

INDUSTRIAL RELATIONS UPDATE

15 August 2014

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President knocked out of super arena

The four yearly review of the default superannuation fund terms was disrupted by the disqualification of two expert panel members due to conflicts of interest. The President of the Fair Work Commission (FWC) appointed himself as a member of the panel to fill one of the vacancies. Consequently, the Financial Services Council took legal action against the FWC President for extending beyond his legislative power.

The Federal Court noted that the legislation on the compositional requirements of the FWC bench dealing with the review was not entirely clear. However, the court said, on balance, that the FWC full bench must be comprised of three mandatory Expert Panel Members. As such, they ruled that FWC President could not appoint himself to fill that vacancy. This is because he was not defined as an expert member and at the time of appointment, the panel only consisted of two expert members.

The court stated that an injunction against FWC from further dealing with the Review would not be issued as the President would not proceed to deal with the matter despite the panel not being properly constituted.

However, in the event that no new expert panel member was appointed by the Governor-General, the doctrine of necessity could be adopted. This means that under such circumstances, the FWC may still try to proceed with the Review, although this is unlikely. Currently, the review process remains at a standstill until another expert member is appointed by the Governor-General.

[Financial Services Council Ltd v Industry Super Australia Pty Limited \[2014\] FCAFC 92 \(25 July 2014\)](#)

Raising the bar on sexual harassment

The Federal Court has increased a former Oracle manager's overall damages for sexual harassment from \$18000 to \$130000. The ruling highlights the new approach taken by the court in the assessment of damages for harassment and discrimination cases.

The shift in the court's assessment of general damages reflects prevailing community standards for non-economic loss such as pain, suffering and loss of enjoyment of life.

The court said that the "community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct."

In addition, Oracle was found to be vicariously liable for their employee's unlawful conduct, despite having policies in place and conducting an investigation. This means that the employer's exposure to damages has substantially increased.

Employers need to be aware that the approach taken by the court in harassment and discrimination matters, more broadly, has changed. Given the potential for higher damages, employers should have clear and enforceable policies in place that make it more obvious that harassment and discrimination in the workplace is "against the law."

[Richardson v Oracle Corporation Australia Pty Ltd \[2014\] FCAFC 82 \(15 July 2014\)](#)

ANY QUESTIONS OR QUERIES?

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Cracking the whip on porn—or not?

It is a common thought amongst most employers that emailing porn at work is automatically a sackable offence. However, the Federal court have upheld the FWC full bench decision to reinstate two Australia Post employees, who were found to be circulating mainly soft-core porn within the workplace.

The FWC full bench were not supportive of Australia Post's 'zero-tolerance' policy towards workplace pornography and found that the employees had been unfairly dismissed. It stated that "accessing, sending, or receiving and storing pornography is not a separate species of misconduct to which special rules apply."

Employers should be aware that the distribution of porn in the workplace must be treated like all other matters of misconduct. That is, they should be consistent and follow due process when conducting disciplinary action in relation to a breach of policy – no matter the nature of the offence.

The full bench also reminded employers that it is all well and good to have policies in place but they need to be actively enforced throughout the workplace. It also noted that additional steps need to be taken by employers to communicate the seriousness of policy breaches.

[Australian Postal Corporation v D'Rozario \[2014\] FCAFC 89 \(23 July 2014\)](#)

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