

March 2022

A VISION IN THE WORKPLACE

Our March edition of Vision includes:

- Announcement of the Modern Award Audit Package;
- History of Harassment Catches up with Bunnings Employee;
- Unrealistic Workload leads to Constructive Dismissal; and
- A Bullying Accusation falls short.



MODERN AWARD AUDIT

New Fixed Fee Offer for Companies

Stevens & Associates are excited to announce the launch of our Modern Award Audit Package ("**the Audit Package**") which you can check out by clicking the button below.

The Audit Package offers a fixed fee \$2000.00 review of your Company's compliance with the relevant Modern

Awards and underlying employment law legislation and regulations.

We believe conducting an audit is prudent for Companies particularly considering the current 'wage underpayment' prosecutions and penalties pursued by the Fair Work Ombudsman.

Please contact [Nick Stevens](#), [Luke Maroney](#), [Daphne Klianis](#) or [Josh Hoggett](#) on (02) 9222 1691 if you have any questions about the Audit Package and how it can protect your Company and provide you with peace of mind with respect to your employment law obligations.



History of Harassment catches up with Bunnings Workers

A recent case heard in the Fair Work Division of the Federal Circuit and Family Court of Australia ("**FCFCA**") has raised some

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interesting questions around whether a new employer can terminate for serious misconduct that occurred during the course of work with a former employer.

In this case, an accountant (“**the Applicant**”) is challenging his summary dismissal from Bunnings Warehouse (“**Bunnings**”) after it became aware that the Federal Court found he had sexually harassed his former supervisor whilst working as a chartered accountant for his former employer.

Background

In 2013, a claim was made against the Applicant for sexually harassing his former supervisor (“**the Colleague**”) whilst working for the Former Employer. The case was heard in the Federal Court and Justice Mordy Bromberg ordered that the Applicant pay \$476,000 in damages to the Colleague for physical and verbal harassment. As a result of the harassment, the Colleague was diagnosed with post-traumatic stress disorder and other psychiatric illnesses that would affect her ability to work again.

The Applicant commenced work at Bunnings in May 2021, and was subsequently promoted in October 2021 to a pricing coordinator role within the Victorian head office. In November 2021, the Applicant

alleges that Bunnings summarily dismissed him upon finding out about his history of workplace sexual harassment.

The Applicant’s Case

The Applicant has accused Bunnings of unfair dismissal when they terminated his employment after becoming aware of the Federal Court’s findings of sexual harassment against him.

The Applicant contended that he had been dismissed without “*any merit or reasonable basis whatsoever*” and that Bunnings had failed to investigate or discuss his background with him before summarily dismissing him. He also accused Bunnings of discriminating against him because of his ‘social origin’ and that it did so “*forcefully and with outright vengeful intent*”.

The Applicant is seeking \$167,000 for two years’ loss of wages plus damages. The Applicant justified that the amount was appropriate as he is a “*53-year-old man who is now unable to work as a chartered accountant ([having] lost his professional qualification due to the adverse findings) and now obliged to work below his skill level*”.

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Bunning's Defence

Bunnings is contesting the unfair dismissal application and sought an interlocutory application that argued several parts of the Applicant's case should be dismissed on the grounds that they have no reasonable prospects of success.

The Legal Issue

The Applicant has alleged that he was not afforded procedural fairness in his dismissal. Namely, that Bunnings failed to investigate or consult with him prior to terminating his employment.

Further, as per s351(1) of the Act an employer cannot take adverse action against an employee because of that person's social origin. For the purposes of the Act, social origin is interpreted as referring to the Applicant's supposed social status or "socio-occupational category". The purpose of including 'social origin' within the Act is to protect people that exhibit characteristics that are consistent with lower (or higher class) identity from adverse action. In order to succeed in his claim the Applicant must demonstrate that the decision to terminate his employment was made on the basis of his social origin.

The hearing between Bunnings and the Applicant was transferred from the Federal Court to the Federal Circuit and Family Court. Judge Mercuri will conduct a directions hearing on 29 March 2022.

The Takeaway

This case will have interesting implications as to whether existing conduct of an employee that occurred whilst employed for a different employer, can be utilised as a valid reason for termination of employment. Due to the serious nature of the conduct, one can understand the reasons why Bunnings terminated the Applicant's employment, however, the key question is whether Bunnings had a sound and defensible reason for doing so. Whether this dismissal was unfairly discriminatory and on procedural unfair will be key to the court's consideration of this matter.

If you require any further advice on unfair dismissal, please do not hesitate to contact Nick Stevens, Luke Maroney, Daphne Klianis or Josh Hoggett.

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Unrealistic Workload Leads to Constructive Dismissal

Mr Sathananthan (“**the Applicant**”) claimed he was being constructively dismissed from his employer (“**the Respondent**”) after being expected to work excessive hours well beyond his contractual terms. As this case will demonstrate, employers ought to be aware that resignation by an employee does not necessarily prevent an employee from making a successful unfair dismissal claim.

Background

The Applicant made complaints to the Respondent during the course of his employment which included:

- an excessive workload where the applicant regularly worked 70 hours or more each week;

- the inadequate work performance of the Colleague with whom he worked;
- his poor personal relationship with the support office; and
- that his grievances about a Colleague had not been properly dealt with.

No formal findings were made by the Respondent regarding the Applicant’s complaints. The situation escalated around March 2019 as the Applicant suffered from health episodes including a panic attack due to the combined pressure of a Colleague’s negative behaviour towards him and his excessive workload. The Applicant subsequently tendered his resignation, which was accepted by the Respondent.

The Unfair Dismissal Application

The Applicant filed an Unfair Dismissal Application in the Fair Work Commission (**FWC**) claiming that he was forced to resign because of the Respondent’s insufficient handling of his complaints. The Respondent argued that there was no dismissal and contended that the resignation was not forced, and that the Applicant had resigned of his own freewill and volition. The Respondent submitted that on this basis, the FWC does not have jurisdiction to decide over the matter because there was no dismissal.

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The FWC Decision

Was the Applicant Constructively Dismissed?

The FWC found that the Respondent had failed to recognise or deal with the Applicant's complaints about his working hours, aspects of his allegations impacting his relationships the Colleague and had disregarded his health and well-being. Commissioner Hampton found that the "[Applicant] *had no option but to resign from his position with [the Respondent]*" even though the FWC noted that the Respondent "*did not engage in a course of conduct with the intention of bringing its relationship with [the Applicant] to an end.*"

The FWC acknowledged the 'high threshold' required for such a finding, but was satisfied that the combination of the events, the excessive workload, and the treatment of the Applicant's concerns about the colleague was sufficient to establish that the Applicant had no choice but to resign and was constructively dismissed.

Was the Dismissal Unfair?

Once it was established that the Applicant was constructively dismissed, the FWC

turned its mind to whether the dismissal was unfair.

The FWC held that there was no valid reason for the dismissal related to the Applicant's capacity or conduct. Furthermore, due to the nature of the constructive dismissal in this instance, through the Applicant's forced resignation, the Applicant was found not to have been afforded the requisite procedural fairness such as: being notified of the reason for his dismissal, nor was he given an opportunity to respond to any concerns about his capacity or conduct. The FWC further held that it ought to consider the impact of the dismissal upon the Applicant given all of the circumstances, which was namely that he lost his employment without a valid reason for his dismissal.

It was determined that the Applicant that the dismissal was harsh, unjust and unreasonable and this unfair, and that \$45,990.00 compensation was appropriate instead of reinstatement.

Takeaway

This case demonstrates the importance of treating employee complaints with respect to work and their co-workers seriously, timely and effective investigation of the

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same and taking action to resolve any issues.

It is important for employers to note that where employees are left with ‘no choice’ but to resign, employers can be found to have constructively dismissed the employee. The legal position is that if the employment relationship was brought to an end by the employer's conduct, even though it was the employee who in fact resigned, the decision to resign can still be treated as a dismissal.

If you have any questions about constructive dismissal, or the unfair dismissal jurisdiction of the FWC more generally, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), [Daphne Klianis](#) or [Josh Hoggett](#).

A Bullying Accusation Falls Short

The Fair Work Commission (“**FWC**”) has rejected an allegation of bullying made by an employee of a charitable organisation (“**the Organisation**”).

Mr Garcia (“**the Employee**”) claimed that he had been bullied under s 759FC of the *Fair Work Act 2009* (Cth) (“**FWA**”), accusing the organisation of giving his usual shifts to

another employee because he was struggling with depression.



Background

The employee received performance counselling on 26 November 2020 from a manager (“**Manager A**”) after being diagnosed with depression (“**the Performance Meeting**”). He was informed that his hours would be reduced because he slept on the job, was reluctant to work and was using his “*depression as an excuse*”. On 9 December 2020, the employee emailed a human resources manager (“**Manager B**”) of his concerns relating to the outcome of Performance Meeting. Following the Employee’s complaint, the Organisation decided that Manager A would undergo additional training for managing people with mental illness.

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On 15 December 2020, Manager B received a call from the Employee who suggested that the way he was feeling “*made him understand why people bring a gun to work*”. He was challenged on this, but assured Manager B that he was not threatening anyone and “*would not act on it*”. On 23 December 2020, the Employee had a meeting with a Chaplain facilitated by the Organisation. He claimed that he felt betrayed by the Organisation and that he was being bullied so that he would leave. The Employee subsequently requested a 24/7 support person to be made available to him.

One week later, a third manager (“**Manager C**”) informed the Employee that he needed to take time off work for threatening violence after making the comment, “*they are lucky I don’t give people a knuckle sandwich*”. The Employee was served a warning letter on 8 February 2021 for the inappropriate conduct, and he was later informed that he would be unable to return to the Organisation branch in Youngtown due to a change in volunteering requirements. The Employee ignored the exclusion order and attempted to confront Manager A. He was escorted from the premises by police.

The Employee was terminated from his casual position, but this was later reversed after he filed an unfair dismissal application before the Fair Work Commission on 30 March 2021. Relations between the Employee and the Organisation deteriorated over the following six months. The Employee threatened to kill himself, calling his colleagues “*evil people*” and claimed that the Organisation had treated him “*like sh*t*”. Manager C contacted the police and on 30 July 2021, police attended the Employee’s house and talked to him about his threatening call with Manager B in which he alluded to bringing a firearm to work.

In response to this, the Employee lodged an application for an order to stop bullying.

The Outcome

The FWC determined that the Organisation had not mistreated or bullied the Employee. It was determined that while the Employee had been honest with his evidence, but evasive on matters where he thought adverse findings would be made in his interests. The Commissioner found that the Organisation had legitimate concerns about the Employee working again for the safety of his colleagues and branded his lack of insight as “*concerning*”.

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In his closing remarks, Commissioner Lee stated that; *“in fact, the evidence shows an organisation that, particularly through the agency of [the HR manager], has turned itself inside out to accommodate the needs of [the worker]”*.

The Takeaway

It is important that managers are trained to be supportive and accommodating of employees with mental health disorders and other disabilities. Support networks might come in the form of flexible working arrangements, consultations with a mental health professional and/or time off work. However, violent or otherwise threatening behaviour should never be tolerated in the workplace.

The Organisation afforded the Employee with many opportunities to change his behaviour prior to terminating his employment. The FWC commended the Organisation on their patience and how accommodating they were to the Employee, particularly given their genuine fear for the safety of their employees. This case demonstrates the need for procedural

fairness in disciplinary procedures, but also ensuring that the safety of employees is prioritised.

If you have any questions about managing employees with mental health disorders, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), [Daphne Klianis](#) or [Josh Hoggett](#).

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.