



“VISION IN THE WORKPLACE”

October 2016

In this edition of *Vision in the Workplace*, we explore the consequences of underpaying employees. We also examine a recent decision in the Supreme Court of NSW, where an employer was found to be liable for failing to prevent the psychiatric injury of an employee. Finally, we discuss a recent decision of the Federal Circuit Court of Australia where an employer found to have grossly contravened the *Fair Work Act 2009* (Cth) in an attempt to coerce an employee to withdraw a complaint to the Fair Work Ombudsman.

Precedent: Employers no longer protected by 'Corporate Veil'

A recent case in the Federal Circuit Court of Australia ('FCCA') has reaffirmed that Federal Courts are willing to impose individual penalties for contraventions of the *Fair Work Act 2009* (Cth) ('The Act'). The Fair Work Ombudsman ('FWO'), commenced proceedings against both Step Ahead Securities ('the Employer') and Mr Jennings, the sole owner of the Employer company, for the total underpayment of \$22,779.72 to eight employees over a three month period.

Judge Jarret applied section 45 of the Act which imposes a “civil penalty” within the meaning of the Act for contravention of a modern award. Breaches of this section carry penalties of up to \$54,000 for a corporate body and \$10,800 for an individual, per offence.

The employer was found to have committed “numerous” breaches of the *Security Services Industry Award 2010* ('the Award'), by failing to provide: correct minimum wage, minimum shifts, casual loading, Saturday, Sunday and Public Holiday loading and overtime rates. Instead of complying with the pay rates specified by the Award, the Employer paid the employees at a flat hourly rate below the legal minimum.

Judge Jarret criticised the Employer's “blatant disregard” for both Australian workplace laws and employee rights/entitlements, imposing a significant civil penalty of \$257,000 on the Employer. Furthermore, Judge Jarret found that s 545 of the Act provides the court with broad powers to make “any order” it considers “appropriate”, including compensation orders against a person it is “satisfied” was involved in a contravention within the meaning of s 550 of the Act. The court ruled that Mr Jennings was, “knowingly involved”, in the Employer's conduct and was personally fined a penalty sum of \$51,400.

Additionally, The FCCA found that both Mr Jennings and the Employer were liable to repay the \$22,779 of underpaid wages. This additional penalty was to ensure that Mr Jennings did not retain the benefits acquired by his misconduct.

The precedent set by the decision highlights the potential exposure for company directors to be personally responsible for employee back pay, with the Fair Work Ombudsman ('FWO') warning that “it should be clear to employers across all levels of operations”, that they can be subject to, “substantial... personal penalties.”

The FWO has recently adopted a tougher stance on accessorial liability, releasing a public statement that directors of companies, “can no longer hide behind the corporate veil”, as courts shift blame to individuals to rectify employee underpayments.

If you would like more information about issues relating to underpayment/ your company's minimum employment obligations please don't hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

Workplace Complaints & Investigations: *Making sure your outcomes stick*

We warmly invite you to attend our free “Christmas” breakfast seminar to be held on Thursday, 24 November 2016

When: Thursday, 24 November 2016

Where: The Lane www.thelanesydney.com.au
Shop 3, 20 Hunter Street, Sydney

Time: 7:15 / 7:30 am to approx. 9:00 am
(Breakfast served from 7:30am)

RSVP: Please RSVP to David Wells via email dww@salaw.com.au or (02) 92221691 by Tuesday, 22 November 2016. Spaces are limited.

Employer liable for Employee developing a psychiatric illness

In a recent decision in the Supreme Court, an employer was found to have breached its duty of care by failing to prevent an employee from developing a foreseeable psychiatric injury in the course of his employment.

Castricum Brothers Pty Ltd (**'the Defendant'**), a meat processing company, required Mr Roussety (**'the Plaintiff'**) to be on call 24 hours per day and work up to 70 hours per week.

The Plaintiff was appointed to the position of rendering plant manager in 2004 and initially agreed to work long hours and be on call 24 hours per day. However, structural changes within the Defendant's company (namely maintenance issues and staff reductions) caused the number of hours worked by the Plaintiff to increase above what was originally agreed upon in his employment contract. The Plaintiff subsequently developed a psychiatric injury, including major depression, and sued the Defendant.

The Plaintiff alleged that the Defendant negligently exposed him to a foreseeable risk of psychiatric injury in failing to provide "appropriate assistance and support" for inherently "excessive work demands." The Defendant refused to accept that the psychiatric injury was a "work related injury"

In order to impose a duty of care on the Defendant, the Court considered whether the psychiatric injury that Mr Roussety suffered was the reaction of a "reasonable person" in the circumstances. In light of the long hours, ongoing maintenance issues and staff reductions Justice Zammit found that it would be reasonably foreseeable that an individual in the Plaintiff's circumstances, would be at a "significant risk" of suffering from a "recognisable psychiatric illness."

Justice Zammit found that the Defendant had the requisite knowledge of the Plaintiff's deteriorating condition, "should have responded in a more supportive manner", and that it was their obligation as his employer to "investigate his concerns" and "put supports in place." Justice Zammit heard that the Plaintiff repeatedly complained to the operations manager about the workplace conditions and his health, including that he was stressed, exhausted and experiencing insomnia. The Defendant's operations manager allegedly told the Plaintiff that she had "grown tired" of his complaints, sceptical about the link between the work and the symptoms of psychiatric harm experienced by the Plaintiff.

Justice Zammit ruled that the Defendant breached its duty of care to the Plaintiff in its failure to prevent the Plaintiff from working excessive hours, which the judge directly attributed to "injury to his mental state." The damages that are to be awarded to the Plaintiff will be determined in a later hearing.

This case reflects the willingness of Courts to impose liability on employers whom provide poor working conditions for their employees and subsequently breach the duty of care that they owe to employees.

If you have any questions regarding duty of care to employees please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

"Appalling treatment" of employee lands medical practice in hot water

In a recent Federal Circuit Court of Australia decision, the Fair Work Ombudsman (**'the Ombudsman'**) successfully imposed a significant penalty and compensation order on Windaroo Medical Surgery Pty Ltd (**'the Medical Practice'**) whom subjected an Employee to "appalling" treatment after he made a complaint to the Ombudsman.

The court found that the Medical Practice and its operators, Dr Pathmanathan and Dr Tran, breached section 343 of the *Fair Work Act 2009* (Cth) (**'the Act'**) when they threatened to cease paying a doctor (**'the Employee'**) at the Medical Practice, unless he withdrew a complaint to the Ombudsman. Judge Jarrett characterised the parties' conduct as a "gross contravention" of s 343 of the Act, stating that the section is specifically designed to ensure that "no person should be subject to coercion for exercising a workplace right." The court identified that the contraventions were intended to deprive the Employee's "right to complaint" and "right to payment". Both Respondent's were also found to have knowledge that the doctor was experiencing "significant financial difficulty", and manipulated him with the "specific intent" to avoid "scrutiny of regulatory authority".

A \$3960 penalty was imposed on Dr Tran for threatening to cease the Employee's pay if he did not withdraw the complaint. Dr Pathmanathan was penalised \$7920 for her role in the threat and taking adverse action against the Employee by cutting off his pay. Furthermore, a \$24,724 penalty was imposed jointly upon Dr Pathmanathan and the Medical Practice to compensate the victim for the economic loss and associated distress suffered.

Fair Work Ombudsman Michael Campbell commented that this outcome has demonstrated that the Ombudsman "will not hesitate to take enforcement action" against organisations that "unlawfully threaten and coerce workers". This case also reiterates the Court's increasing willingness to impose penalties on individuals for contraventions of the Act, highlighting that employers may be held personally accountable within the employment relationship.

If you have any questions about the exercising of workplace rights by Employees, please contact Nick Stevens, Megan Cant or Jane Murray.

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