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Employment Law Update

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Reasonable management action: What is "reasonable"?

The concept of "reasonable management action" arises both in relation to workers compensation claims for psychological injury (including claims concerning stress and anxiety), and in relation to bullying claims in the Fair Work Commissions. Reasonable management action, carried out in a reasonable manner, may be a defence to these claims.

What is reasonable will vary depending on the circumstances. Here are some examples:

Worker sacked for obesity posing a workplace risk:

BHP Coal sacked a supervisor who weighed 160kg because medical assessments indicated he couldn't perform some workplace tasks safely because of his weight. The supervisor made a claim for stress and depression resulting from the dismissal. Before terminating his employment, the supervisor had been absent for nearly two years on stress leave, during which BHP argued that it made significant efforts to try to get him to return to work, including regular contact, counselling, and arranging fitness-for-work assessments. These assessments identified issues such as kneeling, squatting or climbing ladders as being risky because they may aggravate an underlying knee condition. The risk to other workers who might have to try to move the employee if he became injured at work was also taken into account. The employer tried to get the employee to address his weight problem to eliminate safety issues but to no avail.

The Commissioner hearing the case viewed the manager's actions as being those of a manager genuinely working towards returning the supervisor to work. A superficial or overhasty approach may have had a different outcome, but in this context, any psychological injury suffered by the employee was the result of reasonable action by management.

Workplace change, not bullying:

A long serving employee of The Salvation Army's Employment Plus job placement service complained about changes in her duties. Having previously dealt with clients who were "generally job ready," the scope of clients she needed to deal with was broadened to include people who weren't job ready, and who may have impediments to obtaining work such as recent time in prison, drug issues or mental health issues. The employee refused to deal with these clients.

Management insisted, and the employee made a bullying claim to the Fair Work Commission. The Commissioner noted that it wasn't unreasonable for the employee's refusal to work with some of her allocated clients to become an issue in her performance appraisal, when it was part of her job description. The fact that Employment Plus had not closely assessed individual performance in the past, and that the introduction of individual performance management was a significant change, was not unreasonable. The Commissioner felt that the organisation had shifted from "a long period of moribund management to an environment where the organisation is performance focussed." While this was a significant change for the employee, it was reasonable management action and did not amount to bullying, particularly when there was evidence that the change of culture was intended to avoid losses which had to be subsidised from elsewhere in the organisation.

Reasonable management action: What is "reasonable"? cont.

Failure to make reasonable adjustments:

In contrast, in another recent case, Corrective Services NSW (CSNSW) had to pay substantial damages to an employee for discriminatory treatment when it failed to make reasonable adjustments for the employee after she was diagnosed with a digestive disorder. Medical evidence available to CSNSW confirmed that the employee could make trips of longer than 30 minutes, provided breaks were scheduled to assist her to do so. However, CSNSW ignored the qualification, and acted on the basis that the employee was unable to travel for longer than 30 minutes. As that was necessary for her secondment as an intelligence analyst, that secondment was terminated, and the employee was told she would be medically retired unless able to return to her original position.

The conduct of CSNSW was found to rest on misunderstandings, assumptions without foundation and an attitude of presumption, rather than bringing an open mind and positive approach to resolution of the issues. CSNSW had decided early on that medical retirement was the only option, whereas a more open and consultative approach may have yielded solutions to the perceived problems.

The lesson to draw from these examples is that a knee jerk response, or a response based on unsound assumptions, will not be "reasonable management action," while the open-minded and consultative approach taken by BHP Coal or the assertive and soundly based approach of Employment Plus are much more likely to meet that standard.

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Niceties in the calculation of the unfair dismissal salary cap:

The limit on non-award employees commencing unfair dismissal proceedings is an income of under $136,700 (effective 1 July 2015), which includes guaranteed salary (not statutory superannuation), and other guaranteed benefits. It sounds simple, but sometimes calculating the settlements of salary which come within this definition, and which may take a particular employee outside the unfair dismissal jurisdiction, can be difficult.

As a couple of examples:

- An employee on $115,500 base salary for a 40 hour week was contractually obliged to work 58 hours a week with overtime paid at $56.00 per hour plus a 5% project allowance. This totalled $173,250 per annum, exceeding the salary cap. The employee argued that the overtime component was not guaranteed, because it was not paid if inclement weather interrupted his work or if he took sick leave.

  The Fair Work Commission (FWC) decided that the overtime was to be included in his annual earnings, because events outside the control of the employer did not indicate that the overtime was not guaranteed. The overtime expected to be received, all things being equal, could be determined in advance and was therefore part of guaranteed income, even though traditional overtime is not anticipated or agreed in advance.

- Guaranteed income can also include non-monetary items, if a "personal use" value can be calculated for work-related benefits.

  For example, with a car allowance, the FWC applies a formula based on work-related use and private use to establish a dollar value for private use, and then considers whether that takes the employee outside the salary cap. In a recent case concerning a work provided iPad, although the employee claimed that he used it only for work purposes, the contents of the ipad showed numerous personal photos and videos. In addition 62.5% of his iPhone use ($1,220 conservatively, 412 out of 659 calls identified as private) and 60% personal use of a car ($11,454 conservatively since it didn't include tolls and speeding fines paid by the employer) took the employee over the salary threshold.

If you're faced with an unfair dismissal claim, it's worth considering whether additional cash or non-cash benefits take pay above the threshold, potentially putting the application outside the jurisdiction of the Commission.

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What happens if you need to make a 457 visa holder redundant?

Employers often find themselves scratching their heads when it comes to making a 457 visa holder's position redundant, or terminating their employment. Below is a quick refresher of the rights and obligations for employers (sponsors) when ending a 457 visa holder's employment.

Firstly, if the position held by the 457 visa holder is required elsewhere in the sponsor's business, the 457 visa holder can work in an associated entity of the sponsor - if the sponsoring business was a lawfully operating business in Australia at the time it was approved as a standard business sponsor. Under this arrangement, the sponsor retains ultimate responsibility for the 457 visa holder, including all sponsorship obligations, not the associated entity. Note that the 457 visa holder cannot be on-hired by the sponsor or associated entity to any other non-associated business.

If redeployment isn't an option, and the 457 visa holder is either made redundant or has their employment terminated, the 457 visa holder should be treated in the same way that Australian citizens or permanent residents are treated under Australian workplace and industrial laws. Sponsors aren't required by the Department of Immigration and Border Protection (the Department) to help 457 visa holders find alternative employment, although they can if they want to.

Notifying the Department of a redundancy or termination

An employer is obligated to inform the Department within 10 days of ending a 457 visa holder's employment that the 457 visa holder's employment has ceased.

The same notification requirements apply if the 457 visa holder decides to change his/her place of employment, and it would be the visa holder's responsibility to arrange sponsorship with the new employer.

Return travel costs

If a 457 visa holder can't find a new employer willing to sponsor them in Australia, or wishes to return home following the end of their employment with their existing sponsor, the sponsor is obliged to pay the return travel costs for them and any sponsored family members to their country of intended travel. The 457 visa holder must ask the sponsor in writing to pay the costs, or the Department can make a written request on their behalf. Travel costs must be paid by the sponsor within 30 days of receiving a request, and the sponsor must notify the Department of any payment for travel being made within 10 working days.

Sponsors/employers must meet their sponsorship obligations to avoid exposing themselves to the risk of sanctions being applied by the Department. More information about these obligations can be found on the Department's website at http://www.immi.gov.au/visas/pages/457.aspx

What happens if you need to make a 457 visa holder redundant? cont.

What does all this mean for 457 visa holders?

If a 457 via holder stops working for their sponsor, he/she must do one of the following within 90 days of their resignation, redundancy or termination:

- Find another employer willing to sponsor them. The new employer will first need to be, or become, an approved business sponsor and then have their nomination for the proposed 457 visa holder approved
- Apply for a different visa
- Make arrangements to leave Australia.

The 457 visa holder is responsible for looking after their own welfare arrangements during this time and for finding other employment.

For more information on the above or for any other visa-related enquiries or assistance, please contact:

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