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WORK INSIGHTS

Winter edition 2019

Editorial

Welcome to the Winter 2019 edition of *Work InSights*.

The first article in this edition covers casual employment and recent and upcoming developments in four key areas: penalty rates in certain sectors, case law, record-keeping requirements for employers, and employee rights to request for employment to be converted from casual to permanent.

The second article explores the legal framework for criminal record checks in Australia, and outlines how employers can minimise their exposure to criminal record discrimination.

With a heightened focus on sexual harassment in the wake of #metoo and subsequent social media campaigns, the final article in this edition addresses having a plan for responding to dating in the workplace with love contracts and non-fraternisation policies considered as potential measures to protect employers.

We hope you find this edition of value.

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Keeping it casual: recent and upcoming changes to casual employment relationships

Greg Robertson, Justin Pen, Megan Prouatt and Sabine Ford-Arthur

Introduction

"*Casual*" employment in Australia is common but difficult to define. It is characterised by less certainty than permanent employment, and is often thought of as a series of individual engagements rather than a single continuous period of employment. Casual employees have generally been regarded as employees not entitled to benefits such as annual leave, however, casual employees are often entitled to payment of a "*loading*" said to compensate for the missing rights. However, the rights of casual employees, and the corresponding duties of their employers, have undergone significant change.

In brief:

- penalty rates have been reduced for casual employees working in certain sectors;
- a dump-truck operator, who had been described as a "*casual employee*" and who had been paid a significant casual loading, successfully argued he was entitled to annual leave under the *Fair Work Act 2009* (Cth) ("**FW Act**") over the course of his employment;
- long-term casual employees covered under certain modern Awards are now entitled to request their employment be converted into part-time or full-time employment; and
- employers who do not keep proper records of their employees' pay must now disprove that an employee has not been underpaid, if an employee raises such an allegation against them.

This article examines these four recent changes and what they mean for casual employees and their employers.

Are casuals entitled to annual leave?

What happened?

On 16 August 2018, the Full Court of the Federal Court of Australia handed down a landmark decision regarding the definition of "*casual employees*" under the FW Act.

In ***Skene v Workpac Pty Ltd***, the Full Court considered whether or not Mr Paul Skene, a dump-truck operator, who had been employed by a labour-hire business, Workpac Pty Ltd, was a "*casual employee*" for the purposes of the FW Act.

For about two years, Mr Skene had been deemed to be a casual employee under the Workpac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007 ("**Workpac Agreement**") and had been remunerated at a higher base rate of pay under the Workpac Agreement, in accordance with the entitlements owed to casual employees under that Agreement.

If the Court decided Mr Skene was an "*employee, other than casual employee*", it followed that Mr Skene would be entitled to annual leave under the FW Act for the duration of his employment, notwithstanding the fact that he had been paid a casual loading.

The Full Court decided that Mr Skene was an "*employee, other than casual employee*" and reasoned that:

- if an employer could simply deem an employee to be a "*casual employee*" under an Award or Enterprise Agreement, the statutory purpose for annual leave would be "*readily defeated*";
- Mr Skene's contract of employment did not designate any part of his pay as comprising either his "*casual loading or as monies in lieu of paid annual leave*"; and
- there was no "*uniformly understood specialised meaning of the expression 'casual employee'*".

In a separate case, the Federal Court is now determining if an employer can "*set off*" a casual employee's loaded pay rate against the casual employees' entitlement to annual leave.

So, when will an employee be a "*casual employee*" for the purposes of the FW Act?

The Full Court, in *Skene v Workpac Pty Ltd,* stated that the expression "*casual employee*" had a distinct common law meaning, which seemed to be easier to describe than to define:

> *"... [A] casual employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work."*

The Full Court identified the following "*indicia of casual employment*" to assist in working out whether an employee is a "*casual employee*":

- irregular work patterns;
- uncertainty;
- discontinuity;
- intermittency of work; and
- unpredictability.

What does this mean?

Employers should review their contractual and practical arrangements with their casual employees, particularly casual employees who have been engaged for an extended period of time.

The Federal Circuit Court recently applied the Full Court's decision in *Skene v Workpac Pty Ltd* in finding that a so-called "*casual teacher*" at a TAFE college had been entitled to just over $10,500 (plus interest) in unpaid annual leave (see *Stanton-Long v Federation Training (No.2)).*

Workpac Pty Ltd is currently defending class action proceedings based on the Full Federal Court's decision in *Skene v Workpac Pty Ltd*.

Can casuals request to convert to permanent employment as of right?

What happened?

In 2018, the Full Bench of the Fair Work Commission determined the final wording of a model clause to be inserted into most modern Awards, which confers a right on casual employees to request their employment be converted into permanent employment ("**Casual Conversion Model Clause**").

Put simply, the Casual Conversion Model Clause entitles certain casual employees to request that their casual employment be converted to full-time or part-time employment ("**Conversion Request**"). Importantly, it does not confer a right to conversion to permanent employment; it confers a right to request permanent employment.

Casual employees who can demonstrate ongoing and regular hours of work for a period of at least 12 months are entitled to make a Conversion Request. Casual employees who do not satisfy these requirements are not entitled to make a Conversion Request.

The Casual Conversion Model Clause now appears in 71 modern Awards, including major awards such as:

- the Fast Food Industry Award 2010;
- the Restaurant Industry Award 2010;
- the Banking, Finance and Insurance Award 2010;
- the Manufacturing and Associated Industries and Occupations Award 2010;
- the General Retail Industry Award 2010;
- the Mining Industry Award 2010;
- the Rail Industry Award 2010; and
- the Nurses Award 2010.

Employers have some leeway to reject Conversion Request, as long as their refusal is based on "*reasonable grounds*". The Casual Conversion Model Clause provides that such reasonable grounds may include:

- the need, if any, to significantly adjust the requesting employee's hours;
- whether it is known or foreseeable that changes to the requesting employee's hours of work will occur over the next 12 months; and
- whether or not the requesting employee's position will cease to exist in 12 months.

Employers must also consult with casual employees who have issued a Conversion Request and provide them with written reasons for their refusal within 21 days of the employee's request.

What does this mean?

Employers whose casual employees are covered by the relevant modern Awards must consider the effect of these clauses and ensure their compliance with their obligations.

By 1 January 2019, employers should have notified all casual employees who had been employed prior to 1 October 2018 of their right to make a Conversion Request.

For employees engaged subsequent to 1 October 2018, employers must provide casual employees with the text of the Casual Conversion Clause within 12 months of their employment.

Importantly, employers should review the specific clause inserted in the modern Award that applies to their industry. Certain modern Awards require employers to notify their casual employees of their right to make a Conversion Request earlier than other modern Awards. For example, the casual conversion clause that appears in the Manufacturing and Associated Industries and Occupations Award 2010 requires that employers notify casual employees of their right to make a Conversion Request within four weeks following a casual employee's completion of six months of employment with their employer.

All employers should consider whether they are impacted by these casual conversion clauses by reviewing the list of affected industries and their relevant modern awards

(refer to: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/schedule-of-draft-determinations-300818.pdf).

Reductions to penalty rates

What happened?

In the *4 yearly review of modern awards – Penalty Rates* decision in 2017, the Full Bench of the Fair Work Commission made a preliminary ruling that it would reduce weekend and public holiday penalty rates as prescribed in several modern Awards, including:

- the Hospitality Industry (General) Award 2010 ;
- the Registered and Licensed Clubs Award 2010;
- the Restaurant Industry Award 2010;
- the Fast Food Industry Award 2010;
- the General Retail Industry Award 2010;
- the Hair and Beauty Industry Award 2010; and
- the Pharmacy Industry Award 2010.

Relevantly, the Full Bench reduced the Sunday pay rates of casual employees to 175% of the base rate and set the public holiday rate at 250% of the base rate – but required that those reductions be implemented over a four-year period.

The full extent of these penalty rate reductions will take effect in 2020.

Importantly, the size of these reductions varies between Awards. For example, from 1 July 2019:

- casual employees covered under the General Retail Industry Award 2010 ("**Retail Award**") will receive 175% of the base rate on Sundays;
- casual employees covered under the Pharmacy Industry Award 2010 ("**Pharmacy Award**") will receive 190% of the base rate on Sundays; and
- casual employees covered under the Hospitality Industry (General) Award 2010 ("**Hospitality Award**") will receive 175% of the base rate on Sundays.

The reductions to casual employees' penalty rates will coincide with annual increases to the minimum wages set under each modern Award. Accordingly, on 1 July 2019, the minimum wage under the Retail Award, Hospitality Award and Restaurant Award will increase by 3%.

What does this mean?

Employers should review their rates of pay for all casual employees and ensure they are complying with both the reductions to penalty rates and increases to the minimum wage under their relevant modern Award.

Employers now bear the burden of proving no under-payments have occurred if proper pay records have not been kept

What happened?

The passing of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* ("**Fair Work Amendment**") dramatically increased penalties for "serious contraventions" of the FW Act.

At the same time, the Fair Work Amendment introduced a significant legal change to how claims for wage underpayments are pursued and determined. Section 557C of the FW Act imposes a new statutory presumption on employers to disprove an employee's allegation in circumstances where:

- an employee alleges they have not been paid properly; and
- the employer has not made and kept proper records.

Previously, the employee would have to establish that an underpayment had occurred and, if so, the size of the underpayment based on the hours worked and the amount of monies not paid. Now, if such circumstances are established, an employer must disprove the employee's underpayment claim.

What does this mean?

At the time of publishing, what an employer must demonstrate to disprove an underpayment allegation has not been examined by the Courts.

In a 2017 decision, *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor*, which dealt with underpayment allegations just prior to the passage of the Fair Work Amendment, Judge Riethmuller issued the following comments on the then forthcoming changes to the FW Act:

> *"... [I]n future if the employer fails to keep time sheets and provide payslips the employer has the burden of disproving an employee's claim about hours worked and payments made.*
>
> *In a case such as this, I would have been prepared to accept even generalised estimates from the employee as to his hours. In the circumstances of this case, his diary entries amount to good evidence which I have no hesitation in accepting."*

More recently, the Fair Work Ombudsman launched its first prosecution reliant on the new statutory presumption.

Conclusion

The last few years have seen judicial, arbitral and legislative changes to the rights of casual employees and the responsibilities of their employers. It is essential for employers to:

- review their contractual documents and arrangements with casual employees to ensure their casual workforce is actually "*casual*";
- inform their long-term casual employees of their right to request that their employment be converted to permanent employment and manage properly any such requests; and
- develop and maintain proper record-keeping processes to confirm that casual employees are being paid their proper rates under the applicable modern Award.

When can employers carry out criminal record checks?

Jenny Inness and Zeb Holmes

Introduction

Earlier this year the Australian Human Rights Commission released a report that found that a company that withdrew an offer of employment after it had discovered a candidate's historical criminal record, had acted unlawfully by discriminating against the candidate based on her criminal record.

The company, Redflex Traffic Systems Pty Ltd ("**Redflex**"), had in September 2016 interviewed a candidate for a position as a mobile speed camera operator, and subsequently offered her the job. The job offer was subject to the company's "*standard*" criminal record check and medical assessment. Redflex later withdrew its offer of employment when it discovered the candidate had two previous criminal convictions from 2004 and 2007 respectively.

Like Redflex, many employers in Australia carry out criminal record checks as part of their standard recruitment and HR practices. Understandably, some employers can be reticent to employ a person who has been convicted of a criminal offence in the past.

However, employers need to be careful to ensure that any recruitment or other employment decisions that are made on the basis of a person's criminal record are not made unlawfully, and importantly, that such decisions are made by reference to whether the criminal record is relevant to an inherent requirement of the particular job.

In this article we explain the legal framework for criminal record checks in Australia, and we outline how employers can minimise their exposure to adverse findings of criminal record discrimination.

The Legal Framework

In Australia, the State of Tasmania and the Northern Territory have enacted specific legislation that render discrimination based on criminal record unlawful.

In Tasmania, the *Anti-Discrimination Act 1998* (Tas) makes it unlawful for an employer to discriminate against another person on the basis of an "*irrelevant criminal record*". Under that legislation, an "*irrelevant criminal record*" is defined to mean a record relating to arrest, interrogation or criminal proceedings where:

- further action was not taken in relation to the arrest, interrogation or charge of the person;
- a charge has not been laid;
- the charge was dismissed;
- the prosecution was withdrawn;
- the person was discharged, whether or not on conviction;

- the person was found not guilty;
- the person's conviction was quashed or set aside;
- the person was granted a pardon;
- the circumstances relating to the offence to which the person was convicted are not directly relevant to the situation in which the discrimination arises;
- the person's charge or conviction was expunged under the *Expungement of Historical Offences Act 2017*.

This means, for example, that if a current or prospective employee has been arrested, charged, but later had the charge dismissed, in most cases it would likely be unlawful for an employer in Tasmania to discriminate against that person based on those records. Similarly, if a current or prospective employee was arrested, charged, subjected to a full criminal trial, but ultimately found not guilty, in most cases it would likely be unlawful for an employer in Tasmania to discriminate against that person based on those records.

Importantly, the Tasmanian legislation contains an exception that permits an employer to discriminate on the ground of an irrelevant criminal record if it is in relation to the education, training or care of children, and if it is reasonably necessary to do so to protect the physical, psychological or emotional wellbeing of children. Accordingly, if you are an employer operating in the education, training or care of children, different considerations will apply.

The provisions of the Tasmanian legislation are quite similar to the provisions operating in the Northern Territory pursuant to the *Anti-Discrimination Act 1992* (NT). In the Northern Territory it is also unlawful for an employer to discriminate against a person on the grounds of a person's "*irrelevant criminal record*", and that term is defined in similar (although not identical) terms to the definition in the Tasmanian legislation.

In the Northern Territory, the legislation also includes an important exception that permits an employer to discriminate on the ground of an irrelevant criminal record where the work principally involves the care, instruction or supervision of vulnerable persons, including children, aged persons and persons with a physical or intellectual disability or mental illness.

In both the Tasmanian and Northern Territory legislation, it is recognised that it is not unlawful for an employer to discriminate against a person based on a criminal record where the circumstances relating to the offence for which the person was convicted are "*directly relevant*" to the situation in which the discrimination arises (such as the type of job a person is applying for). This means that employers can make employment decisions based on a person's criminal record if the criminal offence which that person has been convicted of is "*directly relevant*" to the person's job (or the job they are applying for). This raises the question of the "*inherent requirements*" of a job, which we discuss below.

In both Tasmania and the Northern Territory, if a finding of unlawful discrimination is made against an employer, the court can make a variety of orders, including for example an order that the employer not repeat the prohibited conduct, and order that the employer pay compensation, or that the employer take certain steps such as re-employing the person.

In addition to the legislation in Tasmania and the Northern Territory, at a Commonwealth level, if a current or prospective employee in any part of Australia considers that they have been discriminated against based on their criminal record, that person is entitled to make a complaint to the Australian Human Rights Commission ("**AHRC**") under the *Australian Human Rights Commission Act 1986* (Cth) ("**AHRC Act**"). The AHRC has the power to conduct an inquiry into such a complaint of criminal record discrimination. The AHRC also has the power to attempt to resolve the complaint via a conciliation process. In certain cases, if the AHRC considers that discrimination has occurred, the AHRC may prepare a report for the Commonwealth Attorney-General which must be tabled in Parliament. Indeed, this is what happened in the Redflex case mentioned above.

The power of the AHRC to take action in response to a complaint of criminal record discrimination arises from section 31 of

the AHRC Act, and from the definition of discrimination in section 3 of the AHRC Act, which defines discrimination to include:

> *(b) any other distinction, exclusion or preference that:*
>
> *(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and*
>
> *(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;*

The Australian Human Rights Commission Regulations declare that a distinction, exclusion or preference made on the basis of criminal record may constitute discrimination under the AHRC Act.

Importantly, the AHRC Act also provides that discrimination does not include any distinction, exclusion or preference in respect of a particular job that is based on the "*inherent requirements of the job*". We turn to that concept now.

What are the inherent requirements of the job?

An inherent requirement of a job is according to the 1998 High Court decision of *Qantas Airways v Christie*, something that is "*essential*" to the position rather than merely being incidental, peripheral or accidental.

The inherent requirement must be an "*essential feature*" or a "*defining characteristic*" of the particular role. The fact that certain statements appear in a position description document is not necessarily sufficient to establish that they are "*inherent requirements*" of a particular job. In the case of *Qantas Airways v Christie*, Brennan CJ stated that the question of whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract, but also by reference to the function which the employee performs as part of the employer's undertaking.

The following questions may be helpful in deciding whether a certain criminal record may have an impact on the essential tasks of the job:

- Does legislation require the employer to ensure that the employee meets certain requirements which may be hindered by a criminal record? For example, a working with children check.
- Is a licence or registration essential to the job and the person is barred from obtaining this due to a criminal record?
- Does the job involve one-to-one contact with vulnerable people, such as children, the mentally ill, or persons with disabilities?
- Does the job involve any direct responsibility for finance or items of significant value such as sensitive data, or intellectual property, where particular offences may be relevant?

Similarly, and by way of further example:

- a person with convictions for violence may in certain circumstances reasonably be refused a job as an unsupervised aged care support worker;
- a person with convictions for fraud may in certain circumstances reasonably be refused a job where they are responsible for financial transactions or handling cash; and
- a person with certain drug related convictions may in certain circumstances reasonably be refused a job as a nurse who is responsible for administering medication to patients.

However, the above are merely examples, and as an employer it is critical that each case is reviewed individually taking all relevant considerations into account. There will be many cases where a person's criminal record will not prevent them from fulfilling the inherent requirements of a particular job.

This point was highlighted in the 1996 decision of *Hosking v Fraser Central Recruiting*, where the Northern Territory Anti-Discrimination Commission found that an employment agency should not have sought criminal record information from all applicants for a nursing position because it was not relevant to the inherent requirements of the position. The Commission stated:

> *"While Mr Fraser's wish to protect Aboriginal communities from unscrupulous persons is admirable, a general requirement for 'police checks' without any reference to the relevance of any check, the relevance of any criminal record and to such matters as spent convictions cannot be considered reasonable. Recruitment forms, and the information they elicit, must be relevant to the duties to be performed, couched in non-discriminatory terms, and based on non-discriminatory practices."*

The Redflex Traffic Systems Case

In September 2016, Ms Jessica Smith applied for, and was interviewed for, a position as a mobile speed camera operator with Redflex Traffic Systems Pty Ltd. Ms Smith performed well in her interview and was offered the job, subject to a criminal history check and medical assessment.

In October 2016, Redflex contacted Ms Smith and advised via telephone that the offer of employment was withdrawn because of her criminal history. During this conversation, Ms Smith did two things. First, she requested a copy of the information relating to her criminal history that the company was relying upon, so that she could verify its accuracy. Secondly, Ms Smith also asked for the opportunity to explain her past offenses. Redflex did not provide the information requested by Ms Smith, nor did the company provide Ms Smith with the opportunity to explain the circumstances of her past convictions.

Following that, Ms Smith made a complaint to the AHRC.

As part of the AHRC process, Redflex submitted that Ms Smith could not carry out the inherent requirements of the job of a mobile speed camera operator because of her criminal history. Relevantly, Ms Smith's criminal history included:

- an offence for assault occasioning actual bodily harm in November 2004, for which she was sentenced to 80 hours community service;
- an offence for possessing a prohibited drug (marijuana) in May 2007, for which she was fined $150 plus $67 in court costs.

Significantly, Redflex submitted to the AHRC that it had a commercial contract with Roads and Maritime Services NSW which required Redflex to carry out probity checks prior to employing any person (including Ms Smith), and that this contractual obligation with RMS meant that a satisfactory probity check was an inherent requirement of the role that Ms Smith had applied for. On a preliminary basis, the AHRC expressed a view that any requirement for a "*clean*" criminal history would likely be a breach of the prohibition against discrimination in employment under section 31 of the AHRC Act, because it would cause Ms Smith to be discriminated against based on her criminal record.

The AHRC also examined the other requirements of the role that Redflex submitted were "*inherent requirements*", including:

- that the role required the person be trustworthy and of good character; and
- that the role required the person be able to behave calmly and professionally in hostile situations.

However, the AHRC confirmed that a criminal record alone cannot be a basis upon which to impute bad character. Ms Smith was 19 years old, and 22 years old, when she committed the offences, and she was 32

years old when she applied for the job with Redflex. Ms Smith had held down stable and permanent employment for the intervening 11 years. The AHRC took the view that the historical offences in 2004 and 2007 did not necessarily mean that Ms Smith was untrustworthy or of bad character in 2016. Nor was the AHRC persuaded that there was a sufficiently tight correlation between the requirement to behave calmly and professionally in hostile situations and Ms Smith's historical criminal records.

The AHRC concluded that Redflex's exclusion of Ms Smith based on her criminal record, was not based on an inherent requirement of the role, and amounted to discriminatory conduct under the AHRC Act. The AHRC recommended to Redflex that it:

- pay Ms Smith compensation for the hurt, humiliation and distress experienced;
- revise its policies in relation to recruitment of people with criminal records; and
- conduct training for its staff involved in employment decisions, in relation to non-discriminatory methods of assessing criminal records against inherent requirements of the role.

Redflex adopted all of the AHRC's recommendations.

Unfair dismissal

Employers must also exercise caution when terminating a person's employment based on a criminal record.

In the unfair dismissal jurisdiction, the 2010 Fair Work Commision case of *Wilson v Nestle Australia* offers some guidance as to the Fair Work Commission's exercise of discretion in these circumstances and the importance of providing procedural fairness.

In the Wilson matter, a casual employee, Mr Steve Wilson, said that his employer's knowledge of criminal convictions (some for sexual harassment-related offences) which were being appealed at the time led to his constructive dismissal as he alleged he was offered no more shifts. Senior Deputy President Drake began by warning:

> "*There is no general presumption that a criminal conviction is a valid reason for termination of employment. It is a matter to be decided on the facts of each case. The nature of the employment, the role of the employee and the nature of the offence are all relevant.*"

The same reasoning followed in 2015 by Senior Deputy President Hamberger in *Deeth v Milly Hill Pty Ltd.* In that case Senior Deputy President Hamberger said:

> *"While it is not the case that out-of-hours conduct can never be a valid reason for dismissing an employee, the starting point must be that what an employee does on his or her own time is a matter for him or her. There is no presumption that a criminal conviction alone is a valid reason for termination of employment, particularly where the criminal offence was committed outside of work."*

While Senior Deputy President Drake was satisfied in the Wilson case that the convictions were "*a valid reason for the termination*", she nevertheless concluded that the dismissal was "*harsh, unjust and unreasonable*", due to the employer's failure to provide Mr Wilson with procedural fairness in connection with the termination of his employment.

What should employers do?

Every employer has the right to employ someone of their own choosing, based on a person's suitability for a job. However, employers must also exercise caution not to contravene discrimination legislation or unfair dismissal laws.

Some practical steps that employers can take include:

1. Employers must always carefully consider whether criminal record information is relevant to the inherent requirements of each particular job.
2. A criminal record should not generally be an absolute bar to employment of a person.
3. Employers should have a written policy and procedure for the employment of people with a criminal record covering recruitment, employment and termination.
4. Employers should provide training to all staff involved in recruitment and selection on the appropriate workplace policy and procedure when employing someone with a criminal record, including information on relevant anti-discrimination laws.
5. If a criminal record check is thought necessary, prospective employee for a role should be informed that any offer of employment is dependent on a criminal record check.
6. If an employer takes a criminal record into account in making an employment decision, it is best practice to provide the candidate or employee with an opportunity to provide an explanation about their criminal record, so that the criminal record is not considered in a vacuum.
7. Criminal record checks should only be conducted with the written consent of the job applicant or current employee.
8. Information about a person's criminal record should always be stored in a private and confidential manner and used only for the purpose for which it is intended.
9. Do not forget that access to employment is crucial to allowing the reintegration of past offenders back into productive society.

Should your business implement love contracts and non-fraternisation policies?

Amy Zhang

According to Relationships Australia, 40% of people in the 35 to 50 age group met their partner at work.

Longer working hours in the office and a general blurring of the distinction between "*work time*" and "*leisure time*" could be factors behind the increased tendency of workers to look for that perfect someone no further than down the office corridor.

Whilst on one hand, office romances may be indicative of a positive and productive work environment, risks arise for businesses where relationships between colleagues turn sour. With a heightened focus on sexual harassment in the wake of the #MeToo movement, it is more important than ever that employers have a plan in place to properly address dating in the workplace.

Non-fraternisation policies and love contracts

It can be difficult to find the right balance between a "*live and let live*" approach and a blanket "*no dating*" policy.

The acknowledgement of the risks to employees and businesses have led many workplaces to try to expressly regulate office romance. However, outright prohibition of employees having any kind of personal relationships will rarely stand up to scrutiny or be effective.

Prohibition policies, however, can be of three different types.

Type 1 is a strict non-fraternisation policy, a straight ban on any dating or personal relationship in the workplace.

Firstly, there would be significant doubts that such a policy would be upheld, at least in the Australian context, as it would rarely be within the concept of a reasonable and lawful direction. It could breach privacy laws and could itself be discriminatory (for example if the policy in practice favoured married couples against singles). Moreover, such a policy could have negative effects on the workforce, encouraging employees to be dishonest about their relationships, affecting morale generally, and causing employees who

do develop relationships with a co-worker to simply leave the employer.

Type 2 policies, prohibiting supervisors from dating any employees, are less problematic, and more legally enforceable, but still suffer from some of the same concerns above.

As an example of a Type 2 policy, in early 2018, the then Prime Minister Malcolm Turnbull announced that Ministers would be banned from having sexual relationships with staffers. The Statement of Ministerial Standards now provides:

> *"Ministers must not engage in sexual relations with their staff. Doing so will constitute a breach of this code."*

The standards that apply to Ministers of the Federal Parliament may not be appropriate for every workplace setting however, and such policies are likely to be more problematic in private workplaces.

Type 3 policies prevent supervisors from dating subordinate employees, and may be a useful policy to have, as it prevents power-imbalance issues. However, a blanket ban even on these forms of relationships can cause issues and cause morale and retention problems.

Another form of control that has been used by some US companies is the so-called "*love contracts*", "*dating contracts*" or even "*cupid contracts*", where employees who are starting a relationship are asked to enter into a contract that confirms that the relationship is consensual, will not result in favouritism, will not interfere with work, and in the event of breakdown, will not result in either party taking action against the employer. Employees undertake that they will behave professionally, will not let the relationship interfere with work, and will not participate in decision making that could affect the other's pay, performance, reviews, hours, career, or promotional activities. Again, such policies and contracts can breach privacy rights, and may not be effective in preventing harassment claims. These have not been widely used in Australia.

A novel approach was recently introduced at Facebook and Google. These companies now adopt a "*one strike and you're out*" rule, which states that employees only have one opportunity to ask a co-worker out on a date. If the co-worker rejects their offer, that employee is not allowed to ask again. As per above, whether such a rule would be enforceable in practice is an interesting proposition.

Dismissal for "*fraternisation*"

In light of the risks of office relationships, many US businesses have taken to enforcing "*non-fraternisation*" policies and clauses, including type 1 policies discussed above.

In the US context, Courts appear to be more willing to uphold no fraternisation clauses and policies. In the case of *Shumway v United Parcel Service Inc*, it was considered legitimate to terminate the applicant's employment for breaching UPS' blanket non-fraternisation policy. Similarly, in *Sanguinetti v United Parcel Service*, it was said that termination was legitimate if taken on the sole basis of violation of the no-dating rule through a personal, sexual relationship with a subordinate. In this case, it was said that the burden of such a policy will weigh more heavily on managers and supervisors.

Such policies and clauses are less commonplace in Australia and have not been squarely considered. However, a recent Fair Work Commission decision did provide a glimpse into how more limited restrictions could operate.

In *Mihalopoulos v Westpac Banking Corporation*, the Fair Work Commission said "*employers cannot stop their employees forming romantic relationships*". Nevertheless, the existence (and breach) of a conflict of interest policy or contractual clause could have ramifications for the way that office relationships are conducted and treated in the Australian context, as made clear by this case.

In this case, Mr Mihalopoulos was a manager in an extramarital relationship with a subordinate. While Westpac policies did not specifically refer to office relationships, Mr Mihalopoulos' employment contract did require that Mr Mihalopoulos avoid situations which could give rise to real or perceived conflict of interest.

The Commission added that it was "*virtually impossible*" for relationships between managers and subordinates not to create at least the perception that a conflict of interest may arise, in issues such as performance appraisals, the allocation of work, and promotion opportunities. As such, these relationships would always require disclosure to allow the conflict to be appropriately managed.

It was held that the failure to disclose the relationship, in circumstances where there was a clear conflict of interest, compounded by dishonesty on the part of Mr Mihalopoulos in lying about the relationship when questioned by Westpac, constituted a valid reason for dismissal.

While the above case did not deal specifically with no-dating policies or contractual clauses, and constituted a fairly uncontroversial consideration and application of standard no-conflict clauses, the above suggests that type 3 policies, which prevent supervisors from dating subordinate employees, could be considered reasonable in the Australian context.

What to do?

Workplace romances will occur regardless of steps taken by employers to quell them. This makes it imperative for employers to be alive to the risks that can arise from workplace relationships and to appropriately manage them through adequate policies and systems. While some things may not work in the Australian context per the above, employers should at the very least consider what, if any, additional measures can and should be introduced to protect its business.

Key takeaways for employers

1. Be alive to the risks that can arise from workplace relationships.
2. Appropriately manage workplace relationships through adequate policies and systems.
3. A straight ban on any dating or personal relationship in the workplace is likely to be considered unreasonable and unenforceable.
4. A policy that prevents supervisors from dating subordinate employees will likely be more enforceable.
5. Consider whether to implement at the very least no-conflict policies or introduce no-conflict clauses into employment contracts as a means to minimise the risks of workplace romances.

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. 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 is a multi-award winning employment law firm. Recent awards include: 2019 Australasian Law Awards for "*Employment Law Specialist Firm of the Year*", the Human Resources Director magazine's HR Service Provider Awards: 2018 "*Silver medal for Employment law" and 2017 "Gold medal for Employment Law";* the 2017 Lawyers Weekly "*Workplace Relations and Employment Team of the Year*"; and the 2017 Lawyers Weekly Women in Law Awards "*Boutique Diversity Firm of the Year*". Harmers has also won several global awards for "Employment/Industrial Law Firm of the Year - Australia" (2011 - 2019).

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 24 international practices across 6 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";* was ranked by Chambers Global in the *"Band 1 - Global – Wide Employment Law Network"* Category (2013 - 2017); and, most recently, as an "*Elite*" Global Law Firm Network (2018 & 2019).

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.

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