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Employment Law Update

March 2016

ANZ culture shock: What to do when employees run wild

In recent news, *two former ANZ traders* have sued the ANZ bank in separate proceedings before the Federal Court of Australia, for losses allegedly sustained by them as a result of their employment having been terminated by the bank. In late January, one of the traders, Mr O'Connor, dropped his claim against the bank, saying that he was not prepared to put his family through a difficult fight, and the associated financial and emotional costs.

Mr Alexiou, who is continuing his claim, was stood down by the bank in September 2015, following findings by the bank of inappropriate conduct including lewd and explicit communications about sex and drugs, over the internal chat terminal used by employees.

Mr O'Connor sued the bank for damages allegedly suffered by him as a result of the termination of his employment in October 2015, which also, according to the bank, arose from inappropriate and sexually explicit communications, as well as for allegedly spending $37,000 on the company credit card for non-work related expenses.

Both Mr Alexiou and Mr O'Connor sued ANZ for damages, more than $30 million between them, for deferred shares and bonuses, and future income which they say they have lost as a result of their dismissals.

Both traders alleged as part of their claims that their dismissals were unlawful, unfair or in breach of their contracts, because the conduct for which they were allegedly being dismissed was conduct of a type which was in fact encouraged or condoned, directly or indirectly, by ANZ.

The crux of Mr Alexiou's ongoing argument is that the trading floor culture of sex, drugs and alcohol is at odds with what the bank dictates in its policy documents as acceptable and expected conduct, but was nevertheless tolerated, and that it was therefore unreasonable for the bank to dismiss him for engaging in conduct that was in line with the real culture of at least part of the bank.

This case raises an interesting issue: what happens when an employer condones and tolerates inappropriate behaviour? Can the employer still discipline an employee engaging in that conduct, on the basis that it is inconsistent with company policies and expectations?

While each situation will turn on its own facts, what is clear is that it becomes more difficult for an employer to argue that certain behaviour is inconsistent with company policies and expectations when, in fact, the behaviour complained of is a regular occurrence in the company, and is often ignored or dealt with inconsistently.

In one case, employees had a beer at lunch and were dismissed for it. It was held that they were unfairly dismissed, despite there being a clear written policy of zero tolerance for drinking alcohol at work, because the company's approach to disciplining employees who did have a drink at work was inconsistent. It was unfair to allow some employees to have a drink over lunch, while dismissing others for the same behaviour.

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

In another case, employees have been held to have been unfairly dismissed for swearing in the workplace, because the workplace tolerated a culture of swearing (though tolerating generalised swearing may not condone swearing abusively at a particular person, if that distinction is reasonable in the context).

These cases turn on what would be "harsh, unjust or unreasonable", the criterion for general unfairness for unfair dismissal in the Fair Work Commission (FWC). Mr Alexiou and Mr O'Connor were paid too much to make a claim in the FWC, so they sued in a common law court. The relevance of condoning behaviour there will probably not be fairness as such, but the validity of the application of (allegedly disregarded) policies as grounds for their termination, and the requirements for termination to be found in their contracts. In particular, did their conduct amount to "serious misconduct" if, as alleged, such conduct was common and condoned?

Colourful allegations of this sort also serve a tactical purpose in attracting media attention, which might be used as a pressure point to assist in settlement negotiations.

The publicity thus far has already prompted comments by ANZ Chief Executive Shayne Elliot that the bank is determined to stamp out such conduct, and to tackle Alexiou's claim in court. It remains to be seen whether the proceedings will continue to a hearing, or settle confidentially. No-one wants to air their dirty laundry in public, but the public perception of a settlement on undisclosed terms could be difficult for ANZ. We'll await the outcome with interest.

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When employees go rogue: How to protect your confidential information and intellectual property

On 4 January 2016, Justice Bromberg of the Federal Court of Australia, handed down a judgment after hearing an urgent ex parte application brought by steel producing mogul, BlueScope Steel. The urgent application was to stop a disgruntled former employee, Ms Chinnari Sridevi Somanchi, from leaking confidential information and intellectual property, to competitors.

Ms Somanchi was an employee of BlueScope for 12 years and was involved in the development of BlueScope intellectual property (IP). Her position with BlueScope was made redundant on 29 June 2015. In an *article published by the Sydney Morning Herald*, it was alleged that in the hours before her redundancy meeting, Ms Somanchi was suddenly very busy on the phone. BlueScope alleged she was downloading volumes of confidential information from her computer- all up over 40 gigabytes of IP and confidential information over four years, including important codes which could result in disastrous consequences for BlueScope if they fell into the wrong hands, such as a serious loss of its competitive edge.

Ms Somanchi relocated to Singapore in November 2015 to take up a position as Innovation Manager of NS BlueScope Limited, a joint venture of BlueScope Steel with two other companies. Although related, BlueScope and the joint venture do not share IP. BlueScope Steel didn't seek monetary penalties in its urgent application: the aim of the game was simply to find and secure the information. The Court granted injunctions to restrain Ms Somanchi and to require delivery of BlueScope's information, pending further hearing. Similar orders have been sought in the Singaporean courts.

Seeking these types of search and desist orders from a Court is a costly process. Therefore, as far as possible, prevention is better than cure, and the best form of defence is to take action to protect your confidential information and IP.

First of all, make sure your IP is properly protected through trade marks or copyright.

Secondly, make sure your employment contracts and internal policies clearly state that employees have duties to protect that information, both during and after their employment, and regulating employee use of electronic devices, especially their own devices. If there's nothing in the contract, your rights to go to court will be limited.

Thirdly, make sure you know which employees have access to what information, who is using what devices, and if necessary, speak to IT experts to make sure that only those who need to know have access.

Fourthly, if a relationship with an employee with a lot of access to sensitive information gets rocky, then take steps proactively to ensure that their ability to take that information is limited.

Fifthly, if such an employee does leave, make sure that all their means of access to your system are closed off. Employees with sophisticated IT knowledge and with codes that enable access to your system may still be taking information, or creating havoc in your system, after they go.

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When employees go rogue: How to protect your confidential information and intellectual property cont.

If you need help protecting your IP, or reviewing your contracts and policies to ensure they offer adequate protection to your confidential information and IP, then get in touch with Rita Khodeir (IP Specialist) in our Litigation & Dispute Resolution team, or a member of our Employment Law team:

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When mistakes become personal – Personal liability as an HR Manager

It's not just Directors who can be held personally liable when something goes wrong. Managers who are directly involved in an infringement can also experience the same fate.

In the case of Cerin v ACI Operations Pty Ltd, Mr Cerin brought a claim against his employer ACI Operations and the Human Resources Manager, Ms Nicola Powell. Mr Cerin alleged that the notice provisions in the National Employment Standards (NES) and the Fair Work Act had been breached upon termination of his employment, when he was provided 28 days' payment in lieu of notice, instead of the five weeks which he was entitled to under the NES.

Mr Cerin had been injured at work and had received workers compensation payments for some time. The company decided that there were no suitable alternative positions for him and that his employment could not continue. Under the relevant South Australian workers compensation rules the company had to give Mr Cerin 28 days notice, which it did.

The workers compensation rules didn't displace the greater entitlement under the NES. The loss Mr Cerin suffered in not being paid the extra week's notice was $181.66 - the difference between an extra week's wages, and the weekly workers compensation payment that he was receiving.

Mr Cerin submitted that Ms Powell was aware of the NES provisions and made a "deliberate and conscious decision" that he wouldn't be given five weeks notice. Ms Powell on the other hand, submitted that the payment of 28 days notice was a matter of procedure, complied with the relevant compensation laws, and was not a deliberate failure to apply the extra week's notice as provided under the NES.

The Court held that Ms Powell knew about the NES, and, in failing to provide the correct notice to Mr Cerin, was personally liable for a contravention of the NES provisions. The maximum penalty for the company was $51,000 and the maximum penalty for Ms Powell as an individual was $10,200. The judge fined the company $20,400 and fined Ms Powell $1,020.

The Court noted that ACI Operations was a large international company. This was not a situation where the company was lacking in human resources experience, so as to excuse such an error. It had persisted in refusing to pay the extra notice once the breach of the NES (a statutory obligation, not a matter for negotiation) was brought to its attention.

As the NES provides a guaranteed safety net of minimum entitlements for employees, and as Mr Cerin was an injured and vulnerable employee, the Court held that a penalty should be set that would deter other employers from infringing the NES.

This is not the first time an HR Manager has been penalised. Penalties have also been imposed on an HR Manager involved in sham contracting of vulnerable and exploited workers: the manager's argument that he was just following orders cut no ice.

In the 2010 case of *Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Ors*, the Fair Work Ombudsman brought proceedings against Centennial Financial Services, the company's sole director and shareholder, and Mr Chorazy, the company's HR Manager. The company was found to have failed to pay nine employees their minimum employment entitlements, including accrued annual leave, over 13 months, as well as engaging in sham contracting by converting employees to contractors. The director was liable for nine contraventions was ordered to pay a total of $13,400 in penalties. Mr Chorazy was liable for 11 contraventions and was ordered to pay a total of $3,750.

When mistakes become personal – Personal liability as an HR Manager cont.

Defending his actions, Mr Chorazy said that he had no knowledge of the difference between employees and contractors prior to working at Centennial Financial Services. He went on to say that when he was told to type out a new contractor agreement for existing employees, he didn't notice that the duties and key performance indicators were identical to the employment agreements that he had initially issued to the employees - the only change being that the employees would receive a commission rather than receiving wages.

The court did not excuse Mr Chorazy from liability. Just doing as he was told was not a defence - as a responsible executive, he was expected to apply some independent judgment, and the sham nature of the new arrangements should have been obvious to him. The Court found that Mr Chorazy was materially involved in almost all aspects of the contraventions and that he was liable as an accessory to those contraventions.

These cases demonstrate that HR Managers can be directly penalised for being involved in company actions in breach of the Fair Work Act. While penalties against managers aren't frequent, they do highlight the responsibilities of HR professionals to uphold the law and to take responsibility.

If you need advice in relation to your obligations as an HR Manager under the Fair Work Act and other legislation towards your employees, contact our Employment Law team:

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Immigration Law: Recap on 457 visa sponsorship obligations

On 20 May 2015, the Federal Court of Australia handed down the largest ever court imposed fine for breaching subclass 457 visa sponsorship obligations. The offending company, Choong Enterprises operated restaurants and cafes in Darwin, acting as a sponsor for 10 employees from the Philippines, who travelled to Australia on subclass 457 visas.

The primary obligation of a 457 sponsor is to ensure that the sponsored employees are employed on equivalent terms and conditions to Australian employees in an equivalent role and location. In this case, Choong Enterprises was not paying entitlements such as loadings, sick leave and superannuation contributions, and was also paying below the award minimum by paying $12 per hour.

Choong Enterprises fabricated documents in an attempt to demonstrate compliance with its obligations, and also recovered agent costs from the sponsored employees, which is prohibited under the Migration Regulations 1994 (Cth).

The Court imposed penalties totalling $175,400 on Choong Enterprises.

In response to this finding, Senator Michaelia Cash, the then Assistant Minister for Immigration and Border Protection, said: “The stiff penalty this company has received should send a warning to other sponsors: if you fail to meet your requirements, my Department may impose administrative sanctions, issue an infringement notice, execute an enforceable undertaking, or apply to the Federal court for a civil penalty order.”

“The overwhelming majority of businesses act in good faith and therefore have nothing to fear, but we want to send a strong message that if you breach your obligations, you can expect to face the consequences.”

True to her word, Taskforce Cadena was launched on 1 July 2015 and it has been focusing on compliance in the agricultural and food processing industries.

To ensure that you are complying with your obligations as a sponsor of subclass 457 visas, let’s recap sponsorship obligations. The nine key obligations are to:

1. Cooperate with inspectors in providing access to information and premises
2. Ensure equivalent terms and conditions of employment
3. Pay travel costs to enable sponsored persons to leave Australia at the end of their visa
4. Pay costs incurred by the Commonwealth to locate and remove unlawful non-citizens
5. Keep accurate records (Choong’s fabrication of records with intent to deceive was an aggravating factor)
6. Provide records and information to the Minister
7. Provide information to the Department when certain events occur
8. Ensure the sponsored person works in the nominated occupation
9. Not recover certain costs from the employee, such as migration agent costs.

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Immigration Law: Recap on 457 visa sponsorship obligations cont.

Under strengthened penalty provisions under the Migration Act 1958, any individual or body corporate that allows or continues to allow an unlawful non-citizen to work, or breach their visa conditions, or who refers unlawful non-citizens to work for a third party, could be liable for both civil and criminal penalties. As a compliance measure, employers should establish the citizenship, residence or visa status and work rights of their employees, and review the status of visa holders periodically to ensure they remain "legal." Recruitment processes should include review of the relevant documents, and retention of copies, and contracts should provide for the employee to provide such further information as may be required from time to time.

For advice on whether you are meeting your sponsorship requirements, contact our Employment and Migration team:

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