SQUIRE PATTON BOGGS

WORKPLACE VIEW

July 2015

The High Costs of Being a Vexatious Litigant!

Recent cases this year have highlighted that even though the Fair Work Act 2009 (Cth) (**FW Act**) is generally a 'no costs' jurisdiction (i.e. a win does not ordinarily result in an award of costs in the successful party's favour), the bringing of unmeritorious claims can come at a high price for applicants.

Costs will not normally be awarded against another party in relation to a matter arising under the FW Act, unless the court is satisfied that the person has:

- either instituted proceedings vexatiously or without reasonable cause;
- unreasonably acted or failed to act causing the other party to incur costs; and
- unreasonably refused to participate in a matter before the Fair Work Commission which arose out of the same facts.

As the cases below demonstrate, the courts will not be shy in awarding costs where one of these circumstances arises.

AU$150,000 Costs Order for 'Unreasonable Act'

The first case is a discrimination case brought by a software engineer against her former employer, IBM, in *Yeoh v IBM Australia Limited* [2015] FCCA 724.

The employee in that case claimed that IBM had discriminated against her on grounds of her gender and family responsibilities by unreasonably requiring her to work double her contracted working hours and by paying her less than her husband (who also worked for IBM). She even blamed the company for her marriage collapse. But the claim that mostly led to her downfall was that her manager had treated her less favourably by referring to her as having a 'baby brain'.

In some circumstances such a comment would be enough to succeed in a discrimination claim. But in this case the judge rejected the employee's claim, finding that she had embellished her evidence and exaggerated her claims in order to try and advance her case. Judge Street said '*to deliberately fabricate evidence to advance one's case casts doubt on the credibility of the applicant in relation to the other areas of conflict of evidence between the applicant and the respondent's witnesses*'. He went on to find in favour of IBM in relation to all of the allegations.

Ultimately the claim proved a very costly lesson for the employee with the court ordering her to pay IBM AU$150,000 in costs following her decision to unreasonably reject IBM's offer (prior to the hearing commencing) for both parties to walk away and bear their own costs.

AU$5,000 Costs Order for a 'Vexatious' Pursuit of the Maximum Penalty

Less than three months later, the Federal Circuit Court in *Zahra v Pharmacy Management Avoca Beach Pty Ltd* (No.2) [2015] FCCA 1515 ordered a pharmacist's assistant to pay her former employer AU$5,000 for unreasonably and vexatiously lodging an adverse action case and in particular, for pursuing the maximum available penalty against her former employer for the alleged adverse action when that claim was never going to succeed.

The assistant claimed that her employer took adverse action, by dismissing her, because of a disability (being her varicose veins which allegedly resulted in a partial loss of bodily function) and pursued the highest penalty available against the pharmacist. The pharmacist however, maintained that his assistant was dismissed because she became increasingly inappropriate, rude and discourteous towards him and such behaviour was contrary to an effective working relationship as pharmacist and pharmacist's assistant.

The court found that the pharmacist's reason for dismissing the assistant was the breakdown in the working relationship and not her varicose veins.

In considering the application for costs, the court said that seeking the maximum available penalty for the employer's alleged breaches was vexatious and unreasonable, and on this basis ordered the assistant to pay AU$5,000 in costs to her former employer.

AU$900,000 Costs Order for Pursuing 'Fanciful' Discrimination Claims

Two days later the Federal Court in *Chen v Monash University* (No 2) [2015] FCA 552 rounded out the spate of cases with a whopping AU$900,000 costs order against a self-represented academic who made more than 50 unsuccessful claims of sex discrimination and sexual harassment against Monash University and two senior academics.

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After rejecting a AU$30,000 settlement offer from the university, the academic pursued her discrimination claims in the Federal Court.

Following a lengthy trial, Justice Tracey concluded that the claims were fanciful and without foundation and ordered that the academic pay the legal costs of the university and the two professors.

In its application for costs, the university and the two professors sought just over AU$1 million in indemnity costs, while the academic in responding to the application for costs endeavoured to 'reargue the merits of her case and to traverse many of the adverse findings made by the Court in rejecting her claims'.

In considering the application for costs, Judge Street said that the academic's failure to accept the '*generous offer of settlement before any substantial costs had been incurred on either side*', particularly given the effect of refusing the offer was properly explained to her, was unreasonable and on this basis, ordered her to pay AU$900,000 in indemnity costs (in total) to the university and the two academics. Indemnity costs are generally all costs incurred by a party in relation to the proceedings provided they have not been unreasonably incurred and are not an unreasonable amount.

What Does This Mean for Employers?

These cases serve as a timely reminder for employers that, in certain circumstances, an early offer of settlement or compromise will place the employer in a position to seek costs (from that point in time) if the matter proceeds to trial and is ultimately found to be without merit.

In making costs orders where an early offer of settlement is declined, the court will consider whether the other party's failure to accept the offer was reasonable. As such, employers should ensure:

- the offer was clear and capable of being accepted;
- the offer and the time limit for accepting the offer were reasonable in the circumstances; and
- the effect of the applicant refusing to accept the offer was clearly explained to him or her.

Alert – Visa Charge Increase!

With effect from 1 July 2015 the Department of Immigration and Border Protection will increase the Visa Application Charges (VAC) for a number of visas. The new VAC for primary applicants, for the visas most commonly used by our clients, are set out below (please note VAC increases may also apply to dependants included in the visa application).

Visa	Previous VAC	New VAC
Subclass 457 – Temporary Work (Skilled)	AU$1,035	AU$1,060
Subclass 186 - Employer Nomination (Permanent)	AU$3,520	AU$3,600
Subclass 187 – Regional Employer Nomination (Permanent)	AU$3,520	AU$3,600
Subclass 400 – Temporary Work (Short Stay)	AU$165	AU$175
Subclass 188 – Business Innovation and Investment (SIV Stream)	AU$4,675	AU$7,010

Alert – Unfair Dismissal Income Cap and Compensation Limit Rise!

As of 1 July 2015, the high income threshold will rise from AU$133,000 to AU$136,700. Accordingly, employees who are not covered by an award or enterprise agreement and earn on or above the new high income threshold are ineligible to make an unfair dismissal claim under the FW Act. The compensation limit for unfair dismissal claims will also rise from AU$66,500 to AU$68,350.

Employer Reminder

A reminder for employers to ensure, where applicable, their pay rates take into account the 2.5% increase to the national minimum wage and award rates which will commence from the first full pay period starting on or after 1 July 2015.

The Fair Work Commission has confirmed that the national minimum wage (for award/agreement free employees) will increase from AU$640.90 to AU$656.90 per week based on a 38 hour week of a full-time employee (AU$17.29 per hour). Award rates and in some cases registered agreements will also increase by 2.5%. The Fair Work Commission has published on its website, the latest wage and expense-related allowance determinations for each modern award which take into account the latest increases. For more information see the FWC webpage on modern award wage and allowance determinations.

Increases also apply to the minimum wages for award/agreement free casual employees, junior employees, employees to whom training arrangements apply, employees with disability and employees paid piece rates. The final national minimum wage order for 2015 outlining all increases will be published by 1 July 2015. For more information see the FWC webpage on the draft national minimum wage order.

International Spotlight

They Get Leave for That?!

If you thought we were onto a good thing in Australia with four weeks annual leave, 10 days personal leave each year and long service leave, here are just a few of the interesting (and unusual) leave perks enjoyed by other workers around the world:

1. **Menstrual/sanitary leave**

This is a legally recognised right for female workers in countries such as Japan, South Korea, Indonesia and Taiwan. For instance, in South Korea, women are entitled to one day of 'menstrual leave' each month and receive additional pay if they choose not to take it. This topic sparked debate in the UK in December last year after a British gynaecologist argued that such leave would boost productivity while others have commented that it is a form of 'reverse discrimination'.

2. **Marriage leave in China**

In China, newlywed employees are entitled to 1-3 days 'marriage leave'. However, if the employee has a 'late marriage', that is, getting married for the first time at 23 years or older (for females) or 25 years or older (for males), an additional seven days marriage leave must be granted depending on local regulations.

3. **Solo parental leave in the Philippines**

In addition to leave benefits under existing laws, 'solo' parents are entitled to seven days leave if they have worked for their employer for at least one year. The definition of 'solo' parent is quite broad; some examples include a parent left solo or alone with the responsibility of parenthood due to death of spouse and a woman who gives birth as a result of crimes against chastity.

At the other end of the spectrum, spare a thought for the people of the United States of America, which has not previously mandated a minimum number of paid sick leave days. President Obama proposed legislation at the beginning of this year to rectify this situation. This month Oregon became the fourth state to pass paid sick leave legislation, which will require most employers with 10 or more employees in Oregon to provide employees with up to 40 hours per year of paid sick leave.

Did You Know?

There will shortly be more flexibility and clarity for employers in dealing with annual leave for award employees.

Based on the directions issued by the Full Bench of the Fair Work Commission these changes are likely to commence during August 2015 once the terms of the draft new model clause for modern awards is approved after further submissions by interested parties on the proposed changes below.

Provided employers keep records of the specific cashing-out request by the employee and don't pressure their employees to cash out their leave, they will be able to agree with their award-covered employees to cash-out up to two weeks' annual leave in any 12 month period.

In addition, provided the employer has requested a meeting and genuinely tried but failed to reach agreement with an employee who has excessive annual leave accruals (i.e. eight weeks or more for non-shift workers and 10 weeks for shift workers), the employer may direct the employee in writing to take such leave (providing at least eight weeks' notice) to reduce excessive leave accruals to no less than six weeks.

This has been seen as a win for employers given that the ACTU argued against the changes, suggesting that they would undermine the NES entitlement to annual leave and lead to employees failing to receive sufficient rest and recreation.

It is important for employers to note that before they are entitled to direct employees to reduce 'excessive' accrued leave they will be required to meet the employee and try to reach agreement first on steps to reduce or eliminate the excessive accrual. For full details of the model term and its requirements please see the Full Bench's decision dated 11 June 2015.

Legislation Update

Jurisdiction	Legislative Instrument	Status	Proposed Changes
Western Australia	*Directors' Liability Reform Bill 2015*	Passed second reading in the Legislative Council on 25 February 2015	To remove the imposition of personal criminal liability on directors for corporate fault and incorporate the standard provisions found in s44C (Officer liability for corporate offence: onus on prosecution to prove reasonable steps not taken) or s44E (Officer liability for corporate offence: onus on officer to prove reasonable steps taken) of the Criminal Code Act Compilation Act 1913 No. 28 (WA).
New South Wales	Payroll Tax Rebate Scheme (Jobs Action Plan) Amendment (Extension) Act 2015	Assented to 2 June 2015	To extend the date on which the Payroll Tax Rebate Scheme under the principal act is automatically closed, from 30 June 2015 to 30 June 2019.
Northern Territory (**NT**)	Construction Industry Long Service Leave and Benefits Amendment Act 2015	Assented to 23 April 2015	To: (a) simplify the constitution of the NT Build board provisions to facilitate the appointment of a balanced board with broader skills and knowledge of the NT construction industry; (b) reduce the number of qualifying service days a worker needs to be credited with a year of long service leave credit from 260 days to 220 days; and (c) clarify the way the levy will be calculated for major construction projects by ensuring the rate determined by the relevant Minister in relation to the AU$1 billion threshold amount equates to the assessed liability accrued to the Long Service Leave and Benefits Scheme.
	Workers Rehabilitation and Compensation Legislation Amendment Act 2015	Assented to 23 April 2015	To reduce costs of the workers compensation scheme for NT employers, while providing fair benefits to injured NT workers, by amending the principal act to: (a) change the name of the principal Act from the "Workers Rehabilitation and Compensation Act" to the "Return to Work Act"; (b) provide for the effective rehabilitation and compensation of injured workers and the management of workplace injuries in a manner that promotes the return to work of injured workers as soon as practicable; (c) insert new section 49A (Calculation of worker's normal weekly earnings) and prescribe what is and what is not to be included in the calculation; and (d) insert section 50A (Eligibility of firefighter for compensation for prescribed disease), and provide the formula for calculating loss of earning capacity and maximum benefits.

Awards

We are pleased to announce that we have been:

- Recommended in the area of employment by Chambers Asia Pacific 2015.
- Listed by Doyle's Guide as a **Recommended Leading Employment Law Firm, Perth 2015**, with **Bruno Di Girolami** and **Kylie Groves** listed as **Recommended Leading Employment Lawyers, Perth 2015**.

Events Update

Labour & Employment Breakfast Seminar Series 2015

Perth – Level 21, 300 Murray Street

- Wednesday, 26 August 2015

  "Contractor or Employee: Getting the Relationship Right"

  Speakers: Bruno di Girolami and Dominique Hartfield

- Wednesday, 4 November 2015

  "Modern Awards and Enterprise Agreement Making: Emerging Trends"

  Speakers: Bruno Di Girolami and Kylie Groves

Sydney – Level 10, The Gateway, 1 Macquarie Place

- Wednesday, 5 August 2015

  "A Masterclass on Leave Entitlements and Managing Employee Leave Issues"

  Speakers: Bruno di Girolami and Anna Elliott

- Wednesday, 11 November 2015

  "Modern Awards and Enterprise Agreement Making: Emerging Trends"

  Speakers: Kylie Groves and Anna Elliott

To register your interest in any of these events in Perth or Sydney please send your rsvp to Isla Rollason on isla.rollason@squirepb.com.

New for 2015 – Employment Law Worldview Webinars

Over the coming months a number of our offices across the globe will present a webinar on key local labour and employment issues as part of our new global webinar series. The jurisdictions covered will include the United Kingdom, Spain, Australia, Germany, Hong Kong, United States and France.

The first featured country in the webinar series will be the United Kingdom at 3 p.m. GMT (11 p.m. AWST) on 30 June 2015. David Whincup, Annabel Mace and Andrew Peters from our London office will provide updates on:

- Holiday pay and commissions. The implications for employers in the latest UK and European cases.
- The recently-introduced regime of Shared Parental Leave – key points.
- The "Woolworths" case and how it impacts on collective consultations.
- Recent Business Immigration developments.
- What the newly–elected Government has in store on the labour and employment law front.

To pre-register your interest in any of the webinars in the global series please click on the Series Link in the flyer link.

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