SQUIRE PATTON BOGGS

Workplace View

April 2018

Snorkelling Fatality a Tragic Lesson on the Importance of Adhering to Safety and Health Procedures

Madeleine Smith, Law Graduate, and Dominique Hartfield, Of Counsel

A recent safety prosecution in the New South Wales District Court (*SafeWork NSW v. Millart Enterprises and Notlad Enterprises* [2018] NSWDC 52) provides a tragic reminder to employers of the importance of training and employee compliance with safety policies and procedures. Two partnering companies that owned a snorkelling tour operator out of Byron Bay at the relevant time (Byron Bay Dive) were fined AU$60,000 each for failing to comply with their duty to reasonably ensure their customer's safety under sections 19(2) and 32 of the *Work Health and Safety Act 2011 (NSW)* (the Act), following a customer fatality in 2015.

Failure to Ask Further Questions and Escalate Concerns

Prior to commencing a drift snorkelling tour, a Byron Bay Dive employee required a customer to complete a risk identification form (RIF), in which the customer responded affirmatively to the question 'Have you ever had past or present' with respect to breathlessness, heart disease, taking medication and any illness or operation within the last month. When questioned by the employee about the impact of her health on her ability to snorkel, the customer simply responded that her medical conditions were under control. The employee relied on these assertions and took no further action regarding the RIF. In breach of Byron Bay Dive's safety management system (SMS), the employee did not inform the tour vessel captain or any other employee about the customer's medical condition, nor require any additional control measures.

Under the SMS, employees were required to assess RIFs and question a customer about issues that may affect a decision to exclude them from a tour activity. If the employee believed that further investigation was necessary, they were obliged to inform management, who were in turn required to question the customer.

While snorkelling, the customer struggled against a current, became distressed and breathless and ultimately lost consciousness. Byron Bay Dive employees performed CPR until her arrival at hospital where she died shortly thereafter.

Reliance on Customer's Assertions Was Insufficient

The companies that owned Byron Bay Dive pleaded guilty and were convicted of safety breaches, despite the fact that the customer had verbally confirmed she was physically able to undertake the tour.

It was found her representations to Byron Bay Dive did not properly reflect the nature and extent of her medical condition, with medical reports revealing that, two years prior, the customer had been diagnosed with mixed connective tissue disease and suffered progressive breathlessness as a result.

Justice Scotting was not satisfied that even if the employee had asked appropriate questions, it would have been obvious that the customer should have been prevented from snorkelling. However, he considered that the companies' employee had failed to ask the customer appropriate follow-up questions upon which the employee could make an informed assessment about the customer's safety. He observed that it would have been prudent, reasonably practical and cost-effective for the employee to ask about the nature of the customer's condition.

Employers' Remorse and Response Mitigated Seriousness of Offence

In assessing an appropriate penalty, Justice Scotting considered that the sole director and shareholders of the employer companies had conducted more than 5,000 previous tours with no safety incidents, had accepted responsibility and expressed remorse, and the incident had caused a devastating psychological impact on the company directors and employees involved. Byron Bay Dive had since reinforced its safety policies, required employees to undertake a risk control course and updated its procedures to require all disclosed medical conditions to be divulged to management and recorded and assessed by the vessel captain.

Lessons for Employers

The case provides a timely reminder to employers of the importance of maintaining tailored and up-to-date policies and procedures that ensure the safety of both customers and employees. Crucially:

- The mere existence of a workplace safety and health policy is futile – employers need to reinforce strict compliance by employees at all times.
- Employers need to be wary of employees relying on assertions from customers or clients regarding their fitness and failing to properly escalate safety and health concerns as a result. Representations by customers as to their own safety will not protect an employer from legal liability where it has a duty to maintain a safe workplace.
- While the mitigating factors relayed above meant the companies were fined AU$60,000 each, employers should bear in mind that the maximum penalty under the Act for the relevant offence prosecuted is an AU$1.5 million fine. The proper implementation of safety policies and procedures will mitigate against the risk of incidents occurring that may be damaging both emotionally to individuals and financially to a business.

Employer Reminder

Eyes Wide Shut ... Fair Work Commission Finds Absence of Formal Complaint No Roadblock to Investigation of Inappropriate Conduct

Renae Harg, Associate

Recent decisions of the Fair Work Commission (FWC) are a timely reminder for employers that they do not always need to have received a formal or detailed complaint from an employee before they can investigate alleged inappropriate conduct.

In a recent anti-bullying decision, *Watts* [2018] FWC 1455, the FWC said it was unreasonable management action to not investigate a bullying complaint made by an employee. An employee alleged she had been bullied but did not provide specific details of the bullying. However, she did provide names of witnesses to the alleged bullying conduct and requested that the employer call one of the witnesses to verify the bullying. The human resources manager and the employee's supervisor told the employee they required specific details of the complaint before they could investigate. These requirements were contrary to the employer's policy, which required that managers treat all complaints "seriously, investigating and resolving issues in so far as they are able". The FWC found the employer's conduct in failing to undertake an investigation was unreasonable management action.

In *Colwell v. Sydney International Container Terminals Pty Limited* [2018] FWC 174, an employee sent a pornographic video to select Facebook friends, some of who were work colleagues. Whilst no complaint was made to the employer, the employer became aware of the video. The employer conducted an investigation and terminated the employee's employment. The FWC said that an employer did not require a formal complaint to investigate as they had a duty of care to employees. A failure by the employer to act when they became aware of inappropriate conduct may result in risks that could have otherwise been avoided had an investigation been undertaken.

If an employer is put on notice in relation to inappropriate conduct in the workplace, whether by an informal complaint or by other means, it should make appropriate inquiries in order to assess whether an investigation is warranted.

Migration Alert

Migration Alert – Arrival of TSS Visa Brings More Stringent Labour Market Testing Obligations

Rachel Barnett, Migration Agent (MARN 1800448)

On 18 March 2018, the Temporary Work (Skilled) visa (subclass 457 visa) was abolished and replaced with the new Temporary Skill Shortage visa (TSS visa). Employers who are standard business sponsors (SBS), or are applying to become an SBS, should be alert to the mandatory labour market testing (LMT) obligations under the TSS visa.

Unless exempt, sponsors who wish to nominate a TSS visa applicant **must** provide evidence that they have conducted LMT within the 12-month period prior to lodging the application. This will shorten to six months after 18 June 2018. There are specific ways in which LMT must be undertaken in order to satisfy the relevant legislative criteria.

For the TSS visa program, businesses in Australia are now **only** exempt from LMT if LMT would be inconsistent with Australia's international trade obligations, that is, if the applicant being nominated:

- Is a citizen of Japan, Thailand or China
- Is a citizen or permanent resident of South Korea, New Zealand, Chile or Singapore
- Is a current employee of an associated entity of the business that operates in Chile, China, Japan, South Korea, New Zealand or an ASEAN country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam)
- Is a current employee of an associated entity of the business that operates in a World Trade Organization (WTO) member country (so long as the nominated occupation is an executive or senior manager position and the nominee will be responsible for the entire or a substantial part of the company's operations in Australia)
- Is a citizen of a WTO member country and has worked full time in the nominated role in Australia for the last two years
- The business currently operates in a WTO member country or territory and is seeking to establish a business in Australia, and the nominated occupation is an executive or senior manager position

There are specified positions, which may satisfy the "executive or senior manager" requirement. If you are unsure if your business is required to conduct LMT prior to nominating a TSS visa applicant, do not hesitate to contact our migration team for advice.

OSH Alert

Positive Built Workplace Environments: Report Links "Green" Working Environments and Inclusive Building Management Techniques With Increased Productivity and Wellbeing for Workforces

Jane Silcock, Senior Associate

In a self-proclaimed "world first" white paper (White Paper), psychologists from the University of Sydney, together with International Towers at Barangaroo, Sydney, have introduced a new concept: the Positive Built Workplace Environment (PBWE). A PBWE is a physical workplace environment that "promotes sustainable high performance and this means that it should promote both performance and employee wellbeing."

The White Paper noted that whilst it is generally accepted that physical workspaces can impact upon the behaviours and attitudes of staff, there has been very little research to date into how the physical built environments in which we work (and management of those physical spaces) impact upon the psychology of workers within those physical environments.

Importantly, the White Paper found that well-designed working layouts can significantly improve staff productivity and performance, by addressing certain innate needs of the workforce, such as belonging, self-esteem and self-actualisation. In addition, "green" working environments (compared to standard offices spaces) increased staff performance on cognitive tasks by between 60% and 100%, with one study showing that employees reported fewer headaches whilst at work, 30% less respiratory complaints and slept better at night.

All businesses stand to gain from implementing the findings of the White Paper, which reported significant productivity increases. Prior to the release of this White Paper, a report produced by Safe Work Australia noted that addressing psychosocial hazards in the workplace could improve productivity for employers whilst also making improvements to the wellbeing of workers[1] (Report).

The White Paper also notes that building management can have an important role to play in the wellbeing of its tenants and their staff, by creating a collaborate and inclusive culture within the whole building, to achieve positive outcomes for workers within.

A copy of the White Paper is available on the International Towers website and the Report is available on the Safe Work Australia website.

Legislation Alert

New Modern Award Model Term to Provide for Five Days (Unpaid) Domestic Violence Leave

Jane Silcock, Senior Associate

There are increasing calls for the introduction of a paid domestic violence leave employee entitlement, following the recent decision of a full bench of the Fair Work Commission to include five days (unpaid) domestic violence leave as a model term of many modern awards, with a draft to be provided over the coming weeks. However, the Turnbull government has recently indicated that the *Fair Work Act 2009* (Cth) (FW Act) will only be amended in line with the final model clause, to extend the availability of five days of unpaid domestic violence leave to all national system employees.

Whilst the entitlement falls short of that sought by the ACTU in its original application for up to 10 days of paid domestic violence leave, it will, at a minimum, enable employees who experience family and domestic violence to obtain leave designated for that purpose, without having to first access their paid personal/carer's leave.

In any event, whilst the proposed model term will provide for unpaid leave, large and institutional employers are becoming increasingly aware of the extent and impact of domestic violence in Australia upon individual employees, with some taking positive steps to introduce paid domestic violence leave entitlements for their employees (which may be determined on a case-by-case basis).

The Fair Work Commission has indicated that it will further consider (unpaid) domestic leave entitlements in June 2021, after the new model term has been in effect for three years. The commission has also indicated that it will, at that time, revisit the question of whether provision should be made for "paid" family and domestic violence leave.

1 [1] "Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism", 23 November 2016 report by Harry Becher, Maureen Dollard, Asia Pacific Centre for Work Health and Safety, WHO Collaborating Centre in Occupational Health and the University of South Australia, licensed by Safe Work Australia.

Let's Get Quizzical

Lisa's employment was terminated two weeks ago by her employer, Big Corp Pty Ltd. She is considering making a claim against Big Corp Pty Ltd in relation to her employment and has requested copies of employment documents from it. The documents she has requested from Big Corp Pty Ltd are her leave records, overtime records, performance reviews and individual flexibility arrangement. Which records is her former employer required to provide her with under the Fair Work Act 2009 (Cth)?

(a) All of these records

(b) Leave records, overtime records and individual flexibility arrangement

(c) Leave records and overtime records

(d) None of these records

Curious Cases….

All Smells That Ends Well!

Windy workers can breathe a little easier, following a recent decision by the Victorian Supreme Court to dismiss a worker's $1.8m workplace bullying claim, finding that the tendency of his flatulent supervisor (nicknamed Mr Stinky) to "let one rip" around him (amongst other things) did not amount to workplace bullying and had not caused him to develop psychiatric and physical injuries. Over the course of an 18 day hearing, the court decided that the real cause of the worker's grievance was his redundancy, rather than the supervisor's failure to "toot his own horn" in the privacy of the bathroom.

On a more serious note, whilst in this case the court found that the worker's injuries were likely caused by a combination of stressors in his personal life combined with the redundancy, any repeated and unreasonable behaviour directed towards an employee (or a group of employees) that creates a risk to health and safety (including a risk to the mental or physical health of an employee) will, in the ordinary course, amount to unlawful workplace bullying.

Events Update

Employment Law APAC Clinic

Following on from the success of our inaugural APAC Clinic event in Singapore in 2017, we are delighted to be able to host our second clinic in Singapore on 22 and 23 May 2018.

This clinic provides senior in-house legal and HR teams with an opportunity to discuss labour and employment issues, in person, with our legal experts from across Asia and Australia. Each consultation will last up to 30 minutes and participants can tailor their event to ensure they are discussing the jurisdictions that matter to them.

Please also feel free to extend this invitation to anyone else in your organisation who you think may be interested.

Should you have any queries or wish to register, please click on the below link or contact Rosalie Cote (Perth) on +61 8 9429 7683.

Register

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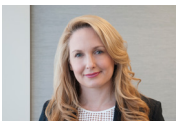

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