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Employee unlawfully discriminated against when terminated for failure "to fit" the workplace culture

McEvoy v Acorn Stairlifts Pty Ltd [2017] NSWCATAD 273

In a recent decision, an employee successfully claimed he had been discriminated against by reason of his age and presumed disabilities under the *Anti-Discrimination Act 1997* (NSW) when his employment was terminated because he did not "fit the culture" of the workplace.

Mr McEvoy was employed with Acorn Stairlifts Pty Ltd (Acorn) as a telephone sales advisor, responsible for answering telephone enquiries from prospective customers and arranging appointments for sales team members. His employment was terminated, he contended, because he was 62 years old and it was assumed he had an incapacity because of presumed physical disabilities. Such termination was alleged to be in breach of the *Anti-Discrimination Act 1997* (NSW) (the Act) on the basis of unlawful age and disability discrimination. The complaint of unlawful discrimination was referred to NSW Civil and Administrative Tribunal (NSWCAT) for determination.

Acorn dismissed Mr McEvoy sixteen weeks after commencing employment, when on 28 February 2014, Ms Kelly, the National Sales Manager met with him and advised his employment was terminated, stating "…I've decided to let you go because I feel you don't fit the culture here…". When he enquired further as to why, Ms Kelly replied "look around", allegedly comparing 62 year old Mr McEvoy to other employees aged between 25 and 30.

Ms Kelly continued, stating Mr McEvoy's age was "not the only problem", while also expressing concerns about a back injury he had sustained outside of work. When he attempted to refute this assertion advising that he had obtained a medical certificate from his treating doctor confirming that he was clear to return to work, Ms Kelly stated "I don't believe you. You're also deaf", asserting she would yell across the room and stand next to Mr McEvoy swearing without eliciting a response. Mr McEvoy defended himself, advising he could hear perfectly well, but "[he doesn't] respond to being yelled at and that filthy language". Mr McEvoy gave evidence that Ms Kelly gave reason that "you don't fit the culture here…"

The Anti-Discrimination Board invited Acorn to respond to Mr McEvoy's account of the meeting. Without elaborating, the solicitors for Acorn wrote that Mr McEvoy had been dismissed from his employment due to "ongoing problems with his performance". Mr McEvoy contested this claim, arguing he had never performed poorly on the job and further, at the time of his termination Mr McEvoy was not informed that he his employment was being terminated by reason of poor performance.

Mr McEvoy sought compensation in the sum of approximately $40,000 for loss of income and non-economic loss for pain, suffering and humiliation, resulting from his termination. He recounted the experience as being "very distressing" and one he "lives with constantly" thereafter exacerbating his depression, stress and anxiety.

The NSWCAT preferred McEvoy's account of what occurred at the termination meeting, noting that his evidence upon cross examination was consistent and supported by two former employees. The tribunal were satisfied that the complaints of discrimination on the basis of age and disability were sufficiently established. The tribunal were satisfied that the age group to which Mr McEvoy belonged, his back injury and presumed hearing impairment as reason for the perceived poor culture fit at Acorn were material reasons in determining his dismissal from employment. The tribunal held that McEvoy's employment was terminated by reason of unlawful discrimination.

The tribunal made orders for Acorn to pay Mr McEvoy compensation in the total sum of $31,420.

What does this mean for employers?

- Employers should be mindful to provide valid and lawful reasons when terminating employment;
- In determining an employee's capacity or suitability, employers must not rely upon and terminate an employee on the basis of discriminatory attributes such as age or disability

$424,445 Awarded for repudiation of contract considering 'improbable factual hypothesis'

Crowe Horwath (Aust) Pty Ltd v Loone (No 3) [2017] VSC 548 (15 September 2017)

The Supreme Court has ordered accountancy firm, Crowe Horwath (Aust) (CHA), to pay a senior accountant damages totalling $424,445, following the repudiation of his employment contract. Found to have refused to perform its contractual obligations and fulfil the duties owed to employee, Mr Loone, CHA's arguments that damages should be limited because a restructure would have meant the employee's employment would have been terminated in August 2016 were rejected. Giving regard to authorities, the Court held instead that the employee would have remained employed until at least July 2017, resulting in the substantial damages finding.

In April 2017, the Supreme Court held CHA engaged in three separate acts that were considered to have repudiated Mr Loone's employment contract, being: 1) the exclusion of a business acquisition from the calculation of Mr Loone's 2015/2016 bonus; 2) the proposal of a new incentive model whereby 20% of Mr Loone's bonus payments would be deferred for three years; and 3) the substantial reduction of Mr Loone's management responsibilities including the reduction of profit and loss responsibilities. While conceding in part that they owed the employee damages for the repudiation, in assessing the value of those damages, CHA argued that at the time of repudiation, it proposed to introduce a 'Family Office Initiative' (Initiative) that would have diminished the employee's role, most likely resulting in a breakdown in the employment relationship and leading to termination with notice by August 2016. The ultimate question for the Supreme Court to determine in this matter was consequently whether, in assessing damages, to give regard to the fact that the proposed Initiative was introduced, or rather, as submitted by Mr Loone, to favour a hypothetical hypothesis that the repudiatory conduct had not occurred, the initiative was not introduced and employment would have continued until July 2017.

Authorities in this area of law, particularly the leading Australian authority, *Commonweath v Amann Aviation Pty Ltd* (1991) CLR 64, make it clear that the assessment of damages for repudiation rests on the principle that the employee is entitled to financial compensation that adequately places them in the position they would have been in had the conduct not occurred. This involves a comparison, sometimes implicit, between a hypothetical and actual state of affairs. To determine Mr Loone's compensation the Court compared material factual circumstances with hypothetical ones, including the hypothetical situation that the introduction of the Initiative may not have substantially reduced the employee's managerial responsibilities and led to a termination. It considered that CHA had in part admitted this was the appropriate approach by positing that damages related to the miscalculation of Mr Loone's 2015/2016 bonus should be assessed with reference to the hypothetical scenario that Mr Loone remained employed – concluding he was likely to have done so until July 2017.

The case wades through the relevant case law and concludes that its application of *Amann* did not contradict the need for the court to look at actual facts over an improbable factual hypothesis. This qualifies the least burdensome principle, which allows a party to perform a contract in the least burdensome manner that fulfils the contract terms and obligations, under which the assessed damages would have been lower. The Court held that whilst the least burdensome principle operates here, it does not automatically restrict the amount of assessed damages. Justice McDonald held that it was unlikely for Crowe Horwath to have fulfilled Mr Loone's contract in the least burdensome manner possible and despite having the contractual right to terminate the contract, them actually doing so was 'an improbable factual hypothesis'. Justice McDonald held that it was unacceptable for damages to be assessed under the assumption that Mr Loone's employment contract would have been terminated in August 2016. He stated that doing so would be akin to reducing Crowe Horwath's liability for the conduct that amounted to the contract repudiation.

Overall, this highlights that if a party suffers a loss due to the repudiation of a contract both actual and hypothetical factual scenarios will be assessed. This will determine the amount of damages needed to adequately place that party in the position they would have been in had the repudiation not occurred. However, this does not mean that a hypothetical course of conduct, such as a contract being performed in the least burdensome manner possible, is determinative if it is an 'improbable factual hypothesis'. In this situation the hypothetical termination of Mr Loone's employment contract, in accordance with it terms, following the implementation of the Home Office Initiative, was held to have been improbable and therefore did not form part of considered hypothetical factual scenario.

What does this mean for employers?

- Damages will seek to place an employee in the position they would have been in had their contract not been repudiated.
- Damages for contract repudiation are assessed through the comparison of actual facts and likely hypothetical factual scenarios, not improbable ones.
- If improbable that an employer would have fulfilled a contract in the least burdensome manner allowable, this manner will not be automatically accepted as a hypothetical fact in the assessment of damages.

Poor processes result in the reinstatement of employee unfairly dismissed on medical grounds

Bennett v Colin Joss & Co Ltd T/A Joss Facility Management [2017] FWC 3669

An employee terminated on the basis of her employer's Injury Department Management and Internal Legal Counsel's conclusion that the employee could no longer perform the inherent requirements of her role as a cleaner following surgery, has been reinstated following the Fair Work Commission's conclusion that her termination was harsh unjust and unreasonable. Strongly criticising the employer's conduct as a failure to treat the employee 'with basic human dignity' and 'with the perfunctory dispassion of tossing out a dirty rag', Commissioner Cambridge highlighted the need to ensure termination on such grounds does not take place via telephone. Further, that it is based on a valid reason grounded in fact, not an employer's personal assessment of capacity.

Ms Bennett was a long serving employee who, at the age of 56 with almost 30 years' experience, worked as a cleaner on a permanent part-time basis. Working across multiple sites in regional NSW town Blayney, she had been employed by commercial contracting and maintenance business Joss Facilities (who were engaged under contract by the New South Wales government) for 5-and-a-half years. Previously engaged by a former contractor, she continued to provide substantial cleaning services at the local public school under Joss Facilities, where she had cleaned for approximately 23 years.

In August 2016, Ms Bennett commenced a period of unpaid sick leave following a medical procedure to remove spurs from her left foot and ankle (having similarly taken sick leave in 2014 for surgery to her right ankle), requiring a long recovery period with prolonged absence extending into 2017. During Ms Bennett's period of leave, she consistently provided ongoing medical certificates from her treating Doctor who advised she was unfit for work for defined periods. On 3 December 2016, Ms Bennett's treating Doctor confirmed via a Certification of Capacity, she was not fit to return to her pre-injury duties and a further medical certificate stated she would be unfit for her normal duties from 18 January to Monday 13 February 2017, inclusive.

Throughout her absence, Ms Bennett's engaged by phone with the employer's return to work coordinator regarding her health and potential return to work. On 16 January 2017, she informed him she had an appointment with her treating doctor on 10 February 2017, at which she anticipated she would receive some clarification in respect to returning to work. However, on 6 February 2017, four days before the appointment, Ms Bennett was called by Joss Facilities' internal legal counsel and injury department manager Ms Thompsons, who proceeded to enquire about Ms Bennett's medical condition and her period of extended absence. While she advised Ms Thompson of her upcoming medical appointment, during the call Ms Thompson formed her own view that Ms Bennett was unable to perform the inherent requirements of her role and, during the call, advised Ms Bennett that her employment was therefore terminated. This was confirmed in writing the following day, in a letter that informed Ms Bennett her employment was terminated on the basis of her inability to undertake the inherent duties required in her position as a cleaner. Three days later, at her scheduled appointment, Ms Bennett was issued a certificate of fitness, clearing her to return to her normal pre-injury duties as early as 14 February 2017.

In considering Ms Bennett's unfair dismissal application, the FWC accepted her argument that there was no valid reason for dismissal – that the employer knew she intended to obtain further medical advice on her capacity to return to work and as such, the decision to dismiss was hasty, premature and ultimately proven incorrect. Further, it remarked that there was no proper basis upon which the employer could have established that view that Ms Bennett was unable to undertake the inherent requirements of her role, stating that "the capricious falsity" was "blatantly exposed" when medical clearance to return to work was "amazingly" issued four days after the dismissal.

Commissioner Cambridge remarked that the dismissal had no basis in fact and upon no construction would be found valid, the reason for dismissal being "…unfounded, fanciful, ill-considered…and devoid of compassion". In addition, Ms Bennet was not properly notified or provided with an opportunity to respond to the alleged reason for dismissal, as confirmed by the letter of termination, which only provided confirmation of the decision to dismiss rather than communicating the decision to dismiss was being considered. In the absence of any prior notification, this deprived Ms Bennett of the opportunity to respond and submit a defence to the allegations of her capacity upon which Joss Facilities based its decision to dismiss. Having dismissed Ms Bennet via a telephone conversation she was refused the opportunity to have a support person assist and further, failed to take into account other relevant matters such as her length of service and the impact of the loss of employment given her age and limited skills set.

In scathing remarks, the Commissioner reminded all that employees are human beings, not resources to be quickly discarded or advised of termination by telephone or other electronic means. Describing the case as "ignominiously memorable", the case emphasises that employees must be terminated on the basis of valid evidence and information leading to a valid reason, provided with appropriate procedural fairness and natural justice. Such failure may otherwise, as here, lead to a finding that the dismissal is harsh, unjust and unreasonable, leading to orders for reinstatement, as deemed appropriate in all of the circumstances of this case.

What does this mean for employers?

- When terminating an employee, it is imperative to ensure that the process is conducted in a manner which is fair and that the employee is afforded both substantive and procedural fairness
- The employee must be provided the opportunity to respond to any reasons relating to capacity or conduct prior to any decision to dismiss is finalised
- An employer should be cautious not to act prematurely to dismiss an employee, it is important to ensure that all relevant information is obtained to make an informed and factually supported decision
- It is prudent to seek advice from an employment law/human resource advisor prior to making any decision to terminate an employee's employment

Reinstatement ordered after terminated employee acquitted of criminal changes

Toohey v Dr Dan White, Executive Director of Catholic Schools and legal representative of the Catholic Education Office, Sydney [2017] FWC 4722

A Religious Education Co-ordinator (REC) at Freeman Catholic College, terminated following criminal charges for "Assault with act of indecency", was found to have been unfairly dismissed by FWC Deputy President, Anna Booth, because his employer made a decision to terminate his employment prior to giving him an opportunity to respond. Reinstatement and back pay were ordered, following his criminal acquittal.

Employed by the Sydney Catholic Schools (SCS), in March 2016, teacher Michael Toohey was called to a meeting with SCS wherein he faced allegations from a female colleague, that in two separate incidents he had touched her in the upper chest without her consent. Stating he could not recall the first alleged incident and explaining the second as the demonstration of an osteopathic technique, Mr Toohey accepted he had acted in an unprofessional and inappropriate manner and was given a written, first and final warning. However, on 25 May 2016, he was criminally charged with two counts of 'Assault with act of indecency' in relation to the incidents, causing him to lose his Working with Children Check Clearance (Clearance), the holding of which was a requirement of his employment.

At a meeting on 30 May 2016, Mr Toohey was advised by SCS, that his employment was at an end by reason of frustration – the loss of his Clearance leading to an inability to perform his duties in a manner that was sufficiently similar to that anticipated when the parties entered into his employment contract. Mr Toohey lodged an unfair dismissal claim, arguing his employment contract was not frustrated and the subsequent dismissal was harsh and without valid reason. While his carinal charges were dismissed in February 2017, it was the manner in which the termination of his employment occurred that ultimately led to his success in this claim.

SCS argued Mr Toohey was not dismissed, but that his inability to perform child related work was an essential and inherent term of his employment contract and he could not do so without his Clearance. However, this was not the view of the FWC. Giving consideration to Mr Toohey's advice to SCS that he intended to plead not guilty to the charges, the view that he was temporarily unable to perform child-related work, and that at the time of dismissal it was not known if Mr Toohey's obligations in the future would be radically different from those agreed on by SCS and Mr Toohey, the FWC did not consider the contract frustrated. Rather, it concluded that the contract contemplated changes to the employment, including periods of absence, and therefore altered obligations did not automatically lead to frustration.

Prepared for this finding, SCS argued in the alternative it had valid reasons for the termination, being: Mr Toohey's loss of a Clearance, preventing him from undertaking child related work; alleged 'downplaying' of the seriousness of the relevant incidents; and the occurrence of several other incidents relating to treatment of female colleagues, including amongst other things, making inappropriate comments and massaging colleagues. While it had not considered it sufficient to frustrate the employment relationship, the FWC held the loss of the Clearance, preventing Mr Toohey from performing tasks he was employed to fulfil for an undetermined period of time, negatively impacting SCS operationally, constituted a valid reason. Whilst labelling the conduct towards female colleagues as 'potentially unwise', these, along with the allegations regarding downplaying incidents were not held to be valid reasons for dismissal.

It was in considering whether the dismissal was procedurally fair, however, that Mr Toohey's application saw success. In a letter dated 26 May 2016, SCS asked Mr Toohey to attend a meeting on 27 May 2016 and clearly indicated that the termination of his employment was being considered. The letter outlined SCS' belief it was required to terminate Mr Toohey's employment because his contract had been frustrated. Mr Toohey downplaying the incident and the occurrence of other incidents were only referred to, as reasons for dismissal, after the fact. The letter and meeting sufficiently notified Mr Toohey of the reasons for his dismissal. However, the letter also indicated that SCS had determined prior to the meeting that Mr Toohey's employment would be terminated. The FWC consequently held he was not given a genuine opportunity to respond to the allegations and influence the decision to terminate. During the meeting, Mr Toohey had suggested alternative arrangements to enable him to continue working, such as redeployment to a non-child related role, with or without pay and the willingness to take unpaid or paid leave until the criminal charges were determined. These were not considered by SCS, evidencing the predetermination of the termination. It was consequently held that he had not been provided with procedural fairness and the dismissal was unfair. Combined with the fact that SCS could reasonably fulfil these alternatives and that they had initially thought that a final written warning was a sufficient form of disciplinary action, the FWC considered that the ultimate decision to dismiss was harsh, unjust and unreasonable.

The FWC ordered Mr Toohey be reinstated to the REC position, or another position with comparable conditions, and be compensated for the loss of remuneration experienced from the date of acquittal, minus minor subsequent earnings as a Funeral Celebrant, despite Mr Toohey's REC contract expiring on 31 January 2017 and reappointment being unlikely.

What does this mean for employers?

- Irrespective of the nature of criminal charges laid against staff and the implications of those charges on the employee's ability to fulfil the obligations associated with their role, employees must be given an opportunity to respond to the proposed reasons for termination before that termination is enforced. An employee's response in such circumstances may influence the decision to terminate
- Prior responses to incidents by an employer, such as giving employees written, final warnings, may be considered in determining if a later dismissal based upon the same allegations (subsequently leading to criminal charges) is harsh, unjust or unreasonable

Accountancy firm liable as an accessory to underpayment claims

Fair Work Ombudsman v Blue Impression Pty Ltd & ORS [2017] FCCA 810; Fair Work Ombudsman v Blue Impression Pty Ltd & Ors (No.2) [2017] FCCA 2797

In a decision giving third parties food for thought when advising on underpayments and Fair Work Act (Act) contraventions, the Federal Circuit Court (Court) has held accounting firm Ezy Accounting (Ezy) liable for the deliberate underpayment of wages, employee entitlements and the failure to comply with the applicable industrial instrument, having given advice to Japanese fast food chain, Blue Impressions. Ordered to pay a pecuniary penalty of $53,880, the Court accepted the Fair Work Ombudsman's (FWO) argument that Ezy had actual knowledge the contraventions admitted to by Blue Impressions and was an intentional participant in that it either aided, abetted or by its acts or omission was directly or indirectly was knowingly concerned in the contravention.

The FWO initiated proceedings following investigation into a complaint by a Taiwanese national, Mr Zheng, employed on a subclass 417 working holiday visa who suspected he had been underpaid. Upon being advised of concerns by the FWO, Blue Impressions engaged Ezy to address and rectify accounting issues. The FWO alleged that Ezy was involved in, and accessorily liable for, contraventions by Blue Impressions of the Act regarding Mr Zheng's employment. Namely, it alleged Ezy was involved in contraventions regarding a failure to pay minimum hourly rates, evening loadings, Saturday and Sunday loadings, public holiday penalty rates, special clothing allowances, and failure to provide rest and meal breaks as prescribed by the applicable industrial instrument.

Such actions may be a breach of the Act where they contravene a term of a modern award. More relevantly, 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), where they have: a) aided, abetted, counselled or procured the contravention; or b) induced the contravention, whether by threats or promises or otherwise; or c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or d) conspired with others to effect the contravention.

Ezy denied liability stating its involvement was "limited to certain bookkeeping work: data entry work and the uploading of MYOB files to Blue Impressions bank". It further contended that "Ezy had no authority to make any adjustment to the data (relevantly the pay rates) Blue Impression provided" and was not aware of the duties or total number of hours performed by Mr Zheng or the failure to provide meal breaks or pay any remuneration in respect to any of the penalty rates, loading or allowances.

The FWO submitted that by having performed payroll processing, Ezy intentionally participated in the underpayment contraventions and evidenced the payroll system Ezy utilised was responsible for the underpayment and therefore, the contravention was caused by the omission of Ezy. It contended Ezy was "wilfully blind, and there was evidence of a deliberate failure to ask questions and make enquires as to the obligations…" of their client, Blue Impressions. Further it alleged Ezy's director had access to all client payroll data on Ezy's software system and MYOB software and yet "refrained from basic checks" and "deliberately abstained from making inquiries."

The Court held Ezy was accessorily liable for the seven contraventions put forth by the FWO, satisfied that Ezy was engaged in conduct of "calculated ignorance", accepting the FWO submissions that Ezy had been "wilfully blind" having shut its eyes to the conduct that amounted to a contravention of the FWA. Justice O'Sullivan accepted FWO's submissions that Ezy had "at their fingertips all necessary information" that showed Blue Impression failed to meet Award obligations and yet continued with their bookkeeping services, with the "inevitable result that breaches would occur."

On 16 November Ezy was ordered to pay a pecuniary penalty of $53,880, 15% of the maximum penalty of $357,000. Judge O'Sullivan accepted that each of the seven separate contraventions constituted a separate breach of the award and therefore could each attract a $51,000 penalty. The decision marks the first time a court has imposed a fine on an accountancy firm involved in an employer's underpayment, emphasising the FWO's pursuit of accessorial liability against negligent advisors.

What does this mean for employers?

- Payroll providers and third parties may be held accessorily liable for contraventions of the FWA in circumstances where they have knowledge and are privy to information in respect to wage rates and employee entitlements yet fail to act
- To minimise exposure for prosecution, it is crucial that employers are aware of the obligations owed to employees and are proactive in ensuring compliance with the FWA, workplace regulations and appropriate industrial instruments
- Employers and relevant personnel should immediately address issues of non-compliance as they become aware of these matters

Unfair dismissal demonstrates the need for serious misconduct to be substantiated and communicated to employee

Biffin v XL Express Pty Ltd T/A XL Express [2017] FWC 3702

The FWC has ordered a large courier company to pay compensation for unfairly dismissing a deport manager. The conduct relied on by the company included the depot manager:

- being a bully;
- allegedly falsely telling a WHSQ Inspector that he had not received workplace bullying training; and
- breaching the delivery 'embargo' of a new JK Rowling book.

Mr Biffin was a long-term employee of XL Express, with 24 years' service and in a management role since May 2008. At the time of his dismissal Mr Biffin was a manager at the Brisbane depot. Mr Biffin's dismissal was communicated to him at a meeting on 23 November 2016. It was the first time that Mr Biffin had been advised of the bullying allegations made against him and that a WHSQ investigation had allegedly found that he displayed bullying behaviour towards other employees.

Following the death of an XL Express employed owner driver, WHSQ began an investigation into general workplace bullying at XL Express. Mr Biffin was interviewed as part of this process. Ms Davitt, XL Express' Human Resource Manager, reported that 'immediately after the interviews' she spoke to both Mr Biffin and was shocked to hear that he had told the investigator that he had not received training in relation to workplace bullying. Mr Biffin disputed this, instead stating that he had told the investigator that he had not received training in regards to how to teach other employees about workplace bullying. According to Ms Davitt, XL Express was notified that WHSQ intended to issue them with an Improvement Notice and that the company's failure to provide employees with sufficient information and training regarding workplace bullying was a health and safety risk. Furthermore, Ms Davitt reported receiving a phone call from the WHSQ's Principle Investigator, during which she was told that there were 'significant problems at the Brisbane Depot; that Steve Biffin was a bully' and that this was the reason why the Improvement Notice was being issued. Ms Davitt admitted that XL Express did not conduct their own investigation into the bullying allegations.

Deputy President Asbury found that the bullying allegations did not constitute a sound, defensible or well-founded reason for Mr Biffin's dismissal. Critically, it was apparent that XL Express had relied on the findings of the WHSQ Investigator and failed to undertake its own investigation.

The FWC noted that as a 'large and well-resourced employer with a dedicated human resources manager' XL Express should have held its own investigation into the bullying allegations. This would have involved putting allegations to Mr Biffin and obtaining his responses.

By relying on the inquiries of the WHSQ Investigator, XL Express did not have or provide any information about who Mr Biffin allegedly bullied, when the alleged bullying took place and what it entailed and therefore did not have sufficient evidence that Mr Biffin had engaged in bullying behaviour.

DP Asbury made the obvious point that if XL Express had established, on its own investigation, that Mr Biffin 'bullied drivers, then such conduct would be a valid reason for dismissal.'
Regarding Mr Biffin telling the WHSQ Inspector that he had not received particular training, the FWC found that Mr Biffin was simply him telling the truth. Accordingly, this did not constitute a valid reason for dismissal.

XL Express regarded Mr Biffin's role in the embargo breach as serious misconduct and therefore, a valid reason for his dismissal. Delivery of embargoed freight entails specific handling procedures, to ensure that delivery is completed on the same date, either in Australia or across the world. Mr Kosecki, XL Express' National Operations Manager, stated that the delivery of embargoed freight is the most important type of distribution work. In this instance, copies of JK Rowling's new novel were delivered a day early from the Brisbane depot, where Mr Biffin was manager. The cause of this was identified as multiple failures to follow procedure, with Mr Biffin's failure to oversee operations being one of them. On the day in question, Mr Biffin was on leave however the FWC deemed that due to his position as manager and the importance of the embargoed delivery, he should have taken steps to ensure its successful delivery. The Deputy President suggested that Mr Biffin, at the very least, should have made visual contact with the freight on the previous day and ensured that embargo-specific procedures were in place and being followed. Therefore, it was found that Mr Biffin was partially at fault in the embargo breach.

At the dismissal meeting, Ms Davitt told Mr Biffin that the embargo breach had caused 'significant reputational damage'. Despite not causing XL Express any financial loss, the FWC accepted that the nature of the breach presented the real possibility of loss or damage and that there was 'no doubt' that reputational damaged was or could have been caused.

However, whilst the Commission accepted that Mr Biffin's refusal to take responsibility for contributing to the breach was unreasonable, his involvement in the breach was not serious misconduct. Rather it was misconduct that warranted a warning.

The FWC found that the manner of Mr Biffin's dismissal, at the 23 November 2016 meeting, did not give him adequate opportunity to respond to the reasons for his dismissal. Despite being the first time the issues were being raised with Mr Biffin, the bullying allegations and Mr Biffin's responsibility for the embargo breach were presented as proven facts. Additionally, Mr Biffin was not provided with sufficient information that would have allowed him to reasonably respond allegations of bullying. Therefore, there were critical failures to afford procedural fairness to Mr Biffin in addressing serious allegations.

Evidence that Mr Biffin was responsible for the embargo breach was not provided to him during the dismissal meeting or in prior emails from Mr Kosecki. Whilst the emails did express dissatisfaction with Mr Biffin's performance they did not make clear that the issue was of a significance that placed his employment at risk. Again, this amounted to a denial of procedural fairness.

Considering the size and resources of XL Express, Deputy President Asbury, found it surprising that the dismissal was done in this way.

In determining that Mr Biffin's dismissal was unfair the FWC referred to his untarnished employment record, the length of his employment with XL Express and the fact that he was only one of a number of contributing factors to the embargo breach.

The FWC ordered XL Express pay Mr Biffin compensation. The exact figure was determined with various considerations including the remuneration that Mr Biffin would have received had he not been dismissed, efforts of Mr Biffin to mitigate his loss, including applying for six positions he was qualified for and that Mr Biffin was paid 12.4 weeks of wages upon termination. Mr Biffin's misconduct and initial lack of accountability resulted in deductions in the overall compensation amount. The total amount was almost $59,000, including $7,000 in superannuation contributions.

What does this mean for employers?

- Employers hold the onus of establishing the validity of reasons for dismissal and cannot merely rely on the conclusions of another person / entity
- A critical part of making findings against a person is providing allegations to that person and obtaining and considering their response to those allegations
- The size and resources of a company, especially in Human Resources, influences the extent to which an employer should manage workplace disciplinary matters and investigate allegations

Employee reinstated after deliberate efforts to scuttle candidacy

Girdler v Western Sydney Community Legal Centre Incorporated T/A Western Sydney Community Legal Centre (WSCLC) [2017] FWC 3669

The FWC has found that the decision of a community legal centre to terminate a long-serving manager as "capricious", finding that the management committee used the redundancy and restructure as a means to thwart her candidacy and had been ordered to reinstate and promote her to the newly created role of Director.

Ms Maria Girdler had been employed as the Manager of Macquarie Legal Centre for eighteen years spanning from 1998 to June 2016, thereafter the amalgamation of multiple legal centres Ms Girdler was later appointed to General Manager of the new entity Western Sydney Community Legal Centre (WSCLC). WSCLC is a non-profit community legal centre which provides legal services to disadvantaged members of the Western Sydney community. The operation of legal centre is predominantly funded and reliant upon grants from the NSW and the Commonwealth Government, in response to funding cuts the centre was forced to review its staffing and operational services.

In September 2016, Ms Girdler recommended an organisational review of WSCLC to the Committee of Management (the Committee), who have the overarching responsibility for the operation of the legal centre. The Committee authorised and endorsed the review, however Ms Girdler was excluded from the initial meetings where the framework and terms for the review were decided and was further requested to leave or was not invited to meetings where matters relating to restructure were being discussed. An organisational consultant was engaged to conduct a review of the WSCLC structure.

In February 2017, Ms Girdler was notified that her position as General Manager was being made redundant and that her employment was therefore terminated. Ms Girdler was invited to attend a meeting with the organisational consultant and the WSCLC treasurer, Ms Girdler was not advised to bring a support person, at the commencement of the meeting she was presented with a letter stating that she was dismissed due to redundancy.

As a result of the restructure the General Manager position had been divided into three newly created roles, these being Director, Human Resource Manager and Community Programs Manager.

Ms Girdler applied for both the Director and HR Manager roles and was unsuccessful. She did not get an interview for the Director position and did not have her application for the HR Manager acknowledged.

Despite Ms Girdler's contract of employment referring to her position being covered by a modern award, WSCLC did not consult Ms Girdler in accordance with the award about the alleged redundancy, and at the hearing. Consequently, during the hearing, WSCLC abandoned its jurisdictional argument that Ms Girdler's dismissal was a case of genuine redundancy.

The Commission noted, with some dissatisfaction, that no member of the WSCLC Committee attended the Commission or gave evidence. Given this, the only evidence from anyone directly associated with WSCLC was that of Ms Girdler (with evidence from WSCLC coming only from the organisational consultant).
Ms Girdler contended that the introduction of the 'newly created roles' did not amount to a significant change to the position of General Manger. The key responsibilities and functions of the Director role were the same as Ms Girdler had performed in her role as General Manager.

Ms Girdler further contended that WSCLC failed to comply with the termination provisions contained within her employment agreement and failed to consult with her regarding the redundancy. WSCLC conceded that they may be held responsible for a procedural deficiency having not advised Ms Girdler of the likely outcome of the restructure earlier.

The FWC found that Ms Girdler was not afforded the requisite procedural fairness during the termination process. Ms Girdler was not consulted about the redundancy nor given the opportunity to respond to the termination, MSCLC further failed to consider any opportunity for redeployment. Accordingly, the dismissal was not a genuine redundancy (noting that WSCLCL had already abandoned this argument).

In terms of a valid reason, the Commission cited *Parmalat Food Products Pty Ltd v Wililo*, on the proposition that 'the existence of a valid reason is a very important consideration in any unfair dismissal case. The absence of a valid reason will almost invariably render the termination unfair'. WSCLC submitted that the reason for Ms Girdler's termination was a consequence of operational changes that were implemented as a result of the restructure which created a management hierarchy. This failed to persuade the FWC, and Riodan C held that WSCLC did not have a valid reason to terminate Ms Girdler. It was noted that the Director position was her General Manager position but with fewer duties and more pay – therefore it was difficult to comprehend how there was a valid reason to dismiss her.

C Riordan went further and held "*that WSCLC deliberately created a situation where Ms Girdler would be unsuccessful in obtaining the role of Director. Unbelievable Ms Girdler did not make it past the first stage in the appointment process*."

Commissioner Riordan commented that "renaming the role and increasing its remuneration whilst reducing its operational requirements should have resulted in Ms Girdler being congratulated for carrying the organisation since the amalgamation – not a decision to terminate her employment."

The Commissioner went on to state that "the actions of WSCLC were fanciful and capricious."

Commissioner Riordan further commented that if it had not been for the "deliberate and inappropriate actions of the Committee of Management, Ms Girdler would have been appointed to the role of Director, the functions of which she was already performing…Ms Girdler was performing every component of the new Director role but without the title. It was her job".

The FWC ordered that Ms Girdler be reinstated to the role of Director.

In these circumstances, the FWC held that reinstatement was the most appropriate remedy and the Commissioner was confident that Ms Girdler could re-establish her good working relationship with the staff at WSCLC and the WSCLC Committee of Management.

Commissioner Riordan stated that he could see "*no reason why Ms Girdler would have any difficulty in performing the role of Director, a role of which is significantly less arduous than her role prior to the restructure*."

What does this mean for employers?

- There should be a convincing business case / rationale for any restructure that leads to a redundancy situation
- A redundancy does not mean termination of employment – redeployment must be properly considered in determining whether the person's employment can continue in a different role
- In enacting restructures and implementing organisational change employers should ensure that they consult in accordance with the applicable industrial instrument (if any) and thoroughly consider redeployment opportunities

4 Yearly Review of Modern Awards Update

Casual and Part-Time Employment Determinations

On 12 December 2017 the FWC handed down final determinations for the common issue of part time and casual employment, resulting in changes to various awards. This determination is part of the ongoing 4 yearly review of modern awards. These changes come into effect on 1 January 2018.

Changes have been made to the following awards:

- Registered and Licensed Clubs Award 2010 (see below)
- Hospitality Industry (General) Award 2010
- Hair and Beauty Industry Award 2010
- General Retail Industry Award 2010
- Social, Community, Home Care and Disability Services Industry Award 2010

Registered and Licensed Clubs Award 2010

Please be aware that, as mentioned above, changes to the Registered and Licensed Clubs Award 2010, regarding casual and part time employees and overtime will come into effect from the first full pay period that starts on or after 1 January 2018.

Please refer to the circular published on 19 December 2017 for an outline of these amendments. This can be accessed on the www.ccv.siag.com.au website or www.rsl.siag.com.au, via the member portal login.

Family and Domestic Violence Leave

On 3 July 2017, as part of the 4-yearly review of Modern Awards, the Full bench of the FWC, rejected the Australian Council of Trade Unions (ACTU), attempt to have all Modern Awards to require 10 days of paid family and domestic violence leave. Despite this finding, the FWC also found that Modern Awards did not provide sufficient entitlements to satisfy the needs of employees who were experiencing family and domestic violence. In a Circular published by SIAG on 5 July 2017, it was reported that the FWC had the 'preliminary view' that Modern Awards needed to enable:

- a period of unpaid family and domestic violence leave; and
- employees who experience family and domestic violence to access personal / carer's leave for the purpose of taking family and domestic violence leave.

Following this the FWC considered submissions from various parties and released several more statements. In a statement released on 19 October 2017, regarding the status of proceedings, the FWC, stated that it was the position of the parties that the FWC does not have the necessary jurisdiction to alter Modern Awards, to enable employees to access personal / carer's leave for the purpose of taking family and domestic violence leave.

The 5 July 2017 Circular can be accessed through the member portal login, via the relevant SIAG website.

Second 4 yearly review of modern awards not to commence

4 yearly review of modern awards [2017] FWC 6623

The current provisions of the FW Act requires the FWC to begin a review of modern awards 'as soon as practicable' every four years after 1 January 2010. The first 4 yearly review began in February 2014, with the second review due to commence post 1 January 2018 in accordance with the FW Act. Given that the first review remains ongoing for modern awards (with anticipated completion in late 2018), the practicality of commencing the second review has been in question.

Whilst the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 will repeal the requirement to complete 4 yearly reviews, this will not take effect until after 1 January 2018. In a statement issued on 11 December 2017, the President of the FWC formed the 'provisional view' that commencing the second 4 yearly review would not be 'practicable' given the initial review remains on foot. The FWC's provisional view also advised that the commencement of the second four yearly review should commence once the existing review was completed, and parties have had the opportunity to consider how award amendments operate in practice.

Interested parties are invited make submissions in respect of the FWC's provisional view this week.

Fair Work Amendment (Corrupting Benefits) Bill 2017

The Fair Work Amendment (Corrupting Benefits) Bill 2017 (CBB) passed the Senate on 10 August 2017, amending the FWA. Schedules 1 and 2 of the CBB came into force on 11 September 2017. The CBB, was introduced following the Royal Commission into Trade Union Governance and Corruption. The amendments introduce criminal offences for dishonestly giving, receiving and soliciting of a corrupting benefit. This includes doing so with the intention to influence the exercise of functions by a registered organisation's officers or employees. Registered organisations include unions. Furthermore, the CBB makes it a criminal offence for employers to give cash or payment via a service or good, to a union of which their employees are members.

Introduction of the CBB also requires bargaining representatives for proposed enterprise agreements to disclose certain financial benefits. This will require unions to take all reasonable steps to highlight any terms in an enterprise agreement that will financially benefit the union. This disclosure is to take the form of a written document that must be provided to the employers by the fourth day, at the latest, of the seven day access period. The document then needs to be presented to employees before the agreement goes to the vote.

Vulnerable Workers Legislative Update

The *Fair Work Amendment (Protecting Vulnerable Workings) Act 2017* (the Act) took effect on 15 September 2017. The Act was introduced following reports in 2016 of the underpayment and exploitation of vulnerable workers by large, franchised entities. The Act aims to deter breaches of payment-related provisions in the *Fair Work Act 2009* (FW Act) by increasing penalties and enhancing the investigative powers of the Fair Work Ombudsman (FWO).

Key Amendments

Key amendments to the FW Act include:

- Prohibiting 'cash back payments' preventing employers from requesting employees or prospective employee to pay back wages earnt in cash
- Increased penalties by up to 10 times for 'serious contraventions' of payment-related provisions;
- Extending liability to franchisors and holding companies for breaches committed by entities that they have significant control over;
- Enhanced investigative powers of the FWO;
- Increased penalties for providing false or misleading information to the FWO or obstructing a FWO investigation; and
- Increased responsibility of companies to maintain accurate records of wage payments.

'Serious Contravention'

A breach of certain civil remedy provisions will be a 'serious contravention' if the relevant conduct is deliberate and part of a systematic pattern of conduct in relation to one or more persons. Breaching a serious contravention provision may attract penalties that are substantially increased and higher than the penalties that applied for breaches of the civil remedy provision in the FW Act.

Liability on Franchisors and Holding Companies

The Act expands potential liability under the FW Act to franchisors and holding companies where a franchisee commits a breach of the FW Act. Where a franchisor has a significant degree of control over the activities of an individual franchisee, they may now be liable for any breach where they could reasonably have taken action to prevent the breaches from occurring. A franchisor that has taken reasonable steps to prevent the contraventions will not be liable under the new provisions.

Fair Work Ombudsman Powers

The Act enhances the FWO's ability to investigate contraventions of the FW Act and prosecute employers for the exploitation of employees, particularly in situations involving underpayment and vulnerable employees. The Act also introduces new penalty provisions for hindering or obstructing the FWO or an inspector in the performance of their function or exercising their power, and penalties for providing false or misleading information or documents.

Reverse Onus of Proof

If an employee makes a claim that they have been underpaid and an employer cannot produce proper employee records and pay slips, the onus will be placed on the employer to prove that they have paid the employee correctly, unless it can be substantiated that there is a reasonable excuse for not having such records/pay slips.

Glossary

Core/Base Terms

Abbreviation	Term
DP	Deputy President
EA	Enterprise Agreement
FCCA	Federal Circuit Court of Australia
FCA	Federal Court of Australia
FW Act	Fair Work Act 2009 (Cth)
FWC	Fair Work Commission
FWCFB	Fair Work Commission Full Bench
FWO	Fair Work Ombudsman
NES	National Employment Standards

Edition Specific

Abbreviation	Term
ANMF	Australian Nursing and Midwifery Federation
CCB	Corrupting Benefits Bill 2017t
NSWCAT	New South Wales Civil and Administrative Tribunal
WHSQ	Workplace Health and Safety Queensland

To ensure that SIAG continues to provide the most efficient services to your organisation, it is vital that the contact details we have for our clients are correct and current. Please ensure you notify us of any changes to the nominated persons you wish to have access to the national advisory service, website, and HR / IR updates.

To obtain a client detail form or to inform us of any changes,
please contact Darcy Moffatt at dmoffatt@siag.com.au.

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) 2018					
	$895 per person (plus gst)				
	day 1	**day 2**	**day 3**	**day 4**	**day 5**
March Course	Thursday 8 March	Thursday 15 March	Thursday 22 March	Thursday 29 March	Thursday 5 April
June Course	Friday 15 June	Friday 22 June	Friday 29 June	Friday 6 July	Friday 13 July
August Course	Tuesday 14 August	Tuesday 21 August	Tuesday 28 August	Tuesday 4 September	Tuesday 11 September
November Course	Wednesday 14 November	Wednesday 21 November	Wednesday 28 November	Wednesday 5 December	Wednesday 12 December

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

siag training : development

A WorkSafe Approved Training Course

Health and Safety Representative Refresher OHS Training Course

The HSR refresher OHS training course is an opportunity to revisit aspects of the initial training course and refresh their knowledge on the learning outcomes. This training course will assist HSRs' and Deputy HSRs' understanding of how they can effectively use their powers when participating in the identification, prevention and control of the risks associated with work related incidents.

Throughout the year SIAG offers the HSR Refresher OHS Training Course (1 Day). 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.

Entitlement

Under the OHS Act (section 67) all elected HSRs and deputy HSRs after completing an initial course of training, have an entitlement (for each year they hold office) to attend Refresher training and choose the course in consultation with their employer.

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

HSR Refresher OHS Training Course (1 day) 2018	
	$385 per person (plus gst)
February Class	Tuesday 13 February
May Class	Tuesday 29 May
September Class	Tuesday 5 September

It is a requirement to complete the HSR Initial OHS Training Course before embarking on the HSR Refresher OHS Training Course.

Please contact SIAG for more information.

Refund policy

**Cancellations 21 days or more from commencement date receive full refund

**Cancellations 14 days from commencement date receive 50% refund

**Cancellations 7 days or less from commencement date receive no refund