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Why keeping accurate time sheets and records of hours can be essential

FWO v Pulis Plumbing Pty Ltd & Anor [2017] FCCA 3013

In a decision handed down from the FCC, a message has been sent that to protect themselves in the face of a claim for underpayment, employers need to ensure they are keeping accurate records of hours worked and overtime earned. Following from the passing of the *Fair Work Amendment (Protections of Vulnerable Workers) Act 2017*, this case highlights both the penalties that may arise for failure to do so, but also the preference given to an employee's record of their hours where the employer has failed to keep such records. In handing down a $100,000 fine and providing for payment of over $21,000 by the employer individually, FCC Judge Grant Riethmuller emphasises the importance of maintaining time sheets and providing pay slips to employees.

In September 2014, a young man commenced what he believed to be a probationary period for his second year apprenticeship with Pulis Plumbing. While being paid for regular hours, he was working between 10 to 12 hours per day and not receiving payment for overtime. His superior, Mr. Pulis, told him he would be paid overtime, but that it "would be sorted out later" and paid separately.

Despite working 201 hours of overtime and receiving two cash payments, the employee was ultimately paid less than $2000 for overtime hours. In addition, while he understood he was completing the second year of his apprenticeship and being paid as such, he later discovered Mr. Pulis never registered the apprenticeship. On this basis, he was actually engaged as a labourer and was entitled labouring wages, which was not how his wage was being calculated. Paid an apprentice rate of $12.18 per hour, under the Company's Enterprise Agreement, he was entitled to $37.08 per hour for ordinary hours and up to $74.16 for overtime hours. As such, he had been underpaid over $26,000 in the three months he was employed. To make matters worse, despite being under the impression his employment was going well, with no reprimands for conduct or skill, at the end of the probationary period his "skills and attitude" were criticised. He was consequently offered another three month trial, or a reference if he chose to terminate his position and chose the latter.

After ceasing employment, the employee contacted Mr. Pulis on several occasions politely requesting the payment of his outstanding wages, including overtime. Mr. Pulis ultimately responded saying, "Seriously, f*** off. [I'll pay you] when I'm ready." The matter was escalated to the Fair Work Ombudsman and action taken. The FWO decided to pursue the matter in part, due to previous issues with Pulis Plumbing that put them on notice to comply with workplace laws, but also given the company's refusal to co-operate and rectify the alleged underpayment. In a statement on the FWO's website, it also emphasised that the FWO "treats the underpayment of young workers particularly seriously" and is concerned about the treatment of vulnerable young people seeking to become qualified in a trade.

Finding that Pulis Plumbing contravened a number of provisions in the FW Act, including failure to pay overtime rates, holiday rates, personal leave, annual leave, travel allowance and meal allowance, Judge Riethmuller made some pertinent comments that act as a warning for errant employers. Finding that Pulis Plumbing failed to produce records, provide payslips, and to make and keep records, he relied on the diary notes of the employee in determining the employee's hours and the monies owed. Pertinently, he stated "if the employer fails to keep timesheets and provide payslips the employer has the burden of disproving an employee's claim for hours worked and payments made". While Pulis Plumbing rectified the underpayments following the involvement of the FWO, the Judge found their conduct to be an "outrageous exploitation of a young person", particularly given the difference between the amounts paid and owed. Worse than underpaying, they also promised the employee an apprenticeship that did not eventuate. These factors played a role in considering the penalty, as did the absence of an apology or statement of regret. As a result, Judge Riethmuller ordered that Pulis Plumbing pay a penalty of $100,000 and Mr. Pulis – being involved in each of the contraventions – to pay a fine of $21,500 to the Commonwealth within 90 days.

What does this mean for employers?

- Payslips, timesheets, and records of hours have a real and practical importance, as well as being required by the FW Act
- It is essential for employers to keep time sheets and provide payslips, as they will have the burden of disproving an employee's claim about hours worked and payments made
- In the absence of employer evidence of time and hours worked, the Court will have regard to and rely on those kept by an employee

Poor use of HR department results in reinstatement

Ballam v Pilbara Iron Company (Services) Pty Ltd T/A Rio Tinto Iron Ore [2017] FWC 6248

Unsatisfactory HR investigations may lead to reinstatement for employees in unfair dismissal claims where the size and sophistication of the employer would suggest an appropriate process should have been undertaken. This was discovered by Rio Tinto Iron Ore (Rio Tinto), when it had to reinstate an employee mechanic, Mr Ballam, following unfair accusations of safety breaches while operating machinery on site. While since appealed, quashed and remitted for rehearing on the basis of a "significant error of fact" regarding valid reason for the dismissal, it reinforces the necessity of collecting accurate and unbiased information when investigating alleged breaches of conduct, as well as appropriate consideration of all surrounding circumstances before entertaining the option of dismissal.

As a condition of his employment, Mr Ballam was required to comply with the *Iron Ore (WA) Isolation Regulations* (***Regulations***) and the *Life Saving Commitments* (**Commitments**). Following a workplace fatality in mid-2016, Rio Tinto revised the Regulations and Commitments. Mr Ballam was alleged to have breached the revised Regulations and Life Saving Commitment on three separate occasions on 1 December 2016 by placing himself in the footprint of the Grader, the shadow cast by the Grader when the sun is directly overhead. His conduct was reported and a Safety Investigation was conducted. This included a re-enactment of the alleged events, but did not involve Mr Ballam in this re-enactment. Ultimately, it suggest Mr Ballam needed re-training in regards to compliance with the safety obligations. The materials were provided to the HR Department who then arranged to meet with Mr Ballam.

In responding to the allegations put to him in a first meeting with the HR Department, Mr Ballam admitted to some of the accusations made against him, and was invited to advise Rio Tinto of any mitigating factors as to why the employer should consider alternative disciplinary action. At a further meeting, he was advised that Rio Tinto was considering terminating his employment and was provided with an opportunity to address that prospect. Mr Ballam then requested a two week extension to seek legal advice in order to provide a response. An extension was only granted until the next morning, and "in the absence of further information", Mr Ballam's employment was terminated the following week, effective immediately.

On first hearing, Rio Tinto was found to have failed to consider all aspects of the investigation, admitting to dismissing the Safety Investigation recommendations. Additionally, Rio Tinto was criticised for failing to include Mr Ballam in the re-enactment of the event which led to an "inaccurate understanding of the severity of the incident". It was also held there was no valid reason for termination on the basis that Mr Ballam was found not to have breached the safety regulations on each of the three occasions alleged. Rio Tinto was found to be treating this breach with an inconsistent approach, given several previous cases more serious in nature did not end in dismissal. The dismissal was ultimately found to have been harsh, unjust, and unreasonable in light of the above, as well as its negative consequences on the economic and personal circumstances of the employee.

It was in regards to valid reason in particular, that Rio Tinto lodged an appeal. They claimed that the Deputy President made a "significant error of fact" which resulted in the determination that there was no valid reason for Mr Ballam's dismissal on the basis of not committing all three alleged safety breaches. The Commission granted the appeal based on the notion it was in the public interest to do so, given the necessity of upholding "strict statutory obligations" to sustain a safe workplace particularly in regards to safety matters.

Irrespective of the appeal, the case highlights that as a large company with access to appropriate HR and employment law advice, Rio Tinto was expected to follow the appropriate process prior to dismissal and provide the employee with procedural fairness. The decision not to grant Mr Ballam's reasonable request to extend the time to seek legal advice was considered a disregard for basic HR requirements, which should be noted. Further, it provides insight into the factors that will be given consideration in the reinstatement of an employee.

The FWC held in the first instance that reinstatement was appropriate in the circumstances. It also gave consideration to section 391(2) of the FW Act, which provides a discretion to the FWC to determine if it is appropriate to make an order maintaining the employee's continuity of employment and continuous service with the employer. It considered it appropriate in the circumstances to make an order maintaining the continuity of the Mr Ballam's employment and continuous service with Rio Tinto. However, giving consideration to section 391(3) of the FW Act, which provides a discretion to determine if it is appropriate to make an order causing Rio Tinto to pay Mr Ballam an amount for the remuneration lost, or likely to be lost, because of the dismissal, it held it was not appropriate to make an order restoring remuneration lost, or reasonably likely to be lost, by Mr Ballam because of the dismissal giving consideration to the importance of safety in his working environment.

We will wait and see whether the reinstatement ordered as the remedy will be upheld or overturned on re-hearing and keep you posted as the matter progresses.

What does this mean for employers?

- It is essential to involve appropriate HR personnel when dealing with allegations of breaches of conduct and to consider requests by employee's for additional time to enable them to respond to the proposed reasons for dismissal
- Before dismissing an employee, ensure this course of action is proportionate to the severity of the offence

Relief regarding the requirements for an extension of time

Lin v Woolworths Limited [2017] FWC 4019

On appeal, a decision accepting what were described as exceptional circumstances permitting an unfair dismissal application lodged 164 days out of time to proceed has been quashed by the FWCFB, reassuring employers that the bar to such an application proceeding is still a high one. In the original decision, giving consideration to a combination of factors, including 'significant' mental illness; misunderstandings regarding the scope of an anti-bullying complaint previously lodged; and lack of awareness regarding the ability to lodge an unfair dismissal, in the first instance, Commissioner Wilson permitted employee, Ms Lin, to continue her claim against her former employer, Woolworths well after the 21 day post-termination timeframe.

Ms Lin's employment with Woolworths began in May 2014, however, issues arose after the appointment of a new manager in October 2015. After making a complaint regarding reduction in her rostered work hours, Ms Lin was engaged in a 'difficult interaction' which culminated in her being escorted from her workplace by police. She was then reassigned to various stores and appointed a psychiatrist to assess her mental health. Following a further incident in October 2016 with another employee, Woolworths stood Ms Lin down and began an investigation into potential workplace breaches, which it attributed to Ms Lin's deteriorating mental health. In December 2016, following further discussions, Ms Lin signed a Release Agreement and resignation letter, thanking Woolworths for her employment opportunities, which she subsequently alleged Woolworths coerced her into doing, telling her she would be terminated if she did not resign.

The FW Act provides at section 394(3) that a further period may be provided for an unfair dismissal application where there are exceptional circumstances, taking into account: the reason for the delay; whether the person first became aware of the dismissal after it took effect; any action by the person to dispute the dismissal; the prejudice to the employer; the merits of the application; and fairness between the person and other persons in a similar position. In this context, it is well established that exceptional circumstances for the purpose of an extension of time are those which 'may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.' This can consist of a single event or multiple, combined events, however the standard is high and the longer the delay, the harder it is to satisfy.

In this matter, the Commission considered the following three issues as resulting in 'exceptional circumstances' lending towards granting the extension of time:

1. Ms Lin's significant mental illness, which the Commission found was 'significantly beyond the norm' and which Ms Lin stated stemmed from her employment with Woolworths. This included admission to a psychiatric hospital in April 2017 for a period of ten days;

2. Ms Lin's incorrect belief that an anti-bullying application lodged in October 2016, prior to her dismissal, would also assess her dismissal. This was accepted by the FWC as being partly due to the limited English language skills of Ms Lin and her father, who assisted her with the application. The claim was dismissed in June 2017, as she was no longer employed by Woolworths at the time and had no other matters before the FWC.; and

3. Ms Lin's limited knowledge of her rights and legal options – only become aware that she could lodge an unfair dismissal application while she was in hospital for her mental illness in April 2017. Whilst ignorance of the law is not usually a valid reason for a delay, when combined with the other two factors it contributed to there being sufficiently unusual circumstances that were exceptional.

In line with section 394(3), the FWC also appropriately considered whether Ms Lin became aware of her dismissal when it occurred, any action taken by her to dispute the dismissal, any prejudice that will be experienced by Woolworths for the delay and granting of an extension, the merits of the unfair dismissal application and the fairness between Ms Lin and other persons in a similar position.

In regards to the merits of Ms Lin's unfair dismissal claim, Commissioner Wilson held it was not open to the FWC, to make a finding regarding the likely outcome of the unfair dismissal application. Whilst both parties presented conflicting evidence, oral evidence supported Ms Lin's assertion that she was coerced into ceasing her employment and, as such, there was a potential unfair dismissal. Overall, none of these factors were determinative of the outcome of the case, with Commissioner Wilson holding that they had a neutral impact. Ms Lin was granted an extension of time and the application was returned to the general unfair dismissal list.

Woolworths appealed the decision, arguing that Commissioner Wilson erred in exercising his discretion under section 394(3) because he did not find one factor convincing him there was an acceptable reason for the delay, but relied on a cumulative effect of the three factors outlined above. Woolworths submitted the Commissioner allowed irrelevant factors to guide him (being the ignorance of the FWC's functions and time limits) and failed to take into account material consideration of Woolworth's account for the entirety of the period of delay. Further, that too much emphasis was placed on Ms Lin's medical evidence, despite an objection that proper medical evidence should have been provided.

The FWCFB allowed the appeal, finding the Commissioner had erred in combining the three reasons referred to and had no proper basis to do so. Further, that sufficient weight was not given to relevant factors where required. In a manner reinforcing that exceptional circumstances are required to grant the application, it consequently quashed the decision and re-determined the matter. Having taken into account the factors referred to in s.394(3)(a) to (f) of the Act, it was not persuaded that there were any exceptional circumstances warranting consideration of whether it should exercise its discretion to allow a further period within which an unfair dismissal remedy could be lodged by Ms Lin.

What does this mean for employers?

- The longer the delay in filing an unfair dismissal claim, the harder it is for an applicant to establish exceptional circumstances sufficient enough to permit the granting of a time extension. The bar for acceptance of such a claim remains a relatively high one.

- Employers should be conscious of the timeframes required and ensure that where the application is made out of time, it is challenged. SIAG can assist in ensuring such a challenge is appropriately made.

Reassurance two separate roles doesn't add up to one entitlement

Lacson v Australian Postal Corporation [2018] FCCA 51

For employer's engaging one employee in two distinct and separate roles, commenced at different times and subject to different wage rates, this case provides reassurance that the roles and hours will not be considered cumulatively for the purpose of calculating overtime and similar entitlements. Considering the employment of Mr Lacson, who was engaged both as a Postal Delivery Officer (PDO) and Postal Services Officer (PSO) for Australia Post, the FCC held that it was possible to hold two separate and distinct roles under one enterprise agreement, irrespective of whether there was a multi-hiring clause or not.

In 2002, Mr Lacson's employment as PDO commenced with him working at the Collingwood Post Office, undertaking duties including sorting mail, working mornings from around 6:00 am until 9:00 am. In 2004, he took the role as PSO at the Melbourne Parcel Facility in Sunshine West. In this role, Mr Lacson's duties included loading and unloading bulk mail and parcels with a forklift, amongst other things, working afternoon and evening shifts, usually from 3:30 pm. until 7:30 pm. In 2010, as a result of a new HR/payroll system, Australia Post assigned employees with multiple jobs a new personnel number for their second or third jobs. Consequently, Mr Lacson was issued with a second personnel number for the PSO role.

Mr Lacson claimed that Australia Post owed him over $220,000 in overtime, rest relief, and meal allowance payments on the basis that his employment in two roles should be dealt with cumulatively. He based his argument on the facts that both roles were covered by the same successive Enterprise Agreements and that the Agreements did not provide for multi-hiring. Referring to section 52 of the FW Act, that provides when an agreement will cover an employee, he contended it is apparent that where there are two engagements under different enterprise agreements, they will not be dealt with cumulatively, but where they are covered by the same enterprise agreement, that should not be the case. He argued the roles could only be treated separately if they were treated as separate arrangements covered by different industrial instruments.

Giving consideration to the principles of interpretation of enterprise agreements, the FCC found that section 52 of the FW Act does not preclude an enterprise agreement applying to one particular employment and to a different employment undertaken by the same employee with the same employer. Rather, referring to the explanatory memorandum supporting the FW Act, the FCC determined that if an employee has more than one job, each job is treated separately in determining the affect of an award or agreement on the employee's entitlements in relation to each job.

In this case, the FCC focussed on the distinctions between the two roles, namely the physical separation of the roles, being 16 kms apart and on opposite sides of the Melbourne CPD, the difference in duties of the roles and the provision of different pay slips and personnel numbers for each role. The FCC stated it was clear from the facts that the engagements were separate and the subject of two distinct contracts of employment with no intention to give rise to one engagement. On that basis, Judge McNab ascertained that Australia Post was not in breach of the EA in failing to aggregate the hours worked in each position occupied by the applicant. Accordingly, Mr Lacson's application claiming aggregated overtime entitlements was dismissed.

The case provides guidance for employers who commonly engage employees in multiple roles with no intention to aggregate the employment for the purpose of entitlements. Where previously this scenario may have been avoided at all costs, the case assists in providing guidance as to how to enter into such an engagement without the associated risks. Namely, ensuring the two engagements are separate and distinct and under two contracts of employment.

What does this mean for employers?

- If a single person is employed under two roles within your organisation, it is beneficial to treat these positions as distinct in order to not accrue excess overtime entitlement
- Ways to distinguish the roles under one employee include:
  - Having multiple EAs which apply differently to each role
  - Different hourly wages
  - Distinct personnel numbers
  - Separate payslips

23 Redundancies did not amount to major workplace change, court says consultation not required

Australian Nursing and Midwifery Federation v Bupa Aged Care Australia Pty Ltd [2017] FCA 1246

The Federal Court recently found that an employer did not have to consult about 23 redundancies. In response to a lack of funding, the employer sought to abolish these positions. In accordance with the consultation clause of the enterprise agreement and the evidence submitted the court was satisfied that the effect of the redundancy did not amount to a major workplace change, and therefore there was no requirement for the employer to consult.

Employing 53 Care Managers and 25 Clinical Managers across 26 aged care facilities in Victoria, as a result of a restructure Bupa sought to abolish these positions and introduce 55 Clinical Care Managers in their place which would result in 23 position redundancies. The operation of the aged care facilities is largely dependent upon government grants, in response to funding cuts staffing levels were sought to be reduced at night which lead to the decision to abolish the two said positions and appoint the Clinical Care Manager.

ANMF sought interlocutory and final orders to prevent Bupa from enacting the proposed restructure abolishing the Care Manager and Clinical Manager positions, and further orders to prevent Bupa from taking the steps to introduce the Clinical Care Manager role within its nominated facilities. The ANMF contended that Bupa had contravened section 50 FW Act by reason of breaching clause 7, consultation regarding major workplace change, of the Bupa Care Services, ANMF and HSU Victorian Enterprise Agreement 2013 (the Agreement) by failing to consult with impacted employees regarding major workplace change.

Pursuant to clause 7 of the Agreement, Bupa is required to consult with employees where it has made a decision to introduce a major change to production, program, organisational structure or technology in relation to its enterprise and the change is likely to have a significant effect on employees. Bupa must notify the relevant employees of the decision to introduce the major change as soon as practicable discussing the introduction of the change, the effect of the likely change and measures taken to avert or mitigate the adverse effect. Notably, a major change is likely to have a significant effect on employees if it results in the termination of employees or a major change to the composition, operation or size of Bupa's workforce or to the skills required of the employee.

The threshold question for the Court to consider was whether the consultation provision of the Agreement had been triggered insofar as determining if the resulting redundancies constituted a major workplace change.

ANMF accepted that the mere fact that forced redundancies would occur as a result of the proposed decision does not automatically amount to a 'major change'. However, the ANMF alleged that the redundancies were a major workplace change because of the large number of redundancies and the seniority and operational importance of the roles. ANMF further submitted that the proposed restructure would affect supervisory functions, contending that registered nurses who work closely the Clinical Managers would lose this consultative relationship. However no evidence was led in support of this position.

BUPA contended that the redundancy of 23 positions out of over 3000 employees did not constitute a major workplace change. Bupa gave unchallenged evidence that whilst the amalgamation of the two roles would result in a reduction in head count, Bupa contended that the proposal would not have an impact on the care of their residents, their safety and well-being, or the safety and well-being of their staff.

Bupa gave unchallenged evidence that the purpose of the restructure was to reduce the administrative burden on employees. The amalgamation of the Care Manager and Clinical Manager positions would see that the administrative duties of these roles would be reallocated to Administrative Officers and General Managers, dependent upon the complexity of the administrative task, with the intention that the Clinical Care Manager would remain wholly focused on the residents.

In determining whether the restructure would result in a major change, in accordance with the meaning set out in the Agreement, the Court referred to the decision of *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18 where several points were considered in determining what constitutes a major change:

- The total number of employees that are to be made redundant;
- The seniority and importance of the employees in the entities operations;
- The extent to which the employees work in an integrated or disconnected manner; and
- The consequence for continuing employees of the redundancies and consequent terminations.

O'Callaghan noted that the ANMF did not adduce any evidence about the possible impact of the decision "more broadly", and that, on the contrary, all evidence before the Court was unchallenged by the ANMF suggesting that Bupa employees were unlikely to be significantly impacted by a major change.
The Federal Court dismissed ANMF's application, satisfied that on the evidence before the Court the proposed restructure did not amount to a major workplace change and followed that the consultation clause of the Agreement had no application in this case.

What does this mean for employers?

- This decision does not give employers a green light to initiate redundancies without consulting with employees and their representatives. This case turned on the evidence, much of which was unchallenged by the ANMF. Had the ANMF been able to produce evidence that the redundancies would have had a significant impact on employees more broadly, it is likely that the consultation clause in the Agreement would have been triggered and the employer would have had an obligation to consult with employees and their representatives about the impact of those redundancies.
- As a means of best practice, when conducting redundancies employers should comply with any consultation obligations provided for in their relevant industrial instruments. Employers should consult with all affected employees, and their representatives if appointed, discussing the impact of any such proposed restructure prior to implementing any workplace change.
- While the decision serves as a reminder that redundancies may not constitute a 'major workplace change' for the purposes of triggering consultation obligations under industrial agreements, employers should be mindful to carefully evaluate and assess whether consultation obligations are triggered, particularly having regard to the impact on other employees more broadly.
- The decision also deals with the issue of how far employers have to go to 'recognise' employee representatives in consultation. The Court found there was no obligation imposed on the employer to consult separately with the ANMF or to separately invite the ANMF to meet with its employees. Instead, if an employee appoints a representative for the purposes of consultation, the employee may invite the representative to a meeting or ask that information be shared with their representative, but there is no obligation on the employer to invite a representative or provide information to that representative regardless of the wishes of the employee.

Reliance on the small business code does not excuse absence of a valid reason

Trialonas v Steric Solutions Pty Ltd [2017] FWC 5068

Being a small business will not be enough to avoid a finding of unfair dismissal, in the absence of relying on a valid reason, as found out by small business, Steric Solutions when employee Mr Trialonas, a yard hand, was dismissed for inappropriate conduct. In a finding that ordered Steric Solutions pay Mr Trialonas $25,765.22 in compensation, the Fair Work Commission (FWC) decision also provides guidance as to the appropriate invocation of the Small Business Fair Dismissal Code (the Code) and the appropriate handling of the dismissal process.

Mr Trialonas was dismissed over a series of events which transpired over the course of a week in December 2016, beginning with an argument with Ms Docherty, his superior, regarding machinery obstructing his pathway into the factory. He was promptly sent home after referring to her as a "backstabbing c***". However, after apologising to Ms Docherty and meeting at her home, he retained his job, because she "felt sorry for him". He attended work the next day and the incident was not mentioned. However, Ms Docherty felt she had made a mistake in allowing him to return to work and three days after the incident, her uncle and primary shareholder of Steric Solutions, James Docherty attended the site. At this time she informed him that Mr. Trialonas was an unsafe worker who "shouldn't be here anymore". Soon after, following a loud disagreement with Mr Docherty that made her cry, Ms Docherty approached Mr Trialonas and told him that she had been directed to dismiss him. Apologising to him for laying him off so close to Christmas, she asserted she had been forced into terminating his employment. The dismissal was said to be "for serious misconduct including but not limited to language, intimidation, bullying and serious safety breaches".

Steric Solutions claimed their dismissal was consistent with the Code and as a small business employer, they were therefore exempt from the unfair dismissal claim. Section 388 of the FW Act states that if immediately before the time of the dismissal the person's employer was a small business employer, and the employer complied with the Code in relation to the dismissal, the termination will be consistent with the Code. If consistent with the Code, a person will not be considered to have been unfairly dismissed. While it was held that Steric Solutions were a small business employer as defined in section 23 of the FW Act (having less than 15 employees), the FWC held they were not exempt, highlighting the actions required to attract such protection. The Code requires that a dismissal be based on a reasonable belief by the employer that an employee has exhibited sufficiently serious conduct worthy of termination. As established, this requires consideration as to whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Further, whether that belief was based on reasonable grounds. This second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. However, it is not necessary to determine whether the employer was correct in the belief that it held.

Steris Solutions submitted that Mr Trialonas was dismissed for serious misconduct resulting from his use of foul language. The FWC found that the reason for termination was not Mr Trialonas' vulgar language, but that James Docherty no longer wanted him as an employee. Although Commissioner Johns commented that the language was "beyond the pale" and "intended to disparage Ms Docherty" he did not accept that it's use was the reason for the dismissal. As such, it was held that Steric Solutions did not comply with the Code - simply wanting an employee gone does not constitute sufficiently serious conduct for dismissal and therefore they were not exempt. Proceeding to consider the unfair dismissal application, giving consideration to the dismissal, the FWC subsequently found it was harsh, unjust and/or unreasonable in the absence of a valid reason for termination. While this was considered in part to be the result of the absence of a dedicated HR specialist within the business, this did not excuse the dismissal.

The elements for consideration in an unfair dismissal application are set out at section 387 of the FW Act. Along with consideration, amongst other things, as to whether there was a valid reason for the dismissal or procedural fairness was afforded the applicant, section 387(g) requires consideration as to whether the absence of a dedicated human resources management specialist/expertise has impacted on procedures followed. Here, it was held that the absence of any such management did impact on the procedures followed, as no human resources specialist would have recommended Ms Dochery terminate Mr Trialonis in the manner that she did. However, this did not overcome consideration of the other factors, including the need for a valid reason.

Finding reinstatement inappropriate given the level of animosity that the proceedings had caused between the parties, the FWC determined compensation the best remedy and awarded $25,765.22. The figure was reached giving consideration to the likely length of Mr Trialonas' employment but for the dismissal. Given the absence of any written warnings and the otherwise unblemished nature of Mr Trialonas' employment, it considered his employment would have continued for at least 12 months.

What does this mean for employers?

- Consultation and compliance with human resources management in terminations will always be of assistance. While the absence of such dedicated specialists is a consideration in the determination of an unfair dismissal application, it will not overcome other factors, such as the need for a valid reason or procedural fairness.
- Ensure appropriate communication between employers – particularly superiors – in regards to the termination of employees, specifically guaranteeing that termination is based on a valid reason irrespective of differing views regarding the employee in question.
- In order for employers to comply with the standards of the Code, dismissals must be based on a reasonable belief that an employee has displayed sufficiently serious conduct that is worthy of termination.

FWC ruling underlines importance of proper drug testing processes

Harding v MMG Australia Limited [2018] FWC 594

A recent decision by the FWC, provides a warning to employers seeking to rely upon their drug and alcohol policies for the basis of termination: while a zero tolerance approach may be maintained in safely critical environments, it will not excuse the requirement for testing to be validated, preferably via application of the Australian Standard for drug testing to strengthen the integrity of the process.

The employer operated an underground metals mine, at which the employee – who had been employed at the mine since 2008 - held the primary responsibility of Charge-Up activities (ie. explosives use). A zero tolerance drug and alcohol policy ("Policy") was in place at the workplace and was understood by employees on site.

In May 2017, the employee failed a random drug test on site and was immediately suspended, on full pay, pending the outcome of his results. Several days later, the National Association of Testing Authorities (NATA) confirmed a positive result for cannabis. In evidence, the employee admitted to "*smoking a joint of marijuana while socialising with friends*" outside of work time. Prior to returning to work he had taken a drug test at home, purchased from the local chemist, that returned a negative result – he did not disclose his drug use to the employer prior to re-commencing work.

Following consideration of the employee's response to the allegations of serious misconduct put to him, being the breach of the Policy, his employment was terminated and he was paid 5 weeks' in lieu of notice.

The employee claimed that the drug testing process undertaken by the employer was invalid because it failed to comply with the applicable Australian Standard – despite their Policy indicating that standard would be applied. In his decision, Commissioner Lee warned that whilst *"compliance with the Australian Standard is voluntary, not mandated. A failure to comply with the Australian Standard means that confidence in the testing process may not be ensured and the integrity of the testing process cannot be taken for granted."* Notwithstanding, although there were several breaches of the Australian Standard by the employer, the Commissioner ultimately held that none of these gave rise to concerns regarding the integrity of process undertaken by it.

Commissioner Lee found that there was a valid reason for termination of the employee's employment, being his failure to follow the employer's lawful and reasonable direction to be free from illicit drugs in circumstances where the workplace was safety critical.

In considering the mitigating factors put forward on behalf of the employee - his otherwise unblemished work record, and the home self-test - the Commissioner found that that the employee was "*foolish to rely on the self-test*" and return to work inside the period where metabolites could still be detected. The employee acknowledged that had the option to disclose his drug use to the employer prior to returning for work, but elected not to do so. The circumstances, where the employee was aware of the option and agreed the likely outcome would have led to him being unable to work until he tested negative (but not necessarily termination), weighed against a finding that the dismissal was disproportionate, harsh, unjust or unreasonable. Ultimately, the mitigating factors were not significant enough to outweigh the seriousness of the employee's breach and the application was unsuccessful.

What does this mean for employers?

- Compliance with the Australian Standard for drug testing will ensure integrity of the testing procedure, and assist employers to defend any subsequent termination based on the test results
- Maintaining a zero-tolerance approach to illicit substances will be considered reasonable for employers dealing in safety critical environments

No leave required to obtain legal advice in the lead-up to a hearing

Stringfellow v Commonwealth Scientific and Industrial research Organisation T/A CSIRO [2018] FWC 1136

The issue of obtaining leave to be represented by an external lawyer in FWC proceedings has received substantial consideration of late, but the FWC has recently confirmed that no such leave is required to obtain legal advice in the lead up to a hearing. As such, employers should be reassured that obtaining legal advice to present their best case is permitted and appropriate.

Section 596 of the FW Act sets out the provisions requiring a lawyer or paid agent to seek permission for a party to be represented in FWC proceedings. In general, and pursuant to section 596(2), the FWC will grant permission for a person to be represented if it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter, or it would be unfair not to allow the person to be represented because the person is unable to represent themselves effectively, or taking into account fairness between the parties. In October 2017, the decision of *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 considered section 596 and reinforced that a lawyer was unable to assist a party to present their case without permission. It also held that permission was not limited to court room advocacy but extended to all areas of representation before the FWC. It did not permit a solicitor to sit beside its client to assist them as they presented the case, holding that leave was required for such assistance. The decision has given rise to significant commentary and increased contention between parties where legal representation is sought. Nevertheless, parties should still appropriately seek legal advice in matters, such as those relating to an employee's potential termination and management of dismissal matters, prior to proceedings and seek leave to be represented to put their best case forward.

This ability to seek legal advice prior to proceedings was reinforced in a recent finding of Deputy President Clancy (DP Clancy) of the FWC, which confirmed the assumption that obtaining legal advice in the lead-up to a hearing does not constitute representation for the purposes of the FW Act. Rather, both parties are entitled to seek legal advice preceding a hearing.

This decision was made following an application by Dr Stringfellow for unfair dismissal by his employer, CSIRO. Dr Stringfellow argued that CSIRO should not be permitted to obtain legal advice for the Mention Hearing and Submissions for the unfair dismissal proceedings. He argued that given CSIRO have both a large human resources division and in-house lawyers, allowing them to obtain external legal assistance weighed against the notion of fairness, particularly given Dr Stringfellow was self-represented. CSIRO disagreed, arguing representation was required given the lack of capacity their internal resources had to deal with the matter. Further, they asserted that the FWC would benefit from the presence of legal counsel, aiding the efficiency of the process leading up to the hearing.

In considering the application, DP Clancy noted that legal representation at the hearing itself would require parties to seek permission from the Commission. However, he held this provision does not extend to seeking legal advice prior or even after an application is made to the Commission. The case delves into the meaning of Rule 12(2) of the FW Rules which provide that a person may be legally represented without permission where they are preparing a written application or submission in the matter; lodging the application, written submission or other document, or corresponding with the Commission in relation to the matter. However, the other side may seek a direction that they not be so represented. While it noted that Dr Stringfellow may seek directions by the Commission under Rule 12(2) of the FWC Rules to require CSIRO to seek permission for obtaining legal advice in regards to written applications, submissions, correspondence, or participation in conciliation or mediation, his application for this was denied by DP Clancy. Given the circumstances, being that CSIRO simply sought legal advice preceding the hearing, and not for the hearing itself, DP Clancy saw no reason to depart from the regular position that this activity is permitted without leave. Dr Stringfellow's application was dismissed, reaffirming the position that legal advice prior to hearing is permitted and employers should continue to seek such advice and assistance.

What does this mean for employers?

- While employers should be aware of the recent considerations regarding representation before the FWC, an employer can ensure it puts its best case forward by seeking advice in matters that may result in termination of employment or other FWC proceedings. Further, it should not avoid seeking representation, as leave can still be granted in accordance with section 596 of the FW Act.
- As a general rule, it is well within the rights of the employer to obtain legal advice in the lead-up to a hearing at the FWC, and this will not be considered in the bounds of representation in the hearing itself.
- Employers may, if the Commission has granted an application by the employee, be required to seek permission from the FWC before seeking advice from a lawyer regarding written submissions, correspondence, and/or a conciliation or mediation process. However as seen in this case, the threshold for approving a permission requirement is a high hurdle.

Employer activates redundancy of pregnant employee too early: breaches FW act

Power v BOC Ltd & Ors [2017] FCCA 1868

An employee, Caroline Power, who was made redundant in the days leading up to her maternity leave has been successful in arguing that there was adverse action taken against her on the basis of pregnancy. BOC Ltd, defended its actions on the basis that the termination was a result of business restructuring. As discussed below, the FCC found BOC to be in breach of the FW Act, as they brought forward the date of the employee's redundancy from 12 November 2015 to 4 November 2015.

Caroline Power had been employed by BOC in Mt Isa, Queensland, for two years before she became pregnant. She informed her superiors when she heard of the news and was approved to begin her leave on 6 November 2015.

On 4 November 2015, Ms Power attended a meeting with Andrew Finnie, her superior, and Mr Vare, who held her position in Townsville and was to take on her responsibilities whilst Ms Power took her parental leave. During this meeting, Ms Power was handed a letter informing her that her position was to be made redundant. The nature of the relevant restructure involved two account management positions being merged into one.

Ms Power also claimed that her dismissal occurred because of her maternity leave and specifically, so that BOC could avoid having to afford her the generous entitlement to paid parental leave under its parental leave policy. She claimed she was singled out and had been discriminated against as a pregnant woman who would soon have family responsibilities.

The FCC had to consider whether or not the redundancy was genuinely as BOC claimed. They held in favour of BOC, on two grounds. The first was that in the 20 months since the redundancy, Mr Vare remained employed in the position of accounts manager for both Townsville and Mt Isa. The second is that there were eight redundancies made at the same time, which supported the view that Ms Power's termination of employment was part of a larger restructure. On the two grounds, the FCC was clear 'there is nothing before me that would, in any way, put any doubt into the genuineness of such a decision' to restructure.

Accepting that there was a genuine business case for the restructure, the next question was – why was Ms Power chosen? As above, her case was that she was chosen because of her pregnancy.

The two account positions for Townsville and Mt Isa were held by Mr Vare and Ms Power respectively. The Townsville account was much larger. Mr Vare also had considerably more experience with BOC – 15 years compared to Ms Power's 3 years. These were the reasons offered by the General Manager (Mr Newnham) as being relevant when selecting to retain Mr Vare ahead of Ms Power.

The FCC accepted that Ms Power was selected for reasons that did not infringe the general protections.

However, there was a third and final question in this case – why was Ms Power's position made redundant on 4 November 2018?

The evidence disclosed that the 8 redundancies were to occur on 12 November 2015. Ms Power's position was one of these. In relation to her position, the relevant decision maker decided that it would not be in her best interests to be brought back to the workplace 6 days after commencing maternity leave to be informed of the redundancy. Accordingly, a decision was made to bring the date of redundancy of her position forward to 4 November 2015.

On this issue of timing, it was held that BOC had engaged in adverse action for a prohibited reason – specifically bringing the date of a redundancy forward because Ms Power's was to commence a period of maternity leave (exercise of a workplace right, section 340).

In a separate penalty hearing, it was ordered that BOC pay Ms Power a total of $57,842.99, inclusive of $20,000 in penalties.

What does this mean for employers?

- Ensure appropriate consultation with HR department before commencing proceedings for termination of employment, including redundancies
- Adverse action is a broad concept and the full reach of a potential general protections claim should be considered before actions are taken

Prepare to update your whistleblower policies

Treasury Laws Amendments (Enhancing Whistleblower Protections) Bill 2017

Employers are being advised to get ready to update their existing Whistleblower Policy or prepare to introduce one as Parliament considers the *Treasury Laws Amendments (Enhancing Whistleblower Protections) Bill 2017* ('the Bill') and proposes to enact changes by 30 June 2018. Introduced in December 2017 and now the subject of further consideration, the Bill intends to provide consistent and enhanced whistleblower protections in the private sector, creating conditions whereby whistleblowers will have greater protections when disclosing a broader range of misconduct.

Resulting in the requirement for public and large proprietary companies to create and make available internal whistleblower policies, the Bill proposes to protect people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. Consolidating and broadening the existing whistleblower protection regime in the *Corporations Act 2001* (Corporations Act), the Bill proposes to extend coverage to the corporate, financial and credit sectors, and create a new whistleblower protection scheme through changes to the *Tax Administrative Act 1952* to afford greater protection to individuals who expose tax misconduct.

In operation the Bill intends to strengthen Commonwealth whistleblower protections in various ways, including by:

- Expanding the definition of "eligible whistleblower";
- Introducing broader scope of potential misconduct that may be the subject of a protected disclosure;
- Broadening conduct that may be the subject of a qualifying disclosure to include actual or suspected conduct;
- Making irrelevant 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, making the motivation of whistleblowers' irrelevant in determining whether a disclosure ought to qualify for protection;
- Allowing anonymous disclosures;
- Subject to various conditions in exceptional circumstances, 'emergency disclosures' made to the media or members or parliament may be justified;
- Improving access to compensation for whistleblowers who suffer damage as a result of victimising conduct; and
- Requiring public companies and large proprietary companies to create, and make readily available, internal whistleblower policies.

As the draft explanatory memorandum states that the proposed regime is intended to apply from 1 July 2018, affected companies need to be proactive to ensure compliance. This includes complying with the proposals by updating policies to:

- Detail the protections available to whistleblowers;
- Include coverage of present and past employees and family members, contractors and suppliers;
- Document a process for addressing protected disclosures and dealing with them in a reasonable time; and
- Outline the intended fair treatment of employees referred to in protected disclosures or to whom the disclosure is made.

SIAG will continue to update you as the Bill progresses.

Greater enforcement measures and tougher penalties for the failure to pay superannuation

Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018

Employees have been put on notice that greater enforcement measures and tougher penalties for failure to pay Superannuation are on the horizon, if proposed draft legislation *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018* (the Bill) is passed. Intended to strengthen protections for employee's super entitlements, the draft Bill proposes to give effect to the Government's Superannuation Guarantee Integrity Package, announced by the Minister for Revenue and Financial Services in August 2017.

In operation, the legislation would introduces a range of methods to better modernise the system and Superannuation Guarantee enforcement measures. The Superannuation Guarantee rules are designed to ensure that employees have a minimum level of superannuation support through contributions by their employer during the course of their employment.

The key features of the proposed reforms include:

- Extending Single Touch Payroll technology to all employers, subject to passing legislation, commencing 1 July 2018 for employers with 20 or more employees and for those with fewer than 20 employees 1 July 2019. Consideration should be given to existing systems to ensure they align with Single Touch Payroll reporting.
- Empowering the ATO to issue directions to pay unpaid superannuation and undertake superannuation education courses in order to address employers who intentionally and repeatedly disregard their obligations and continuously fail to pay superannuation;
- Introducing criminal penalties permitting the ATO to penalise dishonest employers with up to 12 months imprisonment who defy direction orders to pay superannuation to their employees; and
- Allowing the ATO to disclose information about superannuation non-compliance to affected employees.

Kelly O'Dwyer, Minister for Revenue and Financial Services, has said that the measures contained within the draft laws are aimed at better supporting the ATO with more timely information to "support earlier detection and proactive prevention of non payment of superannuation that is rightfully owed to employee." The purpose of the amendments is to enhance compliance by providing the ATO with real-time visibility over Superannuation Guarantee compliance by employers. The amendments empower the Commissioner to issue orders to employers to undertake specific directions where the Commissioner is satisfied that there has been a failure to comply with making superannuation payments. The ATO Commissioner will only issue direction relating to serious contraventions by employers whose actions are "consistent with an ongoing and intentional disregard of those obligations".

SIAG will continue to update you as the Bill progresses.

Glossary

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

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

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

siag training : development

A WorkSafe Approved Training Course

WorkSafe VICTORIA

Health and Safety Representative Initial OHS Training Course

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

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

The learning objectives of the course are:

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

Entitlement

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

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

Time: 9am - 5pm

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

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

Refund policy

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

siag training : development

A WorkSafe Approved Training Course

Health and Safety Representative Refresher OHS Training Course

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

Throughout the year SIAG offers the HSR Refresher OHS Training Course (1 Day). This is a WorkSafe approved course, and can be run in groups at your organisation or for individuals as part of our public program held at SIAG's head office.

Entitlement

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

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

HSR Refresher OHS Training Course (1 day) 2018	
	$385 per person (plus gst)
February Class	Tuesday 13 February
May Class	Tuesday 29 May
September Class	Tuesday 4 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