STEVENS & ASSOCIATES LAWYERS

NEWS

"VISION IN THE WORKPLACE"

May 2016

In this edition of *Vision in the Workplace,* we review three recent decisions, which have significant implications for employers. The first decision highlights the power of the Fair Work Commission to make an order for costs against an Applicant; the second provides a timely reminder to employers of the implications of a finding of unlawful adverse action; and the third demonstrates the importance of maintaining procedural fairness in a disciplinary process.

'Hard Bargaining' Employee Pays Costs

The Fair Work Commission has ordered an unrepresented employee, Mr Colin Ferry, to pay almost $14,000 in costs following his refusal to accept a settlement offer of $3,000 from his former employer, GHS Regional WA Pty Ltd ("**GHS Regional**") to settle his unfair dismissal claim.

Mr Ferry was dismissed form his position of Yard Manager at GHS Regional on 13 October 2014 for entering GHS Regional's yard out of hours without permission and for removing items from the yard for his personal use. Mr Ferry filed an unfair dismissal claim under section 394 of the *Fair Work Act 2009* (Cth) ("**FW Act**").

Following Commissioner Williams' decision to dismiss Mr Ferry's unfair dismissal claim, GHS Regional applied for a costs order pursuant to section 400A of the FW Act on the basis that Mr Ferry's refusal to accept GHS Regional's offer of settlement was an "unreasonable act or omission".

Commissioner Williams, in forming his decision, noted "*…the Commission should only exercise its discretion to award costs where there is clear evidence of an unreasonable act or omission has occurred, and that a mere failure to agree to a settlement offer, even when a person's case may be weak and ultimately unsuccessful, does not necessarily warrant the exercising of the discretion to award costs. Section 400A of the Act does not preclude parties from hard bargaining and compel them to accept the best, or near best offer, of the other party*".

Commissioner Williams took into account that Mr Ferry, being unrepresented, was not a "*seasoned negotiator"* and could not be expected to bring those skills and understanding to settlement negotiations. GHS Regional also had not put to Mr Ferry when making its offer of settlement that Mr Ferry's case was very weak. However, Commissioner Williams was satisfied that Mr Ferry had, in "*wilful disregard to known facts*" failed to "*reasonably assess the prospects of his case and his refusal to accept the respondent settlement offer went beyond "hard bargaining" and did amount to an unreasonable act in connection with the continuation of his application which caused costs to be incurred by the Respondent".*

In forming his decision to order costs, Commissioner Williams also emphasised that any offers made during the course of a conciliation should not be taken into account in a costs application unless that offer is later made on an open basis.

For advice and/or guidance in relation to unfair dismissal claims, or issues as to exposure to costs orders, please contact Nick Stevens, Megan Cant or Jane Murray.

EOFY Breakfast Seminar

We warmly invite you to attend our free Breakfast Seminar to be held on Thursday, 9 June 2016.

Liberal or Labor?
How Your Vote Could Shape Industrial Relations
&
"Uberization" - Changing the Face of Employment Relationships

When: Thursday, 9 June 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 Monday, 6 June 2016. Spaces are limited.

Beware: Unlawful Adverse Action against Employee Proves Costly

The Federal Circuit Court of Australia in *Cai v Tiy Loy & Co Ltd (No. 3) [2016]* FCCA 675 ordered Tiy Loy & Co Ltd ("**Tiy Loy**") to pay more than $400,000 in compensation and penalties of more than $50,000 for unlawful adverse action against its employee, Mr Ree Bin Cai. This recent decision reinforces the willingness of the courts to impose harsh penalties on employers who unfavourably alter an employee's position in response to the employee exercising a workplace right.

Between 1994 to late 2012, Mr Cai was employed by Tiy Loy as a full-time tea attendant. In early 2012 Mr Cai sustained a leg injury and his subsequent claim for workers' compensation claim was accepted by Tiy Loy's insurer ("**the Insurance Claim**"). Tiy Loy was required to implement an Injury Management Plan for Mr Cai as part of the Insurance Claim.

Judge Manousaridis found that, in breach of section 340(1) of the FW Act, Tiy Loy took adverse action against Mr Cai by altering Mr Cai's employment from full-time to part-time, therefore unilaterally altering "*the terms of Mr Cai's contract of employment in a fundamental way*". Judge Manousaridis found that Tiy Loy took the adverse action in order to offset the expected additional costs that would occur as a result of the Insurance Claim.

In addition, Judge Manousaridis found that Tiy Loy had systematically and significantly underpaid Mr Cai the amount that he was entitled as a tea attendant under the relevant Awards and the FW Act. These contraventions, in addition to the unlawful adverse action, were found to warrant the significant penalty imposed on Tiy Loy, irrespective of any ignorance of the law on the part of Tiy Loy.

This case demonstrates the significant risks of substantial penalties and orders for compensation being imposed on an employer for breaches of the FW Act.

If you would like more information about the potential legal implications of adverse action and how to minimise legal risks, please contact Nick Stevens, Megan Cant or Jane Murray.

Procedural Fairness Paramount in Dismissal

A recent case before the FWC demonstrates the importance of ensuring procedural fairness in dismissing an employee. In *Kirkbright v K&S Freighters Pty Ltd [2016]* FWC 1555, Commissioner Bissett held that, although the employer had a valid reason for dismissing Mr Colin Kirkbright, the deficiencies in the employer's dismissal procedure resulted in the dismissal being harsh, disproportionate and unreasonable.

K&S Freighters Pty Ltd ("**K&S**") dismissed Mr Kirkbright from his unblemished employment of 30 years for unauthorised personal use of a company fuel card during annual leave despite clear instructions to the contrary and for knowingly sending freight without necessary documentation, both which constituted a breach of well-established K&S policy.

Commissioner Bissett held that these factors constituted a valid reason for dismissal within the meaning of the *Fair Work Act 2009 (Cth) ("**FW Act**").*

However, Mr Kirkbright was successful in his unfair dismissal application due to deficiencies in K&S's dismissal process, ostensibly due to a lack of communication between the various managers involved in the process.

In reaching her decision, Commissioner Bissett took into account that K&S, during its meeting with Mr Kirkbright on 17 August 2015 ("**the 17 August Meeting**"), or any other time, did not provide Mr Kirkbright with an opportunity to consider the claims being made against him, or to properly provide an opportunity to respond. During the 17 August Meeting, Mr Kirkbright "*displayed an appalling lack of respect for his manager and co-worker… [but] this was the first time he had been confronted with the allegations. His reaction was not outside the realm of possibilities and should have been foreseen. The human resource manager, if she had not, should have walked [the Manager] through what to do in such a circumstance. The meeting should have been halted*". [Emphasis added]

Mr Kirkbright's 30 years of unblemished service with K&S was a substantial factor in Commissioner Bissett's consideration of the unreasonableness of the dismissal, but weight was not given to the letter of termination having been prepared prior to the 17 August Meeting.

Commissioner Bissett held the view that an appropriate dismissal procedure should have involved providing Mr Kirkbright with the allegations against him in writing, followed by a meeting a few days later. This process would have allowed Mr Kirkbright to properly respond to the allegations put to him.

Commissioner Bissett found that reinstatement would be inappropriate due to the breakdown in trust and confidence and ordered further submissions and evidence to be filed in relation to compensation.

Please contact Nick Stevens, Megan Cant or Jane Murray if you have any questions regarding how to maintain procedural fairness in disciplinary matters.