JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this month's *Update*, we examine several important legislative developments that will have important regulatory implications for employers, especially those in the construction industry. We also discuss a number of unfair dismissal decisions involving serious misconduct. In the first decision, the Fair Work Commission ("Commission") affirmed the strict procedural requirements that are imposed on employers in circumstances where an employee is dismissed for serious misconduct. In the second decision, the Commission confirmed that it is permissible for it to take into account misconduct that was discovered only subsequent to the dismissal, where it can be properly established as evidence.

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

REGISTERED ORGANISATIONS BILL AND ABCC BILL SUCCESSFULLY PASS THROUGH THE SENATE

Two key legislative components of the Government's industrial relations reform agenda (which provided the impetus for the double dissolution election) have passed the Senate. The *Fair Work (Registered Organisations) Amendment Bill 2014* passed with minor amendments by two crossbenchers. The Bill establishes a Registered Organisations Commission that will monitor and regulate the activities of registered organisations (including unions and other employer organisations). The Commission

is to have enhanced investigatory and information-gathering powers modelled on those available to the Australian Securities and Investment Commission. The agreed amendments, put forward by Senators Nick Xenophon and Derryn Hinch, include enhanced protections and a comprehensive compensation scheme for whistleblowers, as well as changes to ensure the independence and increased accountability of auditors.

As discussed in a previous *Update*, the *Building and Construction Industry (Improving Productivity) Bill 2013* had previously failed to pass the Senate on two occasions, thus providing the trigger for the federal election held on 2 July this year. The Bill re-establishes the Australian Building and Construction Commission ("ABCC"), a watchdog tasked with regulating conduct in the construction industry, with the aim of eliminating illegal behaviour on building sites and limiting the improper influence of unions. It will target unlawful industrial action, coercion and discrimination arising out of workplace bargaining. Like the Registered Organisations Commission, the ABCC Commission will have broad information-gathering powers, together with the ability to make orders for contraventions of civil remedy provisions.

Many senators had expressed concerns about the Bill, and thus the Government made a number of concessions to ensure its smooth passage based on amendments proposed by a number of senators (including David Leyonhjelm, Nick Xenophon and Derryn Hinch).

One concession is that the Building Code, to be issued under the legislation, won't come into effect until November 2018, providing construction companies with a two-year transitional period to ensure compliance. Key amendments include new procurement rules in the Building Code that will require that government entities undertaking building projects ensure that preferred tenderers provide information on matters relating to the impact of the building project on jobs and whether the project will contribute to skills growth. Further, new rules on job advertisements have been added to curtail the use of 457 visas for foreign skilled workers in the construction sector. Employers will have to comply with the following requirements before employing persons to undertake building work: (i) any position must first be advertised in Australia; (ii) the advertising must be targeted in such a way that a significant proportion of suitably qualified and experienced Australian citizens and permanent residents would be likely to see it; (iii) any skills or experience requirements in the advertising must be suitable to the position; and (iv) the employer must demonstrate that no Australian citizen or permanent resident is suitable for the job.

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

FAIR WORK COMMISSION UPHOLDS UNFAIR DISMISSAL CLAIM DUE TO EMPLOYER ERROR, DESPITE EVIDENCE OF SERIOUS MISCONDUCT THAT WOULD OTHERWISE JUSTIFY DISMISSAL

The Commission has found that an employee who was reasonably suspected of engaging in criminal conduct was unfairly dismissed, after his employer failed to suspend him when the allegations arose, and only later sought to take action by terminating his employment without notice.

Factual Background. The applicant, Mr Wong, had been employed for more than nine years as a delivery truck driver by Taitung Australia Pty Ltd, which operates a food supply business. In February 2016, allegations arose that a number of employees (including the applicant) had been adding extra produce to delivery trucks, selling it directly and pocketing the proceeds. The allegations were reported to the general manager, and a police statement was made. The police suggested that the employer not take any disciplinary action against employees until the investigation had been concluded. As a result, Mr Wong's employment continued into May 2016.

On 12 May 2016, the applicant made a complaint to the warehouse manager about the roadworthiness of his truck. On the same day, he was suspended from duty for 24 hours. The following week, he received a letter inviting him to attend a disciplinary meeting and outlining the allegations against him. During the meeting, the allegations were again put to the applicant, and he was given the opportunity to respond. Later that day, he was advised verbally and in writing that he had been summarily dismissed on the basis of serious misconduct. The applicant lodged a claim for unfair dismissal alleging that the employer had been improperly motivated by his complaints about unsafe work practices. The applicant sought compensation in lieu of reinstatement.

Legal Background. Under section 385 of the *Fair Work Act 2009* (Cth) ("FWA"), a person has been unfairly dismissed if the Commission is satisfied of all of the following: (i) the person has been *dismissed* (per section 386); (ii) the dismissal was *harsh, unjust or unreasonable*; (iii) the dismissal was *not consistent with the Small Business Fair Dismissal Code*; and (iv) the dismissal was *not a case of genuine redundancy* (per section 389). The criteria for considering harshness in section 387 include: (i) whether there was a valid reason for the dismissal related to capacity or conduct; (ii) whether the person was notified of that reason and given an opportunity to respond; (iii) any unreasonable refusal by the employer to allow a support person to be present at discussions; (iv) whether the person had been warned about unsatisfactory performance before the dismissal (if applicable); (v) the degree to which the size of the employer's enterprise and the absence of dedicated HR management would affect the dismissal procedures; and (vi) any other relevant matters.

Under section 392 of the FWA, the Commission may make an order for the payment of compensation in lieu of reinstatement. However, if the Commission is satisfied that the person's misconduct contributed to the decision to dismiss the person, then it must reduce the amount payable.

Decision. Commissioner Cambridge found that all of the procedural fairness requirements in section 387 had been satisfied by the employer. He also found that the evidence supported the employer's belief that the applicant had participated in the enterprise, based on the civil standard of proof (the balance of probabilities) and taking into account the nature and seriousness of the alleged conduct (as it involved allegations of criminality). He held that this represented a valid reason for the applicant's dismissal.

However, the Commission found that there was one further relevant matter under section 387(h). It held that there had been an "unfortunate and important error" in the dismissal procedure adopted by the employer. It found that the continuation of the applicant's employment, even after the employer had obtained a full understanding of the nature and seriousness of the misconduct in question, had "removed the capacity for the employer to subsequently summarily dismiss the employee" for the serious misconduct. The severity of the employer's conduct, in summarily dismissing the applicant, was inconsistent with its permitting him to continue working for several months after the allegations arose and were later substantiated. The employer should have suspended the employee from duty, pending completion of the investigation. As it had not, any subsequent dismissal had to be implemented with notice. As the employer had failed to dismiss the applicant with notice (or payment in lieu of notice), the dismissal had been harsh, unjust or unreasonable under the FWA.

In considering the amount of compensation payable, the Commission noted that an amount equivalent to the notice period would usually be appropriate. However, having regard to the nature and seriousness of the applicant's misconduct, section 393(3) of the FWA should operate to reduce the compensation payable to zero.

Lessons for Employers. Employers should act quickly to investigate allegations of serious misconduct and should also, where appropriate, suspend the employee/s from duty pending the outcome of any investigation. Otherwise, if the employer later acts to dismiss the employee without notice, he or she may be found to have surrendered the right to summarily dismiss and could be liable for unfair dismissal. This may be the case, even where the findings of serious misconduct are later confirmed (and would have provided a valid reason for the dismissal). Alternatively, employers faced with such a scenario are advised to carefully follow the procedure for dismissal with notice (or payment in lieu of notice) so as to avoid any potential claims.

VICTORIAN SUPREME COURT MAKES COSTS ORDER AGAINST EMPLOYER, HR MANAGER AND FORMER CEO IN RELATION TO ONGOING WORKPLACE DISCRIMINATION CASE

Factual Background. The employee, Ms Bashour, had been employed by ANZ as a compliance manager since 2009. In the first half of 2012, she allegedly began to suffer discrimination at the hands of senior management after she announced her first pregnancy. In October 2014, she tendered her letter of resignation, claiming she was forced to resign because of the ongoing conduct of her employer that included "a series of objectionable and humiliating events, broken agreements, directions and bullying and harassment". This conduct was the subject of a claim in the Victorian Civil and Administrative Tribunal ("VCAT") ("VCAT proceeding"). Prior to this, Ms Bashour had filed a claim in the Fair Work Division of the Federal Court ("Federal Court proceeding") that pertained to the discrimination she experienced during

her first pregnancy and alleged mistreatment on her return from maternity leave in April 2013.

In the VCAT proceeding, Ms Bashour sought a declaration that ANZ and the other defendants (which include the former CEO and chief human relations manager) contravened the Victorian *Equal Opportunity Act 2010* on the basis of discrimination, victimisation and a failure to make reasonable adjustments for an employee with a disability. On 20 March 2015, ANZ and the other defendants made an application to strike out the VCAT proceeding (on the basis that there was a current and related proceeding on foot). VCAT made the order and ordered that the subject matter of the VCAT proceeding be referred to the Federal Court. Ms Bashour's lawyers then requested that VCAT revoke the order or reinstate the VCAT proceeding. This request was refused. Ms Bashour commenced proceedings in the Supreme Court of Victoria seeking orders quashing VCAT's strike-out order. She was also required to seek an extension of time because she had filed the application 94 days out of time. Ms Bashour claimed that VCAT lacked the power to refer the VCAT proceeding to the Federal Court and thus should not have struck out the VCAT proceeding. The Victorian Supreme Court was therefore only required to consider the correctness of the strike-out order, as well as the question of who should bear the costs of the application.

Legal Background. The usual rule is that a party who successfully applies for an extension of time will be required to pay the costs of the application (pursuant to rule 63.14 of the Victorian *Supreme Court (General Civil Procedure) Rules 2015*). This reflects the fact that the applicant has not complied with court procedure and is therefore seeking an indulgence from the court. However, the precise costs order made will depend on the facts of the case.

Decision. The Court found that VCAT had no power to refer to the proceedings to the Federal Court under the relevant legislation, and it quashed the strike-out order. In relation to who should bear the costs of the application, ANZ and the other defendants did not seek an order that the usual rule should apply and instead argued that there should be no order as to costs.

In making its decision, the Court considered the conduct of both Ms Bashour (taking into account her lengthy delay in filing the application for an extension of time and the lack of a reasonable explanation for the delay) and the conduct of ANZ in making the original transfer application. The Court found that despite ANZ's and the other defendants' legitimate purpose in making the strike-out application, it was their submissions that had led VCAT into error and resulted in the erroneous strike-out order being made. Although they had not intentionally misled the Court in making the transfer application, the Court found that the defendants should nonetheless be held liable for the costs of the application, as the application became necessary only because of their incorrect submissions about VCAT's power to transfer proceedings to the Federal Court. Thus the Court ordered that ANZ and the other defendants pay the costs of the extension application and the present proceeding. The VCAT and Federal Court proceedings are ongoing.

Lessons for Employers. Employers facing multiple claims in different courts or tribunals that relate to similar subject matter should exercise caution in applying to have one proceeding transferred and heard together with another. Although from a practical perspective it may be desirable to have all claims heard in the same forum, it is important to consider whether the court or tribunal has the power to refer the proceedings. Otherwise, as this case demonstrates, there could be serious costs implications if a party brings an unmeritorious claim or misleads a court or tribunal in making a transfer application.

COMMISSION CONFIRMS THAT EMPLOYEE MISCONDUCT DISCOVERED AFTER DISMISSAL MAY BE TAKEN INTO ACCOUNT IN DETERMINING AN UNFAIR DISMISSAL CLAIM

The Fair Work Commission has provided important clarification regarding the evidence that can be taken into account in determining an unfair dismissal claim. It held that it is entitled to take into account evidence of serious misconduct by an applicant that was discovered only after dismissal.

Factual Background. The applicant, Ms Finemore, was employed as an account executive by CMIB, a small business employer under the FWA. Ms Finemore commenced working for CMIB in 2010. On 28 April 2016, she provided a letter of resignation to the director and intended to work for the duration of the notice period. However, on 3 May 2016, she was given a letter notifying her that as a result of a disciplinary

hearing held that same day, she had been dismissed without notice for serious misconduct. Ms Finemore brought a claim for unfair dismissal under the FWA.

Legal Background. Under section 385 of the FWA, a person has been unfairly dismissed if the Commission is satisfied of all of the following: (i) the person has been *dismissed* (per the definition of "dismissed" in section 386); (ii) the dismissal was *harsh, unjust or unreasonable* (per the criteria in section 387); (iii) the dismissal was *not consistent with the Small Business Fair Dismissal Code*; and (iv) the dismissal was *not a case of genuine redundancy* (per the definition in section 389). The Small Business Fair Dismissal Code ("Code") applies to small business employers (those with fewer than 15 employees) per section 23 of the FWA. It requires that an employer who intends to dismiss an employee take steps to: (i) give the employee a valid reason why he or she is at risk of dismissal; (ii) warn the employee in writing (or verbally) of the risk of dismissal if there is no improvement; (iii) provide an opportunity to respond and a reasonable chance to rectify the problem; and (iv) before dismissing the employee, inform him or her of the reason for the dismissal. In addition, it requires that employers keep records of warnings issued to employees or of discussions on how their conduct or performance could be improved.

Decision. The applicant claimed that there had been no valid reason for her dismissal, that she was not given prior notice of the allegations before the 3 May meeting, that she had no opportunity to have a support person present at the meeting and that she had no opportunity to respond to the allegations made in the meeting. She also denied that she had acted in breach of her employment contract and that she had engaged in serious misconduct justifying summary dismissal. In response, the employer provided evidence that Ms Finemore had engaged in a number of instances of misconduct, including ignoring a direction to stop working from home and to stop accessing the work server from home. Further, and more significantly, the employer found evidence that Ms Finemore had emailed a spreadsheet containing client information to her personal email address just prior to tendering her resignation (a fact she initially denied but later admitted).

Ms Finemore alleged this act was done to enable her to update the client records remotely before her departure, as she had been prevented from accessing the work server from home. She also claimed the document was not a "client list" but a document used to track her work. Although the applicant acknowledged that the document contained highly confidential information that would have been useful to a competitor, she denied that she had breached the confidentiality obligations in her employment contract. The employer claimed that even if Ms Finemore had not yet breached her confidentiality obligations, she would have done so but for the fact she was discovered (citing *Trompp v Endeavour Coal Pty Ltd* [2013] FWC 9887).

In making its findings, the Commission was satisfied, on the balance of probabilities, that Ms Finemore had emailed the material to her personal email address and downloaded it to her personal computer with the intention of making use of it once she had left the business. This conduct was done in breach of the confidentiality obligations in Ms Finemore's employment contract and amounted to serious misconduct, thus providing a valid reason for her dismissal. However, there was further evidence of misconduct that arose after Ms Finemore had been dismissed. In June 2016, a USB was discovered containing a significant amount of information belonging to the employer which had been accessed at the same time as the spreadsheet. The employer argued that this misconduct merely strengthened its claim that Ms Finemore had engaged in serious misconduct and had been dismissed for a valid reason. It also showed she had an improper motive in accessing the material (and refuted her previous explanation).

The Commission considered whether it was permissible for it to take into account information that was acquired after the time of dismissal, even if the employer had not been aware of those facts at the time, and did not rely on them in dismissing the employee. Based on previous authorities, it found it was. It observed that the reasons for termination relied upon during the hearing are not confined to the reasons given by the employer at the time of termination, and can extend to other reasons if they can be established by evidence at the hearing. As a result, based on the evidence before it (including the subsequent evidence), the Commission was satisfied that the dismissal was done for a valid reason and was consistent with the Code. It therefore dismissed the application.

Lessons for Employers. In circumstances where an employee is dismissed for serious misconduct, employers should be aware that in defending any subsequent unfair dismissal

claim, they will not be confined to evidence of misconduct that was known prior to dismissal, nor to the reasons originally given to the employee for the dismissal. Evidence of further conduct that was discovered only post-dismissal may be relied upon (if properly established before the Commission) and may be used to bolster any assertion that the dismissal was done for a valid reason (even if it did not form part of the original reasons for the dismissal).

We thank associate Claire Goulding for her assistance in the preparation of this Update.

LAWYER CONTACT

Adam Salter
Partner
Sydney
+61.2.8272.0514
asalter@jonesday.com

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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