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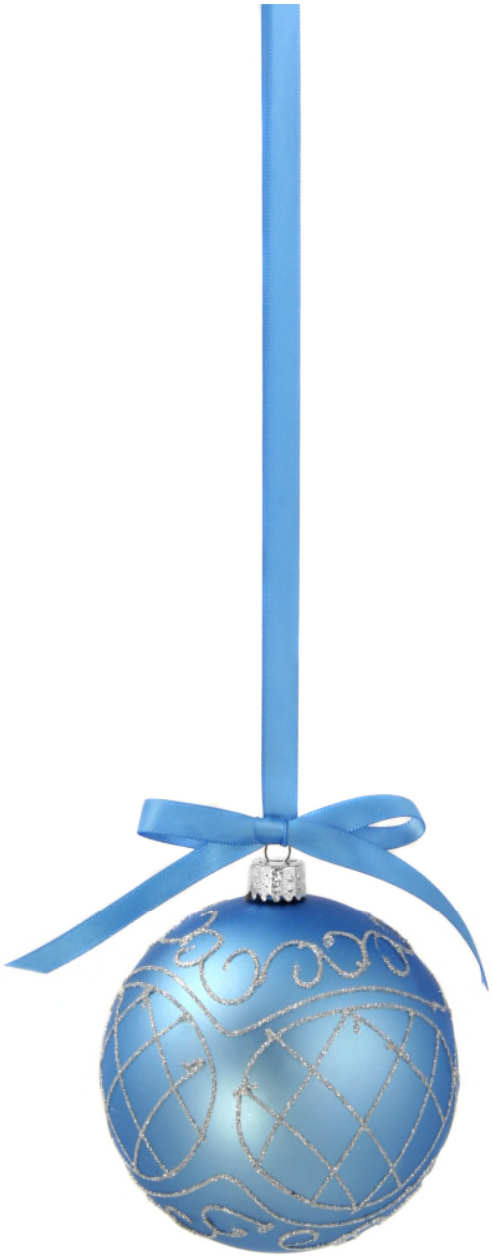
Workplace View

December 2012



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2012 - Reflections on the Year

As the Christmas festivities begin, the year 2012 comes to a close. It has been an interesting year in labour and employment, with laws being clarified in some areas but many questions for employers remaining in others.

Bullying

Bullying in the workplace has been a much talked-about issue in 2012 and the federal government and state bodies have made progress in addressing it. In November, we reported that the federal opposition had criticised the heavy burden the draft *Preventing and Responding to Bullying Code* imposed on employers. Despite that, a parliamentary committee has since recommended that the federal government encourage the Code to be adopted in all jurisdictions. The committee also recommended that the federal government implement workplace health and safety regulations that impose minimum requirements for managing the risk of workplace bullying.

OH&S

In occupational health and safety news, the federal government has continued to promote harmonised legislation across the land. So far, eight jurisdictions have signed up, the Victorian government has declined and Western Australia's position remains uncertain because, despite a government announcement in May that a bill would be released to implement the model *Work Health and Safety Act* (subject to some reservations), no such bill has been seen.

Adverse action

On the employment front, employers everywhere breathed a sigh of relief in September when the High Court delivered a landmark decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 3. The Full Federal Court's onerous approach to determining whether a decision maker has taken adverse action because of a 'prohibited reason' was rejected and the High Court unanimously ruled that the test to be applied was whether, on the balance of probabilities, a prohibited reason was a *'substantial or operative factor'* for the adverse action to be taken.

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Social media

Social media in the workplace has been a subject impossible for employers to ignore in 2012. Fair Work Australia (**FWA**) upheld a spate of unfair dismissal claims where employees had posted derogatory or offensive remarks on Facebook about their employers. In October, the Full Bench of FWA held that the posting of derogatory or offensive statements about managers or other employees on Facebook '*might*' provide a valid reason for termination, however, in each case the enquiry will relate to the '*nature of the comments and statements made and the width of their publication*'. This approach highlighted the need for all employers to implement comprehensive social media policies clearly outlining the employer's expectations, directions on what is and is not appropriate use, and the consequences of a breach.

Drug testing

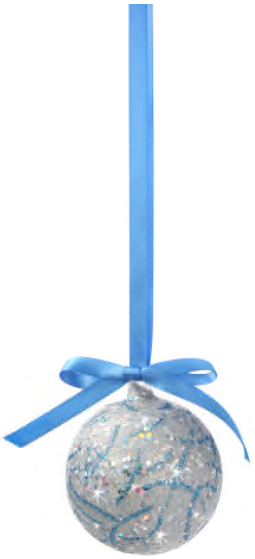
Another area of focus in 2012 has been the most appropriate method of drug testing in the workplace, with FWA ruling that saliva testing is the most reliable in some cases and urine testing in others. Given this uncertainty, we reported in August that fact-specific inquiries into the most appropriate method must be conducted in each case.

Mental health claims

2012 has seen a continued rise in mental health claims in workplaces across Australia with many employees seeking workers' compensation for stress or other psychological injuries arising out of administrative action taken against them by employers. The employers who have been able to successfully defend such claims are those who have been able to demonstrate that they had acted reasonably by having established processes in place which they followed fairly.

Season's greetings from Squire Sanders

We have enjoyed keeping you updated on labour and employment issues throughout 2012 and look forward to providing you with more of the same in 2013. In the meantime, we take this opportunity to wish you and your families a very safe and happy Christmas.



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Post-Dismissal Conduct and Discoveries Relevant to Claims

Sometimes in unfair dismissal cases, actions that become known to an employee after they are dismissed can be relied upon in presenting their case. In a Fair Work Australia (**FWA**) Full Bench decision handed down this month, three employees were allowed to rely on actions taken by their employer after dismissal in successfully arguing their claims.

The employer had terminated the employees' employment citing economic reasons and, at the time, the employees had accepted that they had been subject to genuine redundancies and could not be redeployed. But when the employer appointed new staff to positions that the dismissed employees could have filled, they considered that they had actually been unfairly dismissed.

By this time, however, more than 14 days had passed since the dismissals, being the cut off time within which to bring an unfair dismissal claim. But the Full Bench granted the employees an extension of time on the basis that a later acquired belief that an earlier redundancy was not genuine may constitute '*exceptional circumstances'* that justify extension of time limits imposed by the *Fair Work Act 2009* (Cth) (**FW Act**).

The idea that events that follow termination can be considered in cases concerning dismissal was brought to our attention in a High Court case *Concut Pty Ltd v Worrell [2000] HCA 64* that was handed down 12 years ago. In that case, the opposite situation occurred. The employer was the one who benefited from relying on the employee's misconduct as a sufficient basis for termination even though that misconduct only came into the employer's knowledge after termination.

In that case, the employee had used the resources and time of the employer's company to work on the construction of his own house. The employer dismissed the employee, but only later became aware of his serious misconduct. The High Court ruled that in defending a common law claim regarding a summary dismissal, the question is not whether the employer was aware of grounds to justify dismissal, but simply whether those grounds existed. Facts that came into the employer's knowledge after the dismissal were still available for it to rely on in its defence.

Implications for Employers

This case shows that it is not just employers who can rely on facts which come to their knowledge after a dismissal, but also employees. Accordingly, employers need to be careful to ensure that when dismissing employees on the grounds of a genuine redundancy, that not only have they complied with any consultation obligation, but also determined whether it would be reasonable in all the circumstances for the employee to be redeployed within the enterprise or the enterprise of an associated entity.

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The Beauty, the Medical Certificate and the Geek

In November the Federal Magistrates Court reinstated a potential Beauty and the Geek contestant to his position as a weather observer after upholding the adverse action claim he had brought against his employer, the Bureau of Meteorology.

The Bureau had dismissed the aspiring Geek for failing to perform his duties at work due to anxiety and stress, but meanwhile planning to appear on the reality television program. His employment was terminated on the basis of 'non-performance of duties'.

The Bureau argued that the employee was not medically unfit to work, nor had he produced satisfactory medical evidence to explain his absence. The Court, however, accepted that the employee had provided a medical certificate that stated he suffered from an adjustment disorder and required leave because his work would aggravate his symptoms of anxiety and traumatic stress.

The issue for the Court to consider was why, on the one hand, the employee's doctor certified him as unfit for work while, on the other, he was assessed to be ready, willing, and able to compete as a Geek on national television. The doctor stated in evidence, which the Court accepted, that the environment of Beauty and the Geek possibly could have been beneficial to the employee's health, while work would have been detrimental.

The Bureau's enterprise agreement provided that absence from work could be taken with satisfactory medical evidence. The Court interpreted this to be 'objectively' satisfactory evidence and therefore the question of whether the employer was actually satisfied with the evidence was immaterial.

The Bureau had sought to rely upon on a 2008 case involving a football fan whose employment was terminated after he provided a medical certificate and took sick leave only to fly from Melbourne to Perth to watch a football game. In that case, the Court dismissed the employee's unfair dismissal claim.

The football case was distinguished, however, because of its unique facts - the employee had told his employer he intended to say that he was sick and attend the match and the medical practitioner who provided the certificate had a history of issuing false certificates. In the Beauty and the Geek case, the Court made it clear that the football case did not set a precedent allowing employers to ignore medical certificates that they do not agree with.

The Court commented that where the doctor is trusted and reputable, there is no reason to doubt the validity of the medical certificate certifying the employee actually is in ill health and that a dismissal by reason of absence from work may result in an adverse action finding.

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Implications for employers

Employers who are concerned about the validity of medical certificates may wish to consider engaging their own medical professional to assess a medical certificate and the circumstances surrounding an employee's illness to enable an objective assessment of an employee's capacity to be made.

Employers should also be aware of the complexity of mental health issues. A simple medical assessment may not be enough to adequately assess complex mental illnesses that require ongoing assessment and treatment by medical professionals. Further, there may also be an issue of outside circumstances affecting the medical certificate which the employer is not aware.

Ultimately, it can be very useful at the outset of employment to include an appropriate clause in an employment agreement requiring the employee upon the request of the employer, to undergo a relevant medical assessment and to provide the employer with access to the results, to meet its obligations to provide a safe workplace to the employee and others and to ensure the employee can perform the inherent requirements of the role.

Workplace Bullying at its Worst: Employer told to pay $100,000

The Melbourne Magistrates Court has fined a laundry owner $50,000 and ordered him to pay a further $50,000 in costs for his bullying that had '*harrowing'* effects on employees and was a clear example of an employer breaking occupational health and safety laws.

The employer was found to have threatened to dissolve his employees in acid, which was available to him in the workplace, and told them, *'if you are going to die, die quietly, or if you are going to cry, cry quietly, and if you have an accident, don't tell me about it.'*

The employer also threatened to lock employees in sea containers with his dogs, often pushed laundry trolleys into them, taunted a female employee about rapists in the area, and deducted 'penalties' from wages for wasting time.

The employer denied he was guilty of bullying, stating that the claims were part of a conspiracy against him. The defence described its client's behaviour at work as '*old school*'.

The Court rejected the defence's argument, commenting that the employer's actions were '*disgusting and appalling*' and that employers should know that this kind of behaviour will not be tolerated in modern society or by the Courts.

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What does this mean for employers?

This case demonstrates that employers need to be wary of managers who have an '*old school*' approach towards the management of employees and that they receive appropriate guidance and training.

Employers need to ensure that they have a comprehensive bullying policy in place which clearly outlines the employer's expectations, directions on what is bullying and the consequences of an employee breaching the policy. Furthermore, training on the content of the policy should be administered on a regular basis to employees.

Employer's also should consider the Commonwealth Government report into workplace bullying issued in October of this year, which sets out useful practical information concerning the establishment of a national code on workplace bullying.

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The Labour and Employment team wish you a very safe and happy holiday season

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