INDUSTRIAL RELATIONS UPDATE

February 2020

Coronavirus is not a Mexican Hangover

Employers and employees may need to deal with the ramifications of coronavirus. Staff who have recently travelled to China's Hubei province or come into contact with persons who have, are obviously at risk of infection. The catchment areas are widening constantly. The prospect of standing down employees has to be contemplated.

Employers need to have protocols in place for employees who have recently travelled from infected areas. Failure to do so would likely be a failure of the employer's duty of care if an infected employee spread the virus in the workplace.

Already, in SE Asia, numerous strategies have been developed to minimise the impact on personal and business' health. Wherever possible, employees are working from home; visitors to their work sites are obliged to don a face mask; and at-risk employees are required to check and record their temperature twice daily especially if they have visited known infection areas within the incubation period.

These are just a few of the measures being adopted in SE Asia. Understandably, given their proximity, some of these are onerous. All the same, they are indicative of what Australian employers can consider for their own circumstances.

Dealing with coronavirus is a shared responsibility. Under WHS laws, employees have a duty not to adversely affect the health of others. They have an obligation to self-report and stay away from work if they believe they've been infected. Information to that effect ought to be disseminated.

Some businesses and institutions may refuse entry to any person, including the employees of suppliers/contractors, without that person taking a specified precaution or otherwise minimising the business' or institution's risk. This may impact on an employee's capacity to be gainfully employed.

Employees may have children affected by school bans on those who have recently travelled from infected areas. For some, there will be difficulties coping with alternative arrangements for children at short notice. Employers should be ready to respond to additional requests for flexible hours and leave in respect of this development.

In situations like this, it is possible that assistance given by employers to their staff, like accommodation expenses if they were stranded due to quarantine, may be exempt from fringe benefits tax. So employers should check (see link below) if there is some relief available there.

If matters escalate, a key question in all of this is whether or not any absence enforced by the employer is paid or unpaid and that will depend on the circumstances – there is no blanket unfettered right to stand-down employees without pay.

Standing down of employees without pay can occur where a stoppage of work arises for a cause for which the employer cannot be reasonably held responsible. The Fair Work Commission can review employer decisions to do this if an employee is aggrieved, so there is a safety net to challenge alleged abuses of that process.

Fair Work Act, Stand Down
ATO Newsroom – Helping employees in emergencies

Annual Salary Record Keeping Nightmare About to Start

Starting in March, many employers to whom modern awards apply and who pay staff an annual salary will be required to keep detailed records as part of new obligations. The changes arise from the modern awards review which now requires employers to "*keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement".* Areas affected include clerical/admin/call centres, hospitality, horticulture, pastoral and other industries where annualised salaries frequently occur.

4 yearly review of modern awards - Annualised Wage Arrangements (23 December 2019)

Discrimination More Complex than Mere Description

After an employee was called a "*big threatening scary man*" by a female colleague, he claimed it was sexual discrimination in a bullying case before the Fair Work Commission.

But the FWC disagreed, making the following observation: *"simply describing someone by reference to their sex is not discrimination. The concept requires more – including that it involve some less favourable treatment of the person due to their sex or characteristics generally connected to persons of that sex."*.

This decision is important on two levels; it spells out succinctly what is required to meet the discrimination threshold; and it supports the point that in many situations it is not a particular action, but the consequences of that action that really matter.

The FWC found no instance of the employee being treated differently because he was a male, so rejected any suggestion of discrimination.

Mr Shane Atkins [2020] FWC 305 (20 January 2020)

Social Media and the Admissibility of Evidence

Claiming you are agoraphobic and can't leave home to attend hearings, while posting pictures on social media of yourself having fun at various bars around town is not a smart way to run a dismissal case. But that's what one woman did recently. During a period in which she failed to attend four hearings, her posts read like a *TripAdvisor* blog.

The employer, exasperated by the Fair Work Commission's leniency towards the recalcitrant applicant demanded the matter be struck out. Eventually, after just too many 'fails' to excuse, the FWC dismissed the application.

But the FWC avoided criticism of the employee in relation to her being well enough to party all over town but not attend hearings or properly deal with the claim. Rather, the FWC preferred to characterise the social media posts as part of "*serious allegations*" which would provide a "*sound basis for the (employer's) concerns such that further inquiry was warranted had the Applicant sought to pursue her claim*".

This suggests the FWC might not automatically accept screen shots of social media posts as evidence, but rather something that may 'warrant further inquiry'. This situation arises where social media platforms don't guarantee the posts are authentic. Which is important, given the possibility of on-line impersonation.

In the workplace relations arena, the likelihood of bad actors creating false blogs or posts is remote. But merely presenting screen shots to the FWC may not be enough. Employers need to be ready for the FWC to ask the question 'is this genuine'.

Potential submissions in response include the physical setting of the posts, the time and date, other persons in the pictures, comments and likes, and who made them. These all can support the authenticity argument.

The relevance of the posts is also critical to their admissibility. The employer here argued a late application should not be accepted, because the excuses given for the lateness were inconsistent with the posts made at that same time.

The FWC is not required to establish criminal proof standards; it operates on the balance of probabilities. That doesn't mean parties in the FWC should take anything for granted. Evidence has to measure up. It has to be genuine and it has to be relevant. Social media posts are no exception.

Mandy Lee Baillie v PJDH Pty Ltd t/a Brazilian Beauty Fairfield

Contractor or Employee? FWO Campaign Not the Way to Find Out

The perennial question, contractor or employee, will soon be answered for a transport operator the Fair Work Ombudsman is suing. The FWO alleges the drivers are not independent contractors, but employees. According to the FWO, they "*drove vans owned by the company, wore company uniforms and were required to work at days and times set by the company*".

The problem of misclassification is as old as employment law itself, but the FWO has directed resources to a campaign to look closely at situations where workers are categorised as independent contractors. Many employers engage people "on contract", and think that word 'contract' magically removes them from awards and all the rest. It's rarely the case.

If the drivers do work just for this company and, as the FWO alleges, are restricted to working as and when the company dictates, don't have their own 'tools of trade' and for all intents and purposes are a manifestation of the company, then the FWO case looks fairly strong. While not the end of the matter, the best quick way to see if there is cause for concern is to ask the basic question: "is this person carrying on a genuine business in their own right". If the answer is iffy, then the independent contractor tag probably is to. That'd be a good time to make further enquiries, before the Inspector comes knocking.

FWO v Boske Road Transport Pty Ltd