EMPLOYMENT, HEALTH, SAFETY & INDUSTRIAL LAW

In the November update we look at:

- **WORKPLACE CHANGE:** What is considered a significant effect on the workforce?
- **TERMINATION**: Are you required to provide an ascertainable date for termination?
- **PERFORMANCE IMPROVEMENT PLANS:** Do you have to see it through?
- **SAFETY:** What did the Federal Court consider to be the worst category of safety breaches?
- **COERCION:** Union handed down hefty fine for refusing to employ a non-union worker

In Focus: Breast Cancer Risks found in four common industrial substances

Spanish Researchers have found four occupational substances commonly used in the nursing, agriculture and painting industries have a possible or probable connection with main causes of breast cancer in humans.

The research was conducted on 1476 female workers in multiple workings environments. The chemicals analysed included Perchloroethylene, a common dry cleaning chemical; aliphatic hydrocarbon solvents used by painters and printers; mould spores present in farm, agriculture and forestry industries and ionising radiation affecting medical radiation and health workers.

The research indicated those exposed to the chemicals had a higher rate of mammographic density (MD) in their system, which is one of the leading risk factors for breast cancer in humans. The researchers at Carlos III Institute of Health found that those exposed to Perchloroethylene or mould spores had a MD rate increase of 12 per cent for every five years whilst those exposed to Aliphatic or Alicyclic hydrocarbon solvents increased 11 per cent and 3 per cent for ionising radiation.

The researchers have said further investigations and research is required to clarify and fine tune their results further but brings to light a new risk employers and employees need to be aware of.

Case Brief: ***Four substances linked to breast cancer risk factor***

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MAJOR WORKPLACE CHANGE NEEDS TO HAVE SIGNIFICANT EFFECT ON WORKFORCE

The Federal Court has dismissed the Australian Nursing and Midwifery Federation application against BUPA, finding the 23 potential redundancies do not amount to 'major change' and therefore did not trigger the applicable Enterprise Agreement's consultation clause.

Case Brief: ***Australian Nursing and Midwifery Federation v Bupa Aged Care Australia Pty Ltd*** **[2017] FCA 1246 (24 October 2017)**

BUPA presented a proposal to replace 78 care managers and clinical manager positions with 55 clinical care managers (**the proposal**) and had begun their consultation meetings with the affected workers.

The ANMF union brought an application arguing the proposal was considered a 'major change' and triggered the agreement's consultation clause. They argued that BUPA had consequently contravened s 50 of the *Fair Work Act* 2009 (Cth) (**the FWA**) because it had failed to abide by the Enterprise Agreement's union consultation clause.

The ANMF submitted the job cuts were "major change" because of the seniority of the positions.

Federal Court Justice David O'Callaghan stated that the change was not considered major change because there was no evidence that 23 out of 3000 jobs was major change that had a significant effect on BUPA employees. Whilst seniority may have been an issue, the impact was not large enough to be considered major change. Further, O'Callaghan J said the proposal still remained a proposal rather than a definitive change. He concluded that the ANMF therefore had no application to make.

What does this mean for employers?

- The case provides guidance on the major change threshold as having a significant impact on employees.

EMPLOYER'S MUST PROVIDE AN ASCERTAINABLE DATE FOR TERMINATION

Employers are required to provide employees notice of the date their dismissal will be effective.

Case Brief: ***Metropolitan Fire and Emergency Services Board v Garth Duggan*** **[2017] FWCFB 4878 (25 September 2017)**

After two months of employment, the Metropolitan Fire and Emergency Services Board (**the Board**) was put on notice that an employee failed to disclose previous adverse findings of professional misconduct made at a state tribunal. The employee was still in his six-month probation period. In May, the employee provided his response to the adverse discovery and the United Firefighters Union registered a dispute under the relevant Enterprise Agreement.

The Board sent a letter to the employee and informed him that he would be dismissed on the

completion of the dispute resolution process that was required under the Enterprise Agreement. The Board could not ascertain how long it would take to resolve the dispute or when his employment would be effectively terminated.

The employee brought an action claiming the dismissal letter did not meet the requirements of notice under the FWA. The issue was initially heard by Commissioner Ryan who held the notice fell short of the requisite detail required. Further, he held the employee would be eligible to bring an unfair dismissal application if he wished because his eventual dismissal was over 6 months since he began employment.

On appeal, Deputy Presidents Val Gostencnik and Richard Clancy and Commissioner Tony Saunders ultimately agreed with Commission Ryan's March determination on the construction of s383(a)(1) requiring 'an employer to inform the employee of the time when the employment relationship will come to an end'. The full bench stated the notice letter failed to do that and held the notice of dismissal requirement under s383(a)(i) must also reach the threshold under s117 of the FWA.

What does this mean for employers?

- Employer's must ensure they are aware of the requisite notice periods, particularly in circumstances where the employee is still on probation.

PERFORMANCE IMPROVEMENT PLANS: EARLY CONCLUSION?

An employee has been granted permission to appeal their termination which occurred one week into a six week performance improvement plan.

Case Brief: ***Robert Etienne v FMG Personnel Services Pty Ltd [2017] FWCFB 3864* (13 October 2017)**

At first instance, Deputy President Melanie Binet found in favour of the employer because she held they had valid and reasonable grounds to demonstrate continued performance reviews would be unsuccessful, and this allowed valid ground for early dismissal.

The Fair Work Commission (**FWC**) full bench has granted the appeal but cautioned against the suggestion employers must always complete performance improvement plans to the full term.

The FWC President Iain Ross, Deputy President Alan Colman and Commissioner Tanya Cirkovic allowed the appeal. Whilst acknowledging the case was not an example of a manifest injustice the FWC stated the case did engage areas of the public interest and therefore would allow the appeal.

The FWC warned against interpreting a blanket approach to performance improvement plans and contemplated circumstances where there may be valid reasons not to complete a performance improvement plan.

What does this mean for employers?

- It is essential to ensure performance improvement plans are well established and required before placing an employee on one.
- Be aware of the surrounding circumstances and the likely success of placing an employee on an employee performance improvement plan.

"MOST RECIDIVIST CORPORATE OFFENDER IN AUSTRALIAN HISTORY" – UNION FINED $306,000

Safety breaches including the use of a single swipe card to log multiple members in and out of site has led to a union fine of $306,000 and a $10,200 individual penalty for the former union president.

Case Brief: ***Australian Building and Construction Commissioner v Hanna & Anor (No.3) [2017] FCCA 2519 (19 October 2017)***

A former CFMEU president's multiple safety and right-of–entry breaches has led to the union being fined a maximum penalty and its' former president receiving a significant personal penalty.

The former presidents' actions included the swipe card incident which made it impossible for managers and other senior employees to track personnel on site. Other instances of safety breaches included the former president entering a site in Brisbane without an entry notice, ignoring site management requests to vacate or to have discussions. The president then proceeded to raise his middle finger at the site supervisor and swear at him aggressively.

Justice Salvatore Vasta in the Federal Circuit Court stated the safety risks were quite obvious and the apparent disregard for safety concerns and the FW Act meant his actions were the 'worst category' of offences. Justice Vasta added that the Union provided no condemnation or apology which 'has been deafening'.

The former President resigned in 2015 after internal investigations revealed he had obtained money from employers to fund an organiser's IVF treatment. Justice Vasta further acknowledged the CFMEU's history of contraventions as "astounding".

UNION FINED FOR COERCION- REFUSING TO EMPLOY A NON-UNION MEMBER

The Federal Court has fined the CFMEU and a delegate $100,000 in penalties for coercion against a non-union employee.

Case Brief: ***Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case) [2017] FCA 1235***

A CFMEU delegate prevented a Subcontractor's employee from working on a project because the employee was not part of the union. The Federal Court fined the union $90,000 and the regional delegate $8,000 for breaching s348 of the Fair Work Act. Justice Tracey said they had also breached s346 for taking adverse action against an employee because of his non-union status.

Justice Tracey reflected on 15 other occasions the union had attempted to impose the 'no ticket, no start' regime and considered deterrence as his guiding principle to determine the penalty amount.

Despite this, Tracey J applied a 10% discount to the union and personal penalty because they occurred during the same induction process.

What does this mean for employers?

- Is essential to be aware that 'no ticket, no start' regime are not tolerated in the industrial space with the heavy penalties been imposed.

OTHER NOTEWORTHY CASES

- **Increased FWC role in General Protections Claims?** At a recent Queensland IR Society Convention, Vice President Joe Catanzariti hinted at suggestions the FWC should play a greater role for General Protection cases which can currently take up to 4 years to run. The FWC currently does not have the power to force arbitrations but VP Catanzariti says this could present an answer to the extraordinary length of some General Protections cases.

- **Fair Work Ombudsman Annual Report Released:** The Report has identified a higher rate of financial penalties awarded against employers who engaged in exploitative and sham contracting arrangements with penalties increasing from $2.9 million in 2015-2016 to $4.8 million in 2016-2017. Ombudsman Natalie James said this was a reflection of a changing attitude towards employer behaviour. Further, the report outlines recent cases as demonstrating an increase in the notice requirements of HR and accountants. Anonymous tips and greater intelligence-gathering approaches led to $30 million in total recoveries up from $27.3 million in 2015-2016.

- **Streets Free Summer:** The AMWU is adamant the "*streets-free-summer"* campaign will continue until Unilever withdraws its application to terminate its Enterprise agreement. The Union is arguing the terminate will led to a 46% pay cut if workers were forced to rely on the old *Food, Beverage and Tobacco Manufacturing Award*. Unilever have argued it requires more flexibility and maintained it has no intention of implementing historic award pay when they negotiate a new agreement.