

A VISION IN THE WORKPLACE

In our September 2017 edition of *Vision in the Workplace* we examine the implications for employers now that the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* has become law. We also consider a recent unfair dismissal case where an employee was awarded reinstatement by the Fair Work Commission after being successful in their claim of constructive dismissal.



FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) ACT 2017: WHAT ARE THE IMPLICATIONS FOR EMPLOYERS?

No doubt you have heard whispers about the Federal Government's *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) in recent months. Now, it's time to get serious and ensure you are abreast of the key provisions.

Why? - on 15 September 2017 the new legislation, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* ('**Vulnerable Workers Act**') became law, with the majority of changes now in force.

Directed at reducing the systematic exploitation of vulnerable workers that was brought to the fore by the recent 7-Eleven (and similar) scandals, the *Vulnerable Workers Act* will increase the maximum civil penalties for certain contraventions of the *Fair Work Act 2009* (Cth) ('**FW Act**'), expand the accessorial liability provisions of the FW Act, and grant the Fair Work Ombudsman ('**FWO**') enhanced powers to aid its investigative function.

Whilst the *Vulnerable Workers Act* appears to target franchises, such as 7-Eleven that have been found to systematically underpay employees, it has wider reaching implications for employers. For example, increasing the penalty for failing to meet record keeping obligations. Accordingly, it acts as a suitable reminder for businesses to review their practices to ensure compliance.

Key Changes

Increased Penalties for Serious Contraventions

The *Vulnerable Workers Act* introduces new penalties for "*serious contraventions*" of the FW Act where there is a knowing contravention that is part of a systematic pattern of conduct. Employers found guilty of some serious contraventions may be liable for a penalty of up to \$126,000 for individuals and \$630,000 per contravention for companies. To determine whether a contravention is part of a "*systematic pattern of conduct*" a court may consider (among other factors): the number of contraventions, the period over which the contraventions occurred, the number of people affected by the relevant contraventions, and the response to (or failure to respond to) any complaints made about the contraventions.

Eliminating 'Pay Back' Arrangements

The *Vulnerable Workers Act* expressly prohibits employers from unreasonably seeking payments from employees, patently directed at preventing the practice

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of employers paying correct wages and then seeking partial cash back payment of such wages.

Record Keeping Penalties

The Vulnerable Workers Act doubles the previous penalties for breach of record keeping provisions and triples existing penalties for providing false or misleading payslips or providing the FWO with false information.

FWO Enhanced Powers

The Vulnerable Workers Act enhances the investigative and evidence gathering powers of the FWO, which is now armed with the power to (among other things) issue notices on individuals and/or companies that require production of documents or information if it “*reasonably believes*” that the person has information relevant to a suspected contravention of the FW Act and/or is capable of giving evidence in an investigation.

New Reverse Onus

Notably, new provisions impose a reverse onus burden on employers to disprove allegations of improper record keeping made by employees or the FWO. Whilst the full reach of these provisions remains untested, the relevant provisions appear to create a rebuttable presumption that an employer has breached the relevant record keeping provisions (if alleged) and provides a defence where failure to keep records was “*due to exceptional circumstances beyond the employer’s control*”.

Increased Liability of Franchisors

The Vulnerable Workers Act is also designed to extend liability to franchisors and holding companies for franchisee or subsidiary contraventions where they “*knew or could reasonably be expected to have known*” that a contravention would or was likely to occur.

While its name and media coverage may suggest that the Vulnerable Workers Act is solely targeted at preventing repeats of the 7-Eleven scandal, its provisions suggest much farther-reaching implications. A reactive, rather than a proactive approach to the amendments may prove costly.

If you would like to discuss how the Vulnerable Workers Act might affect your business and how to best “armour up” please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.



RESIGNATION LEADS TO UNFAIR DISMISSAL AND REINSTATEMENT: THE IMPORTANCE OF PROCEDURAL FAIRNESS

In a recent unfair dismissal case¹ heard by the Fair Work Commission (‘**FWC**’) an aged care worker Ms Tavassoli (‘**the Applicant**’), who was successful in her claim that she was constructively dismissed, was reinstated due to significant deficiencies in her employer, Bupa Aged Care Mosman’s (‘**Bupa**’) investigative process.

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At the aged care facility where the Applicant worked (**'the Facility'**) between 13-14 of November 2016 a colleague filmed the Applicant using a mobile phone without her consent on two occasions. Bupa alleged that the video recording (**'the Video Recording'**) depicted inappropriate behaviour by the Applicant including: laughing about the death of two residents, ignoring resident's buzzers for staff assistance, and mocking residents by singing a line from the song 'Anything you can do I can do better' (**'the Allegations'**).

On 15 November 2016, the acting General Manager of the Facility, Mr Brice, was shown the Video Recording. The next day whilst the Applicant was at a training course he advised her that they "*need[ed] to have a discussion*", directing the Applicant to wait outside the Facility for two hours to allow time for the Human Resources team to prepare documentation for a meeting.

At this time, the Applicant had not been provided with the Allegations, and whilst waiting outside, concluded that the impending meeting was in relation to being offered beer by a resident. The Applicant feared being accused of theft or that her employment would be terminated for stealing. As a result, when a colleague walked past her she sought assistance in drafting a resignation letter. The Applicant then re-entered the Facility and provided Mr Brice with her letter of resignation which included a provision for four weeks' notice. Mr Brice refused the resignation letter and insisted on a meeting (**'the Meeting'**) to discuss the Allegations.

In the Meeting Mr Brice read aloud letters from Bupa outlining the Allegations and advised the Applicant of Bupa's intention to launch an investigation into the matter. The Applicant was not provided with any copies of these letters, nor was she shown the Video Recording. The Applicant also claimed that she did not fully

understand the process and correspondence in the Meeting, which Commissioner Riordan attributed to her "*poor...command of the English language*." Mr Brice advised that unless the Applicant changed the effective date of her resignation from four weeks' notice to "*immediate*", she would be required to participate in the investigation process. As a result, the Applicant amended her resignation letter to the effect that her resignation had immediate effect. The following day, Mr Brice emailed the Applicant confirming the resignation.

The next morning, the Applicant attended the Facility in an attempt to rescind her resignation, which Mr Brice refused. The FWC held that Mr Brice's refusal of the Applicant's rescission was due to the fact that Mr Brice had already formed the view that Ms Tavassoli "*deserved to be dismissed*" after he viewed the Video Recording.

Commissioner Riordan identified two key legal questions that needed to be decided: the first was whether the Applicant was constructively dismissed or chose to resign and the second was whether the dismissal was harsh, unjust or unreasonable.

Was the Applicant Constructively Dismissed?

The relevant case law required Commissioner Riordan to objectively determine whether the resignation came about as a probable result of the employer's conduct. Commissioner Riordan was also required to consider whether any "*special circumstances*" affected the resignation.

Commissioner Riordan held that the conduct of Bupa resulted in the termination of the Applicant's employment and that the Applicant was constructively dismissed. Commissioner Riordan held that the Applicant's "*agitated and upset*" state in the Meeting as well as the Applicant's "*poor command*" of English and constituted "*special circumstances*". He stated that Mr

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Brice ought to have taken “*additional steps*” to ensure that the Applicant understood “*the circumstances of the investigation and the effect of her resignation*”.

Commissioner Riordan held that Mr Brice’s suggestion to amend the terms of the resignation to “*immediate effect*” caused the resignation to be “*at the initiative*” of Bupa and that his refusal of the Applicant’s resignation was procedurally unfair. This allowed the Applicant to access the unfair dismissal jurisdiction.

Was the Dismissal Harsh, Unjust or Unreasonable?

The FWC held that Bupa did not have a valid reason for termination of the Applicant. Commissioner Riordan held that Mr Brice pre-determined that the applicant “*deserved to be dismissed*” prior to conducting a proper investigation, which caused Mr Brice to unreasonably refuse the Applicant’s request to withdraw her resignation.

Commissioner Riordan also heavily criticised the colleague who filmed the Applicant labelling the recording as a “*blatant breach*” of her privacy, and a potential breach of the *Privacy Act 1988* (Cth). Whilst the legality of the covert video surveillance by the colleague was not within the jurisdiction of the FWC, Commissioner Riordan held that the content of the Video Recording was misconstrued by Bupa and that the Applicant was not laughing at the death of residents and that it was reasonable to ignore resident buzzers whilst on a break. Commissioner Riordan also stated that the singing was

“*not meant to be condescending, nor would it have been taken that way by the resident*”.

The lack of a valid reason for dismissal coupled with the deficiencies in the procedural fairness of the investigation process culminated in the decision that the dismissal was both harsh and unjust. In particular, the FWC were critical of:

- Bupa’s failure to provide the Applicant with clear allegations in writing. In turn, providing her with no real opportunity to respond;
- Failing to show the Applicant the Video Recording from which the allegations arose; and
- Failing to ensure that the Applicant understood the details of the investigation and the effect her resignation.

Remedy

Commissioner Riordan considered reinstatement appropriate, taking into account submissions that the Applicant was a “*dedicated worker*” whom “*has an excellent rapport with the residents*” as well as the fact that Mr Brice no longer worked at the Facility. In addition to her reinstatement, the FWC made orders for the Applicant to be paid for the period between dismissal and reinstatement.

If you have any questions regarding procedural fairness in disciplinary or termination processes please contact Nick Stevens, Megan Cant or Jane Murray.

[1] *Ms Shahin Tavassoli v Bupa Aged Care Mosman*
[2017] FWC 3200

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