

A VISION IN THE WORKPLACE

SEASONS GREETINGS!

In our December 2017 edition of *Vision in the Workplace* we provide a roundup of our recent Christmas Breakfast Seminar and wish all our clients a Merry Christmas! We also welcome our new addition to our team, Isabella Paganin, and explore a recent decision dismissing an employee's adverse action claim in which the employee alleged he had been discriminated against on the basis of his disability of morbid obesity.



Stevens & Associates would like to wish you, our valued clients, and your families a safe and prosperous holiday season.

Our office will be closed from midday on Friday, 22 December 2017 and will re-open on Tuesday, 2 January 2018.

Have a very Merry Christmas! We thank you for all your support this year and look forward to working with you again in the New Year!

CHRISTMAS BREAKFAST SEMINAR ROUNDUP

GRAND AVENUE

BY STEVE BREEN



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Thank you to everyone who attended our Christmas Breakfast Seminar on Thursday, 30 November 2017. We trust everyone enjoyed the breakfast and opportunity to mingle and network with other clients.

Megan Cant's presentation on the 'Holiday Hangover' offered advice on how to best manage staff sickies and last-minute leave requests during the festive season. Megan covered the need to review and update company drug and alcohol policies and when and how to question the validity of employee medical certificates.

Nick Stevens delivered a timely presentation on the 'Contingent Christmas Workforce' which explored the finer, and sometimes overlooked, details that are involved when determining whether to classify a worker as a casual or independent contractor.

If you have any questions arising out of the Breakfast Seminar, please don't hesitate to contact us.

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WELCOME ISABELLA!

Stevens & Associates is thrilled to officially welcome its newest addition to the team, Isabella Paganin!

Isabella was selected from a large pool of candidates to commence as a lawyer at our firm in December. Isabella has most recently been employed by a well-known specialist employment / industrial relations law firm.

Isabella will no doubt add to the breadth of employment law knowledge and services we offer at Stevens & Associates.

EMPLOYEE'S MORBID OBESITY LEADS TO VALID TERMINATION



The Federal Circuit Court of Australia ('FCCA') recently dismissed a security guard's ('Mr Findlay') adverse action claim in which he alleged that MSS Security Pty Ltd ('the Company') discriminated against him on the basis of his disability [1].

Background

On 1 February 2016, Mr Findlay commenced employment with the Company in the position of a full time Security Officer at Deakin University, Geelong ('the University').

On 13 October 2016, the University contacted the Company regarding some "work issues" involved with Mr Findlay including failing to log alarm activations and engaging in completely non-work related tasks while at work.

On 18 October 2016, the University requested the removal of Mr Findlay from the Deakin site. The following day, the Company offered Mr Findlay alternative positions in Melbourne and Geelong. Mr Findlay stated that, due to him being a "big guy", the role would be "not suitable nor is it reasonably equivalent to my position at Deakin [if it] requires [me to] walk or stand for periods of time".

The Company offered Mr Findlay three further alternative positions in Melbourne. Mr Findlay rejected all the options on the basis that each required him to walk for extended periods of time.

The Company subsequently terminated Mr Findlay's employment in accordance with the terms in his employment contract as there was no comparable position to transfer his employment.

Mr Findlay was provided with one weeks' pay in lieu of notice.

Judgement

The FCCA accepted Mr Findlay's submission that his morbid obesity could constitute a disability for the purposes of s 351 of the *Fair Work Act 2009* (Cth) ('the FW Act') because the morbid obesity caused a loss of function in his body. Mr Findlay argued that the Company subjected him to disadvantage due to his disability when he attempted to transfer his employment from the University to a more mobile role.

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The Company gave evidence that prior to his employment, Mr Findlay answered “no” to the pre-employment question:

“[d]o you have any medical condition that could prevent you from performing the inherent requirements of the job you are applying for?”

Additionally, the advertisement for the job at the University listed that a “high level of physical fitness” was required for the job. At the time he was hired Mr Findlay weighed 175kg and at the time of his removal from Deakin he weighed 198kg.

His Honour Judge McNab rejected Mr Findlay’s submission that he had been subjected to adverse action by discrimination because of his morbid obesity. In his decision, His Honour highlighted that Mr Findlay had been hired as a security guard – his appointment to the control room at the University was merely the task he had been given.

Furthermore, the Court held that Mr Findlay’s claim that he could not:

“perform work as a security guard that involved more than five minutes walking per hour meant that he could not perform the inherent requirements of the job that he was employed to perform.” [emphasis added]

The Court also took into account the fact that the Company sought to place Mr Findlay in alternative

positions once the role at the University had been withdrawn.

Ultimately, the Court held that Mr Findlay had not been discriminated against in the termination of his employment and that by refusing the alternative roles his termination was lawful and in accordance with the terms of his employment contract.

Conclusion

The FW Act protects potentially vulnerable workers from dismissal or major change to their job that are made due to that worker’s disability. However, in this instance the Company’s actions against Mr Findlay were related to the inherent requirements of the security job itself.

In not being able to walk for more than five minutes an hour, Mr Findlay could no longer perform the role of security guard – the role in which he had been employed. Therefore, Mr Findlay’s physical disability prevented him from performing the inherent requirements of the job and the Company’s termination of his employment was lawful.

[1] *Findley v MSS Security Pty Ltd* [2017] FCCA 2898

If you are facing any difficulties in managing your diverse workforce, please do not hesitate to contact Nick Stevens, Megan Cant or Isabella Paganin.

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.