

Workplace View

November 2015



Parting Can Be Such Sweet and Expensive Sorrow

Anna Elliott, Of Counsel and Jessica Geelan, Associate

When contemplating the termination of a senior executive's employment, it pays to carefully consider their contractual and legal entitlements and not to fall for the misconception that their inability to claim unfair dismissal will lessen risks and potential liabilities.

As one employer recently found out, a breach of the express or implied terms of a senior executive's contract may entitle the disgruntled employee to recover a significant amount of damages.

\$3.7 Million for Breach of Contract

In *Coghill v Indochine Resources Pty Ltd (No 2) 2015 FCA 1030*, an ASX-listed company was ordered to pay a former senior executive more than AU\$3.7 million after it breached his employment contract and the *Fair Work Act 2009* (Cth) (**FW Act**) by failing to pay his salary, superannuation, leave and other entitlements.

In May 2008 Mr Coghill was employed by Indochine as Chairman, Company Secretary and Chief Financial Officer for an initial term of five years, which was renewable on "substantially the same terms" for a further period of five years (if agreed). His remuneration package included a base salary of US\$240,000 to be increased by 20% each year, plus various allowances and benefits, including a motor vehicle, an overseas living allowance, insurances, airfares for him and his family and share options.

Due to the global financial crisis in October 2008, Mr Coghill and other senior executives agreed to a salary cut, in his case of at least 50% of his base salary. There was a dispute regarding whether the salary arrears would be repaid in Indochine's next capital raising, which occurred in November 2009, or when it was listed on the ASX. However, in June 2010 Mr Coghill's employment was brought to an abrupt end when Indochine summarily terminated his employment, without payment in lieu of notice, alleging "serious misconduct".

Nature of Mr Coghill's claim

Mr Coghill commenced proceedings in the Federal Court, claiming that Indochine had breached his contract of employment by failing to pay his backdated salary and various allowances owed to him. He also claimed liquidated damages of five years' salary and allowances as his contract of employment included a provision for this amount if his employment was terminated during the initial term or a subsequent term "*without proper cause*". In contravention of the FW Act, Indochine had also failed to provide written notice of termination or payment of annual leave due to him on termination.

Indochine initially rejected the claims, but its lawyers subsequently withdrew from proceedings and Indochine did not contest the case. Mr Coghill was granted leave to proceed in their absence, leaving the Court to determine the extent of his losses.

Extent of Damages

Justice Katzmann found Mr Coghill's uncontested evidence "*not inherently implausible*" and that he largely made out his claim for damages. In determining damages for breach of the employment contract, the Court was concerned with whether Indochine had: (a) failed to make the payments claimed; (b) if so, whether this constituted a breach of the employment contract; and (c) the measure of Mr Coghill's loss.

In assessing damages the Court was satisfied that Indochine had breached Mr Coghill's contract of employment in respect of unpaid salary and superannuation, club memberships, reimbursement for business expenses, and the FW Act in respect of unpaid annual leave. However the Court rejected Mr Coghill's claims in respect of the car allowance and overseas living allowance.

Liquidated Damages or Penalty?

The Court considered whether the entitlement to five years' remuneration was truly compensatory or imposed a penalty and was therefore invalid. Although the damages in this regard were significant, Justice Katzman held that "*it has never been the law that merely because a clause provides for payment of a sum which exceeds the damages recoverable at common law the clause is necessarily penal rather than compensatory. An agreed damages clause may not be penal even if it produces a windfall.*"

It was further noted that Mr Coghill was "*not a young man*" and in circumstances where he may not be able to mitigate his losses by obtaining alternative employment, "*it is conceivable that his loss could have been as great as that for which the clause provided.*"

Justice Katzman ordered the full amount of liquidated damages sought, being USD\$2,307,890, resulting in damages totaling US\$2,648.112 (approx. AU\$3.7million).

Further, the Court accepted that Mr Coghill was entitled to interest on half the award made and reserved a final determination on the interest calculation and costs. In its final determination the Court held that the Court was precluded from making an order for costs for breaches of the FW Act as none of the exceptions under the FW Act applied.

Implications for Employers

The above case is a timely reminder to employers to regularly review employment contracts and policies and ensure that:

- terms and conditions of employment are accurately reflected in the contract;
- employees' correct statutory and contractual entitlements are honored, both during employment and upon termination; and
- any liquidated damages clauses are appropriate and a genuine pre-estimate of loss rather than being penal in nature.

Finally, unlike the saying "no good deed goes unpunished", a good deed of release is key to protecting employers from potential claims.

Employer Reminder

Employers should consider auditing their occupational, health and safety (**OHS**) practices as a risk management measure, as highlighted by the recent case of *Boland v Trading Metals Pty Ltd [2015] SAIRC 30 (Boland Case)*.

OHS is not static and best practice evolves with changes in the law as well as changes in a company's operations. It is therefore important that regular audits are carried out of OHS practices in order to identify any gaps and take the pro-active steps that the OHS laws require.

In the Boland Case, the employer, Trading Metals, was charged with breaching s32 of the *Work Health and Safety Act 2012* (SA) after a truck driver's right ring finger was trapped between a pallet and a rail whilst his truck was being loaded by a forklift at his employer's premises.

Trading Metals entered an early plea of guilty. In deciding the appropriate penalty, the court heard that:

- this was the first offence for Trading Metals;
- prior to the incident, Trading Metals had conducted a "legislative compliance audit" in 2013 to address OHS issues; and
- Trading Metals took further steps to address the deficiencies at its worksite following the accident.

In light of the positive steps taken by Trading Metals, including having undertaken a legislative compliance audit, the Magistrate imposed a fine which amounted to less than 3% of the maximum penalty (AU\$39,000 out of a possible AU\$1.5 million).

Please note that our Labour and Employment team has experience in conducting legislative compliance audits.

Did You Know..?

... that workplace behaviour does not need to be aggressive or intimidating to be considered bullying under the **Fair Work Act** 2009 (Cth) (Act).

In two recent cases, the Fair Work Commission shed light on some of the behaviours that will be considered unreasonable and may amount to bullying under the Act.

The types of behaviour included:

- spreading rumours/ gossiping
- Facebook "defriending"
- repeated staring
- ignoring / failing to greet each morning
- delaying completion of an employee/ co-worker's work
- speaking rudely/ abruptly/ loudly
- treating an employee/ co-worker differently to others

However, it is important to note that these actions alone will not necessarily constitute bullying under the Act. Unreasonable behaviour will only be considered bullying if it is repeated and creates a risk to health and safety.

Page [2015] FWC 5955; Mrs Rachel Roberts v VIEW Launceston Pty Ltd as a trustee for the VIEW Launceston Unit Trust T/A View Launceston; Ms Lisa Bird; Mr James Bird [2015] FWC 6556

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Client Corner



Fiona Beermier

Chief Executive Officer Intework

1. What occupation would you have chosen had you not been in your current job?

I actually believe I am right where I am meant to be. Throughout my working life I have always been one for a challenge and have worked to bring about positive change either in individuals' lives or, more extensively, across an organisation. Being the CEO of a disability organisation, particularly as we navigate our way through the unchartered waters of the reform, is very challenging but also extremely rewarding. If I wasn't in my current role I imagine I would be doing something very similar with another not-for-profit only in a different location. I do however have this dream that one day I will own a café or a bed and breakfast!

2. What has been your best professional moment?

I'm fortunate that, having had a diverse career, there have been a few great professional moments. However if I consider this in light of where I am today, my best professional moment was graduating from my MBA and within a short few months securing my current role as the CEO for Intework. I started my MBA as a single mum with two teenage daughters, and finished with two daughters that had become young adults. I also gained a husband and two young adult sons along the way! It made all those late nights, lost weekends and times I had to let the family fend for themselves worthwhile.

3. What do you do for fun on the weekends?

It took me a while to reconnect with what a weekend was meant to be after finishing my MBA. Study had ultimately been my weekend "fun". However now that I have some normality in my life, visiting the wineries of the Swan Valley, bike riding with friends around Fremantle and kayaking along the Swan River are the fun things of my weekend, along with watching my AFL team, Hawthorn, win of course!

4. What do you see as the biggest challenge for Intework in the future?

The disability sector is currently going through unprecedented changes due to the national reform. As the sector continues to evolve, so must Intework as an organisation. It's imperative that we continue to challenge ourselves to provide excellence in individualised services and to further strengthen Intework's future sustainability and innovation.

5. What are two rules you try to live by?

Treat others how you would like to be treated.

Always look for the potential in a person and then decide how you can empower them to achieve it.

Legislation Update

Legislative Instrument	Jurisdiction	Status	Proposed Changes
Associations Incorporation Bill 2014	WA	Passed by both Houses on 20/10/15 and received assent on 2/11/15	<p>The Bill will replace the current Act regulating WA's incorporated associations.</p> <p>Associations will be required to update their rules. The Bill also introduces a number of changes relating to:</p> <ul style="list-style-type: none">• financial reporting• governance• privacy• the rules and membership of incorporated associations
Work Health and Safety (Mines and Petroleum) Legislation Amendment (Harmonisation) Bill 2015	NSW	Passed by both Houses on 21/10/15 and received assent on 2/11/15	<p>Amends the <i>Work Health and Safety (Mines) Act 2013</i>, which will be renamed the <i>Work Health and Safety (Mines and Petroleum) Act</i>. The new Act "reduces both red tape and the regulatory burden on the industry" and "extends this framework to the onshore petroleum industry."</p>

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Legislative Instrument	Jurisdiction	Status	Proposed Changes
Workers Compensation Amendment (Lump Sum Compensation) Bill 2015	NSW	Currently in the Legislative Assembly awaiting second reading debate	The Bill will amend section 66 of the <i>Workers Compensation Act 1987</i> to allow workers to make a second permanent impairment claim.
Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015	Cth	Second reading speech moved in the House of Representatives on 12/10/15	Amends the <i>Fair Work Act 2009</i> to provide for employees employed by a franchisee to recover unpaid remuneration from the franchisor.
Fair Work Amendment Bill 2014	Cth	Passed both Houses on 11/11/15 and is awaiting assent	Amends the <i>Fair Work Act 2009</i> in relation to: <ul style="list-style-type: none"> • requests for extended periods of unpaid parental leave; • the payment of annual leave upon termination of employment; • taking or accruing leave while receiving workers' compensation; • the requirements for flexibility terms in modern awards and enterprise agreements and individual flexibility arrangements made under those terms; • the negotiation of single-enterprise greenfield agreements; • the transfer of business rules; • the application for a protected action ballot order; • right of entry framework; • the Fair Work Commission not having to hold a conference or hearing to dismiss an unfair dismissal application; and • interest payments on unclaimed monies.
Fair Work Amendment (Gender Pay Gap) Bill 2015	Cth	Referred to Senate Education and Employment Legislation Committee on 15/10/15 - report due 12/05/16	Amends the <i>Fair Work Act 2009</i> to remove restrictions on an employee's right to disclose the amount of, or information about, their pay or earnings and prohibits employers from taking adverse action against employees for disclosing this information.
Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015	Cth	Second reading speech moved in the House of Representatives on 19/10/15	Amends the <i>Fair Work Act 2009</i> to make it unlawful for an employer to take adverse action against an employee or potential employee based upon where they live.

Contacts

 Kylie Groves Partner T +61 8 9429 7475 E kylie.groves@squirepb.com	 Bruno Di Girolami Partner T +61 8 9429 7644 E bruno.digirolami@squirepb.com	 Felicity Clarke (Editor) Of Counsel T +61 8 9429 7684 E felicity.clarke@squirepb.com
 Dominique Hartfield (Editor) Senior Associate T +61 8 9429 7500 E dominique.hartfield@squirepb.com	 Anna M. Elliott Of Counsel T +61 2 8248 7804 E anna.elliott@squirepb.com	

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