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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.

Penalties for duress: AWAs

Two similar cases in Tasmania have recently served to highlight the potential dangers of applying duress to employees to sign Australian Workplace Agreements (AWAs). They also illustrate the very different penalties which might be imposed for such an offence.

Glenn Jordan v Mornington Inn Proprietary Limited [2007] FCA 1384

In early June 2006, the Mornington Inn in Tasmania decided to implement AWAs for its casual employees to improve profitability, which it believed was being impeded by the conditions set by the award applying to its staff. Contentious clauses within the AWAs included:

- flat hourly rates of pay; and
- exclusions of any penalty rates, allowances, public holiday provisions, meal and rest break provisions and most allowances.

Mornington distributed cover letters to workers requesting that they return a signed copy of the AWA to the hotel by 5:00 pm the following Monday. No-one from the hotel ever explained the contents of the AWA to any of the employees and most employees decided not to sign them.

A Mr Barry was subsequently employed to manage the hotel staff and rosters. From 4 July onwards, Mr Barry and Ms Hills, Mornington's Office Administrator, began threatening employees – telling staff that if they did not sign the AWAs their work hours would be cut. In most instances, these threats were carried out. It was found that in some situations Mr Barry became angry, aggressive and forceful towards the employees when demanding their signature on the AWAs. This reduced some employees to tears and resulted in other employees signing the AWAs under duress.

Mr Barry admitted that he had placed illegitimate pressure on employees, as he knew they would feel the financial impact of reduced shifts and have no practical choice but to sign the AWAs.

An application was brought by a Workplace Inspector before a single judge of the Federal Court pursuant to sections 400(5) and 792 of the *Workplace Relations Act 1996*, alleging that Mornington applied duress to the employees to sign the AWAs, as well as other associated breaches.

Mornington pled guilty to all ten alleged contraventions of the Act (there were multiple breaches relating to separate employees). The Court held that Mr Barry had gone about implementing the agreements in a cynical and brutal way. His conduct was characterised as deliberate, targeted, sustained and aggressive. His actions were found to have applied duress, and to have been injurious, to employees during their employment.

The employees affected were calculated to have lost amounts varying from $63 up to $3939 in loss of shift work and overtime pay as a consequence of Mr Barry's actions.

As Mornington was a corporation, the maximum penalty that could be imposed was $33,000 per breach. Justice Heerey imposed a penalty of $17,000 for each breach (a combined total of $170,000), citing the importance of the penalty to act as a general deterrent to all employers.

Mornington has appealed the decision to the Full Bench of the Federal Court.

Smith v Granada Tavern & Ors (No 2) [2007] FMCA 904

Meanwhile in early August 2006, Mr Hibberd a part owner of the nearby Granada Tavern, arranged a meeting to discuss AWAs with his workers. It

was established that both during and after the meeting he put excessive pressure on the workers to sign AWAs – informing them that they needed to sign the AWAs so that they could buy drinks and meals from the Tavern at discounted prices and that if they refused to sign them the Tavern would turn into a "concentration camp".

Ms Wills worked on a casual basis at the Tavern in Tasmania in 2005 and 2006. She refused to sign her AWA on the grounds that it offered far less than she would receive under the applicable award. Mr Hibberd then instructed the worker responsible for allocating shifts at the Tavern not to assign Ms Wills any shifts that week. Those instructions were disobeyed and Ms Wills was in fact given three shifts, but the reduction nevertheless caused her distress as she relied on getting five shifts a week to pay bills and meet her other financial commitments. In the weeks that followed, Ms Wills was not rostered for any weekend work, and was given only two or three shifts per week. She was also continually pressured by Mr Hibberd to sign the AWA.

An investigation by a Workplace Inspector into Mr Hibberd's conduct led to the initiation of proceedings in the Federal Magistrates' Court under section 400(5) of the *Workplace Relations Act* alleging duress.

On the evidence presented to the court, the Federal Magistrate found that:

- Ms Wills had always had a regular pattern of employment with the Tavern which all parties knew she wished to continue;
- Ms Wills was a casual employee with no security of employment;
- Mr Hibberd was in a more powerful position owing to his authority and age;
- Ms Wills' employment pattern was altered in order to bring pressure to bear on her;
- Mr Hibberd was plainly extremely eager to have all employees sign up to AWAs because of the impending possible underpayment claims;
- the intensity of Mr Hibberd's attentions to Ms Wills went further than ordinary negotiation; and
- the use of the phrase "concentration camp" was totally inappropriate.

Based on these findings, the Magistrate concluded that Mr Hibberd's domineering conduct had crossed the boundary from ordinary pressures of negotiation into duress and that his conduct breached section 400(5) of the Act.

The Court fined the Tavern $24,750 and Mr Hibberd $4,950 (a further fine of $1,950 was also issued to another employee of the Tavern for her involvement in the breaches).

Employers should be very careful when transferring employees onto AWAs that they do not apply duress to workers. However, it should be noted that requiring new employees to sign an AWA as a condition of their employment will not amount to duress.

Please contact us if you would like further advice on entering into AWAs with your staff.

Union's OHS right of entry must comply with Workplace Relations Act

Australian Building and Construction Commission (Martino v McLoughlin) [2007] AIRC 717

The Australian Industrial Relations Commission recently suspended the right of entry for a CFMEU organiser for two months, finding he had abused his rights.

Under the Victorian Occupational Health and Safety Act 2004 union officials are empowered to enter a workplace where they believe there has been a contravention of the Act, or where a health and safety representative seeks assistance in relation to a health and safety matter.

Under the Commonwealth *Workplace Relations Act 1996* (the WR Act), the union official:

- must produce a permit if requested to do so by the occupier of the premises;
- must comply with reasonable OH&S requirements when requested to do so by the occupier; and
- may only conduct meetings with eligible employees during mealtimes or other breaks.

In the matter before the Commission, the CFMEU official persistently failed to produce his permit when requested by the occupier, St Leonard's College, and repeatedly refused to sign a visitor book and undertake a site induction.

The Commission found that a single refusal to produce a permit will not necessarily result in an abuse of the WR Act. However, the official's pattern of refusal over four site visits and the holding of unauthorised meetings during working hours to obtain OH&S information was an abuse of the official's rights under the WR Act.

- The Commission made orders that:
- the organiser's entry permit be suspended for two months; and

he undertake appropriate training about the rights and responsibilities of a permit holder under both Acts.

Telstra employee reinstated after dismissal for alleged sexual harassment
Carlie Streeter v Telstra Corporation [2007] AIRC 679

Ms Streeter lodged an application with the Australian Industrial Relations Commission alleging that the termination of her employment by Telstra was harsh, unjust or unreasonable. She had been dismissed for allegedly sexually harassing a fellow Telstra employee, Ms Hyett.

The incident arose following a Christmas party dinner at a restaurant in Cronulla, subsidised by Telstra for its Miranda store staff. A room in a nearby hotel had been privately booked for the night and paid for personally by four female employees. It was intended that the employees would stay in the room overnight, but that other employees could drop by the hotel before going to dinner or to have a drink with those staying there.

After the dinner three female employees, including Ms Hyett, returned to the hotel to sleep. Later in the night Ms Streeter entered the room with two male employees and began having sexual intercourse with either one or both of them, awaking the sleeping employees. Ms Streeter and the male employees then moved into the bathroom. Ms Hyett asserted that when she needed to go to the toilet at some point during the night she had no other choice other than to do so in front of Ms Streeter and the male employees while in the bathroom, who then began having sexual intercourse in front of her.

Ms Hyett and the two other female employees lodged a complaint of sexual harassment against Ms Streeter on their return to work and Telstra decided that Ms Streeter's conduct justified dismissal.

In determining whether the termination had been harsh, unjust or unreasonable, Senior Deputy President Hamberger initially had to consider whether there was a sufficient nexus between Ms Streeter's conduct and her employment for it to form a legitimate basis for termination. He stated that it would be inappropriate to decide that there was not such a nexus if Telstra could be held to be vicariously liable for Ms Streeter's conduct under an Act of Parliament. He looked at section 106(1) of the *Sex Discrimination Act 1984* (Cth), which states that an employer will be vicariously liable for the conduct of an employee where that conduct amounts to an offence under the Act *"in connection with the employment of the employee"*. The SDP then referred to case law which stated that section 106(1) should be given a broad construction. It appears to have been relevant to the eventual decision that:

- Telstra had partially funded the Christmas party dinner;
- the employees were only in the room because they had attended the function; and
- the conduct had the potential to adversely affect the working relationships of the subject employees.

SDP Hamberger did not go so far as to say that Telstra would have been vicariously liable for Ms Streeter's conduct under section 106(1), but merely that there was a "potential" that they could be vicariously liable – which was sufficient to give rise to a conclusion that the there was an adequate connection between the conduct and Ms Streeter's employment. It was therefore open to Telstra to terminate Ms Streeter's employment if the conduct was deserving of dismissal.

In considering whether Ms Streeter had sexually harassed her fellow employees, the SDP looked at the meaning of sexual harassment within the *Sex Discrimination Act 1984* and concluded that sexual harassment was to be broken down into the following elements:

- that there must be an unwelcome sexual advance, an unwelcome request for sexual favours or other conduct of a sexual nature;
- that the conduct must be unwelcome;
- if the conduct is in the form of a sexual advance, or a request for sexual favours, it must be made to the person harassed;
- if there is other conduct of a sexual nature, it must be in relation to the person harassed; and
- that the conduct must have occurred in circumstances where a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated.

Most of Ms Streeter's conduct was held to be of an unwelcomed sexual nature. However, the claim of sexual harassment failed as there was never an unwelcomed request to the other employees for sexual favours or of other conduct of a sexual nature. It was not enough that the sexual conduct offended another person, the conduct needed to have either be done with that person in mind or have a connection with that person to be sexually harassing conduct. SDP Hamberger concluded that the termination was therefore harsh, unreasonable or unjust and ordered that Ms Streeter be reinstated by Telstra (though not at the Miranda store) and back-paid for wages lost since her termination.

The decision, which Telstra is in the process of appealing, has attracted a lot of media attention. Some of the commentary has suggested that the decision demonstrates the limits of the control employers have over the personal lives of their workers. If anything, it suggests the opposite. Nevertheless it presents a double-edged sword for employers. On the one hand, it gives greater leeway for employers to dismiss workers for contrary conduct outside work hours and outside official work-related events, as long as there are valid reasons for doing so. Yet it also increases the trend for employers to be held liable for the conduct of their workers within this wider scope of liability.

For the record, the two male employees involved in the incident in the hotel room also had their employment terminated by Telstra but did not bring unfair termination proceedings. Watch out for our update on the outcome of Telstra's appeal in the next few editions.

Recent developments on penalties for serious workplace incidents

The first two prosecutions for fatalities under the Victorian *Occupational Health and Safety Act 2004* handed down recently demonstrate the larger penalties that the courts will impose for breaches of the Act resulting in employee deaths.

The first is the decision in *Regina v Star Track Express*. In 2005 a forklift driver suffered fatal injuries when the forklift he was driving overturned on the floor of the Star Track warehouse. The forklift had been recently hired and had a mast too high to be used in the area of the factory known as the "flight deck". Star Track attached a notice to the forklift which stated that the forklift *"was to be used solely for the Southern facility – not to be taken down the other end"*. A worker disregarded the notice and ran the forklift into the flight deck at right angles, causing it to rear up with its front wheels off the ground. There was no injury or damage, but the incident was reported to management and the employee was advised "to be more careful". A fatal injury occurred the following day when another employee accidentally drove the forklift into the bottom beam of the flight deck and the forklift fell to its right side.

The employer had impressive risk assessments in place for the purchase and hire of equipment, but the forklift was hired during a period when the Occupational Health and Safety Officer was on leave and no risk assessment had been completed. Star Track pleaded guilty in the Victorian County Court to one count of failing to provide or maintain plant and systems of work that were so far as practicable safe and without risks to health. The Court found that Star Track failed in its duty of care as it did not:

> adequately apply a risk assessment to the forklift;

> follow up on the first non-compliance with the notice; or

> enforce the use of seatbelts whilst operating the forklift.

Star Track had no prior convictions. Notwithstanding that and its impressive system, the Court imposed a fine of $200,000.

The second decision was *WorkCover v Camden Neon*. In 2005 an employee of Camden Neon received a fatal electric shock when he removed broken glass from a live light fitting. He had not been provided with protective gloves and was using an uninsulated screwdriver. WorkSafe established employees of Camden Neon routinely left the power on when carrying out sign maintenance and Camden Neon did not use a "look out tag out" procedure.

Camden Neon pleaded guilty to one charge of failing to provide a safe work environment in the County Court. It had no prior convictions. The Court found Camden Neon had failed to provide or maintain safe plant or systems of work and adequate information instruction, training and supervision. A fine of $300,000 was imposed.

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