SQUIRE SANDERS

WORKPLACE VIEW

May 2014

Marching Forward With Stop Bullying Orders

Bullying That Occurred Before January 2014

On 1 January 2014, the *Fair Work Commission* (**FWC**) gained the jurisdiction to make "stop" orders in relation to bullying. In early March, the full bench of the FWC handed down its decision in *Application by Kathleen McInnes* [2014] FWCFB 1440. This decision was the first made by the full bench under the FWC's new anti-bullying jurisdiction. The decision is significant in that it substantially broadened the scope of the application of the Fair Work Act's anti-bullying provisions.

Ms McInnes made an application for a stop bullying order on 9 January this year. In her application, she alleged that she was subjected to bullying behaviour at her workplace over a six year period, from November 2007 to May 2013. Ms McInnes had been on leave from May 2013 and therefore did not allege any bullying behaviour from that date onwards.

In its decision, the full bench confirmed that, when considering an application for a stop bullying order, the FWC is not limited to considering behaviour from 1 January 2014 onwards. Instead, the FWC has the power to consider alleged bullying conduct which occurred prior to the commencement of the anti-bullying regime as the basis for a stop bullying order.

This decision highlights the importance of employers making detailed records of steps taken to deal with bullying complaints, and to keep those records, no matter how old they are.

First Stop Bullying Orders

Also in March, the FWC handed down its first stop bullying orders. The orders, made by Senior Deputy President Drake in the case of *Applicant v Respondent PR548852,* were made by consent following a conference between the two parties. The names of the parties were not published and unfortunately there are no reported details of the background facts.

We do know, however, the content of the orders made, which was as follows:

Stop Bullying Orders

The alleged bully:

- Shall complete any exercise at the employer's premises before 8 a.m.;
- Shall have no contact with the applicant alone;
- Shall make no comment about the applicant's clothes or appearance;
- Shall not send any emails or texts to the applicant except in emergency circumstances; and
- Shall not raise any work issues without notifying the Chief Operating Officer of the respondent, or his subordinate, beforehand.

The alleged victim:

- Shall not arrive at work before 8:15 a.m.

The parties were also granted leave to approach the FWC to have the matter relisted for further conference should there be any difficulty with the implementation of the orders.

The content of these orders demonstrates the significant impact that a stop bullying order can have on your workplace. The orders demonstrate that the FWC, through its workplace bullying jurisdiction, has the capacity to actively regulate the interactions between employees and how they conduct their working life. Not only will this have a real impact on the employees themselves, but it could also create difficulties for employers in the management of their workplace environment. These orders highlight the value for employers of instituting policies to proactively prevent bullying, and the importance of investigation and, where warranted, action when a bullying complaint is made.

Employer Actions

- ✓ Make sure you keep records of all steps taken to deal with bullying
- ✓ Make sure that you have policies in place to prevent bullying and update them if required.

On the Radar

Earlier this year, the National Union of Workers (**NUW**) sought a number of stop bullying orders for a group of Hoban Recruitment Pty Ltd labour hire workers who were engaged at a Caterpillar site in Victoria. On 31 March, a hearing on the matter was held before the full bench of the FWC, to decide whether unions are entitled to apply for stop bullying orders on behalf of workers.

Both Hoban and Caterpillar have disputed the NUW's right to bring the application on the ground that it is not a "worker" as defined in the bullying provisions of the Fair Work Act.

At the time of going to print, the full bench of the FWC had not handed down its decision. If the FWC decides in favour of the NUW, this could lead to a considerable increase in the number of anti-bullying claims brought before the FWC. We will keep you posted on developments.

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Did You Know?

An employer's obligation to consult in redundancy situations under the standard consultation clause contained within most modern awards is likely to apply even when all of the redundancies are voluntary.

In a recent case, the FWC confirmed that BHP Coal's obligation to consult under its enterprise agreement was triggered following a proposal to accept 90 voluntary redundancies at one of its mine sites, despite there being no compulsory redundancies. The FWC found that the obligation to consult arose, not in relation to the volunteers, but in relation to those employees who remained employed once the voluntary redundancies had taken effect. The subject of the consultation was about the impact that the redundancies would have upon the remaining employees.

Although the decision related to a specific redundancy clause within the enterprise agreement, it is likely that the reasoning would apply equally to the consultation clause contained within most modern awards.

CFMEU v BHP Coal Pty Ltd [2014] FWC 2062

Events

Squire Sanders Perth 2013 Australian Labour and Employment Breakfast Series

Perth

Level 21, 300 Murray Street, Perth

- Wednesday 25 June 2014: The Fair Work Act 2009 – An Update on Recent and Proposed Changes
- Wednesday 27 August 2014: Employee Privacy
- Wednesday 26 November 2014: Safety Prosecutions – Lessons Learned

Sydney

Level 10, 1 Macquarie Place, Sydney

- Wednesday 14 May 2014: Bullying from all Angles
- Wednesday 16 July 2014: Executive Employment Issues

Legislation Update

Legislative Instrument	Status	Key Proposed Changes
Paid Parental Leave Amendment Bill 2014	Introduced into Parliament in March 2014; currently before the House of Representatives	In a bid to reduce the administrative burden on employers, the Federal Government is proposing to amend the current administration of the paid parental leave scheme. Currently employers are required to process parental leave pay after receiving an employee's entitlement from Centrelink. Under the Bill, employees will be paid directly by the Department of Human Services, unless an employer "opts in" to provide parental leave pay to its employees, the employee agrees for their employer to pay them and certain other conditions are met. If passed, the changes will take effect from 1 July 2014.

Client Quiz

A union official seeks to exercise a right under the *Fair Work Act* 2009 (Cth) to enter a workplace. The FWC has not granted the official an exemption and the employer does not employ textile, clothing or footwear workers.

How much notice must the official provide the employer/occupier?

A. **No less** than 24 hours and **no more** than 14 days before the proposed visit.

B. **No less** than 12 hours and **no more** than seven days before the proposed visit.

C. **No less** than 12 hours and **no more** than 14 days before the proposed visit.

The first correct entry emailed to isla.rollason@squiresanders.com will win a West Australian Good Food Guide (delivery within Australia only).

Employer Reminder

Evidence of Personal leave

The FWC has warned employers against rejecting "back dated" medical certificates from employees. A recent decision of the FWC found that an employer would breach the *Fair Work Act* 2009 (Cth) if it rejected back dated medical certificates – i.e., medical certificates prepared and dated *after* the date of an employee's illness and used to justify a period of personal (sick) leave.

Under the Fair Work Act, an employee must give his or her employer notice of proposed personal leave as soon as practicable. He or she must also provide evidence which would satisfy **a reasonable person** that the leave is being taken because the person is not fit for work because of illness or injury, or to provide care to a family member.

A term of an enterprise agreement or employment contract which permits employers to reject back dated medical certificates may well be deemed invalid. Employers should remember that employees are only obliged to provide evidence which would satisfy a reasonable person and that applying a blanket rule rejecting certain evidence could expose the employer to risk.

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