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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.

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UPCOMING EVENTS

- 15 Dec – How to draft and implement effective and compliant HR policies
- 18 Feb – Conducting workplace investigations
- 23 March – Managing ill and injured employees

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

Failure to comply with National Employment Standards – Employer and HR manager fined

By Annie Smeaton, Partner and Victoria Hansen, Lawyer

In the recent matter of *Cerin v ACI Operations Pty Ltd & Ors* [2015] FCCA 2762, the Federal Circuit Court ordered the employer and its HR manager to pay a penalty to the employee for failing to give him adequate notice of termination, therefore breaching s 44 and s 117 of the *Fair Work Act 2009*.

The employee, who was on workers' compensation, was given 28 days' notice of termination of employment and the employer argued that this complied with s 58B of the *Workers Rehabilitation and Compensation Act 1986* (SA).

However, the Court found that this was in breach of s 44 of the *Fair Work Act*, which required the employer to comply with the National Employment Standards (NES) and give the employee five weeks' notice. The employee was therefore entitled to a further two days' notice and suffered a loss of $181.66 as a result of the breach.

The Court found that the employer's conduct in terminating the employee's employment without proper notice or payment in lieu was bizarre since no satisfactory excuse was given for not complying with the *Fair Work Act*. Further, the HR manager admitted that she was aware of the NES under the *Fair Work Act* and its requirements as to the amount of notice to be given on termination depending upon length of service of the employee.

Based on her evidence, the Court found that the HR manager was involved in the contravention of the NES due to the accessorial liability provision in the *Fair Work Act*, although her conduct was found to be significantly less serious than that of the employer.

The employer argued that the failure to provide the correct amount of notice was procedural and not a deliberate failure. However, the Court found that there was no excuse for the

employer to ignore their obligations under the *Fair Work Act* and came to the conclusion that the actions of the employer and the HR manager were deliberate.

In an attempt to reflect the seriousness of such breaches, the Court imposed substantial penalties on the employer and the HR manager. The maximum penalty for a corporation at the relevant time was $51,000 and $10,200 for an individual. The Court ordered the employer to pay $20,400 and the HR manager $1,020 to the employee.

'Exemplary' anti-discrimination policies and training not enough to avoid vicarious liability in discrimination complaint

By Annie Smeaton, Partner and Michelle Cowan, Lawyer

In the decision of *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852, the Court found that despite having exemplary workplace policies and training in place the employer was vicariously liable for the actions of its employee for breaches under s18A of the *Racial Discrimination Act 1975*.

The complainant was of Sri Lankan origin and was engaged as a delivery contractor with Australia Post. In the course of his work he would regularly collect mail from the Port Melbourne Australia Post depot and then deliver it to the Melbourne Airport. The complainant alleged that over the course of his contract with Australia Post he was subjected to racial abuse by the afternoon shift manager at the Port Melbourne depot. The complainant gave evidence that he had made numerous complaints to various managers about the shift manager making racially motivated offensive remarks to him and other foreign drivers, which were never investigated.

The complainant lodged a complaint in the Victorian Human Rights Commission of race discrimination in the workplace.

The complainant alleged that the shift manager called the complainant a '*f**king black bastard*' and made comments to the effect of '*you black bastards should do these slave jobs*'. The complainant also identified an incident in the summer of 2009/2010 when on a particularly hot day the complainant waited in an air conditioned staff room while his truck was loaded when the shift manager entered the room and said '*why the f**k are you sitting here? You should be able to stand the heat, get out of this place*'.

The Court considered the evidence of various managers and employees and found it astonishing that none but a manager who wrote the email to her superior on the complainant's behalf could recall being made aware of the complaints that had been raised over an extended period of time.

The Court did not accept that the relevant managers did not know about the alleged racial abuse, nor did the Court accept that the comments made by the shift manager were workplace banter. The Court considered that the employer's response to the complaints was inadequate and that the employer was only concerned with damage control. The Court determined that Australia Post had not satisfied the requirements of a defence by taking all reasonable steps to prevent the shift manager from racially discriminating against the complainant.

His Honour stated that:

> '*The training regimes set up by the first respondent appear to me to be exemplary. There is a process whereby leaflets are sent in payslips and are followed up by what are called toolbox talks. These talks are not brief; they go for about 20 minutes to half an hour.*
>
> *The official position taken by Australia Post is wholly exemplary. The code of conduct and other documents exhibited to the Court show that, on its face, the first respondent is wholly opposed to any form of racial or other unlawful harassment in employment.*
>
> *The difficulty, however, is that it is one thing to have these policies, no doubt sincerely embraced by the management of the first respondent, but it is another to enforce them.*
>
> *While the training and educational side of things cannot in my view on the evidence be the subject of criticism, what is starkly lacking is an effective response on the occasions when allegations of racist conduct were raised.*'

This decision confirms that having employment policies and surrounding training in place about discrimination are not sufficient to protect an employer from being held vicariously liable for the discriminatory actions of their employees and agents. We recommend that in addition to discrimination policies being implemented, a complaints management policy should be put in place and then consistently followed to protect business interests in the event of discrimination complaints being made by employees of your business.

Please contact us for advice on workplace discrimination policies, training and complaint management to assist in securing your business from employee discrimination complaints.

Long awaited changes to *Fair Work Act* and further Bill

By Belinda Winter, Partner and Tobey Knight, Associate

On 11 November 2015 a significantly reduced version of the original *Fair Work Amendment Bill* (Cth) *2014* was passed by Federal Parliament, almost two years after it was introduced.

Amendments

The following amendments were made to the *Fair Work Act 2009* (Cth).

Request to extend unpaid parental leave

Employers are now required to give employees a reasonable opportunity to discuss any request to extend their unpaid parental leave before refusing such a request.

Greenfields enterprise agreements

Employee organisations (i.e. unions) can only be bargaining representatives for a greenfields enterprise agreement if the employer agrees to bargain with them. This means that an employer can refuse to bargain with a particular union. However, in practice, a greenfields agreement must be negotiated with at least one union.

If after six months of negotiations an employer cannot reach agreement with the relevant union/s about a greenfields agreement, it can now apply to the Fair Work Commission for approval of the agreement. This allows an employer to avoid protracted negotiations with the union.

Protected industrial action

Employees are now prevented from taking protected industrial action until after bargaining for a new enterprise agreement has commenced. This prevents employees from taking industrial action to attempt to pressure the employer to agree to bargain.

This amendment reverses the position in the Full Federal Court decision of *J.J. Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53), which allowed protected industrial action prior to the commencement of bargaining for a new agreement.

Amendments not passed

After much debate there were many amendments that were removed from the Bill before it was passed, including the following.

Annual leave loading on termination of employment

The National Employment Standards were to be amended to resolve the inconstancy between the *Fair Work Act* and many modern awards in relation to payment of annual leave loading upon termination of employment. It was proposed that on termination of employment the employee would be entitled to payment of any untaken annual leave at their base rate of pay. This meant that the employee would not be entitled to annual leave loading on termination of employment unless an applicable industrial instrument provided for it.

As this amendment was not passed, the position in *Centennial Northern Mining Services Pty Ltd v CFMEU* [2015] FCAFC 100 remains. That is, if an employee receives annual leave loading during employment, they are also entitled to loading on any untaken annual leave on termination of employment, despite a contrary provision in any industrial instrument.

Individual flexibility agreement

There were various proposed amendments to the requirements for individual flexibility agreements in awards and enterprise agreements, including a statement from the employee about how the agreement meets their genuine needs and results in them being better off overall and providing for 13 weeks' notice of termination.

Transfer of business - exclusion

It was proposed to exclude the transfer of business provisions in relation to transferring instruments where an employee transfers to an associated entity at their own initiative.

Union right of entry limitations

The proposed amendments reversed many of the previous Labour Government provisions about union right of entry, including requiring the employer to facilitate transport and accommodation arrangements in remote locations and making the lunchroom the default location for discussions.

Dismissing unfair dismissal applications without hearing

The proposed amendments gave the Fair Work Commission the ability to dismiss unfair dismissal applications without holding a hearing where the Commission was satisfied that the applicant had failed to attend a conference or hearing, comply with directions or discontinue an application after a settlement agreement or if the application was frivolous, vexatious or had no prospects of success.

Leave while receiving workers' compensation

The proposed amendments provided that an employee could not take or accrue any type of leave while they were absent from work and receiving workers' compensation payments.

Round two – *Fair Work Amendment (Remaining 2014 Measures) Bill 2015*

On 3 December 2015 Federal Parliament introduced a new Bill to amend the *Fair Work Act* containing the above provisions that were removed from the 2014 Bill.

We will keep you updated on the progression of the 2015 Bill.

Queensland Parliament passes the *Work Health and Safety and Other Legislation Amendment Bill 2015*

By Belinda Winter, Partner

The Queensland Government has now passed the *Work Health and Safety and Other Legislation Amendment Bill 2015* (WHS Bill).

The WHS Bill reinstates some right of entry powers that were previously held by work health and safety representatives until their powers were scaled back by the Newman Government in 2014.

The Bill has amended the *Work Health and Safety Act 2011* (WHS Act) to:

- remove the requirement for permit holders to provide 24 hours' notice of entry to investigate a suspected contravention of the WHS Act, allowing permit holders to gain immediate access;
- allow training health and safety representatives to direct workers to cease unsafe work;
- remove the penalty for failing to provide notice of entry to inquire into a suspected contravention of the WHS Act (which is a departure from the current national model WHS laws);
- decrease the maximum penalty for contravening WHS entry permit conditions from 200 penalty units (currently $23,560) to 100 penalty units (currently $11,780);
- reinstate the requirement from the repealed *Workplace Health and Safety Act 1995* for the regulator to be notified of workplace injuries that result in a worker being off work for more than four days; and
- reinstate the Electrical Safety Commissioner, Electrical Safety Education Committee and Electrical Equipment Committee.

The changes represent the implementation of an election commitment from the Palaszczuk Government as part of their *Improving Safety for Queenslanders at Work Policy.*

However, changes are viewed as a backwards step for some employers and employer groups, who feel that for some time, unions have used safety issues as a mechanism to apply pressure on employers when seeking other industrial agendas.

The amendment to reinstate the Electrical Safety Commissioner, Electrical Safety Education Committee and Electrical Equipment Committee is yet to commence as the Government makes appropriate appointments for these roles.

The other abovementioned amendments are already in force.

High Court finalises position on sham contracting in triangular contracting arrangement

By Annie Smeaton, Partner and Sandra Barry, Lawyer

The High Court has determined that the sham contracting provisions in the *Fair Work Act* protect employees engaged by third party contractors and performing services to their former employer. The decision serves as a warning to employers attempting to disguise employment relationships as independent contractor arrangements under triangular contracting arrangements.

The facts

In the recent decision of *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors* [2015] HCA 45, the Fair Work Ombudsman (FWO) commenced proceedings alleging that Quest South Perth Holdings Pty Ltd (Quest) had misrepresented to two employees that they performed services as independent contractors under an engagement through a third party cleaning contractor.

The employees had been engaged by Quest as employees to perform cleaning services. Quest then entered into an arrangement with a third party cleaning contractor which resulted in the employees being engaged as independent contractors by the cleaning contractor to perform cleaning services to Quest. Importantly, the services performed by the employees to Quest as independent contractors were the same services they performed previously as employees when directly employed by Quest.

Section 357(1) of the *Fair Work Act* provides that an employer who employs an individual must not represent to that individual that the contract of employment under which the individual is employed by the employer is a contract for services under which the individual performs work as an independent contractor.

Federal Court

The FWO commenced proceedings against Quest claiming penalties for Quest's contraventions of section 357 of the *Fair Work Act*. At first instance the Federal Court dismissed the proceedings.

On appeal to the Full Federal Court, the Court found that while the effect of the conversion of the employees to independent contractors did not vary the services they performed for Quest (apart from the employees receiving payment of wages from the third party) the proceedings were dismissed on the grounds that a contravention of the sham contracting provisions under section 357 of the *Fair Work Act* had not been established because:

- the employees were not forced to enter into the contracting arrangement; and
- there had to be a representation made by the 'employer' (i.e. Quest) to the employees about the mischaracterisation of the contract of employment. Here, the contract for services was made between the employee and the third party cleaning contractor and did not include Quest.

High Court

The High Court overturned the Full Court's decisions and held that section 357(1) of the *Fair Work Act* prohibits an employer from misrepresenting to an employee that an employee performs work as an independent contractor under a contract for services with a third party.

Importantly, the High Court found:

- that there was a 'triangular contracting' arrangement entered into by Quest whereby a third party engaged the employees as independent contractors and the employees performed the exact same services for Quest but as independent contractors;
- the purpose of the sham contracting provisions under the *Fair Work Act* are to protect individuals who are in truth employees from being misled as to their employment status; and
- the misrepresentation by Quest to the employees as to their employment status was *squarely within the scope of the mischief to which the prohibition in section 357(1) was directed.*

This is an important decision for employers to ensure that their employment and contracting arrangements are lawful.

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.

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