

A VISION IN THE WORKPLACE

This edition includes:

- The reinstatement of an employee who was held to be unfairly dismissed for drunken conduct, by the Fair Work Commission (**FWC**); and
- insight into the 2019 Australian Budget schemes and initiatives that may affect your workplace.



Would getting drunk and vomiting at afterwork drinks get you fired?

“Frankly, if one act of inoffensive drunkenness at an after-work function provided valid reason for dismissal, I suspect that the majority of Australian workers may have potentially lost their jobs.”

- Commissioner Cambridge, FWC

The summary dismissal of an employee for drunken misconduct and alleged sexual propositioning has been deemed unfair by the Fair Work Commission (**FWC**) at a post-work farewell function, highlighting the need for

employers to be extremely cautious about summarily dismissing employees.

A project manager employed by Ryan Wilks Pty Ltd (**Ryan Wilks**), an electrical company contracted by the Sydney Opera House, was summarily dismissed for breaching their internal code of conduct whilst intoxicated at a post-work farewell function held by the Sydney Opera House in July 2018. She was accused of becoming intoxicated and vomiting on the floor of a Sydney Opera House bar, making disparaging comments about other employees and sexually harassing a male colleague employed by the Sydney Opera House.

A Drunk Admission

The employee admitted to being intoxicated to the point that she vomited, and that she required assistance to leave the venue. She expressed remorse during the hearing. However, she rejected the other allegations that she made disparaging comments and sexual propositions.

Questionable Evidence

On the night of the function the employee allegedly said to the male colleague *“don’t let anyone take advantage of me”* but the male colleague denied she was sexually propositioning him.

Commissioner Cambridge stated that despite the employer being aware the male colleague denied feeling sexually propositioned, *“[a]stonishingly...it relied upon it as a reason for dismissal”*.

The Commissioner also described the employer’s evidence that the employee made disparaging comments about another employee as *“strangely inconsistent”* and

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included “*curious evidence*” from “*mysterious*” anonymous witnesses.

In the End

The Commissioner accepted the employee’s evidence as more credible than the employer’s evidence, which the Commissioner deemed had “*no basis in fact*” and was simply an attempt by the employer to “*elevate the severity of the applicant’s misconduct*”.

Commissioner Cambridge accepted that the employee’s conduct could reflect negatively on her employer and stated, “[t]he employer was understandably concerned that the misconduct of the applicant at the farewell drinks function might have some impact upon the renewal of its contract with its major client, the SOH [Sydney Opera House]”.

However, the Commissioner criticised the employer’s investigation as being “*incomplete and truncated*” and held that the employee being intoxicated did not, alone, have the severity to justify a summary dismissal and that her termination was harsh, unjust and unreasonable.

Ryan Wilks was ordered to pay lost wages and to reinstate the employee. The company is appealing the decision.

Lessons for Employers

Behaviour that at first glance may appear to be a valid reason for dismissal, still needs to be thoroughly investigated and considered before being acted upon. In the Commissioner’s own words:

“any employer should be very cautious about invoking a summary dismissal”.

If you require any assistance with unfair dismissal claims or what constitutes a breach of conduct warranting summary dismissal, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.



How might the Budget affect you and your workplace?

The 2019 Australian Budget is introducing funding to target sham contracting and a labour hire registration program. These initiatives are in part addressing recommendations made in the Migrant Worker’s Taskforce Report issued in March 2019.

Sham Contracting Crackdown Unit

The Government has announced that from 2019-20 it will provide the Fair Work Ombudsman (FWO) \$9.2 million over four years to create a sham contracting unit, with a further \$2.3 million in funding each year.

This is aimed at employers engaging in ‘sham contracting behaviour’, described as those who:

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“knowingly or recklessly misrepresent employment relationships as independent contracts to avoid statutory obligations and employment entitlements”.

The unit intends to educate and increase compliance and enforcement around sham contracting, also assigning funding to investigation and litigation.

National Labour Hire Scheme

An additional \$19.8 million in funding was also included for the FWO to help create a national labour hire registration scheme.

The intention of this new scheme is to enhance the FWO’s ability to investigate underpayments, to implement more pre-registration requirements for labour hire companies and to introduce other regulations to promote transparency and *“reduce worker exploitation and drive behavioural change in the industry”*.

High-risk sectors will be mandatorily required to register including cleaning; horticulture; meat processing; and security industries.

Superannuation Guarantee Taskforce

The Budget 2019 also announced it would continue funding the Australian Taxation Office (ATO) for the establishment of the Superannuation Guarantee Taskforce enabling the ATO to issue criminal penalties for employers refusing to pay superannuation.

Impact on Employers

The employment related funding in this year’s Budget is directed at promoting employee protection and will require stricter compliance from employers.

The budget papers stated, *“this will raise vulnerable workers’ awareness of their rights and of the government help available to them, and will also raise employers’ awareness of their responsibilities under workplace laws”*.

If you have any questions about how these schemes may affect your company, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

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