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This month's round-up of labour and employment stories from around our global network

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# Australia: dismissal for misconduct outside work

A recent decision of Fair Work Australia, the national workplace relations tribunal, has brought a renewed focus to the question of whether employers can dismiss employees for 'out of hours' conduct.

In this case, the Full Bench on appeal dismissed a hairdresser's claim for unfair dismissal in circumstances where his erratic behaviour and the employer's knowledge of his out of hours drug use, resulted in the small business employer terminating his employment summarily without notice.

The Full Bench found that the employer genuinely held the belief that the employee's conduct justified immediate dismissal and that the belief was based on reasonable grounds (including his erratic behaviour and health and safety implications for clients).

In Australia, the circumstances in which employees may be lawfully dismissed for conduct outside work are limited. In a useful case often cited by Fair Work Australia, its predecessor the Industrial Relations Commission found that employers can fairly dismiss an employee for out of hours conduct where the employee's conduct:

(a) is likely, viewed objectively, to cause serious damage to the relationship between the employee and employer;

(b) damages the employer's interests; or

(c) is incompatible with the employee's duties as an employee.

The last situation is particularly relevant because it allows employers to take into account the nature of the employee's employment. The contractual obligations of people employed in a professional capacity are often defined largely by their respective professions. So an employee who stacks shelves in a supermarket may get away with out-of-hours conduct which would not be acceptable from an employee who is a police officer, teacher or lawyer or holds some other position of public trust or responsibility.

In considering whether to dismiss an employee for out of hours conduct, employers should carry out a reasonable investigation and ensure there is a sufficient relevant connection between the conduct and the employment. This process should include advising the employee of the valid reason for the proposed dismissal and providing the employee with an opportunity to respond.

If an employer is uncertain whether the conduct is serious enough to justify immediate dismissal, employers should 'play it safe' and dismiss on notice, rather than summarily without notice.  Even then, demonstrating the adverse impact of the conduct on the role and/or employer is key.

**Dominique Hartfield, Senior Associate, Perth**

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# Polish salaries - time for full disclosure?

HR departments in Poland are increasingly facing requests from individual employees relating to the pay of their colleagues. This might be due to several articles which have appeared in the Polish press in recent weeks concerning rulings of the Supreme Court on this issue. Employers need to be aware that such boldness on the part of employees cannot be prevented by simply including a confidentiality clause in their contract of employment.

One of the cases considered by the Polish Supreme Court concerned a sales specialist who provided his colleagues with a full list of their remuneration and bonus details after he obtained this information by mistake from one of his superiors. Members of the Sales team then started asking questions of the employer as to why their pay and bonuses differed, when they were doing the same job. Unhappy with what had taken place, the employer promptly dismissed the sales specialist. The Supreme Court has now said that the employer's actions were unlawful because the employee should not have suffered a detriment for taking steps to counter potential pay discrimination or an alleged breach of the principle of equal treatment at work. It said that employers should not use confidentiality clauses for anything other than protecting business secrets, i.e. to prevent disclosure of pay information outside the business.

In another recent case the Supreme Court ruled that a payroll specialist who was dismissed after she used confidential pay information obtained in the course of her duties to sue her employer had been treated unlawfully. This was despite the fact she had an express confidentiality clause in her contract of employment. The Court said that employers are not entitled to rely on a breach of a confidentiality clause to dismiss an employee if the employee's actions had been done with the intention of exposing a breach of the equal treatment provisions.

These recent rulings make it clear that confidentiality clauses will only protect employers from the disclosure of pay information outside the company and cannot be used to stop employees from sharing pay information with their colleagues if their aim is to expose a potential breach of the equal pay or discrimination legislation. If employees suspect that

their employer's pay arrangements are discriminatory they may discuss their remuneration with their colleagues regardless of any confidentiality clause in their contract of employment. Furthermore, the fact that employees exercise their rights in this way will not constitute grounds for dismissal.

**Katarzyna Witkowska-Pertkiewicz, Associate, Warsaw**

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# France penalized for excessive delays in Industrial Tribunal system

The French State has been accused of denying employees access to justice in light of the lengthy delays being experienced in the Industrial Tribunal system there.

In one of the 16 successful cases that came before the Paris High Court of Justice recently the employee in question had brought a claim for unfair dismissal in June 2004, three months after he was dismissed by his employer. It took four years for the matter to come before the Industrial Tribunal, which gave its decision on 27 June 2008. The employer then appealed against the unfair dismissal ruling and the Court of Appeal finally upheld the Tribunal's decision on 16 December 2010, almost six years after proceedings first began.

Dissatisfied with the length of time it had taken to deal with his claim, the employee then brought a claim against the legal representative of the French Treasury, claiming damages of €20,000. He argued that the delays he had experienced were excessive and unreasonable. He pointed out that his claim was not complex and that the parties themselves had not been the cause of the delays.

The Paris High Court of Justice has recently ruled in the employee's favour. In upholding his claim it said that the French State had breached its obligations under the French Justice Organization Code and was required to pay compensation for any damage suffered as a result of the failures in the functioning of civil justice, notably in cases of a "denial of justice". It said that the French State had failed in its legal duty to ensure that the individual had his claim dealt with in a reasonable period of time, in accordance with Article 6(1) of the European Convention on Human Rights. It said that in determining whether there had been a denial of justice the Courts should take into account the circumstances of each procedure, the nature and complexity of the case and the parties' behaviour. In this particular case the delays had been caused by a lack of resources available to the Industrial Tribunal – something that the French State was responsible for – and a delay of 6 years was clearly excessive and constituted a "denial of justice". The denial of justice arose through the delay itself and no suggestion was made that if the claim had been heard

earlier the outcome would have been any different.

This is not the first time that the French State has been required to pay out compensation because of excessive delays experienced by users of the Tribunal system. This is just one of 16 successful claims dealt with in February 2012, after 71 claims were originally lodged in February 2011 before the Paris High Court of Justice.

**Mia Catanzano, Associate, Paris**

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# US employers should avoid sex stereotyping

Employers should be wary of modern day sex stereotyping i.e. the less favourable treatment of an employee because his/her demeanour or behavior does not conform to the employer's views of "how things should be". Such a claim can arise in many different circumstances. Take for instance the case of Ashley Yang, which has been widely reported recently in the US news. She worked as a security checkpoint screener at Los Angeles International Airport (LAX) and the stories indicate that she was born as a man but lived as a woman. Despite this, officials at LAX informed her that she had to work "as a man". As a result, Ms Yang claims to have worn a short "male wig" while at work, complied with LAX's male dress code, and screened men as they passed through security. She states her employment was terminated after she was observed entering the women's restroom. The news reports indicate that Ms Yang complained of sex discrimination under the Federal anti-discrimination statute, Title VII, and the matter was settled out of court.

Ms Yang's case illustrates a number of issues that could potentially subject an employer to claims of sex stereotyping. Dress codes and appearance policies that differentiate between men and women should be examined. A neutral dress code and appearance policy that is applied equally to all individuals (i.e. approximately equally restrictive of both genders, even if the restrictions are not identical between the sexes) may be one method of reducing the risk of a sex stereotyping claim. Also, while gender may be a legitimate occupational qualification for some positions, those positions should be closely scrutinized. Employers should review those positions frequently to determine whether it is necessary or appropriate to limit the individuals who perform those job duties to one specific gender.

Employers should also recognize the rights of transgender employees in a gender-specific position, and should ensure that all anti-discrimination laws are being followed. Late last year, for example, the Eleventh Circuit Court of Appeals upheld a claim by Vandiver Elizabeth Glen after she claimed she was fired from her job because she intended to transition from male to female. The Court noted that discrimination against a transgender employee because s/he does not "conform" to her/his gender is sex discrimination and is

prohibited by law. This is not a new proposition of law, as the United States Supreme Court dealt with the issue of gender conformity more than two decades ago in ***Price Waterhouse v Hopkins*****,** where the Court found that a female accountant who had been passed over for partnership because she was too "macho" and not feminine enough had a claim for sex stereotyping.

Although Federal law prohibits discrimination against individuals based on gender non-conformity, Title VII does not list sexual orientation as a protected class. Thus, last year, the Sixth Circuit Court of Appeals upheld summary judgment for the employer in ***Gilbert v County Music Assn., Inc*** after it ruled that sexual orientation was not a protected characteristic. In that case, the plaintiff (who was gay) worked as a theater professional organizing award shows. After he complained that he was threatened by another employee and subject to a homosexual slur, he alleged that he stopped receiving work. The Court noted that although sex stereotyping is a recognized form of gender discrimination, there was "not a single allegation that anyone discriminated based on his appearance or mannerisms for his gender non-conformity." This case highlights that under current Federal law, an individual cannot establish a sex discrimination case based solely on the fact that he or she is homosexual. However, employers must consider State and local laws regarding such discrimination, as an increasing number of States and Districts are passing laws and ordinances that protect homosexuals from workplace discrimination and harassment.

Ultimately employers are best advised to take action based on an employee's work performance and select the one who is objectively the most qualified. Employers should also review their policies and procedures to ensure that they are neutral in their impact. As recent cases have made clear, transgender employees who are subjected to sex stereotyping may pursue a claim against their employer. Maintaining a culture that supports a diverse workforce not only limits the employer's potential exposure to liability, but helps to retain and attract the most qualified and talented employees.

**Jeremy R Morris, Associate, Columbus, Ohio**

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## Contact

Caroline Noblet
T + 44 20 7655 1473
caroline.noblet@squiresanders.com

Susan DiMickele
T + 1 614 365 2842
susan.dimickele@squiresanders.com



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