The Advisor

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As we welcome our clients into the new business year, we take this opportunity to acknowledge the difficult start to 2020 that many are currently experiencing.

All at SIAG are shocked by the extreme conditions that firefighters are battling across Australia. The loss of life and injuries suffered by those brave firefighters, local communities and wildlife is deeply saddening, and our thoughts are with all of those - including within the SIAG network - affected.

SIAG will be making an initial donation to each of the fire services, and further donations to the national fund established to support families and individuals affected by the bushfires.

We encourage all of our network to give generously, where they can, and continue to support one another in the true Australian spirit.

Brian Cook and all at SIAG.

Personal leave test case

Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138

A landmark decision of the Full Federal Court has re-shaped the interpretation of personal leave calculation under the National Employment Standards ('**NES**'), finding that full-time and part-time employees are annually entitled to 10 days' paid personal leave irrespective of the pattern of hours worked.

The dispute between Mondelez Australia and employees at its Cadbury Tasmanian manufacturing plant concerned the proper construction of section 96(1) of the *Fair Work Act 2009* (Cth) ('**FW Act**'), which provides full-time and part-time employees an entitlement to 10 days of paid personal/carer's leave for each year of service. In this case, 12-hour shiftwork employees at the plant argued that the provision entitled them to ten 12-hour shifts of paid personal/carer's leave.

Both parties put forward competing arguments on how the word "day" should be interpreted in the context of the entitlement. The employees' argument centred around the ordinary meaning of "calendar day" and that the entitlement to personal leave is to compensate (and pay) the employee for the hours he/she would have worked, on that day, but for their absence. Therefore, the 12 ordinary hours of work completed by the shift workers should be counted when determining their personal leave entitlements - amounting to 120 hours of accrued paid leave per year of service.

In contrast, the employer argued that "day" should be construed according to its "industrial meaning" being, the employee's average daily ordinary hours based on an assumed five-day working week. For instance, an employee who works 36 ordinary hours per week works, over an assumed 5-day working week, an average of 7.2 hours per day - amounting to 72 hours of accrued paid leave per year of service.

Mondelez submitted that the position advanced by the employees would lead to anomalies in how different employees will be treated with respect to personal leave. For example two employees who work 36 ordinary hours per week, the first over 3 longer days and the second over 5 shorter days – would result in the first employee deriving a greater benefit (despite the same number of hours having been worked by the employees across the week).

The arguments put forward by Mondelez were ultimately rejected, with the majority of the Full Federal Court (2:1) finding that while a "day" of personal leave can be converted into hours at any time, how many hours of personal leave a "day" will convert into, depends on how many hours are worked (or would have been) on the day the leave is taken.

In making its decision, the majority noted that the purpose of section 96 of the FW Act is to establish a statutory form of income protection for employees who are ill, or to care for an immediate family or household member. This protection authorises employees to be absent from work without losing income for that working day.

The main points from the decision include:

- Personal leave accrues in "days" over a year of service.
- A "day" of leave refers to the portion of a 24-hour period that would otherwise be allotted to work.
- All permanent employees, irrespective of their shift pattern, are entitled to payments reflecting the base pay they would have received had they been able to work.
- If a partial day of leave is taken, the number of days in the employee's leave balance is reduced proportionally.

While the above reflects the current interpretation of the law, it is important to note that the decision is currently subject to High Court appeal. Submissions to the High Court are due in late January and February 2020, with a hearing not likely to be listed before late April 2020.

SIAG will keep all clients updated as to the outcome of the appeal.

What does this mean for employers?

- Employers should review their payroll systems to determine whether they accord with the current law in respect of calculating the accrual of paid personal leave.
- It is also important to keep in mind that, awards, enterprise agreements and contracts must always be read subject to the NES (noting the above interpretation of the NES).

Updates to Wage Theft Legislation

2019 saw an increase in Australian employers admitting to, or being caught, systematically underpaying their workers, and a growing number of Fair Work Ombudsman underpayment prosecutions.

The issue of employee exploitation has attracted a great amount of scrutiny in recent times, primarily due to a long line of wage theft cases that have become public in recent years; with large companies like Michael Hill, Domino's and 7-Eleven all admitting to underpaying employees. Most prominently, MADE Establishment, whose directors include celebrity chef and TV personality George Colombaris, admitted to underpaying 515 current and past employees a collective total of nearly 8 million dollars. The employees were reimbursed, and the company was ordered to pay a $200,000 contrition payment, a penalty labelled 'light' given the circumstances.

These recent matters have particularly focused on the accountability of individuals within the business and the trend has pushed both Federal and State governments to review the repercussions for those employers who exploit workers.

In early November 2019 the Senate launched the Inquiry into the Unlawful Underpayment of Employees' Remuneration. The inquiry is set to cover a range of issues, including how and why wage theft occurs, its cost to the national economy and whether it has become a 'cost of doing business' for employers. The committee is to report to the Senate by the last sitting day in June 2020

Industrial Relations Minister and Attorney General Christian Porter has been tasked with drafting legislation to deal with wage theft, which - as currently proposed - would amend the *Fair Work Act 2009* (Cth) to increase civil penalties and implement criminal sanctions for individuals of up to 10 years jail. Mr Porter has indicated that strong criminal sanctions and fines will send an 'unambiguous message' to employers who exploit vulnerable employees. However, those new penalties will likely be reserved for especially egregious breaches, with the aim to avoid employers being criminalised for 'genuine mistakes'.

Separately, the West Australian State Government has also begun addressing the issue of wage theft. In early 2019, the government announced an inquiry into the systematic and deliberate underpayment of wages or entitlements to workers in Western Australia. Following its completion and review, an Inquiry report was released on 6 December 2019, containing 28 recommendations to address wage theft in Australia.

In response to the recommendations, the WA Government has established a new wage theft website (*https://www.wa.gov.au/government/multi-step-guides/reporting-wage-theft-western-australia*) containing information for workers suffering from exploitation. The WA Government's proposed response to the inquiry also includes consultation with the Commonwealth regarding whether wage theft should be criminalised as well as possible federal measures designed to facilitate cooperation between State and Federal industrial inspectors.

SIAG will continue to update clients as further announcements are made.

What does this mean for employers?

- The Federal Government will likely introduce new legislation in the coming months that addresses and possibly criminalises the exploitation of workers.
- Employers should be receptive to any new guidelines surrounding worker exploitation and be aware of the appropriate practices to undertake.
- Employers should have well documented and structurally sound payment processes for their employees.

Mandatory Whistleblower Protection Policies Now In Place

The amendments to the *Corporations Act 2001* (Cth) ('**Corps Act**') as outlined in the last edition of the Advisor are now in force.

Now, not only must employers be compliant with provisions relating to qualifying whistleblower disclosures and protections for those whistleblowers, but certain employers (including public companies and 'large' proprietary companies) must have implemented a compliant whistleblowing policy effective from 1 January 2020.

A large proprietary company is a company that satisfies at least two of the following:

- has a consolidated revenue of over $50 million in a financial year;
- consolidated gross assets of $25 million or greater;
- employs at least 100 employees

A compliant whistleblower policy must include:

- The purpose of the policy,
- Who the policy applies to,
- Disclosable matters,
- Who can receive a disclosure,
- How to make a disclosure,
- The legal protections available to the discloser,
- Information on the measures in place to provide support and practical protection for disclosers,
- How the entity will handle and investigate disclosures,
- How the entity will ensure the fair treatment of individuals mentioned in and subject to the disclosure, and
- Information on how the policy will be made available and disseminated

The Australian Securities and Investments Commission ('**ASIC**') released Regulatory Guide 270 "Whistleblower Policies" to assist those affected employers to ensure that their policy complies with the requirements of the Corps Act. ASIC expects that while whistleblower policies must be robust, written in plain language and free of jargon, they should be drafted with consideration of the "nature, size, scale and complexity" of the business.

The Regulatory Guide includes best practice guidance for policy implementation by employers and outlines what ASIC expects a policy to contain can be downloaded from the ASIC website via the following link *https://download.asic.gov.au/media/5340534/rg270-published-13-november-2019.pdf*

What does this mean for employers?

- Employers should confirm whether they are required to have in place a whistleblower policy under the Corps Act and, where so, contact SAIG for assistance in drafting a compliant document.
- Whilst the ASIC Regulatory Guide goes beyond the mandatory requirements prescribed by the legislation, consideration should be had to the document when (re)drafting a compliant policy.
- Regardless of whether they are required to implement a written whistleblower policy, employers should familiarise themselves with whistleblower protections under the Corps Act and general protections provisions of the Fair Work Act 2009 (Cth) to ensure that employee complaints are appropriately managed

High Court ruling to constrain expression of political views

Comcare v Michaela Banerji [2019] HCA 23 (7 August 2019)

In *Comcare v Banerji*, the High Court of Australia considered whether the termination of a public servant who had anonymously posted critical political commentary on Twitter was unlawful.

Background

Michaela Banerji was an employee of the Department of Immigration and Citizenship. The Australian Public Service ('**APS**') Code of Conduct and APS Values contained provisions which required employees to act honestly, impartially and to avoid conflicts of interest.

Between 2006 and 2012, Banerji posted over 9000 anonymous tweets (primarily outside of work hours and from her personal phone) which were critical of the Department and its immigration policies. The Department asserted that this conduct breached the APS Code and terminated her employment in 2013.

Banerji subsequently lodged a claim for workers compensation claiming that her termination had aggravated an underlying psychological condition. Comcare refused the claim on the grounds that her injury was a result of "reasonable administrative action taken in a reasonable manner" and therefore excluded from coverage (and compensation) under the relevant legislation.

The Administrative Appeals Tribunal ('**AAT**') set the decision aside, finding that the APS Code "unacceptably trespassed on the implied freedom of political communication". Comcare then appealed to the Federal Court with the matter ultimately referred to the High Court for determination.

High Court decision

In August 2019 the High Court overturned the AAT decision and held that the termination constituted 'reasonable administrative action' and was therefore not unlawful (consequently, Comcare was not liable to compensate Banerji).

The primary issue for the High Court to determine was whether or not the code unjustifiably burdened the implied freedom of political communication. The Commonwealth conceded that sections of the APS Code did impose such a burden, however the High Court found the burden to be justifiable, as:

- The provisions of the Code were for a 'legitimate purpose' consistent with the system of representative and responsible government in the Constitution because they were attuned to the maintenance and protection of an apolitical public service" and are thus in the public interest, and
- The provisions were reasonably appropriate and adapted to achieve that purpose.

In reaching its decision, the High Court gave weight to the importance of the APS being professional and impartial. The fact that APS agencies were required by the *Public Service Act 1999* (Cth) to implement procedures regarding breaches of the APS Code and the appropriate sanctions was, also highly relevant.

Implications of *Banerji* for the private sector

Private sector employees cannot rely on an implied freedom of political communication. This was only available to Banerji because her employer was the Commonwealth – the APS Code and the Department's power to terminate her were contained in legislation.

Private employers should however be aware of other protections are available to employees under the *Fair Work Act 2009* (Cth). These protections include a prohibition on terminating employees on various grounds, such as political opinion. However, these protections do not extend to employees making public comments which may damage the commercial interests of the employer.

A similar set of facts to *Banerji*, but in a private context, recently arose in *Murkitt v Staysafe Security T/A Alarmnet Monitoring* [2019] FWC 5622. In this case, Murkitt criticised the directors of the company in a Facebook post and her employment was consequently terminated. In terminating Murkitt, the employer relied on a clause in her employment contract which stipulated that she was not permitted to intentionally do anything that might cause harm to the company.

The Fair Work Commission ('**FWC**') determined that the termination was valid as the Facebook post was critical of her employer. While the privacy settings on Murkitt's Facebook profile were strict, the FWC noted that this was irrelevant because "the fact the post became available to and the topic of conversation in the workplace is a sufficient connection."

Despite some key factual differences between *Banerji* and *Murkitt* a common theme underlies each decision – if an employee's social media use damages the employer's interests and conflicts the relevant company policy, this can lead to a valid termination.

What does this mean for employers?

Banerji and *Murkitt* confirm that employees have important obligations to employers to ensure their social media comments do not conflict with their employment duties. Employers should therefore:

- Conduct regular reviews of their core values and social media policies;
- Ensure that employees have a thorough understanding of the terms of their employment;
- Ensure that they understand the policy before investigating a potential breach, and;
- Carefully follow each step of the investigation process in order to be able to demonstrate that 'reasonable administrative action' had been taken in workers' compensation matters.

Procedural or technical errors in enterprise bargaining result in failure to approve agreement

Oakmoore Pty Ltd T/A EGR Extrusion [2019] FWC 7368 (24 October 2019)

The Fair Work Commission ('**FWC**') has confirmed the extent of it's discretion to approve enterprise agreements despite "minor procedural or technical errors" made in relation to certain pre-approval requirements, including the form of the notice of employee representational rights ('**NERR**').

The application for approval of the *EGR Extrusion Enterprise Agreement* ('**Agreement**') was dismissed on the basis that the NERR provided to employees departed from the form and content prescribed by the Fair Work Regulations in a number of important ways, so much so that the FWC could not be satisfied that the employees were not disadvantaged by the NERR.

The NERR issued to employees by the employer – most notably:

- had been edited to remove the standard paragraph informing employees of their ability to engage unions as their bargaining representative; and
- attached a separate form via which employees could nominate up to two of their fellow employees as their bargaining representative. The form did not contemplate the possibility of an employee nominating anyone outside of the company, such as a union, as their bargaining representative.

The FWC invited comment from both the employer and employee bargaining representatives in respect of the above changes to the NERR. The employer submitted that the workforce did not have any union coverage, and that as the workforce had not changed since the last negotiations, the same employee bargaining representatives were simply re-appointed in relation to the agreement negotiations.

Commissioner Simpson was not convinced that affected employees were unlikely to have been disadvantaged by the changes to the NERR, finding that the exclusion of the paragraph relating to the union's role in negotiations was a significant matter (noting that queries about union involvement had been previously raised by employees and there was a perception that it was discouraged).

The FWC further determined that the form pushed employees towards the conclusion that they could only nominate fellow employees as their bargaining representatives.

Application for approval of the Agreement was ultimately dismissed, on the basis that the changes to the NERR were not minor procedural or technical errors and were likely to have disadvantaged employees in the process.

What does this mean for employers?

- Employers should ensure that they issue the most current version of the NERR prescribed by the Fair Work Regulations at the time bargaining is initiated.
- Irrespective of whether there is any known union presence in the workforce, communications which limit employees' understanding of their rights in relation to bargaining representatives will be considered significant and likely to result in agreement pre-approval requirements not being met.

Failure to consult with employees results in $12,000 fine

Civil Air Operations Officers' Association of Australia v Airservices Australia [2019] FCA 1542

The Federal Circuit Court of Australia has fined an employer $12,000 for effectively forcing two employees to take annual leave during a designated shutdown period.

In September 2015 the employer, Airservices Australia, notified its employees of upcoming arrangements for the Christmas/New Year period, which included a 'shut down period' between 19 December 2015 and 3 January 2016. Relevantly, the program required that employees take annual leave during the 'shut down period', subject to any booked training.

Immediately prior to the shutdown period two affected employees expressed concern to management that the arrangements contravened sections of the relevant enterprise agreement. The employees did not receive a reply to their inquiry until after the conclusion of the shutdown period – during which the employees were placed on (forced) annual leave.

The applicable enterprise agreement provided that any annual leave program was to be determined and implemented in consultation with employees. During proceedings, the employer conceded that consultation with employees had not occurred in accordance with the terms of the enterprise agreement, but submitted that even if consultation had occurred, it could still have required employees to take annual leave in line with the employer's 'preferred plan', effectively creating the same outcome.

In his judgement, Justice Mortimer stressed that the purpose of consultations was to ensure that employers consider the views of employees and factor these views into its decisions, and found that – in spite of that purpose – the employer in this case, had consciously determined to ignore the employees' concerns and continue with the implementation of its annual leave program. The resulting effect was significant for the employees, as they were unable to take their recreation leave in accordance with their own plans.

In determining the appropriate remedy, Justice Mortimer acknowledged the employer's concession in admitting the contravention and further considered that it had, somewhat, acted in good faith by retrospectively compensating the employees affected having recredited them the 5 days' annual leave for the period.

Notwithstanding, the Court determined that there was a need to specifically deter the employer from future contraventions of the same kind, and imposed a $12,000 fine (which was ultimately payable to the applicant union).

What does this mean for employers?

- Employers should be familiar with the extent to which they may direct employees to take leave over designated shutdown periods and what prior consultation with employees may be required to take place.
- Consultation requires employers to engage with staff by bringing an open mind (capable of persuasion) to discussions and acting on the employee feedback received.

Importance of accurate employee records

Ghimire v Karriview Management Pty Ltd (No 2) [2019] FCA 1627 (3 October 2019)

A former cook and a guest worker at a hospitality business in Western Australia were awarded substantially higher compensation as a direct result of the reverse burden of proof imposed under section 557C of the *Fair Work Act 2009* (Cth) ('**FW Act**'). Under this provision, where an employer has failed to comply with its record keeping obligations, it has the burden of disproving underpayment allegations made by the employees.

Two former employers of Karriview Lodge ('**Karriview**') claimed that between December 2016 and January 2017, they had worked approximately 18 hours a day and had not been paid for their work. The employees' evidence of the hours worked consisted of handwritten schedules which they claimed were made contemporaneously during the period.

Records of the time worked by the employees were not kept by Karriview, and the employer was unable to confirm on which days each employee worked. Karriview submitted that the employees would not have worked more than 18 and 15 hours each per week, as there was an insufficient number of guests at Karriview to generate any more work.

At first instance the Industrial Magistrate found in favour of the employees awarding payment for some, but not all, of the hours claimed, on the basis that their evidence lacked credibility. On appeal to the Federal Court, the employees were awarded the full amount alleged to be owing - the central issue on appeal being whether the employer had properly discharged the burden of proof placed upon it under section 557C of the FW Act.

Ultimately, Justice Colvin found that Karriview had not discharged the statutory burden of disproving the allegations made in respect of hours and payment for hours worked, on the basis that:

- Karriview could not indicate which days each employee had worked;
- Karriview had no timesheets or other records to establish the employees' hours of work; and
- The employees provided consistent and detailed evidence regarding the hours they claimed to have worked.

The case demonstrates that in the absence of accurate employee records, an employer must (somehow) otherwise positively establish that hours claimed were not worked, before any attention is paid to whether the employee's evidence is credible.

What does this mean for employers?

- Employers should ensure they keep accurate records as required under the FW Act and Fair Work Regulations
- The absence of a fulsome employees records, will place a high burden on employers to disprove hours of work (and associated payments) claimed by employees under the FW Act.

Biometric scan objector's mis-steps deny him reinstatement

Mr Jeremy Lee v Superior Wood Pty Ltd T/A Superior Wood [2019] FWC 55095 (22July 2019)

Further to our previous article titled "Refusal to provide sensitive information for attendance not a valid ground for dismissal", the Fair Work Commission ('**FWC**') has declined to reinstate a worker who had previously been found to have been unfairly terminated.

The employee, Mr Lee, had been terminated for refusing to comply with the employer's new attendance system which required employees to provide biometric data by using a fingerprint scanner to log the beginning and end of their shift. The data was stored electronically and could be accessed by managers through an app on their phone.

The FWC considered whether this attendance policy was fair and reasonable and whether or not it breached the *Privacy Act 1988* (Cth) ('**Act**'). At first instance it was determined that Mr Lee's failure to meet the new attendance policy constituted valid grounds for dismissal. On appeal, the Full Bench found that Superior Wood's direction for Mr Lee to provide a fingerprint amounted to solicitation and was prohibited under the Act. As a result, it was held that Mr Lee could not be validly dismissed purely for this refusal.

Mr Lee claimed that his conduct prior to his dismissal had been courteous and he sought reinstatement on the basis that if the dispute could be resolved, he would be willing and able to continue his employment in the same manner as before. Mr Lee submitted that his reinstatement was appropriate because there has been "no serious or irrevocable breakdown" in the employment relationship.

Ruling on remedy, the FWC declined to reinstate Mr Lee on the basis that he had demonstrated a want to "continue to agitate" his concerns about the issue. Commissioner Simpson referred to Mr Lee's strong language relating to Superior Wood's director Mr Finlayson.

In materials filed with FWC, Mr Lee had referred to Mr Finlayson as "deceitful" and "dishonest" which contributed to the Commissioner's doubt as to likelihood of restoring trust and confidence to the employment relationship. Mr Lee argued that he was merely referring to Mr Finlayson's attempt to take his biometric data without informing him why he was doing so. Commissioner Simpson found that even in this context the comments were "unjustified", "inappropriate", and damaged the goodwill that might have otherwise existed between the parties prior to Mr Lee making the statements.

The Commissioner concluded that Superior Wood had a rational basis for loss of trust and confidence in Mr Lee and that this distrust was mutual. On this basis, it was concluded that a reinstatement order was inappropriate.

What does this mean for employers?

- The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee is necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.
- Whether there is a sufficient level of trust and confidence restored to make the employment relationship viable involves a consideration of the rationality of any attitude taken by the employer and employee in question.

FWC upholds sacking due to employee's abusive tirades and threats

Nicholas Ward v Great Southern Rail Pty Ltd [2019] FWC 5064

The Fair Work Commission ('**FWC**') has upheld the sacking of an employee for serious misconduct, finding his failure to follow a lawful and reasonable direction; and threatening and abusive behaviour towards two managers was serious misconduct and constituted valid reasons for the employee's dismissal.

Mr Ward was employed by Great Southern Rail Pty Ltd ('**GSR**'), as a Hospitality Attendant on The Ghan, a cross national passenger rail service operating between Adelaide and Darwin. On 11 February 2019, Mr Ward, while working, was approached by a passenger who informed him that another drunken passenger had alleged that Mr Ward had made a sexual comment about his wife. This distressed Mr Ward, who reported the incident to the train manager, and advised that he wanted an investigation to clear his name.

The train manager advised Mr Ward that the complaint was not credible; that the complainant had been drunk; and that the matter was not being taken any further. Accordingly, Mr Ward was to continue his normal duties, without the need for modification. However, Mr Ward retained concerns about the impact of the comment on his reputation, and became unwell.

On 14 February 2019, the Ghan stopped in Alice Springs. Mr Ward requested to be put on a tour guide shift, allowing him to get some fresh air, a request that was initially acceded to, but later denied by management. The withdrawal of the permission to take the tour, coupled with his concerns around the bullying treatment, caused Mr Ward to feel stressed and anxious.

Following a report that Mr Ward intended to make a complaint of bullying and harassment, a representative of HR, Ms Mathers, spoke to Mr Ward to obtain particulars of his claims. Mr Ward hung up on her. Shortly after this Mr Ward was advised that his infant child was unwell which heightened Mr Ward's anxiety and desire to return home. Mr Ward and Ms Mathers then exchanged a series of text messages culminating in Mr Ward being assessed by the train manager as unfit for duties, and being offered access to EAP. Mr Ward was directed to reboard the Ghan, but not to perform duties and instead remain in his cabin. Mr Ward refused to do so, insisting that GSR should fly him home.

Mr Ward became agitated with HR and made a series of rude, unprofessional and threatening comments to GSR's HR personnel, yelling and swearing at both representatives, leaving them both feeling scared and unsafe.

A disciplinary process was initiated, with Mr Ward invited to attend a meeting to respond to the conduct allegations against him. Mr Ward ultimately failed to attend the meeting and was subsequently dismissed. He then brought a claim for unfair dismissal.

FWC was to decide whether GSR had a valid reason to dismiss Mr Ward, and whether his dismissal was 'harsh, unjust or unreasonable' having regard to the circumstances in s 387 of the *Fair Work Act* (2009) ('**FW Act**').

Deputy President Anderson found that GSR's direction that Mr Ward re-board the train was reasonable in the circumstances, as there were no grounds objectively assessed that would warrant GSR taking the rare course of flying an employee home. Importantly, neither of the HR representatives had knowledge of Mr Ward's sick child, who was later hospitalised, prior to the Ghan's departure. However, GSR were criticised for not documenting their policy.

The Deputy President found Mr Ward's refusal to re-board the train constituted misconduct, and that the circumstances ie. the multiple requests made to Mr Ward to re-board, and the willingness of GSR to accommodate Mr Ward should he re-board) elevated Mr Ward's behaviour to that of serious misconduct.

Furthermore, Deputy President Anderson found that the abusive and threatening language directed by Mr Ward to the HR representatives constituted serious misconduct. Deputy President Anderson found that these were not isolated instances of abuse or threats and were not provoked or the product of a singular rush of blood. The effect of Mr Ward's actions was also noted; with both HR representatives left shaken and feeing unsafe as a result.

Whilst Deputy President Anderson noted the impacts of Mr Ward's dismissal, including the fact that he had a young child, FWC considered that these factors were not unique and did not outweigh conduct in breach of policy to sufficiently transform a dismissal for a valid reason into one that can be characterised, at law, as harsh.

What does this mean for employers?

- Employers should ensure they can produce clear, written policies for emergency situations and make sure employees are aware of such policies and when they apply.
- Employers should ensure that disciplinary procedures are conducted in a fair and reasonable manner, particularly in cases of dismissal where the employee is distressed or agitated.

Employees can't "demand" flexible working arrangements

Phillips v Integrated Medical Solutions Group Pty Ltd [2019] FWC 6225 (17 September 2019)

The Fair Work Commission ('**FWC**') has rejected a receptionist's claim that she was constructively dismissed when her employer refused to modify her hours and guarantee leave for school holidays.

In January 2017, Ms Phillips commenced employment as a casual medical receptionist, and later was converted to full-time employment. Ms Phillips' mother became terminally ill, following which the employee commenced unpaid leave in October 2018. In January 2019, Ms Phillips' mother passed away and she assumed responsibility and care for her 11-year-old sister.

In March 2019, Ms Phillips met with the HR Manager and advised, amongst other things, that she was ready to recommence work. She requested that her hours be changed from to 10am to 2pm, Monday to Friday and that she be guaranteed a week off on school holidays, and three weeks during summer holidays.

The HR manager declined her request, explaining that the medical practice required staff on opening and closing times, and employed several working parents who also required school holiday leave. The HR manager proposed three alternatives to Ms Phillips: return to her full-time role, accept casual employment or work part time 8.30am to 2.30pm, Monday to Friday. Ms Phillips replied to these proposals stating she was 'disheartened' by the HR manager's response and that her availability was 10am to 2pm, Monday to Friday.

Following a reiteration of the options available to her, Ms Phillips responded that she did wish to return to work, but only under the hours of 10am to 2pm, Monday to Friday. The HR Manager responded that the business was unable to accommodate Ms Philip's request and that if a response was not received by 17 May 2019, it would treat her employment as 'being at an end'.

In June 2019, Ms Phillips requested a separation certificate stating that her employed had been terminated; the reason for separation outlined on the certificate provided was that the employee ceased work voluntarily. Ms Phillips argued that she had not ceased work voluntarily but was instead dismissed, or, in the alternative, was constructively dismissed by the employer.

After consideration of the evidence and submissions by both parties, Commissioner Hunt stated that despite Ms Phillips' unfortunate circumstances the employer was under no obligation to accept her request for working hours of 10am to 2pm from Monday to Friday, and the school holidays off work. This finding was on the basis that the employer:

- had reasonably and professionally corresponded with Ms Phillips on several occasions about her request and the options as to reduced hours of work that it could accommodate; and
- did not unreasonably refuse her request for a flexible working arrangement, but rather it could not accommodate her request, and had 'met all of its obligations to respond appropriately to the flexible arrangement request'.

Regarding the issue of dismissal, the Commissioner found that the employer's conduct did not indicate an intention to bring the employment relationship to end, despite its correspondence of 17 May 2019, as it was clear that Ms Phillips had a substantive job to return to.

Furthermore, Ms Phillips was not forced to resign her employment, as the employer had offered various options for her to return to work, including returning to her substantive role.

What does this mean for employers?

- When presented with a flexible working arrangement request an employer should review their obligations under the relevant enterprise agreement or award, or default to the NES.
- The nature of the business and an employer's conduct is relevant to determining whether there has been a reasonable refusal of a flexible working arrangements request.

Guard awarded over $30k after sacking over drunk patient clash

Scott v Latrobe Regional Hospital [2019] FWC 5680 (6 September 2019)

The Fair Work Commission ('**FWC**') has ordered that a hospital compensate a former security guard after he was unfairly sacked over his treatment of a mental health patient attempting to leave the hospital. The case serves as a reminder of the need for employers to strictly follow their disciplinary procedures.

The security guard, Mr Scott, had worked at Latrobe Regional Hospital for more than 8 years as a permanent part time employee. In June 2018, Mr Scott and another security guard responded to a nurse's Code Grey alert that the patient was attempting to leave an emergency department.

Mr Scott attempted to engage with the patient who was 'large in stature, not wearing a shirt and affected by alcohol' before standing in front of him to stop him from leaving. At one point, Mr Scott took hold of the patient's arm to ensure that he did not leave, but the patient proceeded to kick him in the groin. Mr Scott responded by shouting 'take him down' and brought the patient to the ground. The scuffle caused the patient to have a cut to his nose. Shortly after the scuffle the other members of the Code Grey response team arrived.

Some weeks later, Mr Scott was invited to a meeting with two managers of the hospital who assured him that the meeting formed part of the information gathering process, and did not relate to any allegations made against him. However, on 19 July 2019, almost a month after the incident, Mr Scott was issued with a letter, which alleged that he had committed serious misconduct by using disproportionate and excessive force on an intoxicated patient in breach of its policies.

Following cessation of his employment as a result of the incident, Mr Scott alleged that he had been unfairly dismissed.

Commissioner Cirkovic agreed with the Hospital regarding Mr Scott's breaches of its policies, in that Mr Scott had gotten too close to the patient and had used 'some force'. However, the Commissioner considered that Mr Scott's actions must be viewed in the context of the apparent tension between a security guard's responsibility to perform his role, to prevent the patient from leaving, and the Hospital's Restraint Policy which required that he limit physical restraint to the circumstances. Mr Scott was not found to have used excessive force, or lost his temper or self-control; and was found to had only acted with force and to restrain the patient once he had kicked Mr Scott in the groin.

FWC was critical of the process undertaken by the employer to address the allegations with Mr Scott, finding that it had failed to follow the prescribed disciplinary process set out in its enterprise agreement, in so far as it had not met with Mr Scott to deliver the finding of its investigation, before commencing the disciplinary process.

The Commissioner ultimately held that the dismissal was harsh and unreasonable in light of the above, and Mr Scott's length of service, unblemished employment record and age. He was awarded the maximum compensation available in the circumstances, being the equivalent of 26 weeks' wages.

What does this mean for employers?

- Employers must strictly follow disciplinary procedures as outlined in their relevant enterprise agreement.
- Disciplinary action in relation to an employee's misconduct should be considered in the context of the employees' personal circumstances; and the circumstances surrounding the misconduct.

Redundancy not a solution for avoiding proper performance management

Tran v Macquarie University (No.2) [2019] FCCA 2049 (31 July 2019)

The Federal Circuit Court has found that Macquarie University took adverse action against an employee by using a redundancy to out-manage her complaints. This decision serves as an important reminder that employers must not take adverse action against employees for exercising their workplace rights, and must comply with any redeployment obligations applicable to redundancy circumstances.

Ms Tran sought relief following her position as an accountant at the University being made redundant. She submitted that her employment was terminated because she exercised her workplace right by complaining about her supervisor, Ms Chellappah, and others. She also submitted that the University failed to comply with their obligations of redeployment under their enterprise agreement.

In 2015 Ms Tran had complained to her 2-up manager regarding the way that she was treated by her supervisor, alleging that she was bullied by her and that she was controlling. Ms Tran also made a complaint in July 2016 that a colleague had plagiarised her work.

On 6 October 2016, the University issued a 'proposed change letter' to all staff members which proposed the disestablishment of several positions, including Ms Tran's position as Systems Accountant. Ms Tran arrived at work the following day to find that her computer access had been blocked. Ms Tran challenged the genuineness of her redundancy. However, on 4 November 2016 the University confirmed that Ms Tran's position was to be disestablished.

Judge Humphreys found that the desired outcome of the restructure was the removal of Ms Tran from her employment with the University, and that the substantial and operative part of the reason for the disestablishment of Ms Tran's position was the complaints that Ms Tran had made about her supervisor. Accordingly, the University was deemed to have taken unlawful adverse action against Ms Tran, in breach of the *Fair Work Act 2009* (Cth).

Judge Humphreys was also satisfied that the University breached a clause in it's enterprise agreement regarding redeployment obligations. In particular, the enterprise agreement required the University to give priority consideration to the placement of staff members seeking redeployment, including a priority interview; and where the University identified a position that may be suitable, it was required to review the skills needed to perform the essential requirements of the position, and assess whether the staff member had the relevant experience or was able to be retrained to perform the position.

The University only actively sought to look for positions for Ms Tran on one occasion, and failed to inform Ms Tran of positions being advertised on their website had she been aware, she would have made an application and been entitled to a priority interview. In fact, when Ms Tran became aware of the positions and asked to be interviewed. This was refused by the University. This was considered a clear breach by the Court

What does this mean for employers?

- Employers must ensure the genuineness of any proposed redundancy by focusing on the need for the position, and not the individual in the role
- Employers must be aware of any obligations of redeployment that they may have in relation to restructures, and actively manage them
- Failure to properly manage the above, particularly where the circumstances may result in the termination of an employee who has made complaints in relation to their employment, will likely expose the employer to an adverse action claim

Unfair dismissal despite valid misconduct reason

Paganoni v MECWA t/a Mecwacare [2019] FWC 4231

The Fair Work Commission ('**FWC**') has found that an employee at an aged care facility was unfairly dismissed for deviating from the menu plan by serving residents instant mash potato instead of fresh potatoes without the approval of management and for serving a substandard meal. Despite finding a valid reason and a fair process, FWC held that there were 'special circumstances' that meant that the dismissal was nonetheless unfair.

The facts

The employee, Ms Paganoni worked for Mecwacare's aged care facility as a cook and food service assistant from April 2009 until her dismissal on 9 January 2019.

On 30 November 2018, she was responsible for preparing food for the dinner service consisting of meatloaf, roast pumpkin, beans and 'minted potatoes' (using fresh potatoes).

On the day, Ms Paganoni had put potatoes on the stove to boil and then left the kitchen for her break. When she returned, she realised that the kitchen stove pilot light had gone out and the potatoes had not boiled.

Ms Paganoni claimed that because she had insufficient time to boil the water before dinner service, she decided to depart from the menu and prepare instant mash potato instead. While Ms Paganoni did acknowledge the mash potato was runnier than she would have liked, she thought it tasted fine.

During clean up after the dinner service, the personal care assistant on duty at the time noticed a plate with uneaten mash potato. Upon examination of the plate, she thought it looked bad and decided to show it to the facility manager.

When questioned about why she did not seek management approval for the menu change, Ms Paganoni stated that she did not believe the facility manager could help her in the situation and that menu changes had been made in the past without approval.

Notebly, Ms Paganoni had received a final written warning in April 2018 in which a similar issue (the use of fish fingers instead of fresh fish on a menu plan). In the written warning she was specifically instructed to seek prior management approval for any meal departures. The warning also said that it would remain on the employee's file for 12 months and should there be another breach it will result in the immediate termination of employment.

The decision

The employer's contention was that there was a valid reason to dismiss Ms Paganoni because she departed from the menu plan without management approval and that she served a substandard meal.

FWC noted that Ms Paganoni had received a recent final warning, and been specifically instructed to seek approval for any menu changes. In response to the warning, Ms Paganoni had confirmed her commitment to notifying management in future if she was unable to adhere to the menu plan. FWC found, as was conceded by Ms Paganoni, that she did not notify her manager about the menu change – contrary to that commitment.

Accordingly, FWC held that Ms Paganoni's failure to seek management approval gave rise to a valid reason to dismiss, as it constituted a breach of a lawful requirement on her. However, in finding that there was a valid reason Deputy President Colman did accept the evidence of other employees that there were departures from the menu plans where management approval was not sought.

Regarding the employer's argument about Ms Paganoni serving a substandard meal, the Commissioner held that these allegations were not made out. There were problems with the lack of evidence collected by the employer to substantiate the allegations. For example, the employer alleged that the meal tasted bad, however the only evidence led on the matter was from Ms Paganoni who said it tasted fine (but conceded it was visually unappealing). Further, the employer's argument that the meal was not nutritious ran counter to the fact that the employer stocked the instant mash potato in its kitchen for use in meals. And finally, the employer's argument that because the meal looked unappealing Ms Paganoni put at risk the residents' health and wellbeing (ie because they were less likely to eat visually unappealing food) was not supported by any evidence.

In relation to process, Deputy President Colman found that Ms Paganoni was afforded an opportunity to respond to the reasons for dismissal, which included her support person of choice. There were no real criticisms on the process adopted by the employer. Ultimately however, he held that the employee's dismissal was 'unfair' because there were three 'special circumstances' that applied, specifically:

- Ms Paganoni was trying to do the right thing by residents when she deviated from the menu plan. The instant mash potato was the only avenue to ensure that the residents received their dinner on time;
- as noted above, the evidence demonstrated that there were departures from the menu plans that were not always authorised by management and therefore, there was an inconsistent approach to the enforcement of such requirements; and
- part of the reason for dismissal was that Ms Paganoni produced a bad batch of mash that was visually unappealing. However, FWC accepted evidence the particular product was difficult to work and noted that it was unclear whether Ms Paganoni would have been dismissed had the mash turned out better.

Remedy

FWC was satisfied that it would be inappropriate to order reinstatement. By her own evidence Ms Paganoni conceded that she did not seek management approval (because it would not help the situation) and given her actions were contrary to the direction given by her employer, the Commission held that her employment would not have continued beyond another 6 months. Reductions to the compensation calculations were made to account for payment in lieu of notice, and on account of Ms Paganoni's misconduct, to arrive at a final figure of just under $10,000 gross.

What does this mean for employers?

- Navigating the unfair dismissal jurisdiction is difficult – having a valid reason and fair procedure will not always mean that the dismissal was fair
- An inconsistent application of a policy or requirement may undermine the reason for dismissal
- If an employer intends to rely on a particular reason for dismissal, the employer must ensure that it collects relevant and sufficient evidence to substantiate the allegation/s against the employee and that such evidence is put to the employee for response.
- If the evidence is insufficient to properly make out the allegation, then the overall strength of a case may be weakened by relying on the allegation in the reasons for dismissal.

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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: 7/75 Lorimer Street, DOCKLANDS. VIC 3008

Time: 9am - 5pm

HSR Initial OHS Training Course (5 days) 2020

	$950 per person (plus gst)				
	day 1	**day 2**	**day 3**	**day 4**	**day 5**
February Course	Tuesday 25 February	Tuesday 3 March	Tuesday 10 March	Tuesday 17 March	Tuesday 24 March
April Course	Tuesday 28 April	Tuesday 5 May	Tuesday 12 May	Tuesday 19 May	Tuesday 26 May
August Course	Wednesday 19 August	Wednesday 26 August	Wednesday 2 September	Wednesday 9 September	Wednesday 16 September
November Course	Wednesday 11 November	Wednesday 18 November	Wednesday 25 November	Wednesday 2 December	Wednesday 9 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

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Approved Training Course

WorkSafe VICTORIA

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: 7/75 Lorimer Street, DOCKLANDS. VIC 3008

HSR Refresher OHS Training Course (1 day) 2020	
	$420 per person (plus GST)
May Class	Wednesday 20 May
September Class	Thursday 19 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