HARMERS
WORKPLACE LAWYERS

WORK INSIGHTS

Autumn edition 2016

Editorial

Welcome to the Autumn 2016 edition of *Work InSights*.

In this edition, we cast a spotlight on the practice of engaging interns. We explore recent cases and the nuances of the law relating to internships, work experience and vocational placements in Australia, and highlight the potential risks and penalties for employers.

We then examine the topical issue of drugs and alcohol in the context of unfair dismissals and how this vexed issue is being treated by the Courts.

Lastly, we reflect on some of the key developments in employment law in 2015, focusing on recent amendments to the *Fair Work Act 2009* (Cth), recent case law of interest and foreshadowing some upcoming changes including the introduction of the Fairer Paid Parental Leave Bill 2015 (Cth).

We hope you enjoy this edition.

Contents

1 The legal quandary of the "intern"

4 Drugs, alcohol and unfair dismissal

6 Key developments in employment law in 2015

The legal quandary of the "intern"

Emma Pritchard, Naomi Cooper and Madeleine Boyd

Introduction

In recent years, there has been a dramatic increase in the presence of interns in Australian workplaces. For many young people, a paid or unpaid internship provides invaluable experience and a gateway into their chosen career. For employers, they provide an opportunity to trial a worker before committing to an offer of employment. Given this recent phenomenon of interns in the workplace, it is important that the law provides sufficient safeguards to balance the desire for young workers to gain practical experience with the need to prevent the exploitation of Australia's youth. Employers need to be aware of their obligations when they are considering utilising unpaid interns, in order to prevent exposure to significant back pay claims and potential penalties.

What is an intern?

In early times, internships referred to paid practical experience for medical graduates before they gained their licence to practice. However, since then, other uses of the term "internship" have grown to include "political" interns, "academic" interns, "professional" interns, and "remunerated" interns[1]. Stewart and Owens observe in their *Experience or Exploitation?* Report (**"Report"**) that:

> ...the term "internship" **now has a broad and uncertain meaning in Australia that allows it to be applied to everything from paid entry-level jobs to voluntary work for charitable or community organisations.**[2] (emphasis added)

How widespread are internships?

There is limited information available about how many young people undertake unpaid work, for which organisations and in what area of work.[3] The member organisations of the Australian Internships Industry Association (**"AIIA"**) reported that there were a total of over 2,000 internships during 2012. These placements ranged from 6 to 26 weeks, and most were undertaken by tertiary students or recent graduates. The majority were unpaid.[4] Despite the lack of formal sources available, anecdotally it is clear that internships are far more widespread than the AIIA figure suggests. For example, Stewart and Owens recognise that there is a *"plethora"* of advertisements for unpaid internships available online, often described as an *"opportunity"* or *"training"*.[5] Further, in some industries unpaid internships are *"a common (and perhaps the most common) prelude to securing paid work"*, and are increasingly common in industries that have an oversupply of graduates.[6] Acknowledging the limited evidence, Stewart and Owens conclude that it is likely that the prevalence of unpaid internships will increase as employers are forced to compete with other employers utilising unpaid interns.[7]

Why is it important to regulate unpaid internships?

According to the submissions of Unions NSW to the 2014 inquiry into unpaid work placements, many unpaid work experience placements lead to the exploitation and under- or non-payment of workers.[8] This is of particular concern in relation to young people or migrants who are vulnerable and cannot afford to undertake unpaid work, however have been forced to do so in order to gain a pathway into paid work in their industry of choice.

There is also concern that unpaid internships will cause undercutting of paid positions and the replacement of paid positions with unpaid interns. Unions NSW observes that this may lead to a reduction in entry level paid jobs and the displacement of workers in some industries.[9] If this is allowed to continue, this will become a self-defeating proposition as increasing numbers of workers will turn to unpaid work in order to obtain an entry to work, thereby reducing the number of paid workers overall.

The Australian position on interns

Given the ambiguity in the definition of "intern" and the lack of reliable evidence for the type and existence of internships, it is perhaps unsurprising that the legal position regarding interns is also unclear. The *Fair Work Act 2009* (Cth) (**"Act"**) does not expressly refer to interns. Under the Act, it is a question of whether the intern is an employee working under a contract of employment, or whether the employee falls within an exception created by the Act. If the intern is an employee, the intern will have entitlements under the Act and industrial instruments, including Modern Awards and Enterprise Agreements. These entitlements include a minimum wage.

Therefore, the key issue for determination is whether an employment contract exists between the intern and the employer, and thus whether the intern is an employee.

Is the unpaid worker an employee?

There is no statutory definition of "employee". Accordingly, the status of the intern must be determined according to common law. Under common law, the worker will be regarded as an employee if they satisfy the "multi-factorial test" that has been developed by the courts.[10] No one factor is determinative of the existence of an employment relationship. However, courts place significant weight on the right of the putative employer to control the manner in which the putative employee performs their work.[11] Other factors indicative of an employment relationship include access to leave entitlements, payment of superannuation, deduction of income tax, provision of equipment and exclusivity of performance.[12]

Three key factors are particularly germane to the question of whether an unpaid intern is an employee at common law.[13] Firstly, the existence of an obligation to perform work is often regarded as indicative of the worker being an employee.[14] For example, in *Dietrich v Dare* (1980) 30 ALR 407, the High Court considered that a person who had undertaken a work trial was not an employee because he had not assumed an obligation to perform work, the purpose of the trial being for the employee to demonstrate their ability to work satisfactorily. Secondly, the fact that the putative employer receives a productive benefit suggests that the intern is an employee. In *Drzyzga v G & B Silver Pty Ltd* [1994] NSWCC 12 a person undertaking work experience was held not to be an employee because no productive benefit or consideration flowed to the employer. The mere possibility that the employer might acquire a new employee was held not to be consideration in the relevant sense. Thirdly, the longer the duration of the internship, the more likely a Court will regard an employment relationship as having come into existence.[15]

It is worth noting that some workers are deemed to be employees under state industrial laws or the Act.[16]

The vocational placement exception

Regardless of whether an employment relationship exists, if an internship meets the definition of "vocational placement" the intern will be excluded from the definition of "employee" for the purposes of the Act: see sections 13, 15(1)(b), 30C(1)(a) and 30M(1)(a) of the Act. The effect of this exclusion is that the national minimum wage, the National Employment Standards, the terms and conditions of modern awards and the other minimum entitlements in the Act do not apply to workers on a vocational placement. If, however, the internship does not satisfy the statutory definition of "vocational placement" and a court decides that the worker is an employee, the minimum standards in the Act will generally apply.

Section 12 of the Act defines *"vocational placement"* as a placement that is:

(a) undertaken with an employer for which a person is not entitled to be paid any remuneration;

(b) undertaken as a requirement of an education or training course; and

(c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

This definition of vocational placement is ambiguous for the following reason. Although the term "remuneration" is not defined, it is likely to have a broader meaning than "wages". Under the former *Workplace Relations Act 1996* (Cth), the term "wages" extended to recompense or reward for services rendered including non-cash benefits.[17] Further, section 12(a) only covers remuneration that the worker is *entitled* to, and therefore "remuneration" in this context appears not to include discretionary bonuses or payments. The term "course" is also ambiguous. A "course" may refer to a complete program, or merely a component of such a program such as a unit of study.

It is not clear what the term "placement" means. However, the term suggests that the educational institution must place the individual workers, such that there is some form of an arrangement between the institution and the host organisation. This appears to exclude work experience undertaken by a student on their own initiative.

Government Sponsored Employment Programs

The Federal Budget 2016-2017 includes a proposal to implement the "Youth Jobs Path", which is designed to improve the job participation rates and employability of job seekers under 25 years of age. The program, which is expected to be implemented by April 2017, has three elements:

(a) "Prepare" – pre-employment training for up to six weeks to develop employability skills;

(a) "Trial" – internship placements of up to twelve weeks, for which interns will receive $200 a week in addition to their other Centrelink allowances and businesses will receive $1,000 as an up front incentive payment;

(a) "Hire" – wage subsidies for employers who provide interns with ongoing employment.

The program must be approved by both the House of Representatives and the Senate before being implemented. However, Labour MPs have expressed in principle support for the initiative so it is likely to go ahead no matter which party wins the next federal election.

It is not entirely clear whether the "Youth Jobs Path" internship will satisfy the definition of "vocational placement" in section 12 of the Act. A "Youth Jobs Path" internship is one which will probably be "authorised under a law…" and "undertaken as a requirement of an education or training course". However, the internship may be excluded from the definition of "vocational placement" on the ground that the intern is "entitled to be paid…remuneration" for undertaking the internship.

However, it is likely the Government will seek to exclude "Youth Jobs Path" interns from the meaning of "employee" for the purposes of the Act by express legislative provision to ensure that employers are not liable for wage and entitlement contraventions by participating in the program. "Work for the dole" workers are excluded from the definition of employee in a similar way: see section 120(d) of the *Social Security Act 1991* (Cth).

Employers who seek to take advantage of such programs should take care to ensure their internships fall squarely within the relevant exemption.

Case study: *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140

The decision of the Federal Circuit Court of Australia in *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 sends a strong message to employers that the underpayment of interns will not be accepted. The decision resulted in the first prosecution of an Australian company for failing to pay their interns the minimum wage. The Court relied on the Report to emphasise the ongoing problem of unpaid work experience arrangements.

Background

The case involved two university students studying media who were initially engaged by Crocmedia Pty Ltd (**"Company"**) to complete work experience, for a period of three weeks.

The students were subsequently engaged as "trainees" on a casual basis, and continued working for the Company for six months to a year in this capacity. During this period the students were paid "reimbursement expenses" of $70 per weekday shift and $80 - $120 per weekend shift. These payments were less than the minimum award wage.

Decision

It was held that the Company erred in classifying the students as "trainees" for the period following the three weeks of work experience, and that the Company breached the Act by failing to pay the award wage and provide payslips.

In assessing the question of what quantum of penalty should be imposed the Court took into account many factors, including the circumstances in which the conduct took place; the nature and extent of the conduct; the nature and extent of the loss; whether there was similar previous conduct by the Company; the size of the Company; whether the conduct was deliberate and whether there was involvement by the senior management. It was against this background that the Company was ordered to pay the following penalties:

1. $12,000 for failing to pay minimum wages;
2. $9,000 for failing to pay casual loadings;
3. $2,000 for failing to pay wages in full, at least monthly; and
4. $1,000 for failing to provide payslips.

Other important considerations

The Court also referred to the Report to emphasise the ongoing problem of unpaid work experience arrangements in Australia. In particular the Court acknowledged that the legislative definition of *"vocational placements"* under the Act was unclear and created uncertainty for employers.

To help clarify the definition of *"vocational placement"*, the Court referred to the Report, to highlight that unpaid work experience placements and internships are more likely to be considered employment where the person:

(a) works for an extended period of time such as weeks, months or years;

(b) is expected or required to deliver productive work;

(c) does work which is for the benefit of the employer rather than the person;

(d) provides commercial gain or profit for the employer; and

(e) is not part of any formal vocational placement required for education or a training course.

It was also noted that the main benefit of a genuine work experience placement or internship should flow to the person doing the placement rather than the employer.

The Court concluded by stating:

> *Profiting from "volunteers" is not acceptable conduct within the industrial relations scheme applicable in Australia. In some industries, and the media sector is a good example, the popular appeal of the industry will lure many young people to seek any opportunity to obtain a toehold in the industry. This, coupled with any ambiguous messages that flow from films and television shows from overseas, may have led some businesses to take advantage of aspiring youth.*

Whilst the order for penalties was relatively small, this decision sends a message to employers that Courts will not tolerate the exploitation of unpaid interns in circumstances where they should properly be classified as employees. This decision demonstrates that employers who misclassify their workers may face a range of potential penalties in addition to being required to make backpayments.

Case study: *Upton v Geraldton Resource Centre* [2013] FWC 7827

Whilst earlier in date, *Upton v Geraldton Resource Centre* [2013] FWC 7827 provides useful guidance on the meaning of the phrase *"vocational placement"* for the purposes of the Act. In this case Commissioner Clogham again cautioned that work experience should not be used as a "smokescreen for genuine employment". Nevertheless, the Commissioner was satisfied that the worker in question was undertaking a genuine vocational placement and therefore could not be classified as an employee for the purposes of the Act. This case provides further useful guidance on the notion of "vocational placement".

Background

Mr Upton commenced working as a Graduate Lawyer for the Geraldon Resource Centre (**"Centre"**) on the 4 February 2013 as part of an unpaid practical legal training program (**"PLT Program"**). On 25 February 2013, Mr Upton commenced working as a Tenant Advocate in a full-time paid position. On 15 August 2013 the Centre dismissed Mr Upton with immediate effect and with one weeks' pay in lieu of notice. Mr Upton lodged an application in the Fair Work Commission alleging that he had been unfairly dismissed.

Issues

Only employees who have worked for a minimum period of 6 months can make an unfair dismissal application. Mr Upton contended that the minimum period of employment should be calculated on the basis that he commenced employment on 4 February 2013, being the date that he commenced his unpaid PLT Placement with the Centre. However, the Centre argued that Mr Upton did not commence working as an *employee* until 25 February 2013, with the consequence that he had not completed the minimum employment period. It was argued that between 4 and 24 February 2013 Mr Upton worked towards a "vocational placement" and therefore that this period did not count towards the minimum employment period. The main issue was whether, prior to 25 February 2013, Mr Upton was an employee or whether he was a worker on a vocational placement.

Decision

Commissioner Clogham addressed each element of the definition of *"vocational placement"* in turn. In relation to the first element, the Commissioner held that Mr Upton was not "entitled to be paid". The key factor was that in the application process Mr Upton had affirmed in writing his understanding that the placement was voluntary and unpaid and that he had sufficient funds to support himself. Secondly, the PLT Program was a "requirement of an education or training course" because it was undertaken as part of an approved PLT Course in the College of Law. Thirdly, Commissioner Clogham held that the placement was authorised under

law, because undertaking a PLT Program was a necessary and inherent requirement for admission as a lawyer. The Commissioner also found that the PLT Program was an "administrative arrangement" of the Commonwealth, it being funded by the Attorney General's Department and administered by the National Association of Community Legal Centres.

Having concluded that the PLT Program was a "vocational placement", it followed that Mr Upton was not an employee for the purposes of the Act between 4 and 24 February 2013. Therefore, Mr Upton had not completed the minimum employment period necessary to make an unfair dismissal application.

Commissioner Clogham further considered that even if the PLT Program was not a "vocational placement" Mr Upton would not in any event be classified as an employee because he was undertaking genuine work experience. The Commissioner referred with approval to the following statement from Vice President Lawler's Decision in *University of New South Wales (Professional Staff) Enterprise Agreement 2010:*

> *As a matter of general law, mere "work experience" does not involve a contract of employment… The approach of the High Court in Deitrich v Dare would suggest that, absent an express agreement to contrary, there is no contract of employment involved in period of "work experience", even where some (modest) payment is agreed.*

Conclusion

Given the growth of internships in Australia and the increasing vigilance of the Fair Work Ombudsman, employers must be well informed of the legal position relating to internships to ensure they are not exposing themselves to underpayment and other orders, including penalties.

In particular, the following lessons can be drawn from the above cases:

- Careful attention should be given to any unpaid work experience to ensure that they are legitimate opportunities that fall within the definition of "vocational placement" in the Act.
- Merely classifying individuals as trainees or interns does not necessarily negate the employer's obligation to pay minimum wages and treat employees in accordance with the Act and relevant industrial instruments.
- In determining whether an intern is an employee, consideration needs to be given to whether the worker is an employee at common law and whether the requirements of section 12 of the Act are met.
- An employer who incorrectly classifies an intern as a non-employee is liable to back pay the intern and pay a range of civil penalties.

1 Stewart and Owens Report at 52.
2 Ibid at 52-53.
3 Unions NSW, Submissions to the *Inquiry into Volunteering and Unpaid Work Placements Among Children and Young People in NSW* dated 7 February 2014, at 4 (**"Unions NSW Submissions"**).
4 Ibid at 53.
5 Stewart and Owens Report at 70.
6 Ibid.
7 Unions NSW (2014), Submissions to the Inquiry into Volunteering and Unpaid Work Placements Among Young People in NSW, page 3.
8 Ibid.
9 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.
10 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986).
11 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.
12 *Josie Bianchi v Staff Aid Services* [2004] AIRC 428.
13 Clara Jordan – Baird, "Experience Essential, Remuneration: None the Legal Status of Internships" (2013).
14 *Richards v Cornford (No 3)* [2010] NSWCA 134.
15 *Pacesetter Homes Pty Ltd t/as Pacesetter the Homebuilder v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449.
16 See, eg, section 789BB of the Act.
17 See, eg, *Oliveri v Australian Industrial Relations Commission* (2005) 145 IR 120.

Drugs, alcohol and unfair dismissal

Shana Schreier-Joffe and Amy Zhang

Alcohol and drug use can have a significant negative impact on workplace productivity, performance and reputation. In 2015, it was estimated that alcohol and drug use contributed to a loss of 2.5 million days annually due to absenteeism in Australia, at a cost of more than $680 million.[18] Another study placed the total cost to Australian society of alcohol and drug use at $6.046 billion in lost productivity each year.[19] Beyond a mere commercial and financial impact, employers also face numerous legal risks associated with alcohol and drug misuse by employees. The following recent unfair dismissal cases demonstrate the risks to employers where employees' drug and alcohol use affect the work sphere and where the employer mismanages the issue; and provide guidance for employers on how to handle alcohol and drug related misconduct.

The cases

Toms v Harbour City Ferries Pty Limited [2015] FCAFC 35

Mr Toms was employed with Harbour City Ferries as a Ferry Master. On 25 July 2013, a day on which he was not rostered, Mr Toms agreed to fill in for another employee on an afternoon shift. On the evening before, he had smoked marijuana to relieve his shoulder pain. While on duty, Mr Toms misjudged an approach to a wharf and crashed the ferry into a pylon. He was required, as a matter of routine, to cease his duties and take a drug test. Mr Toms did not disclose that he had smoked marijuana the previous evening until a urine test returned a positive reading for cannabis. When the drug test returned a positive reading, Mr Toms was immediately suspended without pay for a month while an investigation was conducted. Mr Toms was ultimately dismissed at the conclusion of the investigation in line with the company's zero tolerance drug and alcohol policy. Mr Toms subsequently commenced an unfair dismissal application in the Fair Work Commission (**"FWC"**).

The initial decision by Deputy President Lawrence was decided in Mr Toms' favour, and reinstatement was ordered. Despite finding there was a valid reason for the dismissal, Deputy President Lawrence took other factors into account; in particular, the lack of any evidence that Mr Toms was actually impaired by drugs during his shift; and ultimately decided that the dismissal was harsh, unjust or unreasonable.

This initial decision was overturned on appeal by the Full Bench of the FWC. In finding that the dismissal was not harsh, unjust or unreasonable, the Full Bench placed greater emphasis on the fact that Mr Toms had breached the ferry company's zero tolerance drug and alcohol policy. The policy was noted as being significant because the ferry company had statutory obligations towards the public and it was also an offence for ferry masters to operate ferries while under the influence of alcohol or drugs. The Full Bench considered that, in that context, Mr Tom's deliberate failure to comply with that policy constituted serious misconduct and that this could not be mitigated by any demonstrated lack of impairment.

The decision of the Full Bench was ultimately upheld by the Full Court of the Federal Court of Australia, which rejected Mr Toms' application for judicial review of the Full Bench's decision.

Cannon v Poultry Harvesting Pty Ltd [2015] FWC 3126

Ms Cannon was employed by Poultry Harvesting as a chicken farm worker. Her job involved driving a large piece of machinery

with an attached conveyer belt through a large shed for the purpose of collecting chickens for harvest. On 4 November 2014, Melbourne Cup Day, Ms Cannon received a text message asking her to attend work at midnight that night. She was driven to work by a colleague, having consumed approximately 3-4 glasses of wine between midday and 9.30pm. She fell asleep during her work, and consequently caused 50 chickens to be smothered to death by the machine she was operating. Ms Cannon was dismissed as a result of the incident and, in particular, for being intoxicated while at work.

The employer contended that it had a valid reason for Ms Cannon's dismissal because she arrived for work intoxicated; such conduct "could cause serious and imminent risk to the health and safety of the person" or amounted to conduct that caused serious and imminent risk to the reputation, viability or profitability of the employer's business; and Ms Cannon neglected her duty during working hours by falling asleep.

However, the FWC determined that the dismissal was unfair. In reaching this conclusion, the FWC noted that Ms Cannon was dismissed either at 3am by telephone or at 3.45am in person, and at that point, the employer could not have established that it had a valid reason to terminate Ms Cannon because the supervisor who dismissed her did not have sufficient evidence that would allow him to form the view that she was intoxicated to the point of being unable, or unsafe, to work (even though he could smell alcohol on her breath), and otherwise took no steps to objectively assess her condition.

The FWC noted that the employer had a policy in place regarding the usage of alcohol but that document was uncertain in its application and could not be said to be contractually binding or to operate as a zero tolerance policy. Further, it was not clear that Ms Cannon had at any time seen or accessed the policy.

In addition, the FWC noted that even if the policy had been effective, the employer had failed to afford Ms Cannon procedural fairness by dismissing her immediately, not providing her with an opportunity to respond to the allegations against her, and by not providing an opportunity for her to have a support person present.

Ms Cannon was awarded compensation equivalent to 6 weeks' pay.

Sharp v BCS Infrastructure Support Pty Ltd [2014] FWC 7310; *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033

Mr Sharp was employed by BCS Infrastructure Support Pty Ltd (**"BCS"**) at Sydney Airport to perform maintenance and service work. After reporting for work one morning, Mr Sharp was told that he was required to undertake a drug and alcohol test. He immediately informed his supervisor that he had taken marijuana the Saturday prior (being a non-working day); however, he was still required to undertake the test. Mr Sharp returned a positive test that was eight times above the specified threshold.

Mr Sharp was stood down from his duties, after which he was sent a "show cause" letter, and eventually had his employment terminated.

Mr Sharp argued that his actions did not amount to *serious* misconduct and that termination was not justified since he had never engaged in such conduct before, his behaviour was not obviously impaired on that morning, and because other employees, who had returned positive samples, had not been terminated.

The FWC found that in spite of these factors, the positive test result was still a valid reason for dismissal. Whilst there had been some gaps in the information provided to him, the FWC found that Mr Sharp had been appropriately notified of the reason for his dismissal, he was sufficiently aware of BCS' policy in relation to drug and alcohol use, and was aware of the fact that being under the influence of drugs while in the workplace involved serious and imminent risks. There was also evidence that other employees had been terminated at a similar time to the Applicant for returning positive test results, and the other cases where they had not been terminated were sufficiently distinguishable. Further, Mr Sharp's length of service, work record and his personal and economic circumstances did not negate his serious misconduct, and, on that basis, the dismissal was not harsh.

Keenan v Leighton Boral Amey Joint Venture [2015] FWC 3156

In December 2014, Leighton Boral held a staff Christmas party where unlimited food and alcohol were served. One employee, Mr Keenan, arrived at 7pm having already consumed alcohol, and proceeded to consume ten beers and vodka with coke; becoming heavily intoxicated. Prior to the party, Mr Keenan's supervisor had reminded employees about appropriate standards of behaviour to be observed at the Christmas party, including in relation to alcohol consumption and violence.

Mr Keenan was involved in a number of incidents at the Christmas party, during which he (amongst other things):

(f) used inflammatory language towards senior managers;

(g) made defamatory comments about company board members;

(h) sexually harassed a colleague with unwanted propositions;

(i) forcibly kissed another colleague and said he would dream of her later; and

(j) sexually harassed a further colleague by insinuating he wanted to take her home.

Following the party, complaints were made about Mr Keenan's conduct and he was called in for an informal meeting with his direct manager and HR. Mr Keenan was not offered a support person and indicated that he was uncomfortable responding to the questions being put to him. HR conducted their own investigation into the matter and compiled eight allegations in a preliminary investigation report. Mr Keenan was called into a second meeting to respond to each allegation. The facts pertaining to each allegation were not provided to Mr Keenan fully, and this did not allow him to effectively respond to each allegation.

The management team subsequently decided that Mr Keenan had bullied and sexually harassed his colleagues and terminated his employment. In the termination letter, only two of the allegations were listed as reasons for dismissal, being the sexual harassment of a colleague when he asked for her phone number, and the sexual harassment of another colleague when he kissed her on the lips and said he would dream of her later.

The FWC found that the above conduct was a valid reason for dismissal. However, Mr Keenan was found to have been unfairly dismissed due to an inconsistent application of, and failure in respect of, the employer's disciplinary process.

Interestingly for employers, Vice President Hatcher observed in this decision that mere communication and/or reiteration of a company's code of conduct and policies is not enough, and employers may not be in a position to insist on the usual standards of conduct applied at work at work functions if unlimited free alcohol is provided and served by the employer, as such conduct is contradictory. Vice President Hatcher highlighted that the employee's misconduct in this case was the result of his intoxication, and the facilitation of this intoxication by the employer providing unlimited free alcohol at the work event.

The case is currently on appeal and awaiting a decision by the Full Bench of the FWC.

McDaid v Future Engineering and Communication Pty Ltd [2016] FWC 343

This recently handed down case, which is the most recent Australian case involving unfair dismissal and alcohol

consumption, substantiates an ever growing body of case law that encourages employers to consider placing limits on the amount of alcohol served at functions or risk being viewed as complicit in employee misconduct.

In December 2014, Future Engineering and Communication held a Christmas party at their premises where unlimited alcohol was served for all staff in attendance. Throughout the night, Mr McDaid, a Project Coordinator who had worked at the company since 2008, became heavily inebriated and behaved in an aggressive manner towards his colleagues, in particular a Design Engineer, Mr Sugan Sinna. At one point, Mr McDaid is alleged to have repeatedly poked Mr Sinna in the chest before pushing him fully clothed into a pool. Upon being asked to leave the function, Mr McDaid further assaulted the Director/ General Manager of the company, Mr Craig Davies, by pushing him to the ground twice before they both exchanged punches.

Mr McDaid's employment was terminated in March 2015 following an investigation into the events that transpired at the party. The reasons for the termination were as follows:

(a) aggressive behaviour towards his coll eagues;

(b) the threat of violence towards Mr Davies; and

(c) physically assaulting Mr Davies.

Mr McDaid subsequently initiated unfair dismissal proceedings in the FWC alleging the employer had no valid reason to terminate his employment. Mr McDaid disputed the employer's characterisation of the incidents that had occurred, but under cross-examination admitted he was too intoxicated to recall a number of key events. Consequently, the FWC accepted the employer's version of events and found there was a valid reason for termination. Mr McDaid's unfair dismissal application was accordingly dismissed.

While Mr McDaid did not attempt to abdicate responsibility for his actions due to his level of intoxication, he did criticise his employer during the course of the hearing for serving unlimited alcohol at the function.

The FWC accepted that in certain circumstances an organisation's failure to implement Responsible Service of Alcohol procedures may make them complicit in employee misconduct or injury at work functions, but held that this did not excuse or override individual responsibility for the consequences of alcohol consumption.

Lessons for employers

Employers can learn a number of lessons from the above cases:

(a) The creation and implementation of clear staff policies and codes of conduct is critical. Such policies and codes of conduct should explicitly outline the employer's expectations and employees' responsibilities in relation to drug and alcohol use. Where the employer wants to enforce a zero tolerance standard, the policy must make this clear and outline which employees are subject to testing, how the testing will be carried out, and any potential repercussions following a positive result. A zero tolerance policy is advised where employees perform safety critical roles such as the operation of heavy machinery. If, conversely, the employer does not wish to restrict alcohol consumption entirely, then the relevant policies should be as clear as possible regarding what constitutes tolerable alcohol usage and what is the threshold for "serious misconduct" if an incident does occur.

(b) Policies should be communicated to all staff and periodic training should be conducted to ensure constant awareness of the policies.

(c) The validity of an employee's termination, where it involves drug or alcohol use, will be viewed in the context of the business' culture surrounding drugs and alcohol. Where employees are "encouraged" (whether directly or indirectly by conduct) to drink at work functions or in furtherance of client relations, courts and tribunals may be inclined to find the employer facilitated the consequent misconduct and may take such conduct into consideration as a mitigating factor. Consequently, employers should consider placing limits on the number of alcoholic beverages served at functions, employ bar staff to regulate service and/ or consider appointing designated sober staff members with Responsible Service of Alcohol competency to limit the excessive consumption of alcohol and prevent incidents occurring.

(d) In scenarios where drugs or alcohol are a factor in an employee's misconduct, employers are often tempted to treat termination as a *fait accompli* and hastily institute summary dismissal procedures. Care should be had to conduct a thorough and fair investigation in accordance with the employer's standard grievance and disciplinary mechanisms. The employer will need to take steps to objectively assess the employee's condition to reasonably form the view that he or she was intoxicated or under the influence of drugs while performing work. The employee should be afforded an opportunity to respond to the allegation(s) and have a support person present in any meetings with management to discuss the alleged misconduct. Any inconsistent deviation from these procedures may expose the employer to questions of procedural fairness that can vitiate the termination, even if on valid grounds, and may lead to expensive damages payouts.

(e) The courts and tribunals may uphold a termination for drug use despite not finding that the employee was impaired while at work. Where the employer has instituted a zero tolerance policy, the question of misconduct is not necessarily a question of diminished capacity, but rather whether the employee has breached clearly communicated workplace policies and guidelines. If the employee is engaged in work where safety is a significant concern, the courts will be less inclined to find unjustness in the termination.

18 Manning, M, C Smith and P Mazerolle, "The societal costs of alcohol misuse in Australia" (2013) 454 *Trends and Issues in Crime and Criminal Justice* 454.

19 Roche, Ann, Ken Pidd and Victoria Kostadinov, "Alcohol – and drug-related absenteeism: a costly problem" (2015) 39(6) *Australian and New Zealand Journal of Public Health.*

Key developments in employment law in 2015

Emma Pritchard, Daniel Shaw and Jacob White

Introduction

In 2015 significant developments in Australian employment law were brought about by several landmark cases and key legislative reforms. Of particular significance is the *Fair Work Amendment Act 2015* (Cth) (**"Amendment Act"**), which commenced on 27 November 2015 and introduced noteworthy changes to provisions dealing with industrial action, Greenfield Agreementsand requests for flexible working arrangements. Furthermore, several appellate Court decisions provided fresh guidance on the interpretation of key sections of the *Fair Work Act 2009* (Cth) (**"Act"**), including those dealing with sham contracting, redundancy payments and the coverage of the Act. These key developments, and others, are discussed below.

Recent amendments to the law

Until 27 November 2015, when the Amendment Act came into force, there had been no significant amendments to the Act for a considerable period of time. The Fair Work Amendment Act amended the Act in the following ways:

(a) When bargaining for a Greenfields Agreement employers are now able to make an application to the Fair Work Commission (**"FWC"**) for approval of the proposed Greenfields Agreement if a deal has not been reached between an employer(s) and a union(s) within a "negotiating period" of six months. This limits the potential for negotiations to stall major new projects indefinitely.

(b) If an employer makes an application to the FWC for approval of a proposed Greenfields Agreement, the FWC must approve that agreement if, in addition to the factors already set out in the Act, it is satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

(c) A union will only be able to be a bargaining representative for a proposed Greenfields Agreement if an employer agrees to bargain with that particular union.

(d) Parties are only able to commence industrial action once bargaining for a new enterprise agreement has commenced. One of the effects of this amendment is that unions will only be able to pressure employers to reach agreement on an enterprise agreement if the majority of the employees to be covered by the agreement support bargaining for an enterprise agreement, rather than majority of those employees who are union members.

(e) An employer will only be able to refuse a request for an extension of parental leave if the employer has given the employee concerned a reasonable opportunity to discuss the request.

(f) The FWO will now be required to pay interest on certain amounts of unclaimed monies.

Recent cases

Recent cases include:

(a) ***Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*** **[2015] HCA 46**: The High Court overturned a decision of the Full Federal Court, holding that agreed penalties for contraventions of provisions attracting civil penalties can be put forward to the Courts by prosecuting authorities (i.e. Fair Work Building and Construction and the Fair Work Ombudsman).

(b) ***Fair Work Ombudsman v Que St Perth Holdings Pty Ltd*** **[2015] HCA 45**: The High Court held that section 357(1) of the Act prohibits an employer misrepresenting to an employee that the employee performs work as an independent contractor under a contract for services with a third party. The High Court stated that the purpose of this section is to protect an individual who is actually an employee from being misled by their employer about their employment status.

(c) ***C v Commonwealth of Australia*** **[2015] FCAFC 113**: It was decided that Australian defence service members are not employees of the Commonwealth for the purposes of the Act.

(d) ***Romero v Farstad Shipping (Indian Pacific) Pty Ltd*** **[2014] FCAFC 177**: The Full Federal Court found that a company breached its contract with an employee by failing to comply with its discrimination and harassment policy. Notwithstanding that some of the policy provisions were expressed in aspirational language, the policy gave rise to contractual obligations because it created a mutual expectation of compliance, the policy was regularly enforced and the employee's letter of offer stipulated that company policies were to be complied with at all times.

(e) ***National Tertiary Education Industry Union v Swinburne University of Technology*** **[2015] FCAFC 98**: The Full Federal Court held that an employer had wrongfully included the votes of all casual and sessional employees it had engaged in the previous academic year in an enterprise agreement approval ballot. It was held that only those employees who were actually employed at the time of the ballot were eligible to have their votes counted.

(f) ***Australian Commercial Catering Pty Ltd v Fair Work Commission*** **[2015] FCAFC 189**: The Full Federal Court held that the timing of an offer of alternative employment is generally not relevant to the question of whether the FWC should reduce the redundancy pay of an employee under section 120(1)(b)(i) of the Act.

(g) ***Grant v BHP Coal Pty Ltd (No 2)*** **[2015] FCA 1374**: The Federal Court held that a direction given by an employer to attend an appointment with a nominated doctor to assess the employee's fitness to work was a lawful and reasonable direction, non-compliance with which entitled the employer to dismiss the employee for misconduct.

(h) ***Re AKN Pty Ltd T/A Aitkin Crane Services*** **[2015] FWCFB 1833**: The Full Bench of the FWC held that when determining whether an enterprise agreement is "better off overall" by reference to a modern award, the Commission should take a "global" approach rather than a "line by line" approach.

Upcoming developments

The Fairer Paid Parental Leave Bill 2015 (Cth), which is currently before the federal Parliament, proposes to amend the *Paid Parental Leave Act 2010* (Cth) by stipulating that parents entitled to employer-provided parental leave will not be entitled to receive parental leave pay from the Government if the employer-provided payment exceeds that which the employee would otherwise be entitled to receive from the Government.

Furthermore, there are several bills before Parliament proposing to make the following changes to the Act:

(a) Remove restrictions on employees' rights to disclose information about their pay and earnings and prohibit employers from taking adverse action against employees for disclosing this information.

(b) Prohibit employers from taking adverse action against employees based upon where they live.

(c) Require employers to pay employees untaken annual leave on termination of employment in accordance with the governing industrial instrument.

(d) Require flexibility terms in modern awards and enterprise agreements to provide for unilateral termination of individual flexibility arrangements with 13 weeks' notice.

(e) Require flexibility terms in enterprise agreements to provide that individual flexibility arrangements may deal with when work is performed, overtime rates, penalty rates, allowances and leave loading.

(f) Amend the right of entry to provide new eligibility criteria that determine when a permit holder may enter premises for certain purposes.

(g) Remove the requirement for the FWC to hold a hearing or conduct a conference in certain circumstances when determining whether to dismiss an unfair dismissal application.

On 3 December 2015 the Coalition (Liberal and National) Government introduced a bill proposing further amendments to the Act. The Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth) (**"Bill"**) reintroduces amendments which the Government initially proposed but which did not survive the law making process. The Bill addresses a number of important areas including Greenfields Agreements, union right of entry provisions, individual flexibility arrangements, and annual leave loading. It will need to be passed by both the House of Representatives and the Senate to become law.

About us

Harmers Workplace Lawyers "Harmers" focuses on innovative, high quality problem solving and a preventive approach to law across all areas of employment and industrial law. We are perhaps unique in Australian employment practices in that, while having an emphasis on corporate Australia and its senior executives, the firm seeks to implement workplace fairness for all, and will represent employers, employees and their representative organisations as needed. Harmers has represented many of Australia's leading corporations, senior executives and media personalities as well as having run some of Australia's leading cases in employment and discrimination areas.

Harmers won the 2015 & 2016 Australasian Law Awards for *"Employment Law Specialist Firm of the Year"* and previously, was seven times winner of the ALB Australasian Law Awards for *"Employment Specialist Firm of the Year"*. The firm has also received a number of prestigious awards for people management, work-life balance, diversity, innovation and workplace excellence.

Harmers is the Australian member firm for L&E Global, an alliance specialising in providing counsel on cross-border labour and employment law issues with 21 international practices across 5 continents and 1500 + attorneys worldwide. L&E Global brings together premier national labour and employment law firm boutiques – as one firm – with a unified fee-for-all services approach, across borders and throughout the world. L&E Global won The European Lawyer 2016 *"Global Network of the Year"*, and has been ranked by Chambers Global in the *"Band 1 - Global - Wide Employment Law Network"* Category for 2013, 2014 & 2015.

If you would like more information regarding Harmers, or would like to discuss any aspect of this newsletter, please contact one of our experienced professionals.

Michael Harmer
Chairman & Senior Team Leader
michael.harmer@harmers.com.au

Margaret Diamond
Executive Counsel & Team Leader
margaret.diamond@harmers.com.au

Jenny Inness
Executive Counsel & Team Leader
jenny.inness@harmers.com.au

Paul Lorraine
Executive Counsel & Team Leader
paul.lorraine@harmers.com.au

Sandra Marks
Executive Counsel & Team Leader
sandra.marks@harmers.com.au

Emma Pritchard
Executive Counsel & Team Leader
emma.pritchard@harmers.com.au

Sophie Redmond
Executive Counsel & Team Leader
sophie.redmond@harmers.com.au

Greg Robertson
Executive Counsel & Team Leader
greg.robertson@harmers.com.au

Claresta Hartley
Senior Associate & Team Leader
claresta.hartley@harmers.com.au

Shana Schreier-Joffe
Consultant
shana.schreier-joffe@harmers.com.au

HARMERS
WORKPLACE LAWYERS

SYDNEY
Level 27 St Martins Tower
31 Market Street
Sydney NSW 2000
tel: (+ 61 2) 9267 4322
fax: (+ 61 2) 9264 4295
info@harmers.com.au

MELBOURNE
Level 40
140 William Street
Melbourne VIC 3000
tel: (+ 61 3) 9612 2300
fax: (+ 61 3) 9612 2301
info@harmers.com.au

BRISBANE
Level 19
10 Eagle Street
Brisbane QLD 4000
tel: (+61 7) 3016 8000
fax: (+61 7) 3016 8001
info@harmers.com.au

SUBSCRIPTIONS
Please contact
Jane Kewin
Client Service & Communications Director
jane.kewin@harmers.com.au
tel: (+61 2) 9993 8537

www.harmers.com.au

L&E GLOBAL
an alliance of employers' counsel worldwide

160295