

EMPLOYMENT, HEALTH, SAFETY & INDUSTRIAL LAW

In the October update we look at:

- **WORKPLACE INVESTIGATIONS:** Is an employer liable for gossip?
- **VULNERABLE WORKERS LEGISLATION:** What are the latest changes?
- **REPUDIATION OF CONTRACT:** What amounts to a repudiation?



Shane Entriken, Partner (download [CV](#)) leading the team at our recent Boardroom Lunch Masterclass. The workshop covered the latest legal developments in Building, Construction and Major Capital Projects.



Shane Entriken

D: +61 (8) 9216 7141
M: +61 (0) 434 516 230
sentriken@allionpartners.com



Andrew Jonklaas

D / +61 (8) 9216 7124
ajonklaas@allionpartners.com



Lauren Baker

D / +61 (8) 9216 7131
lbaker@allionpartners.com

Visit us at allionpartners.com



EMPLOYER LIABLE FOR A GOSSIP INJURY CAUSED DURING THE DISCIPLINARY PROCESS

Woolworths Ltd has been found liable for an employee's depressive disorder following a workplace investigation.

Case Brief: [Campbell v Woolworths Ltd \[2017\] NSWWCC 213 \(7 September 2017\)](#)

The employee, a produce manager, was investigated for theft in 2015 after reports he was failing to follow correct protocol and procedures. The New South Wales Compensation Commission found Woolworths Ltd (**Woolworths**) liable for a major depressive disorder that was developed by the employee following a workplace investigation into his conduct.

The employee was placed on an employee improvement plan and continued working until September 2015. When a colleague asked him why he had not been sacked for theft, the employee suffered permanent impairment and resigned from his position. The employee stated that he was ostracised from work, his reputation was destroyed and he had become distressed from the comments and the wolf pack mentality.

Woolworths denied liability and stated the workplace investigation was conducted in line with the disciplinary process. They also explained that part of the disciplinary process involved other colleagues becoming aware of the allegations.

The employee accepted the investigations but claimed the disclosure to other employees caused him injury. The employer's investigation

included having police searching the employee's car in front of other employees, which resulted in the circulation of rumours even after he had been cleared of the allegations.

Arbitrator Egan stated Woolworths failed to discharge its onus of establishing the disciplinary actions as the whole or predominant cause of worker's injury. Egan found that the gossip and colleague awareness of the allegations did not reasonably constitute a part of the disciplinary process and found Woolworths ultimately liable for the injury.

What does this mean for employers?

- Confidentiality is an integral component to workplace investigations to maintain an impartial and procedural fair process.
- Establish an investigation framework as soon as possible, and have a clear understanding of the steps that will be likely need to be taken as part of the investigation.

AN EMPLOYER'S DUTY OF CARE EXTENDS TO AGREED PROFESSIONAL RISK

Employers have a duty of care to prevent foreseeable risk even where an employee's professional judgment has identified the risk and chosen to proceed.

Case Brief: [Brisbane Youth Service Inc v Beven \[2017\] QCA 211 \(22 September 2017\)](#)



The Queensland Court of Appeal has upheld a \$1.5 million damages award against an employer

The Brisbane Youth Service Inc. (the **Employer**) has been found liable for the injury of a worker who took on a risky client despite the employees understanding about the risk the client posed.

Two previous employees had ceased working with the female client after she developed inappropriate behaviour towards them. The client had a well documented history of violence.

The employee developed psychiatric injury after being sexually assaulted by the client during a meeting in a restaurant. There were several other people present at the time of the incident.

At first instance in the Queensland Supreme Court, Justice Atkinson awarded \$1,508,639 in damages.

The employer appealed the decision on the grounds the court failed to consider the employees extensive experience as a social worker, her knowledge of the client's sexualised behaviour and the risks involved in that environment. The employer argued as the third social worker, she undertook the role affirming her competence to do so.

Justice Solfronoff and Justice Gotterson stated that the employee's acceptance of the client did not discharge the employer's duty. They held the employer should have ignored the employee's offer because they knew the risks posed to staff and breached their duty by not

referring the client on to a more appropriate agency. The risk was reasonably foreseeable.

What does this mean for employers?

- Employers need to be aware that their duty of care is not extinguished if a professional employee knowingly accepts the risk of a client.

EMPLOYER ORDERED TO PAY SIGNIFICANT SUM TO EMPLOYEE FOR REPUDIATED CONTRACT

An **employee has received \$425, 000 in damages from his repudiated employment contract.**

Case Brief: [Crowe Horwath \(Aust\) Pty Ltd v Loone \(No 3\) \[2017\] VSC 548 \(15 September 2017\)](#)

The Victoria Supreme Court of Appeal (**Court of Appeal**) awarded the employee \$425,000 in damages for the employer's repudiation of his employment contract. The amount of \$425,000 consisted of 12 months' pay, superannuation, plus a \$142,778 bonus the senior accountant would have received if the company had not repudiated the contract. It is worth noting that 12 months' pay was the maximum sought by the employee and it is not uncommon to see compensation for a longer period being claimed.

As part of a company acquisition, the employer was found to have repudiated the employment contract by excluding the acquisition from the bonus pool, creating a new incentive model which deferred annual bonus' for 3 years and



decreasing the management, profit and loss responsibilities of the employee.

The Court of Appeal upheld Justice McDonald's ruling. By implication, the Court of Appeal affirmed the employer was unable to enforce any and all restraint of trade provisions present in the employment contract.

What does this mean for employers?

- In the context of mergers and acquisitions, employers need to ensure they do not inadvertently repudiate the existing employment agreement.
- Where the employee circumstances and responsibilities are going to be significantly impacted, an employer and employee should enter into a new employment agreement.

OTHER NOTEWORTHY CASES

- **WA launches review of Industrial Relations system:** The Western Australian Minister for Industrial Relations (**IR**) Bill Johnston has requested barrister and former WA IRC president Mark Ritter SC (with the assistance of Forrestfield MLA Stephen Price) review the current IR system. The aim of the review is to ensure a streamlined and efficient framework in. The Western Australian IR system has not been reviewed since 2010. The latest review will focus on assessing equal remuneration, comprehensive coverage for employees, efficiency of the current minimum employment conditions, the need for local

government regulation, and effective compliance and enforcement.

- **Vulnerable Workers Legislation**

Commences: *The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* has received royal assent and all changes are to commence by 27 October 2017. The legislation seeks to increase the protection of vulnerable workers and provide a 'safety net of minimum entitlements'. The updated protections include increased penalties (for serious contraventions and record-keeping failures), prohibition of cash back arrangements, increasing the Fair Work Ombudsman evidence gathering powers in investigations and increased responsibilities imposed on Companies and Franchisors.

- **Substantial HR process provides procedural fairness:**

The Fair Work Commission held Coles' procedures, clearly identified policies and significant Human Resources allocation including the role of an in house legal counsel provided sufficient procedural fairness for a worker who was dismissed after she failed to pay for fuel when she filled up her car at a Coles Express which she worked at. The Commission was satisfied the significant capability and dedicated human resource expertise internally and exposure to external resources and advice provided procedural fairness throughout the termination process.

These materials have been developed for the purposes of general information only. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. © Allion Partners 2017. No part of this publication may be copied or reproduced without written prior consent or as permitted by law.