INDUSTRIAL RELATIONS UPDATE

August 2017

On Being Anti-Social with Social Media

More employers are realising the damage that can be caused to their reputation and business generally by adverse social media posts. Employees are expressing opinions, frustrations, gossip and abuse via social media affecting their employers and their colleagues. What was once perhaps confined to a few mates in a bar after work, can now be literally broadcast endlessly. The wider reach afforded to individuals because of IT developments in recent years has significantly extended the reach of what used to be no more than a blowhard's venting.

But questions immediately arise about freedom of speech and privacy – especially the argument "what I do in my own time is not my boss' business". Trouble is, that just isn't so.

Twitter, Facebook, Snapchat, Instagram et al might be new, but the ability of an employer to have influence on an employee's private life is not. For a long time now, courts and tribunals have found that employees must not bring their employer into disrepute by words or actions. There are many cases where an employee has been sacked for private behaviour which an employer found repugnant and a poor reflection on the reputation of that business or organisation.

And again, the social media space is different; we all *say* things impulsively, without thinking. But *writing it down* is a different matter all together.

So how to handle it? A good guide has come to light within the Australian Public Service. The APS has an established Code of Conduct and, as an adjunct to that, has published a short guideline explaining how 'misuse' of social media can intrude into the employment relationship.

At the core of the guide is a principle that can easily translate to the private sector; that an employee who openly criticises his or her employer undermines the public's confidence in both that employee's professionalism, and their ability to act in the best interests of the employer and deliver the goods and services that the organisation exists to provide.

Some of these social media posts are not generic invective directed at 'the boss', but specific criticism aimed at named colleagues. Or customers and suppliers. This is where the whole business gets seriously ugly. The right to free speech is not a right to slight or insult anyone.

Employers need to consider the merit of not just establishing a social media policy but publicising the consequences to employees of using it to rant about work or work-mates. There is no excuse now for failure to have in place relevant policies and cautionary notices for staff. These systems of communication are established and ubiquitous. Some people genuinely do not understand the potential collateral damage they can cause through misuse of social media, and it's too late after the offending item has been posted.

Making Public Comment on Social Media - A Guide for APS Employees

Internships—What's the Story?

The Commonwealth Government has launched a new program called Youth Jobs PaTH. The focus is on internships. It's about providing an opportunity for job-seekers aged 15-24 to test the waters and for employers to see if the person is suitable for the business. Hosting placements run from four to 12 weeks depending on the work. There are various benefits paid to employers and no direct wage costs. Eligibility hinges on there being a reasonable prospect of the intern gaining employment with the host employer at the end of the internship. More details can be found here.

Trends

Bargaining Blues

Some disturbing statistics have emerged from a recent FWC Senate submission. Less than half approved EAs get through the system without faults being found and undertakings required. A staggering 17% are now withdrawn altogether by the employer.

There are many theories about why this is happening, but one thing's for sure; the problems are not confined to SMEs or non-union agreements, but are across the board. It really bells the cat on the "simple, flexible and fair framework" the legislation purports to provide for bargaining.

FWC Submission to Senate Employment Committee Enquiry

Low wage rises still the norm

While the recent large increase in minimum award wages has yet to have any discernible impact, bargaining continues to deliver low end outcomes in terms of wage increases.

In fact, the most recent data from the federal Dept. of Employment indicates that wage rises in private sector enterprise agreements, at an average of 2.7%, are the lowest ever, bar one very small survey sample 26 years ago.

And for a change, the public sector figure was even lower, at 2.4%. This data underlines the oddity of low (relatively) unemployment being coupled with low wage rises, a phenomenon occurring in most industrialised nations.

What is "wage theft"?

Apart from being a newly minted term to describe underpayment of wages, this slogan is a rallying point for unions to try to make underpayment and non-payment of wages a criminal offence. By elevating breaches of awards and the like to "theft" it puts the offence in the same category as break, enter, steal or tax fraud, or any of the myriad of ways humans thieve.

The point of this is to stop underpayment of wages from being classed as an administrative or inadvertent breach and instead be considered a criminal act, deserving of sanctions no different to a common thief. And that means gaol.

While there are some difficulties with this campaign, and it will struggle to succeed, what it may do is force greater resources to be allocated to the Fair Work Ombudsman and the ATO to police awards and superannuation.

Already the federal government is sponsoring an amendment to the Fair Work Act, called, *Protecting Vulnerable Workers* (and who could possibly be opposed to something that altruistic?). This proposed legislation beefs up civil penalties and pushes the liability for award breaches down the line. Think accessorial liability and chain of responsibility. It isn't much of a stretch to see that once this new law is passed, that the policing arms of the system, FWO and ATO, will be asking for greater resources, and getting them.

For employers, they must keep up the pressure for the system to be simplified so that mistakes aren't so easy to make. The layers of workplace relations regulation in this country make a crocodile look positively thin-skinned. It's no wonder so many breaches are detected. And we know why SMEs dominate the stats – they employ the majority of Australians.

Many employers, out of enlightened self-interest, would happily join with the unions in their campaign to stamp out "wage theft" if the quid pro quo was the true simplification of our system. Until that happens, it will remain far too easy to make underpayments, or non-payments through misunderstanding rights and obligations.

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

Four yearly award reviews likely to go

Legislation is before the parliament to abolish the four yearly review of awards currently required by the Fair Work Act. All sides of the debate agree the system has become too cumbersome. The 2014 Review is not yet concluded. The next one, should this legislation fail, is due to start in less six months. However the corks should probably stay in the bubbly. It is likely that some powerful, well-resourced unions will be making applications to vary awards on a regular basis. The 2014 Review has been plagued by a mountain of claims (from unions *and* employer associations) which has seen awards not modernised, but retro-fitted with more red tape. As bargaining steeply declines, awards become more relevant again, hence the temptation to load them up with more provisions may prove irresistible to a union movement losing relevance and members.