HARMERS CLIENT ALERT: ADVERSE ACTION ON THE BASIS OF ROLE AND RESPONSIBILITY

Like the remedy for unfair dismissal, adverse action is a popular avenue for disaffected employees. Employee-applicants often plead multiple forms of the adverse action cause of action in particular:

(a) Section 341(1)(c)(ii) of the *Fair Work Act 2009* (Cth) (**FW Act**), which deals with adverse action taken because the employee has made a complaint or inquiry in relation to his or her employment; and

(b) Section 341(1)(a), which deals with adverse action taken because the employee is entitled to or has the benefit of a *"role or responsibility under … a workplace law, workplace instrument or order made by an industrial body"*.

Hansen v Mt Martha Community Learning Centre Inc [2015] FCA 109], a recent decision of Jessup J of the Federal Court of Australia, concerned both of these varieties of adverse action and importantly, provided important clarification on what it means to have a *"role or responsibility under … [a] workplace instrument"*. The case is the first time that a superior court has commented upon the meaning of *"role or responsibility under…"*.

FACTUAL BACKGROUND

Jocelyn Hansen (**the Applicant**), was employed by Mt Martha Community Learning Centre Inc (**the Respondent**) as coordinator of a childcare service. In this role, Ms Hansen had managerial oversight over other employees at a child care centre including Ms Melanie Moore, who was employed as a coordinator of the centre.

It was Ms Hansen's regular practice to meet with Ms Moore every Friday afternoon to discuss ongoing work matters. For two weeks leading up to Friday, 11 July 2014, Ms Hansen was not able to meet with Ms Moore as planned and in that time, Ms Hansen had developed particular concerns with Ms Moore's performance—her irregular hours, a perceived lack of availability and her actions at a staff meeting.

Around noon on Friday, 11 July 2014, Ms Moore said to Ms Hansen that she would be leaving work early, while Ms Hansen replied that they needed to meet for a discussion. The conversation ended and both Ms Moore and Ms Hansen then attended to their regular duties.

At approximately 1.30pm, after the last of the children had left for the day, both Ms Hansen and Ms Moore, along with Ms Dewhurst (a childcare assistant responsible for occasional care for 0–5 year olds) were in the main room for the children's indoor activities, cleaning, packing up and getting the room ready for the following Monday. Ms Moore had become nervous about her upcoming meeting with Ms Hansen and said to Ms Hansen, words to the effect that she could not meet with her. As Ms Moore went to the exit, Ms Hansen stopped her and—as ultimately found by the court—pushed her and stopped her from exiting through the door. It was not until Ms Dewhurst told her not to touch Ms Moore that Ms Hansen ceased contact with Ms Moore and Ms Moore was able to exit the premises.

On 14 July 2014, Kevin Murphy, the Respondent's General Manager, suspended Ms Hansen from duties with full pay, pending an external investigation into the incident. The external investigator's report concluded that Ms Hansen had (amongst other things) *"physically pushed [Ms Moore], nearly knocking her over"*. On 16 September 2014, in view of the investigator's findings, Ms Hansen's employment was brought to an end on the basis of summary dismissal.

ISSUES

There were three main issues in dispute:

1. whether the Respondent had validly exercised its contractual right to summarily dismiss Ms Hansen from employment;
2. whether the Respondent took adverse action against Ms Hansen due to a complaint or inquiry; and
3. whether the Respondent took adverse action against Ms Hansen because she had a role or responsibility under a workplace instrument.

ISSUE ONE: SUMMARY DISMISSAL

The court held that Ms Hansen's conduct in pushing Ms Moore and more importantly, failing to take responsibility or acknowledge wrongdoing in the weeks following the altercation, was *"repugnant to the contract between herself and the respondent"*. Although physical assault does not necessarily justify summary termination—one must look at the facts of each case—

Ms Hansen's conduct occurred in a context where as the court found, first, she was Ms Moore's immediate supervisor, second, the workplace was *"very small"* and required *"close collaboration"* between staff, and third, Ms Hansen refused to acknowledge fault and did not take any steps to mend fences with Ms Moore. The last factor was critical as the court succinctly remarked:

> *"[t]he position may have been otherwise if the applicant had, more or less immediately, recognised the mistake she had made and mended her fences with Ms Moore"*

ISSUE TWO: ADVERSE ACTION BECAUSE OF A COMPLAINT OR INQUIRY

Jessup J's decision sheds light on two factors of especial relevance to this particular kind of adverse action—the identity of the decision maker and lapse of time.

Ms Hansen's claim failed because the decision to suspend her employment and ultimately bring her employment to an end, were made by Mr Murphy who, the evidence showed, had no awareness at all of the complaints made by Ms Hansen. The complaints were recorded in a 22 May 2012 e-mail that Ms Hansen sent to Ms Vivienne Clarke, the president of the committee of management of the Respondent. This e-mail was never sent to Mr Murphy nor did Mr Murphy otherwise learn of it (until the proceedings commenced). If anything, this is a clear illustration of the advantage that may accrue to employers who properly separate the complaints-handling function from the disciplinary.

Second, the e-mail complaint was sent on 22 May 2012, more than two years prior to Ms Hansen's dismissal and the extended lapse of time was found to have weakened Ms Hansen's case. As Jessup J put it:

> *"There followed a period of more than two years when the applicant was working in the organisation managed by Mr Murphy, a circumstance, of itself, which weakens the applicant's inferential case in relation to Mr Murphy's reasons in July-September 2014."*

The passage of time, in effect, rendered Ms Hansen's complaint stale.

ISSUE THREE: ADVERSE ACTION BECAUSE OF A ROLE OR RESPONSIBILITY UNDER A WORKPLACE INSTRUMENT

On this issue, Jessup J's decision provides clarification on the meaning of the words *"role or responsibility … under a workplace instrument"*.

Ms Hansen relied upon the terms of the *Neighbourhood Houses and Learning Centres Workplace Agreement 2007*, a transitional instrument under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and therefore a *"workplace instrument"*. The agreement proscribed different levels of remuneration for different classifications of role. The roles were described in a schedule to the agreement by a list of indicative duties, functions and responsibilities.

The court rejected Ms Hansen's argument that the classifications amounted to a *"role or responsibility"* in the requisite sense, in essence because the agreement itself did not authorise or require employees to undertake the relevant duties, functions or responsibilities:

> *"… the provisions of the industrial agreement upon which the applicant relies identified the employees who were entitled to remuneration at particular levels, and did so, in some respects, by reference to their roles and responsibilities. That is to say, if an employer assigned certain roles and responsibilities to an employee, his or her remuneration under the industrial agreement would be such as related to those roles and responsibilities.* ***They were not roles and responsibilities under the instrument.***" (emphasis added)

The decision confirms that in order to satisfy the relevant requirements of the adverse action regime, the agreement must not just refer to a role or responsibility; rather, the agreement must require or authorise the role or responsibility by its operative terms. This is the first decision of a superior court to provide this clarification.

LESSONS FOR EMPLOYERS

The lessons of this case for employers are threefold. First, ensure that complaints and inquiry-handling functions are reposed in personnel removed from those with authority over hiring and termination of staff. Second, appreciate that the potency of any particular complaint or inquiry is likely to be at its highest when made and will wane as time passes. Third, the right to summarily dismiss employees should only be exercised sparingly, in egregious circumstances, but it can still be considered as an option, especially in cases of physical contact by one employee against another. In small, collaborative work environments, physical altercation is deserving of greater consequences than for example, larger work environments where employees are engaged in specialised and insular tasks, with little interaction between themselves.

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