

## Workplace View

December 2018



### Big Little Lies on Your Resume? Fair Work Commission Finds Dismissal Fair Even Though Process Was Unfair

**Sharon Payn, associate and Bruno Di Girolami, partner**

A recent decision of the Fair Work Commission (Commission) has held that the dismissal of an employee for providing false and misleading information in their resume was justified, despite the fact that the employee was not provided with procedural fairness.

#### The Facts

In *Charles Tham v Hertz Australia Pty Limited T/A Hertz* [2018] FWC 3967, Mr Tham applied for a vehicle services attendant position with Hertz Australia Pty Limited (Hertz). As part of the application process, he submitted his resume and signed an acknowledgement that providing false information or withholding information relevant to his application could result in the withdrawal of an employment offer or termination of employment.

Shortly after Mr Tham commenced employment at Hertz, Hertz's HR manager discovered that Mr Tham had filed an unfair dismissal claim against a previous employer and the dates of his previous employment were significantly different to the dates specified in his resume. Mr Tham's resume stated he was with a previous employer for more than five years when, in fact, it was only 10 months.

Mr Tham was issued a letter setting out his alleged misconduct and Hertz requested Mr Tham to attend a meeting the next day to discuss the allegations but Mr Tham requested more time. The HR Manager informed Mr Tham that he had been provided with adequate notice of the meeting and she would not be changing the date and time.

Mr Tham did not attend the scheduled meeting, but later that day emailed certificates of capacity to another person at Hertz, which explained why Mr Tham did not attend the meeting. Without making enquiries, the HR manager sent Mr Tham an email later that day terminating his employment. Mr Tham made a claim for unfair dismissal, alleging his dismissal was unfair and disproportionate in the circumstances.

#### The Decision

The Commission held that Mr Tham left out relevant employment history in his resume to disguise the fact he was previously terminated or had taken action against numerous previous employers. The Commission stated Mr Tham intentionally misled his employer into believing he had a history of stable and long term employment. The Commission stated as a vehicle service attendant, Hertz were reliant on the honesty and integrity of its employees especially if customers had left valuables behind in the vehicles.

The Commission was not satisfied that Hertz gave Mr Tham a sufficient opportunity to respond to the allegations. Hertz should have made reasonable enquiries, which would likely have resulted in his employer becoming aware of Mr Tham's certificate of capacity (that provided that he had no capacity for work) and this is why he did not attend the meeting.

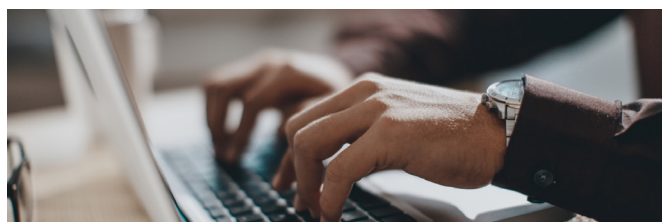
However, the Commission held that the gravity of the intentional dishonesty by Mr Tham was inconsistent with the continuation of the employment relationship; therefore, his dismissal was not harsh, unjust or unreasonable.

#### Intention to Mislead

This decision can be contrasted with the decision of *Chalker v Murrays Australia Pty Ltd* [2017] NSWCATAD 112, reported in our April 2017 edition of Workplace View, where it was held that an employee's failure to disclose he had a mental illness and was taking prescription medication in his employment application form was not dishonest as the candidate believed that he had the ability to perform the duties of the role. This case can be distinguished in that Mr Tham's actions were intentional and misleading as he attempted to disguise a four-year gap in his employment history.

#### Lessons for Employers

- Ensure any offers of employment are conditional on the successful completion of reference and background checks.
- Consider including a clause in the employment offer that enables the employer to withdraw the offer or terminate the employee's employment if the employee provides false or misleading information in the recruitment process.
- Ensure an employee has sufficient time to prepare for meetings that relate to serious allegations against an employee.
- If an employee fails to attend a scheduled meeting, make reasonable enquiries to determine the reason for the employee's non-attendance and whether it was justified before taking further action.



## Did You Know?

### ...The Results Are in for the Enforcer – The Fair Work Ombudsman

#### **Barnaby Austin, associate**

The Fair Work Ombudsman recently finalised her Annual Report for 2017-18 and the key statistics on enforcement were reported:

- 829 formal caution letters were sent to employers, warning them to correct identified compliance issues
- 877 enforcement tools were used (including infringement notices, compliance notices, enforceable undertakings and litigations)

**Infringement notices:** 615 issued for a total of AU\$397,341.

**Compliance notices:** 220 notices recovering more than AU\$950,000 in unpaid wages.

**Enforceable undertakings:** Seven recovering AU\$2.1 million in back-payments – including a single enforceable undertaking recovering AU\$1.4 million in back-payments for more than 1,300 workers in a swim school franchise network.

#### **Litigations:**

- 35 initiated litigations achieving AU\$7.2 million court-ordered penalties (AU\$5.8 million against companies and AU\$1.4 million against individuals) – a 49% increase from the previous highest amount of AU\$4.8 million in 2016-17
- 85 matter before the courts (as at 30 June 2018)

#### **Firsts:**

- First racial discrimination case – with the court ordering over AU\$210,000 in penalties.
- First Paid Parental Leave legal action – with the court issuing nearly AU\$120,000 in penalties against the company and director

#### **Records:**

- A record of the total penalties ordered in one proceeding – total combined penalties of AU\$660,020 (*Fair Work Ombudsman v Mhoney Pty Ltd & Anor* [2017] FCCA 811)
- Highest penalties for legal action in Western Australia, and third highest nationally – penalties of AU\$510,840 ordered (*Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Anors* [2017] FCCA 2838)

## Legislation Updates

### New South Wales Now has a Modern Slavery Act and Australia May Soon Too

#### **Sharon Payn, associate**

Modern slavery is a term used to describe human trafficking, slavery and slavery-like practices, including forced labour. Forced labour in Australia predominantly occurs in the agriculture, construction, domestic work, meat processing, cleaning, hospitality and food service industries.<sup>1</sup> Many of these industries employ a high percentage of migrant workers through Australia's temporary visa scheme designed to fulfil labour shortages.

In June 2018, the New South Wales government passed the Modern Slavery Act 2018, requiring certain commercial organisations, including companies, partnerships and associations with an annual turnover of AU\$50 million or more, to produce a Modern Slavery Statement. This statement must provide details on the incidence of modern slavery in their supply chains. Penalties of up to AU\$1.1 million may apply to organisations that fail to prepare and publish or provide false or misleading information in connection with this statement. This act is scheduled to commence on or before 28 December 2018.

At a national level, the Modern Slavery Bill 2018 was recently passed by the Commonwealth parliament, requiring Australia's businesses (including foreign entities carrying on a business in Australia and specific trusts and partnerships) with an annual consolidated revenue greater than AU\$100 million to publish annual statements on the steps taken to address modern slavery risks in supply chains. The House of Representatives is currently considering a proposal to introduce fines of AU\$210,000 for entities that fail to prepare or provide such statements.

### Four-yearly Review (Repeal – Cth)

#### **Jane Silcock, senior associate**

In early December, the federal government passed amendments to the Fair Work Act 2009 (Cth) to scrap the compulsory four-yearly reviews of modern awards by the Fair Work Commission. The "first" four-yearly review commenced in February 2014 and was still ongoing in December 2017, following 818 days of hearings, conferences and mentions and 218 decisions issued by the Commission. The repeal has essentially shelved the commencement of the second four-yearly review, which was originally scheduled to commence on 1 January 2018.

Moving forward, the Commission has maintained its power under the act to vary modern awards (including minimum wages) either on its own motion, or by application by a party covered by a modern award, where it is necessary to achieve the "modern awards objective" and ensure a fair and relevant minimum "safety net of terms and conditions" (combined with the National Employment Standards) is maintained for award-covered employees.

<sup>1</sup> The Global Slavery Index, *Country Data Australia* 2018, available at: <https://www.globalslaveryindex.org/2018/findings/country-studies/australia/>.

## Labour Hire Licensing (Repeal – SA)

**Jane Silcock, senior associate**

The South Australian government has now repealed its labour hire licensing scheme, which was only introduced earlier this year, in the wake of a “*Four Corners*” investigation that revealed the exploitation of vulnerable and migrant labour hire workers. Since its introduction, the South Australian scheme has received criticism for casting too wide a net and not properly targeting unscrupulous operators.

An equivalent scheme was also introduced in Queensland earlier this year, although there does not appear to be any suggestion that the Queensland scheme will follow South Australia’s lead in repealing its scheme. However, it is less clear whether the decision to revoke the scheme in South Australia will have any impact on the introduction of a similar scheme in Victoria, which is not due to commence until late 2019.

In the meantime, labour hire providers and host businesses that use labour hire workers in Queensland and Victoria should continue to ensure that they are complying with the applicable licensing schemes in force in those jurisdictions, whilst maintaining a close eye on developments in this space.

## NES Now Includes Unpaid Domestic Violence Leave

**Jane Silcock, senior associate**

Following the introduction of a clause into all modern awards providing for unpaid family and domestic violence leave on 1 August 2018, the federal government has now passed legislation that will extend this entitlement to all national system employees, regardless of whether they are covered under a modern award or not.

Family and domestic violence is a significant community issue in Australia and has a very real impact on individual employees as well as within the workplace, making the introduction of a statutory entitlement to family and domestic violence leave a significant development in Australian employment law.

As of 12 December 2018, the National Employment Standards set out in the *Fair Work Act 2009* (Cth) now provide a statutory entitlement of up to five days unpaid family and domestic violence leave, which is available in full at the start of each 12-month period, for all national system employees, including part-time and casual employees.

## Tougher Penalties for Corporate Misuse of the Fair Entitlements Guarantee

**Jane Silcock, senior associate**

The *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018* was introduced into Parliament in late September 2018 by the Morrison Government, and is currently before the Senate.

The purpose of the Bill is to bolster enforcement and recovery options under the *Corporations Act 2001* (Cth) against company directors and others who engage in sharp corporate practices (such as “phoenix” activity) and behaviours which are otherwise intended to prevent, avoid or significantly diminish employee entitlements in insolvency situations, the cost of which is then shifted to Australian taxpayers, who fund the Fair Entitlements Guarantee (FEG) scheme.

The Bill introduces provisions to facilitate the disqualification of company directors or officers who have a “track record” of corporate contraventions and are found to have misused or exploited the FEG scheme.





## Migration Alert

### Accredited business sponsorship – are you eligible?

*Rachel Barnett, migration agent*

Processing times for the Temporary Skill Shortage (TSS) nominations and visa applications continue to rise. The current average processing time for the TSS visa is between one and three months; however, sponsors who qualify for accredited status, and are approved as an Accredited Standard Business Sponsor (ASB Sponsor), will receive **priority processing** and have visas processed in less than five days.

#### Other Benefits of Accredited Sponsorship

Visa applicants who are sponsored by an ASB Sponsor, are not required to obtain police certificates from countries other than Australia, provided they attach a written reference from their ASB Sponsor confirming that they are of “good character” and have not been convicted of any criminal offences. Further, Labour Market Testing (LMT) requirements are more relaxed for an ASB Sponsor – for example, evidence of a job advertisement on the ASB Sponsor’s website will satisfy the LMT criteria.

#### How Do You Become an Accredited Sponsor?

Accredited sponsorship status is granted to larger Australia employers that have a significant and/or regular need for visa sponsorship. To be approved, your business must meet the regular Standard Business Sponsorship requirements, as well as the additional characteristics of one of the below four categories:

1. The sponsor is a Commonwealth, state or territory government agency
2. The sponsor is an Australian Trusted Trader
3. The business has a low volume usage of the TSS Program and high percentage of Australian workers
4. The business has a high volume usage of the TSS Program and medium percentage of Australian workers

#### How Can We Help?

Our migration team is able to assess the eligibility of your business to apply for accredited status. We can provide detailed and strategic advice on the process involved, what is required and your prospects of successfully obtaining accredited status, in addition to assisting with the preparation and lodgement of the application on your behalf. For more information, please contact one of our Australian registered migration agents, Andrew Burnett or Rachel Barnett.



## OSH Alert

### Have Yourself a Merry Office Party...

**Jane Silcock, senior associate**

It is that time of year again: the sun is out and the days are getting longer, holidays are just around the corner and we start to feel celebratory. The invitations are also flowing in for the hectic December stream of year-end catch ups, lunches, cocktail parties and, of course, the office festive party.

Whilst December is a great opportunity to reflect on the year that has been and celebrate successes, it is also time for employers to remember to pull on their ugly (safety) sweater, although with some careful prior planning, there is no need to go the full Scrooge!



Here are some brief tips on how to plan a successful (and safe) office party:

**Carry out a Ho-Ho-Hazard assessment** – When booking your party, visit the venue and consider any safety risks. Are there three flights of narrow or poorly lit stairs? Is the venue outdoors, poolside or on the water? Identifying and eliminating hazards to reduce the risk of any injuries is a crucial step to take. Just because you have booked a fancy venue outside the office, it does not mean employers can outsource their obligations to take reasonable steps to ensure the health and safety of staff.

**A feast with all the trimmings** – Many of the issues we see in the “silly season” fallout are blamed on drunkenness. Whilst the office party need not be a dry event, the law does expect responsible service of alcohol and employers should monitor staff consumption of alcohol. An effective way of minimising the risk of staff becoming overly intoxicated is to ensure adequate food is served (and do not forget to cater for the vegetarians and those with food intolerances!).

**Look out for the Little Drummer Boys (and Girls!)** – Whilst employers are required to take care for the health and safety of all staff, it is worthwhile to remember to keep an extra look out for younger members of staff (think interns, recent school-leavers and graduates), who may be getting a little too jolly by the fire and may need a push in the right direction (home).

**Hark! The Herald Angel did What?** – Take time before the event to send out reminders for staff of your code of conduct, workplace health and safety and harassment policies, or even conduct refresher training. Unfortunately, the office party has been the setting for many sexual harassment and negligence claims over the years, with employers who fail to consider these risks beforehand left even more red-faced than Rudolph’s nose. So, set your organisation’s expectations for the event high and firm – remember, the office party is still part of the “workplace”. Actively promote your organisation’s policies and expectations, and don’t be afraid to look like the Grinch – the law requires those standards of conduct to be maintained during the silly season.

**Lovely weather for a sleigh ride together** – Another important piece of the puzzle to ensure a fantastic (and safe!) office party is to consider any transport options for staff after the event finishes. This also minimises the risk of staff carrying on together for an “after party”, which is often where trouble tends to occur and can, in certain circumstances, still be seen as part of the “workplace”.

**Santa’s Little Helpers** – To ensure that your organisation is taking the appropriate steps with respect to health and safety and is aware of any risks that may emerge on the night, you may want to recruit additional help to keep an eye on the festivities as the party creeps into full swing (offering water, food or Cabcharges out where needed). And, of course, managers and senior leaders should be setting the right example themselves.

**With those tips in mind, we wish you all the best for a very merry (and safe) festive season!**

## Quiz

Saffron runs a business in the home care sector and employs 35 casual employees. Basil is an employee that has worked for Saffron for 18 months from 9 a.m. to 2 p.m. Monday to Thursday. On 1 October 2018, Basil provided a written request to Saffron requesting to convert his employment from casual to part-time. Which of the following option/s can Saffron lawfully take?

- (a) Saffron does not have to do anything, it is her business and she can employ people how she likes.
- (b) Consult with Basil. Saffron can refuse the request if it is known or reasonably foreseeable that Basil's position will cease to exist within the next 12 months, and she provides reasons for the refusal in writing to Basil within 21 days.
- (c) Agree to the request and do nothing.
- (d) Agree to the request by discussing and agreeing with Basil (in writing) that his employment will convert to part-time employment, and that his regular pattern of work will be 20 hours a week worked from 9 a.m. to 2 p.m. Monday to Thursday of each week.

The first correct answer emailed to [kristy.anthony@squirepb.com](mailto:kristy.anthony@squirepb.com) will win an AU\$50 David Jones gift voucher (Australian residents only).

## Meet the Team

### ***Barnaby Austin, associate, Sydney***



This month, we would like to introduce, **Barnaby Austin**, our new associate, who joined our Labour & Employment team based in Sydney in September 2018.

**My first ever job was...** Taking the bins out

**A random fact about me is...** There are no facts

**My favorite quote is...** I solemnly swear that I am up to no good

**The two rule/s I try to live by is/are....**

1. Make the bed in the morning 2. Eat less, do more

**My last supper would be...** Parma and a pint

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