

Workplace View

December 2016



He's Making a List, He's Checking it Twice...

Emma Dawson, Associate

As the festive season approaches, we have taken a look back at the more "interesting" cases of the year to help Santa prepare his Naughty or Nice List.

1. First to be considered for Santa's list is a labourer who, in the midst of a heated discussion, called the CEO an "old c***". Shortly after this discussion, the CEO sacked the labourer over text message. Despite the FWC finding that this misdemeanour constituted a valid reason for dismissal, the labourer was successful in his unfair dismissal application because the CEO did not follow a fair disciplinary process. [Hain v Ace Recycling Pty Ltd \[2016\] FWC 1690](#)
2. Next up is a WA newspaper printer caught moonlighting as an Uber driver when he "accidentally" gave his manager a ride home one Saturday night. Despite his contract expressly requiring that he obtain consent for external employment, the printer continued to lie about his involvement with Uber and ignored attempts by his employer to resolve the matter. The FWC held that the dismissal was not unfair because the printer's conduct "undermined... trust and confidence in him as an employee". [Mervyn Jacob v West Australian Newspapers Limited T/A The West Australian \[2016\] FWC 5382](#)
3. The third contender is a Coles employee who tested positive to cannabis but claimed to have consumed it outside what he believed to be the "window of detection". The employee claimed that his dismissal was unfair because cannabis helped him deal with work-related stress and he smoked it well before his shift. The FWC dismissed his unfair dismissal application because, on the objective evidence, the cannabis was consumed the morning before his shift and this act constituted a flagrant breach of the company's zero tolerance drug and alcohol policy. [Shane Clayton v Coles Group Supply Chain Pty Ltd \[2016\] FWC 4724](#)
4. Fourth off the mark is a general manager who, after being sacked, was found to have downloaded and stored pornographic material on his company phone and laptop and also used the devices to record images and videos of himself performing sex acts. Despite this, the FWC found that he had been unfairly dismissed because the company had no policy confining the use of its equipment to work-related activities and the dismissal process was fundamentally flawed. [Allan Croft v Smarter Insurance Brokers Pty Ltd \[2016\] FWC 6859](#)
5. A sacked garbage truck driver is fifth in line after he was caught urinating in a CBD laneway by a city inspector during his shift. The truck driver immediately reported the incident to his supervisor and was genuinely apologetic. The FWC found that while urinating in public is not acceptable conduct by an employee, the dismissal was harsh because it was disproportionate to the conduct, the driver was genuinely apologetic and had a good employment record. [Bonny Walia v Citywide Service Solutions \[2016\] FWC 7814](#)
6. The sixth candidate is a worker who lodged an unfair dismissal claim after he was sacked for persistently sending unwelcome and inappropriate text messages to a colleague, despite being formally warned against doing so. The FWC found that dismissal was not unfair because the repeated unsolicited text messages, even the ones sent after hours, constituted a clear breach of the employer's harassment policy and therefore a valid reason for dismissal. Further, the worker was provided with procedural fairness in the form of a formal investigation before the ultimate decision to dismiss was reached. [Soomro v Murray's Australia Pty Limited T/A Murray's Australia \[2016\] FWC 8211](#)
7. Last but not least is a long-serving Qantas flight attendant who, following a random search, was found to have a can and a bottle of beer in his jacket, a 50ml bottle of gin in his bag and two 50ml bottles of vodka in his trouser pockets, and had initially lied about deliberately taking them from the flight. In considering the flight attendant's unfair dismissal application, the FWC found that, while a valid reason existed, the dismissal was too harsh given his unblemished tenure, the small value of the stolen items, the fact that he corrected his story and the reduced likelihood of him finding another job at the age of 50. [Dawson v Qantas Airways Limited \[2016\] FWC 8249](#)

While we hope this list provides some assistance to Santa, it also provides a reminder to employers this silly season that no matter how badly an employee acts – their dismissal may still be deemed unfair if they have not been afforded procedural fairness.

Did You Know...?

Emma Dawson, Associate

Did you know that Parliament has passed the Turnbull Government's Australian Building and Construction Commission (**ABCC**) restoration laws?

The *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**Act**) and the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Cth) re-establish the ABCC and the ABCC Commissioner (ABC Commissioner). The construction regulator, which was first established in 2005 and was abolished by the Gillard Government in 2012, will replace Labor's "Office of the Fair Work Building and Construction" and will police inappropriate and unlawful industrial practices in the construction industry.

The object of the Act is to provide an improved workplace relations framework for building work with the aim of reducing industrial disputes and improving the fairness, efficiency and productivity of the construction industry. Employer groups have welcomed the passage of the legislation.

In addition to restoring the ABCC, the Act:

- Expands the definition of "building work" subject to ABCC oversight to include supply or transportation of goods to building sites and offshore resource platforms
- Establishes new prohibitions on the organising or taking of unlawful industrial action and increase penalties
- Removes the current limitation precluding the regulator from instigating or continuing enforcement action where the parties involved have settled a dispute
- Gives legal effect to the government's procurement framework that allows further Commonwealth control over the industrial practices of companies tendering for federally funded projects
- Prohibits engaging foreign workers on a 457 visas on building sites unless the position is first appropriately advertised in Australia and the employer shows that no Australian citizen or permanent resident is suitable for the job

The passage of the legislation required substantial negotiation and amendment in the Senate. Under the original bill, a new building code regulating enterprise bargaining agreements (**EBAs**) would have applied retrospectively to every agreement since April 2014. However, after hard fought negotiations, current EBAs only have to conform with the new building code within two years of the legislation passing, being 30 November 2018. The bill was further amended to provide for additional oversight for the ABCC's coercive powers, judicial review and a review of the laws' operation within a year.



OSH Update

Dreamworld Incident Serves as Reminder of the Importance of OSH Obligations Toward Non-Employees

The recent fatalities at Dreamworld have served as a tragic reminder of the importance of complying with occupational safety and health (OSH) obligations, not only with respect to employees and contractors in the workplace, but also with those owed to non-employees and the general public visiting company premises.

On 25 October 2016, the malfunctioning of the Thunder River Rapids Ride resulted in the death of four patrons when a raft carrying six passengers collided with an unoccupied, raft which had become jammed on the ride's conveyer belt. Dreamworld has remained shut in the aftermath of the accident and has been issued seven improvement notices by Workplace Health and Safety officers, as well as several prohibition notices concerning the safety of other rides.

The Dreamworld incident has led to calls for revision of Queensland's OSH laws. The incident, as well as the death of two men at a construction site at Eagle Farm Racecourse on 6 October, has led to Queensland Premier Anastacia Palaszczuk announcing a "safety blitz" audit of the state's workplace safety and health processes.

The audit will consider whether existing penalties are a sufficient deterrent of unsafe practices and whether the law should be strengthened to include provisions relating to gross negligence causing death.

Queensland, like all Australian jurisdictions excluding Victoria and Western Australia, is covered by the harmonised work health and safety legislation introduced by the *Work Health and Safety Act 2011* (Cth). The current maximum penalty under the harmonised legislation is up to five years' imprisonment with monetary penalties of up to a maximum AU\$3 million for corporations, AU\$600,000 for individual officers and AU\$300,000 for individuals. In Western Australia, the maximum penalty is up to two years' imprisonment with fines of up to AU\$500,000 for corporations and AU\$250,000 for individuals (for first offences). This incident may well cause Western Australian legislators to take another look at the penalty provisions in the WA Work Health Safety bill.

We recommend all employers ensure their workplace safety policies, procedures (including maintenance) and premises are regularly audited for safety hazards and any remedial action required is taken without delay.



Employer Reminder

Emily Tan, Associate

The countdown and excitement to Christmas has begun, as has the end of year celebrations and the opportunity for employees to behave badly. As employers can be held vicariously liable for the actions of employees before, during and after work events, it is important to remember that thoughtful planning can minimise the risks of the silly season getting out of control. Here are our top five tips:

1. Ensure that workplace policies (including sexual harassment, bullying and discrimination) and any code of conduct are up to date and known to employees.
2. Remind employees well in advance about acceptable standards of behaviour at end of year events and that failure to comply with any workplace policies may result in disciplinary action, including termination of employment.
3. Ensure that any function venue has been assessed for safety risks and adopt responsible service of liquor standards. Provide employees with clear details of a contact person in the event they require assistance or have any concerns.
4. Be aware and be prepared to act on poor behaviour at the function (i.e. pulling the employee aside if they pose a risk, and saying goodnight and putting them in a taxi home where that behaviour continues).
5. If an after-party event is organised that is not supported by the company, make this clearly known.

Quiz

Rudolph has been requested to attend a meeting with Santa following a number of allegations from other reindeers and elves of serious misconduct. Which of the following is not likely to constitute "serious misconduct" under the Fair Work Regulations 2009 (Cth)?

- a) Rudolph calling in sick the day after the office Xmas party due to feeling unwell (i.e. a really bad hangover).
- b) While everyone was at a staff meeting, Rudolph broke into the gift room and stole a stocking of presents that he gave to his kids.
- c) Rudolph was seen sculling a jug of rum punch in the lunch room, then passed out in the back meeting room from lunchtime until the end of the workday.

The first correct answer emailed to islaknight@squirepb.com will win an AU\$50 David Jones gift voucher (Australia only)!



Meet the Team



Emily Tan, Associate

- **My first ever job was...** As a junior netball umpire. A great work out...ruined by a free sausage sizzle at Fremantle Netball Court every weekend.
- **What I like about my current job is...** Solving problems and working with a fabulous bunch of colleagues.
- **A random fact about me is...** I can't leave the house without making the bed (including throw rug and cushions!).
- **A rule I try to live by is...** Worry is like a rocking chair: keeps you busy but never gets you anywhere.
- **My last supper would be...** Mum's fried rice OR a freshly barbequed crayfish.

Events Update

Squire Patton Boggs Client CPD Day 2017

We are pleased to host a Continuing Professional Development (CPD) Day for our clients on Wednesday, 1 March 2017 at our Perth office and Tuesday, 21 March 2017 at our Sydney office.

A range of topics will be presented covering all competency areas, including Practice Management, Professional Skills, Ethics and Professional Responsibility and Substantive Law. Guests attending this event can obtain up to seven CPD points across the mandatory competency areas.

The employment topics to be covered include:

- **Perth:** Conducting workplace investigations – to be presented by Dominique Hartfield
- **Sydney:** Employment issues in corporate transactions

Further details of the full program will be circulated in the new year. Should you have any queries, please do not hesitate to contact [Isla Knight](#).

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



Anna M. Elliott
Partner
T +61 2 8248 7804
E anna.elliott@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

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.