The Advisor

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Club liable for over $400,000 to employee dismissed after claiming workers compensation

Cai v Tiy Loy & Co Ltd (No. 3) [2016] FCCA 675 (31 March 2016)

The Federal Circuit Court ('The FCC') ordered Mahjong club Tiy Loy & Co ('Tiy Loy') pay former employee Mr Cai the significant sum of $415,000. This decision reflects the strong penalties the courts may impose against employers for significant adverse action and failure to abide by industrial relations legislation and relevant awards.

Mr Cai had been employed by Tiy Loy for eighteen years before he had his employment was unilaterally altered to his prejudice after pursuing a workers compensation claim. Previously a full-time employee, Mr Cai's employment was reduced to three days a week after he made a compensation claim. His reduction in hours meant Mr Cai was forced to resign as he was not earning enough to cover his cost of living.

Background

Mr Cai was employed by Tiy Loy from August 1994 till July 2012. Judge Manousaridis found that Mr Cai worked an average of 90 hours a week for the duration of his employment. Mr Cai's responsibilities included cooking, tea preparation, cleaning the club, organising mahjong games and letting club members in after hours. His responsibilities meant that Mr Cai was covered by the pre-reform Miscellaneous Workers General Services (State) Award and then the Miscellaneous Award 2010 ('the Awards').

In January 2012, Mr Cai fractured his ankle whilst taking out a wheelie bin, an injury that prevented him from working until February on his doctor's advice. Mr Cai subsequently submitted a workers compensation claim, which required Tiy Loy to implement an injury management plan ('IMP'). Under the IMP Mr Cai was not to work more than 40 hours a week, not walk or stand for more than thirty minutes, and take a five minute break once an hour.

Adverse action in significantly reducing injured workers hours

Following Mr Cai's claim the Tiy Loy board of directors held a private meeting in which it was decided that Mr Cai's role would be split from one full time position to two part time positions, one of which would allow Mr Cai to work 30 hours a week. The board decided that someone else would be hired to work the other position. Ultimately, Mr Cai's role was reduced to three days of work per week, and he was to be paid $115 per day. This compelled Mr Cai to tender his resignation shortly after, as he stated he was not able to support himself on the earnings of the new role.

The FCC found that in unilaterally altering Mr Cai's position after he exercised his workplace right to file a workers compensation claim, Tiy Loy had committed an adverse action. The FCC was highly critical of the fact that Mr Cai's 90 hour work week had been cut down in response to the fact that he sought compensation after being injured at work. Judge Manousaridis found that Tiy Loy had done so to avoid having to pay for Mr Cai's entitlements under his IMP. In addition, Tiy Loy had not paid Mr Cai overtime, penalties or annual leave loading in accordance with the Awards.

Employer 'unaware' they were committing an adverse action

Tiy Loy argued that they were not aware that altering Mr Cai's employment from full time to part time constituted an adverse action, and that they had only done so because they were 'short of money financially'. However, Judge Manousaridis stated that their ignorance of the relevant law was not an excuse and would not mitigate the penalties against them. Even if the court had accepted this reason, this did not mean that the decision was not made for reasons that included as a substantial and operative factor that the employee had an entitlement to benefits under workers compensation legislation. Further, Judge Manousaridis noted that Tiy Loy had posted significant losses in the previous years, and could have changed Mr Cai's position accordingly at more appropriate times but that they had not done so evinced that he was 'worth the salary' they paid him.

Breakdown of penalties

Judge Manousaridis ordered Tiy Loy Pay Mr Cai $415,698.55 for what they owed him for underpayments under the Awards, the Workplace Relations Act, the Fair Work (Transitional Provisions and Consequential Amendment) Act and the Fair Work Act. Tiy Loy was ordered to pay a further $49,500 in pecuniary penalties for failing to pay Mr Cai in accordance with the Awards, failing to comply with employee record keeping requirements, subjecting Mr Cai to unlawful adverse action and breaching the National Employment Standards.

What does this mean for employers?

- Employers should exercise care to ensure they are abiding by relevant industrial awards, including appropriate pay rates and entitlements
- Subjecting an employee to any prejudice as a result of a workers compensation claim is never acceptable and will be penalised harshly by the courts
- Employers should exercise care when looking to change employee arrangements when a workers compensation claim is on foot and seek appropriate advice

Employee Fired for Drinking a Coffee Unfairly Dismissed

Raj Bista v Glad Group Pty Ltd t/a Glad Commercial Cleaning [2016] FWC 3009

Vice President Hatcher gave a scathing indictment of an employer's decision to terminate an employee for having a cup of coffee at his work site prior to his shift. Mr Bista was awarded reinstatement and lost wages after the Fair Work Commission ('the FWC') found that he had been unfairly dismissed. Mr Bista's was terminated on the grounds of 'serious misconduct'. His employer had taken the view that his actions constituted theft which in their view formed a valid basis for dismissal. Mr Bista then lodged an application for remedy of unfair dismissal under s396 of the Fair Work Act ('the Act'), seeking reinstatement to his former position and payment of lost remuneration.

Background

Mr Bista was an international student employed by Glad Group Pty Ltd ('Glad') as a part time cleaner since 2010. He worked at an office building in which several companies had contracted Glad's cleaning services. Mr Bista held a team leader role which entailed increased responsibilities and personal access to a swipe card allowing him to access the building after hours. The FWC accepted evidence that Mr Bista was a 'competent and conscientious' employee and was often personally invited by staff at the office building to have food and coffee. On the day the incident occurred, Mr Bista and a colleague arrived 45 minutes early to their shift and went to a floor occupied by CMC Markets, a client of Glad, and helped himself and his colleague to a cup of coffee. The FWC found that Mr Bista had an 'objective basis' for believing it was acceptable for him and his colleague to have a coffee, as they made them in the presence of CMC staff after having a friendly conversation with them.

On their way out, Mr Bista and his colleague encountered the office and facilities manager Ms Turnbull. Ms Turnbull asked them where the coffee came from, and told them they were not allowed to have coffees. Mr Bista responded "We are sorry, we did not intentionally want to upset you. We did not know we were not allowed to". Ms Turnbull said "Ok" and left without further comment, but then wrote a letter to the facilities manager about the incident and requested that Mr Bista and his colleague no longer have access to the building. A 'breach notice' email stated that "The Office and Facilities Manager (Trudy Turnbull) of CMC Market on Level 8 and 13 at 130 Pitt Street reported that Mr Bista was seen making coffee from the tenants Nespresso Machine. Both cleaners have no permission from the tenants to do so." Mr Shao, Glad's Client Service Manager contacted Mr Bista, who admitted to the event. Mr Bista then attended a disciplinary meeting with Glad's Human Resources department, in which he apologised for his conduct, however, Glad proceeded with his termination.

Dismissal must be a justified and proportionate response to the relevant conduct

The FWC stated that in assessing whether a dismissal is valid it must be shown that the dismissal was a justifiable response to the relevant conduct. The FWC found the conduct that formed grounds for Mr Bistas dismissal was insignificant, and stated that it was at most a 'trivial misdemeanour'. This was insufficient to constitute a valid reason for dismissal and was not well founded or defensible. Vice President Hatcher stated that the conduct could have instead warranted a warning, but that termination was not a proportionate response.

The employer submitted that Mr Bista had been previously warned that such behaviour was inappropriate via tool box talks and a conversation with his manager. The FWC rejected this, finding the manager had previously accepted a cup of coffee in similar circumstances and that there was no evidence this issue had been previously addressed with Mr Bista.

Vice President Hatcher also rejected that Mr Bista having a coffee had posed a serious and imminent risk to the reputation, viability or profitability of Glad's business. The FWC held that Mr Bista's conduct could not be said to have put Glad's business at risk of detriment, as it had only aggrieved Ms Turnbull, and pointed out that he had been allowed to take coffee by other employees of the building. Mr Bista had a well-founded belief that he had permission to have a coffee and had been apologetic when confronted about it. Vice President Hatcher stated that Glad could instead have moved Mr Bista to another work site as a response to Ms Turnbulls complaint, however, outright termination was wholly inappropriate. Describing taking a cup of coffee as theft 'absurd' Vice President Hatcher pointed out that the styrofoam cup and instant coffee would have had a value of less than a dollar, and called the description of a cup of coffee as theft by Glad as 'absurd'. Further, Vice President Hatcher was critical of Glads characterisation of the conduct as theft, stating that it constituted an 'abuse of the English language'. Vice President Hatcher stated that if Glads argument were to be accepted, "The consumption of a glass of water drawn from a client's tap on a hot day would also constitute theft, and the use of a client's toilets to answer an urgent call of nature without express prior permission would be a trespass".

Vice President Hatcher concluded that there were no valid ground for dismissal which rendered it unjust and unreasonable, and also that it was harsh because of Mr Bista's otherwise unblemished employment record and honesty. In the circumstances the FWC found that reinstatement was possible and that Mr Bista could be relocated to another work site if it was deemed inappropriate for him to continue working at CMC Markets. Glad was also ordered to award Mr Bista remuneration for wages lost as a result of his invalid dismissal, to the sum of $9187.20.

What does this mean for employers?

- Employers must identify a valid reason for termination and ensure that employee conduct is met with an appropriate response
- Employers should carefully consider all the circumstances of a situation before deciding whether termination is appropriate
- A failure to consider the employees integrity, particularly their honesty and contrition, relevant justifications for the conduct in question and previous good behaviour when choosing to terminate may render the termination harsh

Flawed procedure undertaken by HR manager results in unfair dismissal

Pham v Somerville Retail Services Pty Ltd [2016] FWC 2267 (12 May 2016)

Hoa Thi Pham commenced unfair dismissal proceedings against Somerville Retail Services (Somerville) in the Fair Work Commission (FWC). Ms Pham worked as a meat processing worker and commenced with Somerville in 2005.

Somerville conducted disciplinary action in relation to Ms Pham conduct during her employment. This included providing a written warning in July 2011 for refusing to leave work and acting in breach of her WorkCover restrictions. In August 2015, Somerville received complaints the Applicant was making crude sexual insults in Vietnamese and the Applicant received a warning for that behaviour. Somerville's HR manager was involved in the investigation of the complaints but could not plausibly explain to the FWC why she did not make statements from the complaining employees and failed to give Ms Pham a satisfactory opportunity to respond to the allegations or question persons Ms Pham identified as witnesses. Further disciplinary action which led to termination was undertaken in October 2015 when the Applicant failed to comply with a lawful instruction issued by a supervisor.

Background

On 13 October 2015 Somerville initially met with the Applicant to issue her with a warning regarding her failure to comply with a lawful instruction. During that meeting, Somerville supervisors gave evidence the Applicant was aggressive and rude to her supervisors and called them liars. After the first meeting, the supervisors spoke with the HR manager and a decision was made in consultation with the general manager to conduct a second meeting with the Applicant. During the second meeting the HR Manager stated that the Applicant was advised of the proposed decision to terminate her employment "in light of her behaviour" and afforded the Applicant the opportunity to respond. The meeting was adjourned for 15 minutes and the Applicant was advised on her return her employment would be terminated.

The termination letter issued to Ms Pham stated Somerville dismissed her because of her:

- refusal to carry out a lawful instruction on 10 October 2015;
- conduct in two meetings on 13 October 2015 when her refusal to carry out the lawful instruction was discussed. The Applicant was aggressive during the initial meeting, then later denied she had engaged in that behaviour;
- refusal to carry out a lawful instruction on 19 July 2011;
- unprofessional conduct and allegations of swearing, arguing and making unwelcome sexual references in Vietnamese on 11 August 2015.

Additional matters were brought to the attention of the FWC including that the Applicant believed she was advised in August 2015 that if she was issued with a third warning, she would be dismissed. The Applicant therefore had the view that if she accepted a third warning, she would be dismissed. Further, there were concerns whether the Applicant was fluent in English to understand matters pertaining to her employment.

The FWC considered the reasons relied upon by Somerville and determined:

- the refusal to carry out a lawful instruction in 2011 was not a valid reason for dismissal;
- because the evidence of Somerville witnesses was an insufficient basis for a finding that the August 2015 conduct occurred, it was not a valid reason for dismissal;
- in consideration of the Applicant's behaviour on 10 and 13 October 2015, a combination of the Applicant refusing the direction, her conduct in the first meeting and her refusal to make concessions about her behaviour were a valid reason for dismissal.

Failure to follow disciplinary procedural policy

When assessing the procedure undertaken by Somerville when effecting the dismissal, the FWC found that it did not comply with its Employee Counselling / Disciplinary Procedure Policy ('the Policy'). The Policy required the Applicant to be given prior warning of disciplinary action before the first meeting on 13 October 2015, and that Somerville was to undertake a two-step process – the first being an initial disciplinary discussion where performance/conduct are discussed, the second being a subsequent meeting where the employee is advised what disciplinary action is to be taken. Somerville did not give advance notice of the 13 October 2015 meeting and if it had followed the two-step process, the outcome may have been different.

The FWC also took into account that the Applicant was a 10 year employee and had an unblemished work history other than the events surrounding her dismissal. In consideration of those matters, the FWC determined that while a valid reason existed to terminate, the dismissal was unreasonable because of the procedural flaws in effecting the dismissal and that the Applicant did not have a satisfactory opportunity to respond. The dismissal was also found to be harsh because the Applicant was a long service employee and had a good work record.
When considering the appropriate remedy, the FWC took into account that the Applicant did not seek reinstatement. The FWC considered that but for the dismissal, the Applicant would have continued in her employment and ordered Somerville to compensate the Applicant for loss of income.

What does this mean for employers?

- Employers must ensure they comply with internal disciplinary policies when addressing unsatisfactory conduct and performance with employees.
- A failure to comply with internal policies may undermine the disciplinary procedure undertaken by an employer and result in a dismissal being in breach of the Fair Work Act 2009 (Cth) (Act).
- A valid reason is insufficient to ensure a dismissal will not be found to be in breach of the Act.

Employee reinstated after termination – disproportional response to issue

Treen v Allwater - Adelaide Services Alliance [2016] FWC 2737 (2 May 2016)

Mr Treen, a jetrodder formerly employed by Allwater, a cleaning service, was dismissed and subsequently reinstated to his role after the Fair Work Commission ('FWC') accepted that his termination, though valid, was a disproportionate response. Mr Treen was dismissed for leaving an obscene message on a co-workers phone, but argued that his dismissal was unfair and sought reinstatement at the FWC in accordance with s. 394 of the Fair Work Act 2009 ('the Act'). The ruling demonstrates that employers should consider the proportionality of termination as a response to employee misconduct.

Background

Mr Treen was 50 years old and had been employed by Allwater for seven years. At the time of his termination, Allwater was renegotiating the enterprise agreement and employees were involved in protected industrial action. Mr Treen was involved in the work stoppages, and on 8 December 2015 he attended a rally at Victoria Square, Adelaide. After noting a diminished turnout in comparison to previous rallies, Mr Treen obtained the phone number of an employee he suspected had continued work during the rally. Whilst driving home from the rally, Mr Treen called and left a voicemail on the employees phone stating, "*Hi mate, just wondering if you are working. If you are, you're a f***ing scab.*"

Mr Treen texted the employee an apology for his message the next day however the employee reported the message to Allwater. Later that day, Allwater informed Mr Treen that his employment was being reconsidered, and that he was to attend a meeting in respect to this on 11 December 2015. Whilst the matter was being investigated, Mr Treen was suspended without pay. The meeting was attended by Mr Treen, a union representative, and a regional manager of Allwater. At the meeting Mr Treen admitted to and apologised for the message, and stated that the accepted that he had done the wrong thing. Mr Treen was terminated by the regional manager on 15 December 2015 with written reasons provided.

Consideration of valid reasons for termination and previous disciplinary actions

Mr Treen lodged an application to the FWC with respect to his termination. The FWC found that Allwater had a valid reason to terminate Mr Treen as his conduct was grossly inappropriate and not in accordance with the spirit of the rules of Allwater. However, the FWC was not satisfied the behaviour amounted to bullying or harassment, as contended by Allwater, as it was a single incident and Allwater did not lead any evidence of the impact the message had on the recipient other than he had reported to others that he was 'upset' and 'p***ed off'. The FWC considered Mr Treens conduct to be contrary to the right of workers to choose themselves whether or not to participate in an industrial action. The FWC stated that the use of 'scab' is well known in Australia to be used to denigrate employees who choose not partake in strikes and was clearly an insult.

Relevant to the FWC's consideration was two other similar incidents Allwater had dealt with. In one, an employee had posted a threatening but non-work related message on the company message board. The employee was issued with a written warning. In another incident, an employee repeatedly swore at a manager in a loud and aggressive manner, and was issued with a final written warning. In comparison to the disciplinary outcomes of these incidents, the FWC found that Allwater had not acted consistently in choosing to terminate Mr Treen for his misconduct.

Termination a disproportionate response to employee conduct
With regard to unfair dismissal considerations under s. 387 of the Act, the FWC found the inconsistent approach of Allwater in similar incidents weighed in favour of the termination being unfair. The FWC determined that Mr Treen had an otherwise 'unblemished' employment record, and had no other major incidents in his employment with Allwater. Significantly, Mr Treen was also described as reliable, hardworking, and honest by the regional manager who dismissed him. Due to his age it was also unlikely that he could readily gain employment at another company. Additionally, the misconduct was a one off, out of character incident and Mr Treen had not intended to intimidate the employee. Accordingly, the FWC found that in not acknowledging these considerations Allwater had unfairly dismissed Mr Treen. Allwater argued that Mr Treen should not be reinstated due to a "breakdown in trust and confidence", but the FWC disagreed with this argument, particularly given the regional manager's assessment of Mr Treen as a hardworking and reliable employee, and Mr Treen was reinstated to his position.

What does this mean for employers?

- Although misconduct, such as calling another employee an obscentiy, is a valid reason for termination, termination may not be a proportionate response to misconduct
- The FWC will look to similar misconduct cases the employer has dealt with to consider whether termination is a proportionate disciplinary response
- The employees history, chances of finding new employment, past transgressions and whether the incident was a 'one off' will all be taken into account by the FWC
- Employers should carefully consider whether termination is a proportionate response to misconduct, particularly where other sanctions may be more appropriate in the circumstances

Employer Remedies $2 million in Underpayments

Enforceable Undertaking between The Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and Deepcore Australia Pty Ltd (CAN 115 967 809), April 2016

Deepcore Australia Pty Ltd (Deepcore) has undertaken to repay employees for underpayments between the period of 2010 to 2014. A recent audit found that Deepcore contravened the *Fair Work Act 2009* by failing to pay employees correct entitlements under the *Mining Industry Award 2010*.

Background

The company failed to pay the correct industry allowance including the night shift penalty for Victorian employees and the Saturday penalty rate to Queensland employees. According to the company, it received incorrect legal and accounting advice from third parties. Additionally, Deepcore admits that the miscalculation of rates was due to a misunderstanding in relation to the transitional arrangements that applied to its staff following the award modernisation process.

Deepcore admitted to the Fair Work Ombudsman (FWO) that they contravened the Commonwealth legislation and entered into an Enforceable Undertaking (Undertaking) with the FWO committing to rectify the contraventions.

Deepcore have agreed to rectify the underpayments of $2.09 million and pay 1.5% interest on underpayments. They also agreed to donate $15,000 to Loddon Campaspe Community Legal Centre and apologise to all employees for its actions.

The miscalculation of rates is significant and the FWO has said it is one of the largest underpayments ever to be enforced. The Ombudsman only began investigation after receiving requests from Deepcore employees regarding wage requests.

Importance of implementing adequate payroll systems

Deepcore failed to implement adequate systems and processes to ensure correct payment of all wage-related entitlements of employees. The company has not only commenced rectification payments to employees, but has employed a dedicated Human Resources, Safety and Training manager.

As a result of the underpayments, and as a part of the Undertaking with the FWO, Deepcore must organise and ensure training is provided to all employees who have managerial responsibility for human resources recruitment, employee entitlements or payroll functions on behalf of the Company. The training will ensure those staff will have knowledge in relation to their obligations under the Mining Award and the National Employment Standards and also the systems and processes developed and implemented in accordance with the Fair Work Regulations.

What does this mean for employers?

- It is important that employers, in particular management and human resource staff, are familiar with relevant industry awards that may apply to their staff, particularly in relation to allowances
- Where there is an increase in minimum wage and other entitlements, ensure these are updated and employees are informed of the increase
- Ensure human resource and payroll staff are appropriately trained
- Where employees are questioning their rates of pay, it may be prudent to seek advice from an external human resource/industrial relations advisor

Employer told 'it takes two to tango' after dismissing employee for calling the CEO an obscenity

Hain v Ace Recycling Pty Ltd [2016] FWC 1690 (16 May 2016)

Mr Hain was employed as a labourer by Ace Recycling ('Ace'). He lodged an application for unfair dismissal under the Fair Work Act 2009 ('the Act') after a verbal altercation between him and the CEO of Ace, Mr Di Carlo, resulted in his dismissal via text message. The altercation occurred after Mr Hain enquired about when he would receive pay for past overtime work, and quickly turned aggressive with Mr Di Carlo becoming verbally abusive to Mr Hain, and Mr Hain calling him an 'old c**t' in response.

Mr Hain had been employed by Ace 'off payroll' since November 2011 until his dismissal on April 30 2015. Mr Hain gave evidence that after asking Mr Di Carlo about the status of overtime pay owed to him, Mr Di Carlo responded in an aggressive and agitated manner. According to Mr Hain, The exchange that resulted in his dismissal went as follows: "*…[Mr Di Carlo] went on to say "you are earning more f***ing money than me, I can't afford to put food on the f***ing table for my family" By this point I was angry and defensive. I responded with "that's not my f***ing problem you owe me money you old c***." He then responded with a few more explicit words and hung up*." Later that afternoon Mr Di Carlo left a threatening message on Mr Hain's phone. After Mr Hain did not respond, Mr Di Carlo wrote: "*The old man here. Do not come back tomorrow thanks*."

Procuring information from employer was like pulling teeth

The FWC noted that there had been delays preventing a swift resolution of the issue. Mr Hain had gone on a one month overseas holiday which caused him to miss a conciliation conference. However, Ace had not cooperated with the FWC from the start. Upon receiving the application, Ace made no effort to respond or contact the FWC, and was absent from conciliation conferences without explanation or having made requests for adjournment. Ace did not comply with a direction to file submissions and witness material by the specified date. After being contacted by the FWC, Ace emailed a response stating that they had been placed into voluntary administration.

Ace ignored six warnings that a failure on their part to tender evidence could result in adverse findings against them. The FWC noted that obtaining further evidence of Ace's trading status or reasons for dismissal of Mr Hain was, "akin to pulling teeth." For the purposes of the hearing, the FWC found Ace to be in the process of being wound up in insolvency. Although this would ordinarily stay proceedings against a company, the FWC does not fall into the definition of 'court' for the purposes of the Corporations Act, and the FWC could proceed with determining Mr Hain's unfair dismissal application.

Misconduct from both employee and employer

The FWC rejected Mr Hain's claim that the dismissal came 'out of the blue', as it clearly followed that his exchange with Mr Di Carlo was the reason for his dismissal. The FWC noted that both Mr Hain and Mr Di Carlo had acted inappropriately. It noted that Mr Hain could have expressed frustration that Mr Di Carlo owed him money without calling him an "*old c****". The comment was indicative of an employment relationship breakdown and formed a valid reason for dismissal, and the FWC noted that any employee that spoke to a CEO in such a manner should expect to be dismissed.

Despite this finding, the FWC was critical of Ace's conduct, highlighting that an employee who asks about the terms and conditions of employment should never be responded to aggressively. Mr Di Carlo unacceptably responded with verbal abuse after Mr Hain asked about his owed overtime pay, which he was entitled to ask about. Mr Di Carlo's conduct therefore mitigated the severity of Mr Hain's words towards him. The FWC held that an employee who is notified of dismissal effective immediately via text message cannot be said to have been properly notified as required by the Act. In addition, Ace never contested the evidence brought before them. Accordingly, while Ace had a valid reason to dismiss Mr Hain, the dismissal was unfair. The FWC noted that this was a matter that could have been resolved by conciliation, were Ace willing to cooperate. Mr Hain was awarded $828.00 less tax as compensation for his unfair dismissal.

What does this mean for employers?

- Employers should always participate in FWC processes and seek advice as required
- Employers should refrain from using abusive language, even when an employee is doing so
- Regardless of trading status, employers must comply with FWC directions and requests for documents
- It is unacceptable to respond angrily or aggressively to employees when asked about a legitimate employment concern, such as owed overtime
- The FWC will likely make adverse findings where employers fail to participate and comply with directions

The Fair Work Obmudsman's shifting focus of accessorial liability

Fair Work Ombudsman v Al Hilfi [2016] FCA 193 and Fair Work Ombudsman v Al Basry.

Fair Work Ombudsman (FWO) Natalie James has issued warning about the increasing focus on accessorial liability and the increase in scope for alleging liability in workplace breaches. Ombudsman Natalie James warned of accessorial liability in a speech delivered to Sydney's Australian Human Resources Institute on Wednesday 27 July 2016. FWO Natalie James spoke about the shift in the FWO's focus to accessorial liability and extending prosecutions beyond its previous narrow application.

Accessorial liability and the Fair Work Act 2009

The *Fair Work Act 2009 (Cth)* ('the Act') provides for accessorial liability and states that an individual's involvement in a contravention of the Act will be treated in the same manner as an actual contravention by an employer. Section 550 of the Act states that a person is involved in a contravention of a provision of the Act if the person has:

- has aided, abetted, counselled or procured the contravention; or
- has induced the contravention, whether by threats or promises or otherwise; or
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- has conspired with others to effect the contravention.
- Broadening the enforcement of accessorial liability

The FWO has broadened the enforcement of section 550 of the Act to take legal action against accessories to breaches of workplace law. While company directors may have previously found themselves named as respondents to proceedings for workplace breaches, the FWO is now extending prosecutions beyond company directors to hold human resource advisers, business managers and recruiters responsible as accessories. The FWO warns that liability could also extend to hold supply chains and franchisees responsible. FWO James cites that actual knowledge extends to include those who are wilfully blind or deliberately ignorant shutting their eyes to facts and breaches within the workplace. If there is a breach FWO Natalie James warned that "in the case of workplace laws, if you are involved in facilitating a breach of the law, you are personally at risk of being found an accessory."

Successful accessorial liability claims

Recent prosecutions by the FWO where accessorial liability claims have been successful include:

- A HR manager found to be personally liable due to a failure to ensure that the company complied with the relevant workplace relation laws. The FWO examined the issues of underpayment and the practise of 'sham contracting' where employees were converted into contractors. In this case, it was not a defence that the HR manager was following instructions, had no control or that he was ignorant to the legal implications. It was found that the HR manager was aware of the contravention, had a responsibility to provide appropriate advice in regards to breaches of employee rights and a duty to ensure that companies are compliant under the relevant employment laws. The HR manager was personally fined for his involvement in the contraventions (*Fair Work Ombudsman v Centennial Financial Services Pty Ltd (2010) 245*).

- Businesses in a position of power and other various entities within the supply chain have also been held to be liable as accessories. Coles Supermarkets contracted the services of Starlink Pty Ltd for the provision of trolley collection services who in turn subcontracted these services to Mr Al Hilfi and Mr Al Basry. Pursuant to s 550 of the Act multiple entities were found to be involved and in serious breach in relation to the significant underpayment of the subcontracted employees. It was argued that the contract price paid by Coles failed to fulfil the minimum employment entitlements. Coles entered into an Enforceable Undertaking with the FWO whereby Coles recognised that it has an ethical and moral responsibility to protect employees

What does this mean for employers?

- To minimise exposure for prosecution, it is critical that employers are aware of the obligations owed to employees and are proactive in ensuring comply with those obligations including under the Act, workplace regulations and industrial instruments.
- Employers and relevant personnel should address issues, including non-compliance, as they become aware of those matters
- Employers should seek advice to ensure appropriate steps are implemented to rectify possible non-compliance concerns.

Annual growth rates of wages in EBA's at an all-time low

In the most recent 2016 March Quarter 'Trends in Federal Enterprise Bargaining' report ('the Report'), the report states the average annual growth rate of wages in newly approved private sector enterprise agreements (EA) was reported as the lowest since 1991. The report identified a significant drop in the growth of wages to a 24-year low.

Annual wage trends within the private and public sector

The average annual wage increase for private sector agreements approved by the Fair Work Commission ('FWC') in the March 2016 quarter was 2.9%. This shows no change in growth since the December quarter in 2015, and a 0.1% decrease from the 2015 March quarter. This increase of 2.9% within the private sector was 0.2% higher than the average across all sectors. For existing enterprise agreements the difference was minimal, with only a -0.1% drop since the December 2015 quarter.

There were two notable large private sector agreements in the period which had a significant impact upon private sector average annual wage increases. 'Large' is defined as any agreement covering more than 2,000 employees. These were the RSL Care Enterprise Agreement 2015, in which 3,517 employees gained a 2.6% average annual wage increase, and the Healthscope Group's New South Wales Nurses and Midwives Enterprise agreement 2015-2019, in which 2,545 employees received a 2.9% average annual wage increase. In the 2016 March Quarter, the FWC approved 956 private sector agreements in the quarter, with an average of 2.6 years

Similar trends have been experienced in the public sector. The Federal Enterprise Bargaining Report illustrates that of the public sector agreements approved in the March 2016 quarter, the public sector had the lowest rise of annualised wage rates in 22 years. The public sector experienced a -0.6% decrease in average annual wage increases to a reported 2.6% down from 3.2% in the December quarter 2015 and 3.7% in the March quarter 2015.

Average annual wage increases by Industry

The report notes that the highest average annual wage increase was of 4% by the Construction industry, followed by 3.6% by Finance. The industries with the lowest average annual wage increase were the Mining industry of 2.2% and Electricity, Gas, Water and Waste Services of 2.2%.

Notably, all industries have a decrease of -0.3% in annual wage increases from 3% increase reported in the December quarter 2015 and the reported 3.1% increase in the March quarter 2015 reflecting a 21 year low.

Disclosure of unquantifiable data

The data for the report was obtained from the Workplace Agreements Database, Department of Employment, which excludes some unquantifiable data. Unquantifiable wage increases excluded from the report, were in sum 31.5% of agreements covering more than 20% of employees. Unquantifiable wage increases were those that were affected by performance, linked to CPI and inconsistent increases amongst other factors.

siag training : development

A WorkSafe Approved Training Course

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) 2016					
	$850 per person (plus gst)				
	Day 1	**Day 2**	**Day 3**	**Day 4**	**Day 5**
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