Heraud claimed breaches of the Act in respect to her workplace right to take maternity leave, to be consulted during her period of maternity leave, the failure to facilitate the return to her pre-parental leave position at the completion of maternity leave and the refusal of a request for flexible working arrangements.

By way of earlier decision, the FCC found that Roy Morgan had engaged in three contraventions of the Act, in deciding:

1. not to return Ms Heraud to her pre-parental leave position after her personal carer's leave was exhausted, Roy Morgan had injured Ms Heraud in her employment;
2. not to make any positions in the Research Centre available for Ms Heraud, Roy Morgan altered her position to her prejudice for the reason, or reasons, that included her request for flexible working arrangements;
3. to terminate Ms Heraud's employment, Roy Morgan dismissed her for the reason, or reasons, that included her request for flexible working arrangements.

Despite numerous redundancies across the organisation, the FCC accepted that Roy Morgan had created an expectation that Ms Heraud would be redeployed in a position of a project manager in the research centre on returning from maternity leave. In withdrawing an offer for this position and failing to make this position available, the FCC found that the employer had contravened the Act by altering her position to her prejudice. Roy Morgan had also engaged in adverse action when it refused to accommodate Ms Heraud's request for flexible working arrangements, the employer later acknowledged that the reason for bringing forward Ms Heraud's redundancy was her request for flexible work.

Ms Heraud's claimed loss arising from the contraventions included $180,356.03 for economic loss, $19821.86 for penalty interest and $30,000 for non-economic loss being a total of $230,177.89. Roy Morgan estimated Ms Heraud's economic loss was $38,081.99 and $15,000 for non-economic loss.

When assessing non-economic loss, the FCC stated that despite the absence of medical evidence supporting the claim, it was satisfied that "*prevailing community standards demand recognition of the fundamental entitlement of an employee to take paternal leave to care for their child or children, safe in the knowledge that their employment and future will not be prejudiced because they have exercised their right to take paternity leave, including to request flexible working arrangements.*" The FCC ordered Roy Morgan to pay $20,000 for the loss of enjoyment and reputation and distress experienced by Ms Heraud.

The FCC also considered penalties to be imposed on Roy Morgan for its breaches of the Act. Whilst considering that 70% of the maximum penalty payable for each breach was appropriate, taking into account the circumstances of the breaches, the FCC ordered Roy Morgan to pay a penalty of $52,000 to Ms Heraud.

The parties were required to prepare consent orders in relation to compensation payable for breaches of the Act.

What does this mean for employers?

- Employers must ensure they comply with obligations under the Act, relevant industrial instrument, policies and contracts to allow employees returning from parental leave to their pre-parental leave position.
- When enacting restructures or introducing organisational change, employers must be transparent and genuine when communicating with employees ensuring that workplace rights are upheld.
- Bringing forward the termination of employment, because of an exercise of a workplace right including a request for flexible working arrangements, may be in breach of the Act.

Split shift between work locations gives rise to entitlement for vehicle allowance

Joyce Tyndall v Goulburn Valley Health [2016] FCAFC 139

Joyce Tyndall who had initiated proceedings in the Federal Court of Australia (**FCA**), seeking orders for payment of travel allowances pursuant to two enterprise agreements, was dismissed. Ms Tyndall was employed by Goulburn Valley Health (**GVH**) as a part time Phlebotomist and worked at GHV clinics in Nathalia, Tatura and Shepparton. During the relevant period, Ms Tyndall used her private motor vehicle to travel 22 kilometres between the clinics at Tatura and Shepparton when she worked four hour shifts at each clinic.

Two enterprise agreements applied to Ms Tyndall's employment, being the *Nurses (Victorian Public Health Sector) Multiple Business Agreement 2007 – 2011* (**2007 EA**) and the *Nurses and Midwives (Victorian Public Health Sector) (Single Interest Employers) Enterprise Agreement 2012 – 2016* (**2012 EA**). Both EA's provided a vehicle allowance that:

> *Where an employee is required to provide his/her own mode of conveyance in connection with his/her duties, she/he will be paid a vehicle allowance as set out in Schedule B. Provided that there be a minimum payment of the amount set out in Schedule B for each occasion of use.*

Ms Tyndall claimed GVH was required to provide a travel allowance for use of her car to journey to and from her place of work and appealed the FCA decision to the Full Court of the FCA (**Full Court**). The FCA had held that Ms Tyndall was not required to provide her vehicle in connection with her duties and the travel was of a private nature and relied upon a taxation decision in reaching that conclusion. The Full Court was required to determine whether Ms Tyndall was required to provide her vehicle in connection with her duties.

Before the Full Court, Ms Tyndall argued that whilst her employer had not provided an express direction to use her personal vehicle to travel between her place of work, it was necessary in order to travel between the clinics and she was forced to use her car by reason of the circumstances of her employment. The Full Court stated that the 2007 and 2012 EA's did not contain a source of the direction for an employee to use their own transport, but it was clearly implicit that a "*relevant direction will be one given by the worker's employer.*" Relying upon that proposition, the Full Court stated that it is the "*employer's requirement that gives rise to the entitlement and it is the employer who must provide the benefit to which the employee is entitled.*" It was common ground that there had not been a direction by GVH to Ms Tyndall to use her vehicle to travel between relevant locations.

The Full Court stated that the manner in which Ms Tyndall travelled from her place of residence to work, and return after completing her rostered working hours was not a matter of direction by GVH, as it had no control over where she commenced her journey or where she went after work. The Full Court stated that it could not be held that GVH had given Ms Tyndall an implied or indirect direction to use her private motor vehicle in these circumstances.

However, the Full Court formed a different view regarding the travel between Shepparton and Tatura when Ms Tyndall undertook two shifts in one day. On Thursdays, Ms Tyndall worked a split shift between two medical clinics completing her morning shift at Tatura at 12.00pm before commencing duties at the Shepparton clinic at 1.00pm. GVH was privy to that agreement and was taken to be aware of the distances and time to be travelled by Ms Tyndall between the clinics. The Full Court held that by fixing the time in which Ms Tyndall was expected to finish at one clinic and then travel to commence work at another, GVH required Ms Tyndall to undertake the journey in a limited period of time. The Full Court stated that in the absence of GVH providing evidence of an alternative means of viable transport (public or otherwise), an implied direction from GVH to Ms Tyndall existed for her to use her private vehicle to travel between the two clinics to complete her split shift. The Full Court's line of enquiry, being the 'requirement' to use a private vehicle in connection with her duties, was therefore that the implied direction was a 'requirement' to travel between the clinics and was inherently linked to the performance of her duties.

In reaching that finding, the Full Court upheld Ms Tyndall's appeal in part and referred the matter to the FCA to determine the quantum of compensation payable and whether penalties should be imposed on GVH.

What does this mean for employers?

- Employers should take note of the specific wording of relevant industrial instruments when assessing employee entitlements.
- Consideration should be given to the particulars of the employment relationship, and the distinction between travelling in connection with the performance of duties as opposed to travelling to or from the workplace and home.
- The absence of an express direction to an employee may still give rise to an exposure for entitlement related claims, subject to the wording of the relevant instrument and the circumstances of the employment.

Serious misconduct dismissal without suspension unreasonable and unjust

Quentin Cook v Australia Postal Corporation [2016] FWC 5962

Australian Postal Corporation (**Australia Post**) summarily dismissed employee Quentin Cook after substantiating seven allegations of misconduct through a disciplinary process. Mr Cook commenced proceedings in the Fair Work Commission (**FWC**) to challenge his dismissal, seeking reinstatement, submitting that the alleged conduct did not constitute a valid reason for dismissal and that the dismissal was unfair under the *Fair Work Act 2009* (Cth) (**Act**).

Decision at first instance

At the date of dismissal, Mr Cook had been employed with Australia Post for 38 years. During his employment Mr Cook had represented his co-workers in workplace related disputes. In April 2014 Mr Cook registered a company called E.L.I.S.A and was the sole director and shareholder. Employees authorised pay-roll deductions to be paid by Australia Post to E.L.I.S.A as a fee for Mr Cook's services. In May 2014 Australia Post became aware that Mr Cook was conducting representative work for payment. In June 2014 the Area Manager warned Mr Cook that the paid services amounted to a conflict of interest in breach of Australia Post's Code of Ethics and its continuance may result in dismissal.

Around October 2015 Australia Post undertook a formal disciplinary inquiry into the seven allegations and during which time Mr Cook continued to work. Australia Post substantiated the allegations and summarily dismissed Mr Cook on 17 December 2015 after affording him the opportunity to respond (which he declined).

The 7 counts of alleged misconduct were grouped in two categories - performance issues and representation related issues. The five performance allegations related to Mr Cook's refusal to comply with the direction of his immediate supervisor on two occasions, one extensive 75 minute meal-break, a self-determined 11.5 hour working day without a break and the loss of an electronic cyber-key. The FWC upheld each of these allegations which aggregated to a level of serious misconduct that would ordinarily justify summary dismissal.

The two representation allegations raised concerns of tensions between Mr Cook's role as Postal Delivery Officer and receiving payment as an employee representative. Australia Post relied upon one occasion where Mr Cook extended his half-hour meal break to one hour in order to attend a teleconference as part of the representative role. The seventh allegation concerned Mr Cook's continued representative activities despite the warning issued by Australia Post, which the FWC considered the gravamen of Mr Cook's misconduct. The FWC considered that for many years Australia Post had accommodated Mr Cook's representation of colleagues, however the role was "significantly and dramatically" altered when the representation was undertaken on a paid basis. The FWC considered the representation had become secondary employment, the purpose of which was directly harmful to Australia Post's interests. The FWC commented that Mr Cook's blatant defiance of warnings regarding the conflict of interest was sufficient to warrant dismissal. The FWC therefore determined Australia Post had a valid reason to terminate Mr Cook's employment.

In considering the procedure undertaken when effecting the dismissal, the FWC noted that the process adopted by Australia Post had "one glaring error." During the investigation, and despite Australia Post having full knowledge of the serious nature of the allegations, it continued to permit Mr Cook to perform his work duties until dismissal on 17 December 2015. In failing to suspend Mr Cook from duty during the investigation and disciplinary process, Australia Post was required to dismiss Mr Cook with notice rather than summarily and without notice. A summary dismissal applied a level of severity to the reasons for dismissal that was inconsistent with Australia Post allowing Mr Cook continuing duties during the disciplinary process.

While the FWC found that Australia Post had proved a valid reason for dismissal for six of the misconduct allegations, the FWC determined that the summary dismissal was unreasonable and unjust in breach of the Act and that Mr Cook was entitled to a remedy for unfair dismissal. While reinstatement was considered inappropriate, Australia Post was ordered to compensate Mr Cook for five weeks which equated to his notice period.

Decision on appeal

Mr Cook applied to the Full Bench of the FWC for permission to appeal the decision not to re-instate and alleged the Commissioner had made errors of law and fact when reaching his decision. Under the Act, the Full Bench must determine whether there is public interest in allowing the appeal and the rehearing of a decision is only exercisable if there is an error by the primary decision maker. In assessing the grounds of fact and law advanced by Mr Cook, the FWC determined that the decisions were open to be made by the Commissioner and accordingly, Mr Cook had not demonstrated any arguable case of appealable error that would attract public interest to allow the appeal, which was subsequently dismissed.

What does this mean for employers?

- Employers should consider, at the commencement of a disciplinary process, whether the allegations could constitute serious misconduct if substantiated.
- If allegations could constitute serious misconduct, and the employer may seek to terminate the employment summarily, the employee should be suspended or removed from the roster (subject to the nature of the engagement) during the disciplinary process.
- A failure to suspend during a disciplinary process which results in summary termination may expose an employer for an obligation to pay notice (or additional compensation) should the termination be challenged.

Inadequate off-set clause insufficient to avoid underpayment claim

Simone Stewart v Next Residential Pty Ltd [2016] WAIRC 00756

An administrative officer has been given permission by the West Australian Industrial Relations Commission (**WAIRC**) to pursue claims for unpaid overtime and lunch breaks against her former employer Next Residential (**Next**), a residential building company. Next argued that Ms Stewart's employment contract provided for an annualised salary which off-set additional hours claimed against early finishes, late starts and half days worked. The parties sought determination of the preliminary issue as to whether the contact excluded relevant award provisions so as to preclude Ms Stewart's claim.

Ms Stewart's annualised salary at termination was $78,000 per annum and her employment was covered by the *Clerks Private Sector Award 2010* (**Award**). Ms Stewart alleged Next directed her to work overtime and through her lunch breaks and sought payment of $28,984. Next responded that any overtime was worked at Ms Stewart's own volition and was offset by variations to start and finishing times. In support of its denial of the claim, Next relied upon the contract which relevantly stated:

- Your ordinary hours of work are from 8.00am to 5.00pm Monday to Friday with a one (1) hour lunch break. You are expected to work on average at least 40 hours per week, however there will be times when you are required to work reasonable additional hours as necessary to ensure that the requirements of your position are met. Your remuneration takes these additional hours of work in account and no further payment will be made for extra hours worked.
- Please refer to Annexure A at the back of this document for the particulars of your salary. Your salary is inclusive of any award provisions/entitlements that may be payable under an award.

In summary, Clause 17 of the Award provides:

- An annualised salary may be paid in satisfaction of minimum weekly wages, allowances, overtime and penalty rates and annual leave loading. The employee must be advised in writing of the annual salary and which provisions of the Award are satisfied by that payment.
- The annual salary must provide no less than the employee would have received if paid in accordance with the Award.

Ms Stewart submitted that the contract did not identify the Award or the provisions satisfied by the annual payment, and accordingly Next had not complied with Clause 17 of the Award and she was entitled to the payments sought. Next relied upon the wording of the off-set clause and that the salary was inclusive of the payments claimed by Ms Stewart.

In determining the preliminary issue, the WAIRC stated that an intention to pay an 'all-inclusive rate', in satisfaction of other entitlements, must be articulated with clear intention as in the absence of it being evidenced in an agreement, an employer will be unable to offset award obligations with over-award payments. There was also a need pursuant to Clause 17 of the Award for an employer to identify which provisions of the Award were satisfied by the remuneration. The WAIRC also commented that the Award permitted only certain entitlements to be off-set.

The WAIRC considered the express wording of the off-set clause in the contract, which it considered attempted "*in the broadest possible way*" to include 'any' award provisions under 'an' award. This was considered to create uncertainty in relation to the award coverage and clauses of the award it purported to cover, and prima facie sought to include entitlements which were incapable of inclusion.

It was further held that if the relevant clause had referenced 'any and all' of the entitlements permitted to be off-set by an employer under Clause 17 of the Award, it would have been sufficient to demonstrate the parties' intention. The WAIRC determined that the contract wording showed the parties were not alert to the relevant award and its provisions when entering into the contractual arrangement. Specificity was considered to be crucial for an employee "*to compare his or her annual salary to award entitlements so that the no-disadvantage test can be properly considered.*" The WAIRC concluded that the contract terms did not exclude Ms Stewart's claim as it did not indicate the entitlements sought to be included in the annual salary.

What does this mean for employers?

- Employers may be permitted by industrial instruments to pay annualised salaries in satisfaction of other entitlements provided by that instrument.
- Where an employer is seeking to pay an annualised salary, they must ensure that the remuneration paid is:
  - consistent with the provisions of the industrial instrument, which may specify what entitlements can be paid on an annualised basis; and
  - sufficient to compensate the employee for what they would have been paid had they been remunerated in accordance with the industrial instrument.
- Contractual provisions must be drafted with sufficiently clarity and specificity so as to:
  - evidence the intention of the parties at the time of entering into the agreement; and
  - allow employees the opportunity to compare the entitlements paid by the annualised salary with those provided for under the industrial instrument.
- Employers should seek advice regarding the calculations associated with annualised salaries, and the drafting of contractual provisions, to ensure they minimise exposures to any underpayment claims.

Procedural deficiencies render dismissal for bullying harsh and unreasonable

Clint Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine [2016] FWC 6036

In a recent decision, the Fair Work Commission (**FWC**) has awarded over $28,000 in compensation to an employee who was dismissed after making derogatory comments on social media about his supervisor which constituted bullying. Mr Remmert commenced employment with Broken Hill Operations Pty Ltd (**BHO**) in July 2011. Whilst at home in April 2015, Mr Remmert along with several other BHO employees were involved in, and commented on, a Facebook post whereby disparaging comments were made, alleged to be in reference to the supervisor. BHO conducted an investigation into the Facebook post, during which several BHO employees were suspended pending the outcome. BHO relied upon bullying the supervisor had previously been subjected to, and that Mr Remmert had received a final warning for inappropriate behaviour, when determining to dismiss him.

Notwithstanding Mr Remmert's denial during the investigation that his comments on the Facebook post were directed at the supervisor, and that he did not reference the supervisor by name, BHO terminated his employment for misconduct. BHO made the decision to dismiss Mr Remmert on the basis that the social media comments were intended to belittle and ridicule the supervisor and were in breach of its social media policy and code of conduct. Mr Remmert subsequently commenced unfair dismissal proceedings in the FWC to challenge his dismissal.

Mr Remmert's submissions to the FWC regarding his dismissal included that he was not at work when he posted the comments on Facebook (and were therefore outside of the employment relationship), that his comments were not directed towards the supervisor, he was unaware of, and did not receive training in relation to, BHO's social media policy. Furthermore, Mr Remmert argued that he did not believe that the management staff conducting the investigation could be impartial, however these objections were ignored and not determined until after he was dismissed. Mr Remmert claimed that he was not given notice of, nor provided with an opportunity to respond to, some of the reasons for dismissal which BHO relied upon prior to the decision to terminate his employment. In substance, Mr Remmert argued that there was no valid reason for the dismissal, he was not afforded procedural fairness, and the dismissal was harsh and unjust in the circumstances.

BHO contended that the conduct had a sufficient connection with the workplace, despite it occurring outside of work hours. BHO maintained that Mr Remmert's conduct constituted serious misconduct and a valid reason for dismissal. The FWC found that Mr Remmert knowingly directed the social media comments towards the BHO supervisor, given that many of Mr Remmert's Facebook friends were also employed by BHO and therefore he was aware that other employees would witness and understand who the comments were directed at and could reasonably cause distress. The FWC accepted BHO's submission and took into account the prior warning issued to Mr Remmert and his subsequent conduct. Mr Remmert's explanation for his Facebook post was not considered convincing and the FWC determined that a valid reason existed for his dismissal.

However, the FWC found that the dismissal was harsh and unreasonable, and therefore unfair. When considering the relevant factors provided by section 387 of the *Fair Work Act 2009* (Cth) (**Act**), the FWC took into account:

- while Mr Remmert was notified of the reason for dismissal relating to the Facebook post, the confidential report prepared by HR as a result of the investigation took into account a matter pertaining to boom gate tag time discrepancies. The discrepancies and report were not notified to Mr Remmert at the relevant time;
- as BHO relied upon matters to dismiss that were not notified to Mr Remmert, he was not afforded the opportunity to respond to those matters;
- it would have been appropriate for BHO to discipline most employees involved in the Facebook post incident. However, BHO applied differential treatment for those employees ranging from no disciplinary action, final warning and dismissal, including where an employee had a standing written warning.

The procedural deficiencies identified by the FWC resulted in unfairness and "*that injustice is likely to have made a difference to the fairness of the dismissal.*" Mr Remmert's dismissal was therefore found to be in breach of the Act.

When assessing the appropriate remedy to be awarded to Mr Remmert, the FWC determined that reinstatement was inappropriate in the circumstances. In applying the relevant factors to determine what compensation could be awarded to Mr Remmert, the FWC determined:

- Mr Remmert would have remained employed for a further 35 weeks, resulting in projected remuneration loss of $72,466;
- a deduction of 10% of the projected remuneration was appropriate as Mr Remmert had not made reasonable efforts to fully mitigate his loss;
- Mr Remmert had earned remuneration from alternative employment of around $6,000 but also took into account that notice was paid at dismissal;
- the prospect of another incident occurring from 11 weeks after the hearing and applied a 50% deduction for contingencies during that period;
- a further reduction of 30% taking into account Mr Remmert's misconduct should be applied.

The FWC therefore awarded Mr Remmert $28,471 as compensation arising from the dismissal.

What does this mean for employers?

- Employers should implement a social media policy that clearly articulates the expectations of acceptable social media use, and when those expectations apply to employees.
- Employers should ensure employees are aware of the existence of, and their obligation to comply with, policies relating to the use of social media.
- Employees must have the opportunity to respond to all matters that may be relied upon by an employer when deciding whether to terminate their employment. A failure to provide that opportunity could render the process deficient and impact an assessment of whether a valid reason existed for termination.
- The FWC can take into account whether differential treatment is applied to employees who have engaged in the same, or similar, conduct. Differential treatment may render a dismissal harsh, unjust or unreasonable and expose an employer for remedial orders, in an unfair dismissal context, including reinstatement and compensation.

Racial discrimination results in $40,000 in compensation

Viswanathan Murugesu v Australia Post & Anor (No. 2) [2016] FCCA 2355

Australia Post has been ordered to pay $40,000 to an employee who was subjected to racial discrimination from a co-worker. In its initial decision regarding the merits of the claim, the Federal Circuit Court (**FCC**) held that Mr Murugesu was subject to racial taunts from an Australia Post employee including being called a 'black bastard', 'f**king black bastard' and being told to 'go home to Sri Lanka by boat.'

In early 2010, Mr Murugesu submitted a complaint to his supervisor, outlining instances of verbal abuse and threatened physical abuse, which was escalated by way of an email to management titled "harassment/bullying/racism." Mr Murugesu also complained to a number of other superiors during his employment of his co-worker's behaviour. Each complaint was defused and no action was taken by Australia Post in response to the allegations. After finding that Mr Murugesu had been subjected to racial discrimination, the FCC considered what compensation would be ordered for breaches of the *Racial Discrimination Act 1975* (Cth) by Australia Post and the co-worker.

Mr Murugesu claimed damages for pain, suffering, distress and humiliation from the racial remarks and an alleged assault in the sum of $100,000 and an additional sum for exemplary damages. Mr Murugesu relied upon the evidence of two medical practitioners and also sought aggravated damages because Australia Post did nothing to prevent the racial abuse.

In regard to the remarks that Mr Murugesu was subjected to, the FCC determined that although they were deeply insulting, they were 'more probably than otherwise isolated', and therefore determined the appropriate amount of compensation to be $40,000.

The gravamen of Mr Murugesu's aggravated damages claim was that had Australia Post acted more promptly, the conduct of its employee would have reduced and Mr Murugesu would have suffered less damage. Though the FCC accepted this submission, taking into account the award of $40,000 of compensation for the employee's conduct which had been determined, an award for aggravated damages for Australia Post's failure to act would result in double dipping.

Mr Murugesu submitted in the alternative that exemplary damages should be awarded if compensation was insufficient to punish the respondents. The FCC stated that the facts of Mr Murugesu's claim did not support the award of exemplary damages. Further, the FCC determined it was not appropriate to award Mr Murugesu interest on the damages payable unless they remained outstanding after the date for payment had expired.

You are able to read about the initial decision of the FCC in our December 2015 edition of the Advisor.

What does this mean for employers?

- Employers must take any allegations of harassment, bullying or racism seriously and should take all necessary steps to address any complaints received.
- Employers should take proactive steps to eliminate all forms of discrimination from the workplace to minimize their exposure for claims.
- Employers may be vicariously liable for the actions of their employees and expose them for orders to pay compensation.

No limitation on behaviours that could constitute adverse action

Kelly Arnett-Somerville v Monash Health [2016] FCA 1451

The Federal Court of Australia (**Court**) has rejected a nurse's claim that Monash Health (**MH**) took adverse action by discriminating against her, injuring and prejudicing her in her employment for exercising a workplace right. The emergency department nurse alleged that MH took adverse action against after she made several complaints including in her capacity as Australian Nursing and Midwifery Federation (**ANMF**) job representative and lodged a grievance letter.

The nurse had been employed with MH on a part-time basis and was an ANMF job representative. In early 2013 MH implemented a new 'ambulance priorisation policy' and later that year a new 'model of care' which effected the operation of the emergency department. During 2013 and until the end of her employment in 2014, the nurse expressed various concerns to the employer in relation to these new policies. The Court accepted that the complaints were exercises of workplace rights in accordance with the *Fair Work Act 2009* (Cth) (**Act**).

In November 2014, a meeting with ANMF members was held to "*discuss industrial and professional issues*"and the nurse was advised to implement a log-book to compile workplace concerns and draft a grievance letter. The letter, outlining the nurses' concerns in relation to patient care, OHS and staff wellbeing, was supported by 70 signatures. MH subsequently undertook an investigation, which affirmed the benefits of the new policies and rejected the concerns of the nurses.

In December 2014 the nurse alleged that MH took adverse action against her in breach of the Act when employees changed the way they treated her, including in a hostile manner, refusing to address her directly and speaking about and to her in a demeaning way. The nurse relied upon section 342(1) of the Act in claiming that these behaviours:

- injured her in her employment;
- altered her position to her prejudice;
- discriminating between her and other employees.

The nurse also alleged that MH had begun to roster her for excessive weekend shifts and that MH had refused to acknowledge that the she had foregone meal breaks during busy periods.

In referring to the 'problematic aspects' of the nurses case, Justice Jessup stated:

> *… the instances of adverse action which she alleged did not, for the most part, fit the conventional paradigm of an employer taking action against its employee (such as, for example, may be seen in situations of demotion, suspension, involuntary transfer, denial of benefits, and the like). That was not fatal, of course, but it made the applicant's adverse action case a less obvious one. The actions which she claimed fitted the terms of paras (b) and (c) of item 1 in the table in s 342(1) of the FW Act were, to a large extent, by way of personal behaviours and interactions, and even then the detrimental or prejudicial aspects of them tended to be subjectively-identified: the applicant was berated, humiliated, treated with hostility etc. When a case is framed in this way, the treatment complained of would, in my view, normally have to be both obvious and egregious to come within the terms of the statute.*

Justice Jessup held that the unconventional allegations did not preclude the applicant from making a claim. However, the Court questioned the reliability of the factual basis of the 'extreme' allegations and rejected the nurse's claims, also holding that the number of weekends worked by the applicant was not excessive when compared to the previous year.

Further, the Court stated that while the nurse's evidence expressed the allegations in terms that suggested hostile and unfriendly interactions with 'venomous' words and behaviours directed to her, she set the bar high. MH's witnesses denied engaging in the behaviour and the Court considered those denials were credible. Other nurses and employees who gave evidence of these interactions provided little or no corroborative evidence in support of the nurse's claims.

The Court also paid attention to the nurse's actions in commencing proceedings in December 2014, whereas the alleged beavhoiur occurred in December 2013 until the third week in January 2014. It was noted this lapse in time impacted the memory of witnesses and that the nurse had a tendency to exaggerate.

In consideration of all witness evidence, the Court rejected that:

- MH discriminated between the nurse and other employees;
- the nurse was prejudiced or injured in her employment;
- there was no basis to conclude that the nurse's rostered weekend hours was excessive;

thereby rejecting that MH had subjected the nurse to adverse action in breach of the Act.

What does this mean for employers?

- Employers may breach the Act if they subject an employee to adverse action for reasons including the unlawful reasons prohibited by the Act.
- Conduct and behaviour that may constitute adverse action may be interpreted broadly and the list is non-exhaustive.
- Adverse action is not limited to conventional claims such as dismissal and demotion, but could also include hostile interactions between management and staff.

Threat by medical surgery to worker to withdraw a workplace complaint constitutes adverse action

Fair Work Ombudsman v Windaroo Medical Surgery Pty Ltd & Ors [2016] FCCA 2505; Fair Work Ombudsman v Windaroo Pty Ltd & Ors [2015] FCCA 554

The Federal Circuit Court (**Court**) has imposed significant penalties on a medical surgery and its two directors for its "*appalling treatment*" of a doctor. In a penalty decision following from its earlier decision on the merits of the claim, the Court has ordered that Windaroo Medical Surgery (**Windaroo**) was also required to compensate the overseas trained general practitioner for failing to pay him and coercively threatening him to withdraw a complaint to the Fair Work Ombudsman (**FWO**).

Dr Kaza, who obtained his medical qualification in India, took up a contractual engagement with Windaroo in 2009. During the engagement, Dr Kaza was not paid for a period of 5 months of work and he attempted to lodge a complaint with the FWO. Windaroo threatened that Dr Kaza "*will have many problems*" if he did not withdraw the complaint and suggested that Dr Kaza would only be paid the amount owing in lump sum if he withdrew his complaint. By early 2010 Dr Kaza expressed his dissatisfaction with Windaroo and had attempted to take up alternative employment in Queensland. However, after failing a requisite registration test, Dr Kaza was unable to obtain employment, returning to India in May 2010.

In its earlier decision, the Court found that Windaroo contravened section 343 of the *Fair Work Act 2009* (Cth) (**Act**) by threatening Dr Kaza with the intent of coercing him to not exercise his workplace right of complaining to the FWO. The two directors of Windaroo were found to have been knowingly involved in the contravention and therefore were personally in breach of section 550 of the Act. The Court also determined that Windaroo had taken adverse action against Dr Kaza by ceasing to pay his remuneration. Dr Kaza sought compensation in excess of $400,000 plus penalties. Windaroo submitted compensation should be $11,590 plus interest.

In assessing compensation which could be awarded to Dr Kaza, the Court referred to case law which provides that there must be an appropriate casual connection between the breach and the loss claimed and that the order of such compensation must be appropriate. The Court awarded Dr Kaza:

- damages amounting to $12,000 plus interest for the amount owing from cessation of his remuneration;
- $2,500 in compensation plus interests for the unnecessary distress caused by the significant financial difficulty suffered.

In doing so the Court rejected Dr Kaza's submission that:

- the treatment by Windaroo was the cause of the termination of contract, stating that Dr Kaza had intended to terminate his engagement before the contraventions occurred and that the failing of the registration test would mean his engagement could not renewed; and
- he should be compensated for his return airfare to India.

The court also imposed penalties on Windaroo and it's the directors and took into account the:

- nature and extent of the conduct;
- circumstances in which the conduct took place
- nature and extent of the loss;
- similar previous conduct;
- size of respondent;
- deliberateness of the behaviour;
- contrition, corrective action, and co-operation;

in deciding that each respondent should be penalized 60% of the maximum penalty prescribed by the Act. The Court remarked on the vulnerability of foreign workers and the seriousness of the contraventions.

The following orders were made by the Court:

1. Windaroo and the first director were ordered to pay $21,052.55 comprising of $17,834.86 for economic loss and interest and $3,699.69 for non-economic loss and interest;
2. Windaroo and the second director were ordered to pay $3,669.69 comprising of non-economic loss and interest. collectively penalised together $11,880 and ordered to compensate Dr Kaza $3,669.69;
3. Windaroo was penalised $39,600; and
4. the second director was penalized $3,960.

What does this mean for employers?

- Courts can impose orders on employers to pay compensation for breaches of the Act including economic and non-economic loss.
- Orders of compensation will take into account the causative nexus between the loss suffered and the breaches of the Act.
- In addition to the employer, individuals who contravene the Act can have penalties imposed on them by courts.

Employee 'terminated' despite employer's apparent legislative requirements

Mahony v White [2016] FCAFC 160

The Full Federal Court (**FCAFC**) has overturned a decision by the Fair Work Commission (**FWC**) in relation to whether a catholic education employer had dismissed an employee where pending criminal charges regarding children precluded the teacher from fulfilling the requirements of the job. Each matter before the FWC (regarding employees Mahony and O'Connell) pertained to whether the employer had dismissed the employee in consideration of the criminal charges and the provisions of the *Child Protection (Working with Children) Act 2012* (NSW) (**CP Act**).

In the Mahony proceedings before the FWC, the employer submitted there had been no termination of employment as the employment relationship was frustrated by the commencement of the CP Act which provided it to be unlawful for the employee to continue to perform his duties. That argument was rejected by the FWC which determined the employment had ended the employer who had consciously terminated the employment thereby constituting a dismissal within the meaning of the *Fair Work Act 2009* (Cth) (**Act**). That decision was appealed to the Full Bench of the FWC (**FWCFB**) which accepted the employer's submission and overturned the initial decision.

In the O'Connell proceedings before the FWC, the employer submitted that by reason of the provisions of the CP Act, it had no lawful choice but to terminate the employment. The FWCFB rejected the submission and held that the CP Act did not require the termination of employment of a teacher who was the subject of criminal charges as laid against Mr O'Connell and that the employer had a choice regarding termination.

The FCAFC accepted submissions on behalf of O'Connell and Mahony that where an employer decides to terminate the employment and puts that decision into effect by giving notice of termination, the employee has been terminated at the employer's initiative. Section 386 of the Act provides a definition of 'dismissed' which includes "*at the initiative of the employer.*" The FCAFC determined that in the Mahony and O'Connell proceedings, the termination of the employment was the "*deliberate, considered act of the CEO*" and even if there were a statutory obligation on the employer to terminate provided by the CP Act, compliance with that obligation required the employer to "*take the initiative in bringing the employment to an end*."

In determining the judicial review for the Mahony and O'Connell proceedings, the FCAFC determined that:

- each application made by the employees to the FWC fell within the jurisdiction of the Act (ie there was a dismissal in each instance);
- as the Mahony application did not address whether the employer had no lawful choice but to terminate in accordance with the CP Act, the FWCFB should consider the merits of Mahony's appeal from the decision at first instance;
- as the employer was the appellant in the O'Connell proceedings, and the employer did not seek relief from the FCAFC other than a declaration that the FWCFB incorrectly decided the matter regarding the CP Act, the FCAFC stated such a declaration would be no more than an 'advisory opinion' and may intrude on the FWCFB's decision on the merits of the O'Connell matter;
- the FCAFC provided no view on the CP Act argument so as not to favour either party in the determination of appeals before the FWCFB.

The FCAFC therefore directed the FWCFB to determine the Mahony appeal from the initial decision by the FWC, and dismissed the O'Connell proceeding.

What does this mean for employers?

- Where an employer terminates an employee's employment at their own initiative, it may constitute a dismissal within the meaning of the Act, which may enable an employee to challenge their dismissal before the FWC.
- Employers should seek legal advice where they form the view that ancillary legislation may preclude an employee from lawfully performing the inherent requirements of their position.
- Actions by an employer to bring an employment relationship to an end, rather than the relationship ending by reason of its own accord, may constitute dismissal rather than the frustration of the relationship.

Employee did not need to come into the workplace to be 'recalled to duty'

Polan v Goulburn Valley Health [2016] FCA 440 (29 April 2016)

In the decision of Polan v Goulburn Valley Health [2016] FCA 440 (**Polan v GVH**) the central issue to be determined in the proceedings was whether the duties performed in the after-hours by the applicant, Ms Polan, constituted a "recall to duty" in accordance with the applicable industrial instruments.

The Federal Court of Australia (**FCA**) rejected Ms Polan's claim for payment of "recall to duty" entitlements for the performance of out of hours calls, finding that whilst recall payments did not apply, an entitlement to overtime payments for the time spend discharging such duties in the after-hours was payable in the circumstances.

Ms Polan was employed by Goulburn Valley Health (**GVH**) from December 1997 until her resignation in November 2014. Her role included acting as a rostering clerk for junior doctors. In performing this role, she took calls from junior doctors and made telephone calls in order to rearrange rosters and fill staffing gaps. Ms Polan was expected to carry out these duties "24/7".

Upon termination of Ms Polan's employment, Ms Polan contended that although she was paid an on-call allowance by GVH, taking the telephone calls and undertaking the resulting work constituted "recalls to duty". She argued that this, in turn, triggered provisions relating to recall to duty entitlements including a three-hour minimum recall payment on each occasion of recall and for instances when Ms Poland did not receive the minimum off-duty period of eight consecutive hours to receive a double time rate of payment until such break was afforded.

In contrast, GVH submitted that the recall to duty provisions in the relevant enterprise agreements and award should be construed to only apply where the employer requires the employee to go back to their workplace. GVH also contended that the telephone calls made and received by Ms Polan had been duly compensated for through the payment of an on-call allowance which she received during her employment.

Ms Polan sought relief under the *Fair Work Act 2009* (Cth) and its predecessor the *Workplace Relations Act 1996* (Cth) for alleged breaches of *The Health Services Union of Australia – Health and Allied Services, Administrative Officers – Victorian Public Sector – Multi Employer Certified Agreement 2006-2007* (**2006 Agreement**) and *The Victorian Public Health Sector (Health and Allied Services, Managers and Administrative Officers) Multiple Enterprise Agreement 2009-2011* (**2009 Agreement**).

Under the 2006 Agreement and 2009 Agreement (together '**The Agreements**'), the FCA confirmed that an on-call allowance compensates an employee for making themselves available to attend work, but does not compensate the employee for undertaking the work once they have been called upon. Accordingly, GVH's payment of an on-call allowance to Ms Polan was appropriate in the circumstances, however, it did not compensate her for the work undertaken as a result of the telephone calls received. Instead, compensation for this time was to be calculated in accordance with the relevant overtime or 'recall to duty' provisions of The Agreements.

The FCA held that the term "recall" emphasised an active request by an employer to an employee to perform duties in a period of time when they would not otherwise have been performed by that employee. Indeed, the FCA provided that "*recall suggests a conscious decision by or on behalf of an employer to require an employee to perform specific duties of employment outside the employee's ordinary hours of duty*".

Accordingly, the FCA held that for Ms Polan to be entitled to the three-hour recall payment under The Agreements, GVH's decision or instruction for her to carry out the work must have been an "*active decision*" resulting in a "*specific direction or instruction*" by GVH in relation to "*a specific occasion*".

In Ms Polan's case, the arrangement for her to take telephone calls 24 hours a day, 7 days a week were reasonable additional hours which were authorised by the employer and "*the result of an ongoing understanding or arrangement between the employer and the employee*" rather than an active decision to recall her back to her duties. In addition, the duties carried out by Ms Polan outside of her ordinary hours were "*a core aspect of the duties of her employment*" and it had been "*contemplated*" by both Ms Polan and GVH that "*the need for these arrangements could arise at any time of the day or night*". As a result, the FCA determined that Ms Polan had not been recalled to duty, but rather was entitled to overtime payments for the time she was required to work while she was on-call.

The FCA determined that The Agreements and *The Health, Community Services and Ambulance – Management and Administrative Staff (Public Sector – Victoria) Award 2005* (**Award**) were silent on whether employees working overtime or as a result of a recall to duty were to perform their duties at the workplace. Accordingly, the FCA considered it unnecessary to restrict the construction of The Agreements and the Award to require a recall to duty to include the employee returning to the workplace.

Instead, the FCA emphasised that the location at which an employee performs their duties will usually depend upon the type of duties undertaken and any individual agreements between the employee and employer. As a result, the FCA determined that an employee may perform their duties in or outside the workplace and still be entitled to overtime and/or recall to duty entitlements under the Award and The Agreements.

What does this mean for employers?

- On-call allowances may only compensate employees for making themselves available to be called upon, not for any work performed subject to the circumstances of the employment and relevant provisions in industrial instruments.
- Employees may be 'recalled to duty' despite not being called into the workplace.
- Employers should be mindful of the distinguishing concepts arising from this decision that:
  - a recall to duty more commonly arises where there is a specific instruction or direction to an employee for a particular occasion or purpose; whereas
  - overtime arises where an employee undertakes reasonable additional hours, which are subject to the employer's authorisation. The authorisation may be express or implied and as such may arise as a result of an ongoing understanding or arrangement between the employer and employee, or as a result of a single event.

In brief: recent unfair dismissal cases

The Fair Work Commission (FWC) has recently made a number of relevant and interesting unfair dismissal decisions.

Social media and the workplace

Nirmal Singh v Aerocare Flight Support Pty Ltd [2016] FWC 6186

A growing area of concern for employers is the rise of social media and the interaction with employment, specifically, the difficulties that arise with the enforcement of social media policies that regulate employee outside of working hours. In its decision, the FWC found that an airport baggage handler in Perth was unfairly dismissed when his employment was terminated for his purported extremist Facebook posts after he was suspected of being a supporter of ISIS.

On 4 October 2015, Mr Singh was suspended by Aerocare Flight Support Pty Ltd (**Aerocare**) after receiving complaints regarding his social media posts which appeared to be in support of ISIS which expressed concern that they felt unsafe working with someone who appeared to support and promote Islamic extremist views. On 5 October 2015 Mr Singh was directed to attend meetings on 6 and 8 October 2015 to assist in the investigation of social media posts. On 8 October 2015, Aerocare informed Mr Singh that his employment would be terminated for breach of their social media policies and maintained that the comments threatened to damage its reputation.

The FWC was required to consider whether a breach of social media policy amounted to a valid reason for dismissal. During the investigation Mr Singh told the company that he was against extremism, that the posts were "sarcastic" in nature and that he did not support ISIS. Furthermore, Mr Singh declared that he did not identify himself as an Aerocare employee in any of the posts and maintained that he kept his personal life and work life separate. The FWC criticised Aerocare for having failed to conduct a proper and thorough investigation for such serious allegations which it concluded within a relatively short period. Furthermore, the FWC stated that it was incumbent upon Aerocare to give greater consideration to Mr Singh's explanations and responses and that they had "closed their minds" to the possibility that post could have meant otherwise. The FWC maintained that it would have been more appropriate to extend the suspension period in order to complete a more comprehensive investigation.

The FWC awarded Mr Singh a compensation of $4,800, and applied deductions of 40% for Mr Singh's misconduct in posting support for ISIS and securing alternative employment at Perth airport the following month.

Employee seniority and qualification unfairly compromised redeployment opportunities

Dr Petranel Ferrao v Peter MacCallum Cancer Institute [2016] FWC 4554

Dr Ferraro was employed as a Senior Research Officer by the Peter MacCallum Cancer Institute (**Peter Mac**) from January 2007 until her position was made redundant effective 22 January 2016. Dr Ferrao was informed that the National Health and Medical Research Council funded programme, of which she was Chief Investigator, would be winding up after grant funding had been de-prioritised. In October 2015, De Ferraro was informed that Peter Mac was committed to taking every effort to find a suitable alternative position before the redundancy date. During this period, Peter Mac gave evidence that they monitored internal vacancies for suitable opportunities however none were advertised. While Dr Ferraro applied for two internal positions, she was unsuccessful after being deemed unsuitable based on her seniority and research expertise.

The FWC found that the dismissal did not constitute a genuine redundancy and criticised Peter Mac's lack of real effort to find a suitable redeployment opportunity. The FWC noted that where an employer decides to advertise a vacancy rather than fill a role by redeployment, requiring that the employee must complete with other candidates, it may result in a finding that the dismissal does not constitute a 'genuine redundancy' within the meaning of the Act.

The FWC found that it was unjust to terminate Dr Ferraro where it would have been reasonable to offer redeployment and noted that fact that an employee is too experienced or qualified is not ordinarily a barrier when considering redeployment. The FWC was satisfied that Dr Ferraro could have been redeployed to one of the positions of which she had applied and awarded her 5.4 weeks compensation totally $9,570 in relation to Peter Mac's failure to undertake adequate efforts to provide redeployment opportunities before her employment was terminated.

Poor execution of fixed term contract permits employee to claim unfair dismissal

Kirsty Fraser v Act for Kids [2016] FWC 5052

Ms Fraser commenced employment with Act for Kids on 30 March 2015, pursuant to a letter of engagement issued by Act for Kids. Ms Fraser's employment came to an end on 1 April 2016. Following the cessation of the employment, Ms Fraser challenged her dismissal alleging that her employment was ongoing. Act for Kids asserted Ms Fraser was not dismissed within the meaning of the Act because she was employed for a specified period of time and the employment ended pursuant to that agreement.

Act for Kids relied upon:

- the letter of clearly engagement stated that the position would be full time from 30 March 2015 to 1 April 2016;
- the job advertisement which referred to employment for a period of 12 months and applicants being advised during the recruitment process the employment was for a year only;
- the position was subject to government funding, hence only offered for 12 months.

Ms Fraser asserted that whilst she understood and accepted that she would be employed full time during the specified period, she argued that the employment agreement did not contain an end date but rather beyond this date her employment could be part-time or casual.

The FWC rejected Act for Kid's jurisdictional objection and held that the employment contract contained ambiguous and uncertain provisions as to whether it was for a fixed term. The FWC found that a reasonable person in Ms Fraser's circumstances, having read the letter of engagement, would not have considered they were entering into a fixed-term contract. The FWC stated that while Act for Kids had intended to engage in any behaviour of a mischievous or underhanded nature, it was unable to rely on the 'clumsy' wording and poor drafting of the employment contact to substantiate the jurisdictional objection.

Report reveals workplace bullying escalates to new unprecedented levels

Bullying & Harassment in Australian Workplaces: Results from the Australian Workplace Barometer Project 2014/2015

Produced by Safe Work Australia, the "Bullying & Harassment in Australian Workplaces Report" (**Report**), was prepared from data obtained by the 2014/15 Australian Workplace Barometer project which undertook research to identify antecedents of bullying and harassment to assist in its prevention. The Report sought to generate a better understanding of the trends and key workplace risk factors associated with the occurrence of bullying and harassment in Australian workplaces. The Report highlights the importance of implementing the appropriate support services and intervention methods in aims of reducing workplace bullying and harassment.

The Report identifies the prevalence of self-reported workplace bullying has risen to 9.6% in 2015, up from 7% in 2009 to 2011. Industries reporting high levels of bullying included health and community services. Nearly one-in-ten Australian workers were found to have experienced workplace bullying. Furthermore, of those who reported experiencing workplace bullying, approximately 12.2% were bullied daily and 32.6% further revealed that they were bullied at least once a week. In respect to harassment, the Report revealed the most common forms of harassment experienced by workers were:

- being sworn at or yelled at in the workplace (37.2%), which had the greatest impact on health and work outcome in the workplace;
- acts of humiliation in front of others (23.2%);
- being physically assaulted or threatened by clients or patients (21.8%); and
- experiencing discomfort listening to humour of a sexual nature (17.9%).

Amongst other findings, key trends indicated that gender was a predominate factor in instances of bullying and harassment. Unfair treatment due to gender was experienced by 10.9% of workers who reported workplace bullying and harassment. Women were found to have experienced higher rates of bullying than their male peers more frequently and for longer periods of time. Findings suggest that women were more likely to be bullied and experience unwanted sexual advances, unfair treatment due to their gender, and more likely to experience physical assault or threats by a client or a patient. However, male employees were significantly more likely to experience being sworn or yelled at in the workplace.

Findings suggested a substantial link between bullying and harassment and poor psychological health. Where there was a lack of job resources, support services and Psychosocial Safety Climate (PSC: management commitment to psychological health and safety), increased bullying was prevalent. In contrast, the Report suggests that higher levels of PSC were linked to increased levels of worker productivity.

The Report identified that interventions to address bullying and harassment could be implemented including:

- raising awareness about the effects of bullying and harassment, and its causes, for managers and supervisors;
- steps to improve PSC should target systems to promote communication regarding bullying and harassment;
- all employees should participate in organisational monitoring, including implementing controls, education and training for risk factors;
- altering work conditions to remove high demand, pressure competition and low control and power circumstances;
- training for supervisors in managing appropriate employee behaviour and performance, a common source of employees who perceive they are being bullied;
- establishing guidelines for respectful behaviour, taking into account workplace diversity.

Meet our team

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siag training : development

A WorkSafe Approved Training Course

WorkSafe VICTORIA

Health and Safety Representative Initial OHS Training Course

To exercise powers 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 course 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) 2017

	$875 per person (plus gst)				
	day 1	**day 2**	**day 3**	**day 4**	**day 5**
March Course	Thursday 16 March	Thursday 23 March	Thursday 30 March	Thursday 6 April	Thursday 13 April
June Course	Wednesday 7 June	Wednesday 14 June	Wednesday 21 June	Wednesday 28 June	Wednesday 5 July
August Course	Tuesday 29 August	Tuesday 5 September	Tuesday 12 September	Tuesday 19 September	Tuesday 26 September
November Course	Tuesday 14 November	Tuesday 21 November	Tuesday 28 November	Tuesday 5 December	Tuesday 12 December

SIAG also offers the HSR Refresher OHS Training Course (1 Day)
Please contact SIAG on 1300 SIAGHR (1300 742447)
for registration forms or 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

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