JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

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MESSAGE FROM THE EDITOR

In this month's *Update*, we focus on two decisions of the Federal Circuit Court (in *Cai v Tiy Loy* and *Konsulteq*) in which the court made significant penalty orders in response to an employer's adverse action in breach of the *Fair Work Act 2009* (Cth). These decisions demonstrate an increasing willingness of courts to impose harsh penalties where employers have attempted to alter an employee's position, or terminated their employment, in response to the employee either having or exercising a workplace right.

In addition, we look at a decision of the Fair Work Commission (in *Wilcox*) that clarifies the circumstances in which an employer will be entitled to legal representation in defending an unfair dismissal claim. We also examine another decision of the Fair Work Commission (in *Gardens*) that provides guidance on the definition of a "small business employer". While it is widely understood that this refers to an employer with fewer than 15 employees, there is a lesser known requirement that the employees of "associated entities" are to be counted toward the total number, which can have serious implications in the context of an unfair dismissal claim.

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

- **BILL TO REINTRODUCE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION AGAIN DEFEATED IN SENATE, SPARKING DOUBLE DISSOLUTION ELECTION**

As discussed in our January 2016 *Update*, the government has been attempting to pass legislation to re-establish the Australian Building and Construction Commission ("ABCC") after it was abolished by the Labor Government in 2012. However, in a special sitting of Parliament in late April 2016, the *Building and Construction Industry (Improving Productivity) Bill 2013 (No 2)* failed to pass for a second time in the Senate.

This result has had far-reaching implications for the Government and the country, as the Prime Minister has previously indicated that if the Bill failed to pass once more, he would consider dissolving both houses and calling a double dissolution Federal Election (which is now to be held on 2 July 2016). Thus it appears unlikely that the ABCC will be resurrected in the near future, with the Government likely hoping it will be able to retain power so that it can submit the Bill to a joint sitting later this year.

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

- **DANGERS OF UNILATERALLY ALTERING THE POSITION OF AN EMPLOYEE WHO EXERCISES A WORKPLACE RIGHT: FEDERAL CIRCUIT COURT ORDERS SIGNIFICANT PAYOUT IN *TIY LOY* DECISIONS**

In the *Cai v Tiy Loy & Co Ltd* decisions, the Federal Circuit Court imposed significant compensation orders and penalties on an employer that moved an employee to a part-time role because the employee sought to exercise his right to access a workers' compensation scheme. The decisions serve as a warning to employers that deciding to unilaterally alter an employee's position because that employee seeks to exercise a workplace right can have serious consequences should the employee bring an adverse action claim.

Factual Background. Mr Cai was employed by Tiy Loy & Co Ltd ("Tiy Loy"), a company formed to provide a meeting place for immigrants from the province of Guangdong to play mahjong. Mr Cai worked 90 hours per week and often stayed overnight at Tiy Loy's premises after performing tasks into the evening, including general maintenance and serving tea.

In January 2012, while walking up the stairs after placing the rubbish outside, Mr Cai fractured his left ankle. Tiy Loy later submitted a workers' compensation claim, and Mr Cai's treating doctor certified that Mr Cai had restricted work capabilities and could work only 40 hours per week.

Tiy Loy claimed that in June 2012, due to a downturn in its revenue, it decided to move Mr Cai from a six-day-per-week full-time position to a three-day-per-week part-time position. However, Mr Cai argued that the decision to alter his employment was made due to his workers' compensation claim. Mr Cai informed Tiy Loy that he had decided to resign because he was not prepared to work part time. Mr Cai claimed that Tiy Loy took adverse action against him in altering his position to part time because he had exercised a workplace right to access benefits under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

Legal Background. Section 340(1) of the *Fair Work Act 2009* (Cth) ("FWA") states that "[a] person must not take adverse action against another person (a) because the other person (i) has a workplace right; or (ii) has, or has not, exercised a workplace right. . .". Section 341 of the FWA defines "workplace right" broadly to include an entitlement to a benefit under a workplace law. According to Section 342(1) of the FWA, an employer takes adverse action against an employee if the employer (i) "dismisses the employee", (ii) "injures the employee in his or her employment", (iii) "alters the position of the employee to the employee's prejudice" or (iv) "discriminates between the employee and other employees of the employer".

Decision. Judge Manousardis found that Tiy Loy's conduct in altering Mr Cai's employment from full time to part time constituted adverse action, because Tiy Loy effectively dismissed Mr Cai when it "purported unilaterally to alter the terms of Mr Cai's contract of employment in a fundamental way". Mr Cai had a "workplace right" because an entitlement to a benefit under workers' compensation law is an entitlement to a benefit under a workplace law. Judge Manousardis also found that Tiy Loy contravened Section 340 of the FWA. Tiy Loy took the adverse action because Mr Cai exercised his workplace right. From the circumstances, "it could

reasonably be inferred that Tiy Loy decided to alter Mr Cai's employment because it desired to reduce or eliminate costs it expected it would incur" to manage Mr Cai's injury in accordance with the workers' compensation scheme.

In addition to the prohibited adverse action, Judge Manousardis found that Tiy Loy failed to pay Mr Cai the penalty rates and leave loading which Mr Cai was entitled to receive as a "tea attendant" within the meaning of the Miscellaneous Award 2010. Based on the findings made by Judge Manousardis, the parties agreed that Tiy Loy should pay Mr Cai $415,698.55 in compensation, including interest. Judge Manousardis also imposed $53,500 in penalties on Tiy Loy for the contraventions. Pursuant to the court's power to order that a penalty be paid to the Commonwealth or a particular person, Judge Manousardis ordered that Tiy Loy should pay the penalties directly to Mr Cai.

Lessons for Employers. Any attempt by an employer to alter an employee's position, such as changing an employee's working hours or role, should be approached with caution. Where the action was taken because the employee exercised a workplace right, it could amount to adverse action that contravenes Section 340 of the FWA. Employers need to have alternative, sound and legitimate reasons to take adverse action against an employee. The *Cai v Tiy Loy* decisions illustrate the broad powers of the courts to impose both compensation orders and penalties on employers that fail to comply with their obligations. This can result in significant payouts being made to an employee that was the victim of the contravention. In this instance, Judge Manousardis's decision to order that Tiy Loy pay penalties directly to Mr Cai also highlights the financial incentive employees have to seek the imposition of penalties in addition to compensation.

COURTS IMPOSE HARSH PENALTIES AGAINST COMPANIES AND DIRECTOR FOUND TO HAVE TAKEN ADVERSE ACTION AND UNDERPAID FOREIGN WORKERS

Factual Background. In *Fair Work Ombudsman v Konsulteq Pty Ltd & Ors* [2015] FCCA 182, the first and second respondents, Konsulteq Pty Ltd ("Konsulteq") and Konsulteq Upskilling and Training Services Pty Ltd ("KUTS"), were in the business of providing IT services and training. Ms V and Ms L, both Indian nationals, entered into agreements with the respondents on the understanding they would receive training and perform paid work. In the end, Ms V was not paid at all, and Ms L was significantly underpaid for work she performed. When Ms L sought payment of the unpaid wages, her employment was terminated, and Mr Gaur, director and shareholder of both companies, informed her that KUTS was unable to pay the outstanding wages due to financial hardship.

Court's Finding. Judge Riethmuller of the Federal Circuit Court held that the respondents had contravened various provisions of the FWA. Further, the third respondent (Mr Gaur) was responsible for the day-to-day management and control of the companies and on this basis was also held liable for the contraventions. In relation to the work performed by Ms V, the court found Konsulteq had, among other things, misrepresented to Ms V that she was engaged pursuant to a contract for services and failed to pay for work performed as an employee. In relation to the work performed by Ms L, KUTS was found to have failed to pay Ms L minimum hourly rates of pay and engaged in adverse action for dismissing Ms L after she exercised a workplace right (by seeking payment of outstanding wages).

In determining the appropriate penalties, Judge Riethmuller concluded that the impugned conduct was deliberate, as notwithstanding the fact that Mr Gaur had mischaracterized Ms V and Ms L as independent contractors, the respondents were on notice as to the obligations they owed under the FWA. Supporting evidence included the fact that: (i) Mr Gaur had tried to de-register the companies (regarded as an attempt to avoid corrective action), (ii) Konsulteq had previously been the subject of a Fair Work Ombudsmen audit and (iii) the signed document provided to Ms L demonstrated an intention to engage her as an employee. Finally, the court stressed that small businesses cannot use cash flow issues as an excuse for failing to pay employees (otherwise employers could use wages to finance unprofitable or nascent businesses).

Court's Orders. The court ordered that the first and second respondents pay compensation to Ms V and Ms L for the unpaid wages. They were also ordered to pay penalties to the Commonwealth totalling $40,000 as against Konsulteq and $120,000 as against KUTS. Further, as he was found to have used the companies to shield his own conduct, Mr Gaur was ordered to pay a penalty of $35,000. The court said there was a need to deter parties who seek to use the corporate veil to evade responsibility for workplace obligations

where they are in fact the "operating mind" of the company in breach (at [30]).

Lessons for Employers. This decision is a cautionary tale for employers that may find themselves the subject of harsh penalty orders for failing to provide minimum protections under the FWA. It makes clear that substantial penalties will be imposed against employers who take adverse action, especially where the employees in question are foreign nationals with a limited understanding of their employment entitlements. Finally, a party who is found on the facts to be the "operating mind" of an employer company may be liable for breaches of the FWA committed by that company.

EMPLOYER GRANTED PERMISSION FOR LEGAL REPRESENTATION IN UNFAIR DISMISSAL CASE WHERE EMPLOYER'S IN-HOUSE REPRESENTATIVE IS ALSO REQUIRED TO APPEAR AS A WITNESS

Factual Background. In *Wilcox v Holcim (Australia) Pty Ltd* [2016] FWC 2359, the Fair Work Commission ("FWC") considered the operation of Section 596 of the FWA in the context of an unfair dismissal claim made by the applicant (Wilcox) against the respondent employer (Holcim). At a directions hearing, Holcim sought permission to have legal representation under Section 596, and Wilcox opposed the application.

Legal Background. Section 596(1) of the FWA provides that permission is required before a person can be represented by a lawyer or paid agent in a matter before the FWC. Permission may be granted under s 596(2) if: (i) it would enable the matter to be dealt with more efficiently, taking into account its complexity; or (ii) it would be unfair not to allow it because the person would otherwise be unable to represent himself or herself effectively; or (iii) it would be unfair not to allow it, taking into account the fairness between the parties.

Decision. Commissioner Simpson granted Holcim permission under Section 596(2)(a) on the basis that the matter was sufficiently complex, but he also canvassed the alternative grounds raised by Holcim. First of all, he agreed it was reasonable in the circumstances for Holcim not to want its HR manager to act as representative *and* appear as a defence witness in the same matter. He noted that this state of affairs, as well as the fact that Holcim didn't have another suitable employee to represent it, would also have justified the granting of legal representation. In relation to the third element in Section 596(2)(c), Commissioner Simpson said he was entitled to consider the relative experience of the representatives in determining whether it would be unfair not to allow Holcim legal representation. On the facts, Holcim would be represented by an inexperienced HR manager, whereas Wilcox would be represented by an experienced employment lawyer (by virtue of the exception in Section 596(4)(b)(i) of the FWA). That Section broadly states that a party is taken not to be represented by a lawyer if the lawyer is also an employee or officer of an organisation (in this case of the CSR & Holcim Staff Association). On this basis, taking into account the necessary fairness between the parties, the FWC held it would be unfair not to allow Holcim legal representation.

Lessons for Employers. Employers faced with an unfair dismissal claim may be entitled to legal representation (rather than having to rely on an in-house representative) in certain circumstances. A clear exception is where the respondent is a small business with no specialist HR staff while the applicant is being represented by an officer or advocate of an industrial association. Importantly, the FWC will consider the relative experience of the representatives in determining whether it would be unfair not to allow a party to be represented. This is so even where the other party's representative is appearing by virtue of the exception in Section 596(4) of the FWA.

EMPLOYER WITH A SINGLE EMPLOYEE HELD NOT TO BE A "SMALL BUSINESS EMPLOYER" FOR THE PURPOSE OF UNFAIR DISMISSAL CLAIM WHERE EMPLOYEES OF AN ASSOCIATED ENTITY ARE TAKEN INTO ACCOUNT

Facts. In *Pretorius v Gardens of Italy Pty Ltd* [2016] FWC 2503 (22 April 2016), the applicant (Mr Pretorius) brought an unfair dismissal claim against his former employer ("Gardens") under Section 394 of the FWA. The former employer objected to the application on a number of grounds, including that the former employer was a "small business employer" under the FWA and that, as a result, the applicant was not entitled to protection from unfair dismissal (as he had not completed the requisite minimum employment period under Section 383 of the FWA).

Legal Background. Under Section 382 of the FWA, a person is protected from unfair dismissal only if he or she has completed the "minimum employment period" with their employer. Under Section 383, the minimum employment period is six

months for a non-small business employer and one year for a small business employer. The meaning of "small business employer" is one that employs fewer than 15 employees (per Section 23 of the FWA). However, that Section also states that for the purposes of calculating the number of employees, associated entities are treated as one entity. The definition of "associated entity" is to be found in Section 50AAA of the *Corporations Act 2001* ("Corps Act"). That Section contains various indicia for determining whether one entity is an associated entity of another (including whether one entity controls the other, and whether the operations, resources or affairs of one are material to the other).

Decision. Senior Deputy President O'Callaghan conceded that at the time of his termination Mr Pretorius was the only employee engaged by Gardens. However, he noted that if the employees of another entity located in South Africa ("Close Corporation") were also taken into account, then Gardens could not be regarded as a small business employer (because Close Corporation employed 21 people at the time of Mr Pretorius's dismissal). On the facts, it was found that Gardens sold some products made by Close Corporation and that both entities were controlled by the same individuals in a manner consistent with Section 50AAA(7) of the Corps Act (as Mr and Mrs Schmidt, the sole shareholders of Gardens, were also sole directors of Close Corporation).

On this basis, Senior Deputy President O'Callaghan was satisfied that the two entities were associated entities under the Corps Act and that, for this reason, Gardens did not meet the definition of a small business employer under the FWA. As a result, Mr Pretorius had completed the requisite six-month minimum employment period and was entitled to bring the unfair dismissal claim. Senior Deputy President O'Callaghan emphasised that, although Gardens was, by itself, a small business, he was obligated under the Corps Act to take into account the employees of the associated entity, in spite of the fact that it operated overseas and did not have any relation to the present matter.

Lessons for Employers. This decision confirms that in determining whether an employer is a "small business employer" for the purpose of Section 383, the FWC will take into account the employees of associated entities, pursuant to Section 23 of the FWA. Employers should be aware of the definition of "small business employer" under the FWA and the possibility that an employer company and its related entities will, by virtue of Section 50AAA of the Corps Act, be taken to be part of a single entity. This may produce a result whereby an employer with fewer than 15 employees in Australia is pushed outside the definition of a "small business employer" by the inclusion of employees of related entities in the overall calculation.

We thank associates Stephanie Crosbie and Claire Goulding 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.

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