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INDUSTRIAL RELATIONS UPDATE

December 2019

'Insulted' HR Manager Vindicated

A federal court appeal has cleared a HR manager who was accused of sacking an employee because of his mental illness, finding that the trial judge had failed to distinguish between a disability and the consequences of it.

The case involved a decision by the HR manager to terminate the employment of the employee after trying unsuccessfully to get him to undertake an independent medical examination. The employee had provided medical certificates short on detail, with regard to both the employee's overall health and any indication of when a return to work was likely. The HR manager eventually formed the view that the employee was not ill and probably working elsewhere, but claiming workers' compensation from her company. So she terminated his employment.

The trial judge decided that since the employee's absence and lack of cooperation stemmed from his asserted mental illness, it was the real reason for the dismissal. He found the HR manager, despite strenuous denials to the contrary, had allowed the illness to influence her, to be an operative factor. The HR manager responded that she was insulted by such an accusation. She testified that she was aware of the requirement to support people suffering from mental disability and was currently doing exactly that with a number of employees.

But this did not sway the judge who said there was no distinction between the employee's ability to work and his mental disability. The dismissal letter's reference to the employee's "capacity to return to work" could only be a reference to the employer's concern about his mental state. In other words, the trial judge did not distinguish between the fact of the employee's continuing absence from work and the cause of it, or the alleged cause of it.

On appeal, this approach was overturned. The full bench said the HR manager did not know the true circumstances of the employee's state of health. The employee had not cooperated with attempts to find that out, so he couldn't have been sacked for the prohibited reason that he had a disability. The HR manager couldn't know if he would ever recover, or when, because there was no evidence to inform her one way or the other. So she couldn't have done what the trial judge said she did.

But most importantly, this decision distinguished the existence of a disability from the consequences of it, especially the effect on the employer. That is, the HR manager didn't dismiss because the employee had an illness, rather, because he couldn't work. The HR manager needed the position filled, and it was the absence, and no clear indication of that absence ever ending, which motivated her. Not the disability. The full bench stressed that an effect of a disability and the disability itself, are not one and the same thing, so the HR manager's action was not prohibited.

Western Union Business Solutions (Australia) Pty Ltd v Robinson [2019] FCAFC 181 (23 October 2019)

Unsure of your Public Holiday obligations over the Christmas/New Year Period?

Are you obliged to observe part holidays in your location?

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Vic Labour Licensing Commences

Anyone who operates a labour hire business or uses one in Victoria has to comply with this licensing regime from 30th October 2019. Heavy fines apply if they do not.

More details here:

Victorian Labour Hire Authority

Whistleblowers' Protection Policy

Large proprietary companies and public companies that haven't got a whistleblower's policy in place by 1st January 2020, face a $12,000 fine, with the passage of the Enhancing Whistleblower Protections amendments into law earlier this year. The policy must include a range of aspects to meet the legislative requirements, such as providing information to employees about whistleblower protections and how their employer will investigate any disclosures a whistleblower makes and what support the employer will afford a whistleblower. The policy also needs to set out to whom disclosures in the employer's organisation may be made and how they are to be made.

Smaller firms, while not required to do this, ought nevertheless consider establishing a similar set-up, not least because many expect their employees to report various behaviours in the workplace (e.g. harassment, bullying). So where there is an expectation on employees to 'blow the whistle', there ought to be some basic rules and protections for them in place.

Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019

Check Your Measurements

KPIs are all well and good to manage employees but it's important they relate to consistent and relevant markers if they are to be used to determine overall performance. And the Fair Work Commission has found that using voluntary customer surveys as *the* measure, doesn't cut it.

The case concerned a car dealership that requests its clients to fill in a customer satisfaction survey after a service. The questionnaire isn't specific in terms of identifying particular employees with whom the client may have had dealt.

The employer collects data from the surveys and uses them to rate employees, with scores referred against national performance figures taken from similar surveys country-wide.

When a Service Advisor was dismissed because his score fell into the bottom half of the ratings, he claimed unfair dismissal and the FWC upheld his case. The FWC was underwhelmed, pointing out the obvious short-comings of the system to determine the employee's capacity. For example, not all customers complete a post-services survey. This potentially skews the results.

The company argued that the last survey relating to a job the employee was involved with immediately prior to his dismissal included several complaints. However the FWC pointed out that even this argument was weak because the survey responses did not deal solely with the employee's actions, but also those of the technicians and other workers.

The FWC found there to be no valid reason for the dismissal based on the "*inherent unfairness in measuring the complete service experience provided to a customer and ranking it against the Service Advisor only, when there may be many and varied reasons unrelated to a Service Advisor's duties as to why a customer provides a low score*".

This case warns of the need for performance guides to be based on measuring activities and attributes an employee can actually influence, that relates to them. The collective nature of this scheme here looks fair on the surface, as all employees are rated and scores averaged, but the inputs were too broad to make the ratings *the* benchmark on an individual basis.

The FWC was unimpressed that an employer would rely almost entirely on the surveys to determine if an employee was performing. It ordered 10 weeks' pay in compensation.

Mr Kris Brennan v ASG Brisbane Pty Ltd T/A Audi Indooroopilly [2019] FWC 7630 (6 November 2019)

Low Expectations

Wage growth continues to slide, with the Reserve Bank observing that perhaps "*wage expectations have become anchored at low levels, as a result of a prolonged period of low wage and inflation outcomes*". And the recently released September quarter Wage Price Index shows private sector pay rises dropped marginally to an average of 2.2%, which continues the long run of low average rises. This Index has not recorded a figure higher than 2.3% for the private sector since December quarter 2014.

This relatively low number has also to be considered in the light of the higher than usual award increases the FWC made the last two July Annual Wage Reviews. The maths doesn't lie – some wage earners are treading water. None of the experts who regularly comment on wage rises sees a change any time soon. The RBA doesn't expect unemployment to drop in the foreseeable future either, dampening hopes for demand driven wage rises/inflation to bolster growth.

RBA Quarterly Statement on Monetary Policy, November 2019
Wage Price Index, Australia, September Quarter 2019, 6345.0

Big Brother ATO is Watching

The Single Touch Payroll (STP) system is certainly 'touching' some employers – the ATO is using it to verify employers' compliance with, among other things, their superannuation guarantee obligations. The STP system can be used to monitor super payments and some employers, tardy or delinquent, have been issued warnings by the ATO.

The obligation for nearly all employers, including those with less than 20 employees, is to report salaries and wages, PAYG and super liabilities. It is from this data that the ATO is observing employers whose systems are not capable of ensuring either the correct amount of superannuation is being paid or that it's paid on time.

Of particular concern is the volume of unpaid super the ATO garnered by issuing individual director notices, which are notices demanding the super liability from directors whose companies had not met their obligations.

The average hit there in the last financial year was around $56,000. Very touching.

Do You Need a Payroll Audit?

Employers wanting to ensure they avoid reputation-damaging headlines about underpaying staff, are opting to do an internal payroll audit before the Fair Work Ombudsman or a union comes knocking. Or they become the subject of negative social media posts that bring unwelcome attention.

Historically the focus has been on small business for detecting award breaches, on the assumption that 'big business' didn't need payroll oversight from government inspectors. It was assumed that they would have adequate resources and safe-guards, including a union presence often, to ensure compliance.

But when the likes of Woolworths, Wesfarmers, Bunnings, Qantas, the ABC, the Commonwealth Bank and others get it wrong, then it just might tip the FWO into 'corporate regulator' mode. For most larger companies, a typical problem is incorrect implementation of EBA conditions, because the payroll department is not involved in the negotiation process and doesn't understand the way to apply varied terms. And payroll functions outsourced to overseas facilities are particularly vulnerable.

An audit should be done by an independent organisation, otherwise the same interpretations or errors that might be being made, are at risk of being repeated. Could a check-up be a good new year's resolution?

From the team at First IR we wish you

Merry Christmas

& Happy New Year

First IR will close around noon EDT 20/12 and re-open at 9am EDT 6/1

If you need anything, just email us

We've appreciated your business in 2019,

we look forward to doing more of that in 2020