JONES DAY

FEBRUARY 2015

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

This month, the Federal Circuit Court fined Melbourne-based media company Crocmedia $24,000 for treating employees as volunteer interns. This case illustrates that the Fair Work Ombudsman is turning its attention to corporate Australia's increasing use of unpaid internships (which appears to be particularly prevalent in industries that are serviced by an oversupply of university graduates). In another case handed down in February, the Federal Circuit Court distinguished "sexual behaviour" from "sexual orientation" for the purposes of interpreting anti-discrimination laws. In this *Update*, we have also examined recent changes made by the Federal Government to the gender reporting requirements which apply to large private sector employers.

Adam Salter, Partner

ECONOMIC DEVELOPMENTS

The Australian Bureau of Statistics released the results of their Wage Price Index for the quarter ending 31 December 2014. The index shows that wage growth continues to be slow in the private sector (with 0.6% growth recorded for the quarter across the country, and particularly low growth rates for resource focused Western Australia).

Wage growth in the private sector in Australia has now been below 3% annually in trend terms for seven successive quarters.

CONTENTS

Company Prosecuted for Unpaid Internships 2

Court Rules that Equal Opportunity Laws Do Not Protect Against Discrimination Based on Sexual Activity, Only Orientation 3

These figures follow the recent statements of the Reserve Bank of Australia that employers they have been consulting have indicated workers appear willing to trade wage growth for greater job security.

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

Last week, the Australian Government announced that it will ease gender reporting requirements recently imposed on large employers from the start of the 2015–2016 reporting period (commencing on 1 April 2015). The changes mean large private sector employers (with more than 100 employees) will no longer need to provide data relating to:

- The remuneration of their chief executive officers or equivalent-level employees;
- Workers engaged through a contract for services (independent contractors);
- Information on the number of applications received for open positions and the number of interviews conducted;
- Information on the number of requests made, and approvals granted, for extension to parental leave; and
- Annualised average full-time components of total remuneration.

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

COMPANY PROSECUTED FOR UNPAID INTERNSHIPS

In *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140, the Federal Circuit Court of Australia ordered that Crocmedia pay a $24,000 penalty for breaching the *Fair Work Act 2009* (Cth) (the "Act").

Crocmedia, a developer of radio and television programs in Victoria, Australia, failed to pay two former employees minimum wages, to pay casual loading rates, to pay on at least a monthly basis and to provide pay slips. The employees had performed unpaid work experience for approximately three weeks and were subsequently employed on a casual basis, working as volunteer producers of Crocmedia's radio programs.

Although they were provided with some payments as "reimbursement for expenses", these payments when totaled were below the national minimum wage order. The employees were incorrectly categorised by Crocmedia as "volunteers".

Reasoning. Following investigation and prosecution by the Fair Work Ombudsman, Crocmedia admitted to breaches of the Act, and the Court was only required to determine what was the appropriate penalty order. The Court settled for a $24,000 penalty. The maximum penalty available to the Court was $115,500.

Factors that Weighed Against Crocmedia. Judge Riethmuller stated that:

> the characterisation of the two employees as volunteers rather than work experience students or interns, together with the extensive period of time involved does not weigh in the Respondent's favour.

The employment lasted one year in the case of one employee and six months in the case of the other. The initial workplace arrangement had been allowed to continue without being reviewed, and Crocmedia did not have adequate systems and processes in place to review work experience placements. Crocmedia was considered of a sufficient size to expect that it has enough resources to ensure compliance with workplace laws.

Factors in Crocmedia's Favour. Although Crocmedia's conduct was found to be exploitative, Judge Riethmuller was not persuaded that there was a "deliberate strategy" to exploit the employees. Rather, Crocmedia had taken "an inappropriate view of the applicability of the Award".

A significant mitigating factor was that Crocmedia fully rectified the underpayment by making full payments of unpaid wages to the employees in timely fashion. Crocmedia cooperated with the Ombudsman's investigation at the earliest opportunity and showed genuine remorse. This merited a 30% discount to the penalty that otherwise would have applied.

Points to Note for Employers. Judge Riethmuller warned that profiting from "volunteers" is not acceptable conduct within the industrial relations scheme applicable in Australia. The Judge foreshadowed an increase in penalties and

prosecutions for such behavior as public exposure of this issues broadened awareness.

Employers need to ensure they are familiar with applicable workplace laws when considering unpaid work arrangements. A report prepared for the Office of the Fair Work Ombudsman, referred to by Judge Riethmuller, (Stewart & Owens, *Experience or Exploitation?* January 2013) helps to differentiate between genuine unpaid volunteer arrangements and unpaid employment. Unpaid work experience will be more likely to be considered employment where:

- The individual remains working for an extended period of time (weeks, months or years rather than days);
- The work which the individual engages in is for the benefit of the organisation he or she is working for (more so than for the benefit of the individual);
- The individual's work results in some form of commercial gain or profit for the organisation; and
- The work experience isn't connected to any formalised vocational placement which is undertaken as a requirement of an education or training course.

If the work being done by an unpaid intern is of a type that would usually be done by a paid employee, employers should seek legal advice about transitioning such volunteers into paid employment (especially considering the significant penalties that they can be exposed to for breaching the Act).

COURT RULES THAT EQUAL OPPORTUNITY LAWS DO NOT PROTECT AGAINST DISCRIMINATION BASED ON SEXUAL ACTIVITY, ONLY ORIENTATION

In *Bunning v Centacare* [2015] FCCA 280, the Federal Circuit Court of Australia recently considered whether sexual behaviour, as distinct from sexual orientation, is protected from discrimination under the *Sex Discrimination Act 1984* (Cth) (the "Act"). Judge Vasta concluded that, rather than being a "subset" of an orientation, sexual behavior is a "manifestation" of sexual orientation and is not covered by the Act.

The applicant alleged unlawful discrimination by her former employer, Catholic Church-run organisation Centacare, claiming that they sacked her because she is "polyamorous". As stated in the judgment, the Australian Oxford Dictionary defines the term as "The practice of engaging in multiple sexual relationships with the consent of all the people involved".

She had worked for several years prior to her termination as a Coordinator of Family Support. On 5 August 2013, she was called to attend an urgent meeting, during which she was immediately dismissed for "gross misconduct". Centacare claimed that she was sacked because she provided the organisation's contact details to the Brisbane Poly Group for publication on their website, without Centacare's permission to do so. The applicant had provided her details as a counsellor at Centacare, following a request from the group for contact details of a "poly-friendly" counsellor.

The applicant alleged that her employment was terminated because she is polyamorous, which she was told goes against the ethics and moral teachings of the Catholic Church. She alleged that she suffered detriment because of her sexual orientation and that a dismissal for that reason is unlawful under the Act.

The Court's Reasoning. Judge Vasta said that since the applicant claimed she was unlawfully discriminated against because of her sexual orientation, the question for determination was whether polyamory is a sexual orientation under the Act.

He found that while "sexual orientation" is protected by the Act, meaning "how one **is,** rather than how one manifests that state of being", "sexual behaviour", including polyamory, is a "manifestation" of a state of being and not covered by the legislative protection. In drawing this distinction, he considered the Australian Human Rights Commission's consultation report that provided the basis for the definition of "sexual orientation" under the Act, which referred to "sexual behaviour" as a separate concept to "sexual orientation".

Judge Vasta stated:

> If the contention of the Applicant were correct, many people whose sexual activity might label them as sado-masochists, coprophiliacs or urophiliacs could claim that such is more than mere behavior; it is in fact their very sexual orientation…the illegal activities of paedophilia and necrophilia may have the protection of the Sex Discrimination Act 1984 (Cth). Such a result would be an absurdity.

He used the example of a person taking a vow of chastity who, while not behaving sexually, can still have a "sexual orientation" as defined by the Act.

This meant that the applicant had not suffered sexual discrimination under the Act, and her case therefore had no "reasonable prospect of success", resulting in its summary dismissal.

While termination of an employee's position for his or her "sexual behaviour" will not be considered discrimination under the *Sex Discrimination Act 1984* (Cth), this does not preclude an employee from bringing a separate claim for unfair dismissal with the Fair Work Commission. Additionally, Judge Vasta stated that a second claim brought by the applicant under common law for insufficient notice could be heard by a state-based court.

ACKNOWLEDGMENTS

Thanks to Associate Michael Whitbread, summer clerk Alexandra Einfeld and graduate Stephanie Crosbie for their 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 Adam Salter, Partner. Adam can be contacted by email at asalter@jonesday.com or by phone on +612 8272 0514.

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

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2015 Jones Day. All rights reserved. Printed in the U.S.A.