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Employment & Industrial Relations Newsletter, September 2013

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Welcome

In this newsletter we consider a watershed decision handed down by the Full Court of the Federal Court on implied contractual terms. We also look at a Federal Circuit Court judgment where a company and its sole director received record fines for sham contracting.

In our cases roundup section we summarise, among other cases, a significant decision on the general protections provisions and on the importance of consistent treatment in dismissals, and following on from our last HR Forum, a very topical post-employment restraint case.

With the upcoming election there have been no shortages in government announcements on proposed employment law changes. Our next HR Forum is on 16 October 2013. We will provide an overview of proposed employment law changes in the wake of the election. If you are interested in attending this free forum, please contact events@cornwalls.com.au.

July & August at a glance

- The newest federal protections against discrimination commenced. The following attributes are now protected under federal laws: sexual orientation, gender identity and intersex status.
- The Fair Work Commission's practice note on Fair Work hearings commenced on 22 July 2013. The note provides procedural guidance on the conduct of hearings. The Commission also made significant changes to its website (particularly regarding how it publishes decisions).
- ASIC has used new powers for the first time to appoint liquidators to six abandoned companies in an attempt to help employees gain access to the Fair Entitlements Guarantee.
- The Fair Work Ombudsman announced it will target the hospitality and restaurant industry by auditing employers in an attempt to crack down on underpayment issues.
- Fair Work Building and Construction reported its findings on its 'National Record Keeping, Payslip and Base Ordinary Wage Audit'. The agency discovered 407 employees had been underpaid almost $242,000.
- 'Australia's Welfare 2013' (the 11th biennial report of the Australian Institute of Health and Welfare) was released. Among other things, the report found that labour participation rates for older Australians has increased significantly.
- The Mentally Healthy Workplace Alliance was launched by the National Mental Health Commission. This is a collaborative partnership between business, the mental health sector and government, which aims to

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provide the business sector with practical guidance about mental health.
- The National Heavy Vehicle Regulator released the second edition of 'On the Road'. It includes information on the Heavy Vehicle National Law, fatigue management and drivers' work diaries.
- WorkSafe WA announced it will conduct an inspection program to look at safety standards in clothing and footwear retailing outlets in the 2013/14 financial year.
- Safe Work Australia released the final version of the *Traffic Management in Workplaces Code of Practice*, its model code of practice on workplace traffic management, as well as four industry-specific guides to the Code.
- The Australian Capital Territory's new on-the-spot fines regime for workplace health and safety breaches began.
- Safe Work Australia released its annual comparison report on workers' compensation arrangements in Australia and New Zealand. The report provides an overview of the different workers' compensation schemes across all jurisdictions.
- In other workers' compensation news, WorkCover Qld released a new guide for employers to determine if a person is a 'worker' for workers' compensation purposes. This follows on from the recently narrowed definition of 'worker' under the Workers' Compensation and Rehabilitation Act 2003 (Qld). WorkSafe Victoria also published a guide to help employers understand their workers' compensation insurance premiums for 2013/14.

Record fines for sham contracting handed down

In proceedings brought by the Fair Work Ombudsman (**FWO**), the Federal Circuit Court has handed down record fines totalling almost $300,000 to a company and its sole director for sham contracting and their wilful blindness to the minimum award standards under the *Fair Work Act 2009* (Cth) (**Act**).

The company had engaged bus drivers as 'independent contractors' to drive passengers to and from Sydney airport and did not pay the drivers the minimum rates of pay under the relevant award, loadings, overtime, public holiday or other award entitlements. The FWO argued that the drivers were, in reality, employees of the business and had been underpaid a total of $26,000 over a four-month period.

The FWO sought severe penalties against the company and its sole director under the sham contracting and underpayment provisions of the Act. It argued that the company had contravened the Act deliberately or with wilful blindness because it had been given extensive notice and warnings in the past from the Australian Taxation Office, the Fair Work Commission and the Administrative Appeals Tribunal about the misclassification of its employees as independent contractors. The company had also failed to keep proper employment records and payslips, which made it difficult to assess the true amount owed to the drivers.

The company conceded it had contravened the Act but argued that the penalties were excessive because it had recently made efforts to make good on the underpayments.

The decision

Justice Driver held that severe penalties were appropriate because the company had been wilfully blind to its employment relationship with its drivers. The FWO had issued a Letter of Caution to the company in 2011 regarding the misclassification, but the company continued to treat its drivers as independent contractors. This was held to be a 'significant aggravating factor'. The company had also been subject to multiple workplace complaints about the same issue in previous years and therefore had been given 'ample opportunity to learn the difference between an employee and an independent

contractor'.

His Honour held that both general and specific deterrence was necessary to highlight the need for all businesses to comply with minimum statutory entitlements. Importantly, he emphasised that financial hardship was not an excuse for failing to pay minimum award requirements, particularly for small businesses. Specific deterrence was necessary, given the company's previous history and the sole director's considerable experience as a company officer.

Nonetheless, a 20 per cent discount was applied to the penalty because the company had made admissions and had recently taken corrective action to address certain underpayments. The company was fined $252,120 and the director was personally fined $47,784.

For employers

This case serves as an important reminder that employers must understand and act in accordance with the difference between an employee and an independent contractor. Employers should also keep accurate employee records. Ignorance and financial hardship are not valid excuses for failing to pay the minimum entitlements prescribed by the Act.

Implied term of mutual trust and confidence confirmed in all Australian employment contracts

While an implied obligation of mutual trust and confidence has long been recognised by English courts as an essential part of the employment relationship, a recent landmark decision in Australia supports the argument that this implied duty also forms part of all Australian employment contracts.

Background

In this case, the employee was employed as an executive manager with a major bank in Adelaide. He had been employed by the bank, in various capacities, over a 23-year period.

A clause in the manager's written employment contract provided that if his position became redundant, the bank would seek to place him in an alternative position, commensurate with his skills and experience.

On 2 March 2009, the manager was informed in writing that his position was to be made redundant that day. He was also told that it was the bank's preference to redeploy him to a suitable role within the bank and that appropriate options would be explored with him. The manager was informed that if he was not redeployed his employment would be terminated on 2 April 2009. This date was later extended to 9 April 2009 and the manager was duly informed that his employment was terminated by reason of redundancy, effective from the close of business that day.

In 2010, the former manager brought proceedings against the bank for, among other things, breaching an implied term of 'mutual trust and confidence' when the bank failed to comply with its own policies regarding his redundancy. At first instance, it was held that the bank's failure to comply with its policies was a serious breach of the implied term of mutual trust and confidence and the court awarded him $317,000 in damages for loss of opportunity.

Decision

The decision was appealed on two grounds - first, that the former manager's contract did not contain an implied term of mutual trust and confidence and second, if it did, the bank's breach of its own policies did not constitute a serious breach of the term.

In a majority decision, the Full Court of the Federal Court found that the implied term, which was first recognised in the House of Lords decision in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (**Malik**) should be accepted in Australia. In Malik, it was held that the term was implied in a contract of employment so that 'an employer must not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'. Importantly however, the House of Lords found that the term did not apply at the point of an employee's dismissal.

The court found that in this case, the line - which could be drawn between the bank's acts prior to his dismissal and the dismissal itself - should be drawn in favour of the term's application. The bank's obligations under the term were to take positive steps from 2 March 2009 to discuss opportunities for redeployment with him. Its failure to do so was sufficient to constitute a breach of the term and damages were recoverable as a result of that breach. However, the bank's failure to follow its policies with respect to redundancy was not co-extensive with the implied term because the policies were not part of the former manager's employment contract.

For employers

This case is significant because it supports the position that a term of mutual trust and confidence is implied into all Australian employment contracts, which prohibits employers and employees from engaging in conduct that is likely to destroy or seriously damage the relationship of confidence between them. However, an employer's duty under the implied term will vary according to the nature of the employment relationship and the facts of each case.

Cases roundup

Ordered to undertake industry training

The Brisbane Industrial Magistrates Court has handed down the first penalty under Queensland's mirror Work Health Safety Act, ordering a building contractor to undertake industry training (one of the new sentencing options available under the Act).

Diabetic worker denied additional breaks - not discriminated against

The Tasmanian Anti-Discrimination Tribunal has dismissed a diabetic worker's claim that he was discriminated against when his employer and supervisor refused to provide him with additional break time to inject himself with insulin. In its ruling, the Tribunal upheld the Anti-Discrimination Commissioner's finding that there was no basis for finding that the worker was treated less favourably than others.

The Tribunal found that the employer already provided each employee with an additional five-minute break on top of their lunch, morning and afternoon tea breaks 'for the very purpose that the worker sought the extra time'. The worker was also allowed to ask for additional time as required and it was entirely reasonable given the nature of the parking officer's work that the employer required him to notify his team leader if he needed an additional break.

Managerial abuse and heavy workload lead to suicide attempt

A worker who attempted suicide has been awarded workers' compensation after the Workers Compensation Commission of New South Wales (**WCC**) found his psychological injury arose as a result of a heavy workload and managerial abuse. The WCC rejected the employer's claim that the worker's condition was caused by a drug dependency (or alternatively by reasonable management action) and said the evidence indicated the worker developed symptoms in response to issues that arose at the workplace (including a

heavy workload, lack of assistance and support (despite requests) and treatment by management that included abusive language).

September 12 is 'R U OK? Day' - a suicide-prevention initiative that encourages workers to ask colleagues how they are feeling.

Court refuses to uphold post-employment restraint

The New South Wales Supreme Court has dismissed a food manufacturer's interlocutory claim that a former national sales manager threatened to breach the post-employment restraint provisions contained in his contract and ordered the company to pay the former employee's legal costs after the court determined that there was little likelihood of genuine harm.

The manager first accepted a position with one of his former employer's major competitors in New South Wales (which was prohibited by the terms of his contract). Legal proceedings were commenced and he was offered a different role with the competitor in its Auckland office. Interestingly the former manager's contract with his new employer contained a provision that required him to honour his post-employment obligations. Despite this, the company refused to release the former employee from his obligations and sought to enforce its post-employment restraints.

The court criticised the company for proceeding with the case, noting that the former manager's new role and responsibilities would not amount to an actual or threatened breach of his restraints because the New Zealand division was not in competition with the company's business activities in NSW.

Importance of consistent treatment in dismissal

The Fair Work Commission (**Commission**) has upheld the dismissal of a worker who drank two bottles of water prior to a second-chance drug test and then provided a diluted urine sample that was unsuitable for determining whether he had drugs in his system. Having already once extended the deadline for returning a 'clear' result, the employer denied the worker more time and found he had failed to demonstrate his fitness for work (thus justifying termination of his employment). The Commission considered a range of factors in determining that the worker's dismissal was not unfair, including that he was treated consistently with other workers (who had also provided positive drug tests) and there was nothing to suggest he would have been treated differently if he too had provided a clear sample prior to the cut-off date.

Union t-shirt case kicked out in the cold

The United Firefighters Union's attempt to convince the Federal Court that a member's employer took adverse action against her when she wore a union t-shirt during protected industrial action in support of a new enterprise agreement has failed. During a period of industrial disputation, the executive assistant to the Executive Director of People and Culture put on the union t-shirt over her existing clothing, allegedly because she was cold and in an attempt to 'see what kind of reaction' she would get. The assistant made a point of going into her director's office, who said she wasn't 'thrilled' to see her wearing it but that it was 'fine'. Later she went in front of the chief executive, who told her he had 'no comment to make on that'. The court rejected arguments that the wearing of the t-shirt constituted industrial action and as such, the assistant was not exercising a workplace right under the Act. The court also rejected her arguments that she had been subject to any adverse consequences as a result of wearing the t-shirt.

Worker injured at home awarded workers' compensation

After protracted legal proceedings, the Telstra employee injured after she fell down a set of stairs (twice) in 2006 while working from home has won her bid for ongoing compensation for a psychological injury. Telstra denied liability for loss of earnings or medical expenses incurred due to her psychological injury, claiming it was no longer work-related after December 2007 and arguing her injury was caused by such factors as the stress of a business venture she was involved in. The Administrative Appeals Tribunal of Australia rejected Telstra's arguments and found it was still liable for the worker's psychological injury.

Assaulted worker wins workers' compensation

The Workers Compensation Commission of New South Wales (**WCC**) has awarded workers' compensation to a Qantas flight attendant who was assaulted after leaving a bar during a break between two flights in Texas. The worker, who had consumed a number of alcoholic drinks, was assaulted and robbed as he walked alone to his hotel. Qantas denied liability, arguing his injuries were not work-related. However, the WCC found that the worker was injured during an 'interlude in an overall period of work' and 'in a place where he was expected to be and engaged in activities anticipated and expected by Qantas'.

Watch this space

Apprentice ruling

New apprentices are expected to benefit from significantly increased wages after the Commission decided current award rates should be lifted. The full bench has also agreed to vary a number of award conditions for all apprentices, such as travel costs and timely payment of training fees.

Minimum rates for adult apprentices will also be introduced to awards that do not already contain them, and for all awards will be set at 80% of the base trade rate in year one (unless the award already provides for a higher rate). In year two, the adult apprentice minimum rate will be the adult minimum weekly wage or the lowest classification rate in the award (whichever is the greatest).

The variations dealing with apprentice conditions of employment will apply to all apprentices from 1 January 2014.

Grocon asks court to fine CFMEU $5 million

Grocon has made a submission to the Victorian Supreme Court to fine the CFMEU a record $5 million for defying court orders to lift its high-profile Melbourne CBD blockade of the Myer Emporium. The court is yet to determine the matter.

High Court reserves decision in the motel room rendezvous case

The High Court has reserved its decision in the appealed case of a worker who was injured while having sex on a work trip. To the surprise of many, the Full Federal Court previously held that the worker's injuries were compensable because her injuries were work-related, given they were sustained in an interlude within an overall period of work and at a place the employer had induced or encouraged her to be.

Road Safety Remuneration Tribunal

Following on from the release of its draft orders and hearing of submissions in August, the Road Safety Remuneration Tribunal is due to hear further submissions in October regarding whether it should make an enforceable remuneration order.

Level 10, 114 William Street, Melbourne VIC 3000, Australia | Phone +61 3 9608 2000 | Fax +61 3 9608 2222