STEVENS & ASSOCIATES LAWYERS

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# A VISION IN THE WORKPLACE

In this edition of *Vision in the Workplace* we examine a recent Fair Work Commission decision to uphold the termination of a manager who accidentally sent an inappropriate email her employer's clients. We also consider a Federal Court of Australia decision that demonstrates the importance of decision-makers keeping proper records of their decision making processes. Finally, we warmly extend an invitation to our mid-year Breakfast Seminar on Thursday, 8 June 2017.

## Long Standing Manager Sends " *inappropriate*" email: Valid Reason for Termination Upheld

A recent Fair Work Commission ('**FWC**') decision to uphold the termination of a key account manager's employment is a timely reminder to check that your workplace policies are up-to-date and sufficiently detailed to ensure any breach can be clearly identified and communicated.

The FWC held that Cosmetic Suppliers Pty Ltd T/A Coty ('**the Respondent**') did not unfairly dismiss Ms Georgina Sologinkin ('**the Applicant**') after it had "*lost trust and confidence*" in her because she mistakenly sent an inappropriate email to the Respondent's clients. The email contained derogatory and offensive comments about the clients, including "*disparaging*" comments about one client's ethnicity and national origin. The Applicant's inappropriate email resulted in the Respondent losing the clients' business.

Following the incident, the Respondent issued the Applicant with a show cause letter inviting her to attend a disciplinary meeting and specifying its concerns with the Applicant's conduct in sending the email. In response, the Applicant claimed she had a lack of management support in the face of organisational change, lack of sleep, stress, and a heavy workload dealing with complaints that she attributed to the customer service team.

Despite considering the Applicant's explanations and acknowledging that the email in question had been *accidentally* distributed to clients, the Respondent determined that the Applicant had breached its Code of Conduct and IT User Conduct Policy (which expressly prohibited use of email to make statements that would be "*embarrassing*" to the Respondent) and accordingly terminated the Applicant's employment paying in lieu of notice.

The FWC dismissed the unfair dismissal application, holding that the Respondent had a valid reason for the termination and afforded the Applicant a procedurally fair process that allowed her to provide a "*detailed and cogent response*" which the Respondent then considered when making its decision.

In determining whether the termination was "*harsh, unjust or unreasonable*" within the meaning of the *Fair Work Act 2009* (Cth), Senior Deputy President Hamberger also considered the fact that the Applicant had apologised and had a lengthy unblemished record of service with the Respondent. Despite this, the Senior Deputy President held that the Applicant's actions caused damage to the Respondent's reputation, constituted a breach of workplace policies, and held that any mitigating factors did not "*outweigh the gravity of the misconduct so as to render the dismissal harsh."*

If you have any questions about unfair dismissal claims, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

## Breakfast Seminar

Stevens & Associates Lawyers warmly invites you to our complimentary Breakfast Seminar on Thursday, 8 June 2017.

**Topics:** *From the "coffice" to the "roaming office" How to Manage the Safety of your Remote Workforce; and Employer's Right to Pry? Where to Draw the Line with Workplace Surveillance*

**Venue**: The Lane
Shop 3, 20 Hunter Street, Sydney
(Rear entrance Cnr Curtin Place & Hamilton Street – across from Ryan's Bar, Australia Square)

**Time**: 7:15 for 7:30am start, to approx. 9:00am

The seminar will begin with an opportunity to network before breakfast is served
with the presentations to follow.

**Date**: Thursday, 8 June 2017

To reserve your seat(s) please reply to David Wells at dww@salaw.com.au or (02) 9222 1691 by Monday, 5 June 2017.

We hope to see you at the seminar.

## Workplace Fundamentals: Record keeping

A recent decision of the Federal Court of Australia ('**FCA**') has reaffirmed the importance of record keeping from recruitment through to dismissal. In particular it has highlighted the fundamental role of employment records in a successful defence against an adverse action claim.

Employers should be particularly mindful of the reverse onus of proof that operates in the general protections jurisdiction that requires the employer to displace the presumption that the action was taken, or decision was made for an unlawful reason. In such instances the court will presume that the employer's conduct was taken for a reason prohibited by the provisions unless the employer can prove otherwise. It is for this reason that employer should keep relevant documentation relating to any 'adverse action' taken against employees in order to prove that the action was not taken for an unlawful reason.

*In Shizas v Comissioner of Police* [2017] FCA 61, Justice Katzmann considered whether two seperate decisions of the Australian Federal Police ('**AFP**') to refuse to employ Mr Shizas ('**the Applicant**') as a police officer were made on the basis of his disability in contravention of section 351 of the *Fair Work Act 2009* (Cth) ('**FW Act**') and, if so, whether the decisions were made because of the inherent requirements of the position, which would invoke the defence to an adverse action claim pursuant to section 351(2)(b) of the FW Act.

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The AFP's refusal to employ the Applicant as a police officer in March 2013 received particular attention, given the difficulty the FCA had in determining who made the decision not to employ the Applicant and on what basis.

The Applicant satisfied the FCA that the AFP refused to employ him *and* that at such time the Applicant had a disability within the meaning of the FW Act (being a musculosketal disorder, ankylosing spondylitis). This invoked the onus on the AFP to establish that the two facts were not linked, that is, it did not refuse to employ the Applicant *because* of his disability.

With respect to the first decision to refuse to employ the Applicant, the AFP was not able to adduce evidence to demonstrate unequivocally who made the decision. As a result, the AFP was not able to specify why the decision was made. Accordingly, the AFP was unable to displace the presumption that its refusal to employ the Applicant was because of his disability or that the reason was that the Applicant could not perform the inherent requirements of the role of a police officer.

Following the first refusal, Mr Shizas lodged a complaint of disability discrimination with the Australian Human Rights Commission. Following this, the Assistant Police Commissioner ('**the Commissioner**') sought independent medical advice, on which he purported to make the AFPs second decision to refuse to employ the Applicant in July 2014. In this regard, Justice Katzmann held that, even though the Commissioner misunderstood the independent medical advice and incorrectly determined that the Applicant could not perform the inherent requirements of the position, section 351(2)(b) of the FW Act requires consideration of the *actual* reasons of the decision maker. Accordingly, an honestly held mistaken belief that the Applicant could not perform the inherent requirements of the position was sufficient to satisfy the exception.

This decision demonstrates the importance of proper record keeping during interview and pre-employment processes and is a reminder that employers owe certain obligations to prospective employees. More broadly, employers should ensure all employment related decision making processes are well documented.

Some best practice tips to mitigate the risk of a successful adverse action claim:

- In circumstances where a prospective or current employee may not be able to perform the inherent requirements of their (or a prospective) position seek independent medical advice and rely on the same.
- Take contemporaneous file notes during all decision-making processes from recruitment processes to disciplinary meetings and complaint handling.
- Ensure such file notes particularise reasons for decisions and name any other persons present at meetings or involved in any decision-making process.
- Ensure managers, human resources staff, and all employees with decision making authority are trained appropriately and are cognisant of the risk of a general protections claim and the circumstances that may give rise to the same.

If you have any questions about adverse action claims or sufficient record keeping, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

*This publication is intended only as a general overview of legal issues currently of interest to clients and practitioners. It is not intended as legal advice and should only be used for information purposes only. Please seek legal advice from Stevens & Associates Lawyers before taking any action based on material published in this Newsletter.*