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to the first edition of the Workplace Relations & Safety Bulletin for 2017!

It has been a big start to the year in employment law. In addition to the landmark penalty rates decision, which we dissect in detail in this Bulletin, the Federal Government has also introduced legislation into Parliament seeking to make amendments to the Fair Work Act 2009 (Cth) (FW Act). These developments, along with a continued focus on the underpayment of vulnerable employees, have resulted in significant public discussion on workplace relations matters.

In early March 2017, our Melbourne team hosted a successful event with the Fair Work Ombudsman, Natalie James. Ms James presented on her approach to using the accessorial liability provisions of the FW Act, and her presentation was followed by a lively and very insightful Q&A session. If you are interested in attending our future events and training sessions, please let us know.

In this edition of the Bulletin we discuss several recent legal developments and helpful tips for employers including:

• if you can rely on a criminal record to make employment decisions;
• when post-employment restraints can be justified; and
• whether an employer can investigate an employee’s Facebook page without breaking privacy laws.

In news from our team, we welcome back Sara Wescott to our Sydney practice after a period of parental leave. Congratulations are in order for Emma Purdue, Arne Frydenberg, Silvia McIntosh, and Christian Mooney on the safe arrival of their new babies, and to Annika Anderson and Rani Wise (née Tisseverasinghe) on their recent weddings.

We hope that you enjoy this edition of the Bulletin. As always, we appreciate your feedback. If you have comments, queries, or suggestions for topics that you would like us to cover in future editions, please do get in touch.

Kind regards,
Workplace Relations & Safety team
Penalty rates in the retail sector

Undoubtedly the hottest issue this quarter is the long-awaited decision of a Full Bench of the Fair Work Commission (Commission) regarding penalty rates in the retail, hospitality, fast food, and pharmacy sectors. The Commission ruled in favour of reducing Sunday and public holiday penalty rates in the retail sector, although the proposed changes to Sunday rates are to be phased in over a number of years—withstanding the exact timing yet to be finally determined. Sunday penalty rates for full-time and part-time employees under the General Retail Industry Award 2010 (Award) will reduce from 200% to 150%. Sunday penalty rates for casual employees under the Award will reduce from 200% to 175%. The 175% for casuals appears to be the rate inclusive of the casual loading. Public holiday rates for full-time and part-time employees under the Award will reduce from 250% to 225%, whilst casuals will continue receiving a penalty rate of 225%.

The Commission noted that the relevant issue in arriving at its decision was whether or not the penalty rates in the Award achieved the modern award objectives. The Commission held that, in relation to the Award, the Sunday and public holiday penalty rates did not provide a fair and relevant minimum safety net. It noted that the impact of Sunday work on affected employees in the retail sector was much less than in times past, although still greater than for Saturday work. Whilst the Commission reviewed the Saturday penalty rates under the Award, it was satisfied that they achieve the Award’s objectives and did not amend them.

The Commission noted that the high Sunday and public holiday penalty rates had led many business owners and operators to restrict their hours of operation and services provided on these days. In the Commission’s view, the reduction in penalty rates is likely to result in a number of benefits to both employees and employers, including increased trading hours.

In light of the fact that the decision is likely to create financial hardship for a number of employees, particularly those who work on Sundays, the Commission concluded that appropriate transitional arrangements will be necessary to mitigate the hardship. It has not reached a concluded view on what these arrangements will be and will seek submissions from interested parties.

However, the Commission has indicated that the transition to the new Sunday penalty rates will be achieved by a series of annual adjustments, commencing on 1 July 2017, over a period of at least two years (but less than five). In this way, the transition will likely occur at the same time as the minimum wage increase is passed on. The changes to the public holiday penalty rates will take effect from 1 July 2017. The decision will provide some welcome relief to retailers after what has been a challenging start to 2017. The catch is that there is unlikely to be an immediate dramatic change due to the reduction in Sunday penalty rates being transitioned in over a number of years, commencing in July 2017.

Large retailers with existing enterprise agreements should review their current arrangements as the decision will affect their industrial relations strategy, particularly in light of the Commission’s recent approach to approving these agreements. In addition to the retail sector, the Commission also ruled in favour of reducing penalty rates in other areas including the hospitality, fast food, and pharmacy sectors.

Fair Work Commission departures and panel changes

Tensions in the Commission’s senior ranks were exposed with the resignation of Vice President Gadresse Watson, effective 28 February 2017. The Australian Financial Review partially reproduced a letter from Vice President Watson to Employment Minister Michaelia Cash in which Watson VP raised concerns regarding the industrial relations system and the Commission, including concerns that the business community increasingly perceives the Commission as partisan, disinterested, and biased. Vice President Watson had been a member of the tribunal since 19 June 2006 and had been the head of the major projects and organisations panels. The Commission has announced changes to the leadership of some of its panels in light of Watson VP’s departure. Vice President Watson heard complex matters in Melbourne covered by the panels for the government and recreational services industry, the manufacturing and building industry, and the transport, agriculture, mining, and services industry. Those matters will now be handled by Vice President Adam Hatcher. Vice President Joe Catanzariti replaces Watson VP as head of the major projects panel; and Senior Deputy President Jonathan Hamberger on the organisations panel. The panel list no longer includes an expert panel for assessment of default superannuation funds, which has been inactive since mid-2014.

The announcement of Watson VP’s departure was followed shortly by the resignations of Senior Deputy Presidents O’Callaghan and Acton.

Construction Code

There have been further changes to the Building and Construction Industry (Improving Productivity) Act (Act). The Act, which finally brought the 2014 Building Code (Building Code) into effect, became law late last year. Before being approved, the original Bill was amended so that the Building Code would no longer apply retrospectively to every enterprise agreement approved since April 2014. Instead, the Act had the effect that:

• if an employer was covered by an enterprise agreement made before the Building Code was issued, which did not comply with the Building Code, that employer had until 29 November 2016 to still submit expressions of interest, tender for, and be awarded Commonwealth funded building work (before being required to have a Code-compliant EBA); and
• enterprise agreements made after the Building Code was issued, must still comply with the Building Code.

However, after a backtrack by Senator Derryn Hinch, the Act was changed (in line with having until 29 November 2018 to have a Code-compliant EBA (for EBAs made before the recent legislative changes, companies will now only have until August this year to renegotiate code-compliant agreements if they want to win Commonwealth government contracts.

Revisions to the paid parental leave scheme—watch this space

On 8 February 2017, the Turnbull Government introduced the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 into Parliament. The Government is seeking crossbench support in the Senate for its revised paid parental leave scheme, which is embedded in legislation that restructures income and family support. The Bill proposes changes to the paid parental leave regime include an extended maximum parental pay period of 20 weeks (from the current 18 weeks), but are otherwise similar to the changes the Government has been attempting to pass over the past few years.

If passed, the Bill will prevent “double-dipping” by denying government-paid leave to parents who are entitled to receive paid parental leave of no less than 20 weeks’ pay at the National Minimum Wage from their employers. The government will pay the difference where employers’ paid leave schemes are less than 20 weeks’ pay. The Opposition says that approximately 70,000 working mothers will be worse off under the revised scheme.

Commonwealth penalty units

On 16 February 2017, the Crimes Amendment (Penalty Units) Bill 2017 (Bill) was introduced into the House of Representatives. The Bill proposes to amend the Crimes Act 1914 (Cth) to increase the Commonwealth penalty unit from $180 to $210, with effect from 1 July 2017. It also seeks to delay the first automatic CPI adjustment to the penalty unit from 1 July 2018 until 1 July 2020, to be indexed annually every three years thereafter. We will keep you informed on whether the Bill is passed by the Senate and is enacted into law.

Author

Kaitlyn Gulle • Senior Associate
Criminal record discrimination is a source of great intrigue (and confusion) for many employers.

A criminal record could be a source of discrimination or a basis for terminating an employee's employment, depending on the circumstances and the nature of the criminal record. The local tribunal has found that, in one of these jurisdictions, an employer discriminates against an employee on the basis of criminal record, and the discrimination has been made, the AHRC can: 

1. Ensure that you consider the interplay with other employment jurisdictions.
2. Before making employment decisions based on information obtained from a police check, give the employee the opportunity to explain the circumstances surrounding the information contained in the police check.
3. Protect your brand! While the AHRC can only make recommendations, a finding of criminal record discrimination has the potential to cause reputational damage to an employer—the AHRC is required to deliver reports to the Attorney-General which are tabled in Parliament and remain on the public record.

Ensure that you consider the interplay with other employment jurisdictions. In particular, where an employee has access to relevant dismissal jurisdiction, employers must consider whether, in all of the circumstances, it would be “harsh, unjust, or unreasonable” to terminate the employee's employment on the basis of their criminal record.
Management beware!

In a recent decision of the Victorian Court of Appeal (Court of Appeal), Spotless Management Services Pty Ltd (Spotless) was ordered to pay its former Chief Information Officer, Anthony Stevens, $477,400 plus interest as a result of Spotless having handed Mr Stevens a document which contained a calculation of his redundancy package, including non-contractual entitlements, prior to his termination.

Representations made to departing employees may come back to bite you!

Key points

- Victoria’s Court of Appeal has awarded an employee more than $477,000 because his employer failed to honour an agreement which had been made about the entitlements the employee would receive on termination.
- The agreement was constituted by the employer having provided the employee with a document setting out its calculation of the payment that the employee would receive if he agreed to the termination of his employment.

Background

After a new management team took control of Spotless, Mr Stevens met with the Managing Director and CEO, Bruce Dixon, on 23 August 2012 to discuss continuing in his role at Spotless (23 August Meeting). Mr Stevens claimed that Mr Dixon told him at that meeting that under a restructure, Mr Stevens would no longer perform the role of CIO (CIO Role) and would instead be offered the role of General Manager – Airports (General Manager Role). Mr Stevens told Mr Dixon that he saw this as a demotion, including because, in Mr Stevens’ view, the General Manager Role did not have a large profit centre. Mr Stevens claimed that Mr Dixon advised him that if his employment was terminated by way of redundancy, he would be paid his full entitlement. Mr Stevens claimed that Mr Dixon verbally agreed that Mr Stevens’ retention bonus, which had previously been paid by issuing shares in Spotless, would be paid in cash.

In September 2012, Mr Stevens met with Spotless’ Chief Operating Officer, Vita Pepe, and told her that he did not believe that the General Manager Role was viable. Mr Stevens presented options for the General Manager Role, including an option that the General Manager Role be made redundant. Ms Pepe claimed that when Mr Stevens was asked whether he wanted to leave Spotless, he confirmed that he did. Ms Pepe asked Mr Stevens to consider his position over the weekend.

On 17 September 2012, Mr Stevens met with Mr Dixon and Ms Pepe (17 September Meeting). At the meeting, Ms Pepe informed Mr Dixon that Mr Stevens had expressed a desire to leave Spotless. Mr Stevens claimed that, at this meeting, it was agreed that his employment would be terminated on the basis of redundancy and that he would be paid a termination payment comprising of 12 months’ pay in lieu of notice (in accordance with his written contract of employment) (Notice Payment), and a retention bonus of 12 months’ pay (Retention Bonus). Mr Stevens claimed that Mr Dixon told him to, “Tyke, Ant, you’ll get paid your entitlements”.

Immediately after the 17 September Meeting, Spotless prepared a Manual Salary Calculation document specifying Mr Stevens’ termination payment entitlements (Termination Pay Calculation). The Termination Pay Calculation included the Retention Bonus and the Notice Payment. Spotless provided this to Mr Stevens and he confirmed that it was correct and agreed to finalise his departure from Spotless.

On 15 October 2012, prior to Mr Stevens’ last day of employment, Spotless processed Mr Stevens the termination payment. Due to a processing error by the Spotless payroll department, Mr Stevens was paid the Retention Bonus but not the Notice Payment. As a result of the error, the termination payment calculations were brought to Spotless’ National HR Manager’s attention to check that they were correct. The National HR Manager considered that Mr Stevens was not entitled to receive the Retention Bonus which had been paid to him. As the amount of the Retention Bonus was the same as the amount of the Notice Payment, Spotless decided to offset the amount of the Notice Payment against the amount which had been paid to Mr Stevens in respect of the Retention Bonus.

Mr Stevens argued that he and Spotless had entered into an oral agreement that he would be paid the Retention Bonus, and ultimately brought proceedings against Spotless.

Spotless argued that there was no agreement to pay Mr Stevens the Retention Bonus

Spotless argued that, at the 17 September Meeting, Mr Dixon’s reference to Mr Stevens getting paid his “entitlements” was a reference to Mr Stevens only being paid his contractual entitlement to the Notice Payment and did not also refer to the Retention Bonus. Further, Spotless argued that the Termination Pay Calculation that was provided to Mr Stevens was only an estimate of his termination payment and did not constitute an offer to Mr Stevens.

In the alternative, Spotless argued that even if it did agree to pay Mr Stevens the Retention Bonus, such an agreement was not enforceable because there was no consideration exchanged between Spotless and Mr Stevens in respect of the agreement.

The decision

At first instance, the Supreme Court of Victoria found that Mr Stevens was not entitled to the Retention Bonus on the basis that there was no discussion between Mr Stevens and Mr Dixon about a possible redundancy and the payment of the Retention Bonus.

However, on appeal, the Court of Appeal overturned the trial judge’s findings and ordered Spotless to pay Mr Stevens $477,400 plus interest in respect of the Retention Bonus.

Whilst the Court of Appeal found that there was no agreement made between Mr Dixon and Mr Stevens in relation to the Retention Bonus during the 23 August or 17 September Meetings, it did find that Mr Stevens agreed to leave his employment with Spotless in reliance upon the Termination Pay Calculation which was provided to him after the 17 September Meeting. On this basis, the Court of Appeal found that Spotless had agreed to pay Mr Stevens the Retention Bonus upon termination.

In respect of Spotless’ argument that no consideration was provided by Mr Stevens in exchange for Spotless agreeing to pay the Retention Bonus, the Court of Appeal found that the consideration that was exchanged was Mr Stevens’ willingness to “leave gracefully”, such that there was a valid agreement.

Bottom line for employers

- Employers negotiating a separation with employees must be careful of any representations made regarding the payments the employee will receive on termination, and ensure that the accuracy of the payment amounts stated—such representations may give rise to an agreement to pay the employee that amount in exchange for the employee agreeing to separate.

Authors

Emily Bowly • Lawyer
Kaitlyn Guille • Senior Associate

Issue 1 2017 Workplace Relations & Safety
A driver employed as a casual employee under a labour hire arrangement has been found to be entitled to annual leave payments under the Fair Work Act. This case is a reminder to employers to ensure that all employment arrangements adequately reflect the day-to-day requirements of the employee’s job.

**Background**

WorkPac Pty Ltd (WorkPac) operated a labour hire business supplying labour to operators of coal mines in central Queensland. Paul Skene was employed by WorkPac as a dump truck operator under the Workpac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007 (WorkPac Enterprise Agreement).

Mr Skene commenced employment with WorkPac on 14 April 2010. Prior to his commencement, he received a “Notice of Offer of Casual Employment”, containing details of his pay rate and hours for the Clermont Mine role. As the employment agreement between Mr Skene and WorkPac was on an “assignment by assignment” basis, his original employment agreement was stated to continue to apply to his employment at Clermont, on the same terms and conditions as for the Dawson Mine role.

Mr Skene performed work in accordance with the Clermont Mine roster, which involved seven-day working weeks, including weekends and public holidays if required. During his working weeks, Mr Skene stayed in camp-style accommodation on site, and at the end of the week was flown home from Clermont Mine at Rio Tinto’s expense. Mr Skene received rosters for Clermont Mine 12 months in advance, and was paid by WorkPac each week.

In April 2012, Mr Skene’s employment was terminated by WorkPac for misconduct. On termination, Mr Skene was not paid any amount in respect of untaken annual leave, on the basis that he was a casual employee. Mr Skene commenced proceedings against WorkPac, contending that he was entitled to six weeks’ paid annual leave, firstly, pursuant to clause 19.1.1 of the WorkPac Enterprise Agreement, and secondly, pursuant to the Fair Work Act 2009 (Cth) (FW Act).

### Reasoning of the Court

Judge Jarrett of the Federal Circuit Court considered each of Mr Skene’s contentions. The WorkPac Enterprise Agreement

Judge Jarrett first considered the WorkPac Enterprise Agreement, in particular clause 5.5.6, which allowed WorkPac to inform the employee of the “status and the terms of their engagement”. His Honour was satisfied that the heading “Notice of Offer of Casual Employment” confirmed that Mr Skene had the employment status of a casual worker for the purposes of the WorkPac Enterprise Agreement.

Accordingly, he was not entitled to annual leave under the WorkPac Enterprise Agreement.

### The Fair Work Act

Section 86 of the FW Act limits the application of the FW Act’s annual leave provisions to all “employees, other than casual employees”. Despite finding that Mr Skene was a casual employee for the purposes of the WorkPac Enterprise Agreement, His Honour found that Mr Skene could still be “other than a casual employee” for the purposes of section 86 of the FW Act.

On this question, Judge Jarrett examined the application of common law principles in order to make his determination, as the FW Act does not define “casual employee”.

His Honour rejected WorkPac’s argument that the definition should be determined according to traditional industrial instrument and award definitions, in which a casual employee is one “who was engaged and paid as such and nothing more”.

His Honour instead applied the approach described in MacMahon Mining Pty Ltd v Williams, in which casual employment was characterised as having an “element of informality, uncertainty and irregularity” and having “an absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work”.

The Court agreed with MacMahon that the question of whether an employee is a casual employee is a question of fact. Accordingly, His Honour considered it necessary to undertake an analysis of the circumstances of Mr Skene’s employment.

### Factors indicating “other than casual” employment

Numerous factors weighed in favour of Mr Skene’s employment at Clermont Mine being something “other than casual.” Judge Jarrett took into account that Mr Skene’s employment:

- was “regular and predictable”;
- was continuous except for a period of seven days’ unpaid leave;
- was “facilitated by a ‘fly in fly out’ arrangement” with all expenses paid;
- was accompanied by an expectation from his employer that Mr Skene would be “available, on an ongoing basis, to perform the duties required of him in accordance with his roster”, and
- did not permit him to choose to work any particular shift or hours offered by WorkPac.

Factors indicating casual employment

On the other hand, in favour of Mr Skene being a casual employee, His Honour noted that:

- Mr Skene was “paid by the hour”;
- his employment was terminable on one hour’s notice; and
- WorkPac had “designated the employment as casual” and Mr Skene was “seemingly aware of and accepted that.”

### The Court’s decision

Judge Jarrett was ultimately convinced that Mr Skene should be seen as “other than a casual employee” for the purposes of section 86 of the FW Act. His Honour found, “There is no absence of a firm advance commitment as to the duration of Mr Skene’s employment or the days (or hours) he would work. Those matters were all clear and predictable. They were set 12 months in advance”.

The amount of compensation was left to be agreed between the parties.

### Key points

- **When determining if an employee is a casual employee under the Fair Work Act 2009 (Cth), the Courts will look beyond what the employment contract says and will look to the actual nature of the employment relationship and work performed by the employee.**
- **To avoid unexpected liability for annual leave and other entitlements, employers should regularly review their employment arrangements to ensure that any “casual” employees are truly working on a casual basis.**

### Authors

Emma Lutwyche • Lawyer  
Emily Burgess • Lawyer  
Anika Anderson • Senior Associate  
2. [2016] FCCA 1721 (MacMahon).  
5. Skene v Workpac Pty Ltd [2016] FCCA 3035 at 81.  
7. Skene v Workpac Pty Ltd [2016] FCCA 3035 at 85.

### Continuous, predictable and determined by rosters in advance—are your casual employees truly casual?

Employment requirements of the employee’s job.

Adequately reflect the day-to-day that all employment arrangements have been found to be your casual employees truly casual?
Unreasonable?

No workers’ compensation for reasonable administrative action, taken in a reasonable manner

The High Court recently handed down a decision regarding the proper construction of the words “as a result of” in the context of the management action exclusion in the Commonwealth workers’ compensation legislation.

Background

Ms Peta Martin was employed by the Australian Broadcasting Corporation (ABC) from 2010 to 2012 in Renmark, South Australia. Her initial role was as the producer of a breakfast radio program where she was under the supervision of Mr Bruce Mellett, a presenter and station manager. Ms Martin had a poor working relationship with Mr Mellett and applied for a range of other positions within the ABC outside of Renmark. While under Mr Mellett’s supervision, she also made allegations that he had engaged in conduct toward her that constituted bullying and harassment — claims that were investigated by the ABC and found to be unsubstantiated.

In 2011, Ms Martin was temporarily appointed to the position of “cross media reporter” based in Renmark but answering to a manager in Hobart. Subsequently, that position was reclassified, transferred, and determined that the worsening of her condition arose as a result of the Promotion Decision.

However, the Tribunal found that administrative action was not taken in a reasonable manner because Mr Mellett participated in the Promotion Decision and in the Tribunal’s opinion, a fair-minded observer acquainted with the matter would probably apprehend that Mr Mellett might not bring an impartial mind to his role on the selection panel. Accordingly, the Tribunal found that the Reasonable Action Exclusion did not apply, and found that Comcare was liable to pay compensation Ms Martin.

The first appeal

Comcare appealed the Tribunal’s finding that the Reasonable Action Exclusion did not apply to the Federal Court of Australia. In the appeal, Ms Martin sought to have the Tribunal’s decision affirmed on the basis that the findings showed that her adjustment disorder did not occur as a result of the Promotion Decision.

The Federal Court upheld Comcare’s appeal and remitted the decision to the Tribunal. In doing so, the Federal Court rejected Ms Martin’s argument that her condition was the result of indirect, real or imagined, causes that were not dependent on the decision not to promote her. The Federal Court also suggested that it may have been intervening administrative action taken in a reasonable manner.

The High Court decision

Comcare obtained special leave to appeal the decision of the Federal Court of Australia, where it argued that the Tribunal was “correct in law to conclude on the facts that it found the causal connection was made”.

Comcare argued that the FCAFC adopted an incorrect view of the causal connection required to satisfy the Reasonable Action Exclusion under the Commonwealth Act.

In the High Court, the FCAFC adopted a view that the High Court was not entitled to review the decision of the Federal Court of Australia on the basis of the appeal. In doing so, the High Court found that the Tribunal had failed to adopt the correct view to the FCAFC’s decision.

Having found that the High Court had failed to adopt the correct view to the FCAFC’s decision, the High Court remitted the decision to the Tribunal for reheard and determined according to law.

Key points

• The High Court has confirmed the extent of the prevention relating to what constitutes a disease, injury, or aggravation of an injury suffered as a result of reasonable administrative action taken in a reasonable manner.

• The required causal connection will be met if, without the taking of the administrative action, the employee would not have suffered the ailment or aggravation that was contributed to in a significant degree, by the employee’s employment.
Key points
• The Fair Work Commission has provided further confirmation that an employer’s subjective belief that they have been bullied will not, by itself, be sufficient to give rise to a finding of workplace bullying.
• Employers should ensure that they have robust management and investigation processes in place to minimise the risk of a successful bullying claim being made against their managers.

A recent decision by the Fair Work Commission has provided further guidance on what is, and is not, repeated and unreasonable behaviour constituting workplace bullying for the purpose of its anti-bullying jurisdiction.

Background
Ms Edwards, a Sales Consultant at E & S Trading, alleged that she had been bullied at work by other Sales Consultants and by various managers.

In April 2016, she lodged an application with the Fair Work Commission (“Commission”) for an order to stop bullying under the anti-bullying provisions of the Fair Work Act 2009 (Cth) (“FW Act”). The matter was unable to be resolved in conference, and Ms Edwards requested that the application be dealt with by way of arbitration.

In relation to her colleagues, Ms Edwards alleged that they had “ganged up on her”, taken sales from her, and engaged in abusive and aggressive behaviour. Ms Edwards’ complaints about her managers included that they had failed to properly investigate complaints and issues raised by her, and that she was singled out and treated less favourably than other Sales Consultants. She also alleged she had been given a final written warning in relation to an incident in November 2015 and was otherwise managed in a manner which amounted to workplace bullying.

Under the FW Act, the Commission can only make an anti-bullying order if it is satisfied that:
• an application has been made under the relevant provisions of the FW Act;
• “the worker has been bullied at work by an individual or group of individuals” and
• “there is a risk that the worker will continue to be bullied at work by the individual or group.”

The decision
An application made under s 789FCA “must also be one in which the employee reasonably believes that he or she has been bullied at work”. The Commission held that “the third issue is both a subjective and objective component to this test: [(N)ot only must the belief be actually and genuinely held by the employee but, in addition, it must be reasonable in the sense that it is able to be supported or justified on an objective basis].”

The Commission accepted that while Ms Edwards genuinely believed that she had been bullied at work, this did not mean that it was a “reasonable” belief. In determining whether there was an objective basis for Ms Edwards’ complaint, the Commission examined the definition of “bullied at work”. This requires that an individual, or a group of individuals, “repeatedly behaves unreasonably towards the worker; or a group of workers of which the worker is a member; and that the behaviour creates a risk to health and safety.”

In this case, the meaning of “repeatedly behaves unreasonably” was critical. The Commission drew on a number of recent decisions and confirmed that “repeated behaviour” may include a range of different behaviours over time; and although there is no set number, one or more of these behaviours must have occurred more than once. The inclusion of “unreasonably” invokes an objective test— the behaviour in question must be such that a reasonable person, having regard to the circumstances at the time, may consider the behaviour unreasonable.

The Commission emphasised that, in interpreting and applying the definition of “repeatedly behaves unreasonably”, the purpose of the substantive provisions (to prevent bullying at work) should be front of mind. The Commission stated that “in order for conduct to be reasonable, it does not have to be the best or the preferable course of action.” It was accepted that, although the November 2015 incident and the processes that followed “could have been handled differently” by management, E & S Trading did behave reasonably in facilitating an external investigation, mediation, and various detailed discussions with employees.

The Commission made some comments in the course of its judgment about Ms Edwards’ perceived version of events. The Commission highlighted that a number of the claims made by her were both “not supported or corroborated by other sworn evidence” and “denied or refuted by the evidence of other witnesses”. This led the Commission to conclude that, although Ms Edwards clearly had a “genuine belief about the nature of the various matters … and what motivated that behaviour”, the evidence could not support a finding “on any objective basis that these individuals have repeatedly behaved unreasonably.”

The Commission ultimately held that although there had been “a number of difficult issues” at E & S Trading’s Moorabin store, including tensions between staff, there was insufficient evidence to conclude that “repeated and unreasonable behaviour constituting workplace bullying had taken place.” Rather, the commission was satisfied that these issues were the result of “a sales culture and a significant degree of hype and competition.”

Given that no bullying at work was found to have taken place, there was no need to determine the third issue of whether there was a continuing risk of bullying to Ms Edwards.

Bottom line for employers
• This case reiterates that an employer’s subjective belief that they have been bullied will not, alone, be sufficient for a finding of bullying by the Commission, even if it is accepted that the belief is genuinely held by the employee.
• In this case, the employer’s robust processes, which included an external investigation, mediation, and detailed discussions with senior management, helped to establish that its managers’ actions were “reasonable management action carried out in a reasonable manner”, and not workplace bullying.
• Employers should seek advice at an early stage whenever allegations of workplace bullying are made to ensure that appropriate management and investigation processes are put in place.

Authors
Amnika Anderson • Senior Associate
1. Fair Work Act 2009 s 789FF.
3. Fair Work Act 2009 s 789DF.
4. Edwards v E & S Trading [64].
6. Ibid [76].
7. Ibid [87].
8. Ibid [71].
9. Ibid [77].
10. Ibid [89].
Unenforceable restraints
Can post-employment restrictions hold up?

Background
On 7 December 2015, Ms Nicole Peck signed a contract of employment with Just Group Limited (Just Group) for the role of Chief Financial Officer. Just Group is the parent company of popular brands including Smiggle, Peter Alexander, and Portmans. Ms Peck commenced the position in early January 2016, however, shortly after on 2 May 2016, Ms Peck tendered her resignation. Prior to her resignation, Ms Peck had been negotiating with Cotton On Group Services Pty Ltd (Cotton On) in respect of an offer of employment as their General Manager. Ms Peck only informed Just Group of her intention to commence employment with Cotton On shortly prior to her last day of employment.

On 2 June 2016, Just Group commenced proceedings in the Supreme Court of Victoria seeking injunctive and declaratory relief to enforce the post-employment restraint clauses in Ms Peck's contract of employment. The restraint clauses in Ms Peck's contract were intended to prevent Ms Peck from working for a competitor, in this case Cotton On, for a specified period of time after her employment with Just Group ended.

The central issue in the proceedings was whether the post-employment restraints in Ms Peck's contract of employment were enforceable, and accordingly whether she could be prevented from working for Cotton On for the period of the restraint.

The restraint
The primary restraint which underpinned Just Group's claims against Ms Peck included restricted activities within Australia and New Zealand during her employment and for a period of between 12 and 24 months after its termination. These restricted activities were set out as follows:

- **Personal Engagement** means directly or indirectly:
  - (a) being engaged, concerned or interested in;
  - (b) assisting or advising in respect of; or
  - (c) carrying on any activity:
    - (i) which is the same as, or similar to, any part of the specially brand and fashion business of a Group Company in which you were involved, or in respect of which you
      - received Confidential Information, in the Connection Period; (the First Limb)
      - (ii) for or on behalf of any of the entities operating the brands listed in Annexure A; (the Second Limb)

Decision at first instance— Supreme Court of Victoria
At the outset, the Court highlighted the basic principles governing restraint of trade clauses, particularly noting that:

- restraint of trade provisions that impose obligations on an employee after the employment relationship has ended are prima facie void and unenforceable.
- this is because they are contrary to the public policy interest of every person being able to carry out his or her trade freely,
- a post-employment restraint will only be justified if they are reasonably necessary to protect a legitimate interest of the employer requiring protection (e.g. confidential information).

Significantly for the Court's decision, the restraint clause in detail in order to determine its impact on Ms Peck and whether this was reasonable.

Interpretation of the Second Limb
The Second Limb prevented Ms Peck from being engaged in "any activity...for or on behalf of any of the entities operating the brands listed in Annexure A". There were 50 brands/entities listed in Annexure A, including Cotton On. In order to determine whether the clause was reasonable, the Court had to consider whether each entity in Annexure A actually competed with Just Group, not just Cotton On. However, Just Group only led evidence regarding the commercial activities of four of the 50 named brands/entities (Target, Big W, Kmart, and Cotton On).

Just Group asked the Court to infer that, in the absence of any contrary evidence, the other 46 entities in Annexure A only had commercial activities that competed with Just Group. The Court found that it was not appropriate to draw an inference in favour of Just Group that these
operating entities only have commercial activities that compete with Just Group, especially in circumstances where one of the entities that evidence was provided for, Woolworths Ltd, has businesses which do not compete with Just Group, yet Ms Peck would be precluded from working in any of those businesses. Justice McDonald found that this restraint would prevent Ms Peck from taking up employment in a role where confidential information acquired by her during the course of her employment with Just Group would be of no relevance to a new employer, and accordingly this was an unreasonable restraint.

Severance

Just Group submitted that the validity of the Second Limb could be secured by severing all of the brands/entities listed in Annexure A, save for Cotton On. Just Group submitted that when read in conjunction with Annexure A, the Second Limb created 50 discrete covenants and that the word “any” in the phrase “any of the entities operating the brands listed in Annexure A” should be read as “any one”. However, Justice McDonald found that “any” means “no matter which”, and so defined “any” of the entities operating the brands listed in Annexure A and the reasonableness of the restraint created by the Second Limb had to be assessed by reference to all 50 brands/entities. Justice McDonald reiterated that there was no evidence to suggest that the level of competition between Just Group and those other brands/entities was on par with the competition which exists between Just Group and Cotton On in order to render the clause reasonable.

The Victorian Supreme Court ultimately found that all the restraints imposed on Ms Peck were unenforceable.¹

Appeal—Victorian Court of Appeal

Shortly after Justice McDonald handed down his decision, Just Group lodged an appeal which was heard by the Victorian Court of Appeal in December 2016. The appeal was dismissed, with the Court of Appeal unanimously upholding the decision of Justice McDonald. In its judgement, the Court of Appeal sent a strong message to Just Group and the public stating, “the courts are referees, not players; they are not supposed to waste their time adapting illegal covenants at the instance of those who seek to benefit from the illegality”.²

Bottom line for employers

- This case is a clear reminder for employers that in circumstances where a post-employment restraint of trade provision is unclear or ambiguous, it is likely to be construed contrary to the employer’s interests. It is important that terms within a restraint of trade provision are unambiguous and defined where necessary.
- A restraint should only prevent an employee from working in a role with a competitor where the confidential information they acquired with their previous employer will be relevant and there is a real risk that it will be misused. If the post-employment restraint provision is broader than this, there is a risk that a court will consider it unreasonable to protect the employer’s legitimate business interests.
- Employees in New South Wales may be able to rely on the Restraints of Trade Act 1976, which empowers the court to read down a restraint that would otherwise be invalid. However, this case demonstrates that the courts will not otherwise be inclined to re-write poorly drafted restraints. Contracts containing restraint of trade provisions should therefore be prepared to apply to the laws of New South Wales in order to have the benefit of the Restraints of Trade Act 1976 (NSW). This will allow the restraint to be drafted in broader terms, but only require an employer to show that the restraint is reasonable in the circumstances of an actual breach.
- Courts may have regard to any disparity between contractual notice of termination periods and post-employment restraint periods in assessing the reasonableness of the post-employment restraint.

Authors

Mini Chandramouli • Lawyer
Kaitlyn Gulle • Senior Associate

¹ Just Group Limited v Peck [2016] VSCA 334
² Just Group Limited v Peck [2016] VSC 614

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Keeping the faith: Strike-triggered redundancies not in breach of bargaining obligations

On 19 August 2016, Capcoal employees who were members of the CFMEU started taking protected industrial action by means of work stoppages. Almost all of the Mine’s shovel operators were members of the CFMEU. As a result of the protected industrial action, there were not enough employees to operate both the dragline and the shovel.

Given that the dragline is more cost effective to operate than the shovel, Capcoal decided that the employees that had attended work would operate the dragline. As the shovel was not used, it fell behind the Schedule of the dragline. The shovel eventually reached a point where it could not be operated and was parked for a period of several months.

Capcoal decided that it needed to adjourn the existing Mine Plan in order to meet the requisite coal production levels. Rather than parking the shovel on a temporary basis, Capcoal revisited an earlier plan to park the shovel permanently, which would provide a cost saving of approximately $40 million to the company. However, parking the shovel permanently would result in a surplus of employees if the revised operational requirements.

In September 2016, Capcoal advised the CFMEU that it was considering making up to 90 positions redundant due to the parking of the shovel as a consequence of an “unplanned delay” to the Schedule. Thereafter, Capcoal refused to provide the CFMEU with an explanation for the “unplanned delay” and denied that the unplanned delay or the parking of the shovel had anything to do with the protected industrial action. In November 2016, the Acting General Manager of the Mine notified the CFMEU that Capcoal had decided to park the shovel and remove 83 positions redundant. The CFMEU contended that the decision to park the shovel was made in response to the employees taking protected industrial action, as Capcoal had advertised positions for contractors at the Mine at the same time.

The CFMEU applied to the Fair Work Commission for a bargaining order on the basis that Capcoal had acted contrary to its good faith bargaining obligations by engaging in capricious or unfair conduct that undermined freedom of association or collective bargaining. In support of its case, the CFMEU relied upon the causal connection between the protected industrial action and the decision to permanently park the shovel and retrench 83 employees. The CFMEU also alleged that during the consultation process, Capcoal made dishonest and untruthful about the reasons why the shovel had fallen behind the dragline and whether the shovel would be parked permanently.

Capcoal said that the reason why it made the decision to park the shovel permanently and restructure its business, as opposed to resuming use of the shovel in the future, was because of the significant costs savings that this option presented.

The CFMEU’s application raised several novel questions about the proper construction of the good faith bargaining provisions in the Fair Work Act 2009 (Cth) (“FW Act”)

Conduct that is capricious or unfair must also undermine collective bargaining or freedom of association

Deputy President Asbury dismissed the CFMEU’s application, finding that conduct that is capricious or unfair will not, of itself, constitute a failure to meet the good faith bargaining requirements. To establish a failure to bargain in good faith, the conduct must be capricious or unfair, and must also have the effect or likely effect of undermining freedom of association or collective bargaining.

However, the Deputy President held that in order for the Commission to make a bargaining order in relation to conduct alleged to be in breach of the good faith bargaining requirements, the Commission does not need to be positively satisfied that freedom of association or collective bargaining are actually being undermined. Rather, it will be sufficient for the Commission to be reasonably satisfied that freedom of association or collectively bargaining will likely be undermined by capricious or unfair conduct.

Capcoal contended that if an employer subjected to protected industrial action which was causing loss and damage made a decision not to pay employees a discretionary bonus, which would otherwise have been paid, the employer’s conduct would not be in breach of its good faith bargaining obligations. The Deputy President agreed with this argument and said that the reason for the employer refusing to pay the bonus might include the loss and damage caused by the industrial action. The refusal to pay the bonus might also cause the employees to rethink their strategy with respect to taking protected industrial action and would also adversely impact the employees who were counting on the bonus.

However, the Deputy President held that this conduct, although unfair in the ordinary sense of the word, would not undermine collective bargaining or freedom of association, and would be insufficient to show that the employer was not meeting its good faith bargaining obligations. Nonetheless, if the conduct was sufficient to make employees abandon their bargaining position, the Deputy President held that the conduct could be conduct which undermined freedom of association or collective bargaining.

It’s the reasons that matter, not the causal connection

The Commission accepted that there was a connection between the protected industrial action and Capcoal’s decision to make the employees taking that action, who were members of the CFMEU, redundant. The Deputy President said that the connection was that the protected industrial action created an environment which prompted Capcoal to change its operations at the Mine.

However, the Commission held that the question of whether the industrial action was causally connected to the delay, which led to the decision to park the shovel, was not a basis for the Commission to find that the retrenchments of the employees were because they were taking protected industrial action or because they intended to do so in future. The Commission was satisfied that the decision to park the shovel and restructure the workforce was taken for legitimate business reasons which included a significant cost saving.

The Deputy President said that there was insufficient evidence to find that the basis for the redundancies was contrived or fabricated, or that the parking of the shovel was a temporary ruse aimed at avoiding the obligations of the union. Accordingly, the fact that the absence of employees from work, which subsequently led to the parking of the shovel, was the result of the employees taking protected industrial action, did not lead to a conclusion that the restructure and retrenchment was implemented because the employees were taking protected industrial action or because they intended to do so in the future.

Key points

Throughout negotiations for an enterprise agreement, bargaining representatives must comply with the good faith bargaining requirements set out in the Fair Work Act 2009 (Cth). These requirements include a prohibition on bargaining representatives engaging in unfair or capricious conduct that undermines collective bargaining or freedom of association.1

Background

A subsidiary of Anglo Coal, Capcoal Management Pty Ltd (Capcoal), operates an open cut black coal mine in Queensland (Mine). From July 2016, Capcoal implemented a plan to uncover enough coal to meet its customer demands by simultaneously using two pieces of equipment—a shovel and a dragline (Mine Plan). Where both pieces of equipment are being used simultaneously, the shovel must work ahead of the dragline to a planned schedule (Schedule). The dragline can also operate on its own, and is more cost effective to operate than the shovel.

Since February 2014, Capcoal and the Construction, Forestry, Mining and Energy Union (CFMEU) had been negotiating for a replacement enterprise agreement.
Noting that prolonged stop-work action presents risks to both employers and employees, the Deputy President accepted Capcoal’s evidence that the redundancies were due to commercial opportunities only identified after the employees went on strike, and stated that, “it is not unfair for an employer suffering loss and damage as a result of employees taking industrial action to decide, on legitimate business grounds, to restructure its business to manage that loss and damage, and to decide to make employees redundant in that process.”

Accordingly, the Commission held that this was not capricious or unfair conduct that undermined freedom of association or collective bargaining, and dismissed the CFMEU’s application.

**State of mind of person alleged to have breached the good faith bargaining obligations is relevant, but not determinative**

Deputy President Asbury also held that the state of mind of Capcoal’s communications to the CFMEU about its decision were at best disingenuous, she did not accept that this was an indication that Capcoal was guilty of formulating a plan to dismiss CFMEU members because they had engaged in protected industrial action, given that Capcoal had a legitimate business case for the restructure.

However, Deputy President Asbury warned Capcoal that “there may be a breach of the good faith bargaining obligations in the future if Capcoal is found to have replaced the retrenched employees with labour hire employees or contractors. This is because it would be open for the Commission to find that the restructure was capricious or unfair and undermined collective bargaining by reducing the number of CFMEU members who may otherwise have remained in employment.”

**The CFMEU appeal**

The CFMEU appealed the Deputy President’s decision to a Full Bench of the Commission.

The Full Bench considered that employers will be at risk of breaching their good faith bargaining obligations if they make employees redundant during enterprise bargaining negotiations without, in its legitimate business reasons for doing so. However, the Full Bench agreed with the Deputy President’s finding that Capcoal’s decision to park the shovel and implement the restructure was a “legitimate response to the commercial and operating circumstances” that flowed from the industrial action.

As part of the appeal, the CFMEU raised the argument that the FW Act provides employers with rights to respond to protected industrial action that is causing loss and damage, such as by applying to suspend or terminate the action. The CFMEU argued that this right did not extend to terminating the employment of employees engaging in protected industrial action. The Full Bench rejected this submission and said that “employees who engage in protected industrial action are ‘protected’ in that their action is not unlawful under the Act and that they are immune from certain civil and criminal liability for engaging in the action.”

However, the Full Bench held that this did not mean that employers are unable to respond to protected industrial action, or to the circumstances created by such action, “by acting in a manner that addresses its legitimate business interests.”

The Full Bench therefore held that the Deputy President was correct in finding that Capcoal’s actions were not capricious or unfair, and dismissed the CFMEU’s appeal.

**Federal Court weighs in**

The Full Bench’s decision came a week after separate Federal Court proceedings brought by the CFMEU against Capcoal alleging that Capcoal took unlawful adverse action against employees because they had taken protected industrial action, in breach of the general protections provisions of the FW Act.

In an interlocutory decision, Justice Katsmann of the Federal Court said that there was a reason to believe Capcoal’s purported redundancy assessments were “not bona fide”. Justice Katsmann accepted the CFMEU’s submission that it should be inferred from the evidence that “the value of the employees to Capcoal only diminished after they became involved in union activities and, in particular, the protected industrial action”. Having found that unlawful adverse action may have occurred, the Court reinstated two employees to the Mine pending final determination of the proceeding. If the Federal Court’s final determination is consistent with its interim decision, it will likely prompt the CFMEU to lodge further adverse action applications seeking to have the other retrenched employees reinstated.

The Federal Court’s final determination is expected in the coming months – watch this space.

**Bottom line for employers**

- If an employer suffers loss and damage because of protected industrial action and undertakes a structure because of the circumstances that flow from the industrial action, the employer will not have engaged in unfair or capricious conduct undermining freedom of association or collective bargaining, breaching the employer’s good faith bargaining obligations, if the employer can demonstrate it has valid business and operational grounds for restructuring.

- The fact that an employer’s conduct adversely impacts on the position of a bargaining person is irrelevant to the question of whether an action is engaged in as a response to protected industrial action and is “protected” in that its action is not unlawful under the Act and that they are immune from certain civil and criminal liability for engaging in the action.

- While the Full Bench has confirmed that protected industrial action leading to loss and damage causes restructuring and job losses will not necessitate a finding that the employer has breached good faith bargaining obligations, the interim Federal Court decision highlights that there is still an unresolved tension determining adverse action applications that involve employees taking protected industrial action. Employers should take care to ensure that they have legitimate business reasons which justify their conduct.

**Facebook stalking of employees may constitute a breach of privacy**

**Background**

In the decision of Jurcut v Director, Transport Safety Victoria, the Supreme Court of Victoria (Court) considered issues relating to a complaint by a public sector employee that her employer breached the Victorian Information Privacy Principles (IPPs) contained in the Privacy and Data Protection Act 2014 (Vic) (Victorian Act) by collecting personal information about her through Facebook.

The complainant was experiencing alleged workplace bullying, stress, and other complaints. She had online conversations with a work colleague over Facebook (using an account under a pseudonym), in which she made references to the employer and other employees. She also posted a lengthy and abusive post on her work colleague’s Facebook wall.

The colleague reported the conversations and posts to the employer. The employer investigated the matter by conducting Google and Facebook searches for information. The employer also accessed the posts and chats from a Facebook friend’s page. This investigation resulted in the complainant being given a final warning and, depending on the circumstances that flow from the action, the employer will not have engaged in unfair or capricious conduct undermining freedom of association or collective bargaining, breaching the employer’s good faith bargaining obligations, if the employer can demonstrate it has valid business and operational grounds for restructuring.

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The decision

The Court found that social media posts using a pseudonym may constitute “personal information” if the person is reasonably identifiable. In this case, the employer was able to ascertain the identity of the individual. Social media posts may not be a “generally available publication” (which is exempt from the Victorian Act). The term only covers information which can be accessed by most of the general public and information only accessible by those with particular skills in searching for information on social media was not within the exemption.

In relation to the alleged breaches of the IPPs, the Court found that:

- the conduct of the employer in obtaining personal information through Facebook was for a legitimate purpose and not to cause harm to the employer or to the circumstances created by the protected industrial action, in breach of the general protections provisions.

- the employer did not breach its obligations under IPP 1.3 and 1.5 which relate to notifying the individual of the collection and use of their information. It was not practicable for the employer to notify the complainant while she was obtaining the information, as to do so could have jeopardised the integrity of the disciplinary investigation; and

- it was not reasonable and practicable for the employer to ask the complainant directly and, therefore, they did not breach IPP 1.4 which provides that if it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual.

**Bottom line for employers**

- This decision is a reminder that privacy legislation can apply in a wide variety of circumstances.

- Although it was not considered in this case as it is not available in the Victorian Act, most private sector employers must comply with the Australian Privacy Principles in the Privacy Act 1988 (Cth) which contains the “employee records” exemption.

- “Employee records” is defined to mean “a record of personal information relating to the employment of the employee” and is therefore more limited.

- Whether Facebook posts of an employee “relate to” their employment will depend on the circumstances.

- Therefore, employers should exercise caution when undertaking workplace investigations to ensure compliance with obligations under privacy legislation.

**Authors**

Varun Bhatia • Lawyer
Natalie Cambrell • Partner
