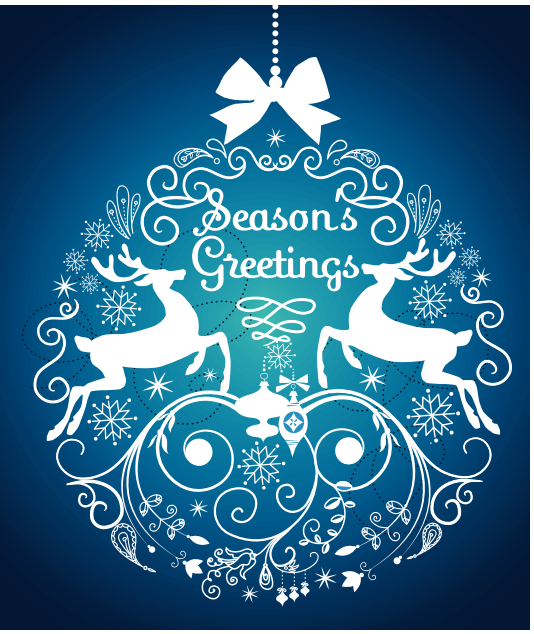
Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

ISSUE 5 | DECEMBER 2011



A message from our Managing Principal

On behalf of the PCS team, I wish you and your staff the very best for the festive season and the year ahead.

This is the fifth edition of "Strateg-Eyes: Workplace Perspectives" and we continue to see this publication as an important contribution to thought leadership in workplace relations law and strategy. PCS has, of course, invested heavily in client education through this publication, our monthly webinars, our bi-annual client functions and ad hoc alerts. We welcome any feedback or suggestions on topics to be covered or alternative ways we can assist, you, our valued clients, to be better informed.

As PCS expands over the next few months we continue to be boosted with our service capability and our depth. We have already serviced over 300 employers around Australia in less than 18 months of business and more importantly, nearly all of those clients have "kept coming back" which is so important for a relationship-based law firm.

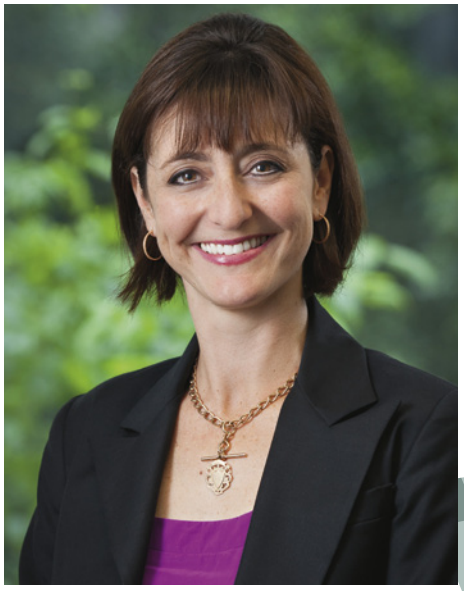
2012 will be a bumper year for us with even more innovation in our service offerings and value-added services.

Joydeep Hor, Managing Principal

PCS welcomes Kathryn Dent

PCS is delighted to welcome Kathryn Dent as a Director. Kathryn has most recently been on a period of parental leave but until then was a partner in the workplace relations section of a national commercial law firm.

We are looking forward to introducing Kathryn to our clients and capitalising on her tremendous employment law capability.



Inside this issue:

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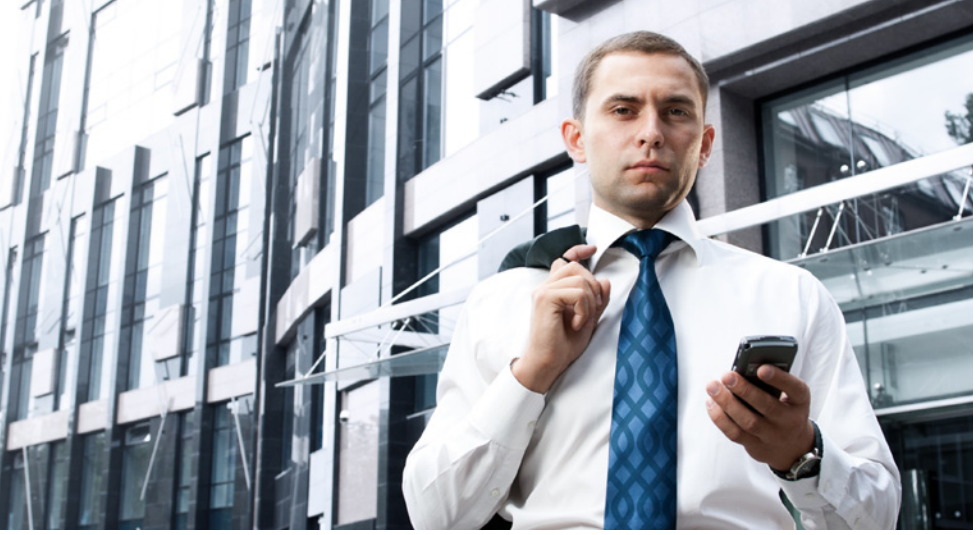


Don't let your staff roast you online this Christmas

The following article is a modified version of a media release issued by PCS on 30 November 2011.

With end-of-year functions in full swing, employers must be mindful of the significant but as yet little understood dangers presented by social media.

Employees are often unaware of the extent to which their interactions on social media can damage their employer's brand and result in legal ramifications, whether it is at work, at a staff Christmas event, or even in their own time (such as after-parties).

Employers must realise that the biggest reputational risks social media presents their businesses are not associated with 'where' or 'how' employees interact. Rather, it is with whom they are sharing those interactions. Essentially, the ramifications of what happens within the confines of staff events, such as Christmas parties, are not limited to who is attending.

By way of example, former Canberra Raiders NRL star Joel Monaghan was recently forced to resign from the team within 48 hours of lewd pictures of him taken at a team end-of-year celebration being released into the public domain on Twitter.

Given the increased connectivity social media provides between fellow employees, friends and even strangers, anything posted online, regardless of it being posted at a work event or using work hardware (such as Blackberries or iPhones), is accessible by anyone else on social media.

Corporate brand damage arising from social media is most commonly associated with disparaging comments, photos, videos or blogs published by an employee, or the disclosure of confidential information or trade secrets. Contemporaneous photos posted via social media sites may also become relevant evidence in court cases that address behaviours that have transpired at these events.

Another example is Olympic swimmer Stephanie Rice who lost at least one sponsorship deal and may have suffered irreparable damage to her reputation following a controversial 'tweet' which was derogatory to homosexuals.

Ultimately, employees are accountable for 'private' Facebook or Twitter comments made in their own time, especially when the comments refer directly to the employer, or where the employer may be held liable for offensive comments.

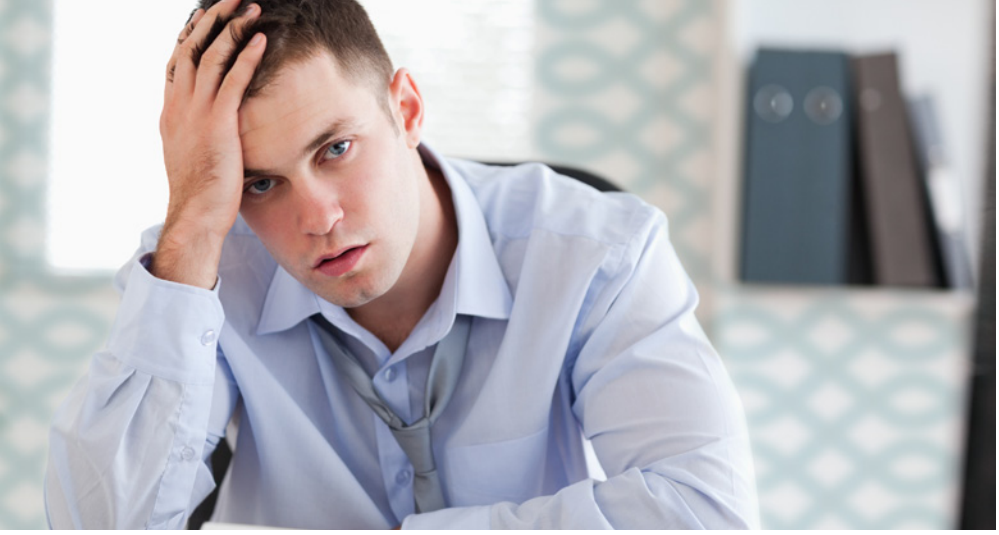
PCS recommends employers assess the ways that their staff use social media and review social media policies currently in place and, in particular, how broadly these policies extend.

A thorough social media policy is a 'must-have' for all organisations and should be regularly updated so it remains relevant as it is an area which is constantly evolving. Staff should also receive training about the policy.

JOYDEEP HOR,
MANAGING PRINCIPAL

Key steps

- Consider your organisation's current online presence and the ways in which your employees use social media both in and outside of the workplace.
- Review any social media policies currently in place and consider how far these policies extend. Ensure that any social media policy is robust and reinforces other policies, particularly in relation to sexual harassment, discrimination, bullying and OH&S.
- Ensure that the policy is explained to employees, preferably with an acknowledgement by them that they have read and understood the terms of the policy and are familiar with it.
- Staff should also receive training regarding the policy - this should include education and awareness about social media as it is a constantly evolving area.
- Regularly update the policy so that it remains relevant and make sure employees are aware of any changes.
- Take a proactive approach to social media, by not only implementing policies and training, but by ensuring that inappropriate use of social media by employees does not go unaddressed.



Serious illness in the workplace: a management perspective

KIRRYN WEST, ASSOCIATE

PCS often receives questions relating to an employer's obligations when an employee is diagnosed with a serious illness such as HIV/AIDS. If this situation occurs, regardless of whether the serious illness was contracted during the course of an employee's employment, there are a broad range of issues employers need to be aware of spanning occupational health and safety, privacy and discrimination. In this article we step through the obligations of an employer to an employee who has a serious illness, other employees and third parties.

Obligation to the affected employee

Employers need to treat the management of an employee with a serious illness with a high degree of care and sensitivity given the broad range of potential legal risks attached to it. Potential legal considerations include:

Occupational Health and Safety/Duty of Care

Where an employee contracts a serious illness in the course of their employment, an employer has obligations arising from occupational health and safety legislation. Occupational health and safety legislation provides that an employer has an obligation to ensure the health and safety of employees as far as reasonably practicable. Where an employee has contracted a serious illness in the course of their employment it is arguable that their employer has breached its obligations under occupational health and safety legislation by failing to ensure the employee's health and safety.

Under occupational health and safety legislation, an employer also has notification obligations where a notifiable or serious incident has occurred. A notifiable or serious incident generally refers to a situation that results in loss of life, amputation of a limb, the placing of the employee on life support and a range of incidents that present an immediate threat to life or require immediate treatment. Even where an illness is not a notifiable or serious incident, an employer should continually reassess whether it is necessary to report the contraction of the serious illness to a state regulatory authority such as WorkCover New South Wales.

Employers also have a duty of care at common law to ensure the health and safety of an employee. If it can be shown that an employer breached its duty of care, and this breach resulted in the employee contracting the serious illness, it may be possible for the employee to seek damages from the employer.

Workers' Compensation

Where an employee contracts a serious illness the workers' compensation insurer of an employer may have an obligation to make payments to the employee. Workers' compensation is payable where an employee has suffered an injury causing incapacity arising out of or in the course of their employment. The definition of an "injury" has been defined broadly and would include the contracting of a serious illness.

Where it is possible a workers' compensation claim could be made, an employer should contact its insurer and review its insurance policy. This is because many insurance policies will contain additional obligations on an employer in situations where it is possible that a workers' compensation claim could be made. Additional obligations may include the obligation on an employer not to make an admission in relation to the illness.

Return to Work

If an employee recovers from a serious illness and advises that he or she is fit to return to work, an employer will have an obligation to allow the employee to return to work (this may be to the employee's previous role or, if the employee is not fit to perform this role, an alternative role). Although, an employer should be cautious that returning an employee to work does not breach any of its occupational health and safety obligations to the employee or other employees at the workplace. Therefore, prior to returning

the employee to work and as a matter of best practice, an employer should obtain medical advice about the employee's capabilities, management of the employee's condition and any risks posed by the employee to co-workers or third parties.

Discrimination

An employer will also have to consider carefully its obligation not to discriminate against an employee at any stage on the basis of the employee's illness. This is because both Commonwealth and State legislation prohibits direct and indirect discriminatory conduct on the ground of disability (which includes an illness or injury).

Termination of Employment

Should an employee be unable to return to work, and there is no alternative work available or adjustment that can be made so that the employee can return to work, it is open to an employer to terminate the employee's employment (subject to any workers' compensation claim made that prohibits termination). However, any termination in this situation would need to be handled with particular care to ensure there is no breach of discrimination law or the adverse action provisions of the *Fair Work Act 2009 (Cth)* (**"FW Act"**). The FW Act deems unlawful any form of adverse action against an employee of the basis of disability. Adverse action includes terminating the employee's employment or varying the position of the employee to the employee's detriment.

Obligation to other employees and third parties

In addition to the obligation to an individual employee, an employer also has an obligation to other employees and third parties. There are a range of considerations employers should be aware of in relation to their obligation to other employees and third parties, including:

Privacy Obligations

While it may seem intuitively important to communicate to employees that one of their co-workers has contracted a serious illness, any decision by an employer to inform other employees of the relevant employee's serious illness may infringe privacy legislation.

This is because the National Privacy Principles set out in the *Privacy Act 1988 (Cth)* state that the personal information of a person cannot be disclosed unless that person consents to the disclosure or unless disclosure is necessary to prevent or lessen a serious imminent threat to life. Therefore, without the consent of the employee, or imminent threat to life, an employee's serious illness cannot be disclosed to other employees at the workplace or third parties.

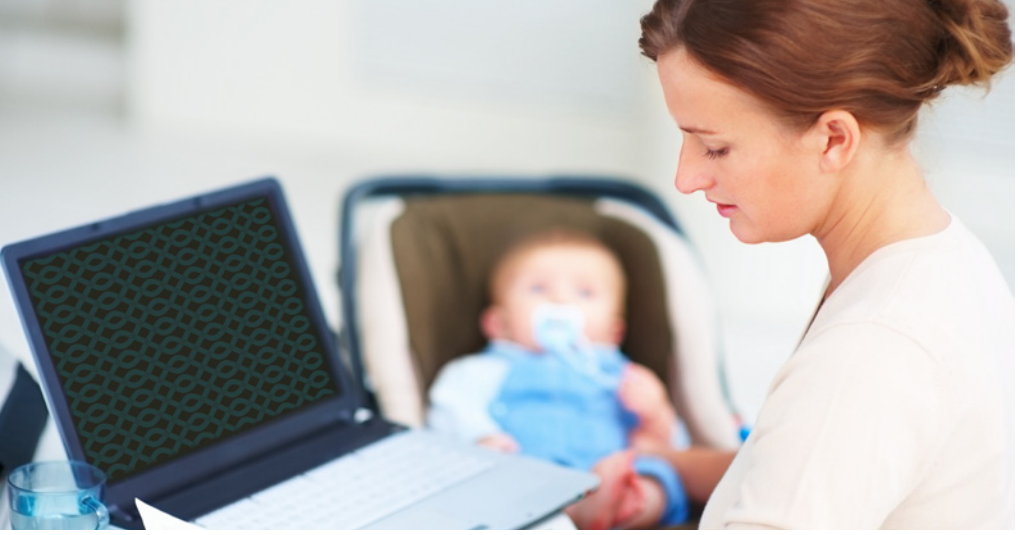
Occupational Health and Safety Obligations

It is also necessary to be mindful of an employer's obligations under occupational health and safety legislation to other employees and third parties. Under occupational health and safety legislation, an employer has an obligation to ensure the health and welfare of all of its employees and other persons at its workplace. Therefore, it is appropriate to consider whether an employer has appropriate mechanisms in place to ensure the health and safety of employees against the risk of contracting the serious illness. This is particularly important should an ill/injured employee return to work, or to prevent the risk of the serious illness spreading.

To determine whether appropriate mechanisms are already in place, an employer should conduct a risk management process involving:

- **hazard identification** – including identifying the potential sources of the infection and identifying activities where hazards exist and potential means of transmission;
- **risk assessment** – including determining the risk of the disease being contracted. This should include looking at the availability of personal protective equipment, access to relevant medical first aid services and individual risk factors for each worker; and
- **risk control** – developing and implementing policies and procedures to control the risks and monitor and review the effectiveness of the policies and procedures.

Practically, implementing any policies and procedures needs to be managed sensitively and without drawing too much attention to the affected employee. So, for example, if an employer needs to amend any of its occupational health and safety practices, it may be prudent to communicate this to employees as part of a broader occupational health and safety review.



MARIA CRABB,
SENIOR ASSOCIATE

How flexible will Australia be with paid parental leave?

Paid parental leave came into effect in Australia on 1 January 2011. This was the first time a national paid parental leave scheme was established.

During the first six months of the scheme employers were not required to make payments to the employee directly, as these payments were made through the Family Assistance Office. However, from 1 July 2011 employers have been responsible for making payments to the employee.

How does it work?

At present, an employee is entitled to receive 18 weeks' pay at the Federal Minimum Wage rate if they:

- are the primary carer for the newborn child or recently adopted child;
- have worked for the employer at least 10 of the 13 months prior to the birth or adoption of the child;
- have worked for at least 330 hours in that 10 month period, with no more than an eight week gap between two consecutive working days;
- are an Australian resident; and
- earn less than $150,000 per annum.

What if the employee's employer offers additional paid parental leave?

Many employers had provided paid parental leave before 1 January 2011. Where the employer had an obligation under contract or an industrial instrument to provide paid parental leave, the employer has an obligation to make payments under the Government scheme and under its own scheme. Where the employer provided paid parental leave under a policy then the employer can vary the policy to absorb the Government funded leave.

Flexibility with maternity leave

The *Fair Work Act 2009 (Cth)* also allows employees with over 12 months' service to take 52 weeks' unpaid leave if the leave is associated with the birth of a child of the employee or the employee's spouse. The period of unpaid leave must be taken as a single continuous period and while the leave may be split between parents the split periods must also be continuous periods.

Maternity leave in the UK

The paid and unpaid maternity leave provisions in the UK are more flexible and generous than those currently in place in Australia. The provisions provide the following benefits:

- 52 weeks of leave of which six weeks is paid at 90% of the employee's base salary;
- a further 33 weeks' pay at the minimum wages;
- two weeks of paid leave for fathers at the minimum wage; and
- once the child is 20 weeks old and the mother decides to return to work, the balance of the 52 weeks leave can be taken by the father. The leave has to be taken in a continuous block.

Proposed changes

The UK Government is currently discussing changes which will allow parents to take parental leave in blocks. This will allow for a greater degree of flexibility amongst working families. The proposal suggests the following:

- mothers will be entitled to 18 weeks of maternity leave and pay that must be taken in one continuous block;
- mothers will be given an additional four weeks of paid parental leave to be taken during the first year of the baby's life;
- an additional four weeks of paid parental leave for fathers that may be taken in one go, or in separate blocks throughout the year if the employer agrees;
- 30 weeks of additional parental leave to be available to either parent of which 17 would be paid at the minimum wage. This leave can be split between the parents and taken in smaller blocks of weeks or months, subject to the employer's approval.

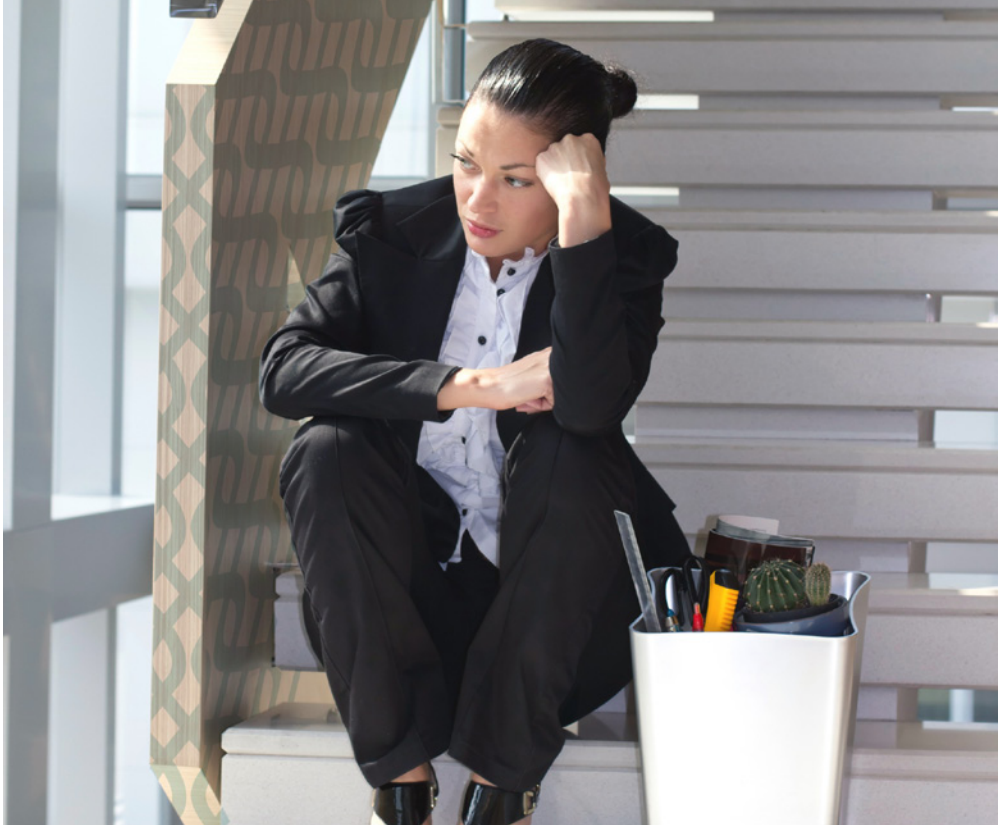
Under these provisions, employers will retain the right to require that the 30 weeks' leave is taken in one continuous block, as the parents request to take the parental leave in blocks can be declined for business reasons.

How flexible will Australia be with paid parental leave?
(continued)

Consequences for employers in Australia

Although your organisation may already have policies in place which give parents entitlement to paid parental leave beyond the statutory minimum, many employers do not offer flexibility as to when the parental leave is to be taken. It is unlikely that any substantial changes will be made to the Government scheme in the near future. PCS, however, recommends you consider taking the following steps:

- Discuss the aim of your organisation's parental leave policy– is the organisation seeking to provide additional benefits, provide flexibility to employees or simply set out employees' statutory entitlements?
- If your organisation's policy is out of date, or you are in the position to offer additional benefits, discuss this with your managers and get their comments on how the additional benefits would impact on their team.
- The Fair Work Act 2009 already imposes obligations on employers to consider requests for flexible working of employees caring for a child under school age. Your organisation may wish to a offer similar system of flexibility for taking parental leave



Legal issues in redundancy and retrenchment

SIOBHAN ANDERSEN,
SENIOR ASSOCIATE

Present economic circumstances indicate that it is timely to revisit some topical legal issues about redundancy and retrenchment. This article is a practical examination of some key issues for employers to consider throughout the redundancy process.

Many drivers may prompt an employer to consider redundancies, such as organisational redesign, business downturn, a merger, or a restructure. This article outlines some key issues which an employer ought to consider to successfully navigate through the redundancy process.

Setting the context

Redundancy – an employer declares an employee's position redundant because the employer no longer requires the position to be performed by anyone.

Redeployment – the process of an employee taking up acceptable alternative employment either with the employer or an associated entity of the employer.

Retrenchment – an employer has dismissed an employee because their position is redundant (and that employee was unable to be redeployed).

Review – an employer's redundancy obligations under the *Fair Work Act 2009 (Cth)* **("FW Act")** and related legislation, applicable Modern Awards, enterprise agreements, policies and procedures, contracts of employment, or matters of custom and practice.

"Front-end" considerations

Any redundancy process will likely incur a certain level of cost, time and risk to implement. Accordingly, an employer should first consider its particular workplace arrangements, and whether there are any alternatives, such as retraining, encouraging employees to use up their leave balances or cost-cutting in other areas.

If an employer chooses to pursue redundancies, then some topical issues to negotiate at the outset include:

- asserting privilege over sensitive documents;
- managing perceptions about "de facto" performance-based exits; and
- avoiding perceptions of pre-determined outcomes by placing "names in boxes".

An employer may generate a high volume of documents during a redundancy process, such as organisational charts and similar, much of which it may wish to protect due to its sensitive or confidential nature. However, employees, unions, the media or other interested parties may seek access to these documents through freedom of information requests or discovery processes. It is possible that an employer can withhold disclosing documents if it can assert that the documents are protected by legal professional privilege. This is a complex area of law (the scope of which is beyond this article). In general terms, an employer will be entitled to assert privilege if the document in question is a communication brought into existence for the sole or dominant purpose of obtaining legal advice or in contemplation of litigation. To assist an employer to assert privilege, it should obtain legal advice early. This has the added benefit of ensuring a smoother redundancy process.

Following on, it is a common misconception during the redundancy process that the employer is manipulating the process as a convenient "de facto" means of effecting performance-based exits without following established performance management processes. An employer can use performance as a selection criterion for identifying those positions which will be made redundant (discussed in more detail below). To avoid setting a questionable cultural precedent and to protect itself, an employer should carefully document the process and ensure that redundancy, rather than performance, is demonstrably the reason for any employee's dismissal.

In addition, another matter which should be made clear to employees is that redundancies are concerned with positions rather than persons. An employer should identify which positions it will retain, rather than which individuals, and consequently ought to avoid placing particular employees' "names in boxes". Otherwise, the employer risks a perception that the redundancy process has a pre-determined outcome and is not genuine. To counter any suggestion of this, the options an employer could consider include "spilling and filling" all roles, by requiring all employees to reapply for their positions.

Making decisions about redundancies

At the next phase of the redundancy process, an employer must contemplate how it will make decisions about redundancies and how it will communicate about those decisions. The issues include:

- the selection process an employer will use; and
- how an employer will communicate with its employees, relevant unions and any other stakeholders.

Setting a selection process

To assess which positions will be made redundant or retained, it is imperative that an employer sets a selection process that incorporates fair and objectively defensible and non-discriminatory criteria. Those criteria should take into account the employer's required essential qualities, qualifications, training, skills, performance, and productivity levels and how those criteria will be weighted.

In setting a selection process, a topical issue is whether an employer may include performance as a selection criterion, as in a number of recent incidents employers have faced criticism for employing "rank and yank" methodologies to effect redundancies. While the answer is essentially "yes", employers tend to face risks (including derailing the redundancy process, industrial disputation, reputational damage, or loss of staff confidence) by failing to properly raise performance issues when they first arise. To counter this, an employer should ensure that the redundancy process is not the first time at which performance issues have been put to employees.

In addition, an employer should consider what practices it will use to effect redundancies. Will it offer voluntary redundancies first, or use a "last on-first off" approach? By way of cautionary warning, a key risk in this area is to avoid practices which could be considered discriminatory to employees. For instance, in one case an employer who instituted the "last on-first off" approach to make its most recent employees redundant was found to have discriminated as the employees retrenched were largely female employees. Accordingly, an employer should examine the characteristics of those employees whose positions will be made redundant, and consider whether in so doing it would be

unlawfully discriminating against those employees.

This could also feed into an "adverse action" claim under the general protections of the FW Act. The basis of the claim would be that the employer has used the redundancy process to dismiss the employee in breach of their "workplace rights", or for a prohibited reason such as their sex or age. These claims are a key area of risk.

A related issue to consider is what positions (if any) an employer will retain during a redundancy process. For instance, an employer may choose to "spill and fill" all roles, but then retain certain positions. In so doing, an employer should consider its motivations as regards the roles retained and whether any particular types of employees are being targeted. For example, it would be a risky strategy to institute a selection process which appears to target employees who are all union members.

Setting a communications strategy

In tandem with setting a selection process, an employer should set and implement a communications strategy about the redundancy process. That strategy should feed into an employer's broader change management strategy and processes and any existing communications protocols. Otherwise, an employer may risk damage to its relationship with its employees and other stakeholders and its reputation. Consequently, an employer should consider what it will communicate, how, to whom, and by what means. Where possible, it should be open and transparent about the process, decisions to be made, timing, and related issues such as whether employees will be required to work out their notice periods.

Implementing redundancies

When an employer moves to the next phase of implementing redundancies it may face a number of legal issues, especially if the process involves significant numbers of employees or levels of change, or a contentious industrial environment. To manage these issues, an employer should implement a staged and procedurally fair redundancy process, in which it:

- consults with its employees while implementing its communications strategy; and
- appropriately documents the implementation process.

When communicating with employees (and others which may be involved such as unions), an employer must undertake consultation, particularly if obliged to do so under its enterprise agreement or an applicable Modern Award. Consulting early and throughout the process will assist in ensuring smoother change management. However, there is a balance to be struck between complying with consultation requirements and the practical realities of consulting with those with a "need to know". Striking this balance will assist in ensuring the integrity and fairness of the redundancy process, and in turn assists to minimise the risk of any subsequent claims.

The question also arises as to how and with whom an employer will consult. For instance, will it seek buy-in by a cascading strategy starting with senior management, and meet individually or in a group setting? An employer should at least meet with directly affected employees. Following consultation, an employer need not necessarily change its position based on the feedback it receives. However, it is entirely conceivable that an employee may make a persuasive case as to why their position should necessarily be retained.

An employer should "back up" its consultation and communication processes by providing employees with appropriate documentation such as communications packs and Q&A decks. This will afford an employer an opportunity to better inform employees, offer consistent messages, and reinforce what decisions are or will be made. An employer should assume that no matter is too trivial. For instance, a common issue arising is whether an employer will still pay an employee redundancy if they obtain another position while working out their notice period. While an employer might technically be able to defend not making a payment (especially if the notice period is lengthy), it should consider converse issues of precedent-setting and the cultural impact of refusing to pay.

Effecting terminations of employment

Following consultation, an employer will move to effect terminations of employment. At this stage, particular matters for an employer to consider include:

- obtaining acceptable alternative employment (redeployment);
- issues such as whether employees will work out their notice periods or be paid out and commence garden leave (if it has not done so already);
- employees' entitlements and their final pay;
- other means of support for retrenched employees; and
- appropriate exit documentation.

An employer must make reasonable efforts in all of the circumstances to redeploy affected employees to alternative acceptable employment, or risk an unfair dismissal claim that the dismissal was not a "genuine redundancy". There is a substantial obligation on the employer to obtain for an otherwise redundant employee a directly or indirectly comparable

position within the organisation or with an associated entity. To meet this obligation, an employer ought to establish clearly what vacancies are available, then inform employees of these and assist them to pursue appointment. If an employee is not appointed, then the employer should ensure that there are sound and defensible reasons for this decision. If an employee does obtain alternative acceptable employment, then it is preferable to place that employee on a trial.

On the other hand, an employee may reject genuinely comparable employment. In some cases, an employer may consequently not be obliged to make a redundancy payment in circumstances when it would otherwise be required to do so. This contrasts with the situation where an employee takes a comparatively lower-paid position, in which case the employer may be obliged to continue to pay the employee at their previous higher rate.

Affected employees whose positions will be made redundant will commence a notice period before being retrenched. An employer should consider whether it will require those employees to work out their notice periods or seek to pay in lieu of notice, or (only if it has a contractual right to do so) whether it will place them on garden leave. This will depend on the workplace, but it may be desirable to pay out an employee, for example to minimise disruption in the workplace. It can also be very tempting to direct an employee to take garden leave; the key in this instance is to take a considered approach to doing so.

When an employee is retrenched, an employer needs to ensure that it correctly pays out all of an employee's entitlements, including any redundancy pay. Most employees are now entitled to some form of redundancy pay pursuant to the National Employment Standards in the FW Act after 12 months' service, unless excepted on some ground such as being a fixed-term employee. Employers should bear in mind that if an employer was already obliged to pay redundancy before the commencement of the Fair Work Act on 1 January 2010, then an employee's entire length of service must generally be taken into account in calculating their redundancy payment. Otherwise, an employee's entitlement will accrue from their employment from 1 January 2010 only. In addition, it is key that an employer applies the correct taxation treatment as concessional rates apply to only "genuine" redundancies (the detail of this issue is beyond the scope of this article).

In line with final payment, an employer ought to consider whether it will make other benefits available to affected employees, such as outplacement services, statements of service, time off for interviews, retraining or financial advice.

From a risk management perspective, an employer ought to provide affected employees with appropriate exit documentation, including a breakdown of entitlements. We suggest that an employer seriously consider obtaining deeds of release from affected employees to minimise the risks to the employer arising out of the redundancy. However, an employer may need to provide a more generous termination package to secure a signature.

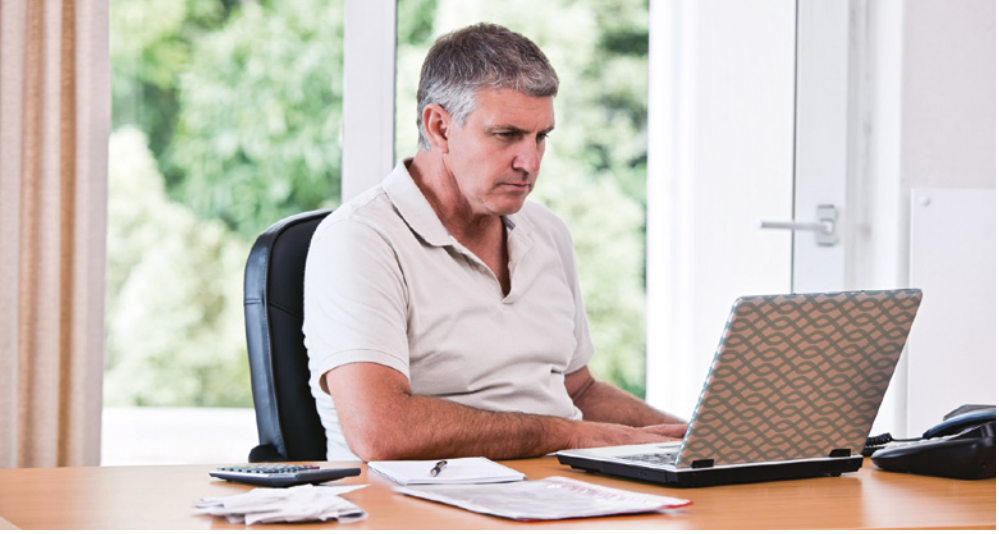
Risks

This article has mentioned some of the risks (both legal and non-legal) associated with pursuing redundancies and potential resultant claims. An employee may make claims of unfair dismissal, adverse action, discrimination, breach of contract or policy, and trade practices legislation. The industrial responses which may flow include industrial action, assertions of breach of the FW Act , applicable Modern Awards, enterprise agreements or equivalent, or a dispute over the application of an enterprise agreement. It is possible that the Fair Work Ombudsman could be asked to investigate, with the worst-case outcomes being prosecutions and monetary penalties. As noted, there are also taxation implications.

We suggest that an employer takes a considered and structured approach when pursuing redundancies to ensure a smooth process and to minimise its risks.

Some minimum considerations

- Explore all options (other than redundancy)
- Review applicable legislative and workplace obligations
- Maintain good records and documentation
- Ensure a "fair" redundancy selection process – consult and communicate
- Make reasonable efforts to redeploy affected employees
- Pay retrenched employees all entitlements and offer other assistance
- Use appropriate exit documentation – consider deeds of release
- Appropriately manage any resultant claims



Home sweet workplace

KATHRYN DENT,
DIRECTOR

The home as a workplace is not without risk as was recently demonstrated in the case of *Hargreaves v Telstra* [2011] AATA 417 (17 June 2011) ("Telstra case").

Aside from the obstacles of partners, neighbours, children and pets, more seriously there may be stairs to navigate, worn carpets and floors that are slip and trip hazards not to mention issues of electricity, ventilation, noise and ergonomics. With advancements in modern technology allowing remote access to the office, coupled with legislated rights to request flexible work practices, the practice of working from home is set to continue and increase. Whilst employers may want, and indeed may be obliged, to accommodate working from home arrangements, employers also need to be aware of the liabilities that such arrangements give rise to so that they may take appropriate steps to discharge their legal obligations and as far as possible, minimise the risks where they do allow these arrangements.

The employer's legal obligations

The obligations owed by an employer to an employee in a working from home situation can often conflict. On the one hand the *Fair Work Act 2009 (Cth)* requires an employer to consider an employee's request for flexible working arrangements which may include a request to work from home. However, there is also the significant duty an employer bears to its employees (and indeed third parties) both at common law and under health and safety legislation, to ensure that its employees and others are not exposed to any risks to their health, safety or welfare arising out of the employer's undertaking. Additionally, an employer must ensure it pays its employees the minimum legislated rates of pay and in a working from home situation, absent proper reporting requirements and policies, an employer may inadvertently breach these.

In the Telstra case the employee sought and was awarded workers' compensation for a range of injuries which included shoulder injuries sustained in two falls at home. Telstra was unsuccessful in denying liability, the court finding that the injuries arose out of, or in the course of, the employment as the employee was working from home at the time, even when the first fall occurred as she was descending stairs to get some cough medicine and fell during a coughing fit. This leads to another salutary lesson, some breaks will still be regarded as work-time and therefore obligations will be owed and liabilities will continue, at these times.

Whilst the ultimate result differed, the Telstra case is not inconsistent with an earlier Full Bench decision of the South Australian Workers' Compensation Commission *WorkCover/EML (Lauman Pty Ltd t/as Roseworthy Roadhouse) v Launer [2008] SAWCT 55 (17 October 2008*) which emphasised that an employee bears the onus of proving the connection between what they were doing when they were injured and their work duties. In that case the fact that the employee permanently resided at the workplace in a live-in arrangement did not give rise to a compensable claim when the employee was injured there at four o'clock in morning.

The employee's legal obligations

Reciprocal to an employer's health and safety obligations are those an employee will owe, under legislation and at common law, to its employer both to take care of themselves and others. These obligations may also be owed by virtue of the employee's contract of employment if it requires compliance with an employer's lawful and reasonable directions and policies. An employer can therefore justify rigorous policies and procedures to govern working from home arrangements not only on the basis of their legal obligations but also on the basis of an employee's.

How to meet the obligations and minimise the risk

The starting point of ensuring health and safety in a workplace is to understand what might compromise the safety of it. This understanding is gained by the employer undertaking

a hazard identification and risk assessment. Where the home is a workplace then this is where the hazard identification and risk assessment must take place in much the same way as an employer would assess the hazards and risks involved if it was typically not present where its employees were working, such as where it has a workforce of contractors or sales people. The challenge involved where the employer is not on site is to ensure that risks are anticipated and control measures put in place, or if they were not anticipated but arise, that they are quickly addressed.

Controlling or eliminating the identified risks in a workplace which is also a home may include replacing, repairing, servicing or providing appropriate equipment, and implementing policies, but should also involve an agreement between the parties as to what the specific working from home arrangements are, something which was missing in the Telstra case.

A working from home policy should include the requirement of employees working on this basis to comply with other relevant policies such as a workplace health and safety policy and, given the likely nature of work being performed from home, computer and internet policies, privacy policies and confidential information policies.

The specific working from home arrangements should supplement the working from home policy as each home is as individual as the employee who lives and works within it. This agreement should therefore detail hours of work, how and where work is to be performed and reporting requirements. Setting out the hours of work is important for a variety of reasons not the least of which is to ensure that the employee is being properly remunerated, to enable performance management and to assess, where an injury occurs, if it arose out of or in the course of employment.

What should employers do now?

PCS has devised the checklist below to assist employers confronted with working from home requests. This checklist has been designed to assist employers to balance the benefits in allowing working from home arrangements which might also be required by law, with the risks which arise in this context. Being aware of where your organisation's work is performed and implementing policies which regulate the safe and legal performance of work will help minimise the risks that such atypical work patterns present.

Hazard Checklist – Work from Home Arrangement

	Yes	No
Equipment		
Does the home based work site have a suitable desk (eg. is it of an appropriate height, is there sufficient leg room)		
Does the home based work site have a suitable chair (eg. is it of a suitable height, can it be adjusted, does it have adequate padding, does it have a sturdy base)?		
Is the home based work site set up to meet ergonomic requirements?		
Is all of the equipment at the home based work site in a condition that does not pose a health and safety risk?		
Are all other fixtures and fittings safe?		
Working Environment		
Does the home based work site have sufficient lighting?		
Does the home based work site have adequate ventilation?		
Are the exits of the home based work site clear to enable evacuation in the event of an emergency?		
Does the home based work site have a smoke detector?		
Does the home based work site have a fire extinguisher?		
Has the employee received training in relation to the use of the fire extinguisher?		
Does the home based work site have an appropriate noise level?		
Is the temperature of the home based work site comfortable?		
Can the temperature of the home based work site be controlled by heating and cooling as required?		
Does the home based work site have sufficient power points to allow operation of all necessary equipment/machines?		
Is there a first aid kit located at the home based work site?		
Training and Information		
Has the employee received an occupational health and safety induction?		
Is the employee familiar with the type of work required to be completed at the home based work site?		
Is the employee aware of the appropriate contact person in the event they require further information about the home based work arrangement?		
Communication		
Is a telephone or other suitable device available to allow effective communication in the event of an emergency?		
Has the employee been provided with a list of emergency telephone numbers in the event of an emergency?		
Are there mechanisms in place to monitor the employee's performance?		
Are there mechanisms in place to ensure appropriate information is provided to the employee from co-workers and management?		

If you answered "NO" to any of the above, please provide further details: .....

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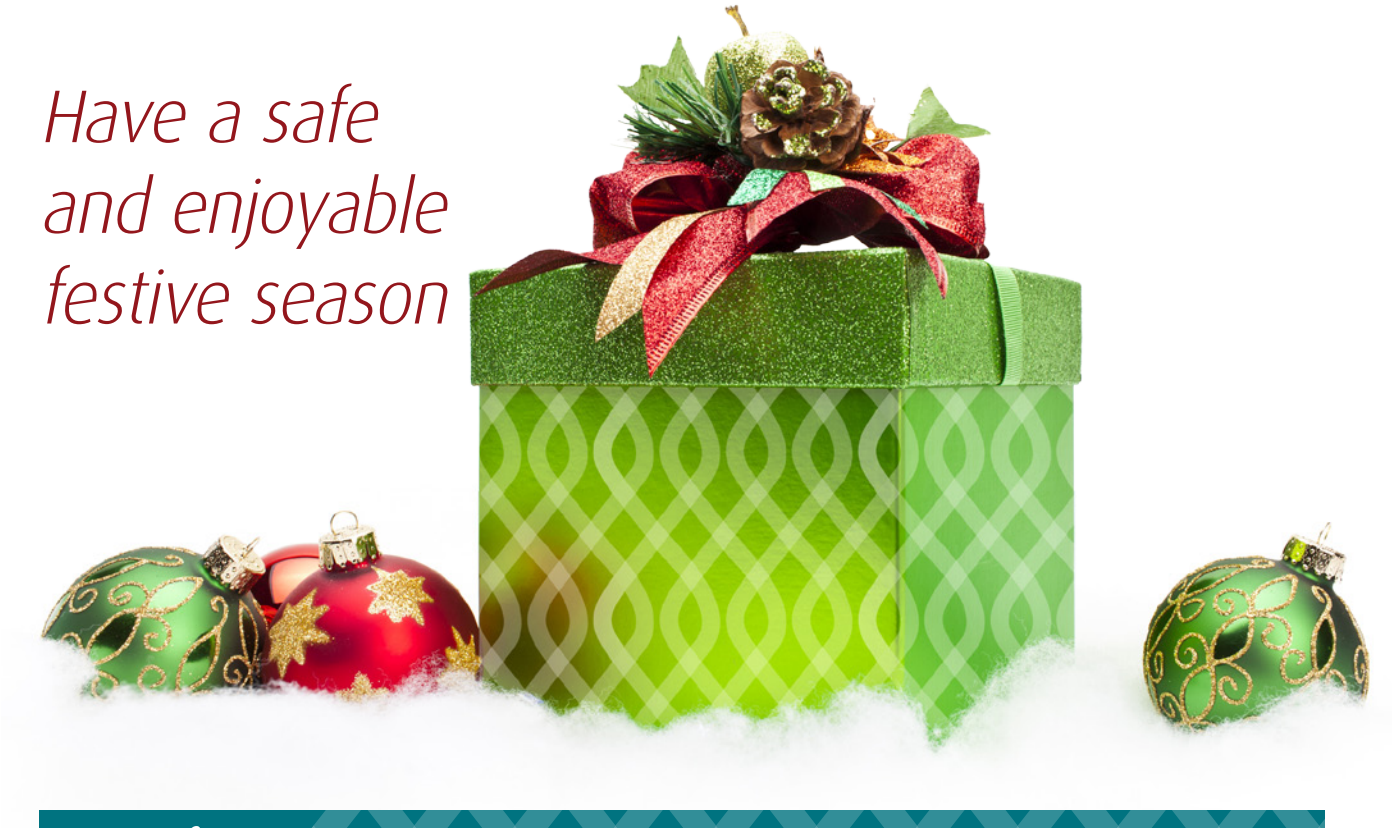
Have a safe and enjoyable festive season



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