INDUSTRIAL RELATIONS UPDATE

April 2018

Spray at the Boss pays Dividends

While it cost him his job, an IT engineer has been compensated after criticising the way the CEO was dealing with a supplier. The company's argument, that his criticism was about operational matters not employment conditions, so no prohibited reason was part of his dismissal, failed.

The case came to court under the adverse action umbrella of the Fair Work Act. The employee claimed he had been dismissed because he made a complaint or enquiry "in relation to his employment". In particular, he was upset that the CEO was refusing to pay a supplier's invoices, for a job the employee was managing.

The employee sent emails to both the CEO and two other senior colleagues in which he openly criticised the CEO and her approach to resolving differences with the supplier. He was subsequently dismissed with notice.

In court, the employee explained that the supplier had been kept waiting a long time to be paid and had withdrawn its services. This in turn was exposing the company to damages for failure to complete. As the manager of the project, he argued this directly related to his employment.

The company contended that the employee had been sacked for a range of reasons, including that he had demonstrated a lack of confidence in the CEO by criticising her tactics to resolve a dispute with a supplier. None of the reasons for his dismissal involved a prohibited reason under the adverse action regime, the company argued, because they were not about terms and conditions or employment rights.

But the court was unmoved by these pleas, and referred to earlier federal court findings that the words of the legislation are broad enough to include any matter in relation to employment. The court agreed with the employee, saying *"the timely payment of subcontractors….. was something that arose directly out of the performance of his work and impacted on him as an employee".*

This decision should be of concern to employers who think their lawful actions as owners or CEOs should not be openly challenged and if they are, this is tantamount to some sort of repudiation of the contract, that it falls within the category of 'loss of trust' or 'loss of confidence'. Many employers would think that an employee writing to colleagues saying the CEO is not "*acting in the highest and best interests of the business"* would indicate a fundamental breakdown of the relationship.

But as this case shows, if the criticism or complaint can be linked, however tenuously, to being "in relation to the employment", then a dismissal for that reason can be adverse action. Employers need to be careful how they respond to an employee making a complaint or inquiry about any matter at work, because getting it wrong could prove costly. Reacting in the way this employer did is not so surprising, but it has a $150,000 bill in compensation and penalties to deal with now.

Fatouros v Broadreach Services Pty Ltd [2018] FCCA 769 (29 March 2018)

Domestic Violence Leave Gets Nod

The FWC has decided to provide five days' unpaid leave to employees experiencing family and domestic violence, if the employee needs to do something to deal with the impact of that violence and it is impractical for them to do it outside their ordinary hours of work. Following further consultations, it is expected most modern awards will be varied to include the new entitlement this year. The federal government has signalled it intends to include the same entitlement in the Fair Work Act.

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ACTU aims for huge award wages increases

The Annual Wage Review is underway and the ACTU is claiming a 7.2% increase to all award wage and salary rates. Given the ACTU has cheer squads in both the parliament and the Reserve Bank for a lift in wage rates, the likelihood of another hefty pay rise like last year is strong.

For a while now, the federal government and opposition, along with the RBA and others, have been making noises about the need for higher wages. The last budget was framed in the expectation that wages would rise.

Employers with agreements or employment contracts that have salary rises clauses tied to this annual review need to brace themselves for another whack come 1st July.

Pay rises track inflation rate

Private sector pay rises and the Consumer Price Index are hand in hand at 1.9%, according to the Bureau of Statistics.

These figures refer to overall increases in private sector pay rates. In EBAs, pay rises are a little higher, running on average at around 2.4% at the end of the year.

The trifecta of low wage rises, low inflation and low interest rates was, until recently, seen as a sign of stability and predictability - a good outcome rather than a state of affairs to be rectified.

That narrative has changed, although so far it is only talk. Come July though, things might start to change.

Bullying and Liability

When employers realised the Fair Work Act's anti-bullying regime had no monetary compensation attached, there was a collective sigh of relief. But a recent Victorian Supreme Court case highlights the prospect of vicarious liability where an employer knows, or ought to know, that bullying can cause psychological injury to an employee.

WHS statutes emphasise employers' obligations to provide safe workplaces – and that means a safe system of work. Taking that one step further, it has been held to mean that employees must be competent to support a safe work system. And a competent employee does not bully, harass, demean, abuse, intimidate or humiliate their colleagues.

The court discussed this in the context of an employer's liability for damages. The pathway is clear: there is a bully; the employer knows this; there is a bullied colleague; the employer knows this; the bullied colleague is at risk of developing a recognisable psychiatric injury; the employer knows, or ought to know, this; ergo, the employer can be vicariously liable and that means the employer pays.

To end up at this point the injured employee would need to show that there had been a pattern of behaviour which met the criteria of bullying. While not a defined legal term, it has been accepted to mean repeated, unreasonable behaviour directed towards an employee that creates a risk to health and safety. The expression "unreasonable behaviour" means behaviour a reasonable person would expect to victimise, undermine, humiliate or threaten.

The duty the employer owes is to each employee. If there were evident signs of distress in the employee's behaviour, the court could find any subsequent psychological injury was 'reasonably foreseeable'.

Bullying has become something of cause célèbre, and possibly over-stated in terms of incidence, which may prompt some to take it all with a grain of salt. But it is an insidious and vitality sapping experience and, even from enlightened self-interest, employers ought to call it out wherever it occurs. To not do so can have debilitating effects on both the employee involved and the employer's bottom line.

Hingst v Construction Engineering (Aust) Pty Ltd (No 3) [2018] VSC 136 (29 March 2018)

Changes Flagged to Employee Flexibility Requests

Despite rejecting union claims for employees with caring responsibilities to have the right to change working times, the Fair Work Commission is prepared to make changes in this area. Citing the need for greater workforce participation, the FWC's provisional views cover three areas. Assuming these go through, first, the classes of employees eligible to request changes will be broadened to cover on-going and casual employees with six months' service. Second, the employer will be required to confer with the employee and to genuinely try to reach agreement. Thirdly, if the request is refused, the employer will be required to furnish comprehensive written details justifying the refusal.

The proposal includes a reminder to employees that the FWC can assist in resolving disputes about award matters. The FWC will hear from interested parties about the details in May with award changes likely to be in place before year's end.