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Greg Reiffel Employee Relations News

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Greg Reiffel HR & IR Consulting

"My business grows by referrals. I would appreciate it if you would let me know if you have any colleagues, clients or associates who could benefit from my skill-set."
I also would greatly appreciate if you could pass this newsletter on to your business contacts. Thank you.

In this edition:

High Court determines "vicarious liability" in sex abuse case

Prince Alfred College Incorporated v ADC. [2016] HCA 37. *5 October 2016.* A20/2016. FRENCH CJ, KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

In 1962 the respondent was sexually abused by Dean Bain. The respondent was then 12 years old and a boarder at the Prince Alfred College ("the PAC"). Bain was employed by the PAC as a housemaster. In December 2008, the respondent brought proceedings against the PAC in the Supreme Court of South Australia.

The Supreme Court of South Australia found that duties not part of the employee's responsibilities had no relevance to what an employee might get up to away from those duties.

The respondent's case that the PAC breached its duty of care to him: it failed to make proper enquiries before employing Bain; it failed to supervise Bain; and it did not respond appropriately when it learned of the abuse that the respondent had suffered.

The HC rejected the appeal and awarded costs against PAC.

At this point, I am (like most people) greatly offended by the crime committed by Bain against a 12-year-old boy. However, the purpose of this newsletter is to inform my readers of matters relating to employment. In this case: "vicarious liability" or, as sometimes referenced as "sins of the father being passed to the son". In other words, is an employer responsible for the (in this case) the criminal acts of its employees.

The HC (in its lengthy and complex decision) referenced Australian and international precedents and writings (including Canada, the UK and Germany). In interpreting this to "simple" English, it is my hope that I have not diminished the erudite deliberations and findings the HC. The HC did find it "understandable that trial courts and intermediate appellate courts in Australia are left in an uncertain position about the approach which should be taken."

Also stating:

> *Vicarious liability is imposed despite the employer not itself being at fault. Common law courts have struggled to identify a coherent basis for identifying the circumstances in which an employer should be held vicariously liable for negligent acts of an employee, let alone for intentional, criminal acts. There have been concerns about imposing an undue burden on employers who are not themselves at fault, and on their business enterprises. On the other hand, the circumstances of some cases have caused judges to exclaim that it would be "shocking" if the defendant employer were not held liable for the act of the employee…*
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> *Long ago, Sir John Salmond proposed tests for determining whether an act was in the course of employment. They were whether the act (a) is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer. He went on further to explain that an employer would also be liable for unauthorised acts provided that they are "so connected" with authorised acts that they may be regarded as modes, although improper modes, of doing them".*

The HC determined:

> *"The role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act,* ***the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim****.*
>
> *"Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include* ***authority, power, trust, control and the ability to achieve intimacy with the victim****. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable. [my emphasis].*

Put simply, I believe the HC found that if it were not for the fact that the "victim" was not a client of the employer, the employee (perpetrator) would not have had the opportunity to commit the crime.

This is why it is so important to ensure that due diligence is carried out in your hiring, policy and supervisory practices.

Aggro employee misconduct nullifies procedural shortfalls

Natalie Eastwood v Brewarrina Business Coop Limited T/A Brewarrina Business Centre [2016] FWC 6709 (U2016/5128). COMMISSIONER MCKENNA, 27 SEPTEMBER 2016.

The applicant, Natalie Eastwood, worked with the organisation for about seven months, until her dismissal with a week's pay in lieu of notice. Her employer being as a not-for-profit cooperative which worked to ensure sustainable enterprise in Aboriginal communities.

The applicant was employed as a as First Teacher Educator and considered herself a hard-working employee, well-regarded and passionate about her role. She considered she worked in an environment where, among other issues, she (and other employees) had been the subject of workplace bullying.

Whilst noting the following, the Commissioner did not find them relevant to this matter:

> *"There was much material before the Commission about matters including: internal disputation; allegations and counter-allegations of bullying in the workplace; individuals who were absenting themselves from work due to stress; workers' compensation claims; alleged privacy intrusions and the like."*

However, the organisation considered the applicant to have (despite assistance and counselling) underperformed and who was aggressive in her workplace interactions.

Interestingly, Legal Aid New South Wales initially assisted the applicant with respect to her application, then a private solicitor, then a paid agent.

The Commissioner commented that this case made for "regrettable reading" in its description of a workplace characterised by apparent dysfunction and difficulties in interpersonal relationships.

The Commissioner finding:

> *"Shortly stated, I consider that respondent had a valid reason for the dismissal related to both the applicant's capacity and her conduct. Equally however, the dismissal was effected in a way that, in the end, lacked any semblance of procedural fairness – and truncated what might otherwise have unfolded during a more formal performance review period.*
>
> *"The applicant's conduct, as reflected in, for example, the regrettable tenor of some of her communications, appears to have been based on the applicant's view that she was better placed than those who managed and supervised her in her employment about how the respondent's operations should be conducted and the manner in which her work might be undertaken. The applicant took it upon herself to be a conduit for the views of some members of the local*

community or some members of the staff; the tenor of some of the communications was certainly high-handed and, on one view of matters, also erratic.

"I am further satisfied the applicant displayed aggression in the workplace, such as may have had an effect on the safety and welfare of other employees (albeit I note that the applicant alleges that she herself was the subject of bullying, and genuinely considers this to have been the case). In this regard, I note the applicant did not make any application to the Commission with respect to an anti-bullying claim prior to the dismissal, and nor did she make any workers' compensation claim either before or after the dismissal with respect to any stress injury".

In dismissing the application, the Commissioner concluded:

"Even accepting there was an absence of procedural fairness that attended the dismissal, I would reduce any order that may otherwise have been made in the applicant's favour to nil on account of that misconduct".

Deaf person wanting to be a juror has case dismissed by the High Court

Lyons v Queensland [2016] HCA 38 5 October 2016 B16/2016 HIGH COURT OF AUSTRALIA FRENCH CJ, BELL, GAGELER, KEANE & NETTLE JJ.

In this matter, the HC was required to determine the which Queensland (ie "state") law held sway: Discrimination or Jury Act.

Ms Lyons, a profoundly deaf person, was excused for jury duty due to her requirement for two (2) Auslan interpreters. Ms Lyons argued this to be discriminatory.

Whilst the High Court accepted it is unlawful for a person performing any function or exercising any power under Queensland law to discriminate against a person on the basis of the person's impairment, it placed greater emphasis on the Jury Act.

It was found that she did not have the capacity to effectively perform the functions of a juror in circumstances in which there is no provision to administer an oath (or affirmation) to a person interpreting for a juror and the Jury Act does not permit a 13th person to be kept together with the jury.

And that, in the absence of legislative provision, the necessity to maintain the secrecy of its deliberations does not permit an interpreter to be present in the jury room during the jury's retirement.

In brief: What's happening in the FWC

Ambulance Victoria Work Value Case 2016

United Voice and the Australian Paramedics Association of Victoria have lodged an application for the Commission to deal with a dispute regarding the work value of paramedic and related classifications covered by Ambulance Victoria Enterprise Agreement 2015.

Annual Wage Review 2015-16

The Fair Work Commission live streamed the handing down of the Annual Wage Review 2015–16 decision on Tuesday, 31 May 2016.

Penalty rates case

As part of the 4-yearly review of modern awards, the Fair Work Commission is reviewing penalty rates in a number of awards in the hospitality and retail sectors.

Equal Remuneration Case 2013-14

United Voice and the Australian Education Union seek the making of an equal remuneration order, within the Children's Services and Early Childhood Education Industry.

Superannuation fund reviews

Most modern awards contain a superannuation clause requiring an employer to make sufficient superannuation contributions to a superannuation fund for the benefit of an employee to avoid the employer having to pay the legislated superannuation guarantee charge. The Fair Work Commission is responsible for further reviewing superannuation in relation to modern awards in 2013 and then as part of the 4-yearly review of default fund terms of modern awards commencing as soon as practicable after 1 January 2014.

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Until next time…

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