

July 2006

# Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

## Managing a Workplace Investigation Process - What to do if an OHS Inspector Comes Knocking?

The answer is "don't panic". There are a number of reasons why a workplace inspector might pay your workplace a visit, and some of those reasons could actually be positive.

In many cases, the visit might be an opportunity for the workplace inspector to obtain information about compliance with the laws and regulations and for your business to build a relationship with the inspectors. In our experience, that can be invaluable.

**The purpose of this article is to give you an overview of the rights and responsibilities of those involved in the investigation process.**

### ***In the beginning ...***

A workplace inspector has the power to investigate all persons associated with the operation of workplaces including employers and employees, company officers, plant designers, installers and manufacturers. From time to time, inspectors will also target "focus areas for prevention" and you should watch the media and the relevant website for announcements.

An investigation will usually commence as a result of a fatality, a serious workplace incident, a non-compliance which is brought to the regulator's attention or in a "focus area for prevention".

### ***Dealing with inspectors***

On the inspector's arrival at a workplace, he or she must inform the occupier, produce an identity card and explain the reason for the visit.

**We recommend that the senior manager for the workplace or work area should be the person to liaise with the workplace inspector as soon as the investigation commences and he/she should inform any employee health and safety representatives.**

In those cases involving a fatality or notifiable incident, we recommend that the senior manager instruct external solicitors to ensure the results of any internal investigation can be subject to a claim for legal professional privilege.

It is important to note that most workplace inspectors hold trade or professional qualifications and experience and health and safety qualifications. Accordingly, they are very familiar with workplace processes, operations and hazards.

Inspectors have wide powers at the workplace, including to:

- > inspect, examine and make enquiries;
- > bring any equipment or materials to the workplace that they require;
- > seize any documents or other things at the workplace, including plant or substances required for further examination;
- > take photographs, measurements, make sketches or recordings; and
- > take formal records of interview.

They also have the power to issue notices to prohibit use of any plant and equipment, or to insist on improvement to certain aspects of the workplace where the non-compliance does not involve an immediate risk to health and safety. Notice recipients generally have the right to seek a review, but those rights must be exercised quickly and you should obtain legal advice before proceeding.



The senior manager should:

- > ensure that he or she retains records of any items seized and copies of any documents taken;
- > retain part of any samples or substances taken;
- > ensure that someone is present during any records of interview, preferably a management representative (although you can't insist on this) together with a colleague, union delegate or employee health and safety representative;
- > confirm with the workplace inspector where and when any photographs, measurements and the like will be available for inspection.

When making a statement to a workplace inspector, the person being interviewed should:

- > give concise answers, limited to the questions asked;
- > provide only factual information within his/her direct knowledge, experience or expertise (and don't offer opinions or speculation);
- > not answer if he/she does not know or is unsure;
- > if uncertain, ask for the interview to be suspended and seek advice.

At the end of the inspection, the inspector should produce a report for the workplace including full details of the inspection, relevant contact details and rights of review. The inspector may also seek further documents and the management representative should require that that request be put in writing.

#### **What other matters are relevant?**

The workplace inspector may be interested in any material that demonstrates compliance with the relevant laws. Therefore, we recommend that all of the following matters should be brought to the inspector's attention, whether or not they are requested:

- > any employee and/or contractor induction programmes;
- > risk assessments and risk control plans;

- > health and safety policies, manuals and other guidance material;
- > warnings in and around the workplace;
- > appropriate machinery guarding, personal protective equipment and designated walkways;
- > counselling and return to work programmes available to injured employees;
- > improvements to health and safety in the workplace as a result of the investigation or incident.

With these things in mind, the Workplace investigation should proceed fairly smoothly for the employer. However, if any matters arise which cause concern, advice should be sought.

### **Termination of Employment - Operational Reasons Examined**

It was anticipated that the recent WorkChoices amendments would ease much of the difficulty surrounding selection of employees for redundancy. The amendments provide that an unfair dismissal claim cannot be sustained where an employer terminates employment for 'genuine operational reasons or reasons that include genuine operational reasons'. This appeared to limit the requirement for an employer to exhaustively justify the objective criteria used to select individual employees for redundancy, focusing instead on operational requirements.

However in *A.Perry v. Savills (Vic) Pty Ltd (20 June 2006)* Senior Deputy President Watson (AIRC) appears to have given the employer defence based on 'genuine operational reasons' very limited effect, stating that;

*"While operational requirements may provide a reason for the restructuring [of a position], they do not necessarily provide a reason for the termination of [the employee's] employment... The restructuring of positions so that an employee's position is no longer available does not, in itself, establish operational reasons for the termination of an individual employee's employment. "*

It is relevant to note that in this case an alternative position existed which the employee could have filled, and the expected expansion of the company created an operational requirement for the retention of her skills. The decision indicates that it will be insufficient to claim that redundancy of an employee's position alone justifies the termination of the employee's employment.

**Further evidence will be required to show that operational requirements also required the termination of employment as opposed to redeployment.**

Of concern is that the decision appears to resurrect the requirement to objectively consider individual employee attributes and circumstances when selecting employees for redundancy. The decision also suggests that it is insufficient to simply invite the employee to formulate an alternative employment option without in fact making a specific offer of alternative employment if such a position exists.

The full impact of the decision is yet to be seen. We will continue to update you as the law develops.

**Is it unlawful for an employer to require an existing employee to sign an Australian Workplace Agreement as a condition of obtaining a promotion?**

This was the issue recently considered by the Federal Court of Australia in *Bishop v Ropolo Services Pty Ltd* [2006] FCA 592. The case was brought under the provisions in the pre-reform *Workplace Relations Act 1996* (Cth) which prohibited a person from applying "duress to an employer or employee in connection with an AWA". Nevertheless, the decision is likely to still be regarded as persuasive authority for future claims brought under the Act as amended by the 2006 Work Choices reforms, which continues to prohibit such conduct.

Mr Bishop was employed as a General Groundsman Qualified Horticulturalist in June 2003 by the respondent, who traded as Landscape Direct. From late January 2004, he accepted an offer from Landscape

Direct to undertake the role of acting Site Supervisor. The company advised all of its employees shortly afterwards that it was introducing a policy to the effect that all new employment offers and all new appointments for existing employees would be made conditional upon the parties entering AWAs.

On 18 March 2004, the company offered Mr Bishop the role of Site Supervisor on a permanent basis. In accordance with the respondent's new policy, the offer was conditional upon Mr Bishop entering an AWA.

Mr Bishop advised his employer that he did not wish to sign an AWA, on the basis that he objected to AWAs on principle. The matter was discussed further between the parties and Mr Bishop was given a period of time over which to consider his stance. During these discussions, Landscape Direct continued to advise Mr Bishop that if he was unwilling to sign the AWA the position would be internally advertised and filled by another person.

Mr Bishop declined to enter an AWA. Landscape Direct advised Mr Bishop that consequently he would return to the permanent role he held immediately prior to his temporary appointment to perform higher duties, and he was given a choice as to the site location to which he was assigned. The position of Site Supervisor was subsequently filled by another person in August 2004.

The Federal Court applied previous decisions which drew a distinction between an offer of employment to a potential employee which is conditional upon the entry into an AWA, and on the other hand the requirement to enter an AWA where there is already a pre-existing employment relationship between the parties (this distinction is now enshrined in the *Workplace Relations Act* as part of the *WorkChoices* reforms). Because this case fell within the latter category, it was "relevant to examine the circumstances of the employer's conduct to determine whether there were features which rendered illegitimate or unconscionable a threat or inducement offered to procure entry into an AWA and thereby amounted to duress."

Elements recognised by the Court as potentially constituting duress were:

- > the different rate of pay between the promotion position and Mr Bishop's permanent position and the apparent difference between the rate paid for the promotion position whilst he was in an acting capacity as compared to what he would receive under the AWA;
- > Landscape Direct's knowledge of Mr Bishop's interest in the promotion position and of his in-principle concerns about AWAs; and
- > an expectation, created by Landscape Direct's past practice of attempting to fill vacancies via internal promotions, of the opportunity for permanent promotion when Mr Bishop was initially appointed to the acting position.

However His Honour was ultimately unconvinced that Landscape Direct's conduct constituted "duress".

A key finding which influenced that conclusion concerned the timing of events. In particular, Mr Bishop had been in the acting position for only three weeks prior to Landscape Direct's announcement of mandatory use of AWAs for all new employees and new promotional transfers.

Pressure was distinguished from duress by the Court. The additional component required in order for pressure to become

duress was said to be an act threatened or done which adversely affects the employee's position in the labour market if the AWA is not made. The Court relied upon this distinction so that Mr Bishop's decision not to sign an AWA neither affected nor threatened his right or legitimate expectation in respect of the promotion position.

The Court indicated that the result may have been different had Mr Bishop's existing employment conditions been derogated by his refusal to sign an AWA, so that the diminished conditions could be seen as punishment for not doing so. The pressure to sign an AWA in order to obtain promotion in those circumstances may have been sufficient to constitute "duress" within the meaning of the Act.

**Employers therefore need to proceed cautiously when contemplating the introduction of AWAs for existing employees. Although the employer's conduct was not duress in this case, the decision is not authority for the bare principle "it is not duress to make an AWA a condition of promotion". It does however offer a degree of comfort to employers who may wish to explore ways to move existing employees onto AWAs.**



**Important Disclaimer:** The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.

## Piper Alderman Lawyers

### Sydney

Level 23  
Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000  
DX 10216, Sydney Stock Exchange  
Phone: + 612 9253 9999  
Facsimile: + 612 9253 9900

### Melbourne

Level 9  
60 Collins Street  
Melbourne VIC 3000  
DX 30829, Collins Street  
Phone: + 613 8665 5555  
Facsimile: + 613 8665 5500

### Brisbane

Level 9  
239 George Street  
Brisbane QLD 4000  
GPO Box 3134  
Brisbane QLD 4001  
DX 105, Brisbane  
Phone: + 617 3220 7777  
Facsimile: + 617 3220 7700

### Adelaide

167 Flinders Street  
Adelaide SA 5000  
GPO Box 65  
Adelaide SA 5001  
DX 102, Adelaide  
Phone: + 618 8205 3333  
Facsimile: + 618 8205 3300

Email: [enquiries@piper-alderman.com.au](mailto:enquiries@piper-alderman.com.au)

[www.piper-alderman.com.au](http://www.piper-alderman.com.au)

For further information contact:

### David Ey

Partner  
[dey@piper-alderman.com.au](mailto:dey@piper-alderman.com.au)

### David McLaughlin

Partner  
[dmclaughlin@piper-alderman.com.au](mailto:dmclaughlin@piper-alderman.com.au)

### Stephanie Vass

Partner  
[svass@piper-alderman.com.au](mailto:svass@piper-alderman.com.au)

If you would prefer to receive Employment Matters by email or if you are not on the mailing list and would like to be included please contact [publications@piper-alderman.com.au](mailto:publications@piper-alderman.com.au)