STEVENS & ASSOCIATES LAWYERS

January 2022

A VISION IN THE WORKPLACE

Our January edition of Vision includes:

- Stevens & Associates Lawyers welcomes you to 2022;
- Employee working from home fails to comply with workplace direction to return to work: Valid Reason for Dismissal; and
- Workplaces hit hard by Omicron Wave: Impact of public health orders.

Stevens & Associates Lawyers welcomes you to 2022!

The team here at Stevens & Associates Lawyers warmly welcome you to 2022! We hope that you had a wonderful Christmas break spent happily with friends and family. As you can see, we decided to celebrate the festive season artistically!

The Omicron Variant of COVID-19 has undoubtedly caused a rocky start to the new year. However, we believe that with organisation, on-going consultation with staff, and appropriate work, health, and safety (WHS) measures, workplaces will remain resilient as we push through the Variant's peak. We understand that this is a trying time for all, however we remain optimistic that the Omicron wave is just another hurdle that we can and will overcome. Despite the pandemic, workplace issues and disputes still permeate the workplace and our employment law specialists look forward to assisting you by providing high level advice in this continually changing area of law.

Finally, you may wish to keep an eye out for our Modern Award Audit Package that the firm will soon be offering to current and prospective clients (the Audit). The Audit will involve our firm conducting a comprehensive analysis of your business' compliance with the relevant award your employees are employed under. As recent wage underpayment cases have demonstrated, it is critical that employers monitor and review their employment practices regularly to ensure they are compliant with current modern awards, registered agreements, and the Fair Work Act 2009 (Cth). Watch this space!

With that said, we look forward to another year of providing excellent employment law advice and wish you all the very best in 2022!

Employee working from home fails to comply with a workplace direction to return to work: Valid Reason for Dismissal

Will an employer have a 'valid reason' for dismissing an employee if they refuse to return to work after being issued a workplace direction to do so? In a recent decision, the Fair Work Commission (**FWC**) has decided that employers will have valid reason in such circumstances, provided that the direction to return to work is both lawful and reasonable.

An employee (**the Employee**) was employed for more than a decade with the Australian Federal Police (**AFP**) in its News & Online Services team. With the onset of COVID-19 lockdowns however, the Employee unilaterally decided to work remotely, without authorisation from management. After 3 months of working from home, the Employee was given a workplace direction by the AFP to return to work and perform his duties onsite at least three days per week.

Cognisant of the Employee's Autism Spectrum Disorder and other mental health issues, various accommodations were proposed by the AFP including implementing appropriate seating arrangements near windows with "limited foot traffic" for the Employee. The AFP attempted to implement reasonable adjustments to ensure that the interests of the Employee were met, namely his concerns surrounding COVID-19 transmission.

The Employee, however, did not comply with the direction and failed to respond to numerous requests made by the AFP to comply with the direction, or comment on the return to work plan the AFP had prepared for him. Instead, when advised that Organisational Health, the relevant department accountable for monitoring work, health, and safety practices for the AFP, would be in contact with him regarding the matter, the Employee failed to cooperate by refusing to discuss any return-to-work arrangement due to his fears over COVID-19 and his mental condition.

Before the FWC, the AFP argued that the Employee had *"wilfully and continually"* refused to comply with the many workplace directions given to him to return to work and did not provide updated medical evidence supporting his mental condition as the reason for his refusal. Although the AFP issued the directives with full knowledge that the

Employee would not comply, as was demonstrated repeatedly, Deputy President Lyndal Dean found that the AFP's workplace directions were in themselves both lawful and reasonable.

DP Dean held that the AFP had taken several reasonable measures to ensure a safe return to work plan for the Employer. Firstly, the AFP sought to discuss with the Employee reasonable adjustments for the Employee to work safely while onsite. Secondly, the AFP requested relevant and up-to-date medical evidence from the Employee to support his mental condition preventing him from attending the workplace. Thirdly, the AFP proposed that the Employee may work remotely partially and would provide suitable seating arrangements for whenever the Employee was to work onsite.

The Employee's refusal to consider these measures despite them being clearly communicated to him, and his non-compliance with the lawful and reasonable directions to return to work, were held by DP Dean to be unreasonable. Upon weighing up the reasonableness of the directives against the unreasonable response of the Employee, the FWC ultimately held that the AFP had a valid reason to dismiss the Employee in the circumstances.

If you require advice on the issuance of "Return-to-Work" workplace directions to employees of your business, please do not hesitate to contact Nick Stevens, Luke Maroney, or Daphne Klianis.

Workplaces hit hard by Omicron Wave: Impact of the latest public health orders

In only the last few weeks, workplaces have taken a major hit due to the surge of Omicron. With case numbers now in the tens of thousands, Omicron poses enormous challenges for the community, supply chains, and the workforce across New South Wales.

To ensure that essential services such as supermarket chains and healthcare remain open, under new public health orders the NSW government has shortened the self-isolation requirement for essential workers confirmed as close contacts (**New Health Orders**). The changes to the isolation requirements create a major dilemma for employers in essential industries. While, under the New Health Orders, it is not prohibited for certain essential workers to return to work after a now shortened period of self-isolation due to being close contacts, the presence of such workers in the workplace may give rise to

increased liability of employers under the *Work, Health, and Safety Act 2011 (NSW)* (**the Act**).

To reduce the risk of breaching the Act and to manage this dilemma, employers must ensure that not only are reasonably practicable measures taken to mitigate or eliminate the spread of COVID-19 in the workplace, but such measures are enhanced. In other words, now more than ever should employers enforce measures including regular rapid antigen/PCR test reporting, mask-wearing, rigorous cleaning, hand sanitising, and social distancing, to ensure adaptation to the significantly more transmissible Omicron strain and WHS obligations are still being met. In addition to the challenges faced by employers to maintain a safe workplace while workers return to the workplace following shorter self-isolation periods, there are now rules for employers to also report workers diagnosed with COVID-19 to SafeWork NSW under other new public health orders.

The new relevant provisions contained in the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* (NSW) (**the Self-Isolation Order**) are relevant for both employers and employees. Under the Self-Isolation Order, workers must, immediately after receiving notification that they have tested positive for COVID-19, take reasonable steps to notify their employer of their positive test result. **For employers, the Self-Isolation Order requires mandatory reporting of COVID-19 cases amongst workers of which employers become aware, if the COVID-19 positive worker attended the employer's workplace while infected or it is likely that the person contracted COVID-19 in the workplace. Once an employer becomes aware of a worker with a COVID-19 diagnosis, the employer has 24 hours to report the outcome to SafeWork NSW under the Self-Isolation Order.**

The various requirements under the Self-Isolation Order, and who they apply to, underscores the importance of having a comprehensive plan in place to bolster COVID-19 reporting procedures. While many employers have in force vaccine mandates to increase compliance with WHS obligations to maintain a safe workplace by requiring employees to be vaccinated, it seems COVID-19 Reporting Policies will similarly become an enforceable procedure used by employers, to ensure compliance with the latest Self-Isolation Order.

If you require further advice on the Self-Isolation Order of the WHS implications of the orders on your business, please do not hesitate to contact Nick Stevens, Luke Maroney, or Daphne Klianis