The Advisor

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Award Update

Family and domestic violence leave entitlements take effect

4 yearly review of modern awards – Family and Domestic Violence Leave [2018] FWCDB 3969; and [2018] FWCFB 3936

From 1 August 2018 all Modern Awards will be varied to provide award covered employees, including casuals, with an entitlement to 5 days unpaid 'Family and Domestic Violence leave' per annum.

Under the Modern Award, 'Family and Domestic Violence' giving rise to the leave is defined as meaning violent, threatening or other abusive behaviour by an employee's family member that seeks to coerce or control the employee, or causes them harm or fear.

Employees affected by family and domestic violence will be able to access the 5 days unpaid leave in the event they need to deal with the impact of domestic and family violence, including, but not limited to taking time to:

- arrange for the safety of themselves and/or family members;
- attend court hearings; and/or
- access police services

where it is impractical for them to do so outside of their ordinary hours of work.

The full entitlement will be available to employees (including casual and part time employees) at the commencement of each 12 month period as opposed to accruing throughout the year, but shall not accumulate from year to year. Any time taken on this leave will not break an employee's continuity of service.

Whilst the Modern Awards provide the new minimum 5 days leave entitlement, arrangements can also be made to extend this form of leave in order to deal with circumstances that arise surrounding family and domestic violence.

Under the clause, employees must give notice of leave to be taken, as well as advice on the expected period of leave. This may occur after the leave has started. Employers may also require employees to provide evidence that would satisfy a reasonable person that the leave is being taken for the appropriate purposes. Such evidence could include documents issued by the police, a court, a family violence support service or a statutory declaration.

Any information given by employees concerning notice or evidence of leave must be treated with confidentiality, as far as it is reasonably practicable. Employers should nonetheless comply with disclosure requirements if necessitated by Australian law or if necessary to protect the life, health or safety of the employee or any other person. Employers should note that information regarding family and domestic violence is sensitive, and if mishandled can have adverse consequences for the employee. Employers should not hesitate to consult with employees in relation to the handling of their information.

What does this mean for employers?

- Where employees are covered by a modern award, employers should ensure compliance with the entitlement and take into consideration notice, evidentiary and confidentiality provisions contained in the Award. Employers are encouraged to introduce proper processes to assist in managing leave and ensure compliance with the amendments.
- Employers are encouraged to review any current Family and Domestic Violence Leave Policy to ensure it aligns with the changes and/or consider introducing a Family and Domestic Violence Policy to make the process of accessing the leave a clear and transparent one.
- Employers should ensure that employees are aware of the entitlement, and that they know the procedure for accessing such leave, to ensure that they communicate any policy changes and any additional support services that may be available.
- Please contact SIAG for assistance in such matters.

Whistleblower policies needed

If you are a public company or a large proprietary company, now is the time to ensure that you have a new or updated Whistleblower Policy in place to guarantee compliance with the proposed 'Enhancing Whistleblower Protections' scheduled to be passed later this year. Requiring the existence of a policy from 1 January 2019, the legislation will apply to disclosures made on or after 1 July 2018, including disclosures regarding events prior to that date, as outlined in the last edition of the Advisor.

Will I be covered?

If you are a public company or a large proprietary company, in addition to those in the corporate, financial and credit sectors, you may be covered by the proposed amendments to be enacted in the *Treasury Laws Amendments (Enhancing Whistleblower Protections) Bill 2017*. To be considered a large proprietary company to whom the changes will apply, you need only meet two of the following criteria, as outlined by ASIC:

- The consolidated revenue of the company and any entities it controls is $25 million or more for the financial year;
- The value of consolidated gross assets of the company and any entities it controls is $12.5 million or more at the end of the financial year;
- The company and any entities it controls have 50 or more employees at the end of the financial year.

What do I need to do if I am covered?

To ensure compliance with the proposed legislation, public and large proprietary companies must have and make available an internal Whistleblower Policy that meets the mandatory requirements set out in the legislation, including:

- Detailing the protections available to whistleblowers under the proposed legislation, which expands the current definition of an 'eligible whistleblower' (to include present and past employees and family members, contractors and suppliers) and broadens the scope of potential misconduct that may be the subject of a protected disclosure;
- Documentation of a process for addressing protected disclosures and dealing with them in a reasonable time; and
- Outlining the intended fair treatment of employees referred to in protected disclosures or to whom the disclosure is made.

We also recommend that training be provided to ensure those involved in the disclosure process understand their obligations and are trained to act in accordance with the Policy and legislation appropriately.

Why now?

In operation the proposed changes are aimed at strengthening the Commonwealth whistleblower protections in various ways, including by:

- Broadening conduct that may be the subject of a qualifying disclosure to include actual or suspected conduct;
- Making irrelevant the motivation of an eligible whistleblower and the currency of the relationship with the employer;
- Removing the requirement that the whistleblower is acting in good faith in order to be afforded the benefit of protection;
- Allowing anonymous disclosures and subject to various conditions in exceptional circumstances, 'emergency disclosures' made to the media or members of parliament may be justified; and
- Improving access to compensation for whistleblowers who suffer damage as a result of victimising conduct.

We encourage all clients who will be covered by the legislation to be proactive in assessing and amending their current Whistleblower Policy, or in the absence of one, introducing a Whistleblower Policy, to ensure compliance. We are happy to assist in this process.

Omission of employer address gives FWC 'no choice' but to reject superior agreement

Chubb Fire & Security Pty Ltd [2018] FWC 4647

The FWC has labelled an employer's failure to include their address on the signature page of an enterprise agreement as a regretful omission, providing them with no option but to reject the application it's for approval. The FW Act (section 185(2)) mandates that an application for the FWC to approve an agreement must be accompanied by a signed copy of the relevant agreement. *The Fair Work Regulations 2009* (**Regulations**), specifically regulation 206A, outline that an enterprise agreement will be considered as signed if, among other points, it is signed by the employer and at least one employee representative, includes the address of the signatories and an explanation of their authority to sign. In regard to the type of address that needs to be included, the FWC Full Bench held in a 2014 decision, that the signatory's work address, as opposed to their residential address, was sufficient.

Chubb Fire & Security (**Chubb**), the employer, was seeking the approval of an agreement that provided for 'generally superior pay and conditions' and had the support of the covered employees.

The signature page of the proposed *Chubb Fire Safety, Alice Springs, Electrical Technicians, Collective Agreement 2017-2019* did not comply with requirements stipulated by the FW Act and Regulations, as the signatory on behalf of Chubb had not included their address.

In her decision, Commissioner McKenna advanced her view that the wording of section 185(2) and regulation 2.06A require strict compliance, given the mandatory language in the FW Act and the Regulations. Therefore, unlike other situations in which the FWC has the power to amend an irregularity in applications and documents, Commissioner McKenna was very clear that this discretion does not apply to correcting an omission relating to the signature page of an enterprise agreement.

Commissioner McKenna was very forthright in stating that the rejection of the application for approval was regretful and if not for the address omission, she would have approved the agreement with undertakings. Chubb's application for the approval of the enterprise agreement was therefore dismissed.

What does this mean for employers?

- Failure to comply with procedural requirements under the FW Act and Regulations may result in the rejection of an agreement that may otherwise have been approved.
- Signatories of an enterprise agreement should ensure that all procedural requirements have been fulfilled, including the insertion of an address.

Full Federal Court upholds decision finding external accountants liable for employer's underpayments

EZY Accounting 123 Pty Ltd v Fair Work Ombudsman [2018] FCAFC 123

The Full Court of the Federal Court of Australia (**Full Court**) has dismissed an appeal by accounting firm, EZY Accounting (**EZY**), which contested a 2017 decision that found them accessorily liable for an employer's underpayments. The original decision of the Federal Circuit Court of Australia (**FCCA**) is outlined in an article in the December 2017 Advisor edition. Significantly, this was the first instance of a financial penalty being imposed on an accounting firm, due to an accessorial liability claim advanced by the Fair Work Ombudsman. Despite a minor reduction in the penalty amount ordered by the FCCA, the Full Court ultimately found that the original decision of Judge O'Sullivan contained no appealable error in finding that Ezy Accounting was sufficiently 'involved' in the contraventions.

By way of background, EZY had been engaged by Blue Impression, the operator of a Japanese fast food chain, after an audit revealed that Blue Impression had contravened multiple underpayment provisions of the FW Act. These included a failure to pay minimum hourly rates, public holiday penalty rates, Saturday and Sunday loadings, evening loadings and other payments. Rather than being rectified by EZY the underpayments actually continued after their engagement.

At first instance, EZY argued that they were given restricted duties by Blue Impression and that it was not within the professional obligation of their sole director, Mr Lau, to know whether Blue Impression was paying employees as per the applicable award. They argued that they did not have the authority to review the number of hours that employees worked or the times at which this was done, and therefore ensuring that payments satisfied minimum award entitlements was not a duty of theirs.

These arguments were rejected at first instance, with Judge O'Sullivan holding that EZY were 'involved in' and had actual knowledge of seven contraventions of section 45 FW Act by Blue Impression, and were therefore intentional participants in their continuing occurrence.

Similarly, the Full Court upheld the finding that EZY had actual knowledge of Blue Impression's underpayments, describing the initial finding as 'unsurprising'. This was because, among other reasons, Mr Lau had 'some' knowledge of the relevant award and the rates of pay within it and that he had conceded that underpayment was 'inevitable' due to the operation of Blue Impression's payroll systems prior to the audit and the fact that they had not been changed after the contraventions were uncovered.

The Full Court concluded that it was open to Judge O'Sullivan to make the factual findings that he did and that he was right in holding that EZY was 'involved in' contraventions of the FW Act (section 45). It was concluded that the conduct of Mr Lau fell within the terms of section 550(2)(c) of the FW Act in that he was "knowingly concerned" in the contraventions of section 45 of the FW Act.

Ezy was initially ordered to pay a pecuniary penalty of $53,880 however this was reduced on appeal to $51,330 as contraventions relating to rest and meal break provisions were set aside. The Fair Work Ombudsman accepted this and agreed with the reduced penalty.

Low annual wage growth in private sector

Wage Price Index: June Quarter 2018, 6345.0; and Consumer Price Index: June Quarter 2018, 6401.0 – Australian Bureau of Statistics

The latest trend in the June Quarter of the Wage Price Index has revealed a 2% annual growth for private sector pay rates, and a 2.4% in the public sector, excluding bonuses.

The private sector experienced a 0.5% quarterly wage growth, seasonally adjusted compared to a 0.6% quarterly wage increase in the public sector. With regard to the range of annual growth within the private sector, the increase ranged from 1.3% in the mining industry to 2.7% for health care and social assistance services.

Separately, in comparison, the June Quarter 2018 CPI data revealed that consumer prices are increasing at 2.1% growth, increasing ahead of private sector wages. The data demonstrates that annual growth in the private sector rates of pay is failing to match the increases in the cost of living.

ACTU Secretary Sally McManus used the release of CPI data in June to continue the ACTU policy platform messaging, commenting that "real wage growth is now zero" and the current wage setting system is failing working people.

New agreement processing timelines among FWC reforms

The FWC has announced that it will adhere to revised timelines in regard to processing enterprise agreements, seeking to finalise simple matters within eight weeks and complex ones within 16 weeks. The announcement was made at the launch of the 'What's Next?' program, which is the FWC's continuation of the previous 'Future Directions' plan. At the launch the tribunal's President Iain Ross, also recognised the need for a more detailed understanding of the experiences of small business and announced changes to the unfair dismissal claims' process, with the aim of providing clarity of information. These initiatives are detailed further below.

Other key initiatives included in the 'What's Next?' program are:

- Permanently establishing and expanding the Workplace Advice Service, which provides pro-bono advice to certain self-represented applicants (this has been trialled since 2013);
- Operationalise 'eCase', a new case management system that will give employers, employees and representatives the ability to access information about their matter, in their own time and from their own devices;
- Producing concise summaries of key modern awards; and
- Utilising expert behavioural insight information, to ensure that FWC communications are expressed in an easy to understand manner, with the aim of increasing attendance at FWC hearings and enabling increased understanding about individual matters and modern award application.

What's Next? will be implemented over the next year and has the underlying aim of increasing the access of all parties to the FWC's procedures and decreasing the confusion that they experience when doing so. The complete 'What's Next: the FWC's plan to improve access and reduce complexity for users initiative' document can be found on the FWC website.

Enterprise Agreement Processing Timelines

The increasing agreement approval times were a key focus of the launch, with the President attributing the delays to significantly larger numbers of agreements being approved with undertakings. These delays have seen past timelines not being satisfied, with none of the 2016-2017 timeline benchmarks being met. The new targets formalise that 50% of agreements, approved without undertakings, are to be finalised within 3 weeks, with 100% being approved within eight weeks. For more complex matters, such as agreements requiring undertakings, previously rejected agreements, contested applications and those requiring a hearing, 50% are to be finalised with 10 weeks, with 100% being cleared within 16 weeks. The aim of these new timelines is to present realistic timelines, that consider the changing nature of agreements.

It is important to note that these new timeline benchmarks represent the FWC's "aspirational" targets but are not strict deadlines for FWC approval processes.

Unfair Dismissal Claims

Increasing clarity regarding unfair dismissal claims was also discussed, with the announcement that by late 2018, an employer's first contact after the lodgement of an unfair dismissal claim will be a phone call from a trained FWC staffer. This staffer will provide the employer with information about the relevant application and the processes that they will need to go through. This contrasts the current procedure in which an employer learns about an unfair dismissal claim, when being served the application by the FWC.

This initiative was based on findings of the User Experience of Unfair Dismissal Matter report, which highlighted the need for applicants and respondents to have access to timely, personalised information regarding unfair dismissal claims. It is hoped that this personalised and informed early support will assist employers and employees in clearly understanding the claims process and assisting with the identification and resolution of preliminary issues, in a timely manner. The changes will also apply to general protections dismissal claims.

Small Business Initiatives

President Ross also acknowledged the need for FWC members to have an increased understanding of the challenges experienced by small business and develop their ability to contextualise the perspective of small business. Despite this, he rejected Bruce Billson's recommendation, in the 'Working Better for Small Business' report, for the FWC to establish a small business division. Rather the President stressed that all FWC members were required to have a comprehensive understanding of small business and FWC matters that they are engaged with. To ensure that this understanding develops FWC members will receive presentations from the family Enterprise Ombudsman and the Council of Small Business of Australia. It was also announced that a small business reference group will also be established.

New and prospective changes to long service leave in Victoria

Long Service Leave Act 2018 (Vic) & Long Service Benefits Portability Bill 2018 (Vic)

Employers in Victoria are advised to update their payroll systems and existing long service leave (**LSL**) policies by 1 November 2018 in light of the introduction of the new *Long Service Leave Act 2018* (Vic) (**the new Act**). The new Act makes a number of key changes, including the ability to access LSL upon 7 years of continuous service, as well as enabling employees to take LSL in periods of 1 day (previously only permitted in 2 or 3 blocks), reducing the effect of Parental Leave and ways in which average hours are calculated.

The changes in the new Act will not apply to emplyees that are covered by NES preserved award-dervived LSL provisions.

Further reforms to LSL are also proposed by the L*ong Service Benefits Portability Bill 2018* (Vic) (**the Bill**), which seeks to provide those in "community service work" with an entitlement to LSL, irrespective of the number of employers they have worked for during the relevant period.

Changes under the new Act

Employers should note that the rate and amount of accrual, as well as the pay rate of the leave period, are unaffected by the new Act. However, changes are being made in the following areas, including:

- Employees will now be entitled to take LSL after 7 years continuous service, as opposed to 10 years' service.
- The minimum leave period has been reduced to 1 day, rather than 2 or 3 days at a time.
- Parental leave of up to 52 weeks qualifies as continuous service, and a period beyond this will not break continuous service.
- Another mechanism has been added to calculate the average hours worked for employees without consistent schedules. All hours worked since an employee's last period of continuous service can be averaged to determine LSL entitlements – the highest sum will prevail.
- Enterprise agreements may now permit pay in lieu of LSL.
- Other changes brought in by the new Act include continuity provisions where a transfer of business assets occurs, or where an employee is dismissed and re-instated within 3 months. Reported breaches will be met by authorised officers whom now have an expanded ability to investigate, and to deliver harsher penalties.

Possible changes under the Bill

Organisations or businesses in the community service industry should take note of proposed changes to LSL entitlements for community service workers. The Bill proposes to entitle employees classified as 'community service workers' to LSL after 7 years' continuous service, regardless of the number of employers they have had during that period. This includes for profit entities that employ at least one community service worker for persons with a disability, or a not-for-profit entity that employs a community services worker. Child services and education services will also be included.

If passed, employers in this industry would be required to register themselves and their employees with the Portable Long Service Benefits Authority and pay quarterly contributions towards LSL accruals. Punitive fines upwards of $20,000 will be handed out if this requirement is not satisfied.

For further information regarding the type of workers that would fall under the community services umbrella, please refer to SIAG's National Circular sent out in April.

High earning director not excluded from award and protected from unfair dismissal

Muscat v Chase Commercial Pty Limited t/a Chase Commercials [2018] FWC 1398

Ms Muscat commenced working for Chase Commercial in April 2009 and was dismissed on 3 November 2017. At the time of the dismissal Ms Muscat was employed in the position of Director of Asset Management. Following the dismissal, Ms Muscat made an application to the FWC under section 394 of the FW Act making a claim for unfair dismissal.

In response, Chase Commercial lodged a jurisdictional objection to the unfair dismissal claim contending that Ms Muscat was not protected from unfair dismissal as she received income in excess of the high income threshold and was not covered by a modern award. The first issue determined by the FWC was whether Ms Muscat was covered by an award. This is because section 382 of the FW Act permits an individual who earns above the high income threshold to be protected from unfair dismissal if they are covered by an enterprise agreement or modern award.

Ms Muscat asserted that she was covered by the Real Estate Industry Award 2010 (**the Award**), and in the instance that it was found that she was not covered by the Award she contended that her annual rate of earnings fell below the high income threshold and, therefore she was a person protected from unfair dismissal. Chase Commercial maintained that Ms Muscat was not covered by a modern award, and further that, when the car allowance that was paid to her was taken into account, her annual rate of earnings exceeded the high income threshold.

Ms Muscat contended that she performed the duties outlined in the classification of Property Management Supervisor under the Award. In considering classification, Commissioner Hunt referred to the decision in *Kaufman v Jones Lang LaSalle (VIC) Pty Ltd T/A JLL* [2017] FWC 2623 (which SIAG covered in the November 2017 Advisor). The decision in *Kaufman* dealt with the issue of award coverage for a senior real estate employee with the title Regional Director, Capital Markets. In that case, despite the applicant's significant earnings and senior title, the FWC determined that the employee was covered by the Award as a Property Sales Representative.

In *Kaufman*, the FWC found that in order to determine if an employee is covered by a modern award it is necessary to identify the industry within which the employer is substantially engaged, and whether the characteristics of the duties and the particular work carried out in the role are covered by the classifications of an industrial instrument. The parties were required to provide submissions and evidence in light of the single member decision in *Kaufman*, and to give consideration as to whether Ms Muscat could be covered by the Award under the Property Management Supervisor classification.

Chase Commercial urged the FWC to differentiate the decision in *Kaufman* to the matters involving Ms Muscat. It was pressed that in *Kaufman*, the employee was in a hierarchy of a large corporation, where he had above him a Victorian management committee, an Australian executive committee and a board of directors. There were 50 other employees in Mr Kaufman's state with the same or a similar job title. Mr Kaufman did not have the capacity to access the company's financial information or bank accounts, nor did he set budgets. He had no staff reporting to him other than an assistant.

Chase Commercial contended that Ms Muscat did not have anybody above her other than the directors of the business, and all staff in her department reported to her. She was the only employee in the business that held the title of director and she had access to the company's bank account.

Relevant to Ms Muscat's title as Director of Asset Management Commissioner Hunt said that she refused to accept that the director title elevated the employee "beyond the status" of an award employee. The title was granted to Ms Muscat when her role was first created and she was earning a base salary of $80,000. Commissioner Hunt went on further to state that 'the nomenclature use was chosen by Chase Commercial, in what one would expect to be a desire to promote or add legitimacy to Chase Commercial's ability to manage commercial property'.

Commissioner Hunt found that the principle purpose of Ms Muscat was to lead the property management team within Chase Commercial, and to increase the revenue for the properties managed by Ms Muscat and her team. The FWC was therefore satisfied that, at the time of the dismissal, Ms Muscat's position of Director of Asset Management was classified as, and the duties she undertook fell comfortably within, a Property Management Supervisor set out under the Award.

Commissioner Hunt was not satisfied that the higher functions Ms Muscat performed resulted in her not being principally employed to perform the work covered by a Property Manager Supervisor.

The FWC dismissed the jurisdictional objection advanced by Chase Commercial finding that Ms Muscat was a person protected by unfair dismissal within the meaning of the FW Act. The application has been relocated to the Unfair Dismissal Case Management Team.

What does this mean for employers?

- An employee may be protected from unfair dismissal, notwithstanding that their income exceeds the high income threshold, where they are covered by a modern award or enterprise agreement.
- A senior job title and salary of an employee will not preclude an employee from being an award-covered employee. Coverage will be determined by virtue of the duties performed within the position and whether the definition of the position falls within a classification under the award. Prior to proceeding with termination, an employer should exercise care to accurately identify whether an employee is covered by a modern award to ensure it meets any obligations provided by that industrial instrument.

RSL Queensland volunteer found eligible to lodge bullying claim

Ryan v Returned & Services League of Australia (Queensland Branch) (RSL Queensland) [2018] FWC 761

In determining whether Mr Ryan, an RSL member and volunteer, was entitled to bring a bullying claim, the FWC held that Mr Ryan was working for RSL Queensland, even though he was volunteering at the Lowood Sub-Branch.

In accordance with the FW Act, only 'workers' who reasonably believe that they have been bullied 'at work' can bring bullying claims. The FW Act provides detailed definitions of 'workers' and 'work', specifically excluding a volunteer organisation with no employees.

Mr Ryan claimed that he was bullied while volunteering for the Pension Advocacy and Welfare Service (**PAWS**) and sought to bring the action against RSL Queensland, an organisation which would clearly come within the ambit of the bullying provisions of the FW Act. In response, RSL Queensland claimed that Mr Ryan could not lodge the claim against RSL Queensland because he volunteered with the Lowood Sub-Branch.

RSL Queensland argued that its only role in relation to PAWS was as a governing body with oversight duties, with no operational or day to day control.

Deputy President Asbury conducted a detailed analysis of the relationship between the relevant RSL entities. She found that RSL Queensland implements the objects of the League or National Body through a range of mechanisms, including the PAWS. DP Asbury also examined the role of RSL Queensland in the context of the PAWS program, in particular noting that:

- RSL Queensland has made a binding policy for the conduct of PAWS;
- RSL Queensland provides insurance for PAWS volunteers and the insurance policy states that volunteers practice under the auspices of RSL Queensland;
- Training for PAWS volunteers is mandated by RSL Queensland, with the state body specifically stipulating the skill level that volunteers are required to maintain;
- RSL Queensland maintains a register of volunteers who meet its requirements;
- RSL Queensland provides the infrastructure for the provision of PAWS, including computer equipment, electronic storage of files, vehicles used by volunteers and, in the case of the Lowood Sub-Branch, funding for the purchase of a building to be used for the provision of the PAWS;
- In external communications, RSL Queensland's general practice is to aggregate volunteer numbers across RSL programs (including PAWS) and present those numbers to the wider community as representative of RSL Queensland; and
- Mr Ryan was described as an 'emanation of RSL Queensland in the community'.

These abovementioned factors, combined with the FWC's analysis of the RSL structure led the Deputy President to conclude that RSL Queensland was the entity for which Mr Ryan volunteered and that RSL Queensland conducted the workplace in which Mr Ryan worked. This conclusion was drawn despite DP Asbury noting that a volunteer, such as Mr Ryan, does not need to be a member of RSL Queensland in order to be involved in PAWS.

What does this mean for employers?

- Before assuming that volunteers cannot bring anti-bullying applications in the FWC, careful consideration needs to be given to the overall corporate structure and relationships between relevant entities.

Failure to allow Pilates attendance found to be indefensible

Knutson v Chesson Pty Ltd T/A Pay Per Click [2018] FWC 2080

The FWC has labelled an employer as 'unnecessarily rigid' when it failed to allow an employee to alter her work and lunch hours, two days a week, in order to attend pre-paid Pilates classes. Ms Knutson had committed to Pilates classes on Monday and Wednesday evenings, prior to her employer extending the work hours of all employees from a 5pm to a 5.30pm finish and issuing new contracts to give effect to the change. The new arrangements included an hour-long lunch break, as opposed to the previous half an hour.

In late 2017, employees were presented with new employment contracts which provided changed work hours. Ms Knutson outlined her concerns in an email to her employer, in which she also explained that the discussion surrounding the altered contracts was causing her increased stress. When presented with the new contract, Ms Knutson, a manager with a good performance record, accepted the new arrangements on three days but sought to take a reduced 45-minute lunch break on Monday and Wednesday to finish at 5.15pm and attend the pre-paid classes. The employer's refusal to accept the request, given the limited time period in which the arrangements would apply, was regarded by the FWC as having 'no defensible explanation'.

While some proposed changes were agreed to, Pay Per Click refused to alter the hours or work and dismissed the alternative arrangement suggested by Ms Knutson. The reasoning for this refusal, provided via email, was that the company needed staff who were flexible and could be responsive to the needs of their clients between 9am and 5.30pm. The Director stated that the altered terms were 'fair and reasonable' given the level of service their clients required and that if Ms Knutson did not want to sign the contract, Pay Per Click would need 'to find staff that will support the business as it grows and continually changes.'

Ms Knutson's response re-affirmed that she would not sign the altered contract. Three and a half hours later Pay Per Click replied via email, stating that Ms Knutson was 'now on notice and will work out [her] notice period' with her employment ceasing after this. Ms Knutson provided Pay Per Click with a medical certificate stating that she was unfit for work during the notice period. The medical evidence was challenged by Pay Per Click, which ultimately only paid Ms Knutson for work performed (up to the date of notification of termination) and outstanding leave. No payment for personal leave or notice period was paid.

Ms Knutson argued that her dismissal was unfair, as it stemmed from her refusal to sign the altered contract and not conduct or performance issues, and that Pay Per Click did not provide her correct notice amongst other matters. Pay Per Click submitted the dismissal was fair as it had a valid commercial reason being operational needs and a desire for uniform work hours. It was suggested that Pay Per Click reasonably negotiated, attempted to compromise and had correctly provided notice to Ms Knutson given concerns regarding her medical evidence.

The FWC found there was no valid commercial requirement for the employer to take such an inflexible approach and therefore no 'sound, defensible or well-founded' reason for dismissal. It was determined that Ms Knutson was dismissed because of her failure to sign the revised contract of employment. This was due to an inability of the parties to reach a compromise regarding her work hours, with Pay Per Click being regarded as adopting an 'inflexible position' on this matter. There were no defensible reasons as to why Pay Per Click could not accommodate the compromise suggested by Ms Knutson, which was considered to be an objectively minor change.

The Commissioner was critical of Pay Per Click notifying Ms Knutson of her dismissal via email, describing the method as unnecessarily callous considering the personal and significant nature of a dismissal. This action was also found to have denied Ms Knutson with an opportunity to respond and involve a support person. Ultimately Pay Per Click were ordered to compensate Mr Knutson, just under $23,000, covering 17 weeks of lost pay.

What does this mean for employers?

- Employers should carefully consider the method of communicating a decision to terminate employment. Relevant considerations may be whether there are geographical difficulties or if the employer has genuine concerns about experiencing physical violence if they meet with the employee.
- Employers must be able to demonstrate that their reason for dismissal is sound, well founded and reasonable. Commercial considerations may not meet such requirements.
- Employers should not be unreasonably inflexible when seeking to negotiate revised terms and conditions of employment.

Large compensation sum for employee making a complaint

Fatouros v Broadreach Services Pty Ltd [2018] FCCA 769

In a decision made by the FCCA, an employer who terminated an employee for making a complaint against the work performance of the company's CEO, has been order to pay over $150,000 in compensation and penalties, plus interest. The decision confirms the trend towards a broader approach as to what may constitute a single 'complaint related to employment' for the purpose of protection against adverse action, including termination, under the FW Act.

At the relevant time, Mr Fatouros was employed as a senior employee providing systems design and project management advice to customers of the company. He was involved in a number of media installation projects with the University of Melbourne and became aware that the projects had fallen behind schedule (through no fault of Mr Fatourous) and that a significant subcontractor, Eclipse, was owed approximately $150,000 from the company in unpaid invoices for project and other matters. Mr Fatouros believed that the company's CEO had informed Eclipse that their invoices would be paid, but took no action on this promise. On 9 August 2016, Eclipse left the sites.

On 11 August 2016 Mr Fatouros sent two emails regarding Eclipse's departure from the site, the first to the company's CEO outlining his grievances in respect of non-payment to the contractor including that he was 'really disappointed' by the CEO's handling of the situation. Mr Fatouros' second email was sent to other senior executives of the group stating that he did not believe that the CEO was acting in the 'best interests of the business', that his email was purely driven by the interests of the business and its employees, customers and suppliers and that 'if disciplinary action [was] the follow-on effect of [his] actions [here] then so be it.'

Mr Fatouros' employment was subsequently terminated, effective 22 August 2016 by way of letter dated 19 August. Despite the employer's argument that Ms Fatouros was terminated for poor performance of duties and unexplained absences from work, the termination letter stated that one of the reasons for the termination of employment was his email(s) of 11 August 2016, as the correspondence undermined staff and customers' confidence in the CEO.

Judge McNab was satisfied that Mr Fatouros' complaints, as to the timely payment of invoices relating to a project he was working on, arose directly out of the performance of his work and impacted on him as an employee, and as such his right to make the complaint (and the exercise of that right) constituted a workplace right for the purpose of the adverse action provisions of the FW Act. His Honour went on to find that the sending of the email(s) (ie. complaints) were a substantial or operative and immediate reason for Mr Fatouros' termination, and consequently the employer was held to have taken unlawful adverse action against him in breach of the FW Act.

Mr Fatouros was compensated just over $130,000 for the eight months he had been out of work, plus penalties ($12,500) and interest.

What does this mean for employers?

- Employers must be mindful of managing grievances, criticisms or complaints raised by employees, particularly against their superiors, as such matters are likely to constitute the exercise of a workplace right for the purposes of the FW Act.
- Employers need to be aware of the obligations and process requirements when dealing with employee complaints, noting the potential for significant financial and reputational consequences.

Poor implemenation of zero tolerance policy results in unfair dismissal

Condello v Fresh Cheese Co (Aust) Pty ltd [2018] FWC 2025

Fresh Cheese Co summarily dismissed a long-serving employee due to his non-compliance with policy on mobile phone usage in the workplace. The FWC found the dismissal to be harsh and unfair, emphasising that an employer must adequately inform and train staff about policies and procedures if they are to be relied upon in disciplinary matters.

Mr Condello was found to have used his mobile phone during his shift. On the following day, he met with the Human Resource Manager and Operations Managers and advised that he was dismissed with immediate effect. Mr Condello contested his dismissal by making an application to the FWC for unfair dismissal. Fresh Cheese Co contended the dismissal was not unfair given its policy against using mobile phones in production areas and that Mr Condello had knowingly breached the policy.

Mr Condello admitted that he was aware that mobile phones could not be used in the production area, however he did not consider the area in which he used his phone to be a production area. Mr Condello briefly spoke to his wife during his shift, as she was looking after her mother who has dementia, and he was concerned that her condition may have deteriorated. In the proceedings, Mr Condello alleged that the HR Manager was already aware of his mother in law's health issues, but this was irrelevant as the decision to terminate his employment had already been made to make an example to other staff. Mr Condello also gave evidence that he did not know he could be dismissed without notice for using his phone.

Fresh Cheese Co relied upon its policies and employee handbook to reinforce external requirements to prevent food contamination by items such as mobile phones. Fresh Cheese Co claimed that all staff are advised of this requirement at induction, it is set out in the handbook, and were reminded at a toolbox meeting held a week before this specific incident. It was contended that Mr Condello was dismissed for gross misconduct and a serious breach of company policy and guidelines, which was fair and reasonable given the extensive training provided to Mr Condello during his employment.

During the arbitration:

- The HR Manager conceded that he had no first-hand knowledge of Mr Condello's attendance at the toolbox meeting or whether he was given a copy of the polices and regulations for phone use. The HR Manager's evidence was that while training was provided to staff, there were no training records to confirm this had occurred;
- The Operations Manager gave evidence that the toolbox meeting took place because mobile phone usage was an issue, and that other employees had been observed to have their phones in their pockets in production areas. Those staff were advised that their phones had to be placed in their lockers. The Operations Manager stated that supervisors routinely used their own phones in the loading bay and storage areas.

The FWC found that mobile phones have been used in production areas and that Fresh Cheese Co had previously taken a lenient approach to mobile phone usage. It also found that there was insufficient evidence to establish that Mr Condello had received extensive training during his employment about mobile phone usage. It was accepted that Mr Condello was not aware that Fresh Cheese Co was taking a supposed 'zero tolerance approach' to mobile phone usage in the workplace.

The FWC was also satisfied that Mr Condello's conduct was isolated and brief, and he had no history of engaging in similar conduct. Accordingly, it was found that the conduct could have been readily resolved through counselling or a lesser form of corrective action.

Importantly, the FWC remarked that:

> *'A company cannot simply produce policies and procedures and expect to rely on them to defend a claim if there is no evidence to support that its employees have been made aware of those documents, trained in the content of the documents, and provided with access to those documents. The onus is on the employer to adequately operationalise their policies and procedures if they seek to rely on them to defend an unfair dismissal application.'*

Accordingly, the FWC determined that there was no valid reason for dismissal; Fresh Cheese Co had failed to establish its 'zero tolerance policy' on phone usage and therefore Mr Condello could not have been in breach of that policy; Mr Condello was not provided with a reasonable opportunity to respond prior to the decision to terminate his employment being made; and he was not afforded a reasonable opportunity to request or obtain a support person.

What does this mean for employers?

- Employers must ensure that employees are informed and adequately trained on workplace policies and procedures. An employer may not be able to rely upon an employee's breach of a policy or procedure if staff have not been informed of its implementation and trained on such matters.
- A fair and proper process must be followed when undertaking a disciplinary procedure. This includes affording an employee an opportunity to respond to disciplinary concerns and allowing them a reasonable opportunity to request or obtain a support person.
- Workplace policies and procedures should be consistently applied, with records made and retained to demonstrate that employees have been informed of, and trained in, such matters.

Uber drivers not considered employees, not protected from unfair dismissal

Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579

In a recent decision handed down by the FWC, an Uber driver who filed for unfair dismissal was considered not to be an employee and as such, the claim was dismissed. Commissioner Wilson thoroughly examined the nature and manner of the work performed, and was satisfied that enough factors weighed against the notion of an employee relationship to dismiss the claim. This decision provides some answers regarding the limitations of employment, contributing to a narrower understanding of who can be considered an employee.

Mr Pallage's relationship with Uber began in July 2016. This partnership was ultimately between Mr Pallage and Rasier Pacific Pty Ltd (**Rasier Pacific**) in the Netherlands, and Uber BV (**Uber**) in Australia. Mr Pallage made an application for unfair dismissal after the deactivation of his account in December 2017, which occurred due to two complaints amounting to breaches of community standards.

Whilst Rasier Pacific advanced the argument that Uber is a technology platform, unaffiliated with providing transport services, Commissioner Wilson refuted this by referring to a US judgment which stated that Uber 'does not simply sell software; it sells rides'. Although this did not ultimately sway the finding that Mr Pallage was an employee, it demonstrates the FWC is willing to recognise that Uber is not only a supplier of technology but also a supplier of a tangible transport service.

In finding for Rasier Pacific, Commissioner Wilson gave due consideration to many factors regarding the nature of duties performed by Mr Pallage.

The main aspects of Mr Pallage's work that gave rise to the decision that he was not an employee included:

- that he had control over the hours worked;
- he was not prohibited from performing work for others;
- he performed the work in a vehicle that he owned and maintained; and
- he had no other periodic wage or salary.

It was noted that Rasier Pacific exercised their capacity to dismiss Mr Pallage due to misconduct and that Mr Pallage was unable to delegate or sub-contract the work, which points strongly to a relationship of employment. However this was one consideration amongst many and ultimately was not meaningful enough to sway the parameters of what can be considered employment. Furthermore, the Service Agreement signed by Mr Pallage explicitly stated that he was not an employee of Rasier Pacific or Uber.

As such, Commissioner Wilson was not satisfied that Mr Pallage's relationship with Uber constituted employment, given the freedoms associated with being an Uber driver which lean more towards independent contracting. Consequently, it can be deduced for the meantime that Uber drivers will not be considered employees of Rasier Pacific or Uber, and are therefore unable to access unfair dismissal remedies.

What does this mean for employers?

- A contract for services, including a term that expressly states the individual is not an employee, will not in itself demonstrate an independent contractor relationship. The FWC, or a Court as the case may be, will instead apply a multi-factorial test to assess whether the person is subject to a contract of employment or a contract for services.
- In this case, the FWC was swayed by factors such as the individual's ability to control his hours, the fact he could work for other employers while working for Uber and that he provided his own vehicle. Factors that may weigh against a finding of an independent contractor relationship would be where an employer exercised control over the way in which work was to be performed, where an individual could not delegate or subcontract the work to others, or where an employer provided uniforms or branding to the individual that might suggest to customers that they person was in fact an employee of the employer.
- While this decision does provide employers with some guidance as to the factors which will be considered by the FWC, employers should seek specific advice regarding their independent contractor arrangements and what measures can be put in place to mitigate against a finding of an employment relationship.
- Further, we anticipate more challenges to other gig economy platforms such as Deliveroo and UberEats as foreshadowed by the Transport Workers Union.

Glossary

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
LSL	Long Service Leave
PAWS	Pension Advocacy and Welfare Service
RSL Qld	RSL 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
September Class	Friday 7 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