The Advisor

May 2022 Edition

web: www.siag.com.au phone enquires Australia wide 1300 SIAGHR (1300 742447)

1. Newsflash: Paid family and domestic violence leave

On 16 May 2022, a full bench of the Fair Work Commission published a ground-breaking decision in the *Family and domestic violence leave review 2021*.

The FWC has expressed a provisional view that modern awards should be varied to provide for paid family and domestic violence (**FDV**) leave.

The proceedings arose out of the 4 yearly review of modern awards, in which the ACTU filed a claim seeking to vary all modern awards to include 10 days paid FDV leave on a yearly basis, and 5 days unpaid FDV leave per occasion.

Under the NES provisions of the *Fair Work Act 2009* (**FW Act**), employees are currently entitled to 5 days of unpaid FDV leave in a 12-month period (s.106A).

'Family and domestic violence' is defined in s.106B(2) of the FW Act as violent, threatening or other abusive behaviour by a close relative of an employee that seeks to coerce or control the employee and causes the employee harm or to be fearful.

A 'close relative' of an employee is defined as a person who is a member of the employee's immediate family or is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

'Immediate family' means a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee, or a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

Unpaid FDV can be taken if an employee is experiencing FDV, they need to do something to deal with the impact of the FDV, and it is impractical for them to do that thing outside their ordinary hours of work (s.106B(1)).

The FW Act entitlement to unpaid FDV leave:

- is available in full at the start of each 12-month period of an employee's employment;
- does not accumulate from year to year; and
- is available in full to part-time and casual employees.

In addressing the general case advanced by the ACTU for an award-based paid FDV leave entitlement, and the submissions in response by opposing parties, the FWC concluded that 'the merits strongly favour a paid FDV leave entitlement' to be included in modern awards.
In a lengthy decision of over 200 pages, the FWC found that:

- *FDV is a workplace issue that requires a workplace response;*
- *paid FDV leave is a critical mechanism for employees to maintain their employment and financial security while dealing with the effects of the FDV;*
- *the financial circumstances of employees who have experienced FDV may make it impracticable for them to access the existing unpaid entitlement, with the consequences that they may not be able to relocate, attend court proceedings, and obtain medical treatment and other forms of support, and this may inhibit such employees from leaving violent relationships;*
- *the current minimum safety net is, accordingly, not fair or relevant;*
- *paid FDV leave is not simply 'a matter for government', and the Commission's jurisdiction to establish additional leave entitlements in modern awards has been properly invoked by the ACTU claim;*
- *that other social issues are not currently dealt with in modern awards is not a reason not to provide for paid FDV leave if the merits otherwise justify it; and*
- *we are not persuaded that the issue of FDV should be left to the enterprise level and left unregulated by modern awards.*

The FWC formed the provisional view that a model FDV leave term should have the following characteristics:

1. *Full time employees and, on a pro-rata basis part-time employees, should be entitled to 10 days paid FDV leave per year.*
2. *The entitlement to 10 days paid FDV leave per year should accrue progressively across the year in the same way as for personal/carer's leave accrues under the NES… The entitlement should accumulate from year to year, but subject to a 'cap' whereby the total accrual does not exceed 10 days at any given time.*
3. *The FDV leave entitlement should be accessible in advance of an entitlement to such leave accruing, by agreement between an employer and employee.*
4. *The FDV leave entitlement should operate on the basis that it is paid at the employee's 'base rate of pay' as defined in s.16 of the FW Act.*
5. *The definition of 'family and domestic violence' should be in the same terms as the definition in s.106B(2) of the FW*

1. Newsflash:
Paid family and domestic violence leave

Act (and not extend to FDV perpetrated by a member of the employee's household who is not related to the employee).

6. *In all other relevant respects the model FDV leave term should reflect the terms of s.106B.*

In referring to the modern awards objective to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', the FWC found that, 'at a global level of assessment … the insertion into modern awards of the provisional model term for 10 days' paid FDV leave is necessary to achieve the modern awards objective'. Given that the FW Act has already been amended to include an entitlement to unpaid FDV, the FWC did not recommend that unpaid FDV leave should also be included in modern awards.

In reaching its conclusion, the FWC notably commented,

FDV is a ubiquitous and persistent social problem. While men can, and do, experience FDV, such violence disproportionately affects women. It is a gendered phenomenon. Since the age of 15, approximately one in 4 women (or 2.2 million women), compared to one in 13 men, have experienced at least one incident of violence by an intimate partner. … The effects of FDV are far reaching and extend beyond the individual directly affected to their families and the general community. The COVID-19 pandemic has seen an increase in the prevalence of FDV. … The aggregate cost to the economy of violence against women, particularly FDV, is substantial. The SWIRLS Report estimates the impact of FDV costs employers up to $2 billion a year. Employment is an important pathway out of violent relationships and paid FDV leave provides significant assistance to employees who experience FDV; it helps individuals to maintain their economic security; to access relevant services, and to safely exit to a life free from FDV.

As to next steps, the parties are to formulate a draft model FDV leave term based on the FWC's provisional views. The proposed draft model terms are to be filed by 4:00pm Friday 17 June 2022.

The parties are to then confer and submit draft directions by no later than 4:00pm Friday 1 July 2022. The FWC will give the Federal Government the "opportunity to clarify its intentions regarding any amendment to the NES, should it choose to do so".

SIAG will publish any updates as the matter progresses.

2. Election 2022

The major parties' IR policies have only occasionally made front page news in the lead up to the 21 May election, but both the Coalition and the ALP have, overall, indicated that the current structure of the IR system will remain – albeit with some new features.

Coalition policy

If re-elected, the Morrison Government would in part re-visit the shelved 2021 Omnibus reform package, and has promised to strengthen the economy to create jobs and improve the standard of living.

The Omnibus Bill tabled in 2021 contained a raft of proposed legislative amendments. The Coalition has stated that it will not revisit the proposed simplification to the Better Off Overall Test. However, some other reforms which it is more likely to re-table are:

- Amendments to modern awards in certain industries to allow employers and part time employees to agree on additional hours without attracting overtime penalties, and to give employers increased flexibility as to the scope of duties that employees are to perform.
- Longer term Greenfields Agreements (up to eight years) with approval of the Fair Work Commission.
- The criminalisation of wage theft for employers who systematically underpay their employees.

Other Coalition policies centre on:

Amendments to the NES to boost redundancy payouts for women and to extend unpaid leave entitlements to foster and kinship carers.

IR Minister Michaelia Cash has said that these changes would aim to "ensure fairness and equity in redundancy payouts, particularly for women", and to recognise the contribution made by foster and kinship carers to vulnerable children.

Changes to paid parental leave and supporting women into work in which the Coalition will spend about $346 million over five years to establish Enhanced Paid Parental Leave for Families - rolling "Dad and Partner Pay" into Parental Leave Pay to create a single paid entitlement of up to 20 weeks, which would be fully flexible and shareable for eligible working parents.

The income test will be adjusted to increase eligibility and further support workforce participation.

The Coalition has also committed $38.6 million to encourage women to undertake non-traditional trade apprenticeships through in-training support and targeted mentoring services; $4.7 million over 5 years to encourage women into the manufacturing industry; and $3.9 million to support women into digitally skilled roles.

Extra Fair Work Commission funding of $5.6 million over four years for a small business support unit within the Fair Work system.

Fair Work Ombudsman funding of $2.7 million in 2022-23 to assist employers and employees to recover from the COVID-19 pandemic.

Job creation by keeping small business taxes low, investing in infrastructure projects, and transforming the manufacturing sector – with a view to creating an additional 1.3 million jobs nationally over the next 5 years.

Incentive for hiring apprentices through the provision of $2.4 billion in additional incentives to train the next generation of apprentices and trainees including:

- 10% wage subsidies for employers for the first 2 years of hiring a new apprentice, and a further 5% in the third year;
- Eligibility for up to $5,000 in support payments for apprentices.
- Enabling eligible apprentices to access the expanded Australian Apprenticeship Support Loans, including aged care and child care workers for the first time.
- Additional incentives for regional apprenticeships.

ALP Policies

The ALP's promises focus on job insecurity and low wages, with investment in skill training to drive economic growth.

Anthony Albanese has committed to commissioning a labour market white paper to foster "secure work and higher wages" and to convening an employment summit to boost job security and to ensure that the bargaining system works effectively.

The ALP's policies include:

Criminalising wage theft and improving the processes for the recovery of wage underpayments – possibly including the creation of a Fair Work Court.

Fair Work Commission and Fair Work Act changes, to "fix the stack" of the Fair Work Commission bench and then return to the convention of making half of new appointments from employer backgrounds and half from unions. Shadow IR Minister Tony Burke has said, "The Fair Work Commission has been stacked and stacked

2. Election 2022 - continued

badly", noting some "shockers", whilst acknowledging that "there are still some very good people in there."

A Labor government would also give the FWC the power to make rulings on the pay and conditions of gig economy workers who are engaged in "employee-like" work. Prioritising, or enshrining "secure work" would be included as an objective of the Fair Work Act 2009. There would also be a limit on the number of consecutive fixed term contracts an employer could offer for the same role.

Same job, same pay would become law – so that labour hire workers would receive equivalent wages to employees.

Closing the gender pay gap and increase pay for women workers, including by:

- empowering the Fair Work Commission to order pay increases for workers in low paid, female dominated industries;
- requiring companies with more than 250 employees to report their gender pay gap;
- prohibiting pay secrecy clauses; and
- redressing the gender pay gap in the Australian Public Service.

The ALP has also committed to implementing the remaining 55 recommendations of the Respect@work report, which the Coalition has not done.

Addressing skills shortages by offering free TAFE for students studying in an industry with a skills shortage, providing $100 million New Energy Apprenticeships to encourage and support 10,000 apprentices to train in new energy jobs, providing 20,000 new university places through the Future Made in Australia Skills Plan to help fix skills shortages in jobs including engineering, nursing, technology and teaching.

Priority would be given to universities offering more opportunities for under-represented groups such as people in remote, regional and outer-suburban areas, those who are the first in their family to study at university, and First Nations Australians.

Increasing the minimum wage to a 'living wage' possibly matching the current inflation rate of 5.1%.

SIAG will closely monitor developments and provide post-election updates.

3. New Parameters in the Employee/Contractor Distinction

The High Court of Australia ('**HCA**') has handed down two significant decisions in relation to the question of whether a relationship is that of employee/employer or independent contractor/principal. These cases signify an important change as the HCA has moved away from established legal principles by focusing its attention on the primacy of the written contract between the parties.

Personnel Contracting

The first case is *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 ('**Personnel Contracting**'). This case involved Mr McCourt, a labourer who applied for and accepted a role offered by Construct, a labour hire company working in the construction industry. Mr McCourt commenced work immediately on a project with the construction company, Hanssen. Mr McCourt worked on two different projects for Hanssen and engaged in basic labouring tasks, such as cleaning workspaces and moving materials. He had signed a contract with Construct, which described him as a 'self employed contractor' but did not sign any documentation with Hansen.

The labourer commenced proceedings, claiming that he was an employee for the purposes of the *Fair Work Act 2009* (Cth). The primary judge dismissed the proceedings and this conclusion was subsequently upheld by the Full Court of the Federal Court of Australia.

The HCA described as 'problematic' the application by both the primary judge and the Full Court of the 'multifactorial test'. This test is a well-established legal test which looks a variety of factors in the relationship to determine whether or not an employment relationship exists. Specifically, the HCA made the following important points:

- In circumstances where there is a comprehensive written agreement outlining the nature of the relationship, those legal rights and obligations should be decisive of the character of the relationship unless:
  - the validity of the contract is challenged as a sham; or
  - subsequent conduct could be shown to have varied the terms of the contract.
- According to the written contract between Construct and the labourer:
  - Construct was able to fix the labourer's remuneration (although he was able to negotiate additional benefits with Hanssen);
  - Construct was the paymaster and was able to terminate the labourer's engagement if he failed to obey the directions of either Construct or Hanssen;
  - Construct retained a right of control over the labourer that was fundamental to its business; Mr McCourt's core obligation was to work as directed by Construct or its customer. There was no suggestion that the labourer would exercise any discretion at all.
- Despite the written contract between the labourer and Construct describing the labourer as a 'contractor', such a label chosen by the parties is not determinative.
- The fact that, according to the contract, the labourer was free to accept or reject any offer of work from others, is also not indicative of a relationship between an independent contractor and principal. Indeed, casual employees are free to accept or reject work from others.

In light of the above, three members of the HCA found in favour of Mr McCourt and remitted the matter to the primary judge for consideration.

Jamsek

The second case, which was heard by the HCA together with Personnel Contracting was *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 ('**Jamsek**'). This case involved two truck drivers, Mr Jamsek and Mr Whitby ('Drivers') who were initially engaged as employees by the predecessor of ZG Operations Pty Ltd ('ZG Operations') in 1977. However, by the mid-1980s, ZG Operations insisted that the arrangement of engaging the men as drivers could only continue if they were engaged as 'contractors'. The Drivers established partnerships with their wives and ZG Operations entered into a series of written contracts with the partnerships for the supply of services. After the agreements between the partnerships and ZG Operations were terminated, the Drivers commenced proceedings in the Federal Court of Australia claiming employee entitlements. The primary judge held that the Drivers were independent contractors and the Full Court of the Federal Court subsequently held that the Drivers were, in fact, employees.

Facts relevant to the relationship include:

- The Drivers had no discretion over the routes that they drove;
- The Drivers did not control what was delivered;
- The Drivers were required to purchase their own trucks;
- On occasion, the Drivers did agree to display the logo of ZG Operations;
- The Drivers were supplied with uniforms but were not required to wear them.

In applying the reasoning set out in Personnel Contracting, the HCA referred to the written agreements between the parties to determine that the Drivers were not employees

3. Employee/Contractor Distinction - Continued

of ZG Operations. Specifically, the HCA stated that the written agreements 'comprehensively regulated' the employment relationship and that the Full Court of the Federal Court had undertaken an expansive approach which involved an "unjustified departure from orthodox contractual analysis. " The HCA further stated that a disparity in bargaining power cannot affect the meaning of what had been agreed upon in the contract if the validity of such contract is not challenged.

The HCA then remitted the matter to the Full Court.

Application of HCA Principles: Pruessner

Very recently, the principles set out in these HCA cases were applied by the Federal Circuit Court in the case of *Pruessner v Caelli Constructions Pty Ltd* [2022] *FedCFamC2G 206* (25 March 2022) ('**Pruessner**'). Unlike the HCA cases, in this matter there was no written contract. Mr Pruessner, who worked for Caelli Construction (Vic) Pty Ltd (**CC**) through his company, Pruessner Holdings Pty Ltd ('**PH**'), claimed that he was an employee from 2012 until July 2020.

In looking at the discussions held between CC and Mr Pruessner in 2012, McNab J found that there was no intention for an employment relationship to be established. However, McNab J also noted that, in circumstances where there is no written contract, "the Court may look at post-contractual conduct to ascertain the terms of the agreement." Specifically, McNab J considered factors including:

- Mr Pruessner's company, PH, rendered invoices to CC;
- PH filed tax returns which accounted for the income based on those invoices rendered to CC;
- PH paid superannuation contributions on behalf of Mr Pruessner;
- PH supplied labour other than Mr Pruessner's labour;
- PH charged CC for its labour at a much higher rate than had Mr Pruessner been an employee of CC.

These factors were found to be determinative of an independent contractor relationship notwithstanding the finding that PH provided services exclusively to CC and that Mr Pruessner worked 'substantial hours' for CC.

With respect to the recent HCA decisions, McNab J noted that he was "fundamentally bound to follow the approach" of the HCA and specifically referred to the HCA's approach in Jamsek which focused on tax arrangements as being highly relevant in determining whether or not someone is an employee.

While this case turned on its specific facts, it is important to note how courts apply the reasoning of the HCA decisions of *Personnel Contracting* and *Jamesk*, particularly where there is no written contract.

Key Take-Aways

In light of these recent cases which highlight the primacy of the written contract, it is crucial that those who wish to establish an independent contractor relationship enter into a comprehensive written agreement with the independent contractor. It should be clear from the written contract that it encapsulates the entire agreement between the parties and that any subsequent changes must be agreed upon in writing. These contracts and relationships must be regularly reviewed and updated to ensure that they are accurate and consistent with the characterisation of the independent contractor/principal relationship.

4. Employee dismissed upheld - failure to comply with vaccination mandate

The Fair Work Commission (**FWC**) in *Stevens v Epworth Foundation* [2022] FWC 593 has upheld the dismissal of an employee who refused to provide proof of her vaccination status as required by public health directions.

Background

In October 2021, the Victorian Government introduced the COVID-19 Mandatory Vaccination Directions (No. 5) (the Directions) which required healthcare workers to be vaccinated against COVID-19 or have a valid medical exemption in order to be lawfully permitted to work onsite from 15 October 2021.

On 20 September 2021, Epworth sent an email to all employees informing them of the mandate.

In late September 2021, Isabella Stevens, who had worked as a Dietician for Epworth for more than 10 years, commenced a period of sick leave running to 21 October 2021.

On 1 October 2021, Ms Stevens wrote to Epworth, objecting to providing evidence of her vaccination status and seeking assurances regarding the safety and effectiveness of the vaccines.

Epworth responded in a letter to Ms Stevens dated 7 October 2021, stating that it was legally bound to comply with the Directions and that it was not required to provide the assurances she sought. The letter also reiterated the requirements under the Directions and stated that any worker who did not meet the requirements would not be able to perform their duties and would not be paid, which would have implications for their ongoing employment.

On 11 October 2021, Ms Stevens wrote to Epworth, questioning the safety of vaccines and requesting to take annual leave from the conclusion of her sick leave on 21 October 2021.

Ms Stevens was subsequently authorised to take annual leave from 21 to 29 October 2021. She was again informed of the Directions and reiterated that failure to meet the requirements would have implications for her ongoing employment.

On 27 October 2021, Ms Stevens again objected to the requirement that she provide proof of vaccination, citing privacy grounds. She also requested long service leave (which was granted to 23 November 2021).

Ms Stevens did not provide the required vaccination information. Epworth wrote to Ms Stevens, stating that whilst it was her right not to provide the information, and that it could not require her to confirm that she had been vaccinated, it could not allow her onto its premises for the purposes of work without this information.

In response, Ms Stevens disputed the lawfulness of the Directions and cited the Privacy Act 1988 in refusing to provide her vaccination status. She also relied on statements from the federal government to the effect that vaccinations were not mandatory.

On 22 November 2021, Epworth informed Ms Stevens of its decision that it had grounds to terminate her employment on the basis that she could no longer fulfil the inherent requirements of her role. Ms Stevens was invited to show cause as to why her employment should not be terminated.

In responding to the show cause letter, Ms Stevens:

- requested that her long service leave be extended to 1 January 2022 or that she be allowed to take the entire balance of her long service leave, noting that the emergency powers in force in Victoria were due to expire;
- stated that the Directions were invalid or did not apply because they were contrary to federal privacy and discrimination laws;
- offered to undergo PCR tests instead of providing her vaccination status information;
- maintained that she would not be providing her private sensitive health information to Epworth, and that it was unlawful for Epworth to request her to do so.

Epworth dismissed Ms Stevens on 3 December 2021 on the basis that she was unable to perform the inherent requirements of her role because she could not lawfully enter the workplace. In considering Ms Stevens' show cause response, Epworth:

- rejected her long service leave extension request, stating that the Victorian Government had announced that the Directions would be renewed and remain in place for a substantial period of time, and that in any event Epworth had issued its own COVID-19 vaccination policy that required all staff to be vaccinated within similar timelines;
- stated that the proposal to take PCR tests did not satisfy the requirements of the Directions; and
- advised it was not possible for Ms Stevens to perform the key requirements of her role from home, and that it was not reasonably possible to deploy her to any role not requiring her attendance at the workplace.

4. Employee dismissed upheld - vaccination mandate - continued

FWC decision

The FWC dismissed Ms Stevens' unfair dismissal application.

The FWC found that Epworth had a valid reason to dismiss Ms Stevens which related to her capacity to perform her role. The FWC determined that whilst Ms Stevens was '*… entitled to her opinions about the safety and efficacy of COVID-19 vaccines…[and] was also within her rights to decline to become vaccinated or to provide Epworth with the information it requested from her…her choices had the inevitable consequence that [she] rendered herself unable to perform her job*'.

Given that Epworth was prohibited by law from allowing Ms Stevens to attend the workplace unless she provided the required evidence, the FWC found that the effect of the Directions was that Epworth was bound by a new "regulatory requirement" that attached to Ms Stevens' job.

The FWC also rejected Ms Stevens' argument that she was forced to become vaccinated, stating:

> '*It is not correct to say that Ms Stevens had no alternative but to become vaccinated. She did have an alternative. It was the alternative that she decided to choose, even though, for Ms Stevens, it was a very difficult choice. It was the alternative that involved her legal exclusion from Epworth's workplace.*'

In dismissing Ms Stevens' remaining arguments, the FWC also held that:

- it was not reasonable for Epworth to consider Ms Stevens' offer to undergo PCR tests to prove she did not have COVID-19, because the Directions did not provide exceptions for employees who return negative COVID-19 tests;
- there was no merit or basis to contend that the Directions were inconsistent with federal privacy and anti-discrimination laws; and
- Epworth had reasonable business grounds to refuse Ms Stevens' request to take further long service leave, noting that it would leave the position unfilled and have an impact on patient services. Relevantly, the FWC was of the view that in any event, had the request been granted, it would not have made a difference as Ms Stevens would have continued to refuse to provide the relevant vaccination information, with the consequence remaining that Epworth would still have been prohibited from allowing her to attend its premises for work.

What does this mean for employers?

Although an employee is entitled to choose not to be vaccinated, where that choice renders the employee incapable of performing the inherent requirements of their role, this choice may result in a valid reason for termination.

5. Excessive texting at work

***Murphy v Clear Day Pty Ltd* [2022] FWC 373**

The Fair Work Commission has ruled that an employee was not unfairly dismissed when she was fired for excessive personal texting while at work. However, the decision underscores the difficulties that employers can face when justifying their actions.

The decision is particularly interesting in the context of the last 2 years, where 'work' is performed at home with much less supervision and control by employers – specifically in terms of *when* such work may be performed.

Facts

This decision concerns an employee with a short period of employment – 8 months. Ms Murphy was employed as the Health, Safety, Environment and Training Manager by Clear Day. The reason for her termination of employment was '*performing non-work-related activities on multiple occasions during her work hours with the Respondent*'.

Within 2 months of commencing employment, Ms Murphy began renting out a cottage on her property to Airbnb customers. This business venture developed into a Farm Stay for caravaners and very quickly become popular.

About 7 months into her employment (12 July 2021), the employer raised the concerns about performance / non-work-related activities with Ms Murphy. The file note (which the FWC could not be satisfied was written contemporaneously) stated that Ms Murphy was given a verbal first and final warning and issued with directions to stop her attending to the non-work-related activities – including a direction that her phone was to be turned off while she was working.

Clear Day submitted that Ms Murphy followed the direction for one week before the conduct continued again. Clear Day next issued Ms Murphy with a letter terminating her employment and providing 1 week's payment in lieu of notice.

Claim

Ms Murphy argued that she had been unfairly dismissed because Clear Day had wrongly deemed her phone use to be 'excessive' and it had failed to warn her that she might lose her job.

It is relevant to note that Ms Murphy's evidence was that she found a similar role on comparable remuneration within 5 weeks. Further, during the hearing (per extracts in the Decision), it is apparent that Ms Murphy's central contention was that Clear Day did not follow the correct process in dismissing her.

Decision

The Fair Work Commission informed itself by requesting phone records from Ms Murphy covering the relevant period of employment. The phone records objectively demonstrated an 'extraordinary and unacceptable' amount of text messages while at work and specifically after Ms Murphy received the verbal warning and related direction to have her personal mobile phone turned off at work. For example, on one morning after the verbal warning had been issued, Ms Murphy sent 73 text messages and the Commission said, '*it is impossible to believe that Ms Murphy did any work at all*'. Therefore, the Commission accepted that Ms Murphy was:

> *not only failing to perform her work to the reasonable standards required by Mrs Barlow, after 12 July 2021, she was deliberately failing to follow a lawful and reasonable direction to have her phone turned off while at work.*

During the hearing, there were other matters that were raised as problematic and relevant to the matter of 'valid reason' for dismissal. For example, Ms Murphy was going through an 'ugly divorce' and had forwarded an email from her personal email account to her work email and then corresponded to lawyers from her work email. The Commission accepted that Ms Murphy had done this deliberately in order to inflate her importance by noting her business title and that such conduct was not acceptable.

The Commission found 'numerous' valid reasons for dismissal on the evidence, including the extraordinary amount of texting during work hours, the failure to follow the lawful and reasonable instruction to not use her phone during work hours / have it turned off and the email sent to lawyers from her work email address.

In terms of procedure, the Commission found that Ms Murphy was not afforded an opportunity to respond to the reason for her dismissal.

In terms of the warning, the Commission accepted that there was a verbal warning issued at the 12 July 2021 meeting but said:

> *There is no doubt that the Respondent should have issued to Ms Murphy a written warning in relation to her conduct. It is always preferable to have clear, undisputable evidence between parties and for Ms Murphy to know exactly the matters she needed to address in order to prevent a dismissal if she repeated her conduct.*

As to whether Ms Murphy was on notice that her

5. Excessive texting at work - continued

employment was in jeopardy, the Commission was so satisfied, finding that Clear Day used the words to the effect of "*if you want to* ***continue working*** *here*" the phone must be turned off during work time.

Ultimately, the Commission found that there were competing factors in the test of harshness and that a balancing of those factors was required. The failure of an opportunity to respond 'had some harsh impact on Ms Murphy' however did not 'weigh so heavily' when account is taken of the seriousness of the valid reason. The Commission noted that when the phone records were made available to the Commission / parties, Ms Murphy had no suitable explanation and therefore was unlikely to have been able to provide any explanation if afforded an opportunity to respond.

For these reasons, the Commission held that the dismissal was not unfair.

What does this mean for the employer?

- Failure to manage disciplinary processes properly can lead to unnecessary litigation – noting that the driving force for the Application and consequent hearing, was the assertion that the 'process' was not followed by Clear Day – a finding that the Commission accepted.
- There are a number of procedural steps in effecting a fair dismissal and employers should ensure that every step is safeguarded – seek advice if unsure.
- Issue formal warnings in writing and ensure that the warning clearly identifies the performance / conduct gap and the measures that are required to be taken to rectify the performance / conduct issue.
- Put an employee on notice if / when their employment is at risk due to a performance / conduct matter – this is an important part of natural justice.
- Consider including dates as to when (important) file notes are drafted – noting that the Commission was unable to accept that a key file note was contemporaneously written.

6. Work from home – emerging case law

COVID-19 impacted the way we work, and perhaps most notably was the emergence of the concept "working from home".

Whilst there are numerous benefits of remote working arrangements, this dramatic shift has impacted businesses and employers, and the manner in which they can direct their employees back to on-site/in-person work, particularly as we emerge from the pandemic.

The issue of working from home was recently in contention in two separate matters before the Queensland Industrial Relations Commission and the Fair Work Commission, involving West Moreton Hinterland Hospital/Health Service and the Australian Federal Police, respectively.

In *Hair v State of Queensland (Queensland Health)* [2021] QIRC 422, the employee requested to work remotely on an indefinite basis, on compressed hours, as she wished to relocate to NSW due to family commitments. After the employer rejected such request, the employee appealed the decision to the tribunal. Whilst the employer acknowledged that the role had been conducted remotely thus far and aspects of it may continue, it was "reasonable to anticipate that the business will welcome" the staff back. This rationale was supported by the tribunal, which upheld the employer's decision and noted that "while an employee may prefer to work in a particular way, this needs to be balanced with the operational requirements of the employer."

In *Jason Lubiejewski v Australian Federal Police* [2022] FWC 15, an employee was medically advised to work from home due to his ill health. The remote working arrangement was initially approved during the pandemic. However, when the lockdowns were lifted, the employee decided to continue working from home without the approval of the employer. After being reasonably and lawfully directed to return to on-site work 10 times, the business terminated the employee's employment due to failing to comply with its directions. The tribunal upheld the dismissal of the employee, ruling it was not harsh, unjust or unreasonable.

What does this mean for employers?

Employers must be ready and well equipped with adequate information in response to the issue of working remotely.

As seen in the matter involving West Moreton Hinterland Hospital/Health Service, this issue arose in the context of a request for flexible working arrangements. This right is inherent for all employees, whether instrument covered or not, and places an obligation on businesses to genuinely consider such requests, prior to determining a decision.

The key take-aways from this decision are:

- ensuring that employers respond in writing to flexible working arrangement requests within the legislated timeframe (i.e. 21 days);
- consulting with the employee before a decision is made;
- that the employer's decision is compliant with its own internal policies/guidelines;
- if the requested is refused, stipulating in writing to the employee the "reasonable business grounds" bases for such decision;
- that employees may be reasonably required to undertake their full role in person if it requires the provision of face-to-face services, or alternatively a balanced roster, including both in-person and remote working;
- that it is not unreasonable for businesses to expect that their employees start transitioning to in-person work; and
- acknowledging the employee's ability to carry out their duties effectively and efficiently during the pandemic thus far and the impact of the decision, if refused or granted.

On the other hand, in the matter involving the Australian Federal Police, remote work arose in the context reasonable and lawful directions issued by a business to its employee.

The key take-aways from this decision are:

- any request to change working arrangements must be put to the employer for its consideration, since remote work is not always operationally possible;
- failure by an employee to obtain consent or authority from their employer for such arrangement, may result in disciplinary action being taken against them, which may include termination of employment;
- refusal to follow a direction to return to work in-person is a valid reason for termination, provided it is reasonable and lawful (e.g. in line with enforceable government orders);
- termination of an employee for any valid reason requires the application of a due process; and
- understanding the risk of claims that a terminated employee may bring against the business.

If you have any queries or concerns, please do not hesitate to contact SIAG to discuss.