

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT



MESSAGE FROM THE EDITOR

Now that the dust has settled following the 7 September 2013 Federal Election, we have noticed employers are pressing ahead with their end of year plans. The new year will bring new challenges with the introduction of privacy law amendments and a new bullying complaints jurisdiction as previously reported. This month we touch on two interesting decisions from the courts—one a victory, the other a warning for employers. We also highlight two future developments to keep an eye on.

Adam Salter, Partner

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

■ OVERSEAS REDEPLOYMENT NOT REASONABLE

Multi-national employers will be pleased to learn that the Fair Work Commission (**FWC**) has agreed that it was not reasonable for an employer to redeploy a redundant worker to overseas operations.

The Australia-based employee brought an unfair dismissal claim claiming his dismissal was not a genuine redundancy. The employee sought to challenge the termination of his employment on the basis that his former employer should have

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explored suitable alternative employment across the global group to redeploy him overseas rather than terminate his employment as a result of the redundancy in Australia.

Under section 389(2) of the *Fair Work Act 2009* (Cth) a termination is not a genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed within the employer's enterprise or an associated entity of the employer. In its defence of the termination, the employer submitted that there were practical difficulties that made overseas redeployment unreasonable in the circumstances, such as relocation costs, differences in company procedures and policies in the overseas entity and no overriding central management.

In evaluating the reasonableness of redeployment, the FWC gave consideration to the costs and impracticality of relocating the employee overseas in the context of adverse overseas market conditions.

Lesson for employers: For employers operating as part of a global group this decision provides a sensible analysis of when it is unreasonable for an employer to redeploy a redundant Australian employee to overseas operations. This decision does not prevent employers from offering redeployment overseas, although such an arrangement would not usually on its own be sufficient to avoid paying redundancy pay to the employee.

Roy v SNC-Lavalin Australia Pty Ltd [2013] FWC 7309 (30 September 2013)

■ \$100,000 ADVERSE ACTION AWARD TO DISMISSED

EMPLOYEE SENDS CLEAR WARNING TO EMPLOYERS

An employee who was sacked for failing to complete a workplace assessment following an accident has succeeded in his adverse action claim and was awarded over \$100,000. The employee was a train driver who had suffered post-traumatic stress disorder and depression following the train accident in which he was involved. The Federal Circuit Court found that the sacking was "clearly deliberate" and for a prohibited reason, accepting that the driver was in a vulnerable state, being sick and anxious following the accident, hence why he was unable to complete the workplace assessment.

The employee had initially sought reinstatement to the position but later claimed and was successful in obtaining compensation and a \$5,000 pecuniary penalty against the company. The Federal Circuit Court awarded the employee six months' lost wages, plus a significant award of \$25,000 for "distress, hurt and humiliation" arising from his dismissal. In deciding the penalty, the judge commented that "there is certainly a need to send a clear message to this employer and others, that employees should only have their employment terminated for proper and lawful reasons. If the employer does not have a proper reason, the employer should expect an appropriate penalty for this unlawful conduct."

Key take away: In Australia, workers have a number of protections, particularly under the general protections provisions which prohibit employers from taking adverse action for a prohibited reason. Consequently it is risky in Australia to terminate an employee's employment without a genuine reason, particularly given the significant damages orders that can be made against employers who fail to terminate for a genuine reason.

IN THE PIPELINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

■ PRIVACY GUIDELINES OPEN FOR DISCUSSION

As reported in our [January 2013 Update](#), new privacy laws will come into operation in March 2014. In preparation for next year's commencement of the *Privacy Amendment (Enhancing Privacy) Act 2012* (Cth), the Office of the Australian Information Commissioner is in the process of developing Australian Privacy Principles (APP) Guidelines. The Commissioner has the power to issue Guidelines to assist organisations to prepare for the upcoming changes. Before finalising the draft Guidelines, the Commissioner has sought public consultation which is being undertaken in tranches. Submissions were most recently sought regarding APPs 6 to 11 which relate to dealing with, and the integrity of, personal information. We will report back once the Guidelines are finalised.

NEW AND NOTEWORTHY—IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

■ ONE STEP CLOSER TO THE RETURN OF THE ABCC?

On 17 October 2013 the Federal Government announced two new appointments associated with the Fair Work Building and Construction (**FWBC**) unit—the construction industry watchdog created by the previous Labor-led Government. Mr Nigel Hadgkiss was appointed Director of Fair Work Building Industry Inspectorate and the Hon. John Lloyd PSM was appointed Chair of the Inspectorate's advisory board.

By re-recruiting two former heads of the Australian Building and Construction Commission (**ABCC**), the appointments are consistent with the Coalition's Federal Election commitment to re-establish the ABCC—a body abolished by the former Labor Government and replaced with the FWBC.

DID YOU KNOW?

The unemployment rate in Australia fell 0.1% in September 2013 to 5.6%, according to figures released by the Australia Bureau of Statistics (**ABS**). The increase in employed people in Australia was driven by an increase in males in full-time employment and females in part-time employment.

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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.

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