Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

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A message from our Managing Principal

Our first year of business at PCS has been, thanks to the support of our loyal clients and business partners, a huge success.

On a personal note, I have been very pleased that without compromising on the quality of our core legal services, we have branded ourselves as a more holistic provider of people management services and solutions. Unsurprisingly, the firm is conducting training for clients (particularly in the areas of behaviour and culture and performance management) at historically high levels.

We are also very pleased that we have been able to produce some thought-leading publications and webinars since our inception. In this edition of Strateg-Eyes we are delighted to have an article written by experienced IR consultant, John Linney, someone whom I have worked with over many years. John's piece on innovation is typically insightful.

My thanks also to Jenny Morris, (Director of Executive Women's Business, an organisation on whose Advisory Council I sit) who has graciously offered her perspective on "positive discrimination".

As always, I am open to any feedback on our firm and its services. We are here to be your partners in workplace law and are very much looking to consolidate our status as the first choice for HR when it comes to legal advice.

Joydeep Hor, Managing Principal

DO YOU ENJOY RECEIVING OUR Strateg-Eyes PUBLICATION?

We have been overwhelmed with the positive feedback received from our clients, and the business community at large, as to the calibre of our publications and events.

Given the high number of recipients of this publication, and consistent with the requests we have received from clients as to their desire to be able to make this publication available to colleagues, we will be reducing the number of print copies made of Strateg-Eyes.

Our next edition, which will be published in November, will be sent to you by email as a PDF file. Please let Sarah Lilley know by email at sarah.lilley@peopleculture.com.au if you wish to continue receiving Strateg-Eyes in hard copy.

Inside this issue:

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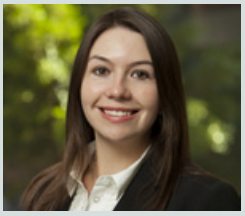
"Positive discrimination" and the forthcoming EOWA reforms



AMBER WOOD,
ASSOCIATE

Despite ongoing debate over how women can break through the infamous "glass ceiling", it is no secret that women remain severely under-represented at the executive level within Australian organisations.

This is reflected in the Australian Census of Women in Leadership, conducted by Macquarie University in 2010, which found that within ASX 200 companies, only 8.4% of those companies featured women on their Board of Directors.

Discussion regarding the appointment of women to Australia's top jobs is timely given the government's announcement in March of forthcoming reforms to the current *Equal Opportunity for Women in the Workplace Act* 1999 ("**Act**"), and the ASX's amendments to its Corporate Governance Principles and Recommendations (the "**Principles**") released in June 2010.

In light of these changes, there has been growing concern from senior management with respect to how these separate requirements can be fulfilled without committing what is sometimes known as "positive discrimination", that is, hiring women on the basis of their gender and not on their merits or suitability for a particular role. These concerns arise from a general misunderstanding as to the substance of the reforms, which do not specify any quotas or percentages of women employees to be appointed to boards or organisations. None of the reforms suggest that gender should override merit in recruiting the right candidate for your organisation.

EOWA reforms

The existing Act will be renamed the *Workplace Gender Equality Act* and will be introduced later this year. The substantial changes will mainly affect businesses with 100 or more employees and include the following:

- organisations must report on the gender composition of their organisation and their Board, employment conditions, and whether they have flexible work practices for men and women;
- instead of reporting on workplace equity plans, organisations must report on tangible outcomes achieved regarding equality within their workplaces;
- pay equity will be enshrined in the objects of the Act and organisations will be required to report against these objects; and
- reports on the organisation's compliance will be accessible to employees and shareholders.

To ensure compliance, the agency (which will be renamed the "**Workplace Gender Equality Agency**") will be given new powers to conduct organisational reviews and perform "spot-checks".

Non-compliant organisations will be named in Parliament and will be ineligible to receive government funded grants or industry assistance and will be unable to tender for government contracts.

ASX reforms

The ASX Principles apply to those companies publicly listed on the Australian Stock Exchange, but are not mandatory. However, where an organisation does not comply with the Principles, the organisation must disclose the reasons for its non-compliance.

The substance of the changes include:

- disclosure of the proportion of females employed at organisational, executive and Board levels in all annual reports; and
- the introduction of a publicly-available diversity policy which should include a requirement for the Board to establish "measurable objectives" for achieving gender diversity and how this should be annually assessed.

Compliance with EOWA/ ASX requirements and "positive discrimination"

While none of the changes prescribe any specified number of women who must be employed with an organisation or appointed to its Board, it is easy to see how the requirement

to create "measurable objectives" to achieve gender diversity could be inappropriately implemented by management, leading to potential discrimination complaints.

Measures intended to ensure equality across an organisation which discriminates against any particular group may be discriminatory, and organisations should proceed on a case-by-case basis, having regard to both the relevant state and federal anti-discrimination legislation.

Federal legislation

At federal level, organisations looking to implement gender diversity measures are largely protected by section 7D of the ***Sex Discrimination Act*** 1984 ("**SDA**"), which states that special measures taken "for the purpose of achieving substantive equality" (including between men and women), will not be interpreted as discrimination.

In relation to individual recruitment decisions, however, management should remain mindful of the broad obligations within section 14 of the SDA which precludes discrimination on the basis of sex in relation to virtually all aspects of employment including recruitment, demotion and terms and conditions of employment.

State legislation

The ***Anti-Discrimination Act*** 1977 (NSW) ("**ADA**") applies at state level in NSW. Section 25 of the ADA largely reflects section 14 of the SDA. However, there is no blanket provision similar to section 7D of the SDA which allows for exceptions regarding achieving substantive equality. Instead, organisations wishing to implement specific measures benefitting one sex over another must first apply to the President of the Anti-Discrimination Board under sections 126 and 126A of the ADA or risk possible discrimination claims.

In Victoria, the recently enacted ***Equal Opportunity Act*** 2010, does not contain a uniform provision similar to section 7D of the SDA, but it does allow exceptions to discriminatory behaviour under section 26 in circumstances where a person's sex is a "genuine occupational requirement", where a particular physical characteristic other than strength or stamina is necessary for a role. In contrast, section 105 of Queensland 's ***Anti-Discrimination Act*** 1991 provides an exemption which allows a person to "do an act to promote equal opportunity for a group of people with an attribute", providing that the act in question is not inconsistent with the legislation. The exemption is only available until the equal opportunity purpose has been achieved.

As part of its broader service offering, PCS regularly assists clients in auditing and effecting change within corporate culture. We would be happy to partner with you to identify areas for improvement in gender equality within your organisation. ●

Commentary on positive discrimination from Jenny Morris, Executive Women's Business

As CEO of the Orijen Group, Jenny Morris is focussed on actively addressing the changing landscape for corporates through the Executive Women's Business Pipeline Programme, creating a confidential and professional environment for women to mentor and support each other to help transition to more senior roles and board opportunities.

THE BUSINESS CASE

Research from a large range of institutions consistently shows a direct link between corporate performance and gender diversity. Companies with the highest number of women in senior management have a higher return on investment (as much as 36%) than those with the lowest level of female representation.

Successful companies already recognise that the price of ignoring gender diversity is high: lost potential, opportunities and credibility. Yet, more than 30 years after women began entering the workforce, women are still under-represented in leadership positions and we still labour under the assumption that affirmative action is discriminative; that diversity is still a gender and not a sustainability issue.

The EOWA reforms are welcome, but if we are to achieve sustainable change we need to have conversations that emphasise both diversity and inclusion.

Inclusion is the idea of encompassing all groups, whether defined by gender, ethnicity, culture, age or some other demographic grouping.

Diversity goes beyond inclusion to actively promote and pursue a workforce that represents all segments of society.

Who owns LinkedIn contacts?

TIM WILSON,
ASSOCIATE

LinkedIn is the world's largest online professional network. Founded in 2003 in California, LinkedIn now has over 100 million members worldwide, two million of which are in Australia. One source cites the professional networking phenomenon as gaining a new member every second.

This professional networking platform has created significant waves in the business world and is seen by some as the future of professional recruitment and business development. However, as with everything to do with social networking, the opportunities are accompanied by pitfalls.

This article examines these issues. It also examines the implications where an employee uses LinkedIn to inform his/her contacts that they have left their employer and/or moved to a competing business and "*solicits*" those contacts to follow the employee to the competing business.

Opportunities

LinkedIn's functionality is already extensively utilised in the recruitment space, particularly in identifying and screening candidates. A 2011 survey in the US found that 73 out of 100 Fortune 500 companies had used LinkedIn as part of their recruitment processes.

Increasingly, our clients are recognising the value of LinkedIn as a professional networking and business development tool. Increasingly, employees in professional industries are expected to seek out networking and business opportunities. The value of LinkedIn is that it provides a convenient and efficient forum in which professionals can connect. A presence on LinkedIn and content posted to a page can extend exponentially further than a standard mail-out list because of the largely "*open*" nature of LinkedIn pages and its system of first, second and third degree contacts.

Issues

The quasi-private / quasi-public nature of LinkedIn presents a number of potential stumbling blocks for employers.

(a) Who owns LinkedIn contacts?

As the value of LinkedIn contacts has become apparent, employers have started to ask who actually owns these contacts. A recent example from the Sydney recruitment market illustrates the difficulties around this point.

Earlier this year, a senior Sydney-based recruitment consultant ("**Recruiter**"), left a large legal recruitment firm ("**Firm**"), to move to another high-profile legal recruiter. Reports of the dispute indicate that:

- over a period of years (including during the Recruiter's employment with the Firm), she developed an extensive network of LinkedIn contacts;
- some time after the Recruiter left the Firm, she updated her profile to reflect her new employer and she began updating her employment history on her LinkedIn profile;
- the Recruiter's employment contract with the Firm included a six-month post-employment restraint against soliciting clients of the Firm or using its intellectual property (but did not specifically deal with LinkedIn or social networking); and
- when the Firm became aware that the Recruiter had been contacted by a candidate in her network, it commenced Local Court proceedings for damages and to obtain an injunction.

This case is yet to be determined.

These factual circumstances are not unique and raise a number of questions, including:

- Whether all of an employee's LinkedIn connections are the confidential information or intellectual property of the employer. If not, can a distinction be drawn between connections that were obtained in the course of employment and those that were obtained privately?

- Is there any difference between contacting a client through LinkedIn and any other form of direct communication? What about posting an update?

(b) Confidential Information / Intellectual Property

Whether or not LinkedIn connections are confidential information and any different from client and supplier lists is yet to be determined by the Courts. However, the answer may depend more on how those connections were formed, rather than whether they are recorded in LinkedIn, or elsewhere. That said, some connections might start as private relationships and later become business relationships or vice versa. For this reason it may be more useful to think about the ownership of a client relationship, rather than the individual relationship between an employee and client.

In a 2008 UK High Court case, Justice Richards made a number of instructive comments concerning whether LinkedIn contacts could be confidential information. In that case, Mr Ions, a mid-level recruitment consultant with Hays Specialist Recruitment, announced that he was leaving Hays to set up his own recruitment consultancy. Prior to leaving, Mr Ions sent invitations through LinkedIn to at least two of Hays' candidates to join his network. At least one of these candidates responded by accepting the invitation and asking Mr Ion to secure them suitable employment.

Although the case was about whether pre-trial discovery should be ordered, Justice Richards examined whether Mr Ions' conduct could amount to a breach of his employment obligations (including whether he had misused Hays' confidential information). Mr Ions argued that he had been encouraged by Hays to form connections through LinkedIn and that once his invitations were accepted, the client information was posted to a widely accessible page and ceased to be confidential. Justice Richards disagreed, arguing that if the client information was confidential, by uploading the information to LinkedIn Mr Ions had transferred Hays' information to a site where the information would be accessible to him after he ceased employment. This was the potential breach, even if the confidentiality of the information was later lost.

In the case of the Sydney recruiter discussed above, part of the Recruiter's defence appears to be that she established most of the connections in her personal time as part of her involvement in the law, and that many of the connections pre-dated her employment with the Firm and her use of LinkedIn. The Firm's response was that the information on LinkedIn was capable of being the intellectual property of the employer, "***just like any other medium you can record or store information on***". Following Justice Richards' reasoning, a court may be convinced by this argument in future cases.

(c) Solicitation

The Courts have a great deal of experience in determining whether the post-employment conduct of employees amounts to solicitation. However, it remains to be seen whether direct communications through social networking platforms and undirected announcements (such as postings or updates) will be treated any differently.

A 2010 Minnesota District Court case provides an interesting illustration of how solicitation can play out through LinkedIn. In that case, an IT recruiter contacted former colleagues and clients through LinkedIn to invite them to the recruiter's new firm. The recruiter's contract of employment contained 18-month post-employment, non-compete and non-solicitation obligations. This dispute was settled on the condition that the recruiter provide broad restraint undertakings for a period of up to 14 months.

Commenting on this case, a US practitioner made the refreshingly common-sense statement that, "*if you can't call someone and say it, and you can't send a letter and say it, then you shouldn't be doing it on LinkedIn*". As occurred in this case, LinkedIn may provide useful evidence of solicitation occurring.

(d) Other issues

In recent years employers have had to re-examine how much control they attempt to exercise over employee use of social networking platforms at work. This has given rise to a myriad of issues, including employee privacy and appropriate use. Although most often associated with Facebook, these issues apply equally to LinkedIn.

Additionally, the nature of LinkedIn exposes employers to a potentially greater risk that their employees will be seen to be acting on behalf of the employer or expressing its views. There is also scope for confidential or commercially sensitive information to be widely disseminated.

Guidance

How then do employers reap the rewards of LinkedIn and other social networking platforms whilst minimising their risk exposure?

Some companies in the US are requiring exiting employees to "un-friend" from Facebook and remove from their LinkedIn network contacts that are connected with the company. However, this may be perceived as a difficult and extreme approach.

Employers should check their employment contract templates and ensure that they provide adequate protection. It is not uncommon for senior employees to be employed under unwritten or out-dated contracts or contracts that do not contain any restraints. Likewise, most employers have yet to update their template contracts to respond to the rise of social networking. This could include broadening the definition of confidential information or even solicitation (for example, to extend to employment candidates). Ultimately, whether an employer takes these steps may depend on how harmful it would be were an employee to take their LinkedIn connections with them. Likewise, any such provisions must be tailored to the particular employee to improve the prospects of the restraints being enforceable.

Employers should be proactive about dealing with social networking use in all aspects of the workplace. As discussed above, employee use of LinkedIn raises many of the same issues as Facebook and other platforms. Employers should consider whether their existing policies adequately deal with these issues and whether they need to implement a social networking policy.

Now is the time to ask whether your organisation is appropriately equipped to respond to the many challenges social networking sites can provide.

PCS has a number of templates available for its clients in relation to social media policies and has developed cutting-edge definitions of confidential information for use by its clients in employment contracts. ●

What's new about innovation?

JOHN LINNEY, LINNEY STRATEGIES

John Linney is the Director and Principal of Linney Strategies, a boutique consultancy that specialises in forging 'enlightened business solutions through people'. The company provides advice on workplace relations and business restructuring to many of Australia's leading corporations."

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According to Peter Drucker: "Innovation is organised, systematic, rational work". This article is about innovation as a business priority – a way to enhance organisational value and business growth by creating new systems, services or products through the harnessing of the firm's organisational knowledge in more efficient and effective ways.

No standard blueprint exists for innovation, but with the evidence being irrefutable that considerable benefits flow from the inculcation of a culture of innovation, it is perplexing to me that the opportunity seems more a case of hit-and-miss in many businesses. It takes courage to be innovative and any opportunity brings with it inherent risks.

Innovation is a crucial source of productivity growth. Over recent years in Australia, there has been considerable debate over our productive performance as a nation. When we look at it from business to business and workforce to workforce, the perspective I take is that innovation is the enabler and productivity is the outcome. For innovation to be an effective enabler, you need to create an environment, a capability, a mindset that is supportive of and conducive to innovation as integral to the way business is done. This requires a longer term view of the journey the business is embarking on and a capacity to articulate the benefit that will result.

Innovation is hard work and it doesn't exist in a vacuum. Innovation is delivered through people. People have doubts, fears and prejudices. Successful innovation requires an understanding of the forces and ramifications brought about by the implementation of change. Innovation is about change at two levels – strategic and tactical. Value is created for the organisation at these two levels.

Strategic change is the change required to create an environment conducive to innovation triggered by a company's conscious decision at senior management level to promote innovation as a business priority. The second level is about the changes that the innovation creates that need to be executed and made effective. Here, value is created each time there is something new created and systemised. I describe this as tactical change. Both of these change dimensions are integral to the successful creation of an innovation culture.

The strategic dimension: a conscious decision to innovate

What is required to deliver innovation? What are the critical managerial factors that impact and influence an organisation's innovation capability?

In a joint study produced by the Australian Business Foundation and Deloitte entitled "The Reality of

Innovation Unzipped", a key finding was that innovation is worthwhile only if executed as a disciplined, structured and sustainable process. A conscious decision needs to be made by senior management and communicated effectively across the organisation that innovation is a priority and is supported in tangible, visible ways. It needs to be evident in the behaviour and actions of senior leaders that the commitment, focus and level of resolve characterises innovation as a sustainable investment by the business. Ongoing leadership is critical to ongoing innovation.

Innovation needs to be hard-wired – there needs to be an innovation framework which explains the constituent elements of the strategy including the resources that will be committed and the supporting infrastructure that will contribute to the success of the strategy.

There needs to be a clear understanding by the workforce of the rationale behind the adoption of a strategy of innovation and how it is linked to better business outcomes and business growth. The strategy will incorporate a realistic assessment of the current situation, a coherent vision of the future and an explanation of the transition required to bridge across to the desired end objective.

These elements, when extrapolated at the tactical level, will also support good decision making around prioritising the innovations that are eventually accepted and executed.

People need to be given the freedom to be innovative. This entails the freedom to bring ideas forward in the expectation that they will be given due and balanced consideration. It entails the freedom to experiment without adverse repercussions. It entails the freedom to challenge the status quo as part of the way business is routinely conducted.

Innovation cannot, however, detract from the importance of existing disciplines around processes and costs. It is the mutually beneficial co-existence of these two (potentially conflicting) elements that has to be considered as part of the innovation strategy and incorporated in the innovation culture and framework.

The tactical dimension: making innovation deliver

The tactical level of innovation is about developing the innovative ideas, assessing their value, and making them happen. Most innovations are executed in the face of uncertainty and the major barriers to innovation at the enterprise level are internal.

In my direct consulting experience across a diverse range of corporate environments, the capability of managers with a direct interface with employees is a pivotal factor in successful business initiatives. Yet all too often they are under-resourced, undervalued and under fire. Employees will make sense of a significant change by how that change is processed and dealt with by their manager. How does the manager in word and deed demonstrate his support for the new business direction and how does he identify and help remove barriers that will impede success?

Fear is the other side of the coin to innovation. How will these changes affect me? What am I expected to do differently? Amongst employees, factors that can erode the effectiveness of the change include a perceived lack of appreciation of the effort being applied to make the change work, major accomplishments along the way not recognised or celebrated, limited communication on the "why" and the "what", inadequate skill-building for managers, and lack of presence of senior management to provide answers and reinforce the objectives.

The more ingrained are the habits and routines underpinning existing organisational behaviour, the higher the resistance to change. In an innovative environment, everyone must display the leadership qualities appropriate to their level and purpose – leadership of thought, leadership of behaviour, and leadership of business practices.

Communication and engagement are essential for any change to be effective. Be clear and straightforward on what you are communicating. Be very clear on your purpose. We still don't have the execution genie tamed. There are still too many projects which run under scope, over time and over budget. Do we have the right execution model and the right people working on them?

Dealing with the constraining factors

Internal roadblocks can derail innovation. The most common constraining factors in my experience are:

- lack of a clear overarching strategy;
- poor communication allied with an under-appreciation of the human side of innovation;
- superficial encouragement of idea generation with no clear method for ideas to be tabled, evaluated and implemented;
- battles over turf and allocation of resources, political game-playing and lack of cooperation; and
- failure to render appropriate resources, time and support.

The challenges that businesses face today demand a concentrated focus on innovation. Organisations that I have been associated with that have unleashed the creative potential of its workforce through a culture of innovation have delivered significant returns to shareholders and have markedly improved their competitiveness. ●

Adverse action claims – the practical impact and consequences

MARIA CRABB,
ASSOCIATE

It has been over two years since the commencement of the *Fair Work Act 2009* (Cth) and the adverse action provisions. While at the time of their introduction many commentators commented on their "novelty" and their potential breadth, these provisions amalgamated a number of the rights already contained in the *Workplace Relations Act 1996* (Cth) including the unlawful termination provisions.

These provisions protected employees from being dismissed due to a temporary absence from work, trade union membership, making a complaint against an employer alleging violations of workplace laws and on discriminatory grounds.

The adverse action provisions seek to protect employees in similar circumstances, not only from termination of their employment, but from other "adverse treatment". The adverse action provisions also expand the categories of protection to employees who have exercised their "workplace rights".

An employee has a workplace right if they are:

- entitled to the benefit of and/or have a role or responsibility under a workplace law;
- able to initiate or participate in a process under a workplace law; or
- able to lodge a complaint or enquiry in relation to their employment or to seek compliance with a workplace law.

Fair Work Procedure

The adverse action provisions provide employees with a quick and informal way to commence legal proceedings. PCS has seen a trend of employees earning over the unfair dismissal threshold attempting to use "adverse action" as they would unfair dismissal, if they had access.

If the matter relates to the dismissal of the employee, the parties must attend a conciliation hearing before a member of Fair Work Australia. If the asserted "adverse action" does not relate to the termination of employment of the employee, there is no obligation for the employer to attend the conciliation. This has the effect of frustrating the employee's claim and requiring them to pursue their claim in the Federal Magistrates Court ("**FMC**") (or the Federal Court of Australia) without the benefit of a prior informal conciliation.

Whether the matter will resolve at conciliation or not, is largely dependent on the employer's willingness to participate actively in the conciliation. It appears that some employers and their advisers have recognised that there is a tactical advantage for them in the process i.e. if the matter is not resolved at conciliation, an employee must commence formal court proceedings at the FMC. Whereas in the unfair dismissal jurisdiction, when a matter cannot be resolved by conciliation, Fair Work Australia will arbitrate. This is less formal than a FMC hearing.

Commencing proceedings in the FMC can be a costly step, and not one which all employees can afford. This is reflected in Fair Work Australia's yearly statistics which demonstrate that only 5% of matters in 2009/2010 proceeded to the FMC.

Although this may provide some tactical advantages to employers at this point in the process, recent cases suggest that breaching adverse action provisions can have serious consequences for employers, which will encourage more employees to commence formal court proceedings.

Recent decisions

The first successful adverse action case was decided by the Federal Court in 2011, following an appeal from the first instance decision in the FMC that found that Bendigo TAFE had not engaged in adverse action. Up until this time, employers had little guidance about what risks they could face in the event adverse action proceedings were brought against them.

Barclay v Bendigo TAFE

A teacher acting in his capacity as a union official sent an email to all union members at Bendigo TAFE. The email stated that the teacher was aware of serious misconduct engaged in by un-named employees at Bendigo TAFE. The CEO of Bendigo TAFE asked the teacher to "***show cause***" as to why he should not be disciplined for failing to report the misconduct. The teacher alleged that Bendigo TAFE had engaged in adverse action against him because of his union officer role, industrial activity and workplace rights.

The Court found that Bendigo TAFE had engaged in adverse action as the email the employee had sent amounted to the employee engaging in industrial activity, and the Court found that the employer's actions were taken because the employee was a union officer, even though Bendigo TAFE stated the employee was disciplined for his conduct as an employee.

The Federal Court determined that the test in deciding whether adverse action was taken cannot be purely subjective. The objective circumstances in which the decision was made have to be examined to determine the real reason behind the decision. This resulted in Bendigo TAFE being unable to show that but for the employee's union membership the employee would not have sent the email.

This case puts employers on notice that they need to exercise a higher degree of caution if they are contemplating action against an employee in response to anything they have done or said that could be deemed to be in their capacity as a union official or interpreted as taking part in industrial activity.

This case highlights the conflict between the employer's prerogative to discipline an employee for conduct at work and manage the workplace, versus the employee having another loyalty to observe which, in this case, trumped the employer's ability to discipline the employee.

The Federal Court also reiterated that the burden of proof in adverse action matters is on the employer to show that the actions taken by them were not as a result of the employee exercising their workplace rights (or some other protected condition).

ALAEA v Qantas Airways

An engineer was posted to Japan for six weeks. On his return, he claimed payment for additional hours worked, including night shift work. The engineer unsuccessfully sought to recover his entitlements through his line manager. The engineer lodged a dispute under the EBA dispute settlement procedure, which also gave him the right to be sent overseas on a posting. Following the dispute being raised, the manager suspended all overseas postings from the Brisbane site where the engineer worked.

Qantas was found to have taken adverse action against the engineer by coercing the engineer not to exercise his workplace right under the EBA. Furthermore, Qantas and the manager took adverse action by suspending all overseas postings from Brisbane where the engineer was based.

This case highlights how the removal of a benefit can amount to adverse action, even though in this case the engineer was unlikely to be posted overseas in the foreseeable future as he had just returned from a posting in Japan.

A decision as to the pecuniary penalties, if any, to be imposed on Qantas is yet to be handed down. It is also understood that Qantas has appealed the decision.

ALAEA v International Aviation Services Assistance Pty Ltd ("IASA")

The employee was an aircraft maintenance engineer who performed work for various airlines including Garuda. In April 2009, the employee had concerns about his overtime and roster. The employee, accordingly, raised a complaint with the IASA management team.

After the employee made the complaint, his performance was reviewed and his employment was terminated. The employee commenced unfair dismissal proceedings and was reinstated.

However, following the employee's reinstatement, the IASA management gave a negative assessment of the employee to Garuda. As a result, Garuda did not allow the employee to maintain his engineering qualification. The loss of this qualification resulted in the termination of his employment.

The negative comments about the employee were made to Garuda by a manager who had not known the employee for a prolonged period of time, and were based on hearsay.

The reverse onus of proof, as discussed in the ***Bendigo*** decision, was reinforced by the Federal Court in this case. The Federal Court was of the view that the employer was not able to show that the adverse action was not taken because of the employee exercising his workplace rights. There was no evidence around the decision-making process that led to the termination, and why a negative report had been given to Garuda.

The Federal Court therefore found that IASA had engaged in adverse action by victimising and dismissing the employee as a result of him raising his concerns about his pay. The adverse action also included IASA making a negative assessment about the employee and sending it to Garuda.

The Federal Court awarded the employee over $76,000 in lost wages together with $7,500 for hurt and humiliation. This is an important decision as it exposes employers to compensation for injury to feelings, a compensatory element not awarded in unfair dismissal cases. Employees may now opt to commence adverse action proceedings instead of unfair dismissal proceedings, as there is no limit to the compensation that may be awarded, together with the opportunity to argue that they are also entitled to damages for hurt and humiliation.

Stephens v Australian Postal Corporation

The employee was a driver on a fixed-term contract whose employment was terminated after making a workers compensation claim. Prior to the termination, the employee had been discussing the progress of his workers compensation claim with his manager. Due to the discussion taking place, the employee did not attend a customer site to make a pick-up.

When the employee returned to work an altercation occurred with his supervisor. This resulted in the employee using obscene language.

The following day the employee's manager invited the employee to a meeting. The employee was asked to explain why he swore at his supervisor and why he had failed to attend a customer site for a pick up. The employee also alleged that at the meeting the manager had made discriminatory comments about the employee's injury. The employee was terminated the following day.

The employee claimed that his employment had been terminated due to him:

- exercising his workplace right to lodge workers compensation claim;
- exercising his workplace right not to be discriminated on the grounds of his disability; and
- due to his temporary illness.

The FMC found that Australia Post had engaged in adverse action against the employee because he had exercised his workplace right to lodge a workers compensation claim and on the grounds of his disability. Australia Post had overstated the seriousness of the alleged misconduct to hide the real reason behind the termination. Further, no contemporaneous notes or evidence were adduced by Australia Post relating to the alleged incident and disciplinary action taken. This lack of documentation did not assist the employer in showing that the employee had been dismissed for reasons other than him exercising his workplace rights.

The FMC ordered that the employee be reinstated and that the continuity of his employment be preserved. A further hearing is scheduled to deal with whether the payment of pecuniary penalties are to be imposed on Australia Post.

Consequences for employers

These decisions highlight the risks employers face if they are found to have breached the adverse action provisions. The Courts will uphold employees' rights, and their consequent protection. As such, employers must take adequate steps to prevent their actions and decisions being challenged. Employers should:

- ensure managers and decision-makers are familiar with the adverse action provisions and protected grounds;
- maintain complete and accurate records of complaints, investigations and disciplinary action that demonstrate sound reasoning behind the action taken;
- remember that having a valid reason to discipline an employee does not protect them from an employee arguing that they have been subjected to adverse action;
- review disciplinary policies, procedures and practices to ensure managers are aware of the obligation to provide reasons for their decisions; and
- ensure all grievances raised by employees are taken seriously and dealt with promptly, and the decision makers should ensure that employees are not victimised as a result of raising a grievance. ●

A WORD ON OUR WEBINARS

In February this year, PCS commenced a series of monthly webinars so as to allow our busy clients to participate in our education programs without leaving their desks. Thank you to all who have participated to-date and for the overwhelmingly positive feedback. The participation fee of $75 (inc GST) per person per webinar is waived for any business or individual who has paid an invoice issued by PCS.

Our next webinar will take place on **Tuesday, 13 September 2011 at 12noon AEST** on *"Best practice in workplace investigations"*. We encourage you to visit our website for more details or contact Sarah Lilley for a schedule of PCS' events in 2011. ●

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If you are interested in receiving regular updates and invitations to our events please register on our website – www.peopleculture.com.au – or email our Practice Manager, Sarah Lilley, directly at sarah.lilley@peopleculture.com.au. ●

Your *Partners* in Workplace Law