JONES DAY

JULY 2013

MONTHLY UPDATE — AUSTRALIAN LABOUR & EMPLOYMENT

CONTENTS

MESSAGE FROM THE EDITOR

Timing is everything. The day after we sent our June Update to the printers, renewed talk of another leadership challenge ended in Mr Kevin Rudd being reinstated as Prime Minister of Australia on 27 June. While at the time of writing (22 July) the 14 September Federal election date remains unchanged, there is talk of bringing the date forward and it is no longer safe to assume that there will be a change in government following the election. With such uncertainty in the political sphere, we return to the traditional battleground for an update from the courts where we have seen some interesting decisions in the last month.

Adam Salter, Partner

HOT OFF THE BENCH–DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

$600,000 IN DAMAGES AWARDED TO WORKPLACE BULLYING VICTIM

A recent Victorian Supreme Court decision has highlighted the need for employers to take swift action when an employee reports workplace bullying. The 61-year-old part-time employee was awarded $300,000 in damages for pain and suffering for a severe psychological condition that resulted from years of sustained intimidation, bullying and harassment from her manager, together with $292,554 for pecuniary loss.

The Court found that the employee experienced a "pattern" of bullying behaviour including a book being thrown at her and repeated verbal attacks from her manager, among other incidents over a four-year period. Back in 2003, and again in 2005, the employee notified her employer about the tension with her manager and the Court was satisfied that had the employer acted promptly, the employee would not have suffered any (or any significant) psychological injury. The Court was also critical of the employer for misleading the employee that it was taking action to deal with the complaint (e.g. promising to implement a workplace conduct policy) when it did not.

In finding the employer vicariously liable for the conduct of the manager, the Court emphasised that an employer cannot abrogate its responsibility for assessing the risk of injury to an employee. Once a complaint is made, the employer has a positive obligation to investigate.

Swan v Monash Law Book Co-operative [2013] VSC 326

Reflection for employers: With a new Federal bullying complaints jurisdiction commencing on 1 January 2014 and Safe Work Australia in the process of finalising a Code of Practice on bullying, there is no doubt that workplace bullying is under the spotlight in Australia. If your organisation does not already have a policy, it should be a priority to develop and implement one.

We recommend employers review their policies to set standards of appropriate workplace behaviour and ensure appropriate processes are in place to address grievances.

BARGAINING UPDATE: FWC "DISLIKES" MAJORITY VOTE CONDUCTED ON FACEBOOK

The Fair Work Commission ("**FWC**") has held that Facebook "likes" are not enough to show that a majority of employees are in support of an application for union registration as an enterprise association.

In a battle for members, a new union iCabin Crew Connect ("**Union**") applied to the FWC to become a registered union covering Virgin Australia's 2000-plus cabin crew employees. In order to gain registration, the Union had to establish that it had majority support of the employees it was seeking to represent.

To demonstrate majority support, the Union unsuccessfully sought to rely on a range of communications including 500 "likes" from employees on the Union's Facebook page.

The FWC dismissed the Association's application, holding that "the majority of the communications were not expressions of support of the requisite kind" and even if they were, did not constitute a majority of the relevant class of employees.

Food for thought: As unions continue efforts to boost membership and stay relevant to modern workforces, companies that employ workers that fall within union coverage should keep their ears close to the ground (or should we say the computer screen?) as Facebook and Twitter "campaigning" becomes more frequent and accessible. Expect also to see more jostling between competing unions for membership and recognition at the workplace.

Social media campaigning also opens up another avenue for workplace bullying and coercion in support of a union's agenda. It is important to have good grievance policies and procedures to be able to investigate and discipline workers for intimidation or bullying occurring between workers on social media platforms.

ADVERSE ACTION UPDATE: THE PRIVACY ACT DID NOT GIVE A WORKER A "WORKPLACE RIGHT"

The Federal Circuit Court has determined that the *Privacy Act 1988* (Cth) is not a "workplace law" for the purpose of protecting a person against adverse action under s 340 of the *Fair Work Act 2009* (Cth) ("**Act**").

The employer in question had engaged a graduate intermittently as an independent contractor and later asked her to apply for a full-time role as an employee. As part of the pre-employment screening process, the job applicant was required to provide an electronic copy of her signature and a digital copy of her passport to an agent conducting the pre-employment drug test. The job applicant declined, citing concerns about identity theft and privacy.

The prospective employer withdrew the offer of employment and at the expiry of the latest engagement terminated the independent contractor arrangement. Although the prospective employer eventually hired the job applicant a few months later (having decided that she had provided

sufficient information to pass the pre-employment check), it dismissed her because she did not accept the authority of her manager.

The job applicant was unsuccessful in her claim for more than $2 million for loss of future earnings alleging that the withdrawal of the original offer, termination of the independent contractor arrangement and dismissal amounted to adverse action for exercising a workplace right arising under a workplace law, namely the *Privacy Act 1988* (Cth) ("**Privacy Act**").

The Court held that the Privacy Act is also not a "workplace law" for the purpose of the general protections provisions in the Act, as the primary concern of the Privacy Act is not aimed at regulating the relationship between employers and employees. However, the judge conceded that a provision within an Act or regulation could regulate the relationship between employers and employees even though the Act or the regulations as a whole did not do so.

In any case, the Judge found that the employer had discharged the onus of proving that it had terminated her employment because of her attitude to her manager and not because she had commenced an adverse action claim.

Austin v Honeywell Ltd [2013] FCCA 662

In a nutshell: Not all statutory rights amount to workplace rights granting protection against adverse action. Whether a workplace right exists depends on whether the provision or Act is aimed at regulating the relationship between employers and employees. The Privacy Act was held not to be a workplace law, therefore it did not give rise to a workplace right.

HOW FAR IS TOO FAR? FWC GIVES GUIDANCE ON WHAT IS REASONABLE TRAVEL FOR AN ALTERNATIVE OFFER OF EMPLOYMENT

A recent decision has provided very helpful guidance on what constitutes an *acceptable* offer of alternative employment where the position has been made redundant.

In this matter, two employees for a catering service in the Hunter region rejected an offer of alternative employment on the basis that the 25km travelling distance to the new location was too far, making the offer *unacceptable*. The new location would have offered them employment in similar catering-based roles with the same pay and hours.

The employer applied to the Fair Work Commission ("**FWC**") to get an order to vary the obligation to pay redundancy pay to the two workers who refused to be redeployed. FWC affirmed that the employer bears the onus of proving that such an offer is acceptable. The employer submitted that the employees' contracts provided for such a move and therefore it was entitled to change the location.

The FWC held that the additional travel time to the new location did not constitute an unacceptable offer of alternative employment. The FWC was satisfied that the appropriate travel time to the new location was considerably less than what the employees claimed and did not prevent the offer from being acceptable. The employer's application to reduce the employees' redundancy pay to zero was granted.

Spotless Services Australia Limited [2013] FWC 4484

Lessons for employers: What is acceptable will depend on the circumstances. The 25km distance in this case needs to be considered in the context of the roles which were located outside a central business district and amounted to only an additional travel time of 25 minutes each way. It was also noted that given the flexible nature of catering work, it would not have been realistic for the employees to expect to remain at their current location indefinitely.

This decision is a timely reminder of the helpful provisions in the Act which allow employers to apply to the FWC to reduce the redundancy cost exposure when suitable alternative employment has been offered.

NEW AND NOTEWORTHY–IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

PARLIAMENT WATCH: AMENDMENTS TO THE FAIR WORK ACT PASSED AND (PARTLY) IN EFFECT

For the last few months, we have been following the progress of the amendments to the *Fair Work Act 2009* (Cth) ("**Act**") and on 27 June, the *Fair Work Amendment Bill 2013*

passed both Houses of Parliament, becoming the *Fair Work Amendment Act 2013* ("**Amendment Act**") and receiving Royal Assent the next day.

As reported in our March and April Updates, the Amendment Act amends Australia's workplace relations laws by introducing new rights under the Act and conferring new powers on the workplace tribunal, the Fair Work Commission (the "**FWC**"). Relevantly, the FWC will pick up a new jurisdiction commencing 1 January 2014 to hear bullying complaints, and also arbitrate general protections claims with the consent on the parties. However, in order to enable the amendments to be passed, the Federal Government abandoned the proposal to give the FWC the power to arbitrate stalled greenfields agreement negotiations.

A number of the "family friendly" amendments relating to concurrent unpaid parental leave, special maternity leave and flexible work arrangements have already come in effect, commencing on 1 July 2013.

The balance of the amendments will come into effect on 1 January 2014, including the new bullying complaints jurisdiction and union right of entry provisions which have given the green light for discussions to take place in lunch areas. In addition, employers will need to consult with employees (and their representatives) covered by a Modern Award or Enterprise Agreement about changes to rosters.

DID YOU KNOW?

New Fair Work Information Statement Available Online. Employers are reminded that all new employees need to be given a copy of the Fair Work Information Statement published by the Fair Work Ombudsman, before or as soon as possible after commencing employment. Make sure your organisation has the latest version on file as an updated version was released effective 1 July and is available from the FWO web site (http://www.fairwork.gov.au/FWISdocs/Fair-Work-Information-Statement.pdf).

QUESTIONS

If you have any questions arising out of the contents of this *Update*, please do not hesitate to contact Adam Salter, Partner, or Lisa Franzini, Associate.

Adam can be contacted by email at asalter@jonesday.com or by phone on +612 8272 0514.

Lisa can be contacted by email at lfranzini@jonesday.com or by phone on +612 8272 0704.

UNSUBSCRIBE?

If you no longer wish to receive the *Monthly Update—Australian Labour & Employment*, please send an email to asalter@jonesday.com with the subject UNSUBSCRIBE.

JONES DAY GLOBAL LOCATIONS

ALKHOBAR	COLUMBUS	IRVINE	MOSCOW	SÃO PAULO
AMSTERDAM	DALLAS	JEDDAH	MUNICH	SHANGHAI
ATLANTA	DUBAI	LONDON	NEW YORK	SILICON VALLEY
BEIJING	DÜSSELDORF	LOS ANGELES	PARIS	SINGAPORE
BOSTON	FRANKFURT	MADRID	PITTSBURGH	SYDNEY
BRUSSELS	HONG KONG	MEXICO CITY	RIYADH	TAIPEI
CHICAGO	HOUSTON	MIAMI	SAN DIEGO	TOKYO
CLEVELAND	INDIA	MILAN	SAN FRANCISCO	WASHINGTON