

# INDUSTRIAL RELATIONS UPDATE

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## Wake up call for employers

Heightened risk of accident for night workers has been the focus of attention in an important case in the WA Supreme Court recently.

The Court rejected a casino employee's appeal that her employer was responsible for her car accident on the way home after working her regular night shift. This was on the basis that she could not prove that she fell asleep while driving which then contributed to the crash.

However, the decision raises serious questions over an employer's duty of care.

The court reasoned that *"the increased risks to which night-shift workers are exposed when driving home in the pre-dawn hours"* are not matters *"which are so blindingly obvious and well known to all, that it could be safely assumed that all workers would be aware of them"*.

The Court said it could not be safely assumed that all night-shift workers would be aware of the risk of accumulating a sleep debt, the circadian cycle and its effect on their alertness during pre-dawn hours or the masking effect of stimuli in the workplace.

As such, it found the employer did have a duty to warn night shift workers of the increased risks of fatigue and drowsiness when driving home.

Employers cannot assume their employees have an understanding or knowledge of the risks of fatigue. Those who engage night workers should make it standard practice to comprehensively warn the employees of the risks of fatigue. Employers can also put in place fatigue management plans to minimise the effect of sleep debt.

[Fraser v Burswood Resort \(Management\) Ltd WASCA 130 \(15 July 2014\)](#)

## Complexities of multiple employment

Although it is not unreasonable for part-timers to have other employment, the use of confidential information or intellectual property, gained in one workplace but used in another, can constitute grounds for serious misconduct.

A part-time HR manager found this out the hard way when her employer discovered while investigating a bullying claim that she had been using its HR policies to develop similar documents for another organisation that she was employed by.

The court disagreed with her allegations, asserting that her use of her first employer's intellectual property, without their knowledge or permission, was 'wholly inappropriate.'

Importantly, the judge noted that the HR manager did not disclose her second job to her first employer and that none of the other senior managers appeared to be aware of it either. It was also important in the judge's view that she had profited from using her first employer HR policies.

This case raises a number of issues regarding the complexities of part-timers having other employment. It is important that employers have clear employment contracts in place that limit the potential for conflict arising from employees having two jobs, particularly in relation to the disclosure of activities and confidentiality.

[De Blasio v Melba Support Services Inc. \[2014\] FCCA 1893 \(22 August 2014\)](#)

**ANY QUESTIONS OR QUERIES?**

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## Mutual trust and confidence implied term quashed

The complexity of employment contract law in Australia, and the overlaying of common law principles governing contract performance, received an airing in a recent High Court case.

On appeal against a Federal Court decision, the High Court has held that under the common law of Australia, there is no implied term of mutual trust and confidence in employment contracts.

In this case, an employee was made redundant by their employer. He claimed the conduct of his employer was in breach of an implied term of mutual trust and confidence. He asserted that this resulted in the denial of an opportunity for redeployment and the retention of his employment with the employer. The employee's argument relied heavily on case law from the UK.

But the High Court found that the implied term was not necessary for the effective operation of the contract of employment and any imposed mutual obligations that were *"wider than those which are necessary."*

The decision also stated that the establishment of an implied term of mutual trust and confidence in common law was a *"step beyond the legitimate law-making function of the courts"* and should be created properly within the realm of the legislator. This was especially relevant in the Australian context which has far more highly prescriptive employment laws and institutions for dealing with them

However, the court agreed that the implied duty of co-operation exists in contracts of employment. This means that employers have a duty to take positive steps to enable the other party to receive a benefit from the contract.

In addition to this, the decision has left the door open in relation to the general obligation to act in good faith in the performance of all contracts.

In order to avoid an implied term, employers must clearly deal with a subject matter to be excluded in their contract of employment.

[Commonwealth Bank of Australia v Barker \[2014\] HCA 32 \(10 September 2014\)](#)

## 'Workplace' includes the local pub

Most people think of their workplace as a discrete, defined space. And they'd be right, most of the time. But not necessarily always as an accountant discovered to his detriment in a recent federal court case.

A full court of the Federal Court has confirmed that a pub two work colleagues visited to deal with sexual advances in the office was a "workplace" under federal discrimination legislation.

The court upheld an earlier court finding that the accountant, who was contracted by the employer, physically harassed his female supervisor over a three day period, including having sexual intercourse with her while she was intoxicated. This included propositioning her with explicit and crude terms at the pub across the road after work one evening.

The court argued that a workplace, as defined by legislation, is *"a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant"*

In a majority ruling, the judges agreed that the supervisor accompanied the accountant to the pub across the road from the office to deal with the unwanted sexual advances that had commenced at the workplace. In this sense, the function of the pub visit was to resolve an issue arising from the workplace.

This case is an important reminder for employers to be conscious that discrimination legislation extends to their contractors and to situations that occur outside of the conventional workplace. Employers need to be aware of their vicarious liability in such circumstances. As such, employers should have clear policies and awareness protocols in place, which clarify the provisions of discrimination legislation.

[Vergara v Ewin \[2014\] FCAFC 100 \(12 August 2014\)](#)

