STEVENS & ASSOCIATES LAWYERS

September 2021

A VISION IN THE WORKPLACE

Our September edition of Vision includes:

- Full Bench upholds Unfair Dismissal Sacking after Employee's Vaccine Refusal;
- Casual Terms Award Review 2021: What are the Casual Conversion Rules for Employers?;
- Respect Bill Passed;
- The pitfalls of sacking via email.

Fair Work Commission Full Bench upholds Unfair Dismissal Sacking after Employee's Vaccine Refusal: Kimber v Sapphire Coast Community Aged Care [2021]

The full bench of the Fair Work Commission (**FWC**) has upheld a decision that the dismissal of a residential aged-care facility receptionist, Ms Kimber, who refused to receive a flu vaccine, was not harsh, unjust or unreasonable. The majority decision maintained that Ms Kimber's employer, Sapphire Coast Community Aged Care Ltd (**the Company**), had not unfairly dismissed her, as her employment with the Company would be 'untenable' after a NSW Public Health Order released in March 2020 (**the March Order)** stated that *'that no one must enter such a facility without an up-to-date influenza vaccination'*, thereby preventing her from fulfilling the inherent requirements of her position.

Ms Kimber had previously received a flu vaccine in 2015, however there was no evidence to suggest any adverse effects suffered by her from the vaccine at this stage. In 2016, after receiving a flu vaccine administered by a nurse under the employ of the Company, Ms Kimber claimed that she had suffered from negative side effects following the vaccination including *"major and debilitating skin inflammation"* which also affected her internal organs and persisted for "many months". In 2017, 2018, and 2019 consecutively, Ms Kimber refused the flu vaccine and her on-going refusal was subsequently accepted by the Company. However, the on-set of COVID-19 brought with it a surging threat to the health and safety of the population, particularly elderly persons living in residential aged-care facilities, calling into question the need to mandate vaccinations, COVID-19 or otherwise, to minimise or eliminate risks to health and safety of employees in workplace, and to protect the potentially vulnerable persons whom they assist.

The purpose of the March Order, amid the commencement of the pandemic, was

to *"minimise vulnerability to illness among aged residents, to keep the aged care workforce healthy, and to reduce demand on the health care system"*. Also, the March Order relevantly required employers of workplaces such as residential aged care facilities to *"take all reasonable steps"* to ensure that a person did not enter or remain on the premises of facilities, such as those housing immuno-compromised persons, in contravention of the March Order. Notwithstanding the March Order and the multiple lawful and reasonable directions given by the Company to Ms Kimber to obtain a flu vaccine, Ms Kimber refused to follow the direction to receive a flu vaccine and was subsequently terminated.

Although Ms Kimber supplied the Company with a 'letter of support' from a general practitioner stating plainly and without any evidence in support that Ms Kimber "*has a medical contraindication to the Influenza Immunization"* and later supplied the Company with a completed 'Influenza Vaccine Medical Contraindication' (**IVMC**) form authorised by a general practitioner, the Company terminated Ms Kimber's employment nevertheless, on the basis that she could not fulfill the inherent requirement of her role, namely to enter the aged-care facility.

The full bench majority's decision to uphold the initial decision, that the dismissal was not unfair, unjust, or unreasonable, goes in large part to the requirement of an objective basis for medical contraindications supporting vaccine exemptions. The full bench majority scrutinised the general practitioner's assessment of Ms Kimber's alleged medical condition, claiming that the completion of the approved IVMC form was not enough to prove the existence a medical contraindication, but that the medical contraindication must necessarily 'qualify' as such under the Australian Immunisation Handbook. Additionally, the full bench accepted the evidence of an immunologist who maintained that the skin inflammation condition included on the IVMC form certified by Ms Kimber's general practitioner *"did not constitute a medical contraindication"* of the influenza vaccine.

Deputy President Dean's dissenting decision outlined that it was not for the FWC to assess the legitimacy of the general practitioner's medical opinion of Ms Kimber's condition and that Ms Kimber should not be denied protections under the *Fair Work Act 2009* (Cth) because of an inference that she may hold 'anti-vaccination' beliefs. The legal representatives for Ms Kimber have hinted that they may be appealing the majority's decision to the Federal Court of Australia.

Although mandatory vaccination is being discussed during a tumultuous time, employers can rest assured that the Court's position is firmly consistent, such that employers requiring

employees to receive a vaccine, against the flu at least at this stage, may constitute a lawful and reasonable direction, the refusal of which may form a valid basis for termination. As the influenza vaccine and the COVID-19 vaccine are markedly different, we recommend seeking legal advice before mandating a compulsory vaccination policy for your employees.

If you require assistance concerning a lawful and reasonable direction to require your employees to receive an approved vaccination, please contact Nick Stevens, Luke Maroney, and Daphne Klianis.

Casual Terms Award Review 2021: What are the Casual Conversion Rules for Employers?

The Fair Work Commission (**Commission**) has officially completed its Casual Terms Review (**the Review**) following amendments to the *Fair Work Act 2009* (Cth) (**the Act**) on 27 March 2021. Schedule 1 of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (**the Amending Act**) introduced a new definition for 'casual employee' under s 15A of and casual conversion under Division 4A of Part 2-2 of the Act.

The Amending Act also required the Commission to conduct the Review, to consider what variations of modern awards were necessary to *"remove inconsistencies, difficulties or uncertainties"*, as a result of the Amending Act. The Commission set out to achieve this in 6 months, and on 27 September 2021 the Review was completed, with a total of 151 awards (out of 155) being varied to be consistent with the Amending Act.

What does this mean for employers?

The Amending Act clarifies the definition of what characterises casual employment, sets requirements offering casual employees conversion to permanent employment, and also clarifies how any claims for entitlements are to be managed thereafter. For employers with more than 15 employees, they must offer casual conversion to casual employees. This article will explore some of the new casual conversion requirements employers must now fulfil.

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What are the eligibility requirements for an employee to request conversion?

To be eligible to request casual conversion, a casual employee:

- needs to have been employed by the employer for at least 12 months;
- needs to have worked a regular pattern of hours on an ongoing basis for at least the last six months; and
- could continue working these hours as a full-time or part-time employee without significant changes.

What are employers required to do to comply with the new casual conversion requirement?

If an employee is eligible for casual conversion, employers (except small business employers) are required to provide a written offer to convert a casual employee to permanent employment (full-time or part-time) within 21 days after the casual employee's 12-month anniversary.

Can an employer reasonably refuse to offer casual conversion?

If an employer decides not to offer casual conversion, the employer must write to the eligible employee within 21 days of the 12-month anniversary of their employment stating:

- that they will not be making the casual employee an offer to convert to permanent employment; and
- the reasons for this decision. The only acceptable reasons for not making an offer are that:

1. the employee hasn't worked a regular pattern of hours on an ongoing basis for at least 6 months which they could continue working as a permanent employee without significant changes; or
2. the business has reasonable grounds for not making an offer which may only include:

- that the employee's position won't exist, or their working hours will change significantly; or
- making the offer would not comply with a recruitment or selection process required by or under federal or state law; or
- the employer would have to significantly adjust the employee's hours for them to be employed full-time or part-time.

Can employees request to convert?

Yes, if they are eligible, employees may now make a request to convert from 21 days after their 12 month employment anniversary if their employer entity has more than 15 employees. If an employee works for a small business with less than 15

employees, casual employees may request to convert to full time or part time employment any time after their 12 month work anniversary. The request has to be in writing and be for:

- full time employment, if the hours worked by the employee for the last 6 months equate to full-time hours; or
- part time employment, if the hours worked by the employee for the last 6 months have been less than full-time hours.

Are employers obligated to respond to requests?

Yes, employers must respond to any request for casual conversion within 21 days of the request being made, advising whether the request has been accepted or not. If the employer refuses, the employer must provide a written response in writing to the employee containing the reasonable grounds for refusal. Please note that employers cannot refuse a request before discussing the request with the employee and they must have reasonable grounds for refusing, stated above.

When is an employee not eligible?

An employee may not be eligible to request casual conversion is they have refused an offer from their employer to convert in the last 6 months or their employer has written to them stating that an offer will not be made and there are reasonable grounds for not making the offer. Casual employees may request to convert to permanency every 6 months, if they are eligible.

Acceptance of request or offer

Once a request or offer to convert has been accepted, the employer must advise their employee of the new working hours, whether the employment is full-time or part time, and the start date of the employee's permanent employment.

If an employer's offer to convert has been accepted by an employee, the employer is required to write to the employee confirming acceptance within 21 days after the employee has accepted the offer.

If a casual employee's request has been accepted by an employer, the employer is required to write to the employee confirming acceptance within 21 days after the employee has made the request.

The procedural requirements, for both casual employees and employers, with regards to casual conversion arrangements are quite technical. If you require assistance with casual conversion arrangements concerning an existing employee, please do not hesitate to contact Nick Stevens, Luke Maroney, and Daphne Klianis.

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Respect Bill Passed

The Morrison Government's Respect@Work legislation has now passed both houses of parliament, after the House of Representatives backed the legislation, as amended by the Senate.

The Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021(Cth) (**Amendment Act**) implements significant elements of Sex Discrimination Commissioner Kate Jenkins' landmark Respect@Work report on workplace sexual harassment. The Bill gives effect to the Government's commitments in relation to Ms Jenkins recommendations.

The Key Changes

The Amendment Act makes it clearer that sexual harassment is a sackable offence and further clarifies that harassing a person on the basis of sex is prohibited.

Instead of six months, employees making allegations of sexual harassment will now have 24 months to lodge a complaint with the Australian Human Rights Commission.

The Amendment Act also includes a recognition that sexual harassment is a workplace health and safety issue, like bullying, and establishes a framework for victims to apply for an "*order to stop sexual harassment*" through the Fair Work Commission.

The new legislation also broadens the definition of what constitutes work for the purpose of making a sexual harassment claim and whose conduct can be subject to a complaint. This means more vulnerable workers will be covered, as well as people working from home.

"*So we now have a better understanding that work is pretty much when you're doing work, at any time, in any place*", stated Ms Jenkins.

Crucially for many, the Amendment Act closes a loophole that previously exempted public officials, including judges, members of parliament and their staff, from being the subject of complaints of sexual harassment.

If you have any questions about how the Respect@Work legislation will influence your business and its employment policies please do not hesitate to contact Nick Stevens, Luke Maroney, and Daphne Klianis.

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The pitfalls of sacking via email

A recent unfair dismissal application has been accepted by the Fair Work Commission, despite being made more than 21 days after the dismissal allegedly took effect. Under the *Fair Work Act 2009* (Cth) employees have a strict 21 days after dismissal to file their unfair dismissal application unless exceptional circumstances apply.

The facts

The HR team of Fortescue Metals Group, a subsidiary of The Pilbara Infrastructure Pty Ltd, notified an employee of their dismissal by email on 16 June 2021. The worker had instructed the Company to delete his old email address multiple times as it was no longer used. The worker only checked the old email address when he received a termination payment from the Company on 5 July 2021. An unfair dismissal application was filed six days later.

"Generally, where an employee is advised of their dismissal by email, the presumption is that an employee will have had a reasonable opportunity to become aware of their dismissal if the email is received in the inbox of [their] email address," Commissioner Williams said.

Commissioner Williams further stated that *"In this case the circumstances were that the email was received in an inbox of an email address that was no longer used by the [worker] and this fact was known to the Company"*.

The Decision

"Consequently, receipt of this email into that inbox on 16 June 2021 did not amount to the [worker] having a reasonable opportunity to become aware of the dismissal from 16 June 2021, when assumedly the termination of employment letter was sent."

As a result, the Commissioner said, the dismissal took effect on 5 July rather than 16 June, meaning the worker made his application within time.

The Takeaway

This case demonstrates the difficulties that can arise for employers when they choose to dismiss employees by email communication. Had the dismissal process occurred by way of a meeting or phone call as well as email communication the

employee would have been reasonably notified of his dismissal. This would have had the result, that the employee's late unfair dismissal application would not be able to proceed. It is clear that dismissal of employees by email creates risk for businesses in finalising the termination process, we recommend dismissals to be conducted in person for this reason.

In another case which demonstrates that the Fair Work Commission expects dismissal to be conducted face-to-face. In *Wallace v AFS Security* Commissioner Cambridge observed that dismissal by text was "*unnecessarily callous*", even in circumstances where text message or other electronic communications are ordinarily used. The Commissioner stated that notice of dismissal "*is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation*."

The Commissioner concluded dismissal by way of a text message was "*plainly unjust, unreasonable, harsh, and, unconscionably undignified*" displaying "*such perfunctory disregard for basic human dignity [reflecting] very poorly upon the character of the individual or individuals responsible*."

The key risk with dismissal by way of a text message is that it clearly deprives the employee of any procedural fairness considerations such as: opportunity to respond, offer explanation or defence about any of the issues that may have contributed to the decision to dismiss. The opportunity to put a case, face-to-face, to the decision-maker is a requirement for procedural fairness, and failure to do will make the resulting dismissal invariably unfair.

Dismissal meetings should be face-to-face wherever possible. Employees should be given an opportunity to respond to possible grounds of dismissal before a final decision is taken, and this is best done in a face-to-face meeting. In light of COVID-19 restrictions, online videoconferencing platforms would be an acceptable alternative but when in-person meetings are possible that should take preference over videoconferencing. Conducting a face-to-face meeting (even via video conferencing) prioritises procedural fairness in dismissal and will be looked upon favourably by the Fair Work Commission in comparison to electronic communication.

Requests for a support person to attend should be granted. If after considering the employee's response to a decision to dismiss is taken, the employee should be given a dismissal notice in person.

The only circumstances in which notice of dismissal might be sent by text or email is where:

- there is a real prospect the employee will behave in an unacceptable manner at the meeting or the employee is unable to attend in person because of physical distance; or
- the employee has been given a reasonable opportunity to respond to the grounds for dismissal, either in writing or in person; and
- it is common practice for employee communications to be sent in this way (and ideally this should be reflected in appropriate provisions in policies and contracts).

If you have any procedural questions about how to properly affect the dismissal of an employee, please do not hesitate to contact Nick Stevens, Luke Maroney, and Daphne Klianis.