SQUIRE PATTON BOGGS

Workplace View

July 2016 Edition

Beware the Costs of Rejecting a Good Offer

By Emma Dawson, Associate, and Teliah Turrill, Paralegal

The Fair Work jurisdiction is generally considered a "no costs" jurisdiction, meaning that, even if a party is successful in an action, they are usually unable to obtain a costs order against the opposing party.

However in 2012, the *Fair Work Amendment Act* 2012 (Cth) widened the scope of exceptions to the "no costs" rule by enacting section 570(2)(b) of the *Fair Work Act* 2009 (Cth).

This section allows costs orders to be made where a party has committed an "unreasonable act or omission" that causes legal costs to be incurred by the opposing party.

So what classifies as an unreasonable act or omission? Notably, recent case law (set out in the table below) has shown that one party's failure to accept the other party's reasonable settlement offer may be considered an unreasonable act, resulting in a costs order being made against them.

Facts	Decision	Comments
Ferry v GHS Regional Pty Ltd [2016] FWC 3120 (24 May 2016)		
A yard manager was dismissed after taking property without authorisation. He subsequently brought an unfair dismissal claim and represented himself in proceedings. Following a series of conciliation meetings, his employer offered him AU$3000 to settle the claim, which he rejected.	The employee's claim was rejected by the Fair Work Commission (**FWC**) and a costs order was made against him to the tune of AU$13,875.50 to cover the legal costs incurred by his employer.	The employee was a self-represented litigant and argued that, due to his lack of legal experience, he was not able to evaluate the prospects of his claim to determine if the offer was reasonable. The FWC noted that, while self-represented litigants were at a disadvantage, this was not an excuse. The employer had provided the employee with all the documents to be relied upon in proceedings and this information would have been sufficient for the employee to realise his claim had little support. The FWC also placed weight on the fact that the letter of offer had expressly stated that the employer would seek costs if the claim failed.
Mifsud v Veolia Transport Sydney Pty Ltd [2012] FMCA 167		
In this case, the employee claimed he was entitled to a redundancy payment under a collective agreement. He sent the employer a letter containing an offer for the sum of AU$27,000, which was open for 28 days. The employer never responded to the settlement offer.	At first instance, the employer was found to have breached the collective agreement and a costs order was made against it for the sum of AU$15,000 (based on legal fees incurred since the expiry of the settlement offer). On appeal, the Federal Magistrates Court of Australia (**FMCA**) found that the employer had not breached the enterprise agreement. Consequently, the costs order was quashed.	In deciding whether to award costs at first instance, the onus was on the employer to establish it had acted reasonably in rejecting the offer. In considering this, the FMCA found that the employer unreasonably failed to respond to the offer, which caused the employee to incur legal costs up to the date of judgement.

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Cugura v Frankston City Council (No 2) [2012] FMCA 530		
In this appeal decision, the employee claimed that his dismissal was an adverse action taken against him on the basis of his disability. The employer subsequently revealed strong evidence that contradicted the employee's unsubstantiated claims. Following this, the employer offered that both parties bear their own costs and walk away from the matter. The employee refused.	The FMCA dismissed the appeal and made a cost order against the employee.	The FMCA noted that unreasonableness in refusing an offer is measured by the reasonable prospects of success at the time the proceedings were instituted and not at the point of judgment.

Quick Tips for Employers

- Where applicable, draw to the attention of an employee (particularly a self-represented litigant) why their case has a low prospect of success. If you have substantial evidence that contradicts their claim, this should also be brought to their attention.
- Ensure any settlement offer made to an employee is both clear in its terms and reasonable in all the circumstances.
- Include in all settlement offers a statement that, if the employee rejects the offer, the employer reserves the right to pursue costs under s 570(2)(b) of the *Fair Work Act* 2009.
- When rejecting a settlement offer made by an employee, do so clearly and state the reasons for rejecting the offer so that these can later be relied upon to show that the grounds for rejection were reasonable.

Did you know?

By Emma Dawson

Did you know that an employee telling you to "*shove your f**king job up your a**e*" in the heat of the moment may not be enough to warrant dismissal?

Two recent cases in the Fair Work Commission (FWC) have shed light on this:

- In *Hain v Ace Recycling Pty Ltd* [2016] FWC 1690, Mr. Hain had a heated exchange about overtime payments with his boss, which ended with Mr. Hain calling his boss an "*old c**t*" and leaving work. Later that day, the boss dismissed Mr. Hain via text message. The FWC acknowledged that, while Mr. Hain's comment provided a valid reason for dismissal, the procedural deficiencies (in failing to provide a warning, or giving Mr. Hain an opportunity to respond) rendered it unfair. Mr. Hain was therefore awarded AU$828 in compensation, taking into account new employment the day after his dismissal and deducting actual earnings over a five week period from those which he would have earned if not dismissed.
- In *Kazmar v Test-Rite Imports Australasia Pty Ltd T/A Medalist* [2016] FWC 3008, Mr. Kazmar's manager was explaining how to complete a task to the necessary standard when Mr. Kazmar responded in frustration "*shove your roster up your a**e*". The manager interpreted the outburst to be a refusal to comply with a reasonable request and Mr. Kazmar was subsequently dismissed. The FWC however stated that "*there have been a lot worse things said by an employee to an employer representative which have not led to dismissal*" and, in that context, the frustrated outburst did not create a valid reason for dismissal. As a result, Mr. Kazmar was awarded AU$3,850 in compensation for the estimated three-month period he might have been retained if not for the outburst that led to his dismissal.

Accordingly, to mitigate the risk of an unfair dismissal claim, employers need to be careful to avoid any knee-jerk reactions and should instead take time to evaluate the whole of the circumstances to ensure an employee is afforded procedural fairness.

OSH Alert

By Teliah Turrill

When an injury occurs in the workplace, it is possible under both legislative and common law principles for employers to argue that the employee contributed to their own injury by being negligent. Contributory negligence can be established if an employee undertook an activity involving obvious risk or failed to take into account an obvious risk.

This begs the question, what risks are obvious risks?

Two recent cases, both involving significant compensation payments, highlight the high threshold used by courts in determining whether or not a risk was obvious.

***Australia and New Zealand Banking Group Ltd v Haq* [2016] NSWCA 93**

In May this year, the NSW Court of Appeal ordered ANZ Bank to pay compensation to an employee who tripped on office cabling under her desk. The employee fell and injured her knee after her foot got caught on a cable when she stood up from her chair.

The Bank argued that the risk was obvious. It would have been obvious to the employee that the telephone and computer at her desk had attached cables and she should have kept her feet clear of them. On this basis the Bank claimed contributory negligence.

However, the threshold for what constituted an obvious risk in this case was very high and the Court was only willing to concede a small degree of negligence by the employee. While the risk may have been considered obvious to some, this didn't prevent the Bank from having to pay compensation to the tune of AU$600,000.

***Garth v BSE Cairns Slipways Pty Ltd* [2015] QDC 343**

A similar decision was reported on 16 May 2016.

In this case, an employee at the end of his night shift switched off the lights at his workplace and on his way out tripped on a metal box causing him to lose balance and fall, breaking his wrist.

The employer argued that tripping was an obvious risk given the employee failed to watch where he was going, didn't use the torch properly and did not use the designated thoroughfare.

While the Court was happy to accept that a reasonable person could perceive that walking into an obstacle in the dark was an obvious risk, in this particular case, the *"inattention bred of familiarity and repetition"* had to be considered. When taking into account the repetitive nature of work, the employee's familiarity with the area and the poor lighting, tripping on the metal box did not meet the threshold of obvious.

This resulted in the employee being awarded AU$320,000 in compensation.

Labour & Employment Seminar Series

The second Labour & Employment Seminar for 2016, 'Strategies for Employers to Reduce Labour Costs', will be held in:

- Perth at 8.00am on Wednesday 17 August 2016 at our offices located at Level 21, 300 Murray Street Perth
  - Presenters: Bruno Di Girolami (Partner), Felicity Clarke (Of Counsel) and Allan Feinburg (BDO Australia)

Should you have any queries or wish to register for these events, please contact Isla Rollason on +61 8 9429 7624

Safety Edge

To help our clients overcome uncertainty about their increasing workplace health and safety (WHS) compliance obligations, our Labour & Employment team has developed Safety Edge.

Safety Edge is designed to help clients save time and reduce legal costs when addressing complex regulatory schemes, while also providing a due diligence defence to directors and other key decision makers under WHS legislation.

In short, Safety Edge is a legal audit and gap analysis of WHS systems and processes performed by our team. The findings and recommendations of the legal audit and gap analysis are provided in a comprehensive written report and/or explained to clients in a workshop format.

Please click here to view more information.

Let's Get Quizzical

By Emma Dawson

The first correct answer to all questions emailed to isla.rollason@squirepb.com will win a AU$50 David Jones voucher (Australia only)

Under the *Fair Work Act* 2009 (Cth), a person has been unfairly dismissed if the FWC is satisfied that an employee (who is protected from unfair dismissal) has been dismissed and the dismissal was harsh, unjust or unreasonable. Which of the following people can bring an unfair dismissal claim in the FWC?

- Elaine worked as a writer for Peterman Catalog from 2013 until 1 April 2016, when she was told her services were no longer required. Elaine was not too concerned as she had a few other contracts on the go and was sick of waiting for Peterman Catalog to pay her after she had submitted her invoices each month.
- George worked as the club secretary for the Fremantle Dockers from 2010 until he made a joke about their 2016 performance and was sacked on the spot. He was earning over AU$120,000 per year and was provided with a new Range Rover for personal use – which was much more beneficial than the terms set out in the *Freo Heave Ho Enterprise Agreement* that governed his employment.
- Newman worked as a postal worker for Australia Post from 1976 until 3 April 2016 when he was sent a text message telling him not to bother showing up to work on Monday. Newman's employment was governed by the *Australia Post Enterprise Agreement* and he was paid in excess of AU$139,000 per year.
- Kramer worked as a baker at H&H Bagels for two weeks until he threatened to strike over working conditions and was fired on the spot. Up until this point, Kramer was being paid the minimum weekly wage as set out in the applicable modern award (the *Bagel Industry Award 2010*).

Meet the Team

Kylie Groves, Partner

- **My first ever job was…** as a junior football umpire – getting paid to blow a whistle and run around after little boys on a Sunday morning.
- **What I like about my current job is…** getting to exercise my brain every day and working with a fantastic group of people.
- **A random fact about me is…** I was interviewed about my first job (see above) by a well-known football personality on Channel 7's World of Football.
- **The two rules I try to live by are…** "act, belong and *over* commit" and "work hard and be nice to people".
- **My last supper would be…** a great big steaming bowl of curry laska.

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