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Can a director be bullied?

Two recent cases have provided a reminder of the broad scope of the anti-bullying jurisdiction of the Fair Work Commission (FWC), as it applies to directors. Some commentary on this decision has suggested that could "paralyse" boardrooms and chill the "robust" discussions that sometimes occur between directors but is this really the case?

In the case of *Kypuros (1 June 2017)* the FWC made consent interim orders in a case where an employee, Ari Kypuros, complained about bullying by one of the directors, Costa Kypuros, of Mag Wheel & Tyre Pty Ltd. Among other things, the orders required Costa and his fellow director, Theo Kypuros, as well as Ari to:

a) refrain from making abusive or offensive statements about each other, and from disparaging each other and other workers;
b) be civil and respectful to each other; and,
c) avoid any circumstance in which an argument, confrontation or violence may arise while at work.

These rules apply between the directors, as well as between them and the employee. Those orders might well constrain "robust" interactions but although a requirement to be civil and respectful, and to avoid offensive and disparaging comments, mandates a standard of behaviour, that shouldn't inhibit each of the directors having their say, and making decisions (or not if they can't agree on the matter at hand), so long as they keep it civil.

In the case of *Adamson (19 May, 2017)*, Commissioner Hampton in the FWC decided that a director, who was not otherwise an employee of the corporation of which he was the director, was able to complain in the FWC about alleged bullying.

Mr Adamson was the Chairperson of a South Australian statutory corporation, Anangu Pitjantjatjara Yankunytjatjara Inc. As the elected Chairperson of the Executive Board of APY Inc, Mr Adamson alleged that the Deputy Chairperson and the General Manager bullied him by undermining his authority and preventing him exercising his powers as Chairperson.

Two preliminary questions arose:

a) Was Mr Adamson at risk of further bullying, given that he had not been re-elected as Chairperson while the case was continuing in the FWC?
b) Was he a "worker" within the scope of the anti-bullying jurisdiction, which depends on the definition of "worker" in the uniform Work Health and Safety Acts?

The Commissioner decided that there was no ongoing risk of bullying because Mr Adamson no longer occupied the role of Chairperson and dismissed the application. However, the Commissioner also dealt with the scope of "worker."

Not surprisingly, the definition of "worker" in the WHS legislation is very broad. It relates to a person who *"carries out work in any capacity for a person conducting a business or undertaking,"* including employees, contractors, subcontractors, labour hire employees and various other classes of workers – it says nothing explicit about directors. Of course, a director who is also an employee or contractor would be within the definition for that reason but what about a director who has no other role with the organisation?

Can a director be bullied? cont.

In Mr Adamson's case, the constitution of the corporation gave him specific duties to exercise on behalf of the corporation, with the approval of the Executive Board. He had official roles to fulfil in relation to the functioning of the corporation and was paid *"significant remuneration for doing so"* - well above the sitting fees for general members of the Board and exceeding cost reimbursement. The Commissioner concluded that Mr Adamson's activities represented work for APY Inc.

As the intention of the definition of "worker" in the WHS Act is intentionally broad, isn't limited to the classes of worker listed, and the scope of the definition goes well beyond a "worker" in the traditional sense of an employee for an employer, the Commissioner concluded that Mr Adamson was a worker, and therefore had the right to commence anti-bullying proceedings.

Given the broad scope of the WHS legislation, and the focus of the anti-bullying jurisdiction on work health and safety risks, it isn't surprising that someone whose role is solely that of a director should be included in the scope of "worker." The Commissioner observed that "WHS hazards and risks do not discriminate based on legal relationships."

So will "robust" interactions between directors commonly become the subject of anti-bullying applications in the FWC as a result of this decision? It seems unlikely. Applications to the FWC under the anti-bullying legislation are relatively infrequent, probably because of the absence of any power to award compensation: the Commission can only issue "stop bullying orders" to try to prevent the objectionable behaviour. The requirement of an ongoing risk is also significant limitation.

So a flood of anti-bullying applications by directors is unlikely. However, the decision does serve as a reminder that not only must organisations ensure that bullying behaviour isn't tolerated at the employee level, the same consideration applies at board and management levels. The need for "robust" interactions shouldn't be treated as cover for humiliating, rude or aggressive conduct, which might fit within the definition of bullying in the Fair Work Act.

And really, this makes sense: it would be surprising if the decision makers who need to enforce anti-bullying policies and codes of conduct by employees could operate on a different basis from the rest of the organisation. This decision highlights that where there is tension or dispute at board level, the board should still function in a civil manner, without bullying behaviour: the controlling mind of the organisation and individual directors ought to be leading by example.

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Employment Law Update

Do you include the time that an employee worked as a casual, when calculating redundancy pay?

Casuals don't get redundancy pay, do they?

Traditionally, no. Section 123 of the Fair Work Act says that the redundancy pay provisions of the Act don't apply to casual employees. That is logical, as the concept of casual employment is a series of stand-alone, finite, engagements; with no ongoing obligation on the employer to provide work and no expectation of ongoing work.

What about a permanent employee who started as a casual?

As a permanent employee, the employee has a right to redundancy pay under the Act but for what period of service? The amount of redundancy pay an employer is required to pay to an employee depends on that employee's period of "continuous service" with the employer. Does the period of casual service count as "continuous service"?

AMWU v Donau Pty Ltd (FWC Full Bench 15 August, 2016)

The Fair Work Commission (FWC) decided by majority 2-1, that service as a casual did have to be included in the calculation of the redundancy entitlements of a permanent employee who had a period of service as a casual before becoming permanent employee. Strictly speaking, this decision concerns the terms of an enterprise agreement but the logic based on the interpretation of "continuous service" in the Fair Work Act and the absence of any wording excluding service as a casual, applies more broadly.

Commissioner Cambridge dissented from the majority decision and argued strongly that the specific provision of section 123, that casuals are not eligible for redundancy pay, should override the general provisions about "continuous service."

What does this mean for employers?

As a result of this decision, prior service as a casual does need to be factored into the calculation of redundancy payments.

However, it is possible that decisions in the FWC's four yearly review, concerning casual conversion rights and other issues concerning casual employment may clarify or alter this position, so that is a development to be watched.

If you would like advice as to calculating redundancy payments, or other redundancy issues, please contact Stephen Booth, Dominic Russell or Lisa Qiu.

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Article preparation by Holly Pitt

Engaging with the workplace cop

The Fair Work Ombudsman (FWO) has, over the last couple of years, developed a reputation as being more than just an industrial watchdog, but a cop on the beat.

The aggressive rhetoric coming from the office of the FWO, coupled with news of six-figure penalties against companies, and fines being issued to directors and managers for non-compliance with their obligations under the Fair Work Act have given many Australian businesses cause for alarm.

What are the key risks and what should a business do in the face of an investigation by the FWO?

The consequences of breaching minimum employment standards can be disastrous but the consequences of obstructing an investigation by the FWO can be worse.

Recently, a café in Albury and its owner were collectively issued penalties of $532,000 for systemic breaches of the Fair Work Act in relation to its five employees. In his decision in the Federal Circuit Court, Judge Altobelli examined the conduct of the company and the owner during the investigation process and found evidence the company had fabricated business records and, despite admitting to the underpayments 12 months previously, had failed to remedy various breaches that had occurred.

In contrast, in April this year a Queensland agricultural company and its managing director were collectively penalised $130,000, despite being found guilty of systemic breaches across six broad classes of contraventions, including substantial underpayments. In his decision, Judge Vasta also examined the conduct of the company and the owner during the investigation process and found that upon being made aware of the potential breaches, the company promptly “engaged reputable solicitors” and put in place “appropriate checks and balances… to ensure… compliance under the FW Act.” As a result of the company’s cooperation and response to the FWO investigation, Judge Vasta applied a 20% discount on the maximum penalties that might otherwise have been payable.

Companies under investigation by the FWO also risk significant reputational damage, both to themselves, as well as companies that form part of the supply chain. In the case of franchises, the reputational harm may extend to all businesses within the franchise.

Woolworths was recently subjected to negative media due to an investigation by the FWO into trolley collection contractors it had engaged. The trolley collection contractors were found to have been paying workers as little as $10 an hour. During the investigations, Woolworths was heavily criticised by the FWO for essentially distancing themselves from the problem and shifting blame onto the contractors.

In another case, Caltex went onto the front foot, establishing a $20m fund for settling underpayment claims for workers at its franchises and conducting its own audit into the compliance of its franchisees. As a result of this, Caltex was in a position to self-report breaches uncovered by their audit, which assisted the FWO in its investigation.

The key lesson businesses should take from these cases is that when faced with investigation by the FWO; *cooperation, transparency and pro-activeness (not to mention engaging reputable solicitors) will go a long way towards reducing exposure to penalties and reputational damage.*

Engaging with the workplace cop cont.

So, what preventative or 'proactive' steps can franchises, franchisees and other businesses take to minimise their risks from a FWO audit?

In the present climate, businesses must take reasonable steps to prevent non-compliance with award conditions and statutory obligations under the Fair Work Act. We have previously written about a Bill currently before Parliament, which if passed, will extend liability for breaches of the Fair Work Act to franchise holding companies, as well as increasing the investigative powers of the FWO.

In addition to making the FWO a quasi-industrial regulator, the Bill also offers fairly concrete guidance on what it means to take "reasonable steps" to prevent contraventions. For franchises, this can include:

- ensuring that franchisees and employees are given guidance on their rights and obligations under workplace laws and any relevant awards;
- monitoring and applying changes to minimum wages and other award entitlements (usually coming into effect from 1 July each year);
- conducting regular audits of work rosters, payroll and maintenance of employee records; and,
- putting a process in place for workers to raise concerns about underpayments or other working conditions.

It may come as a surprise to learn that one of the prescribed functions of the FWO is "to promote harmonious, productive and cooperative workplace relations." It follows from this that any business that implements sound practices and procedures that are aligned with this mission statement should be well placed in the event that the FWO comes knocking.

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Protecting your business from social media

It's always risky business to engage in social commentary about political matters or trending topics for the obvious reason that it can turn really bad, really quickly. That's the exact lesson American journalist, David Leavitt, learnt recently when he tried to leverage off the horrific Manchester bombing. Within minutes of the attack, Leavitt had attempted to 'entertain' his audience with the below tweet:

Rightfully so, the Twittersphere erupted with rage and sent Leavitt's account into meltdown.

But unfortunately, the gags didn't stop there – the journalist continued to dig his hole deeper by poking fun at Ariana Grande herself.

Receiving over 40,000 replies to his series of tweets following the incident, Leavitt continued to spiral downwards as he questioned if his joke could have been better timed.

Protecting your business from social media cont.

After being inundated with condemnatory tweets, Levitt apologised and explained to followers that his conduct was just consistent with his Twitter habits regarding trending topics.

So what can companies learn from Leavitt's #socialmediafail?

1. **Humour and irony are not always appropriate.** At Coleman Greig, we are absolute fans of embedding humour and personality into social media posts and tweets. However, there is definitely a time and place for humour and being "witty" about death or tragedy is never appropriate.

2. **If you are going to comment on current events and in particular tragedies, try and make it positive!** In light of the devastating attack, humanity shone through with businesses and locals taking to social media to offer their offices and homes as safe spaces for injured and frazzled concert goers. The hashtag #RoomForManchester gained traction and saw local businesses offering taxi rides and hotel rooms free of charge to help those injured or stranded.

3. **Go slow and steady.** Avoid the temptation to comment immediately on trending topics, especially in respect of tragic events. You should have a good understanding of the topic you are commenting on to ensure your comments are both accurate and appropriate. Who could forget Donald Trump's famous #socialmediafail in respect of Brexit?

4. **Stop and apologise.** If your post or tweet causes offence, post a simple, honest and unqualified apology. Don't add fuel to the fire by posting more offensive comments such as "Too Soon" or arguing why it was really ok and that others just lack a sense of humour.

   The online conduct of David Leavitt has also lead us to consider the actions available to companies when an employee, contractor, ambassador or agent goes rogue on social media.

5. **Make a statement.** In the event that an agent of your business or someone affiliated to your brand has a #socialmediafail, it is critical to respond with a public statement dissociating your brand from the views of the individual (see below). With the majority of information literally available at our fingertips, the digital age makes it very easy for online audiences to associate your brand with the offending content.

6. **Ensure that your business has a social media policy.** Almost everyone has a social media account of some sort, and in fact, many employers encourage the use of social media by their employees, as a marketing tool. However, as an employer, you should ensure that you have a clear social media policy which sets out what is acceptable social media use and what is not. The policy should also make it clear that employees can be disciplined for improper use of social media, if the views expressed through the social media account can be seen to be affiliated with the employer. The policy should allow the extent of the discipline (ranging from a warning to termination) to be decided at the absolute discretion of the company, on a case-by-case basis.

7. Recently, Jenna Price, a columnist for The Canberra Times and Daily Life, wrote an article on what she did when she received an email from a troll – sent from an email account that showed that he was writing from one of the banks that Jenna banked with. She called the bank and asked to speak firstly to the employee who wrote the nasty email, and secondly, asked to speak to his supervisor. She received a written apology from the bank and no doubt the employee in question found his trolling a career-limiting move.

8. As a company, having a social media policy in place will enable you to take appropriate action when an employee does misbehave on social media. Without such a policy, employers are left to rely on the firm's policy in relation to disciplinary procedures, which may not be as clear or specific in dealing with social media misconduct, as a social media policy would be.

9. **Consider extending the policy to ambassadors, agents and contractors.** Leavitt is a freelance journalist and was not an employee of WBZ Boston News, Yahoo, the Examiner, or presumably, any other news outlet which he has written for before. However, a Google search of Leavitt quickly associated those brands with him, and therefore, his tweets.

If you need assistance with your social media policy, contact our Employment and Business Migration team:

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