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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies
Labour & Employment Law

A LOOK INSIDE:

Welcome

from the Founder and Managing Principal

It is once again a great pleasure to introduce the latest issue of our firm's flagship publication, Strateg-Eyes. In this issue we have covered a broad suite of subjects ranging from negotiation tactics (summarising the key points from my webinar in September), the management of unfit workers (something we will explore in detail at our upcoming Hypothetical event on 10 November 2016) as well as topics of ongoing relevance such as redundancy.

2016 has been another exciting year for the firm. While disappointed to have closed our small Brisbane and Melbourne offices, our brand recognition and revenue growth in our core practice out of Sydney remains very significant. We have been delighted with the take-up of our innovative thinking in our recently-released Guide to Services allowing clients to take much of the guesswork out of their spend when it comes to engaging high quality legal and strategic advisers in the labour and employment law space.

PCS continues to develop its presence internationally. Our membership of Innangard (as its only non-European member firm), my recent invitation to speak at the International Bar Association's Conference in Washington DC and the significant number of new clients headquartered overseas stands as testament to our firm's global footprint.

From 2017, Strateg-Eyes will be produced twice a year with an increased focus from our firm on Blogs and "real-time" articles and publications. We welcome your feedback on any and all of our thought leadership.

I take the opportunity (early as it may be) to wish you all well for the festive season ahead and to thank you once again for your loyal support of our firm.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL

Seven tips for becoming a more effective negotiator

Joydeep Hor, FOUNDER AND MANAGING PRINCIPAL **Sam Cahill,** ASSOCIATE

The workplace presents a broad range of situations where parties are required to negotiate. These can range from everyday tasks (such as rostering, allocating work and setting deadlines) to more challenging situations (such as industrial disputes or litigation). In any context, the negotiator's task is to work towards a solution that meets some of the needs of each of the parties to enable the parties to reach agreement and resolve their dispute. This article sets out seven tips for becoming a more effective negotiator.

Tip 1: Focus on interests, not positions

A negotiator should look for ways to address the needs and interests of the parties, rather than simply defending their own position, or attacking the position that has been adopted by the other party.

While parties will often have conflicting positions, they may have some interests that do not necessarily conflict. This is illustrated by the classic example of the two sisters who each wanted a whole orange. As only one orange was available, they were each given one half. The first sister used her half to make orange juice (discarding the peel) while the second sister used her half to grate the peel to make an orange cake (discarding the flesh). In this scenario neither party was satisfied with the outcome.

If the sisters had taken an interest-based approach to resolving their dispute, and explored why they each wanted the whole orange, they would have realised that their underlying interests were not necessarily in conflict, and could have constructed a solution that met both of their interests.

Example

In the lead up to an annual salary review, John tells his manager, Katie, that he is seeking an increase of $10,000 per annum.

Katie values John and wants to retain him as an employee, but only has the capacity for a salary increase of $5,000. She considers that John's interests go beyond simply maximising his salary. Indeed, John has a broad set of interests, which includes:

- recognition of his contributions to the team;
- confirmation of his seniority and status;
- having a clear path for career progression; and
- having greater flexibility in working hours and locations.

Having considered these interests, Katie is able to develop a range of options that John may find satisfactory in addition to a modest salary increase. This might include, for example, a new job title, a larger office, confirmation that he is on track for a promotion and/or the ability to work from home on some days. Moreover, the prospect of a larger salary increase could be framed in terms of reaching specific targets in the future, with a clear time period for achieving these targets.

Tip 2: Be prepared

A negotiator should prepare by focusing on how the situation can be brought to a satisfactory conclusion. This can be done by focusing on interests as well as a number of other, equally important factors.

Step 1: Know your own interests

Your interests will provide you with a guide to what you are looking to achieve from the negotiation.

You should ask yourself:

- What outcomes would be acceptable to me?
- What is negotiable and what is non-negotiable?
- How can I justify these outcomes to my stakeholders?

However, you should be careful not to focus only on your own side of the equation. The key to effective preparation is also to pay attention to what the other party is seeking and to understand from where they are coming. This will enable you to approach the dispute with a view to achieving a constructive resolution.

Step 2: Consider the interests of the other party

The best way to consider the interests of the other party is to ask the "why" question.

Why do they find the current situation unsatisfactory? Why is the party seeking what they have requested? Why do they feel the way they do?

This will allow you to go beyond the initial position that a party is advocating, and work towards a resolution that has the capacity to satisfy some of the needs of both parties.

Step 3: Consider any emotional, historical or relationship factors

A full understanding of any emotional, historical, and relationship factors also provides useful insights into the motivations of the parties. It can help you to adjust your negotiation strategy to the particular circumstances.

Hence, you should consider:

- What do you know about the other party, including their personality and track record? What does this tell you about the nature of their request?
- What do you see as the emotional or historical factors that motivate them?
- What sort of outcome would they be able to justify to their stakeholders?
- In light of these factors, what outcomes are likely to be acceptable or unacceptable to them?

Step 4: Identify options for resolution

The earlier stages of preparation should enable you to develop a set of options to put to the other party that are realistic ways of resolving the dispute and are likely to have some appeal to them. These should be based on your careful consideration of the interests of the parties as well as any emotional, historical or relationship factors. Having a range of options available enables the options to be packaged together in varying ways, and also gives each party the capacity to have a say in the ultimate outcome.

Tip 3: Identify areas of agreement

A negotiator should seek to identify areas of agreement from the outset of the negotiation process. It does not matter that the subject matter of the agreement may be minor or procedural. The fact that the parties can reach an agreement on something signals that each party is willing to act in a reasonable manner and is capable of resolving the more difficult issues. It also sets up the negotiation as a joint problem-solving exercise, rather than a conflict management situation.

Example

An employer has received a log of claims from a union representing the employees at the workplace. Amanda is appointed as the bargaining representative for the employer.

At the first meeting with the union, Amanda begins by proposing an agenda for the meeting, as well as a clear timeframe for further meetings. The union agrees to Amanda's proposal and the parties begin to negotiate on the substantive issues.

Not only has Amanda demonstrated that the parties are capable of reaching an agreement, she has also sent an important message that she is committed to a process for achieving an outcome.

Tip 4: Demonstrate your willingness to make a deal

A negotiator should demonstrate to the other party that their primary goal is to resolve the matter. This helps to set the tone of the negotiation process, and can encourage the other party to commit to working towards a solution.

Example

Blake has made an anti-bullying application to the Fair Work Commission. Susan attends the conciliation conference as the employer's representative.

At the conciliation conference Susan starts by telling Blake that she is interested in resolving the matter. She explains her preferred options for achieving a resolution. She then tells Blake that she is open to considering any options that he may wish to put on the table for consideration.

Tip 5: "Help me understand..."

A negotiator should always try to understand what is motivating the other party. One of the most effective ways to do this is to ask them for help.

For example, you could ask:

- "Help me understand why you want this outcome."
- "Help me understand why you are reluctant to agree."
- "Help me understand what might change your point of view."

The simple phrase "help me understand" can have a significant impact on the tone of the negotiation and the mindset of the parties. Firstly, it can help to make the negotiation feel more open and collaborative. Framed as a request for "help", it has the potential to prompt a positive emotional response from the other party. It also puts the onus on the other party to justify or explain their position.

Tip 6: Ignore ultimatums

A negotiator should avoid engaging with any ultimata issued by the other side. The best response to an ultimatum is to turn the discussion back towards seeking a resolution. It is often better to walk around a demand rather than walk into it, or try and walk through it.

Example

John and Sally are involved in a heated argument at work. The next day, John tells his manager, Mary, that he is going to resign unless Sally is dismissed for her role in the incident.

Mary does not try to convince John not to resign. Instead, she says:

"This is obviously an important issue... Let's talk about how we might address this situation. Are there things about how the workplace is functioning that you would like to bring to my attention? Are you concerned about any broader issues in the workplace? How do you think these issues could be resolved?"

Tip 7: Remember that "no" doesn't always mean "no", it can mean "not now"

A negotiator should not be discouraged if an agreement cannot be reached immediately. There will usually be the opportunity for further discussions and the prospect of an eventual resolution. If there hasn't been agreement, the negotiation is still a success if it has narrowed the issues between the parties or provided greater clarity about motivations and needs, thereby building a foundation for a resolution at some time in the future. ■

> ***"Why do they find the current situation unsatisfactory? Why is the party seeking what they have requested? Why do they feel the way they do?"***

Is this a redundancy?:

emerging themes in redundancies

Erin Lynch, ASSOCIATE DIRECTOR **David Weiler,** ASSOCIATE

A report[1] produced by the Organisation for Economic Co-operation and Development this year found that *"workers who involuntarily lose their jobs can face substantial economic and non-economic costs. On average, each year around 2.3% of Australian workers with at least one year of tenure experience job loss due to economic reasons such as corporate downsizing or firm closure. In an international comparison, Australia has been rather successful at providing new jobs relatively quickly to these workers, as 70% become re-employed within one year and almost 80% within two years, even if new jobs are sometimes of poorer quality".*

Effective change management in these circumstances requires employers to implement a strategic approach to what roles are still required within an organisation, whether the obligation to pay redundancy is in fact triggered, and what options may exist for redeployment.

In this article, we have distilled some emerging themes arising from recent decisions in relation to redundancies. These include:

- when employers are (and when they are not) required to make redundancy payments;
- what types of employment count towards continuous service;
- how employers should approach redeployment in the redundancy context; and
- the impact of specific obligations under a modern award or enterprise agreement.

Redundancy as we know it

Under the *Fair Work Act 2009* (Cth) ("**FW Act**") a redundancy occurs if an employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise.

[1] *OECD (2016), Back to Work: Australia: Improving the Re-employment Prospects of Displaced Workers, , OECD Publishing, Paris http://dx.doi.org/10.1787/9789264253476-en*

Redundancy pay: not automatic

Often employees will perceive a situation where their role is no longer required as meaning that they are automatically entitled to redundancy pay (an outcome which can be more attractive than continuing employment in another position). However, employers should remember that the FW Act requires there to be a termination of employment before the entitlement to a redundancy payment arises.

The redundancy of a job or position does not necessarily amount to a termination of employment. Where the evidence demonstrates that, after identifying that a role is longer required, an employer has attempted to retain the employee's services by offering an alternate position, there may be no termination of employment and, therefore, no entitlement to redundancy pay.

Whether making a particular position redundant and offering a new role amounts to repudiation of the contract of employment (which may lead to a termination of employment if the repudiation is accepted by the employee) will be determined by the terms of the relevant contract and the terms and conditions of the new role. For example, it is common (and in fact recommended) that employment contracts are subject to a condition that employees may be required to perform other duties that an employer may direct them to perform, having regard to their skills, training and experience, and that the employer may relocate them if the operational needs of the business require it.

In a recent case, an employee's role was no longer required but the employer proceeded to offer various alternative roles. After turning down all of the roles offered, the employee alleged that he was entitled to redundancy pay, and when the employer refused to terminate his employment, he resigned. The employee then brought a claim for redundancy pay on the basis that he was constructively dismissed. The Court rejected this argument, in part, on the basis that the employer still required the employee's services.[2]

When dealing with organisational change it is important for employers to consider whether the changes proposed are such that they are relatively minor and within the scope of duties that the employer can direct the employee to perform, as opposed to changes that amount to a termination (or repudiation) of the employment.

How much do I need to pay?

If an employer determines that a redundancy payment is due, it then needs to undertake the task of determining the amount payable based on the employee's period of continuous service with the employer.

The National Employment Standards ("**NES**") contain the minimum redundancy entitlement that an employee will receive. An employee may be entitled to a more generous redundancy entitlement in accordance with their contract of employment, a policy, enterprise agreement or award.

In a recent decision[3] the Fair Work Commission ("**FWC**") determined that periods of "regular and systematic" casual employment will be counted towards redundancy entitlements in circumstances where an employee transitions from casual employment to permanent employment (and is not a casual employee at the time of the termination of their employment).

The effect of this decision is, so long as the period of casual employment was "regular and systematic" and was part of the period of employment from which the employee is being made redundant, there will be no break in service between the period of casual employment and the transition to permanent employment for the purpose of calculating redundancy pay.

Other acceptable employment

If an employee is entitled to be paid an amount of redundancy pay and the employer obtains "other acceptable employment" for that employee, the employer can apply to the FWC for an order to reduce the amount of redundancy pay, including to nil.

What constitutes "acceptable alternative employment" is a matter to be determined on an objective basis. The use of the qualification

[2] *Adcock v Blackmores Limited & Ors* [2016] FCCA 265.

[3] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Donau Pty Ltd* [2016] FWCFB 3075.

"acceptable" is a clear indication that it is not any employment which complies, but that which meets the relevant standard. There are core elements of such a standard, including that the work is of a like nature, the location is not unreasonably distant, and the pay arrangements comply with award requirements.

This relevant standard will be dependent on the *"entire factual matrix"* and an *"objective assessment of acceptability"*.[4] For example, where the alternative employment requires a change of location, the FWC will look at the additional travelling time and distance involved, and any consequential disruption to the employee's personal life and circumstances.

Obtaining that alternative employment

In a recent case the question was whether the former employer had "obtained" the alternative employment. At first instance the FWC decided to vary the redundancy pay owed by an employer to 48 employees from their full entitlement to nil, on the basis that it had facilitated suitable alternative employment with a new employer. However, the decision was overturned on the basis that the former employer did no more than facilitate contact between the new employer and the employees. This simply led to an invitation being extended to those employees to apply for a position and to attend an interview, which may or may not have resulted in an offer of employment. The Full Bench of the Federal Court upheld this decision on appeal, stating that:

*"to **obtain** employment for an individual means to **procure another employer to make an offer of employment**, which the individual may or may not accept as a matter of his or her choice. If the employment is not accepted, the question whether that employment was 'acceptable' will then arise."* [5]

Know your industrial instruments

In addition to any consultation provisions, employers covered by an enterprise agreement or modern award must be conscious of other obligations that may arise under such instruments. In a recent case following a downsizing at the Port Kembla Coal Terminal, the enterprise agreement in question placed an obligation on the employer to *"investigate all avenues to avoid forced redundancies, including the reduction of contractors"* where permanent employees could instead adequately perform the duties of contractors. The Federal Court determined that the employer contravened this provision by failing to explore voluntary redundancies and by only considering reducing the use of full-time and permanent contractors (when at the time of the redundancies there were no such contractors). The court upheld an order to reinstate the employees affected by those decisions.[6] ■

Key Takeaways

- A role may no longer be required, but this does not automatically give rise to an entitlement to redundancy pay.
- Consider all periods of continuous service, including prior casual employment where there was a transition to permanent employment before the redundancies transpired.
- Identify what may be "acceptable" alternative employment and understand the active role that employers must play in securing it.
- Factor into the decision-making and implementation processes any particular obligations binding on your organisation as a consequence of an applicable industrial instrument.

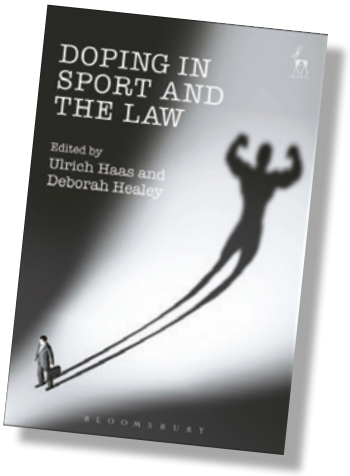
[4] *Lake Mona Pty Ltd T/A Cambridge Street Child Care Centre* [2015] FWC 4098 at [29].

[5] *FBIS International Protective Services (Aust) Pty Ltd v MUA and Fair Work Commission* [2015] FCAFC 90, at [18].

[6] *Port Kembla Coal Terminal Ltd v CFMEU* [2016] FCAFC 99.

PCS Published:

an extract from "Doping in Sport and the Law"



In this edition of Strateg-eyes we have extracted a portion of the chapter written by PCS Team Members Professor Joellen Riley (who is on a leave of absence during her term as Dean of Sydney Law School) and David Weiler (Associate).

In the lead up to the 2016 Olympics in Rio de Janeiro we witnessed a resurgence of controversy around doping in sport, including the International Olympic Committee (**"IOC**") considering banning the entire Russian team from competing in the Games. Ultimately the IOC decided to allow 278 of the 389 Russian athletes to compete. However, the seriousness of the allegations against the Russian Government highlights the need for a better understanding of the regulation of performance enhancing drugs in sport.

Closer to home, the majority of the 34 past and present Essendon Bombers players who were charged with using prohibited substances by the World Anti-Doping Agency ("**WADA**") following the 2013 AFL doping scandal are set to have their bans expire at the end of this year.

Doping in Sport and the Law[7] is an edited book that seeks to fill a knowledge gap in the academic literature surrounding these controversies with a range of experts in their respective fields of study contributing views. However, it is not just for lawyers or academics. Former President of WADA, John Fahey, AC, has described it as *"a significant resource for athletes and officials. It should certainly be read by sport medical officers, coaches and club directors."*

This chapter seeks to explore the complex nature of the employment relationship of professional athletes whose "work" falls under the authority of WADA and looks at the rights and responsibilities of both the employee and employer in these circumstances.

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Modern-Day Gladiators: The Professional Athlete Employment Relationship Under the World Anti-Doping Code

JOELLEN RILEY* AND DAVID WEILER**

Sport as Employment

[7] Edited by Ulrich Haas, Professor of Law at the University of Zurich, Switzerland and Deborah Healey, Associate Professor of Law at UNSW, Australia, published on 22 September 2016 by Hart Publishing. The book is available for purchase from Co-op bookstores and online at: http://www.bloomsburyprofessional.com/uk/doping-in-sport-and-the-law-9781509905881/

Today's football stars are like the gladiators of ancient Rome.[21] Matches between local teams, states and even countries occupy a great deal of contemporary society's time, effort and money. Lang Park in Brisbane, a host stadium for the annual State of Origin matches, holds approximately the same number of spectators as the Roman Colosseum did hundreds of years ago.[22] Like today's grand stadiums with their private corporate boxes, the Colosseum also fashioned artificial lighting and comfortable members' seating for society's elites.[23] Roman families kept terracotta lamps in the shape of a gladiator's helmet, like modern-day memorabilia. The popularity of contests created a major economic incentive to train and own gladiators.[24] The greater the potential profits, the greater the control exerted by the owners over the gladiators. The extent of this control was virtually limitless and amounted to supervision of *every aspect* of the gladiator's life: training, diet, accommodation and exclusive ownership of services. Although many gladiators were slaves or criminals, there were free men who took the gladiatorial oath, hence relinquishing nearly all of their legal rights as Roman citizens for the opportunity of fame, glory[25] and sometimes even fortune.[26]

The price modern-day gladiators pay for public acclaim is servitude not only to their club, but also to an insatiable public who claim an interest in their private lives. The special level of control asserted over sporting star employees was apparent when the Canterbury Bulldogs Club was successful in obtaining an injunction to prevent a famously talented footballer, Sonny Bill Williams, from breaking his contract to go and play another football code in the South of France.[27] A person less familiar with Australians' and perhaps the world's obsession with sport might have found it shocking that such a young person could have been so constrained in his life choices. An ordinary worker who wanted to change jobs and travel abroad would be unlikely to have been subjected to a five-year global restraint.[28] But Sonny Bill was important public property. The grounds given for the injunction included that his participation in the team contributed to 'the goodwill, patronage, membership subscriptions, pride, prestige and standing' of the Canterbury Bulldogs.[29]

[21] For a picture of the life of the gladiator, see Roland Auguet, *Cruelty and Civilization: The Roman Games* (London, Routledge, 1994); Alison Futrell, *Historical Sources in Translation: The Roman Games* (Oxford, Blackwell, 2006); Thomas Wiedemann, *Emperors and Gladiators* (London, Routledge, 1992).

[22] Wiedemann (n 22) 14, 21.

[23] Auguet (n 22) 35.

[24] Futrell (n 22) 141.

[25] ibid 135.

[26] Auguet (n 22) 164–65.

[27] *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822. Sonny Bill played Rugby League in Australia, but Rugby Union in France.

[28] The doctrine making certain unreasonable restraints of trade illegal would normally limit the duration and scope of a contractual restraint. See generally JD Heydon, *The Restraint of Trade Doctrine* 3rd edn (London, LexisNexis Butterworths, 2008). For a general discussion of injunctions enforcing restrictive covenants in employment contracts, see Joellen Riley, 'Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants' (2012) 34 *Sydney Law Review* 617.

[29] *Bulldogs Rugby League Club Ltd v Williams* (n 28) [45] (Austin J). For a discussion of the particular pressures on the restraint doctrine in the context of the 'mythological importance attached to club loyalty' in team sports, see Neil Bieker and Paul von Nessen, 'Sports and Restraint of Trade: Playing the Game the Court's Way' [1985] 13 *Australian Business Law Review* 180.

According to the court in *Patrick Stevedores (No 1) Pty Ltd v Vaughan*,[30] the employer's duty to take reasonable care to avoid exposing employees to unnecessary risk of injury 'arises from the degree of control that the employer exercises over the lives of the employees'.[31] Clubs—purporting to protect the public interest in well-managed and competitive sporting contests—certainly exert a jealous control over the on- and off-field activities of their player employees, so they can expect to be held to a high standard of care in their dealings with players. Reputational harm potentially influences clubs' ability to attract sponsorship dollars, a fact that was recognised when another celebrity footballer, Andrew Ettingshausen, brought a defamation suit after he was photographed without his permission in the shower. He successfully sued for substantial damages to his reputation on the basis that publication of the photograph imputed that he was a person unfit to be a role model for young players.[32] The significant risk of reputational harm means that sporting clubs can arguably claim a legitimate prerogative to control illegal out-of-hours conduct in ways that other employers may not be able to do.

In considering the employment rights and responsibilities of sports players and organisations, this chapter is framed around two essential questions:

— To what extent do employment law principles require players to take responsibility for their own actions in using illicit substances?
— In what circumstances will clubs bear responsibility for the actions of their coaches and sports clinicians?

These questions will be applied to two hypothetical sets of facts, each assuming that the players are paid professional athletes of a major club within a league (such as the NRL or the AFL) which is governed by ASADA and would be deemed to be employees for the purposes of employment law.

Hypothetical 1—Arthur: Arthur is a player who knowingly ingests a banned substance and/or commissions a third party, without the consent or knowledge of the club, to administer and/or supply banned substances. Arthur tests positive for the banned substance, is issued a 'show-cause' notice by ASADA and is ultimately suspended by the league for two years.

Hypothetical 2—Barry: Barry participates in training programmes that have been either explicitly or implicitly mandated by the club and under the supervision

[30] *Patrick Stevedores (No 1) Pty Ltd v Vaughan* [2002] NSWCA 275. This case concerned a supervisor on the docks during the Waterfront dispute.

[31] ibid [16] (Davies AJA). See also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 98 [276] (Hayne J): 'The common law imposes a duty on the employer because the employer is in a position to direct another to go in harm's way and to do so in circumstances over which that employer can exercise control. The duty is, of course, not absolute; it is the duty "of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury".' See also *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120 [324] (Jessup J) for confirmation of the employer's common law duty of care.

[32] *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 443, 445 (Hunt J). For commentary on this case, see David Rolph, *Reputation, Celebrity and Defamation Law* (Aldershot, Ashgate, 2008) 148–53.

of experts employed by the club. These include conditioning specialists, coaches, who may themselves be former stars and therefore have valuable knowledge and advice for current athletes, and the increasingly popular 'sports scientists'. Barry tests positive for a banned substance, is given a 'show-cause' notice by ASADA and is suspended by the league for two years.

Arthur: Player Misconduct

Arthur is what judges sometimes describe as the 'author of his own misfortune' and is likely to bear the full burden of his misconduct alone. His conduct is very likely to be a breach of his employment contract as well as a breach of ASADA's anti-doping rules,[33] and leaves him vulnerable to the potential termination of his contract.

Players are invariably subject to detailed player contracts, which stipulate obligations to refrain from any form of misconduct, in both general and specific terms. Players generally agree to refrain from any activity that would bring the club or the sport into disrepute, and particularly agree not to commit any drug-related offences and to submit to drug tests at the request of the club.[34] Debates occasionally arise when a player is found to have taken an illicit recreational drug, which the player contends neither unfairly enhances nor is detrimental to his or her sporting performance, and so falls outside of the scope of his or her contractual obligations to the club. Both effects of a drug are problematic: the first may signal cheating and break the rules of the competition, while the second may signal disregard of his or her obligation to maintain peak physical fitness. Each of these would be a breach of the player's obligations under his or her contract.

A player's contention that he or she used drugs recreationally in his or her own private time appeals to the argument that employees do have a right to a private life and should be free from scrutiny when they are relaxing on their own time.[35] This assertion has been relied upon to limit the extent to which employers in other industries can insist on drug testing. In industries where drug testing is tolerated

[33] Australian Sports Anti-Doping Authority Regulations 2006 (Cth) sch 1, cl 2.01A–B. For a discussion of issues arising from the application of the Code to team sports, see Victoria Wark, 'All for One and One for All … For How Much Longer? How WADA Could Tackle Doping in Professional Team Sport' (2014) 9(1) *Australian and New Zealand Sports Law Journal* 1.

[34] See, eg, the standard form Rugby League Player Contract posted by Fox Sports for recommended use by clubs: Rugby League Playing Contract cl 8.2, www.sportingpulse.com/get_file.cgi?id=99639.

[35] See generally Ronald McCallum, *Employer Controls over Private Life* (Sydney, UNSW Press, 2000). For sports writers' views on this debate, see Fridman, Davies and Amos (n 20); James Halt, 'Where is the Privacy in WADA's "Whereabouts" Rule?' (2009) 20 *Marquette Sports Law Review* 267; Paul Horvath, 'Anti-doping and Human Rights in Sport: The Case of the AFL and the WADA Code' (2006) 32 *Monash University Law Review* 357.

because drug use would raise serious safety concerns, employee representatives have often succeeded in arguing for some constraints. For example, urine testing has been successfully resisted by some unions in the mining sector on the basis that it is an unnecessarily invasive form of testing and will pick up earlier, pre-shift drug use. Oral swabs, which test for more immediate use, are permitted.[36]

Footballers, however, are likely to find that recreational drug use is a breach of contract whenever it occurs and is discovered because it brings into question the player's broad obligation not to bring the sport into disrepute.[37] Finding that a player's illicit drug use is a breach of his contract is not the end of the matter—the question of what sanctions will be applied arises. Not every breach of contract will justify termination of an employment contract and not every breach that justifies termination will result in termination, because these gladiators are often extraordinarily valuable talent. So long as they remain capable of winning competitions, clubs will want to keep them on teams. Even sponsors may be forgiving in time.[38]

Some contracts do not prohibit doping absolutely, but provide for sanctions if the athlete is convicted of doping or returns a positive sample.[39] Others by their terms prohibit doping absolutely. Typically, the fines for misconduct stipulated in player contracts operate as liquidated damages clauses, by which the players agree to be subject to a financial penalty for a breach of contract, even if they will keep their places on the team after their infringement of the rules. Of course, keeping a place on the team will be impossible where the illicit drug use also breaches the Code and attracts a compulsory ban, or if it attracts a custodial sentence under criminal laws.

[36] See, eg, *Endeavour Energy* [2014] FWC 198; *Maritime Union of Australia v DP World Brisbane Pty Ltd* [2014] FWC 1523.

[37] Likewise, drug testing of police officers is defensible because they bear the burden of public trust that law enforcement officers are law-abiding themselves: see *Anderson v Sullivan* (1997) 78 FCR 380, 398 (Finn J).

[38] Note the observations by Fridman, Davies and Amos (n 20) 72 on the differential treatment of 'fringe' and 'star' players.

[39] One might infer from such clauses that the employer is happy with doping as long as the athlete is not caught, because the activity of taking a prohibited substance as such is not prohibited.

Absenteeism and unfitness for work:

a "clean hands" approach

Chris Oliver, DIRECTOR **Michael Starkey,** ASSOCIATE

The Australian Human Resources Institute reported in March 2016 that the average Australian worker takes 8.8 days' personal leave each year, 41 per cent of employers believe unscheduled absences have increased in the last 12 months, and 64 per cent of employers believe unscheduled absences are too high in their workforce.[8] With the cost of unscheduled absences to the Australian economy estimated to be in excess of $44 billion each year (or $578 per employee per absent day),[9] the desire of employers to manage absenteeism and unfitness for work is understandable.

The management of these issues requires a measured approach that removes the immediate frustration managers often feel when confronted by an unscheduled absence, but nevertheless remains alive to the detrimental affect that long-term, unresolvable absenteeism can have on a business' bottom line. By noting the tips outlined in this article, business leaders can ensure their response to absenteeism facilitates getting the employee back to work, while at the same time positioning the business to make difficult decisions in a legally compliant way where this becomes necessary.

Planning your response to absenteeism

An integral part of planning is having a clear objective in mind. In managing workplace absenteeism, there are two distinct potential outcomes – either getting the employee back to work, or a termination of the employment.

Our recommendation is to always manage absenteeism with a view to getting the employee back to work. By adopting this approach, managers are far more likely to make instinctively better legal and strategic decisions, and should the time come to move towards a termination of employment, the business will be in a better position to do so without delay.

Legal compliance

In dealing with unfit workers and absenteeism, it is essential that managers understand the minimum entitlements employees have in relation to absences from work for illness or injury (and the related rights of an employer to ensure those entitlements are exercised properly).

- An employer owes a general **duty of care** to ensure, so far as is reasonably practicable, the health and safety of employees while they are at work.
- Full-time and part-time employees are entitled to access any accrued **paid personal leave** when they are unfit for work due to an illness or injury. An employee seeking to take personal leave must notify his or her employer as soon as practicable that they are taking leave, and must advise the employer of the period, or expected period, of the leave. If required by the employer, the employee must also provide evidence that would satisfy a reasonable person that the leave is being taken for a genuine reason (for example, a medical certificate).

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8 Australian Human Resources Institute, *Absence Management* (March 2016), <https://www.ahri.com.au/__data/assets/pdf_file/0007/57427/Absence-Management-Infographic.pdf>

9 AI Group, *Absenteeisn & Presenteeism Survey* (2015), <https://www.aigroup.com.au/policy-and-research/industrysurveys/absencesurvey/>

- It is unlawful for an employer to take any **adverse action** against an employee because the employee has accessed, or proposes to access, personal leave. However, an employer can require an employee to comply with the notification and evidence requirements outlined above, and, where appropriate, take disciplinary action for any failure to comply.
- An employer must not dismiss an employee because the employee is **temporarily absent** from work due to an illness or injury. The temporary absence protection will generally cease to apply to an employee once the employee has been absent from work for more than three months, or a total of three months over a period of 12 months.
- In circumstances where an employee is eligible to bring an **unfair dismissal claim**, if the employee's employment is terminated, an employer will have an obligation to ensure there is a valid reason for the dismissal and that the employee is afforded procedural fairness in relation to the dismissal.
- An ill or injured employee will usually be regarded as having a "**disability**" for the purposes of disability discrimination law. Employers have an obligation under disability discrimination law to identify and make **reasonable adjustments** for employees with a disability.
- An employer must not take action against an employee because the employee has a disability, unless the action is taken on the basis that the employee can no longer perform the **inherent requirements of the position**, and would not be able to do so even with reasonable adjustments.

Getting employees back to work

With the above in mind, let's take some time to consider the key steps to be undertaken in attempting to get an employee back to work.

Understanding the reason for absence

The key to solving a problem is understanding its cause. Understanding the reasons for an absence will place you in a better position to get an employee back to work, and help proactively prevent absences by eliminating or minimising those reasons if possible (particularly if the cause of the absence is not medical, but related to, for example, poor performance, lack of engagement, workplace stress, or bullying).

Determining what needs to be managed

Despite a worker's absence, business must go on. Managers need to consider and plan for a number of issues, including the use of temporary resources to manage workloads, how to manage communications (both with the absent worker and internally), and how to manage the cause of the absence. Managing the cause of the absence is likely to include seeking medical certificates, and asking the employee for more information if what is provided is not sufficient.

Identifying the inherent requirements of the role

Where an absence becomes long term, a business must ultimately turn its mind to whether the absence is likely to impede a worker's ability to perform his or her role on an ongoing basis. In doing so (and to ensure compliance with a number of legal obligations) reference must be had to the "inherent requirements" of the role.

The inherent requirements of a role are those that are essential (rather than incidental or peripheral) to it. When identifying the inherent requirements of a position, regard should be had to the terms of the employment contract, the tasks performed by the employee, the requirements of the particular employment (including any legal requirements) and the organisation of the employer's business.

Whether or not an employee can perform the inherent requirements of his or her role should be determined on the basis of the medical evidence. If the employee is unable or unwilling to provide sufficient medical evidence for this purpose, it will usually be appropriate to direct the employee to attend an independent medical examination (with a practitioner who will often be a specialist in the employee's injury or illness).

> ***The key to solving a problem is understanding its cause.***

Making reasonable adjustments

In determining whether or not an employee can perform the inherent requirements of his or her role, regard must be had to whether the role could be performed if "reasonable adjustments" were made. An adjustment will be considered a "reasonable adjustment" unless making it would impose unjustifiable hardship on the employer (for example, if making the adjustment would be intolerably expensive, impractical or time consuming).

Reasonable adjustments may include:

- providing flexible work hours;
- providing time off work (including access to unpaid leave) in order for the employee to recover where there is a prognosis that recovery is feasible;
- providing regular breaks for employees with chronic pain or fatigue; and/or
- purchasing desks with adjustable heights, installing ramps and modifying toilets.

More than one adjustment may be necessary, and more than one option may be available.

> *"In my opinion, matters such as limited working hours which gradually increase, alterations to supervision arrangements, modifications to face to face meeting requirements, amelioration of deadlines being too tight, changes in the kind of work being performed, minimising conflict situations, avoiding the need to lead teams, where all those matters are envisaged as necessary for a limited period of time of approximately three months, are adjustments which could have been made for [the employee] without imposing unjustifiable hardship on Australia Post."*
>
> ***Watts v Australian Postal Corporation [2014] FCA 370***

Terminations for unfitness for work

In the event that absenteeism is managed with the objective of getting an employee back to work, should a decision ultimately be made that the worker's employment is no longer tenable, the business will be well-placed to implement that decision quickly, and in a way that minimises legal risks. An employer must be able to demonstrate that any termination of employment based on unfitness for work:

- is based on sound medical evidence which demonstrates (at least) that the employee will not be able to perform the inherent requirements of his or her role for an extended period of time;
- has been implemented in circumstances where the employer is able to demonstrate that no reasonable adjustments could be made to allow the employee to perform his or her role (including adjustments which are no longer reasonable, for example, because of their ongoing cost to the business);
- has been conducted in a manner that is procedurally fair, including because the employer has advised the employee that it is considering terminating his or her employment on the basis of the employee's inability to perform the inherent requirements of the role and provided the employee with a chance to respond; and
- complies with any specific requirements under applicable policies or the employee's contract of employment. ■

Key Takeaways

1. Planning to get an employee back to work will help you make the best decisions, both strategically and legally.
2. Employees do not have a right to indefinite absence from work – difficult decisions may need to be made, and, if so, need to be based on sound medical evidence and follow fair procedure.
3. Don't go through the process alone – seek expert medical or legal advice as required.

End of year wrap up and looking ahead to 2017

Adriana Reina, SENIOR ASSOCIATE

2016 has once again provided a number of significant developments and challenges in labour and employment law that will have implications for employers. A tussle over labour laws in fact triggered the 2016 Federal election and changes in this area continue to be contested.

Courts and tribunals have handed down a series of important decisions in relation to a broad range of issues including sham contracting, reasonable notice and damages in racial discrimination matters. The Fair Work Commission ("**FWC**") has continued with its four yearly review of modern awards, finalising its review of a number of important issues such as annual leave, with other award variations still to come.

This article provides insight for employers into these and a range of other developments. This includes changes to the law that will impact on their businesses, their relationship with their employees and the lessons that can be learnt from the experiences of other employers. It also looks at what lies ahead for labour and employment law in the next 12 months.

What do the cases tell us? Significant case law developments

Set out **below** is a selection of cases from the past year that demonstrate the type of matters that are being litigated and the approach of the courts and tribunals to the issues raised.

(i) Sham contracting provisions – representations about work conducted for third parties

In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*,[10] Quest and Contracting Solutions purported to enter into a "triangular contracting" arrangement, in which Contracting Solutions engaged two workers as independent contractors and had them provide housekeeping services for Quest. Quest, who was previously the employer of the workers in question, represented to the workers that under this new arrangement they were performing work as independent contractors, despite continuing to *"perform precisely the same work for Quest in precisely the same manner as they had always done"*.

The Federal Court found, at first instance, that section 357(1) of the *Fair Work Act 2009* (Cth) (the "**FW Act**") would only be contravened by an employer's representation to an employee if it mischaracterised the contract that existed between the employee and the employer, and not the contract between the employee and a third party. However, the High Court held unanimously that Quest's actions amounted to sham contracting under s357(1) of the FW Act, focusing on the primary purpose of the provisions, being to prohibit the *misrepresentation* of the true nature of an individual's employment status.

(ii) Contracts of employment and implied terms

The concept of "reasonable notice" was explored recently in *Westpac Banking v Wittenberg & Ors*[11] in which a claim for reasonable notice was made despite the employment contracts of the affected employees containing express terms relating to notice of termination.

The employees contended that the express term regarding notice did not apply because, at the time of their termination, they were performing duties which were materially different to the duties they were originally engaged to perform. Hence, they argued that an implied term of reasonable notice could co-exist with a provision giving rights of termination based on specified periods of notice.

[10] [2015] HCA 45.

[11] [2016] FCAFC 33.

The Federal Court found that a term of reasonable notice could not be implied in these circumstances, as it would interfere with existing contractual rights and would be inconsistent with the express terms in the contract. Despite the lack of success in this particular case, contractual claims remain an important feature of litigated employment law matters.

(iii) Unfair dismissal update

The 2015-2016 Annual Report of the FWC shows that unfair dismissal applications constitute more than 40 per cent of applications made to it. Over the past five years unfair dismissal applications have been consistently around 14,700 annually.

Employees and illicit substance abuse

Unfair dismissal claims often involve questions of misconduct and/or breach of an employer's policies regarding appropriate behaviour. In *Gregory v Qantas Ltd*,[12] the Applicant was a Qantas pilot who made an unfair dismissal application following the termination of his employment that brought into question his behaviour while he was on a layover in Chile, including conduct that amounted to sexual harassment. Prior to the termination of the Applicant's employment he had undergone a drug test that revealed the presence of cannabinoids.

The Applicant lodged an unfair dismissal application, claiming he had not ingested or smoked cannabis, but that his drink had been spiked. On this basis he asserted that there was no valid reason for his dismissal, but he did not deny the incident of sexual harassment.

The FWC accepted Qantas' evidence and took the view that the Applicant had separated himself from his co-workers deliberately to ingest the illicit substance. The FWC also accepted that he was responsible for the sexual harassment as he made a conscious decision to ingest the substance that caused him to act in a reckless manner.

[12] [2016] FCAFC 7.

[13] [2016] FCCA 2852.

(iv) The anti-bullying jurisdiction

The anti-bullying jurisdiction has displayed a consistent trend since its introduction in January 2014, with fewer claims than initially anticipated and high settlement and withdrawal rates.

In the 2015 – 2016 reporting year, the FWC received 734 application for orders to stop bulling at work.

The overriding intent of the anti-bullying jurisdiction is to address the presence of behaviour that constitutes bullying. On this basis, it stands to reason that proactive steps taken by employers to address bullying may obviate the need for the FWC to make an order. For example, this year the FWC has refused to issue an anti-bullying order in the **below** circumstances:

- on the basis that there was no longer any risk of bullying, because the alleged perpetrators had since resigned; and
- against a high profile restaurant because management had implemented positive measures specifically to address the unreasonable behaviour in question.

(v) Damages awarded for racial discrimination

The highly publicised case of *Murugesu v Australia Post & Anor*[13] saw an Australia Post employee awarded $40,000 in general damages as compensation for contraventions of the *Racial Discrimination Act 1975 (Cth)* . The Applicant was subject to harsh racial taunts by a co-worker over a significant period of time.

The Applicant pursued a claim for general damages for pain, suffering, distress and humiliation in the sum of $100,000 and aggravated damages of $100,000 and/or exemplary damages.

The Applicant was awarded $40,000 in general damages, but no order for aggravated or exemplary damages was made despite the Court's acknowledgment that the conduct would have been lessened (and so too the damage to the Applicant) had Australia Post acted more promptly in addressing the Applicant's grievance.

The general damages awarded in this case are not of the magnitude awarded in the landmark case of *Richardson v Oracle Corporation*

Australia Pty Ltd,[14] which suggests that case is not as yet having the impact on the assessment of damages in discrimination and harassment matters that was anticipated. The decision also confirms that aggravated and/or exemplary damages are rarely awarded with respect to discrimination claims.

(vi) Immigration – foreign-national employees working on vessels in offshore activities

In the migration space, this year saw an end to the longstanding dispute between the Federal Government and the Maritime Union of Australia ("**MUA**") relating to the visa status that should apply to offshore workers in the oil and gas industries. The issue arose due to uncertainty regarding the extent of the "Migration Zone" as defined by the *Migration Act 1958 (Cth)* ("**Migration Act**") and its application to offshore resources industries, a question that has been in contention since 1982.

In 2012, the Federal Court ruled[15] that non-citizens employed on two offshore pipe-laying vessels were *not* within the "Migration Zone", thereby allowing the industries to continue to employ foreign nationals without visas.

Following this decision the former Labor Government introduced a Bill to amend the Migration Act and extend the definition of the "Migration Zone" to include any "offshore resource activity". This change would have the effect of imposing the requirement of a permanent visa, or a visa for this prescribed purpose, on foreign-national workers. This was not well-received and widely perceived as introducing a regulatory burden on the resources industry.

The Coalition government has sought to reverse this change in a number of ways. The latest of these has been via a determination made by Senator Michaela Cash under section 9A(6) of the Migration Act to remove the defined content of "offshore resource activity" from the definition of "Migration Zone". In response, the MUA and the Maritime Officers Union commenced proceedings challenging the validity of the determination.

The High Court unanimously found that the determination did exceed the limits of the Government's powers. The High Court ruled that the Migration Act only permits such exceptions for certain activities or operations, which did not apply to these circumstances. Further it found that the determination was made to undermine the intention of the 2013 amendments to the Migration Act, rendering it invalid.

As a result, non-citizens working in the offshore, oil and gas industries will be required to hold a permanent visa, or a visa prescribed for such work. To date, the visas used for such purposes are the Short Work (Skilled) (Subclass 457) visa (which provides up to four years of working rights), and, for short-term, one-off projects involving highly specialised workers, the Temporary (Short-Stay) (Subclass 400) visa.

The Modern Award Review

As part of the Modern Award Review that takes place every four years, the FWC has determined, or is in the process of determining, new award provisions on a range of common issues. The range of issues include:

- annual leave;
- annualised salaries;
- award flexibility;
- casual employment;
- family and domestic violence clause;
- family friendly work arrangements;
- part-time employment;
- payment of wages; and
- public holidays.

In addition to the **above**, the FWC is also reviewing penalty rates in a number of awards in the hospitality and retail sectors.

Below we have outlined the new award provisions in a number of key areas.

[14] [2014] FCAFC 82.

[15] *Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529.

Annual leave

The provisions with respect to annual leave have been varied in a number of awards. The changes include terms relating to excessive annual leave and cashing out annual leave.

Among other things:

- employees will now be permitted to request accrued annual leave to be paid out subject to certain eligibility requirements;
- employers are able to "direct" employees who have an excessive leave balance accrued to take annual leave, subject to certain requirements;
- employees may now request annual leave prior to accruing the balance required for the requested leave period; and
- employers are entitled to deduct an amount of annual leave taken but not yet accrued on termination of employment.

The majority of the variations to the annual leave clauses in the affected modern awards have been incorporated into the "current" version of the awards on the FWC website and took effect from 29 July 2016 (with other changes deferred until 29 July 2017). The FWC has developed template agreements for employers and employees to use in respect of cashing out agreements and agreements to grant annual leave in advance.

Time off in lieu

The FWC has reviewed the time-off-in-lieu ("**TOIL**") terms in a range of modern awards following applications to vary or insert TOIL terms in various modern awards as part of the Modern Award Review. A decision of the Full Bench on 8 July 2016 determined a redrafted model term for providing time off instead of payment for overtime.

A decision of the Full Bench on 11 July 2016 varied awards which either provided for overtime but did not give employees the option of taking time off instead of payment for working overtime and those that provided TOIL at "ordinary rates" (i.e. an hour off for an hour of overtime worked). On 22 August 2016 the FWC published a schedule of determinations varying 72 modern awards further to the 8 July 2016 and 11 July 2016 decisions.

A decision of the Full Bench of 31 August 2016 determined TOIL provisions in another 13 awards, including those in the maritime industry and the resources sector. On 16 September 2016 the FWC published a schedule of determinations varying a further 8 modern awards further to the 31 August 2016 decision.

Looking ahead: what's on the horizon for 2017?

While we have seen a number of changes flow through this calendar year, we have also seen a variety of proposed changes that may proceed in 2017. Some of the anticipated areas of change are set out **below**.

Further variations to model award provisions

- *Family violence:* The Modern Award Review has included submissions from the ACTU requesting 10 days of paid domestic and family violence leave across all modern awards. The Ai Group, in response, has requested that the proposed wording make more specific reference to the benefit for the victim in a domestic violence dispute. This is due to concerns that the domestic violence leave clause, as currently proposed, could result in the provision of entitlements to perpetrators as well as victims. The application for this amendment is listed for hearing from 14 November 2016 to 2 December 2016.

- *Family friendly working arrangements:* The Modern Award Review has included deliberations over the common issue of family friendly work arrangements, including claims relating to the right to return to part-time work or reduced hours following periods of parental or antenatal leave. A timetable for preparation of evidence and submissions has been issued by the Full Bench with a view to conducting a hearing into the matter in mid August 2017.
- *Annualised salary:* The FWC intends to review all annualised salary terms in modern awards following applications to vary or insert annualised salary terms in various awards as part of the Modern Award Review. The applications were referred to a Full Bench on 31 May 2016 and are listed for hearing from 5 December 2016 to 7 December 2016.
- *Casual and part-time employment:* The FWC is also reviewing the terms of modern awards relating to casual and part-time employment following applications to vary or insert relevant terms in various modern awards as part of the Modern Award Review. There are a number of common and award-specific claims to be reviewed and determined by the Full Bench, and these claims are at varying stages of the review process. Specific terms under review include those in relation to:
    - part-time minimum engagement;
    - part-time rostering provisions and patterns of hours;
    - part-time overtime provisions;
    - casual minimum engagement;
    - casual conversion; and
    - restrictions on casual engagement.
- *Penalty rates:* The FWC's review of penalty rates in the retail and hospitality sectors has been the subject of much public debate and a determination is likely to proceed in the New Year.

Other legislative developments

Bills to re-establish the Australian Building Construction Commission and to set up a Registered Organisations Commission have been introduced into Federal Parliament and will be on the legislative agenda in future parliamentary sittings. Strengthening the powers and the resources of the Fair Work Ombudsman has also been flagged as a priority. Additionally, changes to parental leave arrangements and further protections for vulnerable workers, including migrant workers, may also re-emerge as the subject of legislative change over the next 12 months. ■

> ***"As part of the Modern Award Review, the FWC has determined, or is in the process of determining, new award provisions on a range of common issues."***

Events

Bledisloe Cup

The PCS team once again hosted clients for the evening at the 2016 Bledisloe Cup at ANZ Stadium.

Events

PCS Greater Sydney Rams

For the third year in a row PCS was the principal sponsor of the Western Sydney Rams.

The PCS team, along with its clients, showed its support by attending nearly all games.

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