Union news

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Maurice Blackburn Lawyers Since 1919

This edition:

Injured delegates to access compensation

Workers injured while undertaking union delegate duties can get workers' compensation, according to Queensland's workers compensation regulatory body.

Q-Comp overturned a decision of the insurer, WorkCover, and decided that performing duties as an AMWU delegate was in the course of the member's employment.

It also decided that acting as a union delegate is considered to be on a 'level playing field' with management and therefore a claim for compensation, arising from an injury suffered in the course of delegates' duties, cannot be rejected as a result of the 'reasonable management action' exclusion.

The insurer, WorkCover, had initially rejected the power station worker's claim. The injury he'd suffered was a psychological injury, arising from his dealings with management in representing a member through a competency progression process.

Maurice Blackburn Principal Gino Andrieri said WorkCover rejected the delegate's claim on the grounds that his condition developed as a result of his activities as a union delegate, and not as a result of his role as a utility worker.

"In other words, it was asserted that any injuries sustained by a worker in the role of a union delegate could not be compensable," Mr Andrieri said.

"We successfully appealed to Q-Comp for a review."

Mr Andrieri said that Q-Comp's decision had far-reaching potential for union delegates in Queensland.

"We are proud to have been involved in this case. It supports the efforts of, and offers protection to, union delegates who, voluntarily, give up their time to protect the rights of others."

Bad language a 'serious contravention' of *Workplace Relations Act*

The Full Court of the Federal Court recently handed down its decision in *Gregor v Setka [2010]* FMCA 690, an appeal against the decision of Federal Magistrate Burkhardt.

The case involved an ABCC prosecution of Mr Setka, a CFMEU official, for alleged contraventions of section 767 of the *Workplace Relations Act 1996 (Cth)*. Section 767 provided that "a permit holder exercising, or seeking to exercise, right under section 760…must not intentionally hinder or obstruct any person, or otherwise act in an improper manner". The contravention was said to be that, by using profane language and threatening a company employee, Mr Setka had acted in an improper manner.

At first instance, Mr Setka argued, among other things, that the word 'intentionally' in section 767 qualifies both 'hinder or obstruct' and 'improper manner', such that proving intention to so act was a necessary element of the case. Mr Setka also argued that 'improper manner' is qualified by the words 'hinder or obstruct'.

The Federal Magistrate held that Mr Setka contravened section 767 by using by using profanities and by threatening managers. Under cross-examination, company representatives conceded that Mr Setka made the remarks he did in light of serious safety issues on the site, and against a background of a number of issues on site that day that posed a risk to workers. Despite the circumstances, Mr Sekta was convicted and fined $6,000 (from a maximum penalty of $6,600).

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The Federal Magistrate also held that the words 'otherwise act in an improper manner' stand alone, and are not to be read as being limited by the words 'hinder or obstruct'. That is, the otherwise improper manner does not have to involve the hindering or obstructing of a person. The Federal Magistrate went on to find that Setka's conduct was intentional.

On appeal, the Full Court of the Federal Court reduced Mr Setka's penalty to $3,000. In doing so, the Full Court said:

"Mr Setka's conduct undoubtedly constituted a serious contravention of the Act. It was not, however, conduct of a kind which would bring it into the borderline sentencing territory reserved for the most serious case."

The Full Court confirmed the Federal Magistrate's decision that the words 'otherwise act in an improper manner' are not qualified by the words 'hinder or obstruct', such that the improper manner need have no connection to hindering or obstructing a person.

"The injury he'd suffered was a psychological injury, arising from his dealings with management."

The Full Court left open the question of whether the word 'intention' in section 767 qualifies both 'hinder and obstruct' and 'improper manner', or only the former. However, the Full Court expressed the view that 'intention' qualifies only 'hinder or obstruct'. If that view ultimately prevails, a contravention of section 767 relying on 'improper manner' can be made out without the need to demonstrate intention on the part of the permit holder.

Fair Work Act **broadens circumstances in which cases before Fair Work Australia can be discontinued**

In the recent decision of *CJ Manfield Pty Ltd v CEPU [2011]* FWA 3934, Fair Work Australia ('FWA') has clarified the broad circumstances in which applications can be discontinued and highlighted the importance of clear communication during the negotiation for enterprise agreements.

CJ Manfield applied for the approval of a single enterprise agreement to cover workers at the Rio Tinto Alcan (RTA) Refinery Site at Gove in the Northern Territory. On its face, the agreement met all of the statutory requirements for approval, including the requirement for genuine approval by employees.

However, at the preliminary hearing the company sought to withdraw its application on the basis that the agreeement contained a significant error. The error was said to be in the overtime clause, which was said to accidentally provide for three breaks in a 10 hour shift, rather than two.

The CEPU opposed the discontinuance arguing that:

(a) the agreement had been approved by employees under the *Fair Work Act*, and

(b) the insertion of the clause was not an error, but rather was an agreed term.

The company filed a notice of discontinuance and the CEPU filed its own application for the approval of the enterprise agreement.

At hearing, the company submitted that:

(a) an applicant can discontinue an application at any time and for any reason

(b) a necessary statutory requirement had not been satisfied, namely that the agreement had not been genuinely agreed to (because it contained an error), and

(c) the agreement was voidable because of the company's unilateral mistake as to its terms and effect.

Sams DP held that section 588 (which refers to the discontinuance of proceedings) permits discontinuance without the consent or leave of the Tribunal, and that, accordingly, if a complying notice of discontinuance is filed before the agreement has been approved by FWA the application is at an end.

Although it was not necessary to decide on the other two propositions put by the employer, Sams DP expressed the view that:

(a) the agreement had not been genuinely agreed to by employees because a proposed agreement must be one which the employer is prepared to offer its employees. As the text did not accord with the employer's intended offer, the agreement had not been genuinely agreed to and could not be approved by FWA.

(b) with relation to unilateral mistake, the employer was clearly mistaken about the clause and its true effect had never been discussed between the parties. However, there was no evidence to find that the CEPU had misled the company about the effect of the clause.

Sams DP decided not to exercise his discretion to extend the time limit for the CEPU's application for approval of the agreement and noted that it did not comply with the mandatory procedural requirements because the agreement was not signed by an authorised representative of the employer.

This case illustrates the importance of clear communications between parties negotiating agreements. Further, it is important to document all negotiations and to clarify issues where there appears to be some uncertainty.

Finally, the case serves as clarification of the broad circumstances in which cases before FWA may be discontinued.

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Call for national laws to tackle workplace bullying

Maurice Blackburn is calling on the Federal Government to introduce for the first time national legislation to make workplace bullying illegal and give victims quicker access to the legal system.

> " The Productivity Commission estimates bullying and harassment costs the Australian economy between $6 billion and $36 billion a year."

Maurice Blackburn Employment and Industrial Law Principal Josh Bornstein said workplace bullying was endemic across all professions but was not explicitly addressed by any federal law.

"Workplace bullying involves degrading, belittling, humiliating and threatening behaviour; in some cases it spills over into violence," Mr Bornstein said.

"It is devastating for victims and their families and has an immense economic impact. The Productivity Commission estimates bullying and harassment costs the Australian economy between $6 billion and $36 billion a year.

"It is astounding that Australia lacks national legislation to enable victims to take action to stop bullying in its tracks.

"Currently, victims of workplace bullying rely on occupational health and safety or personal injury laws.

"Invariably these cases proceed well after employees suffer irreparable harm to their health and career. The time for legislation permitting employees to seek a remedy proactively before such damage is done is now.

"I have seen too many employees destroyed by sociopathic workplace bullies; their careers ruined along with their health."

Mr Bornstein said the Federal Government must consider:

- introducing new legislation, giving victims the ability to quickly access a court or tribunal to expose bullying at work
- enabling victims to seek court orders or injunctions for proven cases of bullying
- a national educational campaign to reveal the true costs of workplace bulling, and
- work with Australia's mental health sector to work with employers and employees to take action to pre-empt the health, economic and other damage wrought by this problem.

Mr Bornstein said workplace bullying corrodes a person's dignity, self-esteem, job satisfaction, motivation and ultimately mental and physical health.

"Workplace bullying is above all, a matter of how we treat each other as human beings. It is illegitimate. It is toxic. It should be explicitly addressed in our statutes," he said.

"A national law that enables employees to seek urgent orders stopping the bullying conduct, and before the real damage is done, is well overdue. Once a light is shone on a bullying culture, it tends to wither and die.

"That's why Maurice Blackburn is calling on the Federal Government to introduce new laws to better protect workers.

Maurice Blackburn opens new visiting office in Broadmeadows

We have opened a new visiting office in Broadmeadows.

We have been helping people with WorkCover, TAC, superannuation, public liability, medical negligence and employment and industrial relations issues for more than 90 years.

Senior associate Salvatore Giandinoto said the firm had been representing the people in the Broadmeadows area for some time.

"We have a strong commitment to fighting for fairness and justice across Victoria," Mr Giandinoto said.

"This new visiting office in Broadmeadows will give people across Melbourne's north west the opportunity to meet with a lawyer without having to travel far to access specialised legal services.

"Maurice Blackburn's visiting offices allow Victorians to have access to legal services close to where they live."

Appointments for the Broadmeadows office can be made by calling 1800 810 856.