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LAWYERS

Workplace Relations & Safety

RISK MANAGEMENT ADVISER

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This regular update is designed to keep you abreast of news and issues currently affecting employers, including safety, discrimination, employment and industrial law. If you have any queries or feedback on the issues discussed in this newsletter, please don't hesitate to email us at workplacerelations@cgw.com.au and let us know.

In this issue:

UPCOMING EVENTS

- 10 Sept – Performance management tips and traps
- 28 Oct – Innovation in education – law, funding and IT
- 29 Oct – Equal employment opportunity
- 26 Nov – How to draft and implement effective and compliant HR policies

See more at: www.cgw.com.au/events

Safety more important than privacy in high risk industries

By Belinda Winter, Partner and Michelle Cowan, Lawyer

In a decision released by the Full Bench of the Fair Work Commission this week (*Construction, Forestry, Mining and Energy Union – Construction and General Division v Port Kembla Coal Terminal Limited* [2015] FWCFB 4075), the last word was had on the argument between the CFMEU and Port Kembla Coal Terminal Ltd with regard to the employer's intention to introduce mixed and random drug testing in the workplace. The decision will hearten employers in high risk industries.

In July 2014, after consultation with the Union, the employer announced that it would be introducing the *Alcohol and Other Drug Standard*, requiring employees to undertake random urine and saliva tests to ensure they were free of drugs and alcohol at work. The Union filed a dispute in the Fair Work Commission claiming the use of urine tests illegitimately interfered with the privacy of workers and identified historical drug use that didn't affect an employee's work capacity on the day.

The employer argued that urine testing was widely accepted at other coal port terminals and that using both testing methods randomly would overcome the limitations of using only one method and act as a greater deterrent to illicit drug use and attempts to hide it.

In its initial decision, the Fair Work Commission rejected the Union's argument, stating it was completely irrelevant if one, or four, or more days have elapsed between consumption of the drug and detection of it (or its metabolite) at the workplace. The Commission also held that any discomfort or embarrassment about providing a urine sample would be of negligible consequence if such discomfort or embarrassment avoided death or debilitating injury suffered at work.

The Union appealed to the Full Bench arguing the use of random urine and saliva drug testing unreasonably intrudes into the legitimate rights of employees by seeking to regulate private conduct that is not demonstrated to compromise safety at work.

Ultimately the Full Bench found it was not unjust or unreasonable for the employer to implement a dual random testing scheme using both saliva and urine, arguing that safety at the workplace was paramount to the Union's concerns of the privacy of employees.

For employers in high risk industries, these decisions confirm the safety of all engaged on worksites and the employer's obligation to ensure identified safety standards will prevail over claims of infringement of personal liberties of employees.

If you would like to discuss your drug and alcohol regime please do not hesitate to contact a member of our workplace relations and safety team.

Action on excessive personal/carer's leave not a breach of the general protections provisions - important win for employers

By Annie Smeaton, Partner

In a recent decision of the Full Federal Court in *CFMEU v Endeavour Coal Pty Ltd FCAFC 76* the employer's removal of an employee from the weekend work roster because of the employee's unreliable and unpredictable work attendance due to personal/carer's leave did not constitute a breach of the general protections provisions of the *Fair Work Act*.

The facts

The employee was removed from the weekend roster (which paid higher penalties) and placed on the weekly (Monday to Friday) roster after taking about 29 days of personal/carer's leave over an approximate 18 month period. The employer maintained that the reason for removing the employee from the weekend roster was due to the employee's unreliable and unpredictable attendance at work, which impacted on the operations at the mine.

The law

Judge Cameron in the Federal Circuit Court accepted that the removal of the employee from the weekend roster was 'adverse action' under the *Fair Work Act*. However, his Honour ruled that the employer had not contravened the general protections provisions because the adverse action was not taken because the employee had exercised a workplace right to take personal/carer's leave. Instead, his Honour accepted the employer's assertion that the employee had been removed from the weekend roster because his absences meant that he had become unreliable and unpredictable, not because he had taken personal/carer's leave.

Upheld on appeal

The Union appealed Judge Cameron's decision to the Full Federal Court. In a 2 to 1 majority, the Full Court upheld Judge Cameron's decision, noting that the employer's decision to remove the employee from the weekend roster did not turn on the fact that the employee had taken personal/carer's leave and was because the employee's attendance at work was unreliable and unpredictable.

In his dissent, Justice Bromberg rejected the majority's reasoning. His Honour held that the facts at trial supported the conclusion that the adverse action against the employee was taken by the employer because the employee had exercised a workplace right (to take personal/carer's leave) and that as a consequence of him exercising his workplace right he was deemed unreliable and unpredictable.

The Union is seeking special leave from the High Court to appeal the Full Federal Court decision.

This is an important decision for employers attempting to legitimately manage excessive absenteeism.

Fair Work Commission orders bully not to make contact with employees in workplace

By Tobey Knight, Associate

The Fair Work Commission has ordered a property manager not to make contact with two employees who were found to have been bullied by the manager. The manager has also been ordered not to enter the workplace while the two employees are at work or to access their portfolios. The Commission also made reciprocal orders preventing the employees from making contact with the manager or entering the workplace where the property manager works.

The facts

In the recent case of *CF, NW and Company A and ED [2015] FWC 5272*, two employees lodged separate 'stop bullying' applications in the Commission alleging that a property manager, who was their colleague, had engaged in:

- conduct belittling the employees;
- swearing, yelling and use of otherwise inappropriate language;
- daily interference with and undermining of the employees' work;
- physical intimidation and slamming of objects on the employees' desks;

- attempts to incite the employees to victimise other staff members; and
- threats of violence towards the employees.

The employer had previously attempted to resolve the complaints at the workplace level, which resulted in the property manager resigning and taking up a position with a related company that operated from a different location. Despite this, the Commission found that there was potential for interaction between the two businesses and their employees.

The Commission has power to make any order it considers appropriate (other than an order for payment of compensation) if it is satisfied that:

- the worker has been bullied at work; and
- there is a risk that the worker will continue to be bullied at work.

Orders made

The Commission was satisfied that the employees had been bullied at work by the property manager notwithstanding that the manager was now employed by another related business, and found that there was a risk that they would continue to be bullied if measures were not implemented to enforce appropriate standards at the workplace.

In making the orders, the Commission took into account that the employer did not have any formal anti-bullying or grievance resolution procedures operating within the workplace. In addition to the orders requiring that the bully and the victims avoid each other, the Commission also ordered that the employer conduct anti-bullying training with all of its staff and implement an updated anti-bullying policy and complaints handling procedure at the workplace. The Commission further ordered that the bullying policy must set out appropriate future workplace behaviour and conduct.

The order remains in force for 24 months.

This was only the second published decision made under the 'stop bullying' provisions in the *Fair Work Act 2009* (Cth) that were introduced in early 2014. If an employer or individual breaches an order made under these provisions, they face penalties of up to $54,000 for a company and $10,800 for an individual for each breach.

Productivity Commission delivers draft report into workplace relations – good news for employers

By Dominique Lamb, Associate

The Productivity Commission recently delivered a draft report into workplace relations in Australia. While the Commission is still calling for submissions and intends to finalise its recommendations by November 2015, the Commission has made some recommendations that signal some good news for employers.

NES to be more flexible and simplified

The Commission recommends improvements to the National Employment Standards by:

- including a provision in all Awards allowing employees to observe public holidays on a date other than the prescribed gazetted dates;
- not requiring employers to pay for leave or any additional penalty rates for any new designated state or territory public holidays; and
- creating one uniform long service leave entitlement in order to simplify the current state based systems.

Penalty rate reductions

It also endorsed reducing onerous Sunday penalty rates in awards covering the hospitality, entertainment, retail, restaurant and café industries by bring them in line with Saturday rates, which are usually time and a half rather than double time.

Making unfair dismissal fairer for employers

The report further recommended removing the Fair Work Commission's power to order compensation or reinstatement in unfair dismissals arising from mere procedural errors.

Additionally it suggests:

- requiring the Fair Work Commission to undertake an upfront review of unfair dismissal applications so that the merits of all applications can be assessed before progressing to costly conciliations and hearings;
- fees will be increased to an amount, which is dependent upon the employee's income;
- varying lodgement fees depending upon whether the matter progresses to conciliation or arbitration;
- removing the emphasis on reinstatement as the primary remedy in an unfair dismissal proceeding; and
- the Small Business Dismissal Code be removed, because the code does not protect employer's against unfair dismissal claims and the advice provided by the code is not clear and/ or concise.

General protections

The Commission recommends introducing further limitations on the rights of employees and others to bring general protections claims under the *Fair Work Act 2009*, including:

- further clarification in relation to how the exercise of a workplace right applies in instances where the 'complaint or inquiry' is indirectly related to the employee's employment;
- introducing measures to minimise the costs involved in general protections litigation by ensuring the litigation process is proportional to the issues at hand; and
- a cap being placed on the damages that can be awarded by the Fair Work Commission or by the Federal Circuit Court.

Enterprise agreements

Enterprise bargaining and employment arrangements between employees and employers are the focus of the report. The Commission favours a shift from the 'Better off Overall' test to the 'No Disadvantage' test, which will give employers further flexibility to negotiate the terms of agreements.

The Commission recommended the introduction of measures in negotiations for greenfield agreements that would allow employers to choose from the following options if agreement cannot be reached after three months:

1. continue to negotiate with the union;
2. request the Fair Work Commission to undertake 'last offer' arbitration of an outcome by choosing last offers between the employer and union; and
3. submit the employer's proposed greenfield agreement for approval by the Fair Work Commission without any need for union agreement with a 12 month nominal expiry date.

This approach would assist employers locked in protracted negotiations although the greenfield agreement would still need to meet the 'No Disadvantage' test.

Enterprise contracts

The report recommends the introduction of an enterprise contract to permit employers to vary an award for an entire class of employees or for a group of particular employees without having to negotiate with each party individually or to form an enterprise agreement.

This proposal can be compared to a collective individual flexibility arrangement but importantly would also allow employers to offer an enterprise contract to prospective employees as a condition of employment. The enterprise contract would be accompanied by a number of safeguards including the following:

- Existing employees would be able to choose whether to sign on or stay on their existing employment contracts.
- The enterprise contract would be lodged with the Fair Work Commission but would not require approval.
- The employer would be required to provide this arrangement in writing to its employees.
- Employees could exit the arrangement after one year and return to the award or any other agreed contract.
- The enterprise contract would have an expiry date.

We will provide a further update once the Productivity Commission's final report is tabled later in the year.

Our team

If you would like to find out more about any of the above issues, don't hesitate to contact a member of our team.

Belinda Winter
Partner
T +61 7 3231 2498
E belinda.winter@cgw.com.au

Annie Smeaton
Partner
T +61 7 3231 2946
E annie.smeaton@cgw.com.au

Tobey Knight
Associate
T +61 7 3231 2933
E tobey.knight@cgw.com.au

Dominique Lamb
Associate
T +61 7 3231 2597
E dominique.lamb@cgw.com.au

Michelle Cowan
Lawyer
T +61 7 3231 2915
E michelle.cowan@cgw.com.au