JONES DAY

JUNE 2014

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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

SAFETY ON SITE: JUST WHAT THE DOCTOR ORDERED

Grant v BHP Coal [2014] FWCFB 3027

The Fair Work Commission has held that BHP was within its rights to dismiss a boilermaker who refused to attend an appointment with a company-nominated doctor to determine his fitness for work.

The boilermaker had suffered a shoulder injury and consequently had been off work recovering for eight months. Before his injury, the boilermaker had been engaged in heavy manual labour on a mining site at Peak Downs. He had provided medical certificates from treating doctors proving the extent of the injury. However, BHP required him to see its own physician so that it could assess the duties for which he was fit, in accordance with its obligations under s 39(1) of the *Queensland Coal Mining and Health Act.*

Under that section, employers must ensure that workers are not exposed to an unacceptable level of risk. This obligation, and the complementary obligation of the employee to comply with safety-related instructions of the coal mine operator, gave the force of the law to BHP's instruction to attend the doctor, who was an occupational health specialist. Consequently, the direction was lawful and fell within the scope of the boilermaker's contract. The boilermaker had consequently refused to

obey a lawful direction, and the employer was within its rights to terminate the employment.

Key Takeaway

The key takeaway for employers is that there is no entitlement for employees to refuse to comply with directions from their employers that are expressly directly at maintaining safety on site. Employees should be made aware of their obligations to comply with such directions and the consequences that may flow from disobedience.

EMPLOYEES, NOT VIGILANTES

Tao Sun v CITIC Pacific Mining [2014] FWC 3839

The Fair Work Commission has held that allocating a project outside the general job description of an employee is not bullying and that an allegation of bullying does not permit an employee to conduct his own surveillance of those who are alleged to be conducting the bullying.

In *Tao Sun* [2014] FWC 3839, the managing director of CITIC Pacific Mining had allocated a project to an IT manager that was not covered by his job description and had assisted him with it. The managing director had also monitored the performance of the IT manager during the completion of the project, having regard to his performance in the previous year. The IT manager perceived this as bullying and had secretly accessed the managing director's diary and files in order to substantiate that claim. The employee had also secretly recorded meetings between himself and the managing director in an attempt to provide further evidence for his allegations.

The Commission held that the allocation of tasks outside the job description of an employee was provided for by the contract. The contract allowed the employer to "vary" an employee's duties, as long as the majority of them remained within the scope of the role. Accordingly, it did not constitute bullying. As to the conduct of the employee, the Commission held that the employee was still required to abide by the policies of the employer and could not breach them in order to substantiate the claim. The Commission also held that the employer was entitled to continuously examine the performance of the employee and that such reviews were not confined to a particular review period.

Key Takeaways

The decision reasserts three fundamental entitlements of employers. The first is that there remains flexibility in allocating tasks to employees on the basis of business requirements where provided for in the contract of employment. Employers, within reasonable bounds, control these allocations. The second is that employers are entitled to continuously monitor the performance of their employees. Third, employers have rights during bullying investigations, and employees should be reminded that their conduct during those investigations must remain within the limits of company policies.

BIG STICK FOR SHAM CONTRACTORS

Director, Fair Work Building Inspectorate v Linkhill Pty Ltd [2014] FCCA 1124

Sham contracting has earned Linkhill Pty Ltd a record fine of $313,500 this month. The company had engaged workers to renovate its properties on Flinders Lane and Collins St in Melbourne. Representatives of Linkhill led the workers to understand that their contracts were for services, not of employment, and consequently avoided paying approximately $153,000 in entitlements to them. Judge O'Sullivan held that the relationship between Linkhill and those workers was in fact one of employment. As a result, Linkhill was found guilty of sham contracting and was ordered to pay a fine. The size of that fine came down to two factors. First, representatives from Linkhill demonstrated no contrition for the actions of the company. Second, Linkhill representatives failed to appreciate the effect of sham contracting on the employees themselves.

Key Takeaways

There are three key takeaways for employers. Despite the diminution of the union movement, the risk of complaints of sham contracting has not decreased. This is because the Fair Work Building and Construction Ombudsman now undertakes investigations into sham contracting on its own motion. Whether a relationship between company and worker is classified as a contract for services or one of employment is not dependent upon how the company itself classifies the arrangement. The size of the fine will be in some part determined by the attitude of the company to its conduct. Employers should not make the mistake of considering that the cost of sham contracting is less than the risk of punishment for it.

BREAKING NEWS

- **UNION DENSITY AT HISTORIC LOWS: A CHANCE TO NEGOTIATE INDIVIDUAL CONTRACTS**

The percentage of unionised workers across both the private and public sectors reached a historic low last August, down to 17%. 56,400 workers left private sector unions, and 36,500 left those serving in the public sector. All the declines occurred in the States, predominately in manufacturing, healthcare and social assistance, but membership increased in the Northern Territory and the ACT.

The most significant drop in membership was in the manufacturing industry where membership fell from 170,000 members in 2012 to 129,000 in 2013. Professor Peetz, of Griffith University, attributes the losses to the contraction of that industry.

Nationally, this represents the low watermark of union density, from the most recent peak of 28% in 1998. 93% of the workers who left unions in the period up to last August were employed on a full-time basis. Consequently, the decline has created an important opportunity for employers to restructure their full-time workforce by negotiating individual contracts with their employees (rather than negotiating enterprise agreements with unions) and thereby minimise union involvement in their businesses.

- **FAIR WORK COMMISSION INCREASES NATIONAL MINIMUM WAGE**

$640.90 a week, or $16.87 an hour, will be the new minimum wage from 1 July 2014, the Fair Work Commission has ruled.

In coming to this decision, the Commission took into account "the deterioration in the relative living standards of award-reliant workers, the needs of the low paid, the recent widespread improvement in labour productivity growth, the historically low levels of real unit labour costs and the absence in aggregate of cost pressures". The Fair Work Commission considered the increase to be equitable in circumstances where most other employees' wages had increased substantially while there had been almost no growth in the real value of award rates. Last year's review increased award rates by 2.6% to $15.80 per hour.

Employers should be aware that it is possible to apply for a differential minimum wage to be applied to some award employees. However, the review noted that the submissions from industry groups to that effect did not demonstrate exceptional circumstances justifying those orders.

ACKNOWLEDGMENTS

Thanks to Andrew Berriman (Associate) for his assistance in the preparation of this *Update*.

QUESTIONS

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

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