The Advisor

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Preventing employee from viewing CCTV footage renders dismissal unfair

Peter Mulhall v Direct Freight (Qld) Pty Ltd T/A Direct Freight Express [2016] FWC 58

Mr Mulhall was dismissed by Direct Freight Express (DFE) after it alleged he had engaged in theft. Mr Mulhall was employed as a pick up and delivery driver and was dismissed after DFE alleged he had stolen a box containing a laptop. Despite Mr Mulhall denying he stole the laptop, DFE relied upon CCTV footage when determining it did not accept his denial and dismissed him for serious misconduct. Mr Mulhall applied to the Fair Work Commission (FWC) for unfair dismissal asserting there was no valid reason to justify his dismissal and that DFE's procedure was unfair.

Background

After DFE became aware of the missing box, DFE twice put the allegations to Mr Mulhall on 12 March 2015, who requested to view the CCTV footage relied upon by DFE during each meeting. Despite Mr Mulhall's requests, DFE did not show him the CCTV footage. DFE claimed they intended to show Mr Mulhall the CCTV footage at a subsequent meeting on 13 March 2015.

On the morning of 13 March 2015, Mr Mulhall was unwell and advised DFE he would not be attending the meeting. He subsequently provided a medical certificate to DFE advising he could not attend work. Notwithstanding that certificate, DFE proceeded with Mr Mulhall's dismissal. DFE's witnesses gave evidence during the arbitration that DFE had already determined to terminate Mr Mulhall's employment prior to the 13 March 2015 meeting and that they considered the medical certificate was an attempt to avoid addressing the allegations.

No Valid Reason to Terminate

In considering whether DFE could substantiate that it had a valid reason to terminate Mr Mulhall's employment, and followed an appropriate procedure, the FWC determined that:

- a witness for DFE gave evidence that the purpose of the 13 March 2015 was to get Mr Mulhall to admit to the allegation and resign;
- witnesses for DFE gave inconsistent evidence as to whether DFE's Sydney office had directed management not to show Mr Mulhall the CCTV footage;
- DFE formed the view that Mr Mulhall had stolen the box by the end of the second meeting on 12 March 2015;
- Mr Mulhall was not advised he would be shown the CCTV footage at the 13 March 2015 meeting, and the purpose of that meeting was to advise him of his dismissal;
- in consideration of witness evidence and the CCTV footage, the FWC determined there was no "clear or cogent evidence" to prove Mr Mulhall stole the box, including that witness evidence inconsistently identified the alleged stolen box in the CCTV footage;
- the CCTV footage was "*flimsy*" and DFE could not prove that Mr Mulhall engaged in the conduct as alleged;
- individual matters viewed distinctly and in combination, including Mr Mulhall's alleged erratic behaviour as exhibited by the CCTV footage, was no more than "*speculation*" by DFE; and
- Mr Mulhall was not afforded the opportunity to view the CCTV footage and provide a response prior to DFE determining to dismiss him which denied him procedural fairness.

In consideration of those matters, the FWC determined that DFE did not have a valid reason to dismiss Mr Mulhall and followed an unfair procedure in effecting the dismissal. Accordingly, the FWC determined the dismissal was unjust and unreasonable in breach of the *Fair Work Act 2009 (Cth)* (Act).

Mr Mulhall did not seek reinstatement and the FWC considered compensation to be an appropriate remedy. After assessing the relevant criteria for determining compensation under the Act, the FWC awarded Mr Mulhall $25,468.13 as compensation resulting from his dismissal.

What does this mean for employers?

- "*Speculation*" and "*inference*" may be insufficient for an employer to prove they have a valid reason for termination.
- To ensure a procedurally fair process is followed, employers should ensure they afford employees the opportunity to respond to allegations against them, including in consideration of relevant evidence including CCTV footage.
- Determining that an employee will be dismissed, prior to affording the employee the opportunity to respond, may result in the dismissal being procedurally unfair in breach of the Act.

Damages awarded after employer failed to take into consideration broader possibilities for reasonable adjustment to disability

Butterworth v Independence Australia Services (Human Rights) [2015] VCAT 2056 (22 December 2015)

The Victorian Civil and Administrative Tribunal (VCAT) found that Independent Australia services (IAS) contravened the Victorian Equal Opportunity Act 2010 (EO Act) in terminating an employee with a disability who could no longer perform the key duties of her role. Under section 20 of the EO Act, employers must make reasonable adjustments to accommodate employees with disabilities, and IAS had failed to do so.

Ms Butterworth worked as a customer service officer at IAS, a not-for-profit providing community services to people with disabilities. Ms Butterworth had been diagnosed with fibromyalgia, chronic fatigue syndrome, a workplace injury to her neck and shoulders (which constituted a disability under the EO Act) and an adjustment disorder that featured elements of anxiety and depression. IAS denied Ms Butterworth had the adjustment disorder in the course of her employment. Ms Butterworth made four discrimination claims to the tribunal:

1. That IAS made an unreasonable request for medical information regarding her chronic fatigue syndrome an fibromyalgia
2. That IAS required her to accept new duties that were made difficult by her chronic fatigue syndrome and fibromyalgia
3. That she experienced workplace harassment and bullying
4. That IAS failed to make adjustments and unjustly terminated her

The tribunal found that the first three claims could not be met. The tribunal did find, however, that claim 4 had been made out as IAS had failed to make reasonable adjustments and eventually terminated Ms Butterworth.

<u>Failure to provide reasonable adjustments to a workplace injury</u>

In 2011, Ms Butterworth reported that soft tissue damage was sustained in the course of her employment with IAS. Ms Butterworth's injury was found by doctors to have at least in part stemmed from her workplace duties at IAS. The duties were sitting and answering telephones at her desk for extended periods of time, and resulted in injury to her neck and shoulders. Her WorkCover claim for the injury was accepted by IAS' insurers. In the following 12 months, IAS reduced her hours answering telephone calls and used shorter blocks of time for her work. IAS also delegated to her a greater proportion of administrative duties and tasks such as picking up warehouse orders and sending faxes. Ms Butterworth claimed that this constituted a failure to provide reasonable adjustments, as she ought to have been moved to an administrative position. IAS argued it had complied with the *Accident Compensation Act* (AC Act).

In 2013 Ms Butterworth made another WorkCover claim, alleging bullying and harassment by IAS. IAS' insurers refused this claim. A month later, IAS' obligations under section 194 of the AC Act came to an end , and after reviewing Ms Butterworths capacity to return to her pre injury duties concluded that she could not do so. IAS claimed that reinstating her to her position would put them in breach of *Occupational Health and Safety Act 2004* (the OHS Act) due to the risk of exacerbating her injury. Ms Butterworth claimed she could have been moved to the TAC contract role or similar duties in enquiries and that this would have constituted a reasonable adjustment.

<u>IAS took a narrow view of the customer service officer role</u>

The tribunal found that IAS erred in failing to acknowledge other roles within the Call Service Centre (CSC division. The tribunal noted that IAS had focused on its obligations under the AC Act, but had not considered whether it was in breach of the EO Act. IAS had focused on Ms Butterworth being unable to return to a full time call centre role as a CSO. However, although Ms Butterworth could not perform the key duties of a CSO, the tribunal found that she could have reasonably been moved to the accounts or enquiries divisions within the CSC as this was *within* the employment.

A medical report from 2012 recommended Ms Butterworth return to duties with less telephone duties. This report evinced that the issue to be considered was an adjustment to Ms Butterworths employment that limited or excluded telephone work. The tribunal found that IAS focused on the inherent requirements of working in the call centre and failed to consider the genuine and reasonable requirements of the employment as a whole. In failing to do so, IAS had contravened its obligations under section 20 of the EO Act. VCAT awarded Ms Butterworth damages of $3,325 for economic loss, and $10,000 for hurt and distress.

What does this mean for employers?

- Employers are not required to create new positions however employers need to consider all roles within the employment as alternatives where employees can no longer perform key duties
- A detailed understanding of what tasks can and cannot be undertaken due to the disability is key in identifying if reasonable adjustments can be made
- Employers need to balance their obligations under the ACA Act and the EO Act when dealing with workplace injury issues

“Aggravated” sexual harassment leads to compensation of over $300,000

Collins v Smith (Human Rights) [2015] VCAT 1992

Mr Smith owned and managed the Geelong West Licensed Post Office in partnership with his wife. Ms Collins was an employee and alleged that between 5 January 2013 and 4 April 2013 Mr Smith sexually harassed her in breach of the *Equal Opportunity Act 2010 (Vic)* (EO Act). In July 2015 the Victorian Civil and Administrative Tribunal (VCAT) found that Mr Smith had sexually harassed Ms Collins and contravened sections 92 and 93 of the EO Act for a series of incidents, including:

1. Making sexually explicit and inappropriate comments to Ms Collins by text message and in person;
2. Unwelcomingly touching her in the workplace and commenting on her physical appearance;
3. Stating to her, “*If I had a Lamborghini in the garage, and I couldn’t drive it, I don’t want it here anymore.*”

VCAT issued a second decision as to orders made in relation to compensation for its findings. When assessing possible compensation orders under the EO Act, VCAT can make orders for compensation for loss, damage or injury suffered as a consequence of the contravention, including that the contravention was “*a cause of*” the loss or damage sustained. When determining the appropriate compensation, VCAT relied upon:

1. Medical evidence of chronic post-traumatic stress disorder, major depressive disorder and anxiety disorder and the ongoing treatment of those conditions;
2. Ms Collins attempts to mitigate her economic loss in the context that she remained incapacitated for work;
3. The circumstances of the breaches including that Ms Collins was a “*particularly vulnerable employee*”, that Ms Collins took “*reasonable steps available*” to dissuade Mr Smith from further harassment;
4. Expert evidence when ordering $60,000 for past loss of earnings, 18 months compensation for loss of future earnings and $60,000 for lost future net earnings and superannuation;
5. Out of pocket expenses for health services, medication, medical reports, recovery of mobile phone data tendered in evidence and relocation expenses.

VCAT also found Mr Smith’s conduct was aggravated as he was the person to whom any complaint could be made and as he exercised direct supervision of Ms Collins. Due to the prolonged period of harassment in a confined office environment, Mr Smith’s conduct was “*relentless*” and created “*fear*” in Ms Collins, and despite objective communications supporting Ms Collins’ position, Mr Smith “*persisted in his denials or lack of recall, while purporting to paint [Ms Collins] as provocative and flirtatious*”

VCAT ordered Mr Smith pay compensation to Ms Collins of $332,280 including general damages of $180,000, aggravated damages of $20,000, past loss of net earnings and superannuation of $60,000, future loss of net earnings and superannuation of $60,000, out of pocket expenses of $12,280.

Although the *Victorian Civil and Administrative Act 1998 (Vic)* provides that each party must bear its own costs, VCAT ordered Mr Smith pay Ms Collins’ costs of the proceeding, having particular regard to Mr Smith’s conduct when giving evidence and the without prejudice offers made by each party during the proceedings.

What does this mean for employers?

- The nature of the breaches of the EO Act, including the conduct of witnesses during a trial, will be taken into consideration by VCAT when determining to order compensation.
- Employers should take all complaints of sexual harassment seriously and take steps to investigate, and eliminate as far as possible, the behaviours in the workplace.

Employer's misrepresentations and failure to comply with awards leads to penalty of $17,500

Fair Work Ombudsman v Naomie-Jayne Aldred [2016] FCCA 220

The Fair Work Ombudsman (FWO) prosecuted Ms Aldred in the Federal Circuit Court (FCC) for various breaches of the *Fair Work Act 2009 (Cth)* (Act) and relevant awards. Ms Aldred operated Nexus Coaching *(Nexus)* which was placed into liquidation in December 2013. Prior to that time, Ms Aldred was the director, CEO and responsible for the daily management of Nexus.

Background

When in operation, Nexus advertised for unpaid traineeship positions and offered two individuals the positions of Graphic Design Intern and Multi Media Intern. The contractual arrangements included terms that:

- after a three month period to conclude in October 2013, Nexus would assess whether they were suitable for a part time position;
- the terms of the employment were pursuant to the National Employment Standards under the Act and "*protected by the modern award*."

In October 2012, after the expiration of the relevant three month periods, the two individuals were offered part time employment as Junior Graphic Designer and Junior Multi Media Specialist. By that time, another individual was offered employment as Receptionist/ Marketing Assistant. In April 2013, the employees were told they would be engaged as contractors and required to provide an ABN, establish invoicing systems and pay their own tax and superannuation. All continued to perform overwhelmingly the same duties. The Junior Multi Media Specialist refused the changed and was offered a position as a casual employee which she accepted.

Contraventions of Awards

As a result of the proceedings instituted in the FCC, Ms Aldred admitted to contravening the Act and the relevant awards (*the Graphic Sales Award and the Clerks Award*) as to:

- failing to pay minimum rates during the "*internship*" period and during the employment after that internship period;
- failing to pay the minimum casual rates and loading;
- failing to pay overtime, annual leave, annual leave loading; public holiday pay, personal/carer's leave;
- a breach of section 357 of the Act by misrepresenting the employment as an independent contracting arrangement;
- a breach of section 358 of the Act by dismissing employees to engage them as independent contractors;
- a breach of section 44 of the Act by reason of the failure to pay accrued annual leave at termination to all three employees;
- a breach of section 712 of the Act being a failure to produce records (payslips and timesheets) ;
- a breach of section 535 of the Act by altering payslips.

As Ms Aldred was the "*operating force of the company*", the FCC determined she was knowingly involved in all breaches, constituting a further breach of the Act. The total of the underpayments was $5,114.12, $3,952.28 and $1,118.29 for the three employees.

Factors considered for Penalties

The FCC then considered what penalties may be imposed against Ms Aldred for breaches of the Act including the following factors:

- by the time of judgment, each employee had been paid and the breaches had been remedied;
- the employment letters had "*brazen claims*" to comply with the Act which were "*simply false*" and were misleading and deceptive representations made by Ms Aldred;
- Ms Aldred claimed to have taken advice from her aunt in the United Kingdom and was unfamiliar with Australian workplace laws;
- the effect of Ms Aldred's conduct was to "*take advantage of young graduates in an industry where employment is difficult to obtain*" ;
- the low quantum of the underpayments was to be considered "*in light of the very low earnings of the persons involved*";
- there was no evidence of previous or similar breaches, and the business was small;
- Ms Aldred's evidence was that she altered payslips pursuant to an employee request to be "*better suited for her visa applications*" and while it mitigated the breach of industrial laws, was effectively "*a fraud upon the Department of Immigration*";
- the business was "*marginal*" when operating and had since gone into liquidation;
- the FWO's submission that the total maximum penalties that could be imposed were $112,500.

In consideration of those factors, the FCC imposed a $17,500 penalty against Ms Aldred.

What does this mean for employers?

- All employers, regardless of size and profitability, have obligations to ensure compliance with relevant industrial instruments.
- Employers (and individuals) are not precluded from prosecution for breaching the Act even if the operating entity has gone into liquidation.
- Even if breaches of awards or the Act are remedied by employers, they may still be exposed to prosecution for penalties under the Act.

Aggressive behaviour and improper conduct at work events justified termination

McDaid v Future Engineering and Communication Pty Ltd [2016] FWC 343

Mr McDaid sought an unfair dismissal remedy under section 394 of the Fair Work Act 2009 (the FWA) against his former employer Future Engineering and Communication Pty Ltd (FEC). FEC cited that Mr McDaid had been terminated due aggressive behaviour, threats of violence, and a physical assault occurring at a December 2014 Christmas party that was organised by FEC for FEC employees.

Background

The incidents resulting in Mr McDaid termination transpired as follows:

1. A Christmas party took place at the FEC premises on December 19, 2014, at which free alcohol was provided without restriction, and a swimming pool was available for use.
2. FEC alleged Mr McDaid was inebriated and behaved in a repeated aggressive manner toward another employee, Mr Sinna. Mr McDaid was told to go home several times by other employees and Mr Sinna. Mr McDaid continued to behave aggressively toward Mr Sinna, and eventually pushed him into the swimming pool whilst he was fully clothed.
3. FEC Director/General Manager Mr Craig Davies told Mr McDaid to go home. Mr McDaid refused and responded aggressively, and the two engaged in a physical altercation. Mr McDaid pushed Mr Craig Davies in the chest several times, causing him to fall over into a fence.
4. This incident was partially captured by CCTV footage and there was some witness evidence about the altercation. Mr Len Davies gave an account of how the events transpired, stating that Mr McDaid had initiated the altercation.

Mr McDaid remained on holiday leave after the December 2014 Christmas party. In January 2015, Mr Craig Davies called him into work to discuss his employment. Mr McDaid attended the meeting, in which Mr Craig Davies did not mention Mr McDaid's conduct at the December 2014 Christmas party, but criticised other behaviour over the course of his employment and told Mr McDaid that he had until the end of the month to find a new job.

Mr McDaid then spoke with Mr Len Davies, a trustee of FEC, regarding the possibility of a settlement. Subsequent meetings between Mr Len Davies, Mr McDaid, and Mr McDaid's solicitor failed to reach agreement on a settlement that Mr McDaid was willing to accept.

After a period of medically supported absence, Mr Craig Davies contacted Mr McDaid to continue discussion regarding the future of his employment. Mr Craig Davies also stated he wished to discuss Mr McDaid's conduct at the December 2014 Christmas party. McDaid agreed to attend the meeting and answered a series of questions regarding December 2014 incident.

In the questioning, Mr McDaid stated he could not recall pushing Mr Sinna into the pool, that he had not behaved aggressively throughout the Christmas party, and denied any recollection of a physical altercation with Mr Craig Davies. Mr Craig Davies and Mr Len Davies found these answers unsatisfactory, and then asked Mr McDaid if there was anything he wanted to say to explain his behaviour or that could support a decision against the termination of his employment. Mr McDaid stated that he did not have anything to say, Mr Craig Davies and Mr Len Davies subsequently informed him that he would be terminated and provided him with a letter of termination.

The criteria for harsh, unfair, or unreasonable dismissal under the Fair Work Act 2009

The Fair Work Commission (FWC) is required to take into account the following in assessment of an unfair dismissal:

1. Whether there were valid reasons for a termination,
2. Whether there was proper notification of reasons for termination,
3. Whether the claimant was given an opportunity to respond to the reasons for termination,
4. Whether the claimant was allowed to bring a support person to meetings discussing termination,
5. Whether unsatisfactory performance warnings were given prior to termination,
6. The size of the enterprise involved,
7. And any other matters the FWC considers relevant.

FEC cited Mr McDaid's aggressive behaviour and improper conduct at the December 2014 party as valid reasons for termination, in particular pushing Mr Sinna into the pool and Mr McDaid initiating a physical altercation with Mr Craig Davies. Mr McDaid was given notice of FECS decision to terminate him for these incidents, was given an opportunity to respond (which he did not take), and was allowed a support person at meetings. The FWC found FEC followed proper termination procedure in accordance with its small size and lack of human resources department. With regard to other relevant considerations, the FWC found Mr McDaid's behaviour at the December 2014 Christmas party was not out of character, as other staff at FEC testified that Mr McDaid was frequently verbally aggressive.

Mr McDaid criticised FEC for its unrestricted supply of free alcohol. While the FWC found that employers might be responsible for events attributable to an unrestricted supply of alcohol, such as an intoxicated employee falling down stairs, in this instance Mr McDaid was wholly responsible for his own actions.

The FWC accepted Mr Len Davies evidence of the incident, and found that Mr McDaid initiated the physical altercation and although Mr Craig Davies participated, he was acting in self-defence. Mr Len Davies witness evidence was important to clarifying the factual dispute over how the incident transpired.

In its decision, the FWC concluded that Mr McDaid's termination was not harsh, unfair or unreasonable. FEC was within their rights to terminate Mr McDaid for aggressive behaviour and inappropriate conduct at the December 2014 Christmas party. Mr McDaid's unfair dismissal application was dismissed.

What does this mean for employers?

- Out of work conduct may form valid reason for termination
- Haranguing and aggressive behaviour toward other employees, even when occurring in an informal environment, can justify termination
- In cases involving dispute of fact, witness evidence can provide important clarification
- The FWC will not accept alcohol intoxication as an excuse for an individual's improper behaviour
- While the employer was not criticised for its termination process in this case, larger employers with dedicated HR resources should act swiftly in cases of misconduct and follow appropriate processes such as clearly defining the allegations of misconduct and properly investigating allegations of a serious nature such as physical violence.

FCC asserts that members of an affected class need not be named in adverse action claims

Australian Federation of Air Pilots v Regional Express Holdings [2016] FCCA 316 (17 February 2016)

Regional Express Holdings (REX) failed in a bid to have an adverse action claim struck out on the grounds that the Australian Federation of Air Pilots (AFAP) did not identify specific individuals that had been adversely affected by REX's actions. The Federal Circuit Court (FCC) upheld the jurisdiction for AFAP to make the claim, finding that it did have standing to bring the adverse action claim. The finding sets a precedent for industrial organisations to potentially represent classes of individuals affected by breaches of the Fair Work Act (FWA).

Adverse action in denying minimum award accommodation

In 2014, REX sent a letter to shortlisted applicants to its cadet program, notifying them that they were being considered for a position. The letter stated that technical skills alone, "*Would not be enough,*" for candidates, and that they would be expected to go "*way above and beyond the call of duty, especially in times of need for the company*". The letter went on to state that "*cadets in the past who promised us the earth in order to be selected… but once selected they very quickly showed their true colours*," and used the example of pilots seeking to stay in nearby motels instead of REX nominated accommodation to save money. Further, the letter stated that cadets who acted in such a way were lacking in integrity and would not be considered for entry into the Picus Program, which was a prerequisite to holding a command post.

AFAP contended that the letter formed the basis of an adverse action claim, in that REX would prevent past and current cadets from advancing to a command position if they exercised their workplace rights in seeking accommodation to the standard set out in the award. Accordingly, AFAP filed a claim against REX for contravention of the FWA. However, the applicants' statement of claim did not mention any specific individual to whom the conduct was allegedly directed. Instead, the AFAP contended the adverse action was threatened against two classes of people, being persons in the employee of REX at the time of the letter and shortlisted persons who would go on to be accepted.
REX argued that AFAPs failure identify any named person meant that they were restricted from bringing a claim under section 540(6)(b) of the FWA. REX contended that the ability to represents persons under section 540(6) was limited to people who were members of the organisation bringing the claim, and were the court to find otherwise, the union would effectively be able to represent people regardless of their status as members or desire to be represented. This would, it was argued, contravene freedom of association rights under section 336 of the FWA.

Union's ability to represent a class of affected individuals upheld

Overall, the FCC found that industrial organisations did have sufficient interest, even where they may not have specific members with affected interest, as a result of their "*unique role in the operation of the legislative scheme*." Judge Reithmuller found the FWA to "*create a scheme whereby one may identify if a particular industrial organisation has sufficient interest in the subject matter of the dispute*." The strength of this interest could then potentially justify an organisation having standing to bring claims for contraventions of the FWA.

Judge Reithmuller also considered the historical and modern understanding of the role of industrial organisations, which could be understood to include prosecuting alleged breaches of the FWA. It followed that industrial organisations could bring action on behalf of a class of persons against an employer. Judge Reithmuller stated that "*it is clear that the structure of allowing not only government inspectorates, but employees and industrial organisations, to bring enforcement proceedings under the relevant part continues in the current version of the Act*."

In closing, Judge Reithmuller stated that difficulties could arise if the case concluded without identifying whether any particular employee had an individual damages claim. However, these difficulties could be resolved easily by notifying members of the affected classes that they could apply to join proceedings or choose to have the industrial organisation represent them directly. This would allow affected members of the class to pursue individual claims against adverse action under the FWA.

What does this mean for employers?

- Industrial organisations have standing to bring claims under the FWA
- No specific applicant need be named to bring a claim for a contravention of the FWA
- Employers should refrain from broad statements that could be interpreted as adverse action directed at a class of individuals who may then be able to collectively bring a claim
- Employers should be careful not to limit employee conduct in a manner inconsistent with their minimum award rights

Dismissal for refusal to alter employment from part time to casual a breach of the Fair Work Act

Rosa v Daily Planet Australia Pty Ltd [2016] FCCA 3126

Ms Rosa was employed by Daily Planet (DP) from July 2008 as a part time receptionist in DP's brothel. Ms Rosa worked four days per week, 10.5 hours per day at a flat rate per hour and was not provided with personal leave, annual leave or other benefits above the flat hourly rate. One shift each week was paid by cash.

Background

Shortly prior to Ms Rosa's dismissal, she attended a manager's meeting during which DP advised staff they needed to sign a workplace agreement. Ms Rosa sought to review the agreement at home prior to signing the document, which included provisions that "*no allowance is made for set breaks*", an acknowledgement she was a casual employee and she had no entitlement to paid leave or make a claim for unfair dismissal. Ms Rosa refused to sign the agreement and after this time, her shifts were changed and she attempted to complain to the owner Mr Trimble who was unavailable. Ms Rosa engaged a lawyer to write to DP, and following receipt by DP she was advised there was "*no more work*" because she didn't hold a manager's licence under relevant legislation.

In commencing proceedings in the Federal Circuit Court (FCC), Ms Rosa alleged she was dismissed in breach of the general protections provisions of the *Fair Work Act 2009 (Cth)* (Act), being her refusal to sign the new workplace agreement, and that she was incorrectly characterised as a casual employee, resulting in an underpayment of leave entitlements. Mr Trimble was also named as respondent to the proceedings on the basis that he was knowingly involved in the alleged contraventions of the Act.

DP and Mr Trimble asserted that Ms Rosa was dismissed because she lost her licence to be a manager of a brothel under relevant legislation. As to the alleged underpayment, DP asserted that Ms Rosa was remunerated above the rates in the relevant award as a casual worker, and that Ms Rosa had the opportunity to take breaks resulting in her claim for paid breaks being unsustainable.

Dismissal claim

The FCC determined Ms Rosa's dismissal was for unlawful reasons in breach of the Act and in reaching that decision, it considered:

- the fact that DP employed other receptionists who didn't have manager's licences, and that the dismissal was effected only two months prior to Ms Rosa being eligible to regain the licence which meant the purported reason "does not have the ring of truth about it";
- when giving evidence, Mr Trimble could not recall meetings and discussions with Ms Rosa about the terms of her employment;
- in assessing Mr Trimble's evidence, the FCC found him to be an "unimpressive witness" as a result of his "lack of memory, and evasive presentation";
- when disclosing the loss of her manager's licence due to a drug offence, Ms Rosa was initially advised she "should not worry." Notwithstanding the absence of a manager's licence, so long as another manager who held a licence was present, Ms Rosa could continue to perform her duties and comply with the relevant legislation;
- the adverse action engaged in by DP and Mr Trimble included threats of termination, reduction of shifts and changing the time of the shifts outside of her ordinary hours.

Accordingly, the FCC determined that the operative reason for the dismissal was Ms Rosa's refusal to sign the agreement in breach of the Act and that Mr Trimble was knowingly involved in that contravention.

Underpayment claim

In consideration of the nature of Ms Rosa's engagement, the FCC determined she was engaged on a regularly basis over a number of years resulting in the true nature of her engagement being on a part time basis. Additionally, the FCC determined that as no scheduled break was arranged, and Ms Rosa had no capacity to take a proper break, DP was obliged to pay her additional amounts pursuant to the award.

Accordingly, the FCC determined Ms Rosa was entitled to compensation for breaks not received, notice of termination, annual leave, personal leave, overtime for public holidays, and overtime following the failure to provide a meal break pursuant to the award. In addition, the FCC determined that DP was obliged to pay superannuation on the cash payments provided to Ms Rosa.

The FCC reserved its decision as to the quantum of the underpayment, appropriate declarations, damages and possible penalties as a result of its decision.

What does this mean for employers?

- Employers must not unilaterally change the terms and conditions of an employee's employment.
- Adverse action (including dismissal) taken against an employee by reason of their refusal to sign documentation that alters the nature of their employment, may be found to be unlawful and in breach of the Act.
- When responding to a general protections claim, employers must be able to prove, to the satisfaction of a court or tribunal, that only lawful reasons were relied upon when taking adverse action against an employee.
- A court or tribunal will look at the true nature of an employee's engagement when determining whether they are engaged on a part time or casual basis.

Redundancy was considered as Adverse Action

Heraud v Roy Morgan Research Ltd [2016] FCCA 185 (5 February 2016)

Roy Morgan Research Ltd were found by the Federal Circuit Court to have engaged in adverse action when they refused an employee returning from maternity leave flexible work arrangements and instead brought forward her redundancy.

Ms Heraud, an operations director at Roy Morgan Research Ltd (Roy Morgan), commenced maternity leave in 2013 and was to return to work in July 2014. Whilst Ms Heraud was on maternity leave the company suffered a significant loss in revenue and restructured making some employees redundant. The director made seven adverse action claims against Roy Morgan including that the company failed to consult with her about changes whist she was on maternity leave, failed to return her to her pre-parental leave position and failed to return her to a restructured role. Additionally that the company altered the positon to her prejudice and withdrew an offer for another position in the research centre, rejected her request for flexible working arrangements and brought forward her redundancy.

Justice Jones of the Federal Circuit Court, found that Roy Morgan did take adverse action and engaged in three contraventions of s 340 of the *Fair Work Act 2009* (the FW Act). The Court held that Ms Heraud had exercised a workplace right in taking maternity leave and was entitled under the FW Act to return to her pre-parental leave position or alternatively, if it no longer existed, a comparable position in status and pay for which Ms Heraud was qualified and suitable.

The company argued that Ms Heraud was not interested in pursuing redeployment options or taking a position that was below the level of director. However, the court rejected this argument and found that the company failed to offer redeployment options. Additionally by creating an expectation that Ms Heraud would be redeployed to position in the research centre and then failing to make that position available the company had contravened s340(1) of the FW Act.

The Court also found that the company had engaged in adverse action by refusing her flexible work requests.

What does this mean for employers?

- If your company is going under a restructure where positions are in need of redundancy, there are consultation obligations on you to consult with employees about major workplace changes
    - All awards and registered agreements, and some contractual agreements will have a consultation process for when there are major changes to the work place, such as redundancies
    - The consultation process sets out the things the employer needs to do when they decide to make changes to the business that are likely to result in redundancies
    - This needs to be made as soon as possible after the decision has been made to make these changes
    - Consultation requirements include notifying employees who may be affected by the proposed changes, providing employees with information regarding the effects, discussing steps taken to avoid and minimise negative effects on the employees and considering employees ideas and suggestions about the changes
- Be wary of your employees exercising workplace rights and be sure not to take adverse action against them when exercising a workplace right
- Where an employee is returning from maternity leave, that employee has a return to work guarantee under section 84 of the Act where they are entitled to return to their pre-parental position or if that position no longer exists, an available position in which they are qualified and suited nearest in pay and status.

Recent updates and 2016 forecast

Victorian Government Review of the Long Service Leave Act

TThe Victorian Government is undertaking a review of the current arrangements under the Long Service Leave Act 1992 (Act) to determine whether changes are needed to make long service leave (LSL) in Victoria more efficient, user-friendly and flexible for employees and employers.

The Department of Economic Development, Jobs, Transport and Resources (Department) acknowledge that the Act has not been reviewed for over a decade, and “like other workplace rights and responsibilities, should be kept up to date with community expectations, and be appropriate for a modern, flexible economy” .

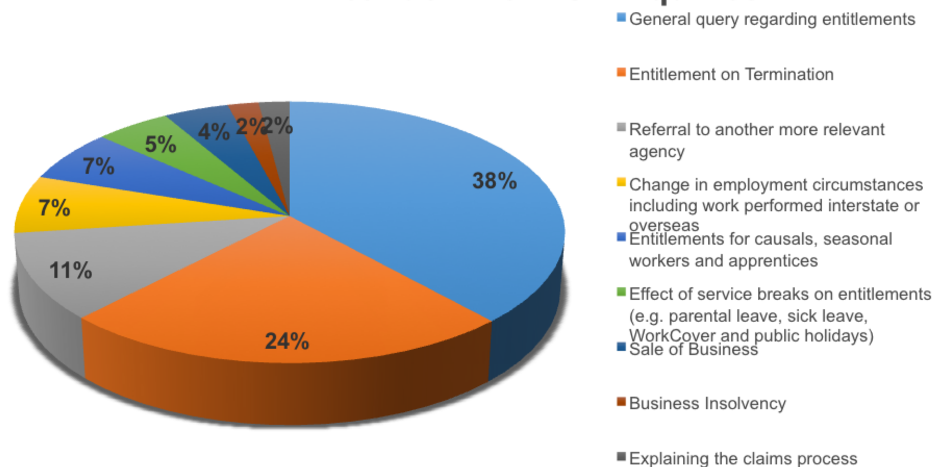
Many of the options for reform are based on common enquiries received by the Department through their telephone enquiry line. These include queries in relation to entitlements, payment upon termination, breaks in employment, changing employment circumstances etc.

Some of the potential reforms stated in the Victorian Government Long Service Leave Discussion Paper include:

1. Flexibility for LSL to be taken in separate periods.
2. Cashing out LSL entitlement.
3. Allowing pro rata LSL to be taken after seven years’.
4. Calculating LSL payment to include penalties and allowances.
5. Calculating LSL to take into account all hours worked by an employee throughout their employment.
6. Periods of unpaid parental leave to be counted towards service.
7. Clarification of LSL entitlements for casual and seasonal employees.
8. Clarification of LSL entitlements where a transfer of business has occurred.
9. Removing the right to seek an exemption from the Act.
10. Higher penalties for noncompliance and stronger enforcement powers for inspectors.

Submissions are currently being reviewed by the Victorian Government, as well as a comprehensive and detailed analysis of the economic impacts and costs for such reforms.

Siag will continue to keep you informed of any changes through our email circulars.



Audit into Bullying and Harassment in the Health Sector

A report into Bullying and Harassment in The Health Sector (Report) has recently been published by the Victorian Auditor General. The Report highlights the importance of building and maintaining a positive workplace culture that has appropriate mechanisms in place to adequately deal with inappropriate behaviour, including that of bullying and harassment. Despite the audit focusing on a limited number public health services, the Auditor-General has noted that "it is a call for a more strategic, proactive sector-wide approach that better reflects community expectations" .

Impacts of bullying and harassment extend beyond the physical, psychological and financial harm to those experiencing or witnessing such behaviours. It was estimated by the Productivity Commission in 2010 that the annual cost of workplace bullying to the Australian economy was between $6 billion and $36 billion. Some of these costs can be linked to high staff turnover, training and recruitment costs, a greater demand on management due to poor productivity and low staff morale, and significant legal costs and reputational damage.

The Report found that organisational policies and procedures are not effective controls for minimising inappropriate behaviour. Despite the audited agencies having such policies and procedures in place, they had significant gaps and were somewhat ambiguous. It was also found that training and education was limited and occurred on an ad hoc basis, was not mandatory, and/or was confined to short online modules.

Further, the Report found that early intervention by line management was inadequate and ineffective. Where formal complaints were made, the audit agencies failed to demonstrate that they respond systematically or effectively. This included lack of urgency, incomplete documentation and analysis, inconsistent investigation processes and rationales for decisions.

The Report makes a number of recommendations to health sector agencies, some of these included:

- Develop a 'risk management framework' to identify and monitor the risk of workplace bullying and harassment.
- Establish fundamental policies and procedures that detail clear responsibility and accountability for identifying and responding to workplace bullying and harassment.
- Conduct mandatory, comprehensive and targeted training for all employees and managers.
- Implement strategies in respect to positive workplace culture to ensure that employees feel safe to report inappropriate behaviour.

The Report concluded that sector-wide collaboration is urgently required, in particular the development of a best practice guide and program specifically tailored to the health sector.

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

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

The learning objectives of the course are:

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

Entitlement

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

Venue: 16/75 Lorimer Street, SOUTHBANK. VIC 3006
Time: 9am - 5pm

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

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

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

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