INDUSTRIAL RELATIONS UPDATE

June 2017

You Don't Need to Write a Book

Conventional wisdom has it that to have a chance of winning an unfair dismissal case, employers need to have every single issue, discussion, HR meeting and counselling session documented within an inch of its life. But that isn't necessarily so.

A large employer recently won a case after it demonstrated to the FWC that it had chosen an informal method to an employee's performance management. Rather than adopt the standard approach of constantly threatening the employee with the sack if he failed to improve, and documenting each session for posterity, his managers frequently showed him the way to do things and, at a personal level, told him what the company's expectations were.

Only after a period of nearly a year of this did management lose patience, formally documenting a performance improvement process. At this juncture the employee's response was to act as if everything that had been done informally beforehand, hadn't occurred.

When there was no immediate improvement, the employee was dismissed.

The FWC accepted that the employer had tried, via informal means, to improve the employee's performance. Most importantly, the FWC said *"While useful from an evidentiary perspective, performance management need not occur in a formal documented manner in order for an employer to rely on it as the basis for the termination of an employee's employment on the grounds of poor performance."*

It is true that the employer was obliged to attend the tribunal and defend its position. No doubt this was disruptive to the business for the time involved. But the informal approach it took to performance management sits more comfortably with many employers than the standard "improve or be sacked" style.

And the FWC, rather than deprecate that approach, upheld it, based on the honest testimony of those managers who had tried, in vain, to help the employee improve.

Keeping a record of performance management is good practice, no question. But it is not fatal to any case if this hasn't been done forensically, as this case ably demonstrates.

Etienne v FMG Personnel Services (2017) FWC 1637 (25 May 2017)

Congratulations Commissioner McKinnon

First IR is delighted to acknowledge the appointment of our 'old girl' Sarah McKinnon to the Fair Work Commission. Sarah commenced with us in 1998, shortly after graduating from university. Many of our clients would remember that she was the first female consultant the firm hired, and how she quickly became a welcome addition to the team.

Sarah impressed with her diligence, organisational ability and pragmatic approach. She easily gained the confidence of our very diverse clientele. Of particular importance to us was her empathy with small to medium sized businesses.

Sarah has had a distinguished and successful career since leaving us in 2006. After a period as a government lawyer in the Commonwealth Department of Employment she became General Manager Workplace Relations & Legal Affairs at the National Farmers' Federation, where she championed the ag sector with her customary steadfastness.

We are very pleased for our former workmate and wish her every success on the bench.

Money Matters

New Federal Minimum Wage

The Fair Work Commission has delivered its 2017 Annual Wage Review Decision. From the first full pay period commencing on or after 1st July 2017, award rates will increase by 3.3%. This means the new Federal Minimum Wage for a full time adult employee will be $694.90 per week.

While this increase relates primarily to modern awards, it is employers' responsibility to ensure that, if their workplace is regulated by an enterprise agreement, the wages paid under that agreement not be less than the equivalent minimum award wage that would otherwise apply to the work concerned.

Penalty Rates Cut Phase-in

After deciding to cut some penalty rates in a number of service industry awards the Fair Work Commission has issued instructions about the phasing-in of the reduced penalty rates. The penalties and their phasing-in are different for the various awards, apart from the reduced public holidays' penalties which will apply in all cases from July this year.

The awards affected are Hospitality (General) Industry, Fast Food Industry, General Retail Industry, and Pharmacy Industry. Phase-ins will apply, depending on the award, through until July 2020. If you are affected by any of these awards and need to know more, please get in touch with us.

Does the Punishment fit the Crime?

When something goes awry in the employment relationship, often employers are left with a choice between two extremes – a tap on the wrist or dismissal. The usual process of warning letters, counselling sessions and other laudable gestures is often ineffectual. A lack of meaningful action also impacts on other employees, who know something's wrong, can't see that much has happened, so feel the employer is letting *them* down.

But there are alternatives for employers. But they need a framework, a legal sanction to enable different approaches to be taken. A few enterprise agreements have penalty clauses in them, authorising suspensions without pay, fines, deferment (with no back-dating) of built-in pay rises and other actions an employer can take.

Such a sudden and severe action as dismissal is rarely in anyone's best interests. The alternatives some of our clients have in their EAs are there to permit a disciplinary reaction to poor performance or behaviour but which stops short of dismissal.

And now the FWC has publicly endorsed this half-way house approach. In an unfair dismissal case, the FWC agreed the employer had a legitimate beef with the employee, but with mitigating circumstances, decided the dismissal was too harsh, so reinstated the employee.

But in doing so, the FWC did two things. First, it said that the wages lost between the time of dismissal and the resolution of the case (which was six months) would not be back-paid - that was a penalty the employee deserved.

And secondly the FWC had this to say:

> *Often a written warning is not viewed as a sufficiently serious consequence but dismissal would be too harsh for the particular misconduct in particular circumstances.*
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> *In dealing with these variable situations, employers often have a limited range of disciplinary options. This increases the likelihood that disciplinary action is not in proportion with the misconduct and the circumstances and is more likely to be either inappropriately lenient or inappropriately harsh. These situations are problematic for both employers and employees.*
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> *It is rare that an employer has a legal right to impose a period of unpaid suspension or some other financial penalty on an employee which might appropriately be adjusted to respond to the seriousness of the misconduct and the particular circumstances. The development of such options, or other novel forms of disciplinary action, are matters some parties do consider when negotiating enterprise agreements.*

Without a range of meaningful measures available, disciplinary responses will continue to oscillate between the extremes the FWC discusses in this case. Clients who have already acted to provide those intermediate actions can be strengthened by this decision. Those who don't have these tools available, ought to consider doing something about it.

Solin v Chevron Australia Pty Ltd [2017] FWC 2584 (22 May 2017)