The Advisor
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Victorian Public Sector Nurses Enterprise Agreement Update

Since our last Advisor, public sector nurses achieved a historic outcome in wages and allowances as part of the offer made by the Victorian Government in the *Nurses and Midwives (Victorian Public Health Sector) Single Interest Employer Enterprise Agreement 2024-28*.

Many of SIAG's clients will understand the challenges that this deal is likely to create (and has already created) in terms of attraction and retention of nurses / midwives and seeking to maintain pace with the entitlements available to public sector nurses – particular with respect to wages in 2027 (noting the Government's offer was significantly back-ended)

The deal was formally approved by the Fair Work Commission on 8 November 2024 and is **available here**.

Wages

Nursing staff covered by the agreement will receive a 28.4% wage uplift over the agreement's life. For Grade 2 Registered Nurses, in their 1st to 5th year, these uplifts are front heavy, ranging from 7.09% to 17.51% and coming into effect from 1 July 2024. For most other classifications, major uplifts will be introduced later in the agreement, with a 12.71% uplift being introduced for the majority of classifications, across two increases (in May and November), in 2027.

Conditions

On top of the above wage increases, this deal also includes the below improvements.

Rostering

Extensive changes have been made to public sector rostering provisions. Now, among other improvements, employees will have access to stronger provisions to schedule ADOs, a minimum 47-hour break following night shifts, transport following overtime shifts and a minimum of 2 consecutive days off for those working 0.8+ EFT per week.

Additionally, the skill mix provision would be amended to ensure that in each given ward, one third of Registered Nurses have more than three years' experience, one third have one to three years' experience and one third are Graduate Registered Nurses or Enrolled Nurses.

Leave

Several leave entitlements will be improved as set out in the below table.

Leave	Improvement
Family & Domestic Violence Leave	• 20 days leave available for full-time and part-time immediately upon employment, rather than accruing. • Casuals will have access to 10 days paid family violence leave.
Paid Parental Leave	• Abolition of the 6 month qualifying period to access paid parental leave.
Ceremonial Leave	• Ceremonial leave for Aboriginal and Torres Strait Islander nurses and midwives has been improved, recognising the need to access leave for Sorry Business.
Gender Affirmation Leave	• 20 days paid leave per year, plus up to 48 weeks of unpaid leave, are available for gender affirmation procedures.
Foster or Primary Carers Leave	• 2 days leave for up to 5 occasions per year for foster or primary carers.
Study Leave	• Access to paid study leave for Enrolled Nurses undertaking the bachelor of nursing / midwifery.
Compassionate Leave	• Access to paid compassionate leave to be extended from 2 to 4 days per occasion.
Personal Leave	• Access to personal leave for pre-natal appointments, assisted reproduction and parentings classes where they are only available during an employee's rostered shift.

Victorian Public Sector Nurses Enterprise Agreement Update
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Superannuation

Superannuation, which in the public sector is contributed during paid and unpaid parental leave will be extended to periods on workers compensation, defence leave, jury duty and no safe job leave.

OH&S matters

The agreement also aims to secure several guarantees in relation to occupational health and safety matters. This includes granting the ANMF greater access to Occupational Violence and Aggression Prevention and Management Committees, the introduction of a provision for the prevention of gendered violence, and redrafting to provide clarity on clauses dealing with fitness and illness being classed as a temporary disability.

Allowances

Further, allowances will be improved as summarised in the below table.

Allowance	Improvement
New Allowances	
Change of Ward Allowance	• $36.10 per shift from 26 June 2024 for permanent staff with a home ward.
Hyperbaric Allowance	• $85.08 per shift allowance for nurses working in a hyperbaric chamber
Improved Allowances	
Change of Roster Allowance	• Payable when 28-day roster is not posted 28 days in advance.
On Call Allowance	• From May 2024 will increase to $115.80 for Saturday, $135.10 on Sunday and weekday public holidays and $202.70 for a weekend public holiday.
Qualification Allowance	• To increase by 92% over the life of the agreement.

It is important to note that the above list of improvements in respect of wages, conditions and allowances is not exhausted and only the key changes have been discussed. For further information on the amendments/improvements you can **click here**.

"Sham" disciplinary process leads to damages for employee's psychiatric injury

Elisha v Vision Australia Limited [2024] HCA 50

The High Court of Australia (**HCA**) has handed down its verdict on the legally significant and long-standing dispute between Mr Elisha, an adaptive technology consultant, and his former employer, Vision Australia.

The decision breaks new ground in Australia and the employer duty of care. It overturns a 100 year old case authority and stands for the proposition that damages are available for a mental / psychiatric injury associated with a breach of an employment contract.

As outlined below, in application, an employee was entitled to receive compensation of $1.44 million dollars following the development of a major depressive disorder that was caused by an employer's 'disgraceful' disciplinary process and termination of employment.

Background

Mr Elisha was staying overnight at accommodation provided for by Vision Australia when he complained about noises emanating from outside his room late at night which resulted in the hotel proprietor making a different room available. The hotel proprietor subsequently relayed to colleagues of Mr Elisha that she felt that Mr Elisha had been aggressive and intimidating in raising the issue and that at checkout he had threw they keys on the reception desk before leaving.

Those colleagues reported this back to Vision Australia and subsequently a disciplinary process commenced that resulted in Mr Elisha's termination of employment. The disciplinary process was botched because:

- it was headed by Mr Elisha's manager, Ms Hauser, who had a strained relationship with Mr Elisha, who had prejudged Mr Elisha and actively tainted the impartiality of other personnel involved in assessing Mr Elisha's response and the decision to take disciplinary action;
- Ms Hauser (and consequently the decision maker/s for the above reason) took into account historic matters that purported to show a history of aggression;
- the real reason for the dismissal was those 'historic matters' and they were never put to Mr Elisha for response.

The above issues meant that Vision Australia did not comply with its Disciplinary Policy.

As the result of his termination, Mr Elisha was diagnosed with major depressive disorder and an adjustment disorder with depressed mood.

At first instance, the Supreme Court held that the disciplinary process was a "sham", and awarded Mr Elisha $1.44 million in damages for the psychiatric injury arising from Vision Australia's contractual breach in its handling of the disciplinary process.

However, in considering the House of Lords decision, *Addis v Gramophone Company Ltd*, the Court of Appeal felt bound to follow authority and declare that no compensation was owing for the psychiatric injury caused from the employer's breach of contract – this broadly being the finding in Addis (damages were not recoverable for psychiatric injuries stemming from the manner of termination of employment, where the employee's feeling may reasonably have been hurt).

Decision of the HCA

a) Was the Disciplinary Policy contractual?

In resolving the matter, a key question for the HCA to resolve was whether Vision Australia's 2015 Discipline Policy formed part of the employment contract, so as to create contractual obligations on Vision Australia.

The HCA concluded that the Disciplinary Policy was contractual. The language of the contract itself was important. Under a heading "Other Conditions", the contract outlined that if Mr Elisha was in breach of its policies and procedures it '*may result in disciplinary action*'. The HCA held that a reasonable person would have understood this to create contractually binding obligations. The Court also pointed to the promissory language of the contract which asked Mr Elisha to agree as part of the acceptance of terms, '*to comply with these terms and conditions of employment and all other Company Policies and Procedures*'.

b) Was there compliance with the Disciplinary Policy?

The Disciplinary Policy enshrined basic tenets of procedural fairness, such as the putting of allegations in writing, the convening of a formal meeting and the opportunity to respond to allegations.

These were not afforded by the disciplinary process of Vision Australia, and consequently, it was ruled that Vision Australia's failure to do so represented a breach of contract.

c) Is mental / psychiatric injury compensable arising from a breach of contract?

The next issue to resolve was whether damages were available for psychiatric injuries resulting from a breach of contract in the course of a disciplinary process. As noted above the Court of Appeal considered and broadly applied *Addis*.

The HCA overturned this approach and while making statement to distinguish Addis, noted that '*a great deal of water has passed under the bridge of Addis*' (and noting '*the case was decided more than a century ago in a different social context*'), and took the opportunity to promulgate a very clear proposition on the rights / obligations of employers in Australia when it comes to a breach of contract. It confirmed any resulting mental / psychiatric injury from a breach of contract (including where it arises from the '*manner of termination*' – being a core aspect of the Addis case) is compensable and hence will entitle the wronged party to contractual damages.

d) Was the loss too 'remote' to give rise to remedy?

Finally, the HCA was required to determine the question of remoteness. In short, the damage resulted from a botched disciplinary process (ie psychiatric injury) was not too remote, and was, in essence, foreseeable based on various provisions of the Disciplinary Policy itself – that is, procedural fairness, including the support person, advance written notification of the

"Sham" disciplinary process leads to damages for employee's psychiatric injury - continued

allegations, exist to lessen the mental burden associated with the disciplinary process, and therefore, the injury resulting from not following such procedural safeguards is not remote – it is expected or '*reasonably contemplated*'.

e) Outcome

Damages for Mr Elisha's subsequent psychiatric injuries were therefore recoverable, and the original award of $1.44 million in damages was reinstated.

Mr Elisha also raised the argument that Vision Australia owed him a specific duty of care to provide a psychologically safe disciplinary process. Given the success of the breach of contract claim, the HCA did not consider or resolve this question.

What does this mean for employers?

This is a significant development in Australian jurisprudence.

In 2024, the High Court has stated that employers may be liable to pay contractual damages where a breach of contract causes a psychological injury – there exists no rule / assumption to the contrary.

It is foreseeable that this clarity results in fertile ground for future claimants seeking compensation around the development of psychiatric illnesses, where the employment is viewed as a contributing factor and employers must be guarded around what may be subsequently construed as a 'breach of contract' with respect to their conduct.

Coogee Legion Ex-Service Club Ltd v Ms Deanna Giblin [2024] FWCFB 270

This case was an appeal by a registered and licensed club in NSW from a decision of the Fair Work Commission that it had unfairly dismissed Ms Gilbin.

Facts and Background

Ms Giblin, who was employed as a Duty Manager and a Customer Service Attendant, was alleged to have stolen from her employer, Coogie Legion Ex-Service Club Ltd (the Club), by receiving a drink which she failed to pay for.

On 13 April 2023, the Club received the outcome of an external stock audit, which found that a significant amount of stock was missing. The Club subsequently altered its policies and provided that if staff were found with food / drink, but could not provide a receipt, this would be considered theft.

The Club held a meeting on 18 April 2023 to discuss the change with staff.

After this meeting, when the Operations Manager left, he noted that a number of employees were socialising at one of the bars. The Club then undertook a further stocktake and found more significant variances in missing stock than they had previously determined.

This led them to then check the CCTV footage of 18 April 2023 and review the conduct of staff after the meeting.

After reviewing the CCTV footage, and then looking at a list of transactions on the till, the Operations Manager found that Ms Giblin consumed a total of 3 drinks – 2 were paid for, but one of was not paid for.

In the initial decision of the Fair Work Commission, it was held that there was not a valid reason for dismissal, as Ms Giblin did not intend to steal the drink. Deputy President Wright held that '*on the balance of probabilities … Ms Giblin did not deliberately take the free drink and that the alleged misconduct did not occur*'.

However, the Club also alleged that a valid reason for Ms Giblin's dismissal was the act of consuming alcohol before the staff meeting. This was because Ms Giblin admitted to consuming one or two drinks before attending the staff meeting.

However, the Deputy President held that this was also not a valid reason for Ms Giblin's dismissal, as the meeting was not placed on the roster, demonstrating '*that the Club does not regard attendance at a meeting as a "shift"*'.

Further, the Club paid staff for one hour, which was not in accordance with the minimum engagement in the Award, again demonstrating that the meeting was not considered work.

Finally, Ms Giblin gave evidence that staff and management had consumed alcohol prior to staff meetings in the past, without sanction.

As such, given that DP Wright found there to be no valid reason for Ms Giblin's dismissal, it was determined that Ms Giblin was unfairly dismissed by the Club.

Coogee Legion Ex-Service Club Ltd v Ms Deanna Giblin [2024] FWCFB 270 - continued

Decision on Appeal

The primary decision was appealed by the Club on 8 grounds, being that the Deputy President erred in:

1. finding that the dismissal was harsh, unjust or unreasonable;
2. finding that the [Club] did not have a valid reason for dismissal;
3. distinguishing between a premeditated arrangement [to accept a drink] without paying and an opportunistic acceptance of a drink without paying;
4. finding that the Club was required to establish misconduct to the criminal standard of proof;
5. not considering whether, having found that [Ms Giblin] did not pay for the drink, the Club had a valid reason for dismissal based on breach of the [Club's] policies;
6. finding that [Ms Giblin's] alcohol consumption prior to [the] staff meeting was not misconduct;
7. finding that [Ms Giblin] genuinely believed she paid for the drink; and
8. finding that the use of the words "fraud" and "theft" when framing a misconduct allegation was intimidatory, and intended to be so.

In consideration of these grounds of appeal, the Full Bench rejected the appeals of grounds 1, 2, 5, and 6, and were not persuaded by the Club that there were errors made in respect of grounds 3, 4, and 7.

However, regarding ground 8, this arose due to consideration of 'other matters that the FWC considers relevant', pursuant to s387(h) of the *Fair Work Act 2009*.

In the primary decision, DP Wright considered that in a letter of allegations to Ms Giblin, the Club's use of the words 'fraud' and 'theft' was intimidatory. The Deputy President then stated that in using these words, the intention of the Club '*was to suggest that Ms Giblin engaged in criminal behaviour*'. To do so validly, it was stated that '*intent is required, and the conduct must be established to the criminal standard of proof, which is beyond reasonable doubt*'.

However, in stating this, the Full Bench held that it appeared that the Deputy President suggested that '*before an employer dismisses an employee for theft and asserts there is a valid reason for the termination, they are required to establish beyond reasonable doubt that the theft occurred*'. The Full Bench disagreed with this, and stated that the balance of probabilities remains the required standard of proof.

Further, the Full Bench noted that this error was not significant, because, having regard to the ultimate conclusions of the Deputy President, it was not determinative of the outcome. Additionally, the Full Bench stated that the Deputy President '*applied the correct standard of proof when considering whether there was a valid reason for the dismissal*'.

Therefore, despite the apparent error in the initial judgment, this had no bearing on the outcome of the case, and as such, the unfair dismissal was upheld.

What does this mean for employers?

This scenario may seem familiar to many SIAG clients in the registered clubs space. In recent years we have provided advice on many similar (though far from identical) situations.

The case is a useful reminder to properly consider all of the circumstances of the particular matter, noting that a few small facts can be the difference between a dismissal being unfair or not.

Health Services Union v Mercy Hospitals Victoria Ltd T/A Werribee Mercy Health [2024] FWCFB 235

The HR Team at Mercy Hospitals Victoria (Mercy) was criticised by a Fair Work Commission (FWC) Full Bench for their response to queries regarding the payment of allowances for 220 employees.

Facts and Background

A group of employees were covered by the *Health and Allied Services, Managers and Administrative Workers (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2021-2025* (**Agreement**), and were entitled to be paid annual flat amounts for a Nauseous Work Allowance and Educational Incentive Allowance.

This Agreement commenced on 20 April 2022, and from the date of operation, 4 separate allowance payments of $350, $350, $500, and $250 were due to be paid to employees.

Mercy did not make the required payments.

The HSU organiser emailed Mercy regarding the matter on 5 May 2022. This email inquired as to when these payments would be made, and Mercy responded that they would check an '*estimated date regarding the backpays*'.

However, Mercy did not make these payments until the pay period between 24 August and 31 August 2022, only after their HR Manager received another email from the HSU organiser on 9 August 2022.

While Mercy had taken steps to resolve the issue, a confirmation of the underpayment, and a summary of estimates of the total amounts payable, was not provided to the HSU until 12 August 2022.

The HSU then asserted that, by not taking steps to correct the underpayments within 24 hours of the HSU's notification, the underpayments attracted an additional penalty, pursuant to the Agreement.

This is because the Agreement stated, in cl 29.3(c), that '*where the underpayment exceeds 5% of the Employee's fortnightly wage, the Employer must take steps to correct the underpayment within 24 hours and to provide confirmation to the Employee of the correction'. Further, under cl 29.3(d), if this is not done, 'the Employee will be paid a penalty payment of 20% of the underpayment, calculated on a daily basis from the date of the entitlement arising*' (**the Penalty**).

Therefore, the HSU's argument was that the confirmation was not provided within 24 hours, and insufficient steps were taken, such that the underpayments attracted the 20% penalty.

Decision

The Member at first instance held that the course of emails sent amongst Mercy HR and payroll staff over a lengthy period of time were sufficient 'steps' to not attract the Penalty.

However, on appeal to the Full Bench, this conclusion was overturned. The Full Bench noted that, '*the lists of employees who were entitled to the back payments were [only] prepared between 12 and 16 August 2022 and the amounts were finally paid between 24 and 31 August 2022*'. This was only after the 9 August 2022 email from the HSU which stated that they would enforce the underpayments clause of the Agreement through the FWC had Mercy not responded.

Therefore, the Full Bench held that steps were not taken by Mercy until they responded on 12 August 2022, which was outside of the 24 hour window that began at the receipt of the 9 August 2022 email. Further, the Full Bench stated that even if they accepted that the course of emails between Mercy HR staff were 'steps', they could not accept '*that Mercy took any steps to confirm the correction to employees*' and only confirmed the underpayment when the underpayment amounts were received by the employees.

The Full Bench also determined that '*the failure to pay allowances to the employees within a reasonable time frame is reprehensible conduct*'. According to the Full Bench, this failure was especially serious as it related to the payment of nauseous allowances, which is an incentive for performing '*important and difficult work*'.

The Full Bench speculated that the failure to comply with their obligations to the unions, coupled with the late payment of the nauseous allowances was either a result of '*incompetence or a breakdown in communication*'.

What does this mean for employers?

Compliance with industrial obligations is important and increasingly so from 2017 following the passage of amendments to the Fair Work Act protecting vulnerable workers (with many amendments since then continuing to strengthen the importance of compliance with industrial obligations).

There are many risks associated with contraventions of such obligations and this case illustrates the reputational damage that can be inflicted by the Fair Work Commission as part of the arbitration of a dispute matter.

All employers must ensure that they conduct regular reviews of their industrial instruments and are satisfied that they comply with all obligations.

Breanna Roche v The Trustee For the Dolphin Hotel Unit Trust [2024] FWC 606

It is not uncommon for employers to use 'group chats' on platforms like WhatsApp and Facebook Messenger to communicate with staff in a quick and simple way. However, these methods of communication can blur personal and professional lines. This case of the Fair Work Commission (**FWC**) examines whether group chats are private or connected to the workplace, and to what extent such activity can ground a valid reason for dismissal.

Facts and Background

Breanna Roche filed an application for an unfair dismissal remedy contending that her dismissal was '*harsh, unjust or unreasonable*'.

The Dolphin Hotel countered with a jurisdictional objection, claiming that Ms Roche was not a regular and systematic employee who is afforded protection, and, to the substantive allegation, responded that the employee was fairly dismissed for poor performance.

Decision

The FWC dismissed the Respondent's jurisdictional objection and held that Ms Roche was a regular and systematic casual employee.

Therefore, the matter hinged on whether the dismissal was harsh, unjust or unreasonable. The FWC cited the termination letter given to Ms Roche, which outlined both general and specific reasons for dismissal.

The general reason for dismissal related to '*persistent concerns regarding behaviour and attitude*'.

The Respondent claimed that Ms Roche's '*involvement in a group chat that has fostered negative comments about the management team*' was a specific (and valid) reason for dismissal because it created '*a divisive atmosphere between the Front of House and the Management team*'.

Ms Roche unilaterally removed managerial staff from the group chat before accusing them of '*cutting shifts when [they're] mad at staff*'. Ms Roche also allegedly encouraged members of the group chat to '*communicate their frustrations*' with the managerial team.

Deputy President Cross found that both the general and specific reasons for dismissal were established, and that Ms Roche's dismissal was not harsh, unjust or unreasonable.

The FWC also discussed the connection between social media group chats and the workplace. Deputy President Cross contended that, in some circumstances, chat groups will be clearly related to the workplace and '*there is no sensible basis*' for describing them as private.

What does this mean for employers?

Modern workplaces commonly use social media group chats as forums for communication, and this case highlights that disciplinary action, up to and including termination of employment, can be taken where there is improper use of such channels of communication. Employers should ensure their workplace policies are up to scratch and refer to behaviour on social media, including activities that may be conducted outside work hours.

Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd [2024] FCA 443 (30 April 2024)

In a significant case highlighting the importance of timely compliance with Fair Work Commission (**FWC**) directives, the Federal Court has imposed a substantial fine on waste giant Cleanaway for their delays in providing essential information for a protected action ballot organised by the Transport Workers' Union of Australia (**TWU**). With their decision aiming to act as a form of general deterrence, the court has emphasised employers must have systems in place to ensure the FWC is promptly provided with the information required to launch a protected action ballot and has warned that larger penalties would be warranted in more egregious cases.

Facts and Background

Employees at Cleanaway's Erskine Park facility are covered by the *Cleanaway Erskine Park Drivers Enterprise Agreement 2020* (**the Enterprise Agreement**), with Clause 3 of this Agreement requiring the parties to commence negotiations for a new enterprise agreement no later than 3 months prior to the nominal expiry date of 23 September 2022. On the 30 of August 2022, the Transport Workers' Union filed a dispute with the FWC against Cleanaway due to their non-compliance with this clause. The TWU was advised on the 5 of September 2022 that Cleanaway would commence bargaining for a new agreement to replace the existing Agreement. This bargaining commenced on 20 October 2022.

Breakdowns in negotiations ultimately resulted in the TWU applying to the Commission for a protected action ballot order. The Application was approved, and the Commission directed Cleanaway to comply by mid-December 2022 with its order to:

- provide a list of its eligible employees;
- give the FWC details of these employees; and
- make a declaration that the information produced for the ballot roll is accurate and up to date (as required by the Fair Work Regulations).

Cleanaway failed to comply in time – missing the deadline by two days at their Erskine Park facility, and one day at their Hillsdale Site. The one-day delay at the Hillsdale site did not prevent the ballot from opening on time, but the two day delay at Erskine Park pushed back the declaration of its ballot from 20 December 2022, to 9 January 2023.

Decision

The failure of Cleanaway to comply was a contravention of s463(2) of the *Fair Work Act 2009*. The civil penalty which was agreed upon by the parties amounted to just under two-thirds of the maximum penalty for a single contravention for the two contraventions in a confined period.

While the breach was not a result of any '*deliberate defiance*' and instead stemmed from '*inadequate systems for compliance*', Justice Bromwich stressed the importance of complying with the Fair Work Act to uphold the balance of the industrial relations system. With a total penalty of $45,000 - $30,000 for the two-day delay at Erskine park, and $15,000 for the one-day delay at Hillsdale, Justice Bromwich aimed to send a clear signal out to employers that these contraventions are not to occur.

Cleanaway was directed to pay the penalties of $45,000 to the TWU.

What does this mean for employers?

There are many civil remedy provisions under the FW Act. This case demonstrates the importance of complying with requirements when industrial action has been notified to the employer. Industrial action may not be common for SIAG's clients (though is increasing steadily in the health sector), and so if in doubt, please contact SIAG immediately for advice on your obligations when faced with industrial action processes.

Dorsch v HEAD Oceania Pty Ltd (Penalty) [2024] FCA 484

In this case, Justice Raper of the Federal Court of Australia found HEAD Oceania contravened s 90(2) of the FW Act, by failing to pay out accrued annual leave entitlement after termination of employment.

The amount owed to the employee was $8,022.82 and was not paid out in accordance with s 90(2) for a period of 3 months.

Facts and Background

Annual leave was not paid out to the employee on the basis that he had not worked on Fridays and was therefore in 'debt' to HEAD Oceania by more than the amount of annual leave entitlement claimed. In effect, the employer sought to offset the time owed to it from the annual leave owed to the employee.

Decision

Justice Raper held that HEAD Oceania '*took no steps to verify the [the employee's] record, seek legal advice or consult with other Australian managers, before or after making the decision*' (noting that the decision was made by an employee based overseas).

Ordinarily, ignorance of the law is not taken into account in ordering a pecuniary penalty. However, in this instance, Justice Raper held that '*where a party committed a contravention (in the belief of its innocence) but is now disabused of that belief may suggest that the need for specific deterrence in this case is reduced*'.

There was a genuine apology and commensurate intention to adhere with the FW Act.

Accordingly, Justice Raper ordered a pecuniary penalty to be paid by HEAD Oceania because of the contravention. However, the penalty was set at $17,000 (which equated to approximately 25% of the maximum at the time of the contravention).

What does this mean for Employers?

While a reminder may not be needed, the National employment Standards (**NES**) must be complied with, without qualification/ exception. There is no capacity, at law, to seek to offset one debt / obligation owed to the employer with NES entitlements.

The case provides an interesting example of where contrition and genuine apology will be relevant to reduce a penalty.

Haydos Pty Ltd Single Enterprise Agreement 2024 [2024] FWCA 2281

While seeking approval of a new enterprise agreement from the Fair Work Commission (**FWC**), Gold Coast road building employer, Haydos Pty Ltd, received pushback from unions, in respect of their workplace social media ban proposed in their enterprise agreement.

The unions argued that imposing a total ban of social media on employees was '*draconian and extreme*'.

Facts and Background

The particular provision in the enterprise agreement imposed a ban on '*any Social Networking Media in any manner whatsoever*' during working hours. However, the provision also extended to '*plac[ing], respond[ing], provid[ing], or in any other manner caus[ing] information in relation to the employer's business … or other confidential information to become published*' on social media. This second sub-clause also covered '*conversations that take place about their employment and during their employment that are provided to a third party*', which then results in publication on social media.

Decision

Despite the concerns that were raised by the Queensland Council of Unions, the Agreement was approved by the FWC, with undertakings, but none relevantly changing the social media clause.

Enterprise agreements cannot be approved if they include unlawful terms, such as discriminatory and objectionable terms, but this does not extend to the regulation of employee's social media use.

What does this mean for employers?

The case is an interesting illustration of employers continuing to explore approaches to regulating, in an appropriate way, employee conduct with respect to social media.

At a minimum, employers should ensure that they have clear and current policies on social media. Some consideration could be given as to whether there is benefit in including a provision in an enterprise agreement.

Junior rates application (AM2024/24) - FWC Application for Full Pay for Junior Employees

Many of SIAG's clients employ junior workers – either on occasions or all the time.

In the above context, earlier in 2024, the Shop, Distributive and Allied Employees' Association (SDA) filed an application with the Fair Work Commission (FWC) to vary the General Retail Industry Award, the Fast Food Industry Award, and the Pharmacy Industry Award to alter the junior rates for employees aged between 15 and 21 years old (the Application).

Currently, under these awards, employees under 21 years of age have lower minimum rates than other employees, for the same classification of work. These minimum rates are expressed in these Awards as a percentage of the minimum rate for the employee's classification, which are as follows:

Age	General Retail Industry Award 2020	Fast Food Industry Award 2020	Pharmacy Industry Award 2020
Under 16 years of age	45%	40%	45%
16 years of age	50%	50%	50%
17 years of age	60%	60%	60%
18 years of age	70%	70%	70%
19 years of age	80%	80%	80%
20 years of age	90% if employed by the employer for less than 6 months, 100% otherwise	90%	90%

The Application seeks to replace the table with the above information in each award with the following:

Age	% of applicable rate
16 years of age and under	50%
17 years of age	75%
18 years of age and over	100%

While the Application, if successful, applies to the 3 specified awards, the Australian Council of Trade Unions has commented on the Application and referred to the total of 75 awards that have junior rates schedules. It is therefore foreseeable that, if successful, the outcome would trickle down to other instruments as part of alignment to the modern awards objective.

The matter has been listed for directions for 21 March 2025.

What does this mean for employers?

The changes that the SDA proposes for the relevant awards would have a large impact on numerous employers in these industries, with higher employment of junior employees. The flow to other awards would equally have an impact and drive up the labour costs for employers using junior employees.

Peter Ridings v Fedex Express Australia Pty Ltd T/A Fedex [2024] FWC 1845

This case concerns the arbitration of a section 65B dispute around a flexible working arrangement request, where it has been rejected by the employer.

Facts and Background

The employee, who joined Fedex in April 2015, did not attend the physical office from September 2023 to July 2024, as he worked under a flexible working arrangement (working from home) to care for his wife and two children. The worker had been qualified as a carer under s65(1A)(b) of the Fair Work Act as his wife had signs of Elhers Danlos Syndrome and Level 2 autism, and his two children had an intellectual disability and Level 3 autism.

While originally working full time, on 1 July 2019, Mr Ridings made a request to reduce his working hours and work part-time, 4 days per week. The request was agreed to by Fedex.

Due to COVID-19, from April 2020, Fedex required all employees to work from home. This continued until September 2022.

After receiving notice from Fedex that he would be required to work from the office 2 days per week from September 2022, Mr Ridings took both annual and carers leave for the days where he was required to attend the office until July 2023.

In July 2023, he was notified that he would be expected to work in the office 3 days per week. He subsequently requested a flexible working arrangement to work 1 day in the office. This request was rejected by Fedex. Although, Fedex then proposed an alternative that he could continue working in the office for 2 days per week, which he accepted in August 2023.

On 18 September 2023, Mr Ridings then stated that he sprained his ankle and took unpaid leave until December 2023. He then requested that he work 4 days from home, as he claimed he was unable to drive to the office with his sprained ankle.

On 10 January 2024, he then requested to work 4 days from home indefinitely.

Decision

The Fair Work Commission (**FWC**) noted that '*until a request is granted, employees are expected to follow the lawful and reasonable direction*' of their employers.

In working where he pleased, Mr Ridings was therefore under the false belief that the post-COVID direction from his employer (to return to the workplace) was not in fact lawful and reasonable, and that he did not have to comply with the mandate until the FWC had made a decision.

Furthermore, the worker was under the incorrect assumption he was entitled to a flexible working arrangement without an approved request.

While the worker had put forward a request, the FWC held that he had failed to provide sufficient information to Fedex to allow Fedex to understand his reasons for the request. The Applicant '*had to demonstrate what his carer responsibilities entailed and how it impacted his ability to attend work in the office*'.

However, employers can only refuse requests with information that has been presented to them after they take reasonable steps to enquire about the circumstances of the employee. If the worker fails to clearly put forward the details, it cannot be said that the employer is properly informed of the circumstances. They cannot genuinely consider requests if they have not been provided with all of the relevant information. Fedex had, reasonably, provided multiple opportunities to Mr Ridings to provide further explanations of his circumstances, although it was only at the FWC hearing where the worker began to explain what his reasoning was in relation to his '*carer demands*'.

Ultimately, whilst the employee incorrectly assumed he was entitled to the flexible working arrangement without a written request, Fedex ultimately did not have a sufficient reason to refuse the request. The reasons must relate to reasonable business grounds based on efficiency and productivity – which Fedex did not have.

However, in arbitrating the dispute, the FWC held that that the request ought not be granted. The FWC determined that allowing him to work from home would inhibit 'efficient informal discussions when needed', heighted by the fact the employee insisted to record calls, only correspond via email, and refused to work in the office. Furthermore, there were concerns related to his lower performance output compared to other colleagues – which the FWC gave weight to. The FWC found it difficult to accept he should be able to work from home indefinitely noting these issues.

Ultimately, Fedex was to allow the employee to work from home 3 days a week and be required to work at the office for 1 day a week. However, if he does not attend the office for more than two consecutive weeks, performance concerns exist, or there are genuine operational requirements requiring the employee's attendance, Fedex may lawfully and reasonably request the employee to work at the office on days he is permitted to work from home.

What does this mean for employers?

The decision highlights the scope of long drawn out processes and disputes around flexible working arrangements.

The case provides useful examples for employers to properly follow through on requests and ensure there is a proper basis to reject them – even where a request is incomplete.

Junior doctors to recover $230 million worth of underpayments in 'landmark' class action settlement with NSW Health.

Fakhouri v The Secretary for the NSW Ministry of Health (No.2) [2024] NSWSC 1171

NSW Health has agreed to pay $230 million to over 20,000 junior doctors who worked between December 2014 and December 2020. It is likely that this settlement will be the largest of its kind in Australian legal history. Rebecca Gilsenan, principal at Maurice Blackburn, stated that a wage underpayment class action of this size has never been settled before.

Head litigant Dr Amireh Fakhouri wants the action to radically change the way that junior doctors are treated in the workplace. Fakhouri stated that the settlement is "about the changes that we're making", and that the few thousand dollars she may receive is just a bonus.

NSW Health Minister Ryan Park expressed his disappointment that the payment concerns had not been addressed by the previous Government's Health Department. Despite making what he described as "*significant inroads*", Park conceded that his Department still needs to do better. "*I'm not saying we fixed it, but we've made a big indent in the past twelve months*", he said.

Ultimately, this is more than just a '*landmark*' wage underpayment class action. Those at the very heart of the claim hope that it triggers a fundamental shift in attitudes shown towards junior doctors in their workplace. The litigants are also hopeful that it alters the hierarchical workplace structure that has created the culture of silence and facilitated the underpayments in the first place.

The Settlement Approval has been fixed for hearing on 30 June 2025 by Justice Garling.