SQUIRE PATTON BOGGS

WORKPLACE VIEW

March 2015

"The importance of being earnest" – disproportionate management action by employers

Emma Dawson, Associate

From allegations of necrophilia, to failing to file a leave form for one days' absence, to swearing at a Managing Director, recent cases have highlighted the danger of employers acting hastily and undertaking disproportionate disciplinary action.

Suspension Arising From Unsubstantiated Sexual Allegations

In the South Australian case of *Cannon v Department for Health and Ageing* [2015] SAWCT 5 (24 February 2015) the South Australian Workers Compensation Tribunal found the employer took unreasonable administrative action in suspending an employee based on the mistaken belief that he had been charged with necrophilia.

The employee informed his operations manager that he was worried about an upcoming court hearing relating to:

- an aggravated assault charge; and
- unsubstantiated allegations, from his ex-partner, relating to paedophilia, necrophilia and pornography-related issues **(Sexual Allegations)**.

The following day, the employee was formally interviewed and consequently suspended by the CEO and the Workforce Director, due to their mistaken belief that the employee had been charged with the Sexual Allegations. The employee however was not informed that their decision to suspend him while an investigation was conducted was based on the Sexual Allegations, which it turned out were without foundation.

Two months later, the investigation concluded and the suspension was lifted. The employee did not return to work and made a claim for compensation for the exacerbated psychological injury as a consequence of the suspension.

The tribunal found that the decision to suspend the employee was not reasonable administrative action because of the failure of those interviewing him to:

- notify him of their belief that he had been charged in relation to the Sexual Allegations; and
- afford the employee an opportunity to respond.

Disciplinary Meeting for Failing to File a Leave Form

The Tasmanian Workers Rehabilitation and Compensation Tribunal **(Tribunal)** in *Learning Partners Pty Ltd v H. (Ref No 1121/2014)* [2015] TASWRCT 3 highlighted the need for employers to act reasonably in disciplining their employees and to be aware that a heavy-handed approach can trigger workers compensation claims.

In this case, the employee missed one day of work and unintentionally failed to lodge the required leave form in time. The employer reacted with a string of emails requesting a disciplinary meeting to discuss her absenteeism. The employee immediately panicked and left the office, later lodging a compensation claim for anxiety and depression.

Learning Partners disputed their liability on the basis that the emails and the disciplinary meeting were reasonable administrative actions.

The Tribunal found that a formal disciplinary meeting with essentially no prior notice was a vastly disproportionate reaction to her taking one day of leave without filing a leave form and ordered the employer to compensate the employee for the stress and mental injury it caused.

Swearing at a Manager

The Fair Work Commission **(FWC)** in *Smith v Aussie Waste Management Pty Ltd* [2015] FWC 1044 (12 February 2015) recently found that dismissing an employee for swearing at a Managing Director during a private conversation was a disproportionate reaction and amounted to an unfair dismissal.

The employee was a truck driver for a waste management company, from 5 July 2012 until he was dismissed on 3 October 2014 following a series of private phone calls with his Managing Director where the employee said "you dribble sh*t, you always dribble f^#*ing sh*t". The Managing Director promptly terminated his employment for "speaking … in an unacceptable manner and using bad language", but the employee was not afforded an opportunity to respond before the termination took effect.

The FWC commented on swearing in modern workplaces and found that it is not "uncommon for bad language to be used in the workplace in this or other similar industries".

The FWC found that while the swearing "should not be tolerated in the workplace, in the context of a one-on-one heated discussion with his Manager without anyone else present…the conduct is not sufficiently insubordinate to establish a valid reason for dismissal".

What Does This Mean for Employers?

These cases serve as a timely reminder that a heavy handed and disproportionate approach by an employer when managing their employees will not be condoned by the courts and tribunals.

To mitigate the risk of a claim, it is important to analyse the conduct, behaviour or performance of the employee and link it to an appropriate form of management/disciplinary action, and consider all the circumstances of the case. It is also important the following steps are undertaken:

- ensuring employees are aware of conduct, expectations and workplace standards;
- monitoring performance and behaviour against these expectations and standards;
- providing employees with an opportunity to respond to any concerns about their conduct prior to disciplinary procedures being commenced; and
- where appropriate, providing written warnings rather than automatically looking to terminate.

Employer Reminder

The new anti-bullying regime under the Fair Work Act 2009 (**FW Act**) has been in full-swing for over a year.

In the recent case of *PK [2015] FWC 562* **(PK)**, the FWC confirmed that a bullying claim will not necessarily be nullified even if the worker's employment has terminated.

Under the FW Act, a worker is bullied at work if repeated unreasonable behaviour creates a **risk to health and safety**. It has previously been held that a risk to health and safety is unlikely to continue to exist where the employment relationship has ended.

However, the FWC held that it may be appropriate to hold an anti-bullying application in "abeyance" if there is a related matter (i.e. dismissal) that is being actively contested and which may result in the employee being re-instated.

It was also held that workers are not required to report bullying to their employers before lodging a claim with the FWC.

In light of the above, employers are reminded that even if an employee has resigned or been terminated, the FWC may still have jurisdiction to consider a bullying claim if there is a pending application challenging the termination.

In addition, to ensure the FWC is not the first port of call for bullying complaints, employers should maintain clear and updated policies and conduct training so that all employees are aware of the internal procedures available to address bullying concerns.

Client Corner

Rozanna Bozabalian
Senior Manager,
Human Resources & Administration
Dolby Australia

1. **What occupation would you have taken up if you had not taken up your current job?**

   That's a bit of a trick question for me as I haven't always been in HR, I've also had an extensive career in communications and related areas, all within the entertainment industry – apparently I'm quite versatile! But film has always intrigued me and it's an interesting genre I haven't tackled. Yet …

2. **What has been your best professional moment?**

   Working as a Media Manager at the FIFA World Cup in 2002 in both Korea and Japan – it was an unreal experience, particularly managing a game involving world heavyweight Spain. A real highlight of my career to that point. Closely followed by working on the 2000 Olympics in Sydney, and looking after the media requirements of the gold medallist women's beach volleyball team. That was hectic!!

3. **As business becomes ever more global, what employee issues are becoming increasingly relevant in your industry?**

   It's probably more to do with maintaining a healthy work/life balance than anything else. We are a big, global business as it stands, so it's about making sure that employees here in Australia who manage or who are involved with overseas teams and projects are not burning the candle at both ends in trying to work through a number of time zones. It's a delicate balance.

4. **What do you do for fun and at the weekends?**

   Well for starters, I'm also an astrologer (you can find me at AstroSparkles on Facebook). I love writing about and discussing planetary energy and the site gives my creative side some air time. As for the rest, if I'm not at the movies or up at all hours watching the Premier League or enjoying a marathon run of Game Of Thrones, you'll often find me out and about with a camera, maybe taking photos of cats and kittens for rescuers working with pounds and shelters around Sydney or maybe visiting what's become my second home – New Zealand. Stunning landscape, stunning wine and home to hobbits, wizards and dwarves – does it get better??

5. **What are two rules you try to live by?**

   Stand up for what you believe in and make a positive difference where you can. I'm an ordinary girl on an extraordinary journey.

Did You Know?

Employers must be careful in categorising work experience interns as "volunteers", particularly when they are performing work for the employer's benefit and the work leans towards being productive instead of simply learning.

In the recent noteworthy decision of *Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA 140* (29 January 2015), the Federal Circuit Court imposed a hefty civil penalty of $24,000 on a media provider for failing to pay minimum wages to two of its interns. The interns were initially engaged for three weeks' work experience, but the arrangement continued for 12 months for one, and six months for the other, with the interns working as producers of radio programs. The only payments made to the interns were for reimbursement of expenses.

While the Court was not persuaded the non-payment was deliberate, it found that the arrangement when viewed objectively was exploititive as the media company received a benefit from the arrangement. This decision has left employers who are heavily reliant on unpaid interns or those on "work experience" in a less than comfortable state!

The decision draws heavily on recent findings documented in research commissioned by the Fair Work Ombudsman into the exploitation of unpaid interns, which is said to be more prevalent in the media, fashion and legal industries where entry-level roles can be difficult to secure. The situation of most concern in the report is where an organisation uses unpaid interns to perform work which could otherwise be performed by paid employees.

The Court recognised arrangements for work experience interns is a "difficult topic within employment systems" but made it clear that "profiting from "volunteers" is not acceptable conduct within the industrial relations scheme applicable in Australia".

The Court emphasised the likelihood that penalties will increase over time as public exposure of the issues will no longer allow employers to claim a mistake in categorising their interns as volunteers. The decision therefore is a warning to employers of the risks associated with unpaid arrangements and that such arrangements are likely to become the subject of increased scrutiny.

Legislation Update

Legislative Instrument	Stage of Legislation	Proposed Changes
Safety Rehabilitation and Compensation legislation amendment Bill 2014 **(SRC Bill)**	SRC Bill is currently before the Senate.	The SRC Bill amends the *Work Health and Safety Act 2011* (Cth) to: • remove the requirement for a ministerial declaration for a corporation to be eligible to be granted a licence for self-insurance; • enable certain corporations to apply to the Comcare scheme; • allow a former Commonwealth authority to apply to be a self-insurer in the Comcare scheme and be granted a group licence if it meets the national employer test; • enable group licences to be granted for related corporations; and • extend coverage to corporations that are licensed to self-insure. The SRC Bill amends the *Safety, Rehabilitation and Compensation Act 1988* (Cth) to: • exclude access to workers compensation when injuries take place in recess breaks away from an employer's premises or • where a person engages in serious and wilful misconduct.
Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014 **(SDA Bill)**	SDA Bill is currently before the House of Representatives (second reading speech was delivered on 1 December 2014)	The SDA Bill amends the *Sex Discrimination Act 1984* **(SD Act)** to permit employers to make higher payments of superannuation to women without breaching discrimination laws or having to seek exemption under s 44 of the SD Act.
Fair Work Amendment (Bargaining Processes) Bill 2014 **(FWA Bill)**	The FWA Bill is currently before the Senate (second reading moved on 10 February 2014).	The FWA Bill: • introduces a requirement that productivity improvements in the workplace must be discussed before an enterprise agreement can be approved by the FWC • amends s443 of the *Fair Work Act 2009* (Cth) to require the FWC to consider prescribed "non-exhaustive factors" to guide its assessment of whether an applicant for protected action ballot order is 'genuinely trying to reach agreement'; and • provides that the FWC must not make a protected action ballot order when it is satisfied that the claims of an applicant are manifestly excessive or would have a significant adverse impact on workplace productivity.

Save the Date! Events Update

We invite all our readers to attend the information-packed HR Knowledge events detailed below

Squire Patton Boggs – Labour & Employment Seminar Series 2015

The program has now been finalised and you should have received a 'Save the Dates' email. The first seminar in the series will be "Discrimination Law: How to Avoid Discrimination Claims" which will be presented:

- on 15 April 2014 in the Perth office by Jillian Howard (Senior Associate) and Emily Tan (Associate); and
- on 22 April 2015 in the Sydney office by Anna Elliott (Of Counsel) and Kylie Groves (Partner).

An invitation will be sent out to you regarding the series shortly!

Squire Patton Boggs Speakers at Public Conferences in March 2015

27 March 2015 – Adventedge Conference – HR Masterclass Australia

Bruno di Girolami will participate in "Q & A Roundtable HR Law Masterclass - Your Chance to Ask Any Workplace Law Question"

Please email Meilani Hundarto at meilani.hundarto@aventedge.com to inquire about registering for this event.

31 March 2015 – Legalwise Conference – Legal Skills and Ethics for All Lawyers

Kylie Groves will speak on "Ethics After Hours: Tips and Tricks to Avoid Conduct Complaints for Online Conduct".

Please call Legalwise Seminars on (02) 9387 8133 to inquire about registering for this event.

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

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

Anna M. Elliott
Of Counsel
T +61 2 8248 7804
E anna.elliott@squirepb.com