INDUSTRIAL RELATIONS UPDATE

May 2019

Clean Record Not Enough to Avoid Hefty Fine

A company has been fined nearly 40% of the maximum penalty for a breach of the Fair Work Act largely because it did not convince the court it had revised its procedures after being found guilty.

The case concerned an employee dismissed during her probation period. She had made some complaints about the way work was being performed. Just before her probation period was up, she was dismissed and told the company didn't have to give her any reason, because she "was on probation".

The employee took the company to court alleging adverse action. Since there is a reversal of onus of proof in such cases, in the absence of a non-prohibited reason for dismissing the employee, the employer was in trouble pretty much straight away. The courts have already ruled that making complaints in relation to employment is a workplace right.

Because of the reverse onus, the court decided that the employer had sacked the employee as a result of the complaints and set about deciding what penalty to impose for the breach. This was in addition to the $10,000 already ordered to the employee in lost wages and benefits as a result of the dismissal.

The separate case to determine penalty included the opportunity for the employer to plead why it should not receive an onerous fine. As part of its submission, the company said it had never breached the Act before, had been in business a long time and this was a one off, an aberration, and unlikely to occur again.

But the court was unimpressed with this response. There was no evidence, the judge said, to show that the company's senior management had made any enquiries about why the contravention occurred, whether there existed any need for the company to take steps to minimise the risks of re-offending nor if the company had even reviewed its procedures in such matters. The company had merely assumed it would not contravene the Act again.

This case is important on a number of levels. Firstly, it is complete rubbish that an employee can be dismissed "without reason" during probation. Probation is no magic cloak to avoid having a valid reason for dismissal. Secondly, if an employee complains about an aspect of their employment, to take action against them for that, is to do so for a prohibited reason and leaves the employer open to challenge.

And thirdly, if a problem *is* found by the courts, simply relying on a clean record to minimise the damage won't do. The employer needs to show its contrition in a meaningful way, including demonstrating to the court that it has reviewed processes and made a fair effort to lessen the risk of a further contravention.

Pacheco-Hernandez v Duty Free Stores Gold Coast Pty Ltd (No.2) [2019] FCCA 1295 (17 May 2019)

Wage Increases Outpace Price Rises

You wouldn't think so from all the poor bugger me union ads run during the recent federal election campaign, but the oracle of the ABS doesn't lie; wages are growing faster than inflation. The annual CPI rate at March this year sat at 1.3% down from 1.8% in the previous quarter. But at the same time, the latest rates of pay increases measured by the Bureau sat at 2.3%. It is true that % wage rises are historically low, but it is also fair to say the same of both inflation and interest rates. With enterprise bargaining stalled, it is not likely these numbers will change much any time soon..

Consumer Price Index, Australia, Mar 2019, 6401.0

Forced Medical OK

Many employers think they can't insist that an employee undergo an independent medical examination (IME) to sort out fitness for work issues, or to see if there is any underlying issue likely to lead to further problems. But there is a substantial body of law now which lays this ghost to rest. It has been all the way to the High Court and back. Management is well within its rights to require an employee to undergo an IME. In a recent dismissal case, the FWC used strong language to stress this saying the employer had "*the contractual right …to reasonably require its employee (to) undertake an IME*."

The employee had refused to see the doctor chosen by the company, complaining the doctor was too close to the company. But the FWC rejected this, pointing out the employee had not even offered any alternative doctor to try to break the impasse.

Employers do not have carte blanche here, but the key determinant is if the request is reasonable in the circumstances. There doesn't have to be anything in policy documents, awards or enterprise agreements to somehow authorise a request. Employers have a mountain of WHS obligations on them and in there lies sufficient 'authority' to make sure employees are fit and able to carry out their duties.

Mr Andreas Bletas v The Star Entertainment Qld Limited [2019] FWC 2792 (24 April 2019)

Greenlight to Roster Planning to Avoid Penalties

A security firm has won an important full bench Federal Court case about legitimately avoiding Sunday penalty rates when drawing up rosters which include significant overtime. The decision has confirmed that where an employee works big hours, there's nothing wrong with exhausting the base 38 hour week in non-penalty attracting times and days.

The union had argued that because the award said ordinary hours were to be 152 over a four week period that meant overtime applied after those ordinary hours were worked. This would mean that an employee who was rostered to work on Sundays, at the beginning of the work cycle, would be entitled to Sunday ordinary time penalties, because it was part of the 152 allocation.

But the court disagreed and said the award provided no such restriction and in fact required the *employer* to set the roster. That meant the employer was free to choose what hours would be identified as the "ordinary hours".

There's nothing new in manipulating rosters this way, but it is nice to see a full bench of the Federal Court appeal decision confirming that where an award says the employer sets the roster, that this practice is not shonky but quite legitimate and within the law.

United Voice v Wilson Security Pty Ltd [2019] FCAFC 66 (26 April 2019)

Fingerprint File

A sawmill operator who refused to provide a scan of his fingerprint for his employer has won an unfair dismissal case on the basis of his right to refuse. The company argued that it used the 'fingerprint' to do two things: firstly, to identify quickly who was, and was not, on the site in the event of an emergency, and secondly, as the sign on/sign off mechanism for payroll. The company also argued that this employee was the only one out of 400 employees who refused, and that in the interests of safety and administrative ease, it was unreasonable for the company to accommodate just him.

But the way the company went about the process was full of basic flaws according to the FWC. Firstly, it had no privacy policy, which is a requirement under the Privacy Act for any corporation which seeks to obtain "personal information" (a defined term) about an employee. There was no doubt a fingerprint scan met that criterion. Secondly, the employer had an obligation to explain properly and fully exactly who would have the data, where it would be held, what measures all third parties had to protect the personal information and so on. None of this was done.

The employer gave the employee an ultimatum, consent or be sacked, which was no choice at all, because consent under those circumstances is not consent at all. The FWC was rightly critical of this approach. The message of this decision is that if an employer seeks to introduce administrative or other management tools into the workplace that involve collection and/or retention of employees' biometric data, they'd better read and comply with the *Privacy Act* first, well before taking any concrete steps to introduce any such system.

Jeremy Lee v Superior Wood Pty Ltd [2019] FWCFB 2946 (1 May 2019)