

### “VISION IN THE WORKPLACE”

**Issue Fifty-six, October 2011**

In this issue of *Vision in the Workplace*, we cordially invite you to attend the Stevens & Associates Lawyers Lunch Seminar, to be held on Thursday, 1 December 2011. We look at a recent decision of the New South Wales Administrative Decisions Tribunal, in which an epileptic employee was awarded \$21,810 in compensation for discrimination on the grounds of his disability. We also outline the requirements of genuine redundancy, as discussed in a recent matter before Fair Work Australia (“FWA”). We examine an ongoing matter before FWA concerning a mother’s request for five years’ part time employment, and her employer’s obligation to consider opportunities for the same in the business as a whole, and not only the mother’s former business department. Finally, we look at a recent decision of FWA which upheld a dismissal by text message.

#### **Employee awarded \$21,810 in compensation for discrimination based on epilepsy**

In the recent decision of *Hunter v Deerubbin Local Aboriginal Land Council [2011] NSWADT 202*, an employee of the Deerubbin Local Aboriginal Land Council (“**the Land Council**”) was been awarded \$21,810 in compensation after the NSW Administrative Decisions Tribunal (“**the ADT**”) found that his employer had stopped offering him work as a result of his epilepsy.

The employee was employed as a casual survey employee between July 2003 and October 2005, and was required to walk behind earthmoving equipment to ensure that no Aboriginal cultural artefacts were exposed as the equipment passed. The employee had informed the employer at the time of commencing his employment that he suffered from Grand Mal epilepsy, and that he was on medication to control the condition. The employee also made a conscious effort to notifying co-workers on each project of his condition, in case he suffered a seizure whilst at a work site.

Initially, the employee was engaged regularly by the Land Council, however after suffering an epileptic fit at a work site on 4 March 2005, the employee received only one more shift on 19 October 2005. Following this shift, the employee suffered a seizure at home which resulted in him being hospitalised, but despite obtaining a doctors certificate declaring him fit to return to work, he received no further shifts.

Despite accepting that there had been “a general decline in the work available to be allocated”, the ADT found that there had been a “significant drop” in the work allocated to the employee from 350 hours in the period from November 2004 to March 2005, to 66 hours between March and October 2005, and then to nothing. This was despite the fact that “comparable casual employees continued to receive work”, and the ADT concluded that the only differing factor in the non-employment of the worker was his disability. This represented a breach by the Land Council of s49D of the State *Anti-Discrimination Act*, which prohibits employees from discriminating on the grounds of disability in determining who should be offered employment. The employee was awarded \$21,810 in compensation, which reflected his loss of income, as well as the loss of self-esteem, social isolation and depression suffered as a result of the breach.

The ADT noted that the Land Council did not appear to be aware of its responsibilities under the *Anti-Discrimination Act*, and had no equal opportunity policy in place at the time. This case therefore highlights the importance to businesses of implementing equal opportunities to ensure that, as a minimum, the requirements of relevant anti-discrimination legislation are met.

For advice on anti-discrimination obligations in relation to employees with disabilities, please contact Nick Stevens, Megan Bowe or Liza Isho.

Invites you to a special lunch seminar  
at The Grace Hotel, Sydney on  
Thursday, 1 December 2011.

### **“The O’Farrell Government’s Vision for Industrial Relations in NSW”**

#### **Free Lunch Seminar**

With Guest Speaker,

**The Honourable Greg Pearce MLC,**  
Minister for Finance & Services & Minister for  
the Illawarra, presenting the  
O’Farrell Government’s Vision for  
Industrial Relations in NSW

Industrial Relations in NSW is now  
encompassed within Mr Pearce’s Portfolio as  
Minister for Finance & Services

**Where:** The Grace Hotel  
77 York Street, Sydney

**When:** Thursday, 1 December 2011

**Time:** 12 Noon (for 12:15pm start) to  
approx. 2:00pm  
Lunch included

**Please contact David Wells on  
(02) 9222 1691 or [dww@salaw.com.au](mailto:dww@salaw.com.au)  
by Monday, 28 November 2011  
to book your seats.**

**Bookings Essential as seats will fill up!**

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## Fashion Firm's Failure to Consult Meant Redundancies Not Genuine

Fair Work Australia ("FWA") has recently ruled that five dismissals by struggling fashion firm, Specialty Fashion Group Ltd ("SFG") were not genuine redundancies as SFG had failed to comply with its consultation obligations, in the case of *Wang, Xiu, Li, Leung and Yang v Specialitt Fashion Group Ltd [2011] FWA6872*.

On 1 June 2011, SFG decided to make 21 of 72 employees redundant, in an effort to restructure its design and production team in light of the 2010-2011 downturn in retail trade. However, the employees were not notified of this decision until 23 June 2011, when they were informed their positions had been made redundant, effective immediately. Five of the affected workers subsequently lodged unfair dismissal applications with FWA.

Under section 389 of the *Fair Work Act*, a dismissal is a genuine redundancy if the position in question is no longer required to be performed due to changes in operational requirements; and if the employer has complied with any obligations under an applicable modern award or enterprise agreement to consult about the redundancy. Because SFG had not complied with the requirement of the *Textile, Clothing, Footwear and Associated Industries Award 2010* that staff must be notified of major changes in operations, Vice President Watson of FWA held that terminations were not genuine redundancies.

To avoid claims of unfair dismissal and ensure that such terminations are deemed by the courts to be genuine redundancies, employers must provide the affected employees an opportunity to raise any matters relevant to the decision, and to provide input on issues such as selection, redeployment, payments and alternatives to redundancy.

For advice on ensuring you have met any consultation obligations with regards to operational restructuring and redundancies, please contact Nick Stevens. Megan Bowe or Liza Isho.

## FWA to Rule on Mother's Request for Five Years' Part-Time Work

Fair Work Australia's recent decision in *Hawkins v Victorian WorkCover Authority trading as WorkSafe [2011] FWA4913* has demonstrated that when mothers returning from maternity leave request part time work, employers must consider whether they can be accommodated in the business as a whole, not just within their former department or business line.

This case concerned Shannon Hawkins, an employee of WorkSafe Victoria who had completed five years of full-time service in the role of Policy Officer before taking twelve months maternity leave commencing in December 2007. Two months prior to Ms Hawkins scheduled return to work, she requested two days of part-time work per week, increasing to three days per week after three months. Ms Hawkins wanted to continue on a part-time basis for five years, until her daughter reached school age.

Ms Hawkins was entitled to request part-time work following parental leave under the *Victorian Workcover Authority Certified Agreement 2005-2008* ("the Agreement"), on the condition that she notify her manager of such request eight weeks prior to her scheduled return to work. WorkSafe

accepted her request and offered three days of part time work in the role of Administration Officer, but claimed that "due to the needs of the business," Ms Hawkins would need to return to full-time duty on 4 January 2010. Commissioner Greg Smith found it evident that WorkSafe had "genuinely explored" part-time options within Hawkins' business unit, but stated that because the Agreement did not define Hawkins' business unit as a party to the agreement "the test is whether or not the employer, WorkSafe, has given due consideration to the request of Ms Hawkins, not a particular business line or unit." The case has been adjourned to allow both WorkSafe, and Ms Hawkins union, the Finance Sector Union, to make further submissions on the issue.

For advice on whether you have fulfilled any obligations in your employees' Enterprise Agreement, please contact Nick Stevens, Megan Bowe or Liza Isho.

## FWA Finds Dismissal by Text Message was not Unfair

In the recent case of *Brett Martin v DecoGlaze Pty Ltd [2011] FWA 6256*, Commissioner Frank Raffaelli of Fair Work Australia has held that it was not unfair for DecoGlaze Pty Ltd ("the Company") to dismiss a painter via text message, because the outcome would likely have been the same if he had been dismissed face-to-face. The Company is a manufacturer of glass splashbacks for kitchens, and had employed the painter in question since September 2006. The painter's dismissal resulted from his failure to use an additive named Silane, which helps paint adhere to glass, which ultimately cost the Company \$74,000 to replace faulty painted glass splashbacks.

The painter claimed that he had informed the production manager that there would be a delay in receiving new stock of Silane, and the production manager left the decision of whether or not to paint the glass without the additive to him. The painter said he decided to proceed with painting the most urgent jobs without Silane knowing that previously, painted glass splashbacks had accidentally been prepared without Silane with no adverse effect. However several weeks later, whilst the painter was on leave, he received text messages from the Company's managing director informing him that several defective orders had been returned, and that the painter had been instantly dismissed.

Commissioner Raffaelli rejected the painter's claim that the production manager had been involved in discussions about proceeding without the additive. His Honour also accepted the evidence of the Company that the painter knew that the use of Silane was a necessary part of the process, and that the failure to use the additive threatened the Company's reputation and had caused the Company to suffer financially. Therefore it was held that the painter's conduct constituted misconduct which formed a valid reason for dismissal.

Commissioner Raffaelli stated that although "in most situations, termination of employment by telephone texting is not appropriate", in this case the dismissal was not harsh, unjust or unreasonable given that the painter was on leave and about to fly overseas. His Honour also noted that the painter was notified of the reasons for his dismissal, was provided with an opportunity to respond in a phone call to the Company's managing director on the same day he received the text messages, and was provided with written notice of his termination upon his return to work.

For advice on protecting your business from unfair dismissal claims, contact Nick Stevens, Megan Bowe or Liza Isho.

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