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Employee Relations News

Edition 1 **29 July 2014**

Welcome to my first edition of *Employee Relations News*

It is my aim to assist those persons who have an interest in issues relating to employment of people. I will be forwarding contemporary decisions of the courts with commentary which I would want to know as a HR professional.

This service is provided without any expectations of anything in return.

I will not be sharing your information with anybody.

In this first edition, it is quite lengthy due to a lot happening over the past month. Read the information that is of interest and ignore/skim the rest. It is my aim to send these out more frequently to minimise the reading time.

As this is my first edition, I ask:

1. If you do not believe you need this information, please pass it onto someone who does (get them to e-mail me their address).

2. If you do not want to receive this e-mail, please reply with "unsubscribe" in the subject line. I will immediately delete your contacts.

3. I do not copyright this material, feel free to share (I would appreciated an acknowledgement, but not mandatory).

4. Feel free to comment. Feedback is always welcome.

5. Most importantly, if you have any need for my services, please keep me in mind ☺

I do hope you find the information useful.

Kind regards

Greg Reiffel

Who is Greg Reiffel?

With 30 years of hands-on and strategic experience in roles ranging from National HR & OH&S Manager to People & Systems Manager to Senior Employee Relations Advisor, including a skill-set ranging from specialist IR/ER, generalist OH&S and HR, and also the implementation of many Quality, Safety & Environmental systems.

Qualifications include a Graduate Diploma in Business (HR/IR); Certificate IV in Training & Assessment; Work Health Safety – Lead Auditors Course – SAI Global (completing Advanced Diploma in WHS May 2014). I am also a Certified Professional member of AHRI and a member of HR@Work.

Greg is available for full-time, part-time/casual, temporary or contract.

Contents of this (bumper) edition

Is HR performance under attack?

> *"387. Criteria for considering harshness etc.*
>
> *In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:*
>
> *(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal*… [**Fair Work Act 2009 (C'wealth)**]"

The days of the "personnel department," with its sole responsibility as the repository of employee information, has been consigned to history. Human Resources Management has now evolved to the extent that it now "writ in law" (see above seemingly innocuous inclusion to the FWA).

For some years now HR has come under fire for not being "business focussed" to "too warm and fuzzy". Employees are confused - often mistaking the HR department as a pseudo trade union.

Greater focus has been placed on the HR department by external parties. For example in the *Centennial*[1] case (relating to "sham contracting"), the HR Manager who was acting under the instructions of the sole shareholder and director of the company, was fined $3,750.00. This was because the Court found that he was "knowingly concerned" in the company's contravention of the (then *Workplace Relations Act 1996).* This was in spite of the HR Manager (a) not having the knowledge of the requirements of employment law; (b) using company prepared templates which were then amended by the Director; and (c) acting under the direct instructions of the Director.

The court's inference in this matter is that the HR Manager ought to have known the law and refused the unlawful and therefore unreasonable instruction of the Director.

This was the first HR Manager prosecution by the FWO, and according to the FWO - "will not be the last."

Unfavourable comments about HR departments have been either insinuated or boldly stated in numerous court rulings and speeches by prominent persons. The following are selected quotes from 2010 to more recent:

- The Federal Magistrates Court[2] being highly critical the council's employee relations practices, that were *"…squarely at odds with any notion of fairness".* And later: *"A general manager who does not appear to manage. Human resources experts who are either silent as to the human impact of employee decisions or ultimately neglect fair process…"*

- Commissioner Hampton in the (then) Fair Work Australia (FWA) [3]: *"The employer's relatively large size and the fact that it had dedicated HR employees was also relevant…The irony is that in this case the lack of application of reasonable human resources practices has largely contributed to the making of this application."*

[1] Fair Work Ombudsman v Centennial Financial Services Pty Ltd (2010) 245 FLR 242
[2] Cook v Oberon city council [2010] FMCA 624
[3] Maria-Anna Owens v Allied Express Transport Pty Ltd [2011] FWA 1058

- Federal Magistrate Lloyd-Jones [4] *"the Court unfortunately sees too many instances similar to the matters in this case* [that are] *inappropriately and incompetently approached by persons who parade under the banner of Human Resources specialists."* (The HR Manager subsequently resigned)

- Fair Work Ombudsman Nick Wilson[5] warned employers of under-resourcing their IR and HR functions, advising *"I encourage you as a professional workplace relations practitioner to be careful about the risks of a corporately sanctioned 'blind eye' which could imperil your organisation's reputation or may be unlawful."* (in reference to "sham contracting")

- FWA's DP McCarthy[6]: *"the company failed to respond to a letter of complaint from the employee after his sacking due to the injury…A prudent human resources approach would have been for Coles to meet again with the Applicant or at the very least respond to his letter…Coles chose to do neither…Coles is a large enterprise and has dedicated human resource expertise."*

- FWA's Commissioner Steel[7]*: "…when the company's HR department investigated the worker's alleged misconduct, it had failed to provide him with policy documents that would have added substance to the indications by* [the company] *that the* [employee's] *employment was seriously at risk of ending.*

  'Given that [the company] *is a large employer, with a substantial varied and diverse workforce and with a dedicated Human Resources team, such an approach is necessary and an omission in procedure."*

- FWA allowed a lawyer to represent the company because the company's HR manager was insufficiently experienced to ensure the company was effectively represented[8]

- FWC Commissioner Cloghan[9]: *"With such a size, and the nature of the industry of the Employer, a certain degree of human resources sophistication would be expected; none was evident."*

- Queensland Civil and Administrative Tribunal member Gordon[10] whilst accepting that the employer's HR department was *"hard pressed, understaffed and overworked"* found the investigation of a sexual harassment claim as *"inept and unprofessional".* As a side bar, the employer was ordered to pay the applicant $35,490 **and** the "harasser" was ordered to pay $4,500.

- An independent investigation of the CSIRO in relation to alleged workplace bullying as part of its 34 recommendations, included "*ensure coal-face managers and HR staff are trained to 'adopt reports of workplace bullying as its problem, rather than the individual's."*

- Federal Court Judge Raphael (in fining the company $50,000)[11] took into account the company had up to 700 employees, a HR team and in-house lawyer with *"dedicated responsibility for compliance".* The Judge said that even though the contraventions were

[4] Vong v Sika Australia Pty Ltd [2011] FMCA 276
[5] Speaking at an IT conference in Canberra 4 May 2011
[6] Mr David Mitchell v Coles Group Supply Chain Pty Ltd T/A Coles Liquor Group [2011] FWA 3162
[7] Mr Anyuon Mabior v Baiada Group Pty Ltd T/A Adelaide Poultry [2011] FWA 5778
[8] CEPU v UGL Resources (Project Aurora) [2012] FWA 2966
[9] Darrel Duke v Central Norseman Gold Corporation Limited [2013] FWC 2993
[10] McCauley v Club Resort Holdings Pty Ltd (No 2) [2013] QCAT 243
[11] Fair Work Ombudsman v Toyota Material Handling (NSW) Pty Limited [2014] FCCA 251

> first offences, the court had to set a penalty that would *"provide a wake-up call to the company and ensure management, including HR, understands and implements the industrial laws governing the workplace."*

To end on a positive note, it would appear that the HR department is being held to account – both operationally and professionally. This means that HR professionals are obligated to ensure that:

- They keep up-to-date on ever changing workplace laws and ensure that they are applied to their workplace
- Investigations are carried out by experienced professionals
- Due process is followed. This means that polices should be implemented taking into account the requirement of the law
- Where there are experiential gaps, either set out to gain this experience (or training) or outsource to the experts
- At all times act professionally, even this may be at odds with the company's wishes (that is, educate the company on lawful practice and refuse unreasonable and unlawful instructions)

The most valuable tip is to be aware of "what you don't know" and never be shy to contact who does know. I like most people do not know everything, and I have built up a good number of contacts who fill in those gaps. Please feel free to contact me to see if I can assist.

Bullying

Is your organisation covered by the new FWA Bullying provisions?

There a number of hurdles for an applicant in seeking a "stop bullying" order under the FWA, including that the employer must be a ***constitutional corporation***.

The FWC's Anti-Bullying Benchbook quotes *from Stewart's Guide to Employment Law*:

> *"The issue of whether an employer is a constitutional corporation usually arises where the employer is a not-for-profit organisation in industries such as health, education,* ***local government*** *[my emphasis] and community services."*

In a recent anti-bullying matter before the FWC[12]) Deputy President Kovacic was required to decide on whether a lawyer could represent the employer. The DP allowed legal representation because of a number of complex jurisdictional matters, including *"…whether or not the health and community services provider is a 'constitutionally covered business'*".

If this case proceeds, it will be an interesting how the DP will view each aspect of the jurisdictional issues, and how (if at all) it will impact on organisations that consider themselves to be "non-trading" entities.

FWC Bullying Report

The FWC recently published its first quarterly report on the anti-bullying measures that have been included in the Fair Work Act 2009 effective 1 January 2014.

In short there were 151 applications – with fundamentally no outcomes – somewhat underwhelming for the estimated deluge of claims that were expected. In summary:

[12] Applicant v Respondents (AB2014/1169) [2014] FWC 4198

- 23 matters withdrawn early in the process
- 16 resolved during proceedings
- 5 applications withdrawn prior to listed proceedings
- 4 applications withdrawn after proceedings but before a decision

President Ross, in his address the NSWIR society, stated that: "The flood of claims expected has not arrived, with about 50 claims being filed per month (against an anticipated rate of approximately 300 per month)".

FWC first anti-bullying decision a fizzer (Part 1)

Commissioner Hampton in Adelaide 12 May 2014, as head of the anti-bullying panel, handed down his first decision[13] under the new law. Whilst the application failed, it did provide a wealth of knowledge on how the FWC has interpreted the anti-bulling provisions.

In this matter the FWC commented that that company should work on its workplace culture and the applicant had not acted "vexatiously". However, when applying the requirement of the FWA to the matter, it failed to meet the requirements for a "stop bullying order".

In other words, the company could do better, but the FWC did not have the jurisdiction to deal with the issue at hand because the application did not meet the "legal" definition of bullying.

The decision interpreted "reasonable management action" as:

> *"[51] The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'. In general terms this is likely to mean that:*
>
> - *management actions do not need to be perfect or ideal to be considered reasonable;*
> - *a course of action may still be 'reasonable action' even if particular steps are not;*
> - *to be considered reasonable, the action must also be lawful and not be 'irrational, absurd or ridiculous';*
> - *any 'unreasonableness' must arise from the actual management action in question, rather than the applicant's perception of it; and*
> - *Consideration may be given as 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."*

The Commissioner (in what seems to becoming increasingly regular in various legal matters) also criticised the HR department. You are therefore encouraged to ensure that:

- Policies are reviewed in the context of *Guide to Preventing & Responding to Workplace Bullying* available at: http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/827/Guide-preventing-responding-workplace-bullying.pdf
- Ensure that policies are signed off and training provided in relation to anti-bullying (with regular refreshers)
- That claims of bullying are investigated immediately and thoroughly. If the HR department lacks such skills, use an external provider
- All parties to the allegation are kept informed of the progress (respecting privacy at all times)

[13] S.W [2014] FWC 4476

It should be pointed out that this decision related to the FWA only, and does not necessarily mean that such a liberal interpretation will be provided by other jurisdictions involving (eg) VWA or the Victorian Human Rights Commission.

Costs order against anti-bullying case fails (part 2)

Ms SW filed an anti-bullying matter with the FWC which failed due to the employer successfully arguing that it was not a constitutional corporation. Ms SW was employed by a public school under the control of the Western Australian Department of Education (the "Department").

The Department then sought costs against Ms SW[14].

In rejecting the claim for costs, Commissioner Hampton stated:

> *"I could be satisfied that it should have been reasonably apparent to Ms SW that a potential jurisdictional hurdle might arise concerning her application. However, the relevant question is whether it should have been reasonably apparent to Ms SW that her application had no reasonable prospects of success."*

In turning to the jurisdictional issue the Commissioner was of the view:

> *"Although as general rule, it might be said that employees of State Government Departments are not covered by the anti-bullying jurisdiction of the FW Act, the jurisdictional matter actually required consideration as to the corporate or other status of the applicant's* ***workplace****. That is, the identity of the applicant's employer may not always be decisive; rather it is a question as to who is conducting the workplace concerned and whether it is a constitutionally-covered workplace. This makes these matters more complex than might initially appear.*
>
> *'The fact that the WA Department operated with an ABN was a consideration but ultimately not decisive. Further, all of the other contentions advanced by Ms S.W. concerning the nature of her employer and workplace ultimately failed. However, the operation of the anti-bullying jurisdiction of the Commission is relatively new, the potential application of the laws in similar circumstances had not been previously determined, and relatively complex legal issues were ultimately involved given the need to ascertain the nature of the workplace concerned."*

<u>Commentary</u>

In this matter it would appear that Ms SW was fortunate that the Commissioner gave her the benefit of the doubt – mainly due to the lack of precedent with the new anti-bullying laws. However, having won the case, it may be a question of why the State pursued costs against one of its own employees.

Whatever the motivation in this matter (from both sides) it illustrates the importance of all managers and employees being aware of their rights and obligations, through training, education, policies and codes of conduct.

From a HR practitioner's point of view, whilst it could be understood that the motivation of employers to "win" in these matters, one could wonder if this is a case of winning the battle and losing the war. Put more plainly, the relationship between the employee and her employer will be strained at best. And in this matter, here is a teacher who ought to be focused on the education of children, not her treatment (perceived or real) whilst at work.

[14] Ms SW, AB2014/1135 [2014] FWC 4476, Hampton C, Adelaide, 7 July 2014

11 day employee awarded nearly $240,000 in damages because employer failed to follow its own bullying policy[15]

An employee returning from maternity leave was found to have been bullied.

The alleged bullying conduct included:

- Excluding the employee from business discussions
- Ignoring her offers of assistance
- Unwarranted criticisms of her past and present performance
- Repeatedly speaking in an "aggressive and nasty"
- Creating an "Isolating atmosphere" in which the manager was generally friendlier to other staff

After four days, the distressed employee made a bullying complaint to her employer's Queensland business manager who, instead of following the employer's bullying and harassment policy, responded by calling the store manager to inform her of the complaint.

This did not resolve the complaint and the bullying continued for a further seven days. The employee made a further bullying complaint to the employer and was told to "work it out herself". She was subsequently diagnosed with a psychiatric disorder and filed a claim of negligence or, alternatively, breach of contract.

Justice Henry of the Supreme Court of Queensland found that a reasonable person in the employer's position would have realised that their failure to address the initial complaint properly "considerably heightened" the prospect of the emotional distress worsening. Therefore, the psychiatric injury was a risk that the employer ought to have reasonably foreseen (my emphasis).

Justice Henry concluded the employer was negligent in permitting the store manager to bully the employee and that it had failed to enforce its bullying and harassment policy. The Court awarded the bullied employee $237,770 in damages.

Guilty of Sexual Harassment? Expect to pay more.

In this Full Bench decision of the Federal Court[16] , Ms Richardson (the appellant) was appealing the amount of monies she was awarded from the original judgement - $18,000 for pain and suffering, with no compensation for economic loss or costs.

This matter considered some 10 laws, 63 cases, and 15 publications to increase the appellant's award to:

- $100,000 for pain and suffering;
- $30,000 for economic loss; plus
- Yet to be determined legal costs.

These costs were awarded because of Oracle's handling of the investigation which allowed for *"Their continued contact*, [which] *compounded Ms Richardson's distress".*

[15] Keegan v Sussan Corporation (Aust.) Pty Ltd [2014] QSC 64
[16] Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 (15 July 2014)

Of further interest is that the courts found against the company, but did not impose any penalty on the perpetrator (the company already have given him a final warning, but failing to separate him from the complainant, Ms Richardson).

By way of background, the original court decision found that the applicant was subjected to a humiliating series of slurs, alternating with sexual advances, which built into a more or less constant barrage of sexual harassment. The applicant described humiliation and slurs in front of other people and sexually motivated advances in more private settings.

The court rejected the Mr Tucker's (the perpetrator) denials and his attempts to defend his conduct as unintended, misunderstood or innocuous, stating that:

> *"It was, I am satisfied, intended at least to demean Ms Richardson and perhaps to humiliate her. Perhaps it was Mr Tucker's way of attempting to get the upper hand in their disagreements, or before their colleagues and representatives of the ANZ Bank. If so, it was an offensive way of doing so and ultimately cruel. … The explanations he proffered exposed clearly the falsity of his earlier denials to Oracle. They were insufficient to excuse his conduct. They afford no reason to question the elements and essentials of Ms Richardson's complaints against him."*

The applicant eventually resigned and found employment elsewhere.

The Full Court rejected the original trial judge's rejection of Ms Richardson's complaints about Oracle's investigation of Mr Tucker's conduct and its aftermath.

> *"In substance, her complaint centred on an alleged need for a "formal complaint"; Oracle's requirement that Ms Richardson continue to work with Mr Tucker while the investigation was carried out; restrictions on Ms Richardson discussing the matter with colleagues while the investigation was being carried out; and Ms Sampayo's* [HR] *action in sending Mr Tucker's apology to Ms Richardson."*

The reasoning behind the awarding of damages in this matter:

> *"The AHRC Act imposes no statutory restriction on the quantum of damages awards for sexual harassment. Rather, the power conferred on the court by s 46PO(4)(d) to award damages is broad, limited only by need for such damages to be by way of compensation for the loss and damage suffered by victim because of the unlawful conduct.'*
>
> *"As I noted, in Tan v Xenos (No 3) the Victorian tribunal awarded the victim of sexual harassment $100,000. I have also referred to the following court awards: in Willett v Victoria the victim received $250,000; in Swan v Monash Law Book Co-operative the victim received $300,000; in Nikolich the victim received $80,000; and in Walker v Citigroup the victim received $100,000. Bearing in mind the nature of the injuries in each case, their severity and when the relevant awards were made, these cases give some guidance as to the level of damages that, having regard to the general standards prevailing in the community, would compensate Ms Richardson for the loss and damage of the kind she suffered because of Mr Tucker's conduct.'*
>
> *"…in Ms Richardson's case that, judged by prevailing community standards, is disproportionately low having regard to the loss and damage she suffered. As noted earlier, the general range of general damages in respect of pain and suffering and loss of enjoyment of life caused by sex discrimination has scarcely altered since 2000 and does not reflect the shift in the community's estimation of the value to be placed on these matters. The range has remained unchanged, notwithstanding 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. Indeed the range has remained fixed despite changing views of what might be "sums which are generally felt to be excessive": Hall v A & A Sheiban at 256. In that case, in addition to cautioning against such excessive sums, Wilcox J (at 256) implored that while:

> *…damages for… injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation … [t]o ignore such items of damage simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit injustice upon a complainant by failing to grant relief in respect of a proved item of damage.'*

I agree. While the sum of $18,000 was not out of step with past awards in cases of this kind, this amount was nonetheless manifestly inadequate. It was out of step with the general standards prevailing in the community regarding the monetary value of the loss and damage of the kind Ms Richardson sustained. In my view the appeal should succeed on this ground and an award of $100,000 general damages should be substituted for the award of $18,000. The amount of $100,000 includes compensation for the injury that the sexual harassment caused to Ms Richardson's sexual relationship with her then partner…"

How 1 minute and 36 seconds caused $500k damage and loss of employment[17]

Background

Ms Brenda Plunkutt was an operator of a CAT 793F haul truck (weight: 150,000 kg's unloaded, 300,000 kg's loaded), employed by Thiess Pty Ltd at the Mt Owen mine.

A "category 3" alarm sounded which required the operator to immediately shutdown the truck to prevent further damage.

Ms Plunkett's response was to find a safe spot to park.

This matter was very much about mine safety.

Incident

- Took 1 minute and 36 seconds
- Traveling 700 metres
- Engine ceased = $500,000 damage bill

The truck was fitted with VIMS (management system/black-box) and GPS – hence the specifics of the evidence.

Mine Manager stated:

> *"The stage 3 alarm can indicate serious damage to equipment and if you are driving a truck at 50 kilometres an hour and the engine "pops out of the housing and blows the truck to a million pieces...(that) is a bigger hazard than stopping the truck on a ramp."*

[17] Brenda Plunkett v Thiess Pty Ltd (U2013/14637)

Incident was caused by a maintenance error ("*engine oil pipe joint bolts had fallen out and pipe joint has come apart allowing all oil to leak out*"), but this was not accounted for in the decision.

Case law considered

- Employees must obey all lawful commands that fall within the scope within the employment relationship and that are reasonable: [141 R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday and Sullivan] and [Woolworths v Brown]

- McLean v Tedman, Mason, Wilson, Brennan and Dawson JJ stated:

  "The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system...

  ...in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands."

- Parmalat Food Products Pty Ltd v Kasian Wililo, a decision which considered a dismissal related to a safety breach, the Full Bench stated:

  "In our view this case raises important questions about the respective rights and obligations of employers and employees in relation to safety requirements at the workplace. Employers have important statutory obligations to maintain a safe place of work…Establishing and enforcing safety rules are an important obligation, a breach of which can lead to serious consequences.

  In this case the employer considered and established to the satisfaction of the Commissioner, that Mr Wililo had breached its safety rules and his conduct amounted to serious misconduct. Clearly disciplinary action was necessary and appropriate because a failure to do so can send a message to the workforce that safety breaches can occur with impunity.

- Hungerford J in Pastrycooks Employees, Biscuit Makers Employee & Flour and Sugar Goods Workers Union (NSW) v Gartrell White (No 3), (Gartrell White):

  In cases of summary dismissal, the onus falls to the employer respondent to prove the conduct as alleged occurred:

  "The right of an employer to summarily dismiss an employee without notice is qualified by the employee inter alia having committed an act of misconduct; thus, to be able to rely upon the right, and to pay the employee up to the time of dismissal only rather than terminate by notice or payment in lieu of notice, the employer must not only allege misconduct but must also prove it.

  "…the act of misconduct or of disobedience had to strike at the fundamental aspect of the relationship of employer-employee so as to make it plain that the conduct complained of was such that the non-offending party may properly conclude that the offending party no longer intended to be bound by the provisions of the employment

contract. In other words, so it seems to me, the test comes down to the question whether the employee's conduct has been so inconsistent with his duties under the employment contract that it strikes down any reasonable suggestion that the employer-employee relationship can be continued in the future."

- Laws v London Chronicle (Indicator) Newspapers (Ltd), 160 Lord Evershed MR (Jenkins and Willmer LJJ agreeing) stated:

  "The question must be - if summary dismissal is claimed to be justifiable - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

The decision

Commissioner Stanton determined:

- The allegations put to the applicant during the disciplinary meetings conducted as part of the respondent's investigation were serious
- The applicant had received training in how to respond to stage 3 alarms on more than one occasion. In any event, when the applicant finally did hear the sounding stage 3 alarm, she proceeded to shut the vehicle down in a fundamentally stable area at the bottom of the ramp. By that stage, the vehicle's engine had lost its oil and the engine had seized
- The applicant's response was inconsistent with the respondent's Transport Rules in operation at Mt Owen and the training that she had received
- In my view, the applicant's conduct can be correctly characterised as serious misconduct...[her] behaviour…had the capacity to cause serious or imminent risk to a person's health and safety in accordance with Regulation 2(b) of the Fair Work Regulations 2009 and seriously breached the respondent's transport rules, safety procedures and policy
- The respondent takes its safety obligations seriously and is entitled to expect its employees reciprocate
- Despite a number of opportunities afforded to her, the applicant failed to acknowledge that her actions were in breach of the respondent's Transport Rules, safety procedures and policy for which she had received training. Safety rules and procedures are mandatory policies
- The applicant's dismissal was for reasons identified in evidence and explained in the applicant's letter of dismissal
- The applicant was presented with her show cause letter and…the applicant was formally instructed that the respondent was relying on those reasons to support her possible dismissal
- The applicant's explanation was that she thought she was "doing the right thing" in response to the situation that was at hand
- The respondent is obliged to take reasonable care to provide all employees with a safe place of work and safe systems of work at all times
- The applicant's conduct, when viewed in its totality, amounted to gross negligence as alleged by the respondent. Her conduct…represented a very significant departure from the response expected of an experienced operator particularly given her training and the express instruction given to operators at the tool box meeting that she attended…

- Her conduct also goes to the relationship of trust between the respondent and herself. It was also conduct that was in breach the implied term in her contract of employment to comply with the lawful and reasonable directions of the employer
- The respondent had a valid reason to dismiss the applicant and was entitled to terminate her employment summarily

Commentary

By way of commentary, whilst the applicant's actions could be described as a "mistake" (albeit expensive) or "poor judgement", Thiess was able to very competently focus the Commissioner's attention on:

- Evidence of the incident and health and safety "theme"
- The steps it took to not only investigate, but the process in which the applicant was kept informed (and was under no illusion that this was a serious matter), including the "show cause" letter

It also provides direction on not only "managerial prerogative" and the thinking that should go into "summary dismissal" decision making.

Redundancies

Redundancy has on occasion been used as a convenient way to exit unwanted employees. This can often back-fire with employee's successfully challenging the dismissal or leaving the organisation open to investigation by the Australian Tax Office (due to the taxation benefits attached to redundancy payments).

However, as "Case 2' attests, if carried out in a genuine manner, organisations will not be in breach of the FWA.

Case 1[18]

Downer EDI made 106 operator and maintenance employees at Idemitsu Australia's Boggabri Coal Mine (30% of the mine's workforce) redundant in early 2013 after deciding to reduce the mine's operations.

However, two months later, it reversed the decision to wind down operations and the company began advertising for maintenance and operator employees.

Three workers unsuccessfully applied several times but were not re-hired.

Commissioner found that the dismissals were not genuine redundancies, and that the dismissals were also unfair because the company did not try to redeploy them.

Each of the three workers, he argued, had appropriate skills and qualified for the advertised positions but had not been rehired by their former employer, leaving them out of work and out of pocket despite attempts to also find other employment.

[18] Mr Justin Fisher; Mr James Davis; Mr Robert Shaw v Downer EDI Mining Pty Ltd [2014] FWC 3382

He ordered immediate reinstatement with continuity of employment and the reimbursement of lost pay (some $150,000).

Case 2[19]

- Applicant made redundant after eight months' work due to restructure
- Workload distributed to other positions
- No reason for the Commission to not accept decision-making of employer genuine, as matters entirely within prerogative of employer as bearer of risks
- Dismissal not harsh, unjust or unreasonable

This decision provides support for job roles to be restructured, with job holder losing their employment.

"Inherent requirements of the job"

We have known for some time that it is not discriminatory to refuse a person employment if they are unable to do the job.

The FWC has upheld this tenet in recent times with decisions relating to absences and "light duties" leading to employers dismissing employees that were unable to meet their work obligations.

Whilst "caution" is always the watchword with all dismissals, it would appear that the employer is not expected to keep a job open indefinitely awaiting the employees return from long standing absences or alternate duties (noting the FWA and Regulations has for some time provided for "temporary absence").

With large organisations, missing or alternate employees can sometimes be the "norm" rather than proactively managed. Of course each case should be decided on its merits.

Recent cases (both involving absence from work):

Kevin Rowe v V/Line Pty Ltd [2014] FWC 1437 (3 March 2014)
Mr Stephen Born v Aurizon [2014] FWC 22 (28 February 2014).

Right of entry "recommendation"

It is always a vexed question on allowing union officials access to employees. There are clear requirements under the FWA, but on a practical level Councils may have their own less stringent approaches.

In a recent matter where the union official obviously outwore his welcome, the FWC's Commissioner Lewin ([2014] FWC 3169) has published a "Recommendation" relating to a Union Official entering workplaces. This "Recommendation," under s505 of the FWA, involved the meat workers' union and a Queensland meat packer, the parties agreed to a protocol:

- Visits to hold discussions with employees to be conducted weekly
- Supplementary visits may be agreed during EBA negotiations
- Additional visits permissible where an employee requests it

[19] Grove v Help Enterprises U2013/16788 [2014] FWC 3168

- Visits are to occur during lunch breaks, in the lunch room and only addressed to employees who wish to participate in the meetings

Do your letters of Offer & Contracts protect you against your own policies? (High Court to rule on "mutual trust & obligation")

The importation of policies into the employment contract has been the subject of breach of contract litigation for some years now (eg "Riverwood v McCormick" and "Nikolich v Goldman Sachs JB Were Services Pty Ltd") ending badly for employers with six figure sum pay-outs.

It would appear that the next "implied" term to be tested in contracts of employment is the tenet of "mutual trust and confidence". Originating from the UK, this common law term provides *"that an employer, without reasonable and proper cause, cannot conduct themselves in a manner calculated or likely to destroy of seriously damage the relationship of confidence and trust between the employer and employee".*

The High Court on 6 April 2014 heard submissions on this point in *Commonwealth Bank of Australia v Barker*. Barker (the employee) had already received successful judgements through the Federal Court and Federal Court Full Benches to the tune of some $317,000. This case related to a redundancy and the CBA failing to utilise its redeployment policy provisions (despite the policy manual excluding the contents from the employment contract).

The High Court's fundamental task is to determine whether the UK provision has relevance to Australian employment law.

If the CBA appeal is successful then organisations should seek advice on suitable wording for contracts of employment that will protect them from such claims.

Going to the media – employees beware

In two separate matters before the FWC, one involving a cleaner in an aged care facility encouraging a resident to complain to a current affair program [20] and the other a RSPCA manager who went to the *Canberra Times* to complain about the concreting of a rabbit warren[21], both involving alleged unfair dismissals and in both cases the FWC found in favour of the employer.

Both employees had breached the employers' trust and undermined their reputation, despite the (misguided) intentions of the employees.

These matters can be avoided by contractual terms and policies that are reinforced in employee handbooks or the like. These matters were also bolstered by the following of due process.

FWC: "…considered applicant's age, health and long service but these do not make dismissal unfair"[22]

At the time of his dismissal, the applicant occupied the position of Finance Manager, a role he had occupied for around five years. He is 60 years old and had worked for the

[20] *The Applicant v the Respondent [2014] FWC 3189)*
[21] Howie v The RSPCA [2014 FWC 2771
[22] Danh Dang v Cabramatta Community Centre (U2013/13793)

respondent in various roles, commencing as a part time bookkeeper in 1987. He has been given substantial financial support by the respondent to upgrade his professional qualifications over the years. This included the payment of study leave and tuition fees for both a graduate diploma and a master's degree.

The respondent is a not-for-profit charity that is predominantly government funded. It employs approximately 150 staff and in the financial year to June 2013 had total revenue of nearly $10 million, most of which came from the Commonwealth government.

The respondent dismissed the applicant on the grounds that he had:

- Deliberately and dishonestly abused his role in administering the respondent's staff loans scheme, processing loans for himself in such a way whereby he deliberately avoided repayment to the respondent of a compulsory 6 per cent fee
- Deliberately overpaid himself a substantial amount of superannuation
- Acted in an inappropriate and threatening manner towards the (then) Human Resources Manager and the (then) CEO, when he approached both of them outside the respondent's premises, where he "mocked" the CEO, took photographs and video of the CEO and HR Manager. When asked by the HR Manager why he was taking "photographs" became agitated and aggressive towards him, which included approaching him with his fists clenched
- Breached the respondent's confidence when, without prior authority to do so, forwarded an email exchange between himself and the CEO to the Australian Services Union (ASU) that included the salary details of nine senior managers at the respondent, collectively referred to as the 'executive management team
- Failed to follow several reasonable and lawful directions to return a motor vehicle owned by the respondent during a lengthy period of unpaid leave contrary to a specific policy
- Other instances of misconduct came to light after the dismissal, involving thousands of dollars on an e-tag account

The decision considered all the above matters and the procedural process followed by the respondent. The commissioner also:

> *"…considered whether the applicant's personal circumstances, including his health, age and long service with the respondent in any way made his dismissal unfair. I am satisfied that they did not. His behaviour was deliberate and dishonest. He sought to enrich himself at his employer's (and indirectly the taxpayer's) expense.*
>
> *Mr Dang's dismissal was not harsh, unjust or unreasonable. His application is dismissed."*

"Blackadder" High Court decision cited in reinstatement case[23]

No, this matter does not relate to the character made famous by comedian Rowan Atkinson, but a Federal Court's decision to temporarily reinstate a CFMEU delegate to his position at Anglo Coal's Dawson mine in Central Queensland pending the hearing of his adverse action claim, and warned the company that it will need to provide him with his usual work to comply with its order.

In rejecting the employer's claim that reinstatement would undermine discipline at the mine, or inconvenience the company because of a claimed breakdown in the relationship of trust and confidence, the Judge cited [Blackadder v Ramsey Butchering Services Pty Ltd [2005] HCA 22; 221 CLR 539; 79 ALJR 975; 139 IR 338; 215 ALR 87], in which:

- Justice Michael Kirby commented:

  "reinstatement is meant to be real and practical, not illusory and theoretical"

- Justices Ian Callinan and Dyson Heydon:

  "to pay [an employee] but not to put him back in his usual situation in the workplace would not be to reinstate him".

Justice Collier said the *Blackadder* ruling amounted to:

"authority at the highest level in this country to the effect that 'reinstatement' in the Fair Work context means not only that the employee must be placed in a position no less favourable than he was prior to termination…but also that the employer must put the employee back to the performance of those duties which the employee was fulfilling before termination, and indeed **provide work** *to be done by the employee of the same kind and volume as was being done before termination".*

So next time a line manager to sack one of their workers, ask the question "do you want them working with you after being reinstated by the FWC?".

Appeal to full bench fails and clarifies a number of workplace issues

This matter[24] fundamentally involves a "stand-off" between a boilermaker with over nine years at a BHP coal mine (and was also an area delegate of the CFMEU) and management over the employee's refusal to undergo a "functional" medical prior to returning to work following a lengthy absence due to an injured shoulder.

The appeal was granted and rejected in favour of the company and confirmed a number of workplace issues:

- The company has a "common law" right to insist that an employee attend a doctor of its choosing. In this case: *"…with respect your fitness to work, and how this impacts on your ability to perform your substantive position as mine employee – boilermaker at Peak Downs mine."* The original decision emphasising

[23] Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd [2014] FCA 522

[24] Appeal against decision [2014] FWC 1712 of Commissioner Spencer at Brisbane on 14 March 2014 in matter number U2013/10299 Mr Darrin Grant v BHP Coal Pty Ltd (C2014/3771)

> *"that the direction was not only lawful (if more was needed) but reasonable in the circumstances, given that: the Appellant had not performed duties on the mine for an eight month period; his duties involved heavy manual labour; he had undergone surgery on his shoulder and associated rehabilitation…"*

- Failure to attend the medicals (in this case on a number of occasions) was considered a failure to comply with a reasonable direction. The commissioner:

> *"…the employer had a power to give a lawful direction to the Appellant to attend a medical assessment; medical certification of the Appellant's fitness for work was couched in broad or general terms; and the doctor to whom the Appellant was referred by the Respondent was a specialist occupational physician working with experience in the setting of the mining industry, and the Respondent's site in particular."*
>
> And
>
> *"This necessity to confirm the fitness for duty should have been reasonably apparent to any reasonable person returning to work on mine site, who had experience in working in mines."*

- Uncooperative at disciplinary meeting:

> *The Appellant "unreasonably refused to co-operate and participate in the investigation process, whereby he refused to respond to questions from the Respondent, unless the questions were first committed to writing by the Respondent."*
>
> *The Commissioner found that the issues at hand were relatively straightforward and that the Appellant's request that every question be put in writing "unreasonably" restricted the interview process and constituted a refusal to participate in that process.*
>
> *The Appellant's conduct in requiring written questions rather than participating in an interview was a measure viewed by the Commissioner (as we imply from her decision) to disrupt or otherwise delay the Respondent's processes or otherwise was an unconstructive contribution to an ordinary workplace process. The Commissioner found that this "formed part of the valid reason for the dismissal".*

- Self-incrimination:

> The appellant attempted to introduce new evidence which was deemed to be (a) not admissible and (b) irrelevant.
>
> It was argued on appeal that the Appellant was not obliged to obey an order which required him to incriminate himself, and otherwise that the Appellant had a penalty privilege.
>
> *"We were taken in this regard to the case of Hartmann v Commissioner of Police ("Re Hartmann") where it was said:*
>
> > *"The protection against self-incrimination is intended to protect against any type of punishment or penalty [...] It follows that the privilege against self-incrimination exists to protect against the penalty of dismissal from employment, and its financial consequences."*

- Recorded conversations:

> The appellant recorded telephone conversations and share them with third parties.

Commissioner found the *"conduct undermines the employment relationship and the obligation of mutual trust and confidence."*

Commentary

In summary this full bench decision provides that:

- Employers can compel employees to attend to its own doctors insofar as it is relevant to the inherent job requirements and failure to attend is a failure to obey a reasonable instruction
- Employees are required to cooperate at disciplinary meetings
- "Self-incrimination" may be applicable to unfair dismissals
- Covert recordings of conversations are a breach of "mutual trust and confidence

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Why Workplace Injuries should be handled with due care (and beware the use of private investigators)

This matter[26] covers a number of areas of interest to HR (and the RTW Coordinator is the subject of special comment).

- Kinnane (the "employee") sustained an injury to his shoulder as a consequence of alighting a forklift, stumbling and grabbing hold of a hand rail, which in turn caused his shoulder to bear his body weight. The employee immediately reported the incident and was told to by his supervisor to attend hospital outplacement (it was late at night)
- The employee was a union representative, however no evidence was led relating to his union activities, or that of his overall work performance (positive or negative) – although management did form a view that he seemed uninjured at a union meeting that was for a duration of six hours
- The employee also ran his own business and this was known to the employer
- The employer's management became suspicious of the quickly escalating nature of the injury: from hospital outplacement (reduced duties), his own doctor (unfit for all duties) to an orthopaedic specialist
- The suspicion turned to action when the manager through the employer's return-to-work (RTW) coordinator instigated the hiring of a private investigator
- The surveillance revealed that the employee was working in his own business whilst unfit for duties with the employer. This was the reason for ultimate dismissal (gross misconduct: "fraudulent, dishonest or deceitful" in that he either broke his obligations on his medical restrictions or the injury was over stated and failed to notify the employer and WorkCover)
- The employer also stated that the employee failed to advise WorkCover that he had his own business. The decision found that there was obligation on the employee to do so
- The decision found in favour of the employee and was adjourned to determine appropriate compensation (which may well amount to reimbursement of lost time and reinstatement with continuous service)

DP Asbury's decision raised a number of issues that are summarised below:

- Managers were suspicious of this claim from the outset, as Deputy President Asbury stated: *"It was apparent from the evidence [management] embarked on an exercise directed to establishing that he [the employee] was dishonest and fraudulent."*
- The DP went on to note that: *"…managers…are not medically qualified…* [and the employee would not] *be expected to display signs of discomfort, particular while sitting in a meeting.*"
- The DP was especially critical of the RTW Coordinator on a number of levels, including:
    - *"Her 'contemporaneous notes' were not in fact contemporaneous and neither were they accurate*
    - *"…*went to great lengths to put a spin on every event and interaction with [the employee]
    - The reasons for her suspicions were weak and may also "*impugned the integrity"* of the treating doctor
    - A number of issues relating to the interaction with WorkCover and the ambiguity of the medical certificates
    - Sent a private investigator instructions that included the employee's details, including home address, date of birth and mobile telephone number, a photograph, and a schedule of medical appointments
    - That she could have organised a medical examination (but did not) by the company doctor and required that the employee attend

[26] Mr Shaun Kinnane v DP World Brisbane Pty Limited [2014] FWC 4541

- It was the surveillance report which was used as the reason for terminating the employee's services for "gross misconduct" in that the employee deliberately provided false information to WorkCover which the company viewed as fraudulent with intent to deceive or obtain personal advantage
- In summary, management had formed the view that the employee was "guilty" and the company had used the surveillance report to prove its view

Commentary

Overview

Whilst on face value, this case seems to be a simple matter usually resolved within the WorkCover jurisdiction, has turned into an unfair dismissal and heard by the FWC.

It is also another example where the human resources area has been scrutinised (albeit this time it's the RTW coordinator) by the "courts". As HR professionals we are expected to rise above the emotions of the workplace. Indeed, AHRI members have the additional obligation of compliance with a professional Code of Conduct.

In hindsight, the RTW Coordinator in this matter could have done a lot better. It is the RTW person's role to support an injured worker to return to safe and sustainable work as soon as possible.

RTW Plan

The company was aware of the fact that the employee had his own business which he conducted outside of the company's time. The RTW Coordinator was unsure of the meaning of the medical certificates – that is, what the employee could and could not do – either at the company or the employee's own business.

The RTW Coordinator ought to have contacted the employee's medical people to seek clarification on the working capacity of the employee (at both his work and business). It is sometimes necessary to meet with the injured worker and treating medical doctor to assist in this process. If you are unsure or uncomfortable with this prospect, seek advice from professionals who can assist.

If this had been undertaken in a more professional way, the ambiguity of the work capacity would have been clarified enabling the company to monitor the employee according to medical facts and an agreed RTW plan; then if the employee failed to comply, action could then be taken.

Pre-conceived notions

The DP made it quite clear that the company thought the employee guilty from the outset. As HR professionals we are required to rise above this and treat each matter on its merits. It is sometimes difficult when line managers are pushing their own agenda.

Surveillance (Privacy)

This was a very worrying aspect of this matter. The company thought it permissible to, on its own cognisance, arrange for the employee to be subjected to covert surveillance.

There are a number of questions raised in relation to the various *privacy* laws that could have been pursued by the employee. Evidence was led by the employee's representative in terms of the invasion of privacy and the DP (arguably) only raised the matter in terms of the reason for the dismissal itself.

The Victorian WorkCover Authority (for eg) has a code of conduct which must be followed by its private investigators. No evidence was ascertained whether the company had any such policy.

Reason for dismissal

As we know, the taking of employment from a person is fraught with complications, and it is essential that HR departments follow a procedural line that ensures a "fair go all round".

As previously mentioned the company in this matter took the opinion of guilty and set out to prove it. The DP commented that the company failed in that it had photo and video surveillance, but chose only to use the photos to "prove" the guilt and subsequent summary dismissal. In that the photos were discredited during the hearing and the employee had no opportunity to respond to the video as he had no access to it.

Serious misconduct

The DP provided excellent guidance on this subject as follows:

> *"There is a distinction in the provisions of the Act between "serious misconduct" and "misconduct". The former term is defined and the latter is not. In general terms, misconduct is wrongful conduct. To be properly described as "serious", misconduct must be 'significantly worse than negligence and serious in its culpable quality as misconduct, as distinct from the results".*[27] *Serious misconduct is judged on an objective basis, and it is therefore not necessary that the employee should intend to do wrong. Wilful misconduct*[28] *carries the additional connotation of intention, or a deliberately reckless course of misconduct, with knowledge that it is wrong.*
>
> *Regulation 1.07 does not require that misconduct be wilful before it is serious misconduct, but provides that serious misconduct includes wilful or deliberate behaviour.*
>
> *However, to sustain an allegation of fraud, for the purposes of establishing that it was a valid reason for dismissal, requires that the employee is dishonest with the intention of gaining a benefit to which he or she is not entitled, to the detriment of the employer.*
>
> *Serious misconduct is sufficiently serious to warrant non-continuation of the contract of employment*[29] *or conduct that indicates that the employee has wilfully or deliberately disregarded the essential conditions of the contract.*[30] *More than mere misconduct is required.*
>
> *Where an employer asserts as a valid reason for a dismissal, that an employee has engaged in serious misconduct such as theft or fraud, an assessment must be made as to whether, on the balance of probabilities, the employee did actually engage in serious misconduct. The*

[27] Boral Resources (Queensland) Pty Ltd v Pyke [1992] 2 Qd R 25 at 42 per Derrington J.
[28] Walton v Mermaid (1996) 142 ALR 681 at 685
[29] Wintle v RUC Cementation Mining Contractors Pty Ltd (No. 3) [2013] FCCA 694
[30] Laws v London Chronicle (Indicator Newspapers) Ltd

> *strength of the evidence necessary to establish a fact upon which serious misconduct is grounded may vary according to the nature of what it is sought to prove, although the standard of proof does not. A finding that a party in civil proceedings has engaged in fraudulent or criminal conduct should not be lightly made, and there is a need for clear and cogent proof.* [31]

Summary

Follow a fair, thorough and transparent process when dealing with any workplace issue. Personal opinions based on conjecture are irrelevant. The onus of proof is on the employer in these matters and it is important to ensure that all information and investigations result in factual information that will result in "beyond reasonable doubt".

For example *"does the punishment meet the crime?*" It is sometimes more productive to issue a well written first and final warning that will in the long run save time and money.

In any case involving dismissal it is highly recommended that you seek a review of the matter prior to a dismissal.

EBA processes scrutinised by FWC

There are a growing number of FWC decisions that are scrutinising the EBA applications to ensure that due process has been followed – especially with issues relating to information to employees being undertaken in strict accordance with the FWA requirements.

On a lighter note

"Near Utopian" workplace conditions, circa 1852 (from HC Online)

You may find this article useful when negotiating your organsiation's next EBA (I am sure your employees would be suitably impressed ☺).

This date stamped notice was discovered in the ruins of a London office building:

1. This firm has reduced the hours of work, and the clerical staff will now only have to present between the hours of 6.00 am and 7.00 pm weekdays.
2. Clothing must be of a sober nature. The clerical staff will not disport themselves in raiment of bright colours, nor will they wear hose unless in good repair.
3. Overshoes and topcoats may not be worn in the office, but neck scarves and headwear may be worn in inclement weather.
4. A stove is provided for the benefit of clerical staff. It is recommended that each member of the clerical staff bring four pounds of coal each day during the cold weather.
5. No member of the clerical staff may leave the room without permission from the supervisor.
6. No talking is allowed during business hours.
7. The craving of tobacco, wine, or spirits is a human weakness, and as such is forbidden to all members of the clerical staff.

[31] Brinks Australia Pty Ltd v Transport Workers' Union of Australia: PR922612 per Giudice J, Acton SDP and Hingley C.

8. Now that the hours have been drastically reduced, the partaking of food is allowed between 11.30 and noon, but work will not on any account cease.
9. Members of the clerical staff will provide their own pens. A new sharpener is available on application to the supervisor.
10. The supervisor will nominate a senior clerk to be responsible for the cleanliness of the main office and the supervisor's private office. All boys and juniors will report to him 40 minutes before prayers and will remain after closing hours for similar work. Brushes, brooms, scrubbers, and soap are provided by the owners.
11. The owners recognise the generosity of the new labour laws, but will expect a great rise in output of work to compensate for these near Utopian conditions.