SQUIRE PATTON BOGGS

Workplace View

March 2019

Employer's Unfair Dismissal Win May Translate Into a Loss

Sharon Payn, Associate and Bruno Di Girolami, Partner

In a recent Fair Work Commission (FWC) decision, an employer who dismissed a long serving employee of 23 years with an unblemished record for breaching the company's alcohol and drug policy (Policy) was held by the FWC to have a valid reason for dismissing the employee. Although the employer was successful in defending the unfair dismissal claim, the FWC was of the view that the employer may have breached its workplace health and safety (WHS) obligations owed to the employee and referred the decision to the WHS regulator.

The Facts

The employee worked as a deck foreman in a stevedoring terminal, which was considered a hazardous work environment. The employee suffered from depression (although the employer was unaware of his illness at the time) and had sent a text message to a work colleague stating, "tell my family I love them with all my heart, please, and I'm sorry". A colleague raised the alarm and the employee was found just in time before he was about to jump off a platform. A team leader was able to talk the employee down, who then returned to work. The incident was not reported to senior management.

The Policy provided that an employee must not have a blood alcohol concentration (BAC) reading of more than 0.02% while at work. Later that day, the employee was random breath tested and returned a BAC of 0.118%. The employee was directed to leave the workplace and, although he was offered a Cabcharge voucher, drove himself home. The employee was subsequently dismissed and made a claim for unfair dismissal.

The Decision

The employer was held to have a valid reason for the employee's dismissal despite:

- The employer not consistently applying the Policy fairly and transparently (by not summarily dismissing other employees who had breached the Policy)
- The fact that there was no evidence the employee received a copy of the Policy or received any training in the Policy
- The Policy did not expressly state a breach would result in the employee's dismissal

The FWC held that the employee was aware of the Policy and he was required to read and comply with it, stating: "No employee needs to be provided with a copy of the relevant policy or be trained in it before they understand that drinking at least four cans of Wild Turkey while at work is inconsistent with what their employer expects of them."

The FWC commented, "the unfair dismissal provisions are intended to operate in a common sense way. The employer operates in a safety critical work environment and the employee's role was crucial to ensuring a safe environment". Although the FWC believed the employer chose to make an example of the employee for breaching the Policy, the FWC held the employee's dismissal was not unjust, unreasonable or harsh in the circumstances.

Potential Breach of WHS Law

Although the FWC has no jurisdiction to determine WHS issues, the FWC was concerned the employer had breached its WHS obligations owed to the employee. The FWC highlighted:

- There was no protocol for employees and management to follow and deal with threats of suicide, including ensuring that these types of incidents are immediately reported "up the line" and that the employee is not returned to work
- The employer failed to promptly notify WorkCover of the incident, along with the employer's insurer, which should have been standard operating procedure by the employer
- Evidence showed another employee (at a different location) died by suicide at work
- The employer had not taken any action to improve and address the systematic failures in its WHS practices since the incident

If you or someone you know is experiencing personal difficulties, please phone Lifeline on 13 11 14.

Lessons for Employers

- Policies should be clear and concise, and outline the potential disciplinary consequences of failing to comply
- Policies should be consistently applied to ensure fairness and transparency amongst employees
- Policies and procedures should be regularly monitored and reviewed, particularly after an incident
- Ensure your policies and procedures work together, including how they interact with policies and procedures on other subject matters (e.g. safety)
- Ensure WHS practices address mental health hazards, not just physical hazards, and protocols are in place for addressing these types of incidents

Did You Know?

Federal and State News Updates

Federal – Right of Entry and Workplace Advisory Service

Barnaby Austin, Associate

Last month, the Minister for Jobs and Industrial Relations, the Hon Kelly O'Dwyer MP, announced that the government will consult on proposed changes to the Fair Work Regulations 2009, to change right of entry rules. One of the proposed changes is to give the FWC the ability to issue ID cards to right of entry permit holders, which must include a photo and any relevant permit conditions. The Minister said that the changes "will make it easier for permit holders to carry permits and exercise right of entry, while those on worksites will be able to appropriately verify the identity of a permit holder on the premises".

The Minister also announced last month that the government is expanding the FWC's Workplace Advice Service, by providing it with AU$1.4 million in new funding. The Minister said, "this funding will allow the FWC to facilitate free legal advice to more small business operators and employees who simply cannot afford to pay for legal services".

State – Amendments to the Industrial Relations Commission Regulations 2005

Anna Lee, Law Graduate

The Industrial Relations Commission Regulations 2005 (WA) have been amended, effective on and from 6 March 2019. The extensive amendments to the Regulations aim to improve the efficiency of the Western Australian Industrial Relations Commission's (Commission's) processes.

The amendments include:

1. **Registrar will be responsible for the service of documents** – Proof of service will no longer be required by parties.
2. **Extending time for electronic lodgement of documents** – Documents lodged up to and including midnight will be deemed to be received that day, and documents lodged on a weekend or public holiday will be deemed to be received on the next working day.
3. **The consolidation and modernisation of Commission forms** – A new online lodgement system has been launched, showcasing interactive versions of the modernised form and information guides. Parties may lodge the Commission's modernised forms online, or alternatively, download the forms via the online lodgement system and lodge them in person, by email or by post.
4. **Electronic lodgement of applications to register an industrial agreement** – An original copy of the executed industrial agreement will no longer be required.
5. **The Commission may deal with certain matters on the papers** – This will depend on the appropriateness of the matter and whether a formal hearing is necessary.

Legislation Update

New Regulation to Prevent Casual Employees "Double Dipping"

Madeleine Smith, Associate and Barnaby Austin, Associate

You may recall our report in the September 2018 edition of Workplace View on the Full Federal Circuit Court's decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (the "WorkPac decision"). The WorkPac decision has meant that employers who misclassify employees as casual instead of full time or part time, when the relationship lacks the "essence of casualness", may be liable to repay unpaid National Employment Standard (**NES**) entitlements, such as annual and personal leave.

Some employers can breathe a little easier about the prospects of giant back pay claims after the coalition government passed amendments to the Fair Work Regulations 2009 (Cth) in December last year.

New Regulations

The Fair Work Amendment (Casual Loading Offset) Regulations 2018 (**Regulations**), which came into effect on 18 December 2018 are designed to, "*provide declaratory clarification of existing legal and equitable general law rights to offset payments of identified casual loading amounts in circumstances where a person makes a subsequent claim to be paid one or more entitlements under the NES*".

The Regulations protect employers, particularly small business employers, from potentially having to pay employees twice for the same work. The Regulations confirm that an employer may claim to have its casual loading payments taken into account in determining the entitlements owed to an employee for relevant NES entitlements if an employee meets all of the following criteria:

- Is engaged on a casual basis and paid a casual loading which is clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements
- Is in fact a full-time or part-time employee
- Has made a claim for NES entitlements they did not receive when they were misclassified as casual

The amendments confirm that in reviewing casual employment arrangements in the wake of the WorkPac decision, employers should ensure any casual loading paid in lieu of permanent employment entitlements are clearly identifiable on employee's pay slips and in employment contracts, including identifying which NES entitlements the loading compensates for.

Disallowance Motion

However, the new Regulations are not safe yet. On 14 February 2019, ALP Senator Doug Cameron lodged a motion in the Senate, to be debated on 2 April 2019, to disallow the Regulations.

It appears the ALP intends to repeal the Regulations and instead include a definition of "casual" in the Fair Work Act 2009 (Cth). We will keep you updated on developments!

Migration Alert

DAMAs – The Future to Addressing Skill Shortage Issues in Australia?

Rosalie Cote, Registered Migration Agent (MARN 1910267) and Rachel Barnett, Registered Migration Agent (MARN 1800448)

Following the introduction of the Temporary Skill Shortage visa (subclass 482) (**TSS**), there has been a noticeable decline of employer sponsored visas granted and an increase in skill shortages in many regional areas.

In response to this issue, the Australian government has come up with a range of visa options in circumstances where Australian employers are not able to utilise the common streams of the TSS visa program. This includes the use of Designated Area Migration Agreements (DAMAs) under the Labour Agreement stream of the TSS Visa. A DAMA is negotiated by states, territories or regions that have employers in specified regions experiencing skills and labour shortages to sponsor overseas workers for positions in their business.

Currently, the most prominent DAMA is in the Northern Territory. The Australian Government has also recently announced a DAMA with Victoria's Great South Coast region. There are also discussions with a range of other regions around Australia experiencing skills shortages, including the Pilbara and the Kalgoorlie-Boulder regions in WA, the Orana region in central New South Wales and Cairns in North Queensland.

For more information regarding the Northern Territory DAMA or the Great South Coast of Victoria DAMA, please read our recent article.

Events Update

Squire Patton Boggs Labour and Employment Seminar Series 2019

Our first event in our seminar series for 2019 was a webinar held on 13 March 2019 on "Key On-boarding Issues in 2019", which was very well attended.

Our next event will be a seminar held in both our Perth and Sydney offices providing attendees with a post-election update, on employment and migration issues employers should be watching out for. An invitation will be send out closer to the date; however, the initial details are set out below.

Sydney

- **12:15 – 1:30 p.m. – Wednesday, 7 August 2019** at Squire Patton Boggs **Sydney office,** at Level 17, Aurora Place, 88 Phillip Street, Sydney.

Perth

- **7:30 – 9 a.m. – Wednesday, 14 August** at Squire Patton Boggs **Perth office,** at Level 21, 300 Murray Street, Perth.

Contacts

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

Dominique Hartfield (Editor)
Of Counsel
T +61 8 9429 7500
E dominique.hartfield@squirepb.com

John Oakes
Partner
T +61 2 8248 7804
E john.oakes@squirepb.com

Andrew Burnett
Of Counsel
T +61 8 9429 7414
E andrew.burnett@squirepb.com