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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

This month, the Full Federal Court has been busy dealing with some significant labour and employment disputes. In *United Firefighters Union v Country Fire Authority*, the Court confirmed that State employers are liable for commitments made in enterprise agreements. In *State of Victoria (Office of Public Prosecutions) v Anthony Grant*, the Court confirmed that the High Court's reasoning in *Purvis* applies to adverse action claims made by employees with disabilities. And in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd*, the Court provided guidance on the dos and don'ts of workplace investigations. On 22 January 2015, we also saw the release of the Productivity Commission's workplace relations issues papers which will frame public debate on the federal government's plans for reform of Australia's labour laws.

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

FEDERAL GOVERNMENT ANNOUNCES INQUIRY INTO AUSTRALIA'S LABOUR RELATIONS LAWS

On 22 January 2015, the Australian Productivity Commission (**Commission**) released a collection of five issues papers which will frame public debate on the Government's plans for reform of Australia's labour relations laws.

The Commission was instructed by the federal government in December 2014 to conduct a public inquiry into the performance of the nation's workplace relations framework, including the *Fair Work Act 2009* (Cth). In conducting this inquiry, the Government has instructed the Commission to examine the current operation of the Australia's labour laws and identify means of improvement, while being mindful of workers' protections and business growth.

The inquiry's terms of reference include investigating unemployment and underemployment, pay, small businesses, productivity and competitiveness, changing economic conditions, patterns of engagement in the labour market, flexibility for employees, bargaining, employer compliance, industrial conflict, independent contracting, the performance of the *Fair Work Act 2009*, the impact of the workplace relations framework, and the experiences of other OECD countries. Labour unions, employers and other interested stakeholders are invited to make submissions for the Commission's consideration.

The Commission has identified the following areas for particular attention:

- Guarantees about employee pay and conditions (safety nets), notably minimum wages, awards, and the National Employment Standards;
- The employee-employer bargaining framework, including industrial disputes;
- Employee protections, notably those relating to unfair dismissal, bullying and adverse action; and
- Other issues in the assessment of the effectiveness of the workplace relations system, such as the efficiency and effectiveness of various workplace relations institutions and government agencies, the overlap between competition policy and workplace relations policy and alternative forms of labour in the economy.

The Commission is expected to release a draft report in mid-2015, when it will seek further information and feedback from the public. A final report containing the Commission's recommendations is scheduled to be delivered to the federal government on 30 November 2015. As to the government's approach to adopting any of the report's recommendations, it has indicated that, rather than guaranteeing implementation, the government will assess if recommended changes are sensible and fair before seeking a mandate for reform at next federal government election, likely to be in 2016.

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

FULL FEDERAL COURT REQUIRES STATE EMPLOYERS TO COMPLY WITH EBA COMMITMENTS

The Full Federal Court, in *United Firefighters Union v Country Fire Authority* [2015] FCAFC 1, upheld the validity of an enterprise bargaining agreement (**EBA**) between the Country Fire Association (a State-owned corporation) (**CFA**) and the United Firefighters Union (**Union**). The decision reverses a recent finding of the Federal Court and means that State-owned employers are subject to commitments contained within EBAs, like their privately owned counterparts.

The Decision, at First Instance

The EBA between the parties required the CFA to recruit at least 30 firefighters each year, although the CFA failed to do so. The Union requested an injunction in the Federal Court to compel the CFA to comply with its obligations in the EBA. The CFA convinced Justice Murphy that the obligations contained within the EBA (given force by the *Fair Work Act 2009* (Cth)) unconstitutionally burdened the rights of the State. Justice Murphy found that the EBA violated the rule in *Re Australian Education Union* (1995)184 CLR 188 that the State must have the right to determine the composition of its workforce and the Commonwealth could not limit that right.

The Decision, on Appeal

The Court disposed of the ruling of Justice Murphy by determining that the (i) CFA was a "trading corporation" and subject to Commonwealth laws, and (ii) the *Fair Work Act 2009* (Cth) did not affect the rights of the CFA to determine the composition of its workforce; the CFA had done that itself by entering into the EBA voluntarily.

The Court first characterised a “trading corporation” as one whose trading, i.e. commercial, activities form a sufficiently significant portion of its overall activities. A “significant” portion is one that is “not insubstantial”; $13m from the CFA’s commercial activities was sufficient. It did not matter that the activities of the CFA that were most valuable ($453m) were neither commercial nor undertaken by paid employees.

In this way, the Court held that the CFA was a trading corporation and that the *Fair Work Act 2009* (Cth) applied. Moreover, the Commonwealth had not imposed any restrictions upon the CFA, as it consensually entered into the EBA with the Union and its employees.

Consequences for State Employers

The decision expands the breadth of State enterprises liable to honour their EBA obligations. Government-sponsored entities that have a commercial element, notwithstanding its size in relation to its noncommercial element, cannot expect to avoid their existing EBA obligations.

FULL FEDERAL COURT PROVIDES GUIDANCE ON ADVERSE ACTION AND MENTAL HEALTH

In *State of Victoria (Office of Public Prosecutions) v Anthony Grant* [2014] FCAFC 184, Mr Anthony Grant, a solicitor formerly employed by the State of Victoria in the Office of Public Prosecutions, claimed that, by terminating his employment, his employer had taken adverse action against him because of his mental disability in contravention of s 351(1) of the *Fair Work Act 2009* (Cth).

The Appeal Court’s Reasoning

It was not contested by the parties that Mr Grant, in suffering from depression and anxiety, had a “mental disability” within the meaning of Act and that termination of Mr Grant’s employment constituted adverse action within the meaning of the Act. Rather, the case turned on the reason(s) which motivated the OPP (Mr Grant’s employer) to terminate his employment.

The OPP argued that it terminated his employment because of Mr Grant’s misconduct which included the following: (i) he repeatedly failed to notify his employer of his failure to attend work or late arrival in accordance with his employer’s directions; and (ii) he failed to perform his work duties in accordance with his employer’s directions, including failing to brief counsel and file required court documentation, failing to attend court and instruct counsel at a hearing and failing to comply with a direction not to attend court and remain in the office.

At first instance, Justice Burchardt concluded that Mr Grant’s mental illness was a factor which played into the OPP’s decision to terminate his employment. Justice Burchardt continued by stating that if he was wrong in this respect:

> . . . [then] what Mr Grant did was completely interwoven with his medical condition and it is what he did that led to his dismissal. In my view as a matter of cause and effect Mr Grant’s illness was quite clearly a part of the reason why he was dismissed. It was his illness on any view that led him to do the things that he did that caused his dismissal, and Mr Hyland well knew of the illness. In the circumstances as I have found them, these two matters cannot be disaggregated. . . .

Justices Tracey, Buchanan and White concluded that Justice Burchardt had erred in determining that the OPP had taken Mr Grant’s illness into consideration when deciding to terminate his employment. In relation to Justice Burchardt’s comments extracted above, Justices Tracey and Buchanan (in their majority judgement) referred to the High Court’s reasoning in *Purvis v New South Wales* [2003] HCA 62 (which was adopted in an adverse action context by Chief Justice French and Justice Crennan in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500) and noted:

> . . . “the central question will always be—why was the aggrieved person treated as he or she was?”. . . It is, therefore, possible, depending on the evidence, for what the primary judge called “disaggregation” to occur when ss 360 and 361 of the Act are being applied. As these authorities demonstrate it is possible for there to be a close association between the proscribed reason and the conduct which gives rise to adverse action and for the decision maker to satisfy the Court that no proscribed reason actuated the adverse action.

As no direct evidence medical existed to demonstrate Mr Grant’s misconduct and his illness, Justices Tracey and Buchanan had no difficulty in “disaggregating” Mr Grant’s

misconduct from his illness (and concluding that the OPP had terminated his employment because of his misconduct).

Consequences for Employers

The Full Court's decision in *Grant* should give employers confidence when defending adverse action claims which are associated with employees' mental health issues which, in our experience, is increasingly common (*see*, for example, *Zarb v Australia & New Zealand Banking Group Limited* [2014] FCCA 967). Provided that employers have evidence to substantiate their adverse action, they should not censor themselves against disciplining (or terminating) underperforming employees simply because they suffer from mental illnesses (which might explain their underperformance).

NAVIGATING THE MURKY WATERS OF WORKPLACE INVESTIGATIONS

In *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC, the Full Court of the Federal Court of Australia unanimously upheld a breach of contract claim made by Ms Romero against her former employer in connection with the employer's failure to comply with its own workplace harassment policy.

The Full Court overturned a decision at first instance to the effect that the Policy did not form part of Ms Romero's contract of employment and that, even if it did, the employer was not in breach of the policy.

The Facts

Ms Romero was working as a second officer on the supply ship *Far Swan* during a 12-day voyage under the Master, Captain Martin. She had a "substantial falling out" with Captain Martin during the voyage, which ultimately led to her being relieved from duty on the ship (at her request). After disembarking, Ms Romero emailed her employer regarding her concerns in relation to her treatment by Captain Martin, noting that she left it to the employer to decide how the issue should be dealt with. Notwithstanding that the email was not (and not intended to be) an informal or formal complaint under the Policy, the employer immediately treated it as a formal complaint and commenced an investigation under the Policy, thereby escalating the matter substantially. Further, the focus of the investigation changed course from Ms Romero's initial complaint against Captain Martin to allegations by Captain Martin as to Ms Romero's competence.

The Full Court found that the employer had breached the contract of employment when it departed from the terms of the Policy by (i) treating Ms Romero's complaint as a formal complaint and proceeding to a formal investigation without consulting her; (ii) failing to properly document the formal investigation; and (iii) generally failing to "carefully and systematically investigate" the complaints of Ms Romero, once the employer had determined to treat them as a formal complaint, including by:

- Interviewing Captain Martin first;
- Failing to put Ms Romero's detailed complaint to Captain Martin;
- Failing to interview other witnesses;
- Failing to obtain Captain Martin's notes relating to the incident after the Captain informed the employer of their existence; and
- Failing to give Ms Romero proper notice regarding the purpose of her interview (during which she was questioned regarding her competence and temperament, or, in the words of the Court, "ambushed with a sequence of complaints or assertions against her competency").

Points to Note for Employers

The above is a handy list of "don'ts" relevant to any workplace investigation that is initiated following complaints by one employee against another. However, there are a number of broader points to take away from this decision:

- Employers should be aware of the risk that workplace policies may be incorporated by reference within their employees' employment contracts. Noncompliance with a workplace policy could mean a breach of contract by the employer.
- When a complaint arises, the terms of those policies should be strictly followed. Before any workplace investigation is commenced, the terms of applicable policies should be closely scrutinised.
- At the very least, the employees in question (including the complainant and the employee under investigation) should be made well aware of the policies and procedures that the employer considers to be applicable.
- In this case, the Full Court considered that an appropriate course of action for the employer, following receipt of the complaint, would have been to have a suitable representative meet with Ms Romero to explain "her options

under the Policy and to explain to her in broad terms the consequences in exercising any of those options".

- Most importantly, workplace investigations should focus on a single issue. This is particularly important in the context of complaints which are likely to involve one employee's word against another's.

Where a workplace investigation is engaged following such a complaint, a strict distinction should be drawn between who is the complainant and who is the employee under investigation. Allegations made against the complainant should *not* be investigated in the same investigation—particularly considering that a different policy or legislative regime may apply to the secondary allegations. In this case, the allegations of incompetency against Ms Romero should have been handled in a separate procedure governed by the applicable enterprise agreement.

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

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