SQUIRE PATTON BOGGS

Workplace View

April 2017

Employer Found to Be Too Hasty in Refusing Employment of Applicant With Mental Illness

Madeleine Smith and Dominique Hartfield

A recent decision of the NSW Civil and Administrative Tribunal (the "Tribunal") has highlighted the need for employers to take care to avoid discrimination when requiring prospective employees to disclose medical conditions and undergo examinations during the recruitment process.

In *Chalker v Murrays Australia Pty Ltd* [2017] NSWCATAD 112 the Tribunal ordered an employer pay AU$10,000 in damages after finding it discriminated against a bus driver by refusing to offer him a position due to his mental illness, even where he failed to initially disclose he had one.

The Facts

The job candidate applied to Murrays Australia (the "Company") for a bus driver role in late 2015. On his application form he responded "no" to the question: "Do you suffer from any medical condition, disability or injury that may have an effect on your performance of the duties in the job for which you have applied?"

In a subsequent medical examination the candidate revealed he was taking medication for a diagnosed borderline personality disorder. The assessing doctor reported that the candidate became "argumentative" and "difficult" when asked if his treating psychiatrist could be contacted about the medication. As a result of the assessment, the doctor found the candidate was "temporarily" unfit for work and recommended further investigations be undertaken.

Contrary to this recommendation, the Company chose not to pursue any further assessment and declined to offer the candidate a job, deciding there would be "problems down the track with him because of his behaviour". The Company's operations manager claimed that one of the reasons he was denied employment was that he was dishonest in failing to initially disclose his medical condition and use of prescription drugs.

The Decision

The Tribunal found this decision was not justified on the basis that the candidate's initial non-disclosure was not "unreasonable or dishonest". Having driven a bus without incident since being diagnosed with a personality disorder in 2014, the candidate had a strong belief that neither his condition nor his medication had any effect on his ability to safely drive a bus. Accordingly, the Tribunal was satisfied that he had been honest in answering a question about his ability to "perform the duties" of a bus driver.

The Tribunal further considered that the candidate's agitated behaviour during his medical examination was also reasonable, given he had genuine concerns about the relevance of questions he was being asked.

The Tribunal considered that the Company had failed to acknowledge the temporary nature of the candidate's unfitness and that there was no evidence of him refusing to undergo further medical assessment. It was found that, in refusing to conduct further investigations, the Company had not come to a final view as to the candidate's ability to comply with the inherent requirements of the position. The Tribunal found that the Company would not have refused to employ a person whose medical examination revealed agitated and irritable behaviour unless that person was known to have a mental illness. Accordingly, it was held that the Company treated the candidate less favourably than they would have treated a person without his disability.

Lesson for Employers

Employers have a legal duty to take reasonable care to avoid foreseeable risks of injury in the workplace. It may therefore be appropriate and necessary to request that candidates disclose medical conditions which may affect their ability to work properly and safely, and to ensure candidates can perform the inherent requirements of the role.

Nonetheless, the *Chalker* decision provides a reminder that employers need to exercise caution in recruitment to avoid potentially costly claims. That is, employers should be wary of making assumptions about a potential employee's future conduct due to mental illness or other health conditions. Before making a decision to refuse employment care must be taken to ensure a final view has been properly formed on a person's ability to perform the job. This may require conducting further investigations. Further, it may be reasonable for a prospective employee to not disclose a medical condition where they reasonably believe it has no impact on or relevance to their performance.

Migration Alert – Abolition of 457 Visas!

Andrew Burnett, Of Counsel (MARN 1174849)

On 18 April 2017, the government announced that the Temporary Work (Skilled) visa (subclass 457 visa) will be abolished and replaced with the completely new Temporary Skill Shortage (TSS) visa in March 2018.

The TSS visa programme will be comprised of a Short-Term stream of up to **two years** and a Medium-Term stream of up to **four years**, will support businesses in addressing genuine skill shortages in their workforce and will contain a number of safeguards which prioritise Australian workers.

The changes, which commence in stages from 19 April 2017 are designed to reduce the number of non-residents who are able to obtain working rights in Australia. With immediate effect the list of occupations has been reduced by 200 and applications for nominations and linked visas can no longer be granted to applicants in those occupations. This is likely to affect sponsoring employers who have commenced the nomination process in one of those occupations. Details about the retrospective effect of these changes will need to be assessed before sponsors make final decisions on withdrawing such applications.

There are a number of other relevant changes and requirements and we recommend you seek advice before entering into any material discussions with job applicants regarding their employment in Australia.

Did You Know…?

Connor McClymont

Did you know … that, following recent differing decisions of the Fair Work Commission (**FWC**), employers must still tread a fine line in determining whether employee misconduct on social media is a sufficiently valid reason for dismissal.

In the very recent case of *Stephen Campbell v Qube Ports Pty Ltd t/a Qube Ports & Bulk* [2017] FWC 1211 (16 March 2017), the FWC considered the conduct of a veteran employee who publicly disrespected his employer's management on Facebook. The employee had been investigated for misconduct after damaging company property, failing to report the damage and lying when questioned about it. Taking umbrage to these allegations the employee went to Facebook to label the chairman a "pig" in a post that disrespected the employer's management and policies.

While the employee's social media conduct was not the reason for their dismissal, the FWC noted that this type of conduct was "unacceptable" and suggested this conduct was enough to warrant the employee's dismissal.

In other recent decisions however, the FWC has found conduct on social media did **not** warrant dismissal. These included thinly veiled criticisms and disparaging comments made by a teacher on Facebook in *Mary-Jane Anders v The Hutchins School* [2016] FWC 241 (15 January 2016). In the case of *Michael Renton v Bendigo Health Care Group* [2016] FWC 9089 (30 December 2016) a nurse who "tagged" work colleagues in sexually explicit videos on Facebook and called his supervisor a "red-headed c**t" in personal messages to a fellow employee was found to have been harshly dismissed. The nurse's termination was deemed by Commissioner Bissett to be "disproportionate to the gravity of the misconduct".

What constitutes conduct worthy of dismissal remains ambiguous in some cases. Therefore, employers should have a clear and comprehensive social media policy which provides examples of unacceptable conduct, and provide training on that policy, so that all employees are aware of the employer's expectations on acceptable conduct and when disciplinary action may be taken (including up to termination of employment). Employers can then more readily seek to rely on a policy breach to support disciplinary action (including dismissal) for misconduct on social media.

OSH Update

A recent coronial inquest has stressed the importance of ensuring risk assessments and emergency management plans are conducted by properly trained employees to identify and address hazards.

In May 2014 34-year old Brendan Hickey fell into the water at Darling Harbour and drowned while watching the Sydney "Vivid" Festival's light and sound show.

The inquest into his death found a risk assessment conducted by a company managing the event was "entirely inadequate", failing to identify the risks to spectators at the waters' edge. The employee who prepared the risk assessment had no formal risk management qualifications or training and merely based their assessment on others the employee had seen "over many years".

It was found the event was unprepared for the incident. There had been inadequate training in emergency management procedure and actions required by staff in emergency situations were found to be inconsistent with the chain of command. Employees ought to have received appropriate training regarding when the show should be stopped during an emergency.

The coroner recommended that the company's directors give urgent consideration to both:

- Retaining "an appropriately qualified risk management consultant to perform a review of the company's risk management policies, practices and procedures".
- Providing formal, documented training to all employees who conduct risk assessments by qualified risk management specialists.

Employer Reminder

Jessica Geelan

Employers are reminded to review their casual employment arrangements and convert the arrangements to part-time or full-time employment where the true nature of those arrangements is not "casual" or is no longer casual.

Late last year, in the case of *Skene v Workpac* Pty Ltd [2016] FCCA 3035, the Federal Circuit Court determined that an employee engaged pursuant to a casual contract of employment was a permanent employee for the purposes of the *Fair Work Act 2009* (Cth) (**FW Act**).

The employer was made to pay AU$24,000 in accrued annual leave to the FIFO dump truck operator, after the court found the employer's 12-month rosters constituted a "firm advance commitment" to the worker's employment and that the "essence of casual employment" was missing. In particular, the regularity and predictability of his work at two central Queensland mines between April 2010 and April 2012 established an entitlement to annual leave under the FW Act.

Although the court observed that several factors supported the proposition that the worker was a casual employee – among them the fact that he accepted that description himself, was paid hourly, completed weekly timesheets and could have his services terminated with an hour's notice – those were ultimately outweighed by other conditions surrounding his time on WorkPac's books. In particular, the court found there was no evidence at all that he could choose which days he would work or not work.

When disputes such as this arise, a court will examine a number of factors (including roster patterns and communications with the worker) to ascertain the true nature of the arrangement, and not just the terms of the agreement, to determine whether or not the worker is engaged as a casual.

The employer has appealed the decision, the outcome of which we will be monitoring closely!

Events Update

Squire Patton Boggs Labour & Employment Seminar Series

Our Labour & Employment Practice Group is holding the first seminar in its Labour & Employment Seminar Series, on the topic ***"On-boarding New Employees – How to Get It Right".***

This seminar, which will be presented by Bruno Di Girolami (partner), Anna Elliott (partner) and Dominique Hartfield (of counsel), will look at the on-boarding process (including the employment contract framework) and provide practical tips on getting the process right, key legal issues to watch out for and steps which can be taken to protect employers' interests.

- **Sydney – 12:15 p.m. registration/lunch** (for a **12:30 p.m. start**) **on Wednesday, 26 April 2017** at Squire Patton Boggs Sydney office, at Level 10, Gateway, 1 Macquarie Place, Sydney.
- **Perth – 7:30 a.m. registration/breakfast** (for an **8 a.m. start**) **on Wednesday, 24 May 2017** at Squire Patton Boggs Perth office, at Level 21, 300 Murray Street, Perth.

Should you have any queries or wish to register for any of the above events, please do not hesitate to contact Danielle Bova (Sydney) on +61 2 8248 7851 or Isla Knight on +61 8 9429 7624 (Perth).

Legislation Update

Legislative Instrument	State	Status	Proposed Changes
Fairer Paid Parental Leave Bill 2016	Cth	Second reading speech moved on 20 October 2016	To amend the paid-parental leave system: • So that parents will receive government-funded paid parental leave only to the extent they are not provided for by their employer • So payments are made directly from the Department of Human Services, unless the employer and employee agree otherwise • To relax the paid parental leave work test to take into account where pregnant employees have been unable to work due to no safe job being available and to extend the permissible gap between two working days from eight weeks to 12 weeks to still meet the test
Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017	Cth	Second reading speech moved on 1 March 2017	Amends the *Fair Work Act 2009* (Cth) to: • Increase maximum penalties for certain serious contraventions of the Act • Hold franchisors and holding companies responsible for certain contraventions by their franchisees and subsidiaries where they knew or ought to have known about the contravention and failed to take reasonable steps to prevent them • Provide the Fair Work Ombudsman with evidence gathering powers • Prohibit individuals from obstructing the functions of the Fair Work Ombudsman or an inspector or giving misleading information
Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017	Cth	Second reading speech moved on 1 March 2017	To amend the Fair Work system to: • Repeal the requirement that the FWC conduct four-yearly reviews of modern awards from 1 January 2018 • Allow the FWC to overlook minor procedural or technical errors which are not likely to disadvantage employees when approving enterprise agreements

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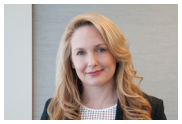

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