IRSQ
Industrial Relations Society of Queensland

The IR Advocate

September 2016

Your Professional Association

President's Welcome

Jo McConnell
IRSQ President

The IRSQ held its annual Patron's Lunch on 21 July at the Brisbane Convention Centre. Have you ever been lucky enough to be in a situation where everything falls into place, so it is almost serendipitous?

Well that was my experience at this year Patron's Lunch.

Why you ask?

There were so many factors involved but some of the key things that made the event such a success included:

- the detailed event planning by the Society's sub-committee members;
- the standing of both the Patron (the Honourable Justice Glenn Martin) and the speaker (the Honorable Grace Grace MP - Minister for Industrial Relations, Employment, Racing and Multicultural Affairs);
- the event venue (the Brisbane Convention Centre was named the World's Best Conference Venue the day after the event);
- our incredible and highly sought after raffle prizes (thank you to all who donated those items); and
- the high level of attendance and industry diversity of attendees.

Suffice to say that there was laughter, learning and after 4pm at Rydges' Soleil Bar, a little leaning. However, I do not wish to sell the event short, there was also work done across the afternoon. We have had a lot of feedback about the benefit of this event given the breadth of the representatives from our industry, so of course this was an opportunity to get together and suggest collaboration. I also know that the Society was approached about working with others to support activities in their area of interest.

Thank you to all who have sent us your positive feedback, so many people made this a great event and that includes all who attended. I look forward to next year's Patron lunch, don't miss it!

Keep your eye out for our next event and remember please feel free to approach any of the Committee members if you are interested in participating in any way. We are always welcoming of new people and ideas.

Event Calendar

21 October – Women in IR

December - Christmas Party

Keep an eye out at: www.irsq.asn.au

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Event Recap – Workplace Investigations

On Wednesday 29 June 2016, the IRSQ held a half day Workplace Investigations Workshop in conjunction with IRIQ, Hall Payne Lawyers, Together Queensland and the NTEU.

This event truly showed both the collegiality and value of the IRSQ. Many members of the IRSQ Committee gave generously of their time on the day as presenters and members of the guest panel. In particular the IRSQ would like to thank the following members for their time and obvious experience presenting informative and insightful sessions on the day: Joanna Minchinton (QHA), Theresa Moltoni (IRIQ), Faiyaz Devjee (IRIQ), Luke Forsyth (Hall Payne Lawyers), Jo McConnell (Together) and Rohan Hilton (NTEU).

The event allowed IRSQ members to network with others from across the field in addition to learning from a broad range of industry experts. The Workshop provided the audience with practical insights and tips about investigation processes. Too numerous to list them all, the topics ranged from the terms of reference, the standard of proof, procedural and natural justice, talking to the client [employers and employees], speaking with the accused and witnesses, report writing and presenting the information, the consequences of getting it wrong, remedies, and from this writer's viewpoint, most importantly, practical insights and considerations gained from years of practice.

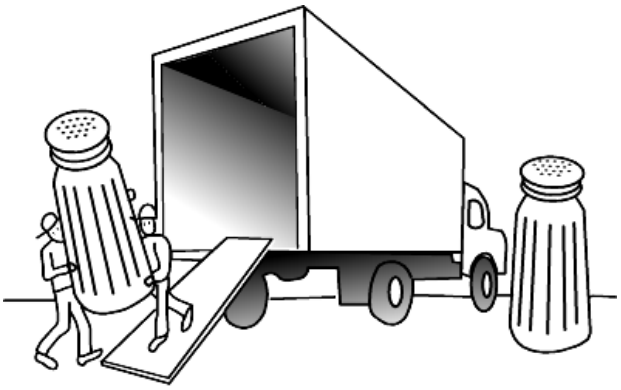
A special thanks must go to the Fair Work Commission for providing us with the venue for the day. A further note of thanks goes to Deputy President Bloomfield for his continual support of the IRSQ and its events. The Deputy President gave plentiful insights at various stages of the presentation, in addition to acting as a guest panel member at the close of the event.

The event concluded with a very engaging panel discussion with a difference. The title itself ("The Adult Conversation") hinted to the no-holds barred, straight talking responses that were delivered. The panel featured distinguished IR experts, John Payne (Hall Payne Lawyers), Andrew Herbert (Barrister at law), and Deputy President Bloomfield (QIRC); all of whom recanted some war stories to make the point of having the 'end in mind'. As the panel so eloquently pointed out, sometimes, you just need to have that 'adult conversation' with your client to keep the process moving forward.

If you are new to the IR field or just want to sharpen up your skills, this is an event that I can truly recommend to members for the future.

Ben French – Lecturer, Griffith University

Movers & Shakers



The Movers and the Shakers

Dale Blackmore has moved from Together Queensland to Hall Payne Lawyers.

New Members

We welcome **Jason O'Dwyer** – Master Electricians Australia, **Tony Hung** – The Public Trustee, **Penny Tovey** – Hall Payne Lawyers, **Tameeka Stewart** – Independent Education Union QLD / NT, **Shirelle Wolfe** – QLD Health, **Brad Montgomery** – Ergon Energy, **Edward Shorten** – QLD Bar, **Simon Ong** – United Voice, **Dermot Peverill** – United Voice, **Jared Marks** – United Voice and **John Spreckley** – United Voice.

If you have moved, been promoted or taken on a new challenge, email the Secretariat at irsq@irsq.asn.au for inclusion in the next edition.

LinkedIn

Did you know that the IRSQ now has a LinkedIn Group? **Click here** to join the Group or alternatively you can search for the group by typing "**Industrial Relations Society of Queensland**" into the search box on LinkedIn.

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Migrant exploitation exposes gaps in labour law protections

By Giri Sivaraman – Principal, Maurice Blackburn Lawyers

Giri Sivaraman is the head of Maurice Blackburn's Queensland Employment Law Department and is based in Brisbane.

There is no doubt that labour trafficking is alive and well in Australia. It seems that almost every other day a story of gross exploitation spills onto the front page of a major publication. No industry is insulated, with stories spanning across health, hospitality, mining, horticulture and retail – and this is not an exhaustive list.

A perfect storm of legal deficiencies creates pristine conditions for labour trafficking to thrive.

74 per cent of the Australian Federal Police's investigations into human trafficking in the 2014-2015 financial year were conducted in industries other than sex work.[1] Similarly, the Fair Work Ombudsman's receipt of complaints detailing calculated exploitation and staggering underpayment is steadily on the rise.[2]

Migrant workers are the archetypical victims of labour trafficking. Such cases are notoriously difficult to successfully investigate and prosecute, and a plethora of cultural, political, social and legal issues compound these difficulties.

Firstly, we cannot get a clear picture of the extent of labour trafficking in Australia because people are often afraid to speak up about themselves or others. In the context of employment, the *Fair Work Act 2009* (Cth) only protects employees making an inquiry or complaint in relation to their own employment, and not the employment of others. Further, the threat of visa cancellation makes it very difficult for people to come forward without fear of immigration related reprisals. For example, where migrants are non-compliant with their work-related visa conditions because of exploitative employment relationships, they risk deportation if they complain to the Fair Work Ombudsman.[3] There is an inherent incompatibility between the restrictions in the *Migration Act 1958* (Cth) and the protections in the *Fair Work Act 2009* (Cth), which perpetuates the cycle of exploitation.

Secondly, a profound amount of this exploitation happens within our transient migrant workforce. Investigations are stultified because victims have often moved onto other employment before police can fully explore the complaint. As a result, evidentiary difficulties make it almost impossible to obtain a conviction.[4]

To date, Australia has only two successful prosecutions of labour trafficking under the *Criminal Code Act 1995* (Cth).[5] It is difficult to show that the accused commodified and exercised the requisite degree of control over the person at the relevant time.[6] Demonstrating unduly harsh working conditions simply will not suffice. Only the most despicable case of undignified treatment returned a conviction.[7]

Our current protection for migrant workers who expose corporate misconduct leaves much to be desired. If we want this conduct to stop, then we need to do more to incentivise whistleblowing by way of legal protection. Further, a number of legislative instruments need to be harmonised for this to come to fruition.

Australia's poor treatment of migrant workers is in the international limelight. We cannot shrug off our poor legal treatment of vulnerable workers any longer, or we risk losing the reputation for a fair go we fought so hard to gain.

[1] University of Queensland, *Labour Trafficking in Australia* (11 July 2016) <https://law.uq.edu.au/research/research-activities/human-trafficking/labour-trafficking>.
[2] Finance and Administration Committee, Parliament of Queensland, *Inquiry into the practices of the Labour Hire Industry in Queensland,* (2016) 25.
[3] *Migration Act 1958* (Cth), ss 116, 137J.
[4] Finance and Administration Committee, Parliament of Queensland, *Inquiry into the practices of the Labour Hire Industry in Queensland,* (2016) 25, 25.
[5] *Criminal Code Act 1995* (Cth), s 271.2(2B).
[6] *The Queen v Tang* [2008] HCA 39 [44].
[7] *R v Rasalingam* (District Court of New South Wales, Judge Puckeridge, 10–11 October 2007)

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Retiree Membership Status

At IRSQ we understand that our loyal Senior Patrons who are nearing retirement, still want to keep abreast of industry new and events.

We are proud to announce, IRSQ will be offering membership status with only a small membership fee to all retired patrons. Please contact IRSQ if you would like more information about our **Retiree Membership Option.**

Volunteer Opportunity

The Queensland Working Women's Service Inc. is pleased to announce the commencement of a new trial program that operates as a weekly clinic providing free and confidential employment advisory services to overseas workers and international students. The advisory service is in response to overwhelming calls for assistance from these groups, predominantly young people from non-english speaking backgrounds and other vulnerable migrants. The Visa Workers Employment Advisory Service is unfunded at this stage and will rely heavily on volunteer support. If you are interested in offering your services on a pro-bono or volunteer basis (approximately 3 hours per month) then please contact the Service Director, Kerriann Dear at director@wwq.org.au.

WWQ
WORKING WOMEN
QUEENSLAND

Lionel Ledlie Prize

In July 2016 the IRSQ was pleased to sponsor and present Griffith University's Lionel Ledlie Prize.

Ms Warrika Watson (pictured left with Terrianne Redman, Treasurer of the IRSQ) was the worthy recipient of the Prize (recognising Academic Excellence in the field of Industrial Relations) for the 2015 Academic year.

The Society has been the proud sponsor of this Award at both Griffith University and QUT for many years as part of its endeavour to support and develop the field of industrial relations.

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Five Minutes with Peter Garske

Peter Garske sits on a number of corporate boards and is the former CEO of the Queensland Trucking Association.

How did you decide on your desired career path?

A public servant, a public sector union advocate, IR advisor Catholic Education, Queensland Confederation of Industry and Queensland Trucking Association (1995-2016)!!! It would be fair to say that I never decided at some point in my life that these were the things that I would do. Rather each employment opportunity developed certain skills and interests that led me to take up a number of opportunities throughout my working life all of which collectively have developed my personality, my values and my goals.

Who are the people who have influenced your career decisions?

A number of people have influenced my thinking and my decision-making. While not limited to those that I identify, certainly the following persons have played a significant role in influencing my entire life, stages of my career and the values that I hold.

Prominent were my father Des, a public servant named Brian Merrin with whom I worked closely with in the 70's and 80's, Fr Bill O'Shea - Catholic Priest and Theologian, Clive Bubb – CEO at QCI and Phil Russell a successful heavy vehicle industry businessman.

Who do you admire greatly and why?

- President Barrack Obama for his leadership skills
- Eddie Ward (retired Rugby League Referee) for his honesty and integrity
- Darren Lockyer for his determination and vision
- and all who devote their lives to serving those in our community with special needs

What has been the biggest change in industrial relations during your career?

The focus on enterprise level negotiation and outcomes giving employees and employers much greater control in decision-making and outcome. Sadly, the demise of the lay advocate and the movement of the Tribunals to a legalistic framework which brings with it very considerable cost. This latter change has reduced the opportunity for social interaction between advocates drawn from employee organisations, employer organisations and the legal fraternity.

What do you most enjoy about your current role?

Every day for the last 20 years has arguably been different. I was recruited 20 years ago essentially because the decision makers at the time were looking for a person with a strong industrial relations background and a modicum of communication and government relations experience and skill. Notwithstanding the media's pre-occupation with the big and the ugly elements of the heavy vehicle industry, the vast majority of business operators and employees/drivers I have met, have been fine upstanding contributors to the community. The industry has undergone a transition embracing reform, improvements in productivity, greater efficiency in operation and a much improved road safety outcome. I have been fortunate to be involved in an industry which makes a significant contribution to the nation's economy while at the same time achieving immense job satisfaction and personal reward. It has been my privilege to practice in government relations and work closely with politicians of all political persuasion.

What are your plans post QTA?

If I wanted my life going forward to be planned and governed by a bloody electronic diary, I would not be retiring! I will retain a small number of Directorships thus exercising my intellect. I look forward to improving my golf, spending much more time with my growing grandchildren, having time to share with my friends and being a house husband to Anne as she continues to pursue her career. Relaxation will be the key to my future activity.

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Event Recap – Annual Patron's Lunch

In July the Society's newest Patron, Justice Glenn Martin, hosted his first Patron's Lunch at the Brisbane Convention and Exhibition Centre, which was attended by over 300 guests.

This year's Keynote Speaker was the Queensland Minister for Employment and Industrial Relations Minister for Racing and Minister for Multicultural Affairs, the Honourable Grace Grace MP.

Ms Grace marked the occasion of the retirement of Peter Garske, a long-time member of the IRSQ and devotee of the Patron's Lunch, by reminding him of her attendance at her very first Patron's Lunch, at which Mr Garske was also in attendance, and remarking at how far they had both come in their industrial relations careers since that first Lunch.

In her keynote address, Ms Grace discussed the Federal election results and possible IR developments at the federal level resulting from the Liberal-National Coalition being returned to Government.

She also discussed developments in the State jurisdiction including the Queensland Government's first major review of industrial relations laws in nearly 20 years, recent developments in the local government sector, the Parliamentary inquiry into labour hire, broader issues around the future of work and IR regulation, and workers' compensation and health and safety.

Ms Grace outlined some of the 68 proposed IR reforms emerging from the final report published on 4 March 2016, entitled 'A review of the industrial relations framework in Queensland', composed by the independent review reference group headed up by a former Queensland Government Director-General, Jim McGowan.

Some of the mooted reforms included ten days paid leave for domestic and family violence related purposes, flexible work provisions, provisions ensuring pay equity in industrial instruments, and the introduction of mutual trust and confidence obligations for the first time in Australian statute law.

Ms Grace advised that the Government was in the process of finalising a response to the report with more announcements to come in the near future.

Of course, with an audience full of IR professionals with such divergent views on the subject, there was always going to be those in the audience who either applauded or dissented from the views expressed by Ms Grace, but that is always part and parcel of the occasion. However, all agreed that Ms Grace gave an entertaining and informative speech and that IRSQ President, Jo McConnell made for an engaging Master of Ceremonies for the event.

As always, the lunch was marked by equal amounts of great food and wine, generous hospitality and robust networking with colleagues in the industry. And of course, there was without doubt much 'interest-based bargaining' amongst the guests.

An event to remember!

Terrianne Redman - Employment Relations Adviser, Queensland Hotels Association

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Conducting Workplace Investigations

Peter Norrie B.Sc. M. Admin

Peter is an accomplished consultant with 30 years' experience in change management, industrial relations, executive recruitment, performance enhancement methodologies and workplace investigations.

The workplace of today has changed dramatically from what it was five years ago, let alone a decade or two ago. Today people know their rights, or at least a television version of their rights. If they are unsure, a quick Google will soon highlight the vast landscape of information available on the web in their area of concern. However, not that long ago, people were much more believing.

More than 15 years ago I was concluding an interview with a woman, let's call her Sue, about some mundane organisational matter when I noticed that Sue seemed to have something else to say. As was my want at that time, I enquired if there was anything else I should know. Sue just looked at me with a somewhat wooden expression. However, I was even more convinced that there was something I should know so I offered my support and reassured Sue of the total confidentiality of our discussion, nothing, I said, would leave this room if she didn't want it too.

Somewhat out of the blue Sue told me she had come to her present job straight from leaving school and on the very first day, her boss (let's call him Fred) had forced her to have intercourse with him in the office. Worse, she said that this had continued to occur every single day that Fred was in the office. For, years.

Apparently, Sue hadn't planned to tell me anything and was, therefore, unprepared for my reaction and also, I think, her own. After a little while, Sue quietly asked and then, more forcefully, demanded that I not tell anyone (reminding me that I had told her it would be confidential). Sue was panicking about her ability to keep her job; she refused to go to the Police or even make an official complaint.

Without going into the gory detail, I was convinced of the truth of what Sue had said or at least enough of the truth that I felt that I had to take some action. What could I do? I left the interview and looked up relevant regulations and made appropriate enquiries. I seemed to be stuck. There were no protections in place that I could identify. Worse, I had made a promise that I couldn't keep without knowing what ramifications were possible.

Without any other options, and unable to do nothing, I spoke to the head of the agency that I worked for at the time. That person then talked to the person in charge of the area in which Sue worked. That same week, Fred apparently decided that he should retire and did so. I heard later that Fred got a gold watch for his long and faithful service (but this may have been hyperbole).

I learnt a few things as a result of this early mishap: firstly, I wasn't nearly as skilled an investigator as I had thought myself to be. The fact that it wasn't an investigation at the start didn't matter; I had made a fundamental mistake in promising not to tell anyone what was said. Secondly, I had come from a different environment and had assumed that the same rules and protections held sway in one way or another (they didn't and here I had no power or authority to do anything).

A story like the above is probably much less likely to happen today: people better know their rights and have access to much more information, greater protections are in place, and people are more mindful of their access to the Courts. Nevertheless, a workplace investigation can start by someone asking a simple question, and the success of the investigation may well depend on what happens immediately afterwards.

Investigations must be done expediently, thoroughly and impartially with structured processes in place so that you can defend whatever your findings are. Far too often, complaints are not taken seriously, or a person in authority makes unfounded judgements about the complaint. Of course, there will be times when mediation will be appropriate, but there will be other times when that is not enough.

A formal investigation will be required if a complainant requests one, or the allegations are more serious, or the organisation's policies state that an investigation should occur. Circumstances will dictate how deep and wide the investigator needs to go regarding witness interviews and collection of evidence, but the process itself must be consistent.

Interviewing is not simple. There are ways to obtain more information from individuals and to obtain the specific information you require. However, this requires training and practice. One of the problems with internal investigators is that they don't conduct investigations every day, and this is why learning the techniques is so important. It is always a good idea to refresh skills when they are used infrequently.

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Report-writing is another area that requires skill. Reports need only the facts – and in many cases, we insert opinions or make comments that could be seen as biased. Other times, a report may be "spiced up" so that it garners more attention or is taken seriously. Unfortunately, opinions, comments and "spice" can be enough to raise questions about whether the investigation was fair and unbiased.

There is nothing wrong with conducting an investigation internally – as long as you have the skills to get the job done. However, if serious allegations are brought to you, consider consulting your legal advisor to assist you in the investigation or contact an external investigator who has the requisite skills and knowledge to manage the investigation.

It might be worthwhile to do a Google search of workplace investigations. Take a look at those that went well as opposed to those that were determined to be faulty. With increased awareness of what is and isn't appropriate in a workplace, there will be an increased requirement for employers to investigate. Be sure you are ready.

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Are you required to pay your employees a redundancy payment?

William Ash – Associate, Hall Payne

Many employers in contracting industries will claim that no redundancy payments are payable if the contract is lost because it is due to 'ordinary and customary turnover of labour'. Some employers will also claim that they do not need to make redundancy payments to employees because they were able to find the employee alternative employment with the incoming contractor.

Two recent decisions of the Full Bench of the Fair Work Commission have cast doubt on whether the above claims by employers will always be correct.

In *CFMEU and ors v Spotless Facility Services Pty Ltd* [2015] FWCFB 1162, the Full Bench found that the entitlement to redundancy payments was not read down by reference to the words 'ordinary and customary turnover of labour', as contained within the National Employment Standards. The Full Bench held that, as the enterprise agreement used the term "redundancy" without any qualification, it should be given its ordinary meaning.

Meanwhile, in *MUA v FBIS International Protective Services (Aust) Pty Ltd* [2014] FWCFB 6737, a Full Bench held that it was not sufficient to merely put employees in contact with an incoming contractor or another employer. The Fell Bench held that the test of 'obtaining' employment for the employee means arranging employment for the employee to accept or reject.

The above decisions highlight that employees should not automatically accept an assertion from their employer that they are not entitled to a redundancy payment when their position is made redundant. To the contrary, it is possible that the employee may, in fact, be entitled to a redundancy payment.

Further, Hall Payne Lawyers are currently acting for a union in proceedings before the Federal Court of Australia which may result in further judicial guidance on what 'ordinary and customary turnover of labour' means.

In summary, these cases emphasise that, while at first glance it may seem to be the case than an employee may not be entitled to a redundancy payment, it is essential that you carefully review the redundancy provisions within the relevant industrial instrument, as well as obtaining full instructions surrounding the circumstances before concluding whether or not a payment should be made.

In the event that an employer fails to pay a redundancy payment to an employee who is otherwise entitled to receive one, the employer and decision maker may contravene the *Fair Work Act 2009* (Cth) and expose themselves to the potential for penalties being ordered against them.

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Life Membership – Call For Nominations

The Society is currently considering nominations for life membership, with a view to awarding successful nominees by the end of this year. To nominate a worthy candidate please go to www.irsq.asn.au and fill in the nomination form.

Applications for 2016 must be received by no later than **31 October 2016.**

All applications will be considered by the Management Committee and put to the general membership for approval at either the Annual General Meeting or a Special General Meeting.

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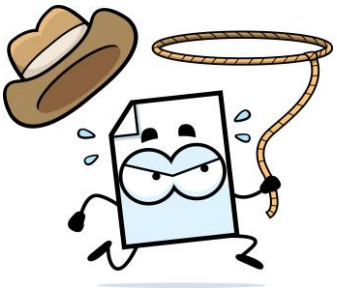

IR World Roundup

Coles enterprise agreement gets the BOOT on appeal – not all employees better off overall

A Full Bench of the FWC has upheld appeals from a Coles worker and the AMIEU against the approval of the new Coles enterprise agreement, finding that the agreement did not pass the 'better off overall test' (BOOT).

The *Coles Store Team Enterprise Agreement 2014-2017* (Agreement) provided employees with a higher ordinary hourly rate of pay, but the penalty rate for working in the evenings, on weekends and on public holidays was lower than the relevant modern award.

The SDA and Coles gave evidence that the employees benefited from the Agreement through control of working time matters as well as additional leave entitlements, such as blood donor leave, Defence Force leave, natural disaster leave, and domestic violence leave.

The Full Bench acknowledged this evidence, but noted that "the level of income is also critical for access to study, caring and other life choices." The Full Bench also determined that the working hours and leave entitlements in the Agreement had a lower benefit than that estimated by Coles, and that these additional entitlements did not make up for the deficit caused by the lower penalty rates provided to employees for evenings, weekends and public holidays.

As a result, the Full Bench was not satisfied that the Agreement passed the BOOT. In particular, there was a significant potential loss in wages for part-time and casual employees and an overall assessment of the loss in wages compared against the benefits of extra working hours and leave entitlements, led to the conclusion that not *every* award covered employee covered by the Agreement would be better off overall.

The Full Bench noted that the BOOT failure could be fixed through either an undertaking to adjust payments for disadvantaged employees or an undertaking to limit penalty hours worked by employees.

(Note: following this decision, Coles rejected the undertakings proposed by the Full Bench, therefore requiring that the FWC quash the previous decision that approved the Agreement. The SDA has approached Coles to re-start talks for a new Agreement.)

Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo;
The Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo [2016] FWCFB 2887

Right of entry - FWC determines permit holders unable to visit employees before or after work

The FWC has concluded that union permit holders can only exercise their right to hold discussions with employees at premises during a break which "interrupts, suspends, or stops the employee's work for a brief time" – not before or after an employee's shift.

The CFMEU had applied to the FWC to resolve a dispute in relation to some of its permit holders wanting to hold discussions with BHP workers before or after their shifts at the BHP Kwinana site.

Section 490(2) of the *Fair Work Act 2009* (Cth) (FW Act) states that a permit holder may enter premises "only during mealtimes or other breaks" to hold discussions with employees under section 484 of the FW Act.

The CFEMU argued that its permit holders could enter premises to hold discussions with employees before or after their shifts, as these times would fall within the meaning of "other breaks" in section 490 of the FW Act. This argument was made on the basis that the Kwinana site operated 24 hours per day, and therefore "if employees are on site prior to or after work, so long as they are not working, they will be on a break from work during working hours".

BHP disagreed with this view, arguing that an employee's free time before the start or after the end of a shift were 'non-working hours' and should not be considered an 'other break' as per section 490(2) of the FW Act.

BHP also submitted that the FWC did not have jurisdiction to hear the matter as it would "involve an exercise of judicial power and not arbitral power". Commissioner Williams agreed that the application could not be heard by the Commission on jurisdictional grounds, but then went on to provide his determination on the interpretation of "other breaks" for the purposes of section 490(2) of the FW Act.

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Commissioner Williams found that the term did not include periods of time before or after the employee's shift and only referred to breaks during an employee's shift, stating that the CFMEU's interpretation would lead to uncertainty and "absurd outcomes in practice".

Construction, Forestry, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd [2016] FWC 3829

Status quo at the ATO – ATO succeeds in overturning reinstatement order

In March 2016, the ATO was ordered to reinstate Mr Shamir as a result of a finding that Mr Shamir had been unfairly dismissed. In July 2016, a Full Bench of the Fair Work Commission overturned that decision and quashed the Order reinstating Mr Shamir. Mr Shamir's application for unfair dismissal remedy was dismissed by the Full Bench on rehearing.

In 2013 the ATO underwent a restructure that included Mr Shamir's then position being made redundant and Mr Shamir being redeployed into another position. Mr Shamir did not consider that he had the skills or experience to perform this position, which included client contact. Initially Mr Shamir was not required to undertake these client contact duties, however he was subsequently directed to perform client contact duties, which he refused to do. Mr Shamir was dismissed in 2015 for non-performance of duties.

The Full Bench granted permission to appeal, in part, on the basis that the Commissioner at first instance took into account an irrelevant consideration. In considering whether the reason for dismissal was "valid" the Commissioner asked himself whether the reason for dismissal was "just". The Full Bench stated that the often quoted test in *Selvachandran* specifically excluded the word "just" from its consideration of the term "valid"; the correct test being - is the reason "*sound, defensible or well founded*".

Approximately a year after Mr Shamir's redeployment, the CPSU on Mr Shamir's behalf, put the issue of the client contact duties into dispute. Mr Shamir was dismissed within a month of the dispute being initiated. Mr Shamir submitted that the status quo provision of the enterprise agreement meant that the ATO could not insist that he perform the duties that were in dispute. The Full Bench considered the dispute resolution procedure of the applicable enterprise agreement. The Full Bench disagreed with Mr Shamir's submission, finding that the dispute procedure required Mr Shamir to continue to work in accordance with his contact of employment while the dispute proceeded. In the absence of some justification regarding the non-performance of the duties, as well as the evidence of training given to the employee to support him in the role, the Full Bench considered that the status quo did not apply such that Mr Shamir was entitled to refuse to perform the client contact duties.

Mr Shamir was dismissed for non-performance of the client contact duties. From 10 April 2015 to 5 June 2015, Mr Shamir was only present at work for 11 days, during which he failed to undertake the duties he was directed to carry out. Mr Shamir acknowledged that during these 11 days he attended to CSPU-related work and also worked on a Comcare claim and a Fair Work Commission application. At Hearing, Mr Shamir accepted he had not performed the client contact duties in the period but argued that he did not have the skills or appropriate support to complete the duties. The Full Bench found that Mr Shamir was given extensive training (some 68 training courses) and was given training and support so that he could complete his duties. The Full Bench found that there was a valid reason for dismissal and that the dismissal was otherwise fair.

Commonwealth of Australia (Australian Taxation Office) v Mr Ron Shamir [2016] FWCFB 4185

Employer in hot water after procedural failure when dismissing employee for visiting swimsuit site

The FWC has ordered a car dealership to pay approximately $25,000 to a former employee, after finding that whilst the employer had a valid reason to dismiss the financial controller for repeated visits to internet sites in breach of the company's IT policy, their failure to follow procedural fairness was "not merely a technical failure which common sense would suggest would not have changed the outcome".

After the employer's IT staff found that a "lifestyle" type website with women in swimsuits had been accessed on the employee's computer (several months after the employee had received a first and final warning after admitting to accessing pornographic websites) the employee was "ambushed" at a meeting where he was dismissed without being given the opportunity to respond to the report on his internet use.

The employer's Dealer Principal and General Manager gave no notice to the employee before arriving at his office to advise that he had breached the company's IT policy again after a first and final warning, and as a result was being dismissed for serious misconduct. During the meeting the employee was provided no information about what website he had allegedly accessed, or the time and day on which he was meant to have accessed the website.

Commissioner Williams noted that had the employee been provided this information and given a proper opportunity to respond to the allegations, the employee might have been able to confirm or deny whether he was in his office at all at the time the site was accessed, and additionally the employer might have been able to substantiate whether a computer virus that the employee raised as a defence after his dismissal was the culprit for the site visit. The

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Commissioner was satisfied that the dismissal of the employee was unfair and awarded $25,341.13 in compensation as reinstatement was not deemed appropriate.

Gerard Roelofs v Auto Classic (WA) Pty Ltd T/A Westcoast BMW [2016] FWC 4954

Medical researcher awarded compensation for failure to redeploy to lower level position

In January 2016, Dr Petranel Ferrao was dismissed from her position as a Senior Research Officer at the Peter MacCallum Cancer Institute (Institute) as a result of an alleged genuine redundancy. Dr Ferrao was conducting research that was funded by a grant from the National Health and Medical Research Council that was funded for a three year period, ending December 2015.

In early 2014, the Institute advised Dr Ferrao that it would not continue to host her research project beyond the current funding period and encouraged Dr Ferrao to find seek an alternate laboratory if funding was extended, which the Institute would support. Over the next 18 months Dr Ferrao and the Institute engaged in discussions about extending funding and applying for further grants. Ultimately Dr Ferrao was made redundant after the end of the funding period.

Commissioner Roe found that the Institute's decision not to continue with Dr Ferrao's research area was a matter within its prerogative. Dr Ferrao argued that the decision to no longer support her research area was directed at removing her from employment. Dr Ferrao gave evidence that she had independently been able to acquire further funding for her Project, which she submitted meant that any reliance by the Institute on the end of her prior funding arrangements was invalid. The Commissioner did not accept this proposition, finding that Dr Ferrao had no authority to seek further funding on the basis that the Institute would administer that funding, as had been made clear to her on a number of occasions. Commissioner Roe stated:

"*A redundancy will be a sham and not genuine where it is targeted to remove an individual and there is no real change or no real organisational rationale.*"

The Commissioner did not find that the evidence supported a conclusion that the redundancy was a sham and held that the Institute no longer required Dr Ferrao's job to be done by anyone.

The Commissioner, in considering the Institute's consultation obligations in the enterprise agreement, stated that it was relevant to consider two periods of consultation; consultation prior to the definite notification of Dr Ferrao's redundancy, and the period following notification of the redundancy. The Commissioner accepted that the two periods of consultation combined were sufficient to meet the requirements of the consultation clause in the enterprise agreement.

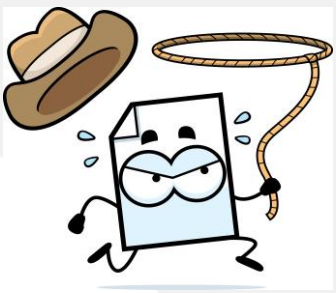
However, the Commissioner found that it would have been reasonable to deploy Dr Ferrao into an alternate position, even if that position was at a lower level than that which Dr Ferrao held prior to her redundancy. The Commissioner found that the Institute had discounted redeployment options that were of a lower level because of its opinion that Dr Ferrao's seniority, narrow research interests and experience meant that redeployment was particularly difficult. The Commissioner said that "*[I]t is generally unreasonable to assume that attitudes expressed by an employee prior to a definite decision to make a position redundant will be the same after the real impact of the redundancy decision hits the employee*". Dr Ferrao applied for two more junior research positions at the Institute and went through a merits based recruitment process. The Commissioner considered it would have been appropriate to redeploy Dr Ferrao to either of these positions, rather than making her apply for and compete for the positions with other applicants. The Commissioner accepted a submission made on behalf of Dr Ferrao which referred to part of the decision in *Ulan Coal Mines v* Honeysett [2010] FWAFB 7578:

"Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job, it will advertise the vacancy and, as such, require the employee to compete with other employees, this might result in a finding that the dismissal is not a case of genuine redundancy".

The Commissioner considered that Dr Ferrao would likely have remained in employment for a further 6 months had redeployment been seriously considered. After deducting Dr Ferrao's redundancy payment – and a further deduction of 10% in respect of Dr Ferrao's misconduct in applying for a further grant without the Institute's authority - the Commissioner awarded Dr Ferrao 5.4 weeks compensation.

Dr Petranel Ferrao v Peter MacCallum Cancer Institute [2016] FWC 4953

Sarah Tilby - Workplace Relations Advisor, AMA Queensland and Nate Burke - Associate, Fair Work Commission



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Notable Quote

The above tongue in cheek Tweet to employers by the Fair Work Ombudsman, Natalie James, follows a series of recent press releases in early August by the FWO about its enquiries and investigations into various employers who allegedly engaged workers on a cash-in-hand or sham contractor basis in an attempt to pay them below minimum wage rates and avoid liability for other entitlements and obligations (such as leave, superannuation and worker's compensation).

According to the FWO, those employers often targeted workers from marginalised backgrounds or groups, such foreign or non-English speaking workers, young and low-income workers, particularly those engaged in highly casualised industries such as cleaning, hospitality, retail, horticulture and viticulture.

The FWO is currently conducting a number of inquiries to identify and address the structural and behavioural drivers of non-compliance in various industry networks and supply chains where these categories of workers are most represented.

In a press release on 4 August, Ms James said "it is important that there be a fair, competitive environment for employers who are doing the right thing by creating a level playing field in relation to business costs". Ms James also Tweeted about the need to build a "culture of compliance" in these sectors.

FWO has been attempting to raise awareness, through its press releases and social media, of the free advice services and resources available to employers to ascertain and understand their industrial obligations, including interpreters and online information in 27 languages.

Employers wishing to access these tools to assist them to comply with workplace laws can seek information at www.fairwork.gov.au or call the Fair Work Infoline on **13 13 94** to obtain free advice and assistance from a team of expert advisers.

Vaishi Raja, Industrial Officer/Lawyer - Independent Education Union (Qld and NT Branch)

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