STEVENS & ASSOCIATES LAWYERS

February 2022

A VISION IN THE WORKPLACE

Our February edition of Vision includes:

- New Modern Award not on the menu for Menulog;
- No 'Gold Star' for Star Casino in Wage Underpayment Scandal; and
- Worker Sacked for Offensive Posts.

New Modern Award not on the menu for Menulog

Food delivery riders and drivers must be paid under the same rules as other truck and van couriers, in a ruling by the Fair Work Commission, though it only applies to workers who are employed rather than the contractor workforce of companies like Uber and Deliveroo.

This decision has dealt a blow to delivery giant Menulog, who last year made the decision that it wanted to employ many of its riders rather than engage its workers as independent contractors.

Application by Menulog

On 24 June 2021, Menulog made an application to the Fair Work Commission for a new On Demand Delivery Industry Award (**"On Demand Award"**). Menulog argued that none of Australia's 120-odd sets of industry minimum pay and conditions rules specifically covered the gig economy industry. The delivery company submitted that it would require a new, dedicated set of pay rules in order to employ its riders on a large scale.

Submissions from TWU

Despite the Transport Workers Union (**"TWU"**) supporting Menulog in their efforts to do "the right thing", the delivery giant nonetheless faced opposition from the Union in its attempt to create their new specialised gig economy On Demand Award.

STEVENS & ASSOCIATES LAWYERS

February 2022

A VISION IN THE WORKPLACE

The TWU argued that there was no need for the creation of this new On Demand Award, but rather, Menulog's operations were already covered by the road transport award, describing the work controlled by it and the likes of Uber and Deliveroo as analogous to "and an outgrowth of" courier work.

Fair Work Commission Decision

On Friday 28 January 2022, the Fair Work Commission ruled against the creation of the new award and held that the Road Transport Award, which governs many truck drivers, applies.

The effect of the benches ruling has resulted in the Menulog employees currently engaged under the Miscellaneous Award being shifted to the Road Transport Award – which features minimum rates of pay in excess of $1 per hour more.

The TWU celebrated the ruling as a win for delivery riders and its members, saying in a press statement that the decision was a "monumental leap forward in the industry".

"Threshold Issue" for new Award

The Full Bench identified a "threshold" issue on Friday, noting that with respect to industry coverage, the "central element" of Menulog's proposal was that it was involved in *"the collection and delivery of food, beverages, goods or any other item".*

"We consider that the business activity referred to clearly falls within that part of the definition of 'road transport and distribution industry' in clause 4.2(a) of the Road Transport Award.

The Full Bench held that the proposed definition of 'collection and delivery' by road in the proposed gig-economy agreement was substantively the same as 'transport by road' in the Award. Similarly, the proposed definition of *'food, beverages, goods or any other item' in the proposed definition was held to fall comfortably within the Award's 'goods, wares, merchandise, material or anything whatsoever...' etc. in clause 4.2(a)."*

This decision of the coverage of the Road Transport Award constitutes a significant set back for Menulog in their attempt to create what is considered one of the world's first gig-economy specific enterprise agreements.

Delivered Food is Captured as "Saleable Goods"

Menulog's argument that the Award does not capture delivery services because it does not specifically include prepared meals was rejected by the Full Bench. The Full Bench favored a broad definition of "goods" in its approach, applying the broad test for "goods" in determining whether or not it was "saleable" as being the qualifying criteria.

The Full Bench referenced amusing past cases from eels to coins which were ultimately held to be classified as "goods". Therefore, they held that the definition extended to meals prepared for sale and home delivery.

"Even if prepared meals did not constitute 'goods', they would clearly fall within the words '...anything whatsoever...' etc. in clause 4.2(a), which appear to us to be drafted as a 'catch-all'," the bench said.

"We therefore conclude that the 'on demand delivery services industry', as defined by Menulog, would comfortably fall within that part of the definition of the 'road transport and distribution industry' contained in clause 4.2(a) of the Road Transport Award.

"It also necessarily follows from this conclusion that the Miscellaneous Award does not cover them by reason of clause 4.1 of that award."

As a result of this finding, the bench said the next step was to consider whether folding on-demand employers and employees under the road transport award meets the Fair Work Act's modern award objectives.

Future

This ruling is not the final outcome for Menulog. There is still an opportunity to try to convince the Fair Work Commission that a new industry award would work better than Road Transport Award, or alternatively, negotiate with the Transport Workers Union on other changes.

Menulog has reaffirmed its commitment to, "*finding avenues for offering employment of couriers in a long-term sustainable fashion*", in the wake of this decision.

If you have any questions in relation classification of independent contractors vs employees, or the interaction of employment law with the gig-economy currently, please do not hesitate to contact Nick Stevens, Luke Maroney, Daphne Klianis or Josh Hoggett.

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February 2022

A VISION IN THE WORKPLACE

No 'Gold Star' for Star Casino in Wage Underpayment Scandal

The current wage underpayment compliance climate has claimed its latest culprit… the Star Entertainment Group Limited (**Star Casino**) who has announced it will spend approximately $13 million (plus interest) to repay around 2200 workers it found were underpaid over a six-year period. This underpayment case reiterates the importance of conducting regular audits of company payments to its employees… or else face the consequences.

Review of Wages Discovered Underpayments

The Star Casino said it identified the underpayment of wages following a six-year retrospective wage review.

Approximately 2200 workers were on annualised salaries underpinned by a modern award during the review period. The review found that in some cases salaried team members were found not to be "better off overall" as their annual salary did not sufficiently compensate them for their equivalent award entitlements such as overtime and penalty rates.

The Fair Work Ombudsman and the United Workers Union have been notified of the underpayments and it is not clear yet whether further legal action or further penalties will be pursued against the Casino Operator.

Takeaway for Employers

This example and the countless of recent wage underpayment cases with the FWO recouping almost $150 million in wage underpayments for the 2020-21 financial year.

These examples demonstrate the important of conducting regular and systematic reviews of your payment and conditions of employees or otherwise face the consequences of massive reconciliation of underpaid monies to affected employees.

The narrative surrounding wage underpayment is generally accusations of big businesses ripping their employees off, however, we see many examples of the reality that wage underpayment is very often an inadvertent mistake of the employer.

That's because the complexity of the legal documents that outline minimum pay rates and conditions of employment – known as awards – result in many employers unknowingly underpaying their workers. Employers often get caught out because their payroll systems were not designed to deal with the complexity of calculating overtime payments in Stevens & Associates now offers a fixed fee Compliance Audit to companies including a review of any and/or all documents such as payroll documentation, letters of appointment, and rostering arrangements of your workforce and finalise a report indicating areas requiring improvement, particularly with respect to wages and/or potential underpayment of wages.

Please contact Nick Stevens, Luke Maroney, Daphne Klianis or Josh Hoggett if you have any questions about a Compliance Audit or wish to commence one on behalf of your employer.

Worker Sacked for Offensive Facebook Posts

Background

The employee ("the Employee") worked as a call centre employee for the Australian Council of Trade Unions ("the ACTU") in Victoria.

On 21 September 2021, an ACTU Director ("**the Director**") discovered posts by the Employee on its Slack platform and his personal Facebook account

that it considered offensive, homophobic, antisemitic, mocked domestic violence and allegedly encouraged the flouting of lockdown restrictions. That same day the Director instructed the Employee to attend a zoom meeting the next morning to discuss "unacceptable conduct that may amount to serious misconduct" (the Zoom Meeting). The Director said that the Zoom Meeting would deal with "statements/posts on social media, and the future of your employment".

On 22 September 2021, during the Zoom Meeting the ACTU summarily dismissed the Employee after six years of employment for serious misconduct, finding his explanations inadequate and the posts "completely inconsistent" with its "clear and unambiguous values and policies". The Employee made requests for the Zoom Meeting to be recorded, or for the allegations against him to be put in writing. The ACTU General Manager and Director refused this request on the basis that doing so would prevent the ACTU from dealing with the matter in an expedient way.

Prior to the Employee's dismissal, the ACTU had issued two warnings in writing to the Employee on 8 March 2018 and 9 August 2021 regarding his behaviour, including a final warning for failing to remove images of naked and topless women from his workstation.

The Unfair Dismissal Application

On 8 October 2021, the Employee lodged an application to the Fair Work Commission ("the FWC") alleging that he had been unfairly dismissed from the ACTU ("the Unfair Dismissal Application") pursuant to s 394 of the Fair Work Act 2009 ("the Act").

In the Unfair Dismissal Application, the Employee contended that he had been the subject of harassment, bullying, and discrimination by the Director and the ACTU senior management. He claimed that the Facebook posts on his personal profile were "proven and justified as valid, credible, and sincere political, religious, and cultural exhortations" and "satirical commentary and critique". The Employee further argued that the ACTU had denied him procedural fairness by failing to give him a proper opportunity to respond to the allegations.

The ACTU made submissions that the posts were contrary to the values of the ACTU which include solidarity, respect, equality and democracy. The Director gave evidence that the ATCU supports LGBTQIA + people, justice for First Nations People, campaigning for the elimination of gendered violence and supporting people of colour and has a public position on these issues. The ACTU also had a clearly articulated public position supporting vaccination and other measures recommended by public health experts.

The Legal Issue

The issue before the FWC was whether the ACTU's dismissal of the Employee was harsh, unjust, or unreasonable, and whether the ACTU's alleged procedural failings could amount to an unfair dismissal.

The Decision

Deputy President Masson (DP Masson) of the FWC held that any procedural unfairness by the ACTU did not outweigh the Employee's breach of obligations to his employer for several key reasons.

(i) Inconsistency with ACTU Position

DP Masson clarified that the Employee's personal views were not 'on trial'. Rather, the question for determination was whether the Employee's out-of-hours conduct on a personal and public social media account – was contrary to his obligations to the ACTU, and therefore constituted serious misconduct and established a valid reason for dismissal.

DP Masson found that the posts did establish a valid reason for dismissal as they were "utterly inconsistent" with the ACTU's position, and furthermore, he found it "almost inconceivable" the Employee could genuinely believe otherwise.

(ii) Offensiveness of Posts

DP Masson held that the Employee ought to have understood the offensive nature of his posts. This was particularly considering his use of a word that is regularly used as an alternative to the highly offensive 'N' word".

Despite the fact that the Employee's Facebook profile did not identify him as an ACTU employee and there was no evidence that the Employee expressed the views in the course of his employment, DP Masson found that the Employee breached his obligations under the ACTU's code of conduct and its harassment, discrimination and workplace bullying policy.

The posts were also found to potentially damage the reputation of the ACTU and were contrary to their values of respect.

(iii) Procedural Unfairness does not outweigh breach by Employee

Despite the fact that the Employee's conduct provided a valid reason, DP Masson held the ACTU did in fact deny him procedural fairness by failing to give him a proper opportunity to respond.

DP Masson held that the ACTU failed to put the allegations in writing, only gave the employee 24 hours between notifying him of the misconduct and dismissing him, and did not provide the

Employee with details of what codes of conduct and polices he was in breach of.

DP Masson found that the lack of procedural fairness was the only factor supporting the Unfair Dismissal Application, and placed greater weight on the valid reason the ACTU had for summary dismissal.

Takeaway Points

It is important to understand the potential consequences of posts made on private social media accounts. A person's personal beliefs may come into conflict with their employer's public position. However, notwithstanding this, employment policies often contain clauses that require employees to refrain from publicly contradicting their employer's public position or values. Social media posts that contain politically divisive, offensive, or violent material may fall foul of such policies and result in disciplinary action up to and including termination of employment.

In this case, the Employee's posts on social media were found to be in breach of the code of conduct and policies of his employment, and inconsistent with the values of his employer.

If you require assistance with unfair dismissal proceedings or assistance reviewing your employment policies, please do not hesitate to contact Nick Stevens, Luke Maroney, Daphne Klianis or Josh Hoggett.

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A VISION IN THE WORKPLACE