INDUSTRIAL RELATIONS UPDATE

July 2018

Bullying, or Reasonable Management Action?

When employees are disciplined or put on a performance improvement plan, HR and line managers can be accused of bullying. This development has spooked some managers who are reluctant to act. Hence bad behaviour and poor performance is let slide, much to the chagrin of more obliging employees who suffer in silence – then often leave.

But the Fair Work Commission has made some useful comments about the distinction between bullying and what has become known in this area, as "reasonable management action". Given its central role in determining bullying complaints, what the FWC has to say about this is significant.

Importantly, to help make clear what the expression "reasonable management action" means in a practical sense, the FWC said in a recent case that "*The test for reasonable management action is whether the "management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'.*

Helpfully, the FWC in the same case, set out five points as a way of establishing the reasonableness of any actions taken.

First, management actions do not need to be perfect or ideal to be considered reasonable. For many small business this is a great relief, as the resources simply aren't available to dot i's and cross t's, no matter how good one's intentions.

Second, a course of action may still be 'reasonable action' even if particular steps are not. Often some aspect of the process may seem severe, like a tough timeline set but not met. And missteps along the way do not mean the overall approach is fatally undermined.

Third, to be considered reasonable, the action must also be lawful and not be 'irrational, absurd or ridiculous'. This is self-explanatory and a useful definition to apply to the more general issue of directions/instructions that employers can give.

Fourth, any 'unreasonableness' must arise from the actual management action in question, rather than the employee's perception of it. This relates to the intentions of the decision-maker. Many cases of alleged bullying have turned out to be nothing of the sort. Rather, the employee could not handle any criticism, had no experience of being disciplined and had an unrealistic evaluation of their own ability.

And finally, consideration may be given to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances. Again, self-evidently, employees ought to be treated the same absent good reason to do otherwise.

Employers need to be able to frankly and effectively let employees know what the workplace needs out of the employee without bullying charges being thrown at them. These guidelines should assist managers to approach their disciplinary and performance management responsibilities confidently.

Miroslav Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears [2018] FWC 2906 (23 May 2018)

Union Entry Only in Breaks

The full Federal Court has rejected an appeal by the CFMMEU against an earlier decision that said union officials can only access workplaces during "meal and other breaks" in the employees' normal working shift. The court did not accept the union's argument that it could see employees before or after their start/finish times. This means if a union wants access to employees, they can only visit the premises to talk to employees during meal times or tea breaks.

CFMMEU v BHP Billiton Nickel West Pty Ltd [2018] FCAFC 107 (6 July 2018)

Annual Wage Review 2018

The Fair Work Commission has increased modern award rates of pay by 3.5% effective first pay period commencing on or after the 1st July 2018. This takes the adult federal minimum wage to $719.20 for a permanent full time employee.

Often employers with their own enterprise agreements forget that this increase applies to all the classifications in the awards, so it is not just the minimum rate that matters. And s.206 of the *Fair Work Act* requires that no one is paid less than the base rate of pay from the award that would otherwise apply to the work.

This means an agreement's rates of pay must at the least match the relevant award rate all the way up the scale.

Also, many agreements have an escalation clause importing the % increase from these annual reviews. In those cases the agreement rates must be lifted by 3.5% this year. It is not enough to merely match the award or be slightly ahead of it – if the agreement says the rates increase in line with whatever the Commission decides each July, then that is the amount wages must go up. This applies, depending on the wording in the agreement, even after the agreement has passed it nominal expiry date.

Another consequence of this decision is that the high income threshold for access to unfair dismissal claims is now at $145,400, with half that figure being the maximum compensation that can be set.

Criminal Past Not Relevant - AHRC

In a contentious decision, the Australian Human Rights Commission has found an employer discriminated against a candidate for a job on the basis of his criminal record. The job applicant had been convicted of accessing, and possession of, child pornography some seven years previously. The company essentially argued that the decision not to hire was based on its corporate values.

This was especially relevant where the company had community partnerships and it was believed hiring a person with the applicant's criminal record would reflect poorly on the company. Further, the company said, on his application form the applicant had answered "No" to the unambiguous question "Have you been found guilty or convicted of an offence as an adult (excluding spent convictions)?".

Together these factors contributed to the withdrawal of a conditional offer of employment by the company.

But the AHRC found that accessing and possession of child pornography did not have sufficient connection to the duties and responsibilities of the tasks to be done. And in relation to lying on his application form, this was dismissed by the AHRC as largely irrelevant as the applicant later admitted his convictions in person to an interviewer, as well as gave permission for a criminal history check.

The AHRC recommended the company pay compensation for the hurt, humiliation and distress that the applicant suffered as a result of the discrimination.

The message for employers is that even where an applicant has lied on an application form and been convicted of a serious offence which does not align with a company's values, if the reason for not employing a person is because of those factors, then the AHRC is unlikely to support the employer.

It is probable the officers in the company responsible for making the decision to not employ this applicant were influenced by the nature of the offences for which he had been convicted. While this is understandable, it remains the law in Australia that if there is not a sufficient connection between the offences and the inherent job characteristics, then to refuse a job based on the convictions is to discriminate unlawfully.

It is lamentable that the AHRC so easily dismissed the false information on the application form in this case. But there is another aspect to all this which the decision, and others like it, does not consider. And that is, there is no thought given to the effect on those in the company, starting with the interviewers, and then HR and relevant managers, of discovering the truth about an applicant with a serious criminal record. They have to somehow divorce their own personal feelings about the nature of the offences, and axiomatically the character of the applicant, in deciding to act lawfully. This is no easy task, and tribunals might consider the distress those staff members experience when confronted with having to make these decisions.

BE v Suncorp Ltd [2018] AHRC 121

Modern Awards Review Nearly Completed

The FWC President, Justice Ross, recently announced his expectation that the four-yearly review of all modern awards will be completed by early 2019. The number and complexity of provisions in these awards continue to expand and they remain at the centre of industrial regulation in this country. All employers should make certain they are up to date with their awards.