IRSQ
Industrial Relations Society of Queensland

The IR Advocate

April – June 2017

Your Professional Association

President's Welcome

Greetings!

We are heading into the every industrial relations practitioner's favourite event – the Patron's Lunch! Who am I to tell you what you already know, I need not remind you that this bespoke event has long provided an opportunity for collegial networking across all industries.

One of the successes of the Industrial Relations Society Queensland is that the nonpartisan nature of the membership is reflected in the attendance and interactions at our events; we are able to approach industry leaders to present to you on areas of common interest to all. I think you will find Professor Peter Jordan's presentation at this year's Patron's Lunch on 21 July particularly interesting!

A significant body of work is also underway to deliver our Convention scheduled for the first weekend in October, please keep an eye of for more details coming your way. We are humbled at the support and generosity of the speakers who have agreed to participate. This will be a professional development event not to miss, and yes, Orange Whip will be there!

Our Women in IR event continues to attract broader audience interest, we welcome everyone to this event scheduled for October 27th. The Committee endeavours to meet the interests of those who attend the event, last year's debate was truly remarkable!

There is a lot happening in this space in which we practice, this keeps us on our toes and drives us to events that can deliver information that is topical and relevant. We want to hear from you about interests or issues you would like to learn more about and from leaders in our field – so please send us an email.

I am also excited to report that we have recently launched our new website – check it out here.

Keep warm and take care to take a break.

Jo McConnell

Upcoming events

The IRSQ has an exciting array of events planned for the remainder of the year including networking, educational and social events. Keep an eye on our website for further details.

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Event recap - trivia night

This year's trivia and networking night was a great success.

We had over 40 keen participants making up 6 teams that put up a good fight to be trivia champion.

There was laughing, crying (on the inside) and a lot of shouting out from the teams attempting to challenge the answers of the trivia master.

Lucky we had Tom Schulz as the trivia master who kindly donated his time to keep the rowdy bunch that call themselves IR professionals in line.

The winners of the competition were a team from the Queensland Law Society's Industrial Law Committee.

A big thank you also to the Queensland Council of Unions who donated the room for the night.

Leaving you with one of the questions from the night – which playwright, poet and author said:

"Always forgive your enemies; nothing annoys them so much"

(Read on to find the answer)

Interesting changes under the new Industrial Relations Act

By Ian Humphreys - managing partner of Ashurst's Brisbane office.

On 1 March 2017, the *Industrial Relations Act 2016* (Qld) (**IR Act**) came into force in Queensland.

The new IR Act will have a limited impact on employers who are regulated by the *Fair Work Act 2009* (Cth) (**FW Act**) but there will be some impact, for example workplace discrimination claims will now be dealt with by the QIRC rather than QCAT. The main impact of the IR Act will fall on public sector employers in Queensland.

While there are a range of changes which employers, unions and employees will need to manage, set out below is a discussion of some changes which are of particular interest.

Good Faith Bargaining

The IR Act in part mirrors the FW Act but contains many important differences. One of the more significant relates to good faith bargaining. Under the FW Act bargaining representatives must comply with certain specified good faith bargaining requirements (see s228). The requirement which has been the subject of most litigation is the requirement to "refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining" (see s229(i)(e)).

Unlike the FW Act, the IR Act imposes a general duty to "bargain in good faith". Section 173 says:

(1) The negotiating parties must negotiate in good faith.

(2) Without limiting subsection (1), each party must do the following things—

(a) attend and participate in bargaining meetings;

(b) disclose relevant information, other than confidential or commercially sensitive information, in a timely way;

(c) genuinely consider proposals made by other parties and:

(i) respond in a timely way; and

(ii) give reasons for the party's response;

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(d) not engage in capricious or unfair conduct that undermines freedom of association or the collective bargaining process.

(3) Subject to subsections (1) and (2), the negotiating parties may make an agreement about procedures or principles for the conduct of the bargaining process.
(emphasis added)

Time will tell how the general duty established by s173(1) will be interpreted and applied, but it opens up the possibility for the duty to be construed much more widely then is currently the case under the FW Act. While some overseas bargaining principles, such as "surface bargaining", have been found to breach the FW Act t good faith bargaining requirements, a full scale importation of US jurisprudence about a general duty to bargain in good faith has not occurred to date. Consequently the industrial parties in Australia have generally not engaged in strategic manoeuvring to leverage the good faith bargaining requirements as is common in the US. This may now change for bargaining under the IR Act.

Some other collective bargaining changes

The IR Act introduces a range of other changes to collective bargaining, a number of which are materially different to what is contained in the FW Act.

A few examples are identified below:

- Scope orders are now available. This opens up the possibility of more agreements being made which would cover smaller groups within the public sector, rather than the very large agreements currently in place.
- Arbitration of bargaining disputes is more readily available. For example if a Commission member conciliates a bargaining dispute, the member may refer the matter for arbitration if satisfied an agreement is not reasonably likely to be reached within a reasonable period and certain other time requirements are satisfied. The arbitration is to be conducted by a full bench and a negotiating party may not be represented by a lawyer.

Mutual duty of trust and confidence

In the landmark decision of *Commonwealth Bank of Australia v Barker* [2014] HCA 32, the High Court of Australia ruled that contracts of employment in Australia do not have an implied mutual duty of trust and confidence. The IR Act addresses itself to this duty.

The "main purpose" of the new Queensland Act is:

> … to provide for a framework for co-operative industrial relations that –
>
> (a) is fair and balanced; and
>
> (b) supports the delivery of high quality services, economic prosperity and social justice for Queenslanders.

Section 4 of the IR Act sets out how this main purpose is to be achieved, including by:

> (e) promoting productive and cooperative workplace relations <u>including by recognising mutual obligations of trust and confidence in the employment relationship</u>; and
>
> …

(emphasis added)

This statutory provision does not alter the common law as determined by the High Court in *Barker* but it is likely to influence the way in which the IR Act will be interpreted and applied, for example in unfair dismissal and workplace rights cases. It may also act as a catalyst for an attempt to revisit the decision in *Barker* in respect of common law contracts which are governed by Queensland law.

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Five Minutes with Commissioner Jennifer Hunt

Commissioner Hunt commenced her career as an Industrial Advocate in 1995 with the Australian Business Chamber. She spent 14 years with Manpower during which time she was in-house counsel. After several years with TNT and then Toll, she was appointed to the Fair Work Commission, commencing in February 2016.

Commissioner Hunt moved to Brisbane two years ago and has decided to stay in the Sunshine State, even though she supports the Blues during State of Origin. The Commissioner was a rugby league referee for 16 years and is an avid Cronulla Sharks supporter. She is married with four children. In her spare time she enjoys playing softball, and having completed half marathons is now contemplating a marathon.

How did you decide on your career path?

Studying IR 101 at Wollongong University, I immediately knew I wanted an IR career. Work is such an important part of everybody's life, and across a lifetime, it can come with conflicts. The contentious nature of alternative perspectives is part of human nature, and is inevitable in the workplace.

Who are the people who have influenced your career decisions?

I was thrilled to befriend **Geoff Stevenson.** He spoke at university IR club function, and later invited me to apply for his role as he was moving on. I was successful, becoming a 21 year old Industrial Advocate running unfair dismissal matters and resolving disputes.

Tony Wilks, former AIRC Commissioner, followed my career after I first appeared before him, and later invited me to join Toll to work with him. He has been a wonderful mentor.

What do you consider to be the most important issues in industrial relations today?

Ensuring wages in Australia remain manageable and fair in the global market place. I am concerned about the rising trend in unpaid internships when not linked to educational institutions/studies. Too often young people are being told they need to work for free in order to gain experience, when it may be appropriate for a person to be employed in that role.

What do you most enjoy about your current role?

Having two sets of competing views and working with parties to find a resolution, and if necessary, determining the matter. I enjoy working with advocates and assisting them to improve their advocacy skills.

When you started in your role, what did you set out to achieve and why?

I dreamed of becoming a member of the Commission because of the fine and long history of the institution.

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Wait, what, the alleged bully has rights too?

By Amy Richardson - Associate at HR Law

It is common practice for employers to offer support and assistance to employees who complain that they are being subjected to bullying conduct, but what about the alleged bully? Unfortunately, sometimes employers concentrate so much of their attention on supporting the complainant that the rights of the alleged bully are overlooked.

Stop and think about this scenario that too often occurs; one of your colleagues makes a bullying complaint about you. Your employer immediately suspends you pending the outcome of an investigation, but gives you no indication about who made the complaint or what has even been alleged. That's the last you hear from your employer for three weeks until your interview, at which time you are presented with 15 un-particularised allegations and told before you have even had an opportunity to respond that it does not look good for you. Never mind that your employer did not keep you updated, your colleagues know all about the complaint sending you texts with 101 questions and statements about what you apparently did, so much for confidentiality.

How is your health, wellbeing and reputation after this investigation process?

There have been a number of Court and Commission decisions in the past year (not necessarily about bullying, but relevant nonetheless) which highlight some key rights a respondent to a workplace investigation has, a few of which are briefly discussed below.

So, the alleged bully has rights too, but what are they?

1. The right to an unbiased investigation free of a pre-determined outcome.

In *Joshua Jimenez v Accent Group T/A Platypus Shoes (Australia) Pty Ltd* [2016] FWC 5141 (an unfair dismissal application), the Fair Work Commission ("Commission") found that the termination of the employee's employment was unfair in part because the employer's process leading to the termination was considered flawed. The Commission held that the employer describing the employee's conduct of taking $220.00 from a customer and not recording the transaction until several days later to be "*theft*" indicated a pre-determined outcome of the allegation.

This case highlights the importance of employers and investigators formulating questions and allegations around the actual events (i.e. *did you receive $220.00 from X customer? What was the $220.00 in payment of? When did you record the transaction? Why was there a delay in recording the transaction?* etc.), and not around what the events would possibly amount to, if substantiated (i.e. you taking $220.00 is theft, isn't it?).

In addition to not pre-determining the outcome, it is important that employers select an unbiased person to investigate. If a party to an investigation believes that the investigator is biased, the party is unlikely to accept the outcome of the investigation. This is often one reason why employers will elect to engage an external investigator who is unknown to the complainant and respondent.

In *Xiaoli Cao v Metro Assist Inc; Rita Wilkinson* [2016] FWC 5592 (an application for an order to stop bullying), the Commission recommended that "*if an employee vigorously asserts that an internal investigation into allegations will lack transparency or independence, it may be prudent for the employer to engage an independent third party to conduct the investigation*".

2. An opportunity to present their version of events: the fair hearing rule.

In *Roelofs v Auto Classic (WA) Pty Ltd* [2016] 4954 (an unfair dismissal application), the Commission found that the employee was unfairly dismissed because he was denied the opportunity to present his case. The Commission held that the employee who was

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dismissed for accessing questionable but not pornographic sites on his work computer had not been provided with sufficient notice of the meeting leading to his termination (including an understanding of what that meeting was even about), was not aware of the allegations prior to the meeting, was not provided with sufficient particulars of the allegations at the meeting (including details of the sites he had allegedly accessed) and was not even asked whether he had any response to the allegation.

Whilst generally speaking, an alleged bully is not entitled to a copy of the complaint and a right to view the complainant's transcript of interview, the individual is entitled to receive sufficient particulars to enable them to understand the complaint made against them and an appropriate opportunity to respond (whether this be orally, in writing or best practice, both). This general notion may be displaced if a respondent is covered by legislation, see for example *Vega Vega v Hoyle & Ors* [2015] QSC 111 in which Dr Vega Vega was found to have been denied natural justice because he had not been provided with information and documentation relied upon by the investigators.

3. Support throughout the investigation process.

It is common practice for an alleged bully to be provided with a right to bring a support person to their interview and perhaps are even offered access to an employee assistance programme, but is this enough? Well, the Queensland Court of Appeal in *Hayes and Ors v State of Queensland* [2016] QCA 191 ("**Hayes and Ors Case**") held that this was not sufficient.

Briefly, the Hayes and Ors Case involved four managers of Disabilities Services Queensland bringing proceedings against their employer for damages in negligence and breach of contract. The proceedings arose after approximately 200 complaints were made against the managers by other employees, which were ultimately found to be unsubstantiated. Each manager claimed the employer had failed to sufficiently support them at the time the complaints were made and during the resulting investigation and as a result of the breaches, each manager had suffered a psychiatric injury.

At the initial hearing, the Judge found that the employer did not owe the managers a duty to support them, but this was overturned on appeal. The Court of Appeal held that employers owe a duty to take reasonable care to eliminate risks of injury, including psychiatric injury.

Some of Disabilities Services Queensland's failings according to the Court of Appeal included sending unsympathetic and isolating emails, removing the managers from their substantive positions but providing no meaningful work to the managers in the alternate positions, failing to appropriately brief the managers about the complaints made against them and the investigation process and not providing an appropriate support person to the managers within the organisation that they could contact to discuss the investigation process. Whilst a point of contact was assigned to the managers, this individual was not independent as she was also assigned to monitor and audit the managers' behaviour, met with the Union involved to ascertain the scope of the complaints and at one point said words to the effect that the complaints would not have been made if there was not something to them.

Disabilities Services Queensland was found to have breached its duty of care in three of the four managers' cases by failing to provide adequate support, however only one of the three Appeal Judges found that the managers had established the necessary causal link between the breach and their psychiatric injury. Interestingly, had a causal link existed, it was held that damages would have ranged from between $300,000.00 to more than $700,000.00 per manager!

What this case highlights is that an employer owes a duty to support an alleged bully throughout the investigation process and while allowing the individual to bring their own support person to investigation interviews and access an employee assistance programme are best practice, this will not be sufficient. Employers should also consider:

(a) appointing an independent point of contact within the organisation that the alleged bully can liaise with about the investigation process;

(b) whether suspending an alleged bully is appropriate or whether other measures can be implemented such as directing that the individual has no contact with the complainant. Remember that

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suspension can have serious ramifications for an individual's reputation and wellbeing and should only be exercised with due cause;

(c) offering financial assistance to an alleged bully to seek their own legal advice in situations where allegations could be career ending;

(d) whether additional emotional support is necessary beyond the employee assistance programme;

(e) providing adequate updates to the alleged bully throughout the process; and

(f) ensuring that all communications with the alleged bully are on the basis that the individual is innocent until proven otherwise.

In addition to the above, an alleged bully should be entitled to understand the investigation process that will be undertaken and enjoy confidentiality of that process. Employers need to check what is contained in their policies and procedures… particularly as they might form a term and condition of the alleged bully's employment.

This article focuses on some of the rights of an alleged bullying throughout the investigation process before the outcome is reached. An alleged bully will have further rights that an employer needs to consider in the event that it is found that the individual did in fact engage in bullying conduct and disciplinary action is warranted. Alternatively, rights may exist if the outcome of the investigation is that the complaint was frivolous, vexatious or made without reasonable cause.

What might happen if an employer gets it wrong?

If an employer does not implement adequate measures to protect an alleged bully's rights, some of the risks to the employer include:

1. a workers' compensation claim by the alleged bully; remember, an employer can only rely on management action as a defence, if such action was appropriate and implemented in a reasonable manner;
2. lost time injury; even if the alleged bully does not make a workers' compensation claim, they may need time off to recover;
3. a disrupted workplace; employers need to conduct investigations assuming that both the complainant and alleged bully will remain in the workplace at the conclusion of the investigation - think about the working relationships;
4. the employer could face various legal claims by the alleged bully, for instance:
   (a) a breach of contract claim, particularly if policies and procedures form part of the employment terms and conditions and are not followed;
   (b) a negligence claim where the employer is alleged to have failed in their duty of care to provide adequate support to the alleged bully;
   (c) an unfair dismissal claim, if the alleged bully was terminated following a flawed investigation process; and/or
   (d) a claim under work health and safety legislation, where the alleged bully could claim that the employer failed to ensure their health and safety in the workplace.

Would you like to advertise in this publication?

The Society is seeking expressions of interest for advertising in future editions of the IR Advocate. If you are a service provider to the IR sector and would like to advertise in this publication please contact the Editor – Kristin Ramsey at kristin.ramsey@hyneslegal.com.au

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Connecting Griffith Students with IR/ER Professionals

Sue Ressia is a member of IRSQ and a lecturer who teaches within the IR/ER major at Griffith University, Nathan Campus. She is also the Student Society Liaison representative for Griffith's undergraduate student society - the Griffith Employment Relations and Human Resource Management Society (**GERHRMS**).

Sue is interested in developing networks with members of the IRSQ who might be associated with employer associations, trade unions and practitioners, as well as businesses concerned with managing employment relations.

She is passionate about bringing real world and practical experiences of IR/ER into the classroom, and to provide opportunities for IRSQ members to share their experiences and connect with students.

Her aim is to support GERHRMS in developing their profile and connecting members of the society with experienced industry professionals.

If you would like to be involved, please contact Sue at s.ressia@griffith.edu.au.

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Worksite Banishment

Banishment from a worksite does not necessarily give an employer grounds for Dismissal

Where there is an allegation of inappropriate conduct in the workplace, it can be difficult for a labour hire provider to fairly deal with the employee subject to the complaint because they have little control over the response of the host employer to the allegations. Indeed, it is not unusual for a host employer to exclude a person from the workplace once an allegation has been made.

If this occurs, it leaves a labour hire provider in a difficult situation, particularly if they do not have any other clients where they could place the employee. It usually means that the only sensible business decision remaining is for the labour hire provider to terminate the employee's employment on the basis that the host employer has excluded them from the work site. Is this fair???

In the recent case of *Tasmanian Ports Corporation Pty Ltd t/a Tasports v. Mr Warwick Gee* [2017] FWCFB 1714 9 (the **Tasports case**), the Full Bench of the Fair Work Commission found that a labour hire provider could not dismiss the worker solely on the basis of the host employer's decision to remove the worker from their workplace. This Full Bench decision endorses and confirms the approach of Asbury DP in the decision of *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925 (**Adecco**), who found that:

"the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal. Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly. If the Commission considers that a dismissal is unfair in all of the circumstances, it can be no defence that the employer was complying with the direction of another entity in effecting the dismissal. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal."

In the Tasports case, the employee, Mr Gee was employed by Tasmanian Ports Corporation Pty Ltd (**Tasports**) who then on-hired his services to a host employer in the mining sector, Grange Resources Ltd (**Grange**) at Port Latta. In or around August 2015, an issue arose in relation to Mr Gee's conduct which caused Grange to commence an investigation into the incident. Surprisingly, Mr Gee was not notified about the commencement or existence of the investigation, much less given the opportunity to respond. However, during the course of the investigation, other issues came to light in relation to his performance and conduct.

On or about 17 August 2015, Grange sent an email to Tasports advising that it was revoking Mr Gee's access to all Grange sites effective immediately. The email outlined why Grange was taking this action, citing the incident on 13 August 2015 and the other conduct issues discovered during the course of the investigation. Tasports sent an email in reply apologising for any inconvenience or issues caused by Mr Gee's conduct and stated that it fully supported the decision of Grange.

Following this email exchange, Tasports notified Mr Gee that his access to the Port Latta site had been revoked by Grange Resources. Tasports also advised Mr Gee of the reasons why he had been excluded from the site. Mr Gee responded to these allegations, however, it is unclear whether his responses were communicated back to Grange. Further, while Tasports asked Grange for further details in relation to the matters discovered during the investigation, the Full Bench found that there was no evidence that any attempt was made by Tasports to seek Mr Gee's response to these matters once it received a response from Grange on 28 August 2015.

Mr Gee was terminated by Tasports that same day on the basis that as he had been engaged exclusively to work on Grange sites and given his access was now revoked, he was "*unable to perform the inherent requirements*" of his position. The letter also stated that there were no alternative available positions/duties that he could perform at Tasports.

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The member hearing this case at first instance, Deputy President Wells, found that Mr Gee had been unfairly dismissed as there was no valid reason for his dismissal relating to his capacity or conduct, given:

- the lack of procedural fairness afforded to Mr Gee in the Grange investigation;
- Tasports' failure to establish whether there was a valid reason for his removal from the site before taking action to end his employment; and
- Tasports' inadequate process in confirming the existence (or otherwise) of an alternate position in which Mr Gee could be redeployed.

These findings were supported by the Full Bench on hearing the appeal. In particular, the Full Bench clarified that not only was the Deputy President's decision consistent with that of Adecco, but that another decision on which Tasports relied in their appeal - *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 (**Pettifer**) - was not inconsistent with Adecco, pointing out that it was merely a difference in circumstances in Pettifer that led the Full Bench to reach a different conclusion to Adecco.

The Full Bench noted that the key differences in Pettifer (as distinct from Adecco and the Tasports case) were that:

- the host employer in Pettifer had a contractual right to remove a labour hire employee from the site - even in circumstances where the labour hire provider, MODEC, did not agree with the decision. There was no evidence of such a contractual right in either the Adecco or Tasports cases;
- in Pettifer, the labour hire provider formed an independent view about whether the allegations against its labour hire employee were substantiated. In both Adecco and the Tasports case, the labour hire provider simply acquiesced to the host employer's view that the worker had engaged in misconduct; and
- in Pettifer, the labour hire provider undertook exhaustive inquiries to redeploy the employee before deciding to terminate on the basis of an inability to find suitable alternative employment for him. Again, this could not be said of either Adecco or Tasports in their respective cases.

The Tasports decision should serve as a reminder to labour hire providers that they simply cannot use a labour hire contract as a shield against employee protections under the *Fair Work Act 2009* (Cth). Notwithstanding the fact that they may not have much daily operational control over their employees, this does not devolve them of basic employer obligations - one of which is to ensure that they are procedurally fair in the treatment of their employees.

This may involve making its own reasonable enquiries and satisfying itself as to whether the host employer's reasons for no longer requiring the employee's service are valid and well-founded, and asking for details about the process the host employer has followed in reaching its decision. This is particularly important if the commercial contract between the host employer and labour hire provider does not provide an express contractual right to remove a labour hire employee from the host employer's site(s). Labour hire providers should also make sure that they are diligent in considering potential redeployment opportunities for employees who can no longer work at certain client sites - including making the necessary enquiries about their skills, knowledge and experience and considering opportunities for simple training/retraining to facilitate redeployment opportunities.

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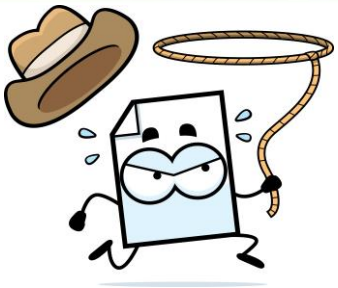

IR World Roundup

'Artificial' process outlined in *Uniline* not so artificial for Linen provider

The Fair Work Commission has considered an application for approval of an enterprise agreement and the principles derived from the Full Bench Decision in *Uniline* in correcting deficient pre-approval processes in enterprise bargaining.

In *Light Industries Laundry Pty Ltd T/A Sunfresh Linen* [2017] FWC 1703, Commissioner Spencer dismissed an application for approval of an enterprise agreement on the basis that a valid Notice of Employee Representational Rights (**NERR**) had not been given in conformity with the Act. Specifically, Commissioner Spencer was not satisfied that a NERR that complied with the Act was given within 14 days of bargaining commencing (the notification time).

On 22 October 2014, a majority support determination came into operation such that Sunfresh and its employees covered by the determination were required to bargain. The commencement of the determination triggered a notification time under the Act and Sunfresh was required to take all reasonable steps to give the NERR to employees within 14 days of that date. Ultimately it was conceded that the NERR given was not valid as the prescribed NERR had impermissibly been varied.

Sunfresh submitted that in an attempt to correct the issue with the 2014 NERR it sought to 'reset' bargaining and issue a valid NERR. Sunfresh maintained that it did this on 10 June 2016 by corresponding with the Textile, Clothing and Footwear Union of Australia (**TCFUA**) (a bargaining representative of employees) and advising that "*[A]fter almost two years, and the parties remaining far apart on many matters, Sunfresh Linen…has decided to 'reset' these enterprise agreement negotiations*".

As a result of this correspondence, Sunfresh submitted that a notification time under the Act was triggered on 10 June, such that when a further NERR was issued to employees the Commission could be satisfied that all reasonable steps had been taken to give notice within the 14 day time period. Sunfresh submitted that this was consistent with the 'artificial' process referred to by the *Uniline* decision on how to correct pre-approval steps taken on the basis of a defective NERR where the Full Bench said that "*…an employer…would cease bargaining with its employees and would agree to bargain or initiate bargaining afresh thus triggering a notification time and a new period within which a valid Notice may be issued*".

Commissioner Spencer was not satisfied that bargaining had in fact been 'reset' with the consequence that a second notification time had not been triggered.

In reaching her conclusion, Commissioner Spencer held that the only evidence before her was of a letter sent to the TCFUA that unilaterally sought to 'reset' bargaining. Commission Spencer stated that it was a 'reasonable expectation' that an employer would communicate with its employees about the matter. It was also relevant to Commissioner Spencer's conclusion that it was not clear before her that the TCFUA was the bargaining representative for all employees and noted that there was a dispute about whether the TWU was also a bargaining representative.

While the Commissioner's decision principally focussed on the factual question of whether a new notification time was triggered under the Act, an issue arose as to whether a second notification time could be triggered in circumstances where a majority support determination remained in operation.

In *Uniline* the Full Bench stated that the Act did not indicate that bargaining could not be recommenced and a notification time triggered "*…except perhaps in circumstances where a majority support determination has been made*". While refraining from finally determining the issue, Commissioner Spencer said that given the operation of the determination, it was not clear whether Sunfresh could agree to or initiate bargaining over the top of the determination. The Commissioner contemplated it may have been necessary to apply to the Commission to revoke

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the determination or, potentially, seek agreement from bargaining representatives to cease the bargaining to which the determination related and agree to, or initiate, a further bargaining round. No doubt this issue will arise again for consideration in the future.

Side note: The Fair Work Commission has refrained from considering some agreement approvals with similar issues whilst it waits the outcome of proposed amendments to the Act that may give the Commission greater discretion in waiving irregularities with the NERR.

***Application by Light Industries Laundry Pty Ltd T/A Sunfresh Linen* [2017] FWC 1703.**

FWO succeeds in prosecuting third party accounting/payroll provider

In 2014, the Fair Work Ombudsman (**FWO**) commenced an investigation into Blue Impression Pty Ltd following a complaint it had received from an employee. The employee was employed in a Japanese fast food restaurant operated by Blue Impression in Melbourne.

The FWO identified contraventions of the Act by Blue Impression relating to failures to comply with relevant provisions under the Award. The contraventions included failure to pay the minimum hourly rate of pay, failure to pay weekend and public holiday penalty rates and failure to provide rest and meal breaks. The contraventions were admitted by Blue Impression at a later point.

The FWO attempted to secure voluntary compliance by issuing contravention notices to Blue Impression. Blue Impression subsequently obtained advice from its accountant, Ezy Accounting 123 Pty Ltd in respect of the contraventions; both corporate entities and an individual Respondent were ultimately pursued by the FWO for direct contraventions of the Act and Award, and involvement in those contraventions.

In respect of Ezy, it defended the claim by stating that it merely provided book keeping services to Blue Impression, including processing payroll information. However, central to the allegations of involvement in the contraventions, the Court was satisfied that Ezy knew the name of each employee, the number of hours worked, the total amount to be paid to each employee and the hourly rates for each employee.

The Court summarised part of the FWO's case against Ezy as being that Ezy "*must have known that [Blue Impression] was underpaying its employees because Ezy knew the rates in its payroll system were not sufficient to allow [Blue Impression] to comply with the obligations*" in the Award.

The Court was satisfied on the evidence that the Director of Ezy (who gave evidence in the matter) knew these matters and that his knowledge was attributable to Ezy.

Given the Court's findings about the knowledge of Ezy, the Court said it was "*risible to suggest*" that even the most basic query by Ezy would have revealed the contraventions. The Court was satisfied that Ezy was "wilfully blind" to the contraventions and ultimately "involved" in the contraventions of Blue Impression.

The Court ultimately made declarations that Ezy was "involved" in 7 contraventions. The matter has been adjourned for a penalty hearing.

***Fair Work Ombudsman v Blue Impression Pty ltd & Ors* [2017] FCCA 810.**

FWC considers fairness of refusing a flexible work request during unfair dismissal application

In this decision, the FWC reviewed the dismissal of Mr Tawasoly, a storeperson who had worked for Alpha Flight Services Pty Ltd (**AFS**) from 2012 until his full-time employment was terminated in August 2016.

Prior to his dismissal, the Applicant formally made a request to work part time under the flexible working provisions in the Act, based on his caring responsibilities for his school-aged children. AFS denied the request referring to operational and staffing requirements.

Evidence was put to the Commission that the AFS managers attempted to engage with the Applicant in a meeting to discuss alternatives, but that the Applicant did not engage with them, saying '*that's okay if you can't, just terminate me*'. Commissioner Hampton noted that the Applicant had essentially had the options of:

a) continuing to work his contracted 38 hours a week;

b) moving to a casual position (so a change from his permanent status);

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c) resignation; or

d) dismissal.

The Applicant was not happy with working his current hours and did not accept a casual position, and so was dismissed in August 2016 for refusing to work his contracted hours.

The Transport Workers Union (**TWU**) represented the Applicant, and argued that whilst AFS may have had a valid reason for dismissal (failure to comply with his contracted hours), the dismissal was nonetheless unfair on several grounds. This included that his dismissal '*was a disproportionate response to Mr Tawasoly's request and is representative of AFS not fulfilling its positive obligation to take all reasonable and proportionate measures necessary to accommodate flexible working arrangements in relation to an employee's responsibilities as a carer*'.

The representative for AFS contended that the dismissal was fair on several grounds, including that AFS validly denied the flexible working request on reasonable business grounds – they had particular operational and staffing requirements given they operated on a 24/7 basis.

Additionally, it was argued that the Applicant's unfair dismissal case was essentially a 'back door' way of trying to have the Commission determine the flexible working request issue where they should not be able to do so. (Disputes about these requests are something the Act does not allow the Commission to deal with usually - there are only very small circumstances where it is permitted, as per section 739 of the Act.)

Commissioner Hampton found that AFS had a valid reason for dismissing the Applicant, given his failure to follow a lawful and reasonable direction to work his contracted hours.

What was interesting in this case was the discussion that Commissioner Hampton had when looking at section 387(h) of the Act. When the Commission considers whether a dismissal was harsh, unjust or unreasonable, they must take into account 'any other matters that the FWC considers relevant' as per section 387(h).

Commissioner Hampton accepted, as per the submissions of AFS, that the Act did not empower him to expressly deal with a dispute between the parties as to the refusal to grant a flexible working request.

However, he could not accept that the refusal of the flexible working request was irrelevant for the purpose of assessing if the dismissal was unfair – particularly since the refusal of the request created the circumstances leading to the Applicant's dismissal.

Ultimately, Commissioner Hampton concluded that the refusal of the request by AFS was reasonable, and whilst the Applicant's dismissal was 'regrettable', it was not unfair.

***Tawasoly v Alpha Flight Services Pty Ltd* [2017] FWC 813**

FWC reminds employers to treat staff as humans, not machines in unfair dismissal case of mentally ill employee

A recent unfair dismissal decision has included some interesting comments from Commissioner Cambridge in relation to a mentally ill employee who was dismissed due to a perceived refusal to carry out their role.

Mr John Finnegan was dismissed from his position as a Customer Service Supervisor with Komatsu Forklift Australia in November 2016. Prior to his dismissal he had been placed on a performance improvement plan and was having difficulties in his relationship with his new manager. It had also become 'clear to the employer that the applicant was experiencing some mental health problems'.

In March 2016, the applicant attended a meeting with the employer in which he was directed to take personal leave, due to 'concerns regarding behaviour and work performance'. The applicant was also directed to provide evidence of fitness for duty, and in particular psychological testing was requested to be completed.

The applicant complied with this request and the independent medical assessment recommended that the applicant be given alternative work arrangements with a different manager to the one that the applicant was having issues with. The employer was able to offer these different work arrangements with an alternative manager for a period of time under a return to work plan. However, the applicant continued to express concerns about returning to work with his original manager, and as a result the employer ended the return to work plan and directed the applicant to cease work.

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In May 2016, the applicant attended a meeting with the employer, where he was offered a deed of release to end the employment relationship. The applicant did not agree to this deed of release, and instead enquired if he could enter into some sort of mediation process with his usual manager.

The employer initially expressed interest in this mediation, but instead directed the applicant to return to work and report to a different manager, in a letter dated 17 May.

The applicant did not return to work and instead provided a medical certificate stating that he was unfit for work.

In June 2016, the employer contacted the applicant asking for information on the prognosis of his condition and whether he might be able to attend work in the foreseeable future. The applicant's doctor provided information indicating that the applicant was still unfit for work.

In July 2016, the applicant's paid personal leave entitlement was exhausted.

After an absence of more than three months of unpaid leave in October 2016, the employer wrote to the applicant advising him that they wished to make an assessment as to whether he was medically fit to carry out the requirements of his role, and that this may result in the applicant's position being terminated. The letter explained that the applicant would be required to provide information on his capacity to return to work.

The applicant's lawyers contact the employer asking for an extension, which was granted. A second request for an extension of time to provide medical was denied though and in November 2016 the applicant was emailed a termination letter. This letter said that the employer '*formed the view the applicant had, for an extended period, refused to work and perform a full range of duties, and therefore it was left with no option other than to terminate the employment*'.

The applicant argued that his dismissal was unfair, submitting that '*he believed that Komatsu had been deceptive, deceitful and bullying in the manner in which they handled his circumstances from the outset*'. He had explained in his submissions that he believed the employer failed to provide a sufficient reason for their direction that he was to take leave in March 2016, their return to work plan was not developed in consultation with him, they cancelled the proposed mediation process between the applicant and his original manager, and the employer made no attempts to contact the applicant's psychiatrist.

The employer's case was that, considering the applicant's failure to present any evidence that he was capable of carrying out his role, he was validly terminated given that the applicant failed to return to work after the employer '*made reasonable attempts to have the applicant returned to work including reconfiguration of relevant management structures*'.

Commissioner Cambridge concluded that the employer did not specifically demonstrate a valid reason for dismissal, explaining that the applicant's absence from work did not amount to a *refusal* to work – the provision of medical evidence instead amounted 'to confirmed incapacity to work'. He noted that the actual reason for the dismissal may be seen as on the basis of frustration of employment caused by a long term absence due to the applicant' inability to complete the inherent requirements of the role. However, Commissioner Cambridge noted the difficulty in establishing the valid reason in this case specifically, given a lack of evidence from the decision maker who terminated the applicant's employment.

When looking at the procedural elements of section 387 of the Act, the Commissioner was particularly scathing about the fact that the employee's position was terminated by email after approximately eight years of service, whilst they were dealing with mental health problems. He described sending the termination letter by email as '*callous, almost beyond belief*'.

With regards to any opportunities provided to the employee to respond to the reasons for the dismissal, Commissioner Cambridge thought that it was strange for the employer to reject the applicant's request for a second extension to provide medical evidence as to his fitness for work, and he also thought that it would have been appropriate to offer a meeting with the employee and his representatives (this was not offered).

Interestingly, when examining section 387(g) of the Act, the Commissioner made some comments about the work of HR specialists generally in paragraph 59 of his decision:

> *"As a personal, general observation, I believe that HR specialists may benefit from a re-naming of their vocation. HR should stand for Human Relations rather than Human Resources. Employees are not like other resources that an employer utilises in the operation of its business. Employees are human beings, they can*

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be easily damaged, and when faulty they should be handled with more care than machines".

Commissioner Cambridge concluded that the employer did not have a valid reason to dismiss the applicant and that 'a denial of natural justice' occurred in relation to the dismissal process that occurred. The applicant's dismissal was deemed to be harsh, unjust and unreasonable.

Interestingly, when looking at the issue of compensation, the Commissioner only ordered that the employer pay to the applicant $1,250, which was the amount the employee would have received if he was properly paid out his notice of termination (the employer failed to provide the one week of additional notice of termination to the applicant based on his age, as required by the National Employment Standards). It was taken into account that the applicant's prospects of continued of employment with the employer were limited, given that his employment 'could be described as having entered the frustration zone'.

John Finnegan v Komatsu Forklift Australia Pty Ltd [2017] FWC 2433

Sarah Tilby – Employment Relations Advisor, Queensland Hotels Association & Nate Burke – Conciliator, Fair Work Commission

TRIVIA ANSWER

Oscar Wilde

Did you get it right?

New Members

We welcome the following new members: Chris Deftereos – QLS Nurses & Midwives Union, Brad Hayes – IEUA QNT,

Giri Sivaraman – Maurice Blackburn Lawyers, Lisa Svenson – APA Group, Madonna Galaeno – Peter Bosel Lawyers, Mandy Cann – RACQ, Christine Smith – O'Reilly Workplace Law, Natasha Shami – Community Management Solutions, Shelley Brace – Hastings Deering, Josephine Leveritt – Wide Bay Hospital & Health Service, Cara Spence – Brisbane City Council, Peter Carlton – Carlton Consulting.

The Society also thanks retiring member Wally Lee for his commitment to the Society over a number of years. All the best Wally and please keep in touch!

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.

Social Media

The Society is on Social Media! You can like, post and follow us on LinkedIn and Facebook.

21 July - Patron's Lunch

6 to 8 October – IRSQ Convention

27 October – Women in IR

Keep an eye out for further details via email and on our website

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Notable Quotes

"You need a licence to operate a real estate agency or to be a motor car dealer, so why shouldn't you need a licence to run a labour hire firm? …

The only way to put an end to this kind of appalling exploitation is through the introduction of a proper labour hire regulation scheme";

said QLD Premier Annastacia Palaszczuk announcing the proposed introduction of a mandatory licensing scheme for labour hire firms at a Labour Day rally in Brisbane on 1 May 2017.

Under such a scheme all labour hire providers operating in Queensland would need to:

- pass a fit-and-proper person test;
- comply with strict workplace laws, including workers' compensation, wages and superannuation;
- pay a license fee;
- report regularly on their operations; and
- divulge the number of employees they have engaged, along with the number of employees engaged through work visa arrangements.

"JUSTICE ROSS: How did you go?

MR IZZO: Fixed it.

MR BULL: Seven weeks. You don't have to do anything. The employers have agreed to pay everyone instantaneously as soon as the employment relationship ends.

MR FERGUSON: To their phone. To their phone.

MR BULL: To their WeChat account."

Transcript Of proceedings - Four yearly review of modern awards (AM2016/8) - 4 May 2017

"Whether they are Uber drivers or Deliveroo riders or freelancers doing digital work, you are finding that they are looking for ways to connect with their fellow workers and put forth a united front to their employers to demand better treatment".

Dr Jim Stanford, Director, Centre for Future Work speaking about the phenomenon of "gig economy" workers.

"The big price rises in the skilled visa charges paid by employers will have largely negative impacts on businesses…

For some employers who may sponsor a few skilled visa holders this will add significantly to the thousands of dollars in migration and recruitment costs already involved in bringing workers from overseas…

Other employers, in the construction and labour hire industries, for example, may require hundreds of workers at sites where it is near impossible to attract appropriately skilled staff. For these companies the costs will be great and it will add pressure on prices and business margins."

Innes Willox, Chief Executive, Australian Industry Group commenting on the Federal Governments proposed changes to 457 Visas.

"It seems to be that a business philosophy … is being brought to it that says the players need to be essentially treated like employees and the cricket board will make the decisions about the allocation of the money. 'We don't need any advice from the players, thanks'. That's not going to work in a major Australian sport."

Former ACTU Secretary Greg Combet on the Cricket Australia pay dispute.

Vaishi Raja, Industrial Officer/Lawyer - Independent Education Union (Qld and NT Branch) and Rohan Hilton, Industrial Officer – National Tertiary Education Union (QLD Division)

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Disclaimer and feedback
The views expressed in this publication do not necessarily reflect the individual views of the members of the IRSQ Management Committee and do not represent the collective stance of the IRSQ Society as a whole, which aims to be impartial. Feedback, suggestions and improvements, including material for upcoming editions can be emailed to the Editor, Kristin Ramsey at kristin.ramsey@hyneslegal.com.au.

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