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INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER — 15-03-10/2

IN THIS ISSUE:

- **Employer fined for no payslips and underpayment**
- **Principles used by the Commission when deciding unfair dismissals**
- **Failing alcohol test led to successful dismissal**
- **Pregnant employee discriminated against due to part time conversion of employment**
- **Bullying in the workplace can prove costly**
- **Long standing employee reinstated despite failing to abide by safety rules**
- **Company director discriminates based on employee's sexuality**
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EMPLOYER FINED FOR NO PAYSLIPS AND UNDERPAYMENT

An employer has been fined $20,000 for failing to supply pay slips to an employee and for failing to pay the minimum wage.

In addition the employer was ordered to $24,560 in back wages.

The employer who owned a small café pleaded to the Federal Court that they had a poor command of English and that the café was their first business.

The Federal Magistrate found that the penalty should reflect that the director and manager had been reckless in the extreme in failing to make enquiries about their obligations as employers in circumstances where they had never run a business before.

Fair Work Ombudsman v Fortcrest Investments Pty Ltd [2010] FMCA 18 (18 January 2010)

ISSUES TO CONSIDER

The failure to supply pay slips and advice regarding superannuation are serious offences as is any non compliance with industrial laws and legislation.

An employer who does not comply is running a significant risk and while there are reports of employers being prosecuted it is nowhere near the number of employers who are caught and have to settle the matter and issues.

OUR VIEW

The Inspectors for the Fair Work Ombudsman have wide ranging powers of investigation and the number of Inspectors has increased. The penalties that can be imposed on an employer can be up to $33,000 for each offence and potentially each time it occurred.

An employer who does not get advice regarding awards and work provisions applicable at their operations is at risk of being caught and can reasonably anticipate that occurring.

PRINCIPLES USED BY THE COMMISSION WHEN DECIDING UNFAIR DISMISSALS

In an unfair dismissal matter where the employee was found to have committed fraudulent behaviour against an employer the Commission analysed the sections of the Fair Work Act 2009 as it applies to unfair dismissals.

The employer was found to have a valid reason for the dismissal but had failed to advise the employee of their right to have someone attend the meeting to discuss the fraudulent behaviour but that was found to be not critical to the particular case.

The employer did not issue a warning because of the gravity of the matter and the Tribunal found that was not necessary in the particular case.

The employer did not adequately investigate the matter and in the view of the Tribunal Member this was relevant.

The findings were that the dismissal was not harsh or unjust but was unreasonable because of the inadequate investigation by the employer even though the employee admitted the fraudulent behaviour during cross examination.

In considering the compensation to be awarded to the employee the Tribunal found that the employee had commenced work a week after the dismissal and awarded the employee no compensation.

Bermingham v Kings Transport and Logistics Pty Ltd [2010] FWA 1116.

ISSUES TO CONSIDER

As set in this case the process of dismissing an employee is as critical as the reasons for dismissing the employee.

The dismissal will still occur but the process will be reviewed and without the process being carefully implemented the chances of an employee being successful in an unfair dismissal application and greatly enhanced.

OUR VIEW

The evidentiary trail is critical to the defence of unfair dismissal applications and so are the reasons for the dismissal.

Give us a call before you start the process of dismissal or go to our website and purchase the employment manual for a step by step guide.

FAILING ALCOHOL TEST LEADS TO DISMISSSAL

The employee had worked for the Company for over seven years as a line haul train driver with no prior issues but failed a Company breath test when he tested above 0.02% on the three occasions he was tested that day.

The employee was stood down and directed to attend a counselling session to respond to the allegations where he stated that six hours before the commencement of his shift he had drunk 2 stubbies of full strength beer with lunch. He was eventually dismissed. He later put his response in writing and claimed he could not recall the amount of alcohol consumed and at what time.

The employee made an unfair dismissal claim and argued the Company drug and alcohol policy was "flawed" and that application of this policy across all employees was not consistent.

The employer stated that a safety notice confirming the importance of compliance with its established Drug and Alcohol Management policy had been issued weeks before the incident and that refresher training had been undertaken that year. The Drug and Alcohol Management policy set out the maximum allowable alcohol levels and reflect legislative requirements in regards to drug and alcohol obligations for train drivers. On the day of the incident, the applicant was tested twice and a final time 25 minutes later with all three results showing an above limit.

Fair Work Australia supported the employer's decision and that it had taken appropriate steps which included advising the employee of the allegations, giving him an opportunity to respond to the allegations before making the decision to terminate his employment.

Mr H v The Employer FWA 532 (04/02/10)

ISSUES TO CONSIDER

Policies need to reflect the employer's characteristics in terms of employment obligations as well as its social and legislative responsibilities.

In relation to drug and alcohol testing, employers must ensure the testing equipment is reliable and supports the integrity of the testing mechanism.

The process of dismissal in this matter was carried out correctly.

OUR VIEW

Policies need to be applied consistently to employees throughout the company.

Furthermore, regular promotion of the policy should be made to employees and a fair disciplinary process followed prior to a decision to end the employment.

If you wish to discuss this matter further contact us.

PREGNANT EMPLOYEE DISCRIMINATED AGAINST DUE TO PART TIME CONVERSION OF EMPLOYMENT

The employee worked full time in a beauty salon and after becoming pregnant requested a reduction in her shifts to cope with pregnancy related illnesses.

The employer initially declined the request but did propose alternative arrangements including taking longer breaks, swapping morning shifts with other employees, leaving early and taking "power naps". Following medical evidence provided by the employee, the employer agreed to the arrangement that the employee would now work three 8 hour shifts per week as a part-time employee.

Following a down turn in business some months later, the employer made the pregnant part time employee redundant.

While the Anti-Discrimination Board accepted that any redundancy decision was business related, it acknowledged that they chose a part-time employee to retrench as the most reasonable position to remove. However the only reason the terminated employee became part time was due to her requesting a reduction in hours due to her being pregnant and the pregnancy was a "substantial reason" in choosing her employment to be terminated.

That is, the employee was treated less favourably than the other employees who required a change in hours for reasons other than pregnancy. The fact that no other employee was made redundant added further weight against the employer.

The Board found that the employer, did not recognise that the employee's reduction in hours was a temporary arrangement because of the pregnancy and should have acknowledged that the employee was still a full time employee.

Stern v Depilation & Skincare Pty Ltd VCAT 2725 (22/12/09)

ISSUES TO CONSIDER

Discrimination includes direct and indirect discrimination on the basis of an attribute such as pregnancy.

Direct discrimination occurs where a person treats someone with an attribute less favourably than they would treat someone without that attribute. It does not matter whether the discriminator was aware of their actions.

The National Employment Standards have provisions relating to employers' obligations for pregnant employees including transfer to "appropriate safe jobs" and paid "no safe job" leave where an employee cannot provide an appropriate safe job.

OUR VIEW

It is critical that employers attempt to accommodate a pregnant employee who makes a request to alternative arrangements during their pregnancy when a mitigating medical issue prevails. In these circumstances any alternative arrangements, which may include a change in employment status or reduction in hours, are to be viewed as a temporary arrangement from the pregnant employees normal terms and conditions of employment and that unless these or other arrangements in the future are agreed to, that the employee is expected to return to the position they had prior to their pregnancy.

Any arrangements agreed to between the parties, including changes to status of employment should be documented and the period of the change set out.

Whilst a person may be made redundant due to business related reasons, the factors as to why a particular person has been chosen will be taken into consideration by a Tribunal. In this particular case, the employer chose a part-time employee as the best preference however the only reason that employee became part-time was directly related to her pregnancy.

If you wish to discuss this matter, or have a similar matter, contact us.

BULLYING IN THE WORKPLACE CAN PROVE SIGNIFICANTLY COSTLY

The employee had worked in a Club as a bar worker where her proven allegations of intimidation, bullying and harassment by her supervisor led to her becoming severely psychologically harmed and unable to work.

Examples of her supervisor's unlawful behaviour included – repeated threats that the Club would "get rid of her", inappropriate language used towards her, requests to break liquor licensing laws, changing shifts without any consultation with the employee including changing her employment status from casual to part time, directions to end her union membership, falsely accusations of theft, reducing her position grade, displaying inappropriate material in the form of pornographic material in the employee's presence.

The employee's symptoms relating to the supervisor's conduct included – crying, loss of sleep, nausea, body itching and was required to seek medical attention that assessed the employee as suffering severe psychiatric problems including serious anxiety disorder, post traumatic stress disorder and depression.

The Tribunal found against the employer and awarded the woman over $500,000 in damages which included lost earnings, both past and present as well as super.

Bailey v Peakhurst & Recreation Club Ltd NSWDC 284 (03/11/09)

ISSUES TO CONSIDER

Courts have the ability to award damages against an employer who has a vicarious liability to ensure their employees act in a professional manner at all times.

Furthermore, an employer has an overriding obligation to ensure a safe and healthy workplace that is free of any potential or likely risks such as bullying, harassment and intimidation.

OUR VIEW

Employers must ensure that they demonstrate a commitment to the eradication of threatening behaviour within their workplace and demonstrate that such conduct will not be tolerated at any level.

As every employer is vicariously liable for the actions of their employees towards each other, the public, etc, they must ensure they are able to prove they have taken "reasonable steps" to lessen any arguments against them.

Such reasonable steps by an employer can include actively promoting an anti-bullying/harassment/intimidation/etc through policies, procedures which include how to make a complaint, investigation of allegations information and ongoing training. Such actions on the part of the employer will be critical in defending any claim made against them. For further information, contact us and we can assist you with implementing such procedures for your workplace.

LONGSTANDING EMPLOYEE REINSTATED DESPITE FAILING TO ABIDE BY SAFETY RULES

The employee had worked at the newsprint manufacturing site in regional Australia for almost 20 years.

The incident that led to his dismissal occurred when he was asked four times by a manager to wear his safety glasses where he was cleaning out a tank containing staples that had to be removed. The employee claimed that he had taken his glasses off as he could not see inside the tank and that due to the humidity inside the tank his glasses were fogging up. He also admitted to swearing at the manager directing him to wear his glasses and to modifying a tool to remove the staples from the tank faster.

The employee was terminated for misconduct in that he breached safety policies and practices by repeatedly failing to wear the safety glasses despite prominent signage to require employees to wear them as being repeatedly reminded during the course of work on the day of the incident and refusal to obey a lawful direction given by a team leader not to modify a tool and use it to remove staples.

Whilst Fair Work Australia did not accept the lawful direction argument in the case of the tool, the repeated failure to wear the goggles was a valid reason to dismiss and acknowledged that the employee's disciplinary history with the Company.

Fair Work Australia however took into consideration the economic impact imposed on the employee as a result of being dismissed and the ordered a reinstatement but not with payment of lost wages. The reinstatement was due to the employee's progressive age and limited education which gave him poor employment prospects and a genuine risk of severe financial hardship.

Fair Work Australia did recognise that the misconduct was of a serious nature and that the Company took its obligations seriously and that while a warning would have been sufficient on this occasion, any further similar breaches would warrant a dismissal that was fair.

Quinlivan v Norske Skog Paper Mills (Australia) Ltd FWA 883 (08/02/10)

ISSUES TO CONSIDER

Tribunals have discretion to consider the personal and economic situations of the terminated employee, particularly with regards to their socio-economic status.

OUR VIEW

While this case highlights the employer's vulnerability of an arbitrated outcome, employers should continue to take their OHS obligations seriously and ensure managers give effect to any safety policies and procedures.

It also shows the importance of looking at the "overall circumstances" of the situation including the employee's socio-economic status, their length of service with the Company, employee performance record and similar in addition to the policies breached and the decision to terminate following procedural fairness or provide a formal written warning.

If you are experiencing performance issues with an employee and are considering what options to take, contact us for a discussion.

COMPANY DIRECTOR DISCRIMINATES BASED ON EMPLOYEE'S SEXUALITY

The employee alleged that the Company director of the caravan park he worked at would ask him questions relating to his private life including his sexual partners and would also make comments about homosexual people.

The Company had discussed with the employee their concerns relating to his work practices.

The employee complained to the Anti-Discrimination Tribunal who found that the conduct against the employee was unwelcome despite the employee openly admitting his sexual orientation. The Tribunal also found that the Company director had directly discriminated against the employee by calling him a "shirt lifter" and it was inappropriate particularly for a Company director to refer or allow others to do so, against a person in an offensive manner.

The employee was awarded $2,000 in damages and the Company director had made attempts to mitigate by offering a limited apology.

Kelly v Moore and GJ & AM Moore Pty Ltd QADT 20 (17/11/09)

ISSUES TO CONSIDER

An example of discrimination based on sexuality can mean treating a person differently because they are homosexual. Asking someone if they are gay and thereafter making their sexuality a subject for discussion would be found a contravention by a Tribunal.

OUR VIEW

Employers should demonstrate a commitment to eliminating discrimination in their workplaces and putting practices in place that promote this goal and ensuring their employees are aware of their responsibilities. Aside from anti-discrimination laws, obligations arise in occupational health and safety legislation where employers and employees must ensure a safe and healthy working environment is in place.

Any persons who represent the employer such as directors should also be expected to abide by these obligations as an employer has a vicarious liability when it comes to the actions of theirs staff and representatives.

If you wish to discuss any of these matters then contact please contact:

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