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Dismissal without opportunity to improve "premature"

Purcell v Rock N Road Bitumen Pty Ltd T/A Rock N Road Bitumen [2017] FWC 486

The Fair Work Commission (FWC) has outlined the importance of providing employees with a reasonable opportunity to improve on unsatisfactory performance, holding that failure to do so resulted in the dismissal of an HR officer being unfair.

Ms Purcell took up employment with Rock N Road Bitumen in October 2015 following a four-week handover from the previous HR Officer.

Mr Wallman, business manager, contended that he had various informal meetings with Ms Purcell in the months leading to her dismissal to discuss concerns with her performance. Mr Wallman described that the 'straw that broke the camel's back' was the receipt of an unsatisfactory pre-audit result, which required 80 hours of remedial work in Mr Wallman's personal time. The pre-audit result reflected the HR officer's failure to keep on top of audit compliance and registers, which were aspects of her position.

In August 2016, Mr Wallman met with Ms Purcell and advised that his attempts to improve her performance were "futile" and it was "a question of whether they part amicably or whether they have to go through a formal process".

The following day a meeting was held off-site at the park where Mr Wallman advised Ms Purcell that she could state her case as to why her employment should continue. Ms Purcell indicated that she would bring a support person and during the meeting provided a written response to the employer's various performance concerns. Two days later, Mr Wallman telephoned Ms Purcell and told her: that her employment was terminated; a further meeting was not required; and that he would be emailing her a letter giving formal effect to the termination of employment.

In assessing the unfair dismissal claim, and whether a valid reason for dismissal exists, the FWC accepted that Ms Purcell was not suited for the position and did not apply herself satisfactorily to many of her duties. However, the FWC found that at the time of dismissal, there was not a valid reason to dismiss, and accordingly described the termination of her employment as "premature". The situation would have been different if Rock N Road had first conducted a formal meeting, and communicated to Ms Purcell that her employment was in jeopardy, and then allowed a reasonable period for her to improve.

The FWC found that although Ms Purcell was warned during informal meetings about her unsatisfactory performance, she was not given adequate warning that she faced the termination if she did not lift her performance. The FWC accepted that the first time that Ms Purcell comprehended that dismissal could result was three days prior to dismissal coming into effect. Accordingly, Ms Purcell was denied the opportunity to demonstrate to her employer that she could satisfactorily perform her role.

The FWC criticised Rock N Road's approach to conducting the performance discussion which only contemplated that Ms Purcell would be leaving the business. The FWC did accept Mr Wallman's evidence that he would have been willing to continue Ms Purcell's employment if she made the appropriate undertakings and commitments to her position. The FWC accepted that Ms Purcell's response was to 'finger point' and blame others in the business, including Mr Wallman.

In assessing whether any remedy should be ordered, the FWC concluded that Ms Purcell was unlikely to have been able to meet the performance expectations of her position. However, a proper process would have permitted Ms Purcell with a reasonable opportunity to improve, and the FWC assessed this time period at eight weeks. The FWC was satisfied that Ms Purcell had mitigated her loss and had gained employment since the dismissal.

Taking all of this into consideration Ms Purcell was awarded $5,192.33 with superannuation, which represented 8 weeks' pay, less one week's notice that was paid in lieu by Rock N Road, less earnings from her casual employment, which would have overlapped with the 8-week period.

What does this mean for employers?

- Performance issues alone may be insufficient to constitute a valid reason for dismissal if time is not afforded to the employee to improve.
- A reasonable opportunity to improve requires that the employer is open to the possibility that performance may improve and that the employment will continue, therefore dismissal must not be a foregone conclusion

Unreliable evidence on assault allegation leads to maximum compensation

Ramsey v The Trustee for the Roman Catholic Church for the Dioceses of Parramatta [2017] FWC 223

The Fair Work Commission (the FWC) has awarded an IT Specialist who was dismissed without a valid reason or proper process 6 months' pay.

In March and April 2016, there were two issues that impacted the Employer's computers. The first related to an administrative error on paperwork relating to the Employer obtaining NBN access, and the second issue related to a virus attack, which was made possible due to an insufficient number of anti-virus licences to cover the Employer's fleet of computers. The issues in no way related to Mr Ramsey's performance or diligence – the fault lay elsewhere.

In mid-April 2016, following a week of leave, Mr Ramsey was contacted by Ms Rashada and advised that he would be required to attend a job performance review. Mr Ramsey twice attended the workplace for a scheduled meeting with Ms Rashada but was kept waiting for more than 4 hours each time as Ms Rashada was busy at the scheduled times.

At the eventual meeting, held on 2 May 2016, Mr Ramsey was given a first written warning for poor performance. Additionally Mr Ramsey was directed to pack up his work belongings at Parramatta and to work only at Blacktown. Mr Ramsey returned to work on 4 May 2016. As he was packing up his belongings in Parramatta, a colleague sought IT assistance from Mr Ramsey. In providing assistance, Mr Ramsey arrived late at Blacktown at 11.20am. Ms Rashada was not satisfied with him arriving late and was critical of him performing any work at Parramatta because had been directed to pack up his belongings and report to Blacktown. In Ms Rashada's mind, Mr Ramsey's performance of work at Parramatta was a breach of a work instruction, and a second warning letter was drafted in relation to this perceived breach.

On 6 May 2016 the two warning letters and a performance improvement plan were issued. Mr Ramsey refused to sign the plan. The FWC found both letters and the performance improvement plan to be without proper justification and the second warning letter was an excessive response and the process of delivering two separate warning letters was 'entirely artificial' and 'intended to build up an adverse employment record for Mr Ramsey'.

On 9 May 2016, Mr Ramsey was directed to perform work back at Parramatta. He proceeded to the work station that had been assigned to him, which was in an open area with other desks around. That morning, around 10.30am, a meeting took place at his desk with Ms Rashada and Mr Netana.

During the meeting Mr Netana left Mr Ramsey's desk. It was alleged by Ms Rashada that Mr Ramsey became agitated and mad. Ms Rashada said that Mr Ramsey stood up and pushed her and that she was forced back two or three steps. Mr Ramsey stated that when Mr Netana left, Ms Rashada threatened his employment and said she would 'sack' him. She then screamed twice and yelled 'don't touch me'. As a result:

- the police were called by Mr Ramsey who attended the scene, but that no formal report was made regarding the incident (Ms Rashada said to police that it was an 'employment issue'); and
- Ms Rashada had verbally terminated Mr Ramsey's employment, shortly after the alleged incident.

Mr Ramsey said he had called the police to try and establish his innocence. The police arrived after Ms Rashada had summonsed a security guard to escort Mr Ramsey off the premises, as he was refusing to leave.

The Employer's alledged that the valid reason for the dismissal was that Mr Ramsey had assaulted Ms Rashada.

Given that Ms Rashada's evidence about the events immediately after the alleged assault conflicted heavily with various other witnesses, the FWC concluded that Ms Rashada had advanced a false version of events and had 'no confidence that she ha[d] given a truthful and accurate account of the incident between herself and Mr Ramsey'.

On balance, the FWC was not satisfied that Mr Ramsey had shoved Ms Rashada in the manner that had been alleged by Ms Rashada. The FWC could not rule out possible incidental contact between the two as the discussion escalated. However, the central finding was that there was insufficient evidence to find Mr Ramsey had angrily assaulted Ms Rashada. Therefore, there was no valid reason for Mr Ramsey's dismissal.

The FWC also found that Mr Ramsey was not notified of the reason for his dismissal or afforded an opportunity to respond to the reason. The FWC said 'it was difficult to imagine a more gross denial of procedural fairness' and noted that Ms Rashada was the victim of the alleged assault, and therefore lacked any impartiality in decision making. Despite this, Ms Rashada dismissed Mr Ramsey immediately, (despite her having no authority to do so). The court observed that anagement 'acquiesced' and failed to demonstrate a 'basic understanding of modern HR principles and practice'. The dismissal was therefore found to be harsh.

On remedy, reinstatement was not sought by Mr Ramsey, and the FWC noted that there was a reasonable basis for Mr Ramsey having lost confidence that he would be treated with dignity and fairness in the future. An order for compensation was considered appropriate and the FWC considered the perceived performance issues were minor and with proper management he would have remained satisfactorily employed for a further two years. While there were some deductions to be made in relation to Mr Ramsey's receipt of Centrelink benefits and his prospect of securing future employment, the award of compensation was ultimately capped at the statutory maximum of 6 months' pay (just under $41,000).

What does this mean for employers?

- Employers relying on misconduct to justify dismissal must conduct an appropriate investigation, which gives the employee the right of reply. Employers must ensure they are satisfied when considering all evidence that alleged conduct can be substantiated.
- In the context of an investigation into misconduct, where the misconduct relates to an employee, they should not be involved in the process to ensure impartiality
- Employers should ensure that managers / supervisors have a clear understanding about dismissal protocols and who has the authority to effect a dismissal

The difficulty in balancing harshness considerations

Renton v Bendigo Health Care Group [2016] FWC 9089

Mr Renton was employed by Bendigo Health and was dismissed when he posted an inappropriate video on Facebook tagging two colleagues, Mr Christie and Ms Keown. The post accompanying the video stated that Mr Christie was 'getting slammed at work' by Ms Keown. Shortly after creating the post, Mr Renton placed blobs of white sorbolene cream around Mr Christie's workstation.

During the proceedings before FWC Mr Renton acknowledged that:

- on 4 August 2016, he had posted the video on Facebook and tagged Mr Christie and Ms Keown;
- on the same day he had put five sorbolene blobs and tissues around Mr Christie's workstation (though he denied that there was any sexual connotation with this, or that there was connection to the video that he had earlier posted on Facebook);
- he knew that by posting the video, Mr Christie and Ms Keown would see the post, as well as Mr Christie and Ms Keown's family and friends who were on Facebook;
- of his 150 Facebook friends, 68 were either colleagues or previous colleagues of Bendigo Health; and
- the video was of a sexually explicit nature.

Mr Christie and Ms Keown gave evidence that they were offended, embarrassed and humiliated by Mr Renton's actions. Mr Christie had made the complaint to HR, which led to the subsequent investigation by Bendigo Health.

In effecting the dismissal, Bendigo Health relied on the allegation that Mr Renton had posted the video to Facebook and left the sorbolene on Mr Christie's desk. Mr Renton admitted to the conduct but sought to downplay the seriousness of his actions. The FWC found that his conduct affected the health and safety of his work colleagues (Mr Christie had sought EAP and Ms Keown was uncomfortable and conflicted at work) and had the potential to adversely affect the reputation of Bendigo Health (given Mr Renton's Facebook friends were largely connected to the workplace and that the 'joke' had already been shared by 'a range of people' and could be seen by an 'ever expanding group' of persons).

In terms of the sorbolene blobs, the FWC did not accept Mr Renton's evidence that there was no connection between the video and the sorbolene. Mr Renton argued that he had often left items (such as lolly wrappers, potato chips and tissues) at Mr Christie's desk as a practical joke. Mr Renton said the sorbolene blobs were in the same category and did not have any sexual undertones. The FWC preferred Mr Christie's evidence, which was that the sorbolene was intended to convey "the aftermath of someone masturbating all over his desk". Accordingly, the FWC found there was a valid reason to dismiss Mr Renton. The FWC did not take any issue with the procedure adopted by Bendigo Health to affect the dismissal.

However, the FWC held that dismissal was disproportionate to the gravity of the misconduct, considering the economic and personal consequences of the decision on Mr Renton. Mr Renton had young children including a child with Attention Deficit Hyperactivity Disorder for whom he shared joint care. It was also relevant that Mr Renton had been employed since 1999 and had no history of misconduct at work and that the Facebook posting was a 'one-off incident'.

Mr Renton sought reinstatement, Bendigo Health said this would be untenable and the FWC accepted that reinstatement was not appropriate in the circumstances. Mr Renton had agreed to a long history of playing pranks and practical jokes in the workplace. The FWC was not satisfied that he had any insight into the seriousness and effect of the Facebook post, and accordingly accepted that Bendigo Health had grounds to have lost confidence in Mr Renton and his ability demonstrate the professionalism required in the workplace and to refrain from unacceptable conduct in the future.

The FWC sought further submissions from the parties with respect to determining an appropriate compensation order.

What does this mean for employers?

- A valid reason and a fair procedure will not necessarily be enough to demonstrate that a dismissal is not harsh, unjust and unreasonable and therefore in breach of the Fair Work Act.
- In a difficult balance, employers need to consider the 'harshness' of a decision to dismiss against the gravity and seriousness of any substantiated misconduct for an employee,

The breadth of the 'reasonable' redeployment obligations

Skinner v Asciano Services Pty Ltd T/A Pacific National Bulk [2017] FWCFB 574

The recent Fair Work Commission Full Bench (FWCFB) decision in Skinner v Asciano Services Pty Ltd [2017] FWCFB 57 provides guidance on 'reasonable' redeployment opportunities in the context of what may constitute termination by way of redundancy.

The seven applicants contended that their employer, Asciano Services Pty Ltd T/A Pacific National Bulk (Pacific National), had failed to comply with the redundancy obligations under the Fair Work Act 2009 (Cth) (FW Act) by not considering possible redeployment opportunities. Pacific National was facing a reduction in customer demand for exports in grains, the closure of multiple industry sites and the loss of demand in exports. This resulted in a reduction in the workload, which forced Pacific National to review its operational requirements. The review suggested that numerous positions could be made redundant. Accordingly, Pacific National made seven of its locomotive driver positions redundant in July 2015.

The seven applications for an unfair dismissal were heard together in November 2015. At first instance, the FWC held that the dismissal were 'genuine redundancies' and, therefore, not unfair dismissals. The FWC held it was not reasonable in all of the circumstances for Pacific National to redeploy the employees. The applicants appealed the decision.

On appeal to the Full Bench, the central issue concerned whether it would have been reasonable in all the circumstances for the applicants to be redeployed. The applicants contended that, given various employees had expressed interest in being made voluntarily redundant, and given that many casual positions were advertised immediately after their dismissal, it was reasonable to offer redundancy "swaps".

Section 389(2) of the FWA defines a 'genuine redundancy'. A person's dismissal will not be a genuine redundancy if 'it would have been reasonable in all the circumstances' for the person to have been redeployed within the employer's business or an associated entity of the employer.

The FWCFB held that, while there is no 'general obligation' for an employer to implement a voluntary redundancy process, in the case of Pacific National, the failure to consider the possibility of such a process meant that Pacific National failed to comply with its redeployment obligations contemplated by the FW Act.

The FWCFB accepted that there is no universal obligation for an employer to facilitate a process to dismiss an employee in order to create a vacant position for another employee, however, the redeployment obligation is expressed in the context of what is 'reasonable in the circumstances'. It followed that what is considered reasonable will depend upon the particular facts in each individual case. In relation to the present matter, the FWCFB observed the following key points:

- Pacific National is a large business employing a significant number of employees who are engaged in essentially identical roles as those that were being made redundant (that is, the locomotive drivers were readily interchangeable);
- given that there is a significant number of employees performing the same role, a role swap would not place onerous training requirements on Pacific National;
- in some instances, there were potential swaps available at a close location to where the applicants worked, and therefore relocation costs could have been avoided;
- Pacific National had previously allowed swaps in similar circumstances; and
- Pacific National itself had raised the idea as an option to mitigate the adverse effects of redundancy to the applicants (but then had excluded it from any contemplation).

For these reasons, the FWCFB ruled that it would have been reasonable in the circumstances for Pacific National to consider the possibility of 'swaps'. The fact that Pacific National removed the option from contemplation, therefore, meant that Pacific National had not complied with section 389(2). The court held that the dismissals were not cases of genuine redundancy.

The FWCFB allowed the appeal, quashed the initial decision and referred the matter back to the FWC for rehearing.

It is worth noting that the FWCFB was not persuaded by the argument about casual positions being advertised after the applicant's dismissals. The availability of the positions after the dismissals could not be "converted by retrospective wishful thinking" into roles that were available as redeployment opportunities at the time of the dismissals.

What does this mean for employers?

- The redeployment obligation should be approached from first principles – what is reasonable in all the circumstances of the employer? This is not a space for hard and fast rules.
- While there is no general obligation to consider a voluntary redundancy process or to consider redundancy 'swaps', depending on the facts of a particular matter, it may be considered reasonable (and hence required by the FW Act for employers wishing to ensure that a dismissal is a case of genuine redundancy)
- The reasonableness of redeployment opportunities is assessed at the time of the dismissals – the future availability of vacant positions will not necessarily mean that redeployment opportunities existed at the time of the dismissals

Employer pays substantial compensation for sexual harassment by an on-call employee

STU v JKL (Qld) Pty Ltd and Ors [2017] QCAT 505

In a decision of the Queensland Civil and Administrative Tribunal (the Tribunal), a hotel has been found vicariously liable for an employee who engaged in sexual harassment and ordered to pay more than $300,000 to a female employee (the Applicant).

The Applicant commenced working at the hotel on 1 December 2010. As part of her employment arrangements, it was agreed that she would share a two-bedroom unit with a male colleague, who performed duties as a night caretaker. On the Applicant's first night of employment, at 5am, the Applicant woke to find the caretaker naked and in her bedroom. The caretaker touched her groin and upper thigh and attempted to remove her underpants – acts which the Tribunal found, and the hotel conceded, constituted sexual harassment under the Anti-Discrimination Act 1991 QLD (the Act).

The Applicant did not return to work from early January 2011 and her employment was terminated by the hotel in February 2011.

The key question for the Tribunal to determine was whether the hotel was vicariously liable for the conduct of the caretaker. Section 133 of the Act provides that an employer will be liable for the actions of an employee if the actions occurred 'in the course of work or while acting as an agent' of the employer. Accordingly, the Tribunal considered whether, by being 'available' to attend to the calls / alarms of the hotel, the caretaker was performing an activity 'in the course of work'.

The caretaker's role required him to be available between 10:00pm and 6:00am to respond / attend to a number of duties. The Tribunal determined that being 'available' (which included being sober and reasonably proximate to the hotel) was a service and rejected the hotel's argument that the caretaker was free 'unless the phone rings'. Given that the caretaker was required to be available at the time that the sexual assault occurred, the Tribunal said he was 'a worker performing work'. Because the caretaker's sexual harassment contravened s. 118 of the Act and the 'course of work' requirement was made out, the hotel was vicariously liable for the conduct.

The Tribunal also made a finding that although the Applicant had no employment requirement to reside in the unit, 'but for' her employment, she would not have been in the room where the assault took place. These conclusions added force to the critical finding that the assault occurred in the course of the caretaker's work.

Under the Act, an employer can minimise its exposure for being found to be vicariously liability for the actions of its workers by demonstrating that it took reasonable steps to prevent the contravening conduct from occurring.

In this case, the hotel provided no evidence of any steps that it took to prevent the caretaker sexually harassing the Applicant. Rather, the hotel said there was nothing it could have done. The Tribunal provided some practical guidance of the minimum expectations of, in these circumstances, an anti-discrimination policy and education programs for workers. Such a policy and educational programs may have shielded the hotel from being found to be vicariously liable for the unlawful acts of the caretaker.

In assessing the amount of damages sought by the Applicant, the Tribunal considered medical evidence from two doctors of psychological damage. The Tribunal accepted this evidence which suggested that the Applicant had suffered post-traumatic stress disorder, depressive illness and alcohol abuse disorder following the assault. The applicant's impaired condition had continued for at least 4 years after the incident.

The Tribunal also considered the effect of the sexual assault on the Applicant's employment. Being incapacitated for any work due to her psychological injuries, the Applicant received no wage payments from 12 December 2010 until 15 March 2015. Since gaining employment in March 2015, the Applicant was receiving a lower rate of pay when compared with her employment with the hotel .

The Tribunal rejected the hotel's argument that the Applicant did not mitigate her loss. Although the Applicant was offered alternative employment with the employer, the Applicant was not medically capable to take up that job and had a reasonable basis for rejecting the offer. Further, the Applicant had reasonably lost confidence in the hotel when she found out that the caretaker had not been immediately dismissed following the sexual assault (he was in fact dismissed on 2 December 2010, but was allowed 7 days to vacate the apartment).

The Tribunal awarded to the Applicant:

- $70,000 in general damages to compensate for 4 years of severe psychological difficulties;
- $196,170.17 for past economic loss and interest;
- $25,407.76 for loss of superannuation benefits and interest;
- $478.17 for special damages and interest;
- $25,000 for future economic loss inclusive of superannuation; and
- $3,000 for future medical and pharmaceutical expenses.

To avoid the Applicant being 'doubly' compensated, the above total was reduced to take into account monies received by the Applicant in relation to the settlement of her common law personal injuries claim.

The total compensation awarded was $313,316.10.

What does this mean for employers?

- At a minimum, all employers should ensure that they have appropriate anti-discrimination policies and provide related training to employees to ensure that all employees understand their obligations in relation to appropriate workplace behaviour
- Conduct occurring in a private residence may occur 'in the course of work' – and the employer should be aware that the connection to work does not necessarily end when a worker leaves 'the workplace'

Employer relying on 'indirect inferences' to dismiss penalised by the FWC

Walker v Salvation Army (NSW) Property Trust t/as The Salvation Army – Salvos Stores [2017] FWC 32

The Fair Work Commission (the FWC) has awarded a former Salvation-Army employee more than $20,000 in compensation after being unfairly dismissed following theft allegations. The FWC found that the CCTV footage which purportedly captured the long-standing store manager stealing money could demonstrate only 'indirect inferences' of misconduct and was insufficient evidence for the Commission to be satisfied that any misconduct had occurred.

At the time of dismissal Ms Walker had been employed for 11 years with the Salvation Army. She had never received any warnings in relation to performance or conduct.

In July 2016, CCTV cameras captured events involving Ms Walker and a customer named 'Shiraz'. The footage showed Ms Walker and Shiraz walking around the store inspecting furniture and after a short period out of camera-view, Ms Walker tucking money into her apron. Shiraz was interested in a number of items of furniture which totalled $200, however he was interested in coming back another day to buy other items. Ms Walker wrote a list of the items Shiraz wanted in a Docket Book and wrote the total price of $200. Ms Walker told Shiraz that she would not be working on the day that he planned to return, but that he could ask for her colleague. Ms Walker denied that any money was exchanged at that time.

Two days later, Shiraz attended the store with the docket and provided it to staff. Shiraz told staff that he had already paid for the items but had only been provided with the docket and did not have a cash register receipt. Although the staff initially questioned the handwritten receipt, the items were delivered to Shiraz in the following days on the faith of his claim that he had already paid for the goods.

The Area Manager met with Ms Walker a week later to inquire about the missing money. The Area Manager had reviewed the CCTV and could see Ms Walker handling money and putting it in her apron. He formed the view that 'this supported Shiraz's claim that he had given [Ms Walker] money for the furniture sale'.

During the meeting with Ms Walker, the Area Manager did not inform Ms Walker that he had viewed the CCTV footage, nor was she invited or allowed to view the footage. Ms Walker said that she never received any money from Shiraz and actually asked the Area Manager to view the CCTV footage as she claimed this would not show her accepting money from Shiraz.

Following the meeting, the Area Manager contacted Shiraz, who again asserted that he had already paid for the items when in the store room. The store room was outside the range of the CCTV footage.

Ms Walker was then invited to a meeting for the purpose of analysing the outcome of the investigation, where she was given an opportunity to respond and allowed a support person present. During this meeting, Ms Walker continued to deny that she had taken any money from Shiraz. The decision to dismiss Ms. Walker was made after the Manager returned from a short break during the meeting. Ms Walker subsequently challenged her dismissal via an unfair dismissal claim. As the reason for termination was based on conduct, the FWC was required to determine whether it was satisfied, based on the evidence, that the conduct actually occurred. As the allegations were of serious misconduct (theft), the standard of proof required was higher than conduct of a less serious nature.

The key issue was whether Ms Walker ever received $200 from Shiraz. The FWC held that the footage 'at its highest', showed Ms Walker folding a single 50 dollar note (not the $200 that was alleged) and putting money into her apron. There was no evidence before the FWC that Shiraz had given that money to Ms Walker. Ms Walker's evidence was that she had that money in her possession for a delivery driver for a different transaction.

Shiraz provided a statement, which was attached to the Area Manager's statement, but as he was not called as a witness or made available for cross examination, his statement was given no weight. The FWC remarked that it was surprising that the employer so readily preferred a customer's version of events over that of a long-standing employee. The FWC also noted the Area Manager's evidence that it had not crossed his mind that Shiraz may have been attempting to get something for free.
In the absence of evidence that Shiraz had given money to Ms Walker, the FWC could not be satisfied that she had "stolen" the money. The FWC went so far as to say that it was satisfied that Ms Walker did not receive any money from Shiraz. Accordingly, the alleged misconduct had not been proven to the required standard and the FWC found there was no valid reason for dismissal.

In considering other aspects of the case, the FWC commented that, as a large employer, the Salvation Army 'should be expected to adopt rigorous procedures' in relation to responding to matters of alleged misconduct. In this instance, the employer should have afforded Ms Walker an opportunity to examine and respond to the CCTV footage, prior to dismissal.

In assessing compensation, the FWC considered Ms. Walker's extensive period of service, and found that but for the dismissal her employment would have continued another year. Ms Walker was therefore awarded the statutory compensation cap which amounted to $22,404.50.

What does this mean for employers?

- Where an employee is facing disciplinary action because of alleged serious misconduct, the employer must ensure that the employee has a reasonable opportunity to examine the evidence against them including CCTV footage
- Employers must carefully consider the evidentiary case against an employee and ensure that all reasons for dismissal are based on sufficient evidence

Employees Reinstated After Hasty Redudancy Process

Williams & Ors v Staples Australia Pty Ltd [2017] FWC 607

Four employees have been reinstated after the Fair Work Commission (FWC) found they were not made genuinely redundant because their employer made only 'disingenuous gestures' of consultation and failed to consider reasonable redeployment as required by the Fair Work Act (Act).

On 5 July 2016, Staples Australia (Staples) made the decision to reduce the number of permanent employees in an effort to reduce operating costs at its Erskine Park site. The warehouse was performing approximately $1 million over-budget, with labour costs at around 60%. On 11 July 2016, the decision to implement redundancies was announced to permanent warehouse employees, who also received a letter confirming the redundancies and stating that positions would be assessed by use of a selection matrix. A number of employees had individual meetings with the manager.

On 12 July 2016, a union official expressed his strong displeasure about the redundancies and criticised part of the selection matrix, alleging that Staples had not engaged in proper consultation.

On 13 July 2016, the 12 employees selected by Staples were advised of their redundancies, provided with a letter and a list of vacant positions for redeployment purposes. Five employees volunteered for redundancy, however the remaining four of the seven employees made involuntarily redundant made claims alleging their dismissal was unfair to the FWC.

Staples raised a jurisdictional objection to the claims on the basis that the dismissals were genuine redundancies. Staples, therefore, needed to satisfy the FWC the positions were no longer required, it complied with the relevant Enterprise Agreement (EA) consultation process and explored redeployment options. The FWC identified 3 sources of an obligation to 'consult' under the Agreement being:

1. The Consultation Clause. The FWC found that the approach undertaken by Staples was 'unduly hasty' and 'largely tokenistic'. describing the process as astonishingly fast – where employees were notified and selected on consecutive days. The EA required 'discussion' and 'provision of relevant information to employees', including measures that might avert or mitigate the adverse effects of a decision.
2. The change to ordinary hours or regular rosters also required consultation.
3. Staples management was required to include the Joint Consultative Committee (JCC) in decision making for major changes affecting Erskine Park employees. Though the JCC was informed of redundancies on 11 July 2016, it was not involved in any decision-making regarding the composition or application of the selection matrix which determined the redundancies. Staples failed to establish it had met its consultation obligations

The FWC also considered an EA clause in which 'Staples commits to the hire of 20 permanent Associates' by 31 December 2016. Consequently, in making the redundancies Staples was aware that they would be required to hire 20 new employees within 5 months. The FWC therefore determined that there was a realistic and 'obvious' prospect that the applicants could have been redeployed into the positions that were required to be filled, however because of the expedient nature of the redundancies, the potential for redeployment into positions which were essentially 'pending' was not considered.

Having determined that the dismissals were not cases of genuine redundancy, it was open to the applicants to establish that their dismissals were 'harsh, unjust or unreasonable' under the Act.
The FWC considered Staples' conduct resulted in manifest injustice including because some criteria in the selection matrix were 'highly subjective' and could produce an unreasonable outcome when coupled with no opportunity to scrutinise the criteria or review selection.

The FWC found the redundancy process as so severely flawed it was unreasonable, the consultation non-compliance was unjust, and the failure to consider redeployment was harsh. The dismissals were, therefore, unfair and in breach of the Act.

Staples' argument that reinstatement was inappropriate as it would likely need to engage in further redundancies and again terminate the applicants was rejected.

The Commissioner found that reinstatement was appropriate because:

- The failure to comply with consultation obligations was a significant defect;
- There was a reasonable prospect of redeployment due to the "new hires" clause of the Agreement;
- There was no evidence of any relationship deterioration;
- The applicants had favourable employment records;
- Evidence suggested improper reasons formed part of the selection for redundancy.

The FWC also ordered back pay of around 6 months, less redundancy entitlements paid.

What does this mean for employers?

- When implementing redundancies, it is essential for employers to comply with consultation obligations provided by their Enterprise Agreement / Award
- Employers that wish to expedite consultation processes must be prepared to accept the risk that they may be found to have not discharged their consultation obligations
- Employers should ensure that they thoroughly consider redeployment opportunities and be aware of the link between proper consultation and the identification of redeployment opportunities
- A redundancy selection process should be based on reasonable and objective criteria and also provide the affected employee with an opportunity to challenge the basis for their selection

Employee disciminated against because of tuberculosis

Choi v Deloitte Touch Tomatsu [2016] NSWCATAD 304 (22 December 2016)

The NSW Civil and Administrative Tribunal has ordered an employer pay compensation for its conduct that was found to intensively performance manage an employee and coerce her to take unpaid leave and resign after she had contracted tuberculosis.

Ms Choi commenced employment as a chartered accountant with Deloitte Touche Tomatsu (Deloitte) in 2011. Before contracting tuberculosis, Ms Choi performed well in her position. In September 2012, Ms Choi advised the employer of her illness. Following this, Ms Choi alleged that the first indication that she was being 'eased out' of her employment was a telephone conversation which transpired while she was still in hospital receiving treatment in November 2012. Despite Deloitte admitting it was not normal practice to make calls to employees while still in hospital, Ms Choi was nonetheless contacted by an HR employee and was presented with three options, including: taking unpaid leave; working part-time; or resigning.

Though Deloitte alleged that Ms Choi was also given the option to return to her usual full-time position provided she had medical clearance, the Tribunal accepted that this option was not actively discussed. The Tribunal was satisfied that Ms Choi was effectively presented with two options – unpaid leave or resignation. While Ms Choi agreed to take a period of 6 weeks' unpaid leave she gave further evidence that she was subsequently asked to resign on at least 12 other occasions.

On her return to work six weeks later, Ms Choi alleged that management made her feel unwelcome in various ways, including:

- it being suggested to her by her Partner that she resign and find a '9 to 5 job';
- telling her to prepare her CV;
- excluding her from a particular training course;
- by being tasked with largely administrative duties / demeaning tasks;
- criticising her performance; and
- subjecting her to an excessive number of meetings with HR and senior HR personnel.

While undertaking non-standard duties, Ms Choi received a negative performance appraisal and was subjected to an intensive performance management process with senior staff. The Tribunal was critical of this and stated that it did not make 'work sense' for Deloitte to challenge her performance when she was not performing her substantive role. On 12 February 2013, Ms Choi complained to Deloitte that she felt bullied to resign from her employment. Deloitte accepted that this complaint was never investigated, which was contrary to Deloitte's policy on discrimination, harassment and bullying.

The Tribunal accepted that the purpose of the meeting to discuss the complaint was to facilitate her resignation. At the meeting, a separation package was offered and rejected.

Subsequently, the separation package was doubled. Ms. Choi took further sick leave and was later admitted to hospital. She was on workers' compensation from February 2013 until January 2014, when she took up a new higher-paying job with a major bank.

Ms Choi commenced procedures for alleged breaches of NSW anti-discrimination legislation (treating a person less favourably because of a disability) and (discrimination).

To determine whether Ms Choi was treated "less favourably than a person…. who does not have that disability", the Tribunal had to determine the proper 'comparator'. That is, who would Ms Choi (and her treatment by Deloitte) be compared to in order to determine whether she was treated less favourably.

The Tribunal accepted the correct comparator was "another employee of similar skills, qualification and experience but without tuberculosis" and was satisfied this person would not have been coerced into taking unpaid leave, or performance managed or pressured to resign. Accordingly, Ms Choi was treated less favourably, in contravention of the Act.

The Tribunal was satisfied that the treatment of Ms Choi was due, at least in part, to the fact that she had tuberculosis. The evidence suggested that Deloitte was concerned that her condition may be infectious. For example, there was a whiteboard showing Ms Choi was 'quarantined'. The Tribunal noted that despite holding the view that Ms Choi was potentially infectious, Deloitte never requested or obtained relevant medical information to clarify that matter.

Deloitte argued that a relevant factor in Ms Choi's treatment was her outward unhappiness and her performance deterioration, however the Tribunal reiterated that the discriminatory action need only be one of the reasons for unfavourable treatment. The Tribunal was satisfied that Ms Choi was treated less favourably '*due, at least in part, to her tuberculosis*'.

The Tribunal noted that any economic loss arising from the unlawful conduct ceased when Ms Choi commenced her new job in January 2014, as she was earning more in her new position with the bank. The Tribunal, therefore, assessed compensation as follows:

- $14,307.69 for loss of earnings resulting from pressure to take six weeks of unpaid leave, (including superannuation); and
- the balance of the difference between Ms Choi's salary plus superannuation and her workers' compensation payments from the time she ceased receiving payment from Deloitte until January 2014.

The Tribunal found Ms Choi failed to mitigate her loss because she had refused to take prescribed medication and commenced employment in January 2014 against her medical advice. The Tribunal considered these factors may have contributed to Ms Choi's inability to recover from the stress resulting from the discrimination.

Taking this into account, $10,000 was awarded for non-economic loss.

What does this mean for employers?

- It is unlawful for employers to treat a disabled employee less favourably than 'the comparator' person who does not have the disability
- In relation to any employee with a 'protected' attribute / characteristic, employers should be aware of the risks of an anti-discrimination claim and ensure that reasonable management decisions are well documented
- In situations where an employer is genuinely concerned about the infectious nature of an employee's illness, the employer should request and consider medical evidence thoroughly before taking any action

Adverse action for denying applicant diagnosed with arthritis

Shizas v Commissioner of Police [2017] FCA 61

The Federal Court of Australia (FCA) has found that the Australian Federal Police (the AFP) took adverse action against a prospective employee by refusing to employ him because of his physical disability.
In April 2012, Mr Shizas submitted an application to join the AFP. In July 2012, after consulting with a rheumatologist, Mr Shizas was diagnosed with ankylosing spondylitis, a form of arthritis which causes inflammation in the spine and through other joints. A letter provided to the AFP by the rheumatologist advised there were no restrictions on Mr Shizas's ability to carry out the job requirements, specifically the use of force.

Mr Shizas received a conditional offer of employment in March 2013, which was later revoked because he did not meet the AFP's medical clearance requirements. Mr Shizas requested a review of their decision and in April 2013 he was advised that despite the medical opinion, ankylosing spondylitis was a precluded condition under the AFP Medical Standards and therefore there was had no ability to review the decision.

Mr Shizas commenced proceedings against the AFP in the FWC alleging discrimination on the basis of his disability which contravened the Fair Work Act 2009 (Cth) (FW Act).

Upon learning of Mr Shizas's proceedings, AFP Human Resources sought independent medical advice regarding Mr Shizas That advice stated Mr Shizas was currently asymptomatic and his physical examination was compatible with the training requirements, however, his history would increase the risk of the injury the degree of increase of risk was 'unquantifiable' but substantial.

AFP Human Resources interpreted this report to mean that Mr Shizas was predisposed to an increase in injury during the performance of duties and that Mr Shizas could not perform the inherent requirements of the role. Mr Shizas was advised the initial decision would not be reviewed (the Review Decision).

The FCA was required to consider if the initial or review decision were made for unlawful reasons in breach of the Act. The AFP failed to prove it made its initial decision for lawful reasons because the decision maker did not give evidence. It was, therefore, presumed that the AFP took adverse action against Mr Shizas because of his disability, in contravention of the Act

However, in considering the Review Decision, the AFP was able to rely on the 'inherent requirements' defence under section 351(2) of the Act. While the FCA did not agree that the medical evidence established that Mr Shizas was unable to perform the inherent requirements of the position, the relevant test was whether the AFP acted on this basis.

The FCA accepted the decision maker's evidence that Mr Shizas was at a substantially greater risk of injury in carrying out his duties because of his disability. Therefore, the FCA was satisfied that the decision maker held the belief that Mr Shizas could not meet the inherent requirements of the position. This finding was made notwithstanding the medical evidence suggests otherwise.

Accordingly, the Review Decision did not breach section 351 of the Act. As Mr Shizas did not seek orders regarding compensation or penalties, the FCW made a declaration that the AFP had breached the Act.

What does this mean for employers?

- The General Protections part of the Fair Work Act requires an employer to rebut the presumption that action was taken for a prohibited reason – therefore, in defending a claim, an employer must be ready and prepared to put the decision maker/s in the witness box and lead evidence
- In relation to employment, employers should ensure that decision making focusses on the requirements of the position, including the safety of the employee, colleagues and the public

Bill introduced to deter exploitation and protect vulnerable workers

Fair Work Amendment (Protecting Vulnerable Workers Bill) 2017

In March 2017 the Government introduced the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Vulnerable Workers Bill) into Parliament, which proposes to increase the scope of franchisor and holding company liability for the exploitation of workers and specifically capture liability for deliberate and serious underpayments. The introduction of the Vulnerable Workers Bill stems from the Government's election commitment to better protect vulnerable workers, and arises in response to the underpayments by 7-Eleven franchisors.

The Vulnerable Workers Bill operates to introduce new provisions to capture and hold franchisors and holding companies responsible for contraventions of the *Fair Work Act 2009* (Cth), and to impose liability on those that fail to address, manage and take mitigating steps to curb exploitation in their business networks. The bill proposes to:

- introduce a higher scale of penalties for 'serious contraventions' of prescribed workplace laws (the maximum penalty being 10 times higher and increased to $108,000 for individuals and $450,000 for body corporates);
- increase penalties for record-keeping failures;
- make franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them. The new responsibilities will only apply where franchisors and holding companies have a significant degree of influence or control over their business networks;
- strengthen the evidence-gathering powers of the Fair Work Ombudsman (FWO) to investigate potential breaches and underpayments.

The proposed amendments are intended to deter the deliberate underpayment and systematic exploitation of workers, including by providing the FWO with expanded powers to pursue those who hinder or obstruct investigations, or provide false or misleading information to the regulator.

Recent decisions, both before and after the 7-Eleven matter, demonstrates the exposure for employers for prosecution for breaches of industrial instruments including:

- a regional café being penalised in excess of $500,000 for failing to pay former employees (including 2 overseas workers) in accordance with the *Restaurant Industry Award 2010* in respect of minimum wages, weekend penalty rates, public holidays, meal breaks and overtime. The employer was also found to have been engaging in a 'cash back' scheme (ie. requiring an employee whose visa is sponsored by the employer to pay back a proportion of their wages to cover costs associated with the working visa). The cash back arrangements resulted in the employees being remunerated as little as $6 per hour and were threatened with violence and deportation if they refused. (*Fair Work Ombudsman v Rubee Enterprises Pty Ltd & Anor [2016]*);
- the FWO recently commenced proceedings against the owner of Bar Coluzzi in inner Sydney against an individual and company for allegedly requiring an overseas worker on a 457 visa to pay back thousands of dollars from their employee wages as part of another exploitative cash back scheme over a period of 15 months. In addition to the cash back scheme, it is alleged that there were underpayments in respect of minimum hourly rates, annual leave, weekend and public holiday rates and overtime. Notwithstanding that the employer has since paid the employee in full, the FWO has commenced proceedings given the seriousness of the alleged conduct (*Fair Work Ombudsman v Robit Nominees Pty Ltd ACN 808 702 012& Anor*).

In an attempt to address and combat the underpayment of workers, the FWO has developed and released an app which enables user to keep an automated record of hours worked. FWO Natalie James believes that the app will prove to be a valuable back up in circumstances where the employer fails to fulfil their record-keeping obligations. The FWO proposes to review data recorded by the app in conjunction with employer records in respect of disputes regarding employee entitlements.

It has recently been reported that Caltex has established a $20 million 'assistance fund' to allow franchise employees to claim underpayments arising after 2015, despite having no liability to do so. Notwithstanding Caltex's review of its franchise arrangements and view that its model allows franchisees to draw a wage, make profits and pay employee entitlements, the fund has been established by Caltex to 'do the right thing' by employees. Caltex will seek to recover any underpayment liabilities from franchisees and has been proactively reporting regular updates to the Fair Work Ombudsman as part of its review.

Penalty Rates

On 23 February 2017 the Fair Work Commission (FWC) handed down its landmark penalty rates decision, which made cuts to Sunday and Public Holiday rates for employees covered by the Hospitality, Retail, Fast Food, Restaurant and Pharmacy awards.

In reaching its decision, the FWC cited two primary penalty rate rationales expressed by industrial tribunals historically: the need to compensate employees for working outside 'normal' hours and to deter employers from scheduling work outside 'normal' hours. Having regard to the modern award objective provisions of the *Fair Work Act 2009* (Cth) (Act), the FWC determined that 'deterrence is no longer a relevant consideration in the setting of weekend penalty rates'.

In regards to the compensatory element, the FWC considered the disutility associated with working on weekends and public holidays and acknowledged the potential hardship of these reductions on affected employees. The FWC also observed that many employees covered by these awards were willing to work Sundays and public holidays. The decision also saw cuts to the early morning period covered by a 15% penalty loading in the Restaurant and Fast Food awards, which will now be applicable to employees working between midnight and 6am (previously 7am). In the Fast Food Award, the 10% evening work penalty will apply from 10:00pm (previously 9.00pm) until midnight. Although the new rates were initially set to operate from 27 March 2017, the FWC has since revised the effective date until 1 July 2017.

The FWC also referred to section 134(1) of the Act, which requires the FWC to consider the need for additional remuneration under some circumstances, as not constituting a 'statutory directive' requiring extra pay for employees working unsocial hours, but rather a relevant consideration. There has also been submission to the FWC by employer groups to replace the term 'penalty rates' with 'additional remuneration' in accordance with the language of the Act.

The decision is a win for employer groups who submitted to the FWC that it was difficult to finance the high costs of weekend work. The Productivity Commission's assessment, accepted by the FWC, also expected that the reductions would produce some positive effects on employment including job opportunities.

Labor and the Greens have expressed that they will continue to contest the full bench ruling and are looking to introduce private members' bill to prevent these reductions.

The ACTU's first female Secretary Sally McManus has pledged to tackle "corporate greed" and push major changes to workplace laws in her commitment to ensuring that living standards of working Australians are "the best in the world".

In an online ACTU article McManus has expressed:

> "My first challenge is to stop the attack on Australian workers through penalty rate cuts. Workers, in their unions, will fight until this unfair decision is reversed by the Government, no matter how long it takes, so that no worker can ever be worse off by a Fair Work Commission decision again."

McManus took over from previous Secretary Dave Oliver who resigned in January after 30 years with the union, who moved aside for a "new generation of highly skilled, diverse and motivated leaders".

Employee awarded overtime payments for work held to be performed as 'overtime' rather than 'recall to duty'

Polan v Goulburn Valley Health (No 2) [2017] FCA 30

The Federal Court of Australia (FCA) has held that an employee was underpaid $27,869.28 in overtime for work performed out of hours and at home, after finding in its earlier liability judgement that the employee was working overtime for duties performed at home.

Revisiting the initial liability decision, the FCA found that Ms Poland was correctly entitled to payment by way of overtime for her time worked at home whilst she was on-call, which was in addition to the on-call allowance that she had received at relevant times during her employment. In terms of assessing the quantum of the underpayment of overtime, there was a lack of available evidence to establish the overtime hours worked that would provide a precise number of hours worked. In the course of determining the quantum of the underpayment, the parties had been unable to agree on how such time should be calculated.

The FCA was not satisfied with either party's suggested method of calculation. Given that there was no doubt that Ms Polan had in fact worked overtime, the FCA was inclined to suggest a method of calculating overtime rather than finding that Ms Polan did not work overtime as the hours worked could not be established. Justice Mortimer ultimately relied upon Ms Polan's outgoing Telstra phone records and 'grossed-up' that time by 50% to additional duties performed during overtime periods (including attending to incoming calls from doctors and considering rostering solutions). Applying the above methodology, the FCA found that Ms Polan was entitled to $27,869 by way of overtime payments, plus interest.

You can read our summary of the initial FCA decision in the December 2016 Advisor.

Nominal damages awarded for breach of workplace policy

Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) [2016] FCA 1453

The FCA has held that the employer could not have foreseen that a flawed investigation into bullying allegations could lead a ship's officer to cease working in the maritime industry altogether when considering damages to be awarded for breach of contract. Ms Romero claimed a total of $115,759.71 in damages for breach of workplace obligations for which she claimed caused her to reskill and train for a new career. Ms Romero gave evidence that she "couldn't work for Farstad ever again, [and had] lost complete trust and faith in them", she did not believe that she could obtain employment with another company within the maritime industry after reading what had been reported about her.

In rejecting the quantum of damages sought, the FCA found that the kind of loss or damage claimed by Ms Romero is loss or damage arising out of a complete change in career, rather than Farstad's breaches. Justice Tracey observed that an employer could not foresee that its breach (or any breach) of the Policy could cause an employee to embark on an entirely new career. Further, Justice Tracey observed that Ms Romero's choice to pursue a law degree was a "personal choice" made after she ceased her employment with Farstad.The FCA therefore rejected Ms Romero's claim for $115,759.71 in damages and awarded nominal damages of $100 for her breach of contract and repudiation claim.

You can read our summary of the initial FCA decision in the March 2016 Advisor.

Adverse action payout for refusal to alter employment from part time to casual employment

Rosa v Daily Planet Australia Pty Ltd & Anor

In early 2016 the Federal Circuit Court (FCC) found that a brothel had taken adverse action against its receptionist when her employment was terminated after she refused to sign a workplace agreement which stated she was a casual employee with no entitlement to paid leave or protection from unfair dismissal. In its initial decision, the FCC found that the nature, regularity and length of employment was in substance a part-time arrangement and that she was underpaid pursuant to the award.

The quantum hearing was delayed after the brothel was placed into liquidation in March 2016. The FCC found that the employee was entitled to:

- $37,033.77 for unpaid annual and personal leave, public holidays, and penalties for overtime and meal breaks and $5,789.89 for interest and superannuation payable on those amounts;
- $34,628 as damages for lost income plus $10,749.60 interest on that amount;
- $10,000 for damages for hurt and humiliation.

In assessing penalties, the FCC found that the gravamen of the employer's conduct was pressing the employee to sign a new agreement that ended her part-time status and subsequently terminating her employment. It was acknowledged that part-time work was important for the employee as she was supporting a child. The FCC found the adverse action was a serious breach of the Act and awarded 70% of the maximum penalty - being $23,100 against the company and $4,620 against operator. For the underpayment breaches, the FCC imposed a payment of 10% of the maximum – being $39,600 against the company and $7,290 against the operator. The FCC required that the penalties be paid to the employee.

You can read our summary of the initial FCA decision in the May 2016 Advisor.

Legislative Update

Corrupting Benefits

To address the payment and receipt of 'corruptive payments' as identified from the report by the Royal Commission into Trade Union Governance and Corruption, the Turnbull government has introduced a bill which criminalises the giving, soliciting or receiving of corruptive benefits. The bill requires bargaining representatives to disclose financial benefits in circumstances where the benefit could reasonably be expected to have been derived in relation to an agreement, amongst other disclosure circumstances.

The Prime Minister asserted that the bill would be used to ban 'corrupt and secret payments made between employers and trade unions', in a commitment to end 'dodgy arrangements which ensure millions of dollars in financial benefits flow into union coffers…with employees none the wiser'.

Offences proposed by the bill include where an employer has made an offer of payment to a union on the proviso that they accept lesser terms and conditions of employment in an agreement, an individual can face up to 10 years imprisonment and/or a fine of $900,000, while a body corporate can face a fine up to $4,500,000. For undisclosed payments without proof of intention to influence, an individual can face up to 2 years imprisonment and/or $90,000, while a body corporate can face up to $450,000.

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

A bill proposing to repeal the mandatory 4-yearly review of modern award has been introduced to Parliament, which responds to recommendations by the Productivity Commission to allow the Fair Work Commission (FWC) to overlook minor procedural or technical errors when approving enterprise agreements insofar as the errors do not disadvantage employees.

The explanatory memorandum to the bill describes that the four-year review is too burdensome and resource-intensive on employers and employee organisations, missing its objectives in creating a simple, easy to understand and sustainable award system. The amendments are intended to provide a fair and relevant minimum safety net through *Fair Work Act 2009* (Cth), with provisions that allow the FWC the right to make, vary and revoke modern awards in accordance with award objectives and prescribe terms that must be included in modern awards. Current award reviews commenced prior to 1 January 2018 will continue.

In relation to agreement approval, the bill sets out that minor procedural deficiencies includes requirements relating to the Notice of Employee Representational Rights (NERR), allowing genuinely agreed agreements to be approved by the FWC notwithstanding trivial non-compliance with the NERR.

The bill also amends the complaint-handling powers of the Minister of Employment and the FWC President to handle complaints that apply to FWC Member's and the performance of their duties and applies the Judicial Misbehaviour and Incapacity Parliamentary Commissions Act to these members.

Parental Leave

The government has recently withdrawn a bill which sought to make changes to paid parental leave including relieving employers of the responsibility of the 'payroll master', increasing the government entitlement from 18 to 20 weeks and measures to prevent 'double-dipping.'

The proposed legislation was withdrawn from parliament the day after the Budget. The Minister for Social Services Christian Porter has commented that it was "clear from the negotiations that agreement could not be reached" and that revisiting the issue would not be an "immediate priority" of the government.

The bill's proposed legislative amendments included provisions to prevent 'double-dipping' to preclude employees from receiving government payments if their employer provided leave totalling at least 20 weeks at the national minimum wage. The Opposition opposed the legislation, claiming that the crack-down on 'double dipping' would render 70,000 mothers worse off under the new scheme.

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 lilli skelton at info@siag.com.au.

SIAG NEWS

SIAG welcomes Ruth Goonan to the Legal Team

We take this opportunity to welcome Ruth Goonan, to the SIAG Team as a Director of Legal Services.

With over 16 years experience specialising in Industrial, Employee and Human Relations in the public and private sector, Ruth works closely with clients to provide commercial and practical workplace relations solutions in todays' changing and challenging environment. She draws on the breadth of her previous roles as Manager, Employee Relations and IR Lead of Australia Post's Reform program, as well as Corporate Lawyer and Senior Associate at Minter Ellison to deliver technical and strategic advice and representation to minimise risk and achieve desired outcomes.

Ruth's experience across employment law includes:

- Award and Enterprise Agreement Interpretation
- Contract of Employment
- Disciplinary Action, Performance Management and Termination of Employment
- Dispute Resolution
- Enterprise Bargaining
- Industrial Action
- Industrial and Employment Strategy
- Redundancies
- Representation/Advocacy
- Transfer of Business
- Workplace Policies and Procedures

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

SIAG welcomes Ben Waugh to the Legal Team

We take this opportunity to welcome Ben Waugh to the SIAG Team as a new Senior Lawyer.

Ben has ample experience assisting employers across a broad spectrum of industrial relations and employment law matters. Ben has assisted employers on highly technical matters, including complex audits and other compliance based-projects. Ben is known for his attention to detail and practical and balanced approach to problem-solving.

Ben's experience across employment law includes:

- Award and Enterprise Agreement interpretation
- Contracts of Employment
- Disciplinary action and termination of employment
- Performance management
- Dispute resolution
- Defending post-employment claims and disputes
- Payroll audits
- Workplace investigations
- Transfer of business
- Workplace policies and procedures

siag training : development

A WorkSafe Approved Training Course

WorkSafe VICTORIA

Health and Safety Representative Initial OHS Training Course

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

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

The learning objectives of the course are:

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

Entitlement

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

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

Time: 9am - 5pm

HSR Initial OHS Training Course (5 days) 2017

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

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