The
Advisor

siag

October 2023 Edition

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The Federal Government has unveiled another series of workplace reform proposals with the introduction on 4 September of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. If passed, the 'Closing Loopholes' amendments will result in considerable changes to the employment landscape, adding to the Secure Jobs Better pay amendments passed last year.
In this edition of the Advisor, we:

- **Summarise the Closing Loopholes Bill;**
- **Examine some of the first decisions applying the Secure Jobs Better Pay amendments; and**
- **Provide in depth analyses of other recent significant cases for employers.**

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Although its name might suggest otherwise, if passed, the 'Closing Loopholes' Bill would introduce significant changes to the *Fair Work Act 2009* (Cth) (**FW Act**).

A Senate inquiry into the proposed legislation is seeking submissions by September 29, with a reporting deadline of February 2024, meaning that the Bill will not be passed this year. Of the raft of changes being proposed, the key aspects of the Bill are as follows:

(a) Casual employment

A new definition of 'casual employee' would be included in the FW Act. According to the Explanatory Memorandum,

this definition would be characterised by the presence or absence of a firm advance commitment to continuing and indefinite work, to be assessed against various factors that indicate the real substance, practical reality and true nature of the employment relationship.

The indicia that would determine the nature of the relationship include whether there is a mutual understanding or expectation between the employer and employee, whether the employee can elect to accept or reject work, the future availability of continuing work, whether there are other employees performing the same work who are part-time or full-time employees, or whether there is a regular pattern of work.

A new pathway for casuals to convert to full-time or part-time employment after 6 months service (other than for small business) would allow casual employees to exercise a choice to convert via a notification procedure, with limited capacity for the employer to decline the conversion, The existing casual conversion procedure would also be maintained, and a new framework for the Fair Work Commission to deal with disputes about employment status would be established.

New civil remedy provisions would prohibit employers from misrepresenting employment as casual employment.

(b) Statutory definition of employment

The Bill features a new statutory test for determining whether or not a worker should be classified as an employee. The Explanatory Memorandum states:

The intention of the amendments is to facilitate a return to the 'multi-factorial' test previously applied by courts and tribunals in characterising a relationship as one of employment or of principal and contractor.

This would reverse the approach adopted following the High Court judgments in *Jamsek* and *Personnel Contracting* in early 2022, which require that where the parties have committed the terms of their relationship to a valid written contract, the characterisation of the relationship in the contract will determine whether a worker is a contractor or an employee – and that the parties' subsequent conduct is not relevant.

(c) Small business redundancy insolvency exemption

Under the current NES, small businesses are exempt from making severance payments in the event of an employee's redundancy.

The proposed amendment would address an anomaly in circumstances of a larger employer incrementally downsizing due to insolvency. If the business fell below the 15-employee threshold and became a small business employer before the final staff were made redundant, those employees would maintain their entitlement to NES redundancy pay.

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 - continued

(d) Labour hire pay parity

The Bill would enable employees and unions to apply to the FWC for an order that would require labour hire employees to be paid no less than what they would receive if they were directly employed by the host business and paid in accordance with the host's enterprise agreement.

Labour hire businesses would effectively be tethered to the host's enterprise agreement, with limited exceptions for training arrangements and engagements of less than three months.

exemption period would apply to avoid impacting labour hire arrangements for surge work or where a short-term replacement is needed. The FWC would be able to hear from parties who wish to extend or shorten that exemption period, on a case-by-case basis.

(e) Workplace delegates' rights

Workplace delegates will be given a new right to be recognised in modern awards and enterprise agreements. Any less favourable term in an enterprise agreement would result in the modern award prevailing.

The Bill would give delegates the positive right to represent employees in disputes, to reasonably communicate with members or eligible members in relation to their industrial interests, to have reasonable access to the workplace and workplace facilities, and to access paid time during normal working hours for training.

(f) Protection from discrimination – family and domestic violence leave

Family and Domestic Violence Leave would become a protected attribute and employees and prospective employees who experienced FDV would be explicitly protected against adverse action by their employer.

The amendments would require the FWC to be satisfied prior to approving an enterprise agreement that the agreement does not include any terms that discriminate against employees on the basis that they have been subjected to FDV.

(g) Sham contracting

Under the current terms of the FW Act, employers are not liable for misrepresenting employment as independent contracting if they prove that, when the representation was made, they did not know, and were not reckless as to whether, the contract was a contract of employment rather than for services.
The amendment would change that defence to a new test of 'reasonableness' rather than 'recklessness' as to the employer's belief.

The FWC will be given new powers to deal with disputes about services contracts and will be able to vary or set aside all or part of a contract that it considers to be 'unfair' – based on a range of factors.

(h) Right of entry - exemption certificates for suspected underpayments

This amendment will allow a union to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid.

It would also protect permit holders who are exercising rights from improper conduct by others and empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in certain circumstances.

(i) Wage theft

It would become a criminal offence to intentionally underpay employee entitlements arising under the FW Act, modern awards or enterprise agreements.

Penalties for wage theft offences would be up to 10 years imprisonment, and financial penalties of up to $1,565,000 for an individual and $7,825,000 for a corporation, or 3 times the value of the underpayment, whichever is higher.

A defence would be available for honest mistakes, where an underpayment was not caused by intentional conduct.

(j) Other proposals

The remainder of the Closing Loopholes proposals to amend the FW Act relate to:

- enabling multiple franchisees to access the single-enterprise stream;
- transitioning from multi-enterprise agreements;
- model terms;
- minimum standards and increased dispute resolution for employee-like workers performing digital platform work and regulated road transport industry contractors; and
- removal of a sunsetted clause relating to applications to vary modern awards.

Secure Jobs and Better Pay amendments in force

The majority of the Secure Jobs Better Pay amendments to the FW Act have now come into law. The following Fair Work Commission decisions are some of the first applications of the new provisions.

(a) Supported bargaining authorisations

On 27 September, a full bench of the FWC handed down the first supported bargaining authorisation under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

Effective from 6 June 2023, the amendments introduced a new 'supported bargaining stream' for multi-enterprise agreements in place of the previous 'low paid bargaining stream'.

In the decision, *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 17 (27 September 2023), the Full Bench accepted an application by the United Workers Union (UWU), Australian Education Union – Victorian Branch (AEU) and the Independent Education Union of Australia (IEU) to negotiate a multi enterprise agreement with 64 early childhood education and care employers.

The FWC accepted that the application met the prerequisites for authorisation, and concluded as follows:

> *[58] On the basis of our consideration of the matters specified in s 243(1)(b) of the FW Act, we are satisfied that it is appropriate for all of the employers and employees that will be covered by the proposed multi-enterprise agreement to bargain together. In summary:*
>
> - *low rates of pay at or close to the award minima prevail in the ECEC sector;*
> - *the employers specified in the authorisation have a number of significant common interests;*
> - *the likely number of bargaining representatives is small and consistent with a manageable collective bargaining process;*
> - *the specified employers support the making of the authorisation;*
> - *the grant of the authorisation may promote gender equality in a female-dominated sector; and*
> - *support is required in order to improve the uptake of enterprise bargaining in the sector.*
>
> *[59] These matters overwhelmingly favour the making of a supported bargaining authorisation. The only matter which we have been able to identify as weighing against the making of the authorisation in the terms applied for is the inclusion of G8, which is an anomalously large employer. However, having regard to the fact that G8 shares the identified common interests with the other specified employers, this matter is not sufficient to render other than appropriate that all of the specified employers, including G8, should be allowed to bargain together.*

The full bench noted that over 90% of the workforce is female and that authorisation would "open the prospect" of improving the rates of pay for women. They took into account the new objects in the FW Act in this regard.

(b) Zombie Agreement extension applications

Pre-2010 'zombie' agreements will automatically terminate on 7 December 2023 unless an extension application is made by that date (for up to 4 years).

The FWC must allow an extension if it is reasonable in the circumstances to do so, or otherwise appropriate because bargaining is occurring to replace the zombie agreement or the employees would be better off overall if the zombie agreement, rather than the modern award, continued to apply.

In the *Application by ISS Health Services Pty Ltd* [2023] *FWCFB 122*, ISS Health Services Pty Ltd (ISS) applied to the FWC to extend their 2004 agreement for 2 years. The application was granted, but only for 12 months, giving ISS and the United Workers' Union (UWU) approximately 18 months to negotiate a new agreement and have it approved from the date of the decision.

The decision to extend the default period was considered to be appropriate for 3 main reasons.

First, both the UWU and ISS intend to negotiate a new enterprise agreement to replace their 2004 agreement. This meant that it was not a case where the parties sought an extension in order to have the 2004 zombie agreement remain the operative industrial instrument for as long as possible.

Further, it was determined that it would be difficult for ISS and the UWU to complete a new enterprise agreement by 6 December 2023, as the bargaining is likely to involve some complexity.

Lastly, each of ISS and the UWU agreed, as was accepted by the FWC, that the 2004 agreement would remunerate employees significantly better than either the Health Professionals and Support Services Award 2020 or the Cleaning Services Award 2020.

The Full Bench, however, considered that the extension for 2 years that was sought was 'longer than reasonably

Secure Jobs and Better Pay amendments in force - continued

necessary' to negotiate a new agreement, and could 'encourage dilatoriness in bargaining'. Having regard also to the UWU's concession that the parties would almost certainly be able to reach agreement given a 1-year extension, the Full Bench ordered an extension of the default period until 6 December 2024.

(c) Pay Secrecy Provisions

The new 'pay secrecy' provisions (s.333B to s.333D of the FW Act) came into effect on 7 June 2023, and give employees the workplace right to disclose or not to disclose their remuneration or anything that is reasonably necessary to determine remuneration.

Further, employees may ask any other employee about their remuneration or anything that is reasonably necessary to determine remuneration. Penalties may be imposed on employers for entering into any contract or written agreement that includes a term that is inconsistent with the pay secrecy laws, and any contractual terms that are inconsistent with the laws will have no effect.

In a decision for the approval of an enterprise agreement, *Application by Equans Electrical and Communications Pty Ltd* [2023] FWCA 1705, the employer requested that its client names be redacted from a Schedule of the agreement.

The FWC found that were this information to be redacted, the employer would be in breach of s.333B of the FW Act. This is because redacting the client names would amount to requiring employees to not disclose information to a potential third party attempting to view the employee's full entitlements.

Deputy President Dobson referred to the principles of open justice and also found that, if the confidentiality order was granted, and any employee who was covered by the agreement sought 'to have their entitlements checked by a third party, … such third party would be unable to access the full terms and conditions in order to perform such a check.' Therefore, this would amount to a breach of s 333B of the FW Act, which states that an 'employee may disclose, or not disclose, … any terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes.

'Serious' Award and NES Contraventions

Basi v Namitha Nakul Pty Ltd (No 2) [2023] FCA 671

This decision involved numerous contraventions of the FW Act and National Employment Standards (NES) by two Indian restaurants in Wollongong and Nowra, both owned and operated by Namitha Nakul Pty Ltd (Namitha Nakul). Justice Halley of the Federal Court of Australia found that many of these breaches amounted to serious contraventions under s557A of the FW Act. This meant that the maximum penalties were ten times greater than the maximum penalties for ordinary breaches.

Facts and Background

Prior to the penalty decision, a liability hearing in 2022 found Namitha Nakul, the operator of two restaurants, to have contravened various provisions of the FW Act and NES against two former employees. The contraventions included:

- Failing to arrange hours of work as required, including failing to give days off, contravening s 45 of the FW Act, and cl 31 of the Award;
- Failing to pay the amount required by the Award, between 2016 and 2018, including weekend penalty rates, breaching ss 45 and 323 of the FW Act, and cl 20 of the Award;
- Requiring payment of cashbacks from one employee, Mr Basi, between 2017 and 2018, in contravention of ss 323 and 325 of the FW Act;
- Failing to display the Restaurant Industry Award 2010 (the Award) and the NES at their restaurants, in breach of both s 45 of the FW Act and cl 5 of the Award;
- Failing to pay the employees their untaken annual leave at the end of their employment, in contravention of ss 44(1) and 90(2) of the FW Act;
- Failing to pay the employees additional leave loading of 17.5%, in breach of both s45 of the FW Act and cl 35.2(b) of the Award;
- Failing to meet the required standards in relation to method and frequency of payment of annual leave and leave loading, under s 323 of the Award;
- Failing to pay superannuation contributions properly for the employees, in breach of s 45 of the FW Act and cl 30.2(a) of the Award;
- Failing to give one employee, Mr Haider, notice or payment in lieu upon termination of his employment, in contravention of ss 44(1) and 117 of the Award;
- Making threats about the employment of one employee, Mr Basi, to force him to comply with work arrangements he instituted, involving foregoing his workplace rights, in contravention of ss 343 and 344;
- Demanding $6000 in August 2017 and $1710 in January 2018 from Mr Basi for the Pay As You Go (PAYG) tax, breaching ss 343 and 345 of the FW Act; and
- Demanding $1400 from Mr Haider for continuing to sponsor Mr Haider's Temporary Work (Skilled) visa, breaching s 325 of the FW Act.

For these various contraventions, the parties agreed that Namitha Nakul was required to pay a total of $186,085.48 to the two employees for unpaid wages, unpaid annual leave, and unpaid superannuation guarantee payments.

However, the remaining issue that was to be determined was the amount of civil penalties to be imposed on both Namitha Nakul and the sole director of Namitha Nakul, Mr Usha.

Decision

In determining the amount of penalties to be imposed, Justice Halley first considered which categories of contraventions applied. In doing so, he found that the ten categories identified by the respondents were an appropriate foundation for determining penalties prior to considering the totality principle. These categories were the arrangement of hours and rates, minimum pay, cashback payments, award display, annual leave and leave loading, superannuation contributions, payment in lieu, PAYG demand (August 2017), PAYG demand, (January 2018), and Visa sponsorship costs.

In the previous liability hearing, many of the breaches were found to be 'serious contraventions' under s557A of the FW Act. A contravention may be a serious contravention where either the provision was knowingly contravened, or where the contravention was part of a systematic pattern of conduct. The particular breaches that were therefore classified as 'serious contraventions' by Justice Halley were the failure to arrange the employees' hours of work and pay weekend and holiday rates, the failure to pay the employees their amounts due and payable, and the imposition of the cashback payments enforced by coercive threats.

These were found by having regard to numerous factors, including that 'there were multiple contraventions … over a period of [approximately] two years', repeated denials of the employees' complaints, trying to make one of the employees, Mr Haider, provide his backdated timesheets, and making 'fallacious claims' about loans to attempt to cover up the contraventions.

‘Serious’ Award and NES Contraventions - continued

Basi v Namitha Nakul Pty Ltd (No 2) [2023] FCA 671

In determining the penalties for the contraventions, both serious and other contraventions, Justice Halley considered multiple factors. These included that the conduct ‘demonstrated a profound disregard of the fundamental obligations of an employer’, the breaches deprived the applicants of ‘significant income and entitlements’, and that the more serious contraventions were deliberate.

Penalties imposed for both the serious and other contraventions totalled $215,000 for Namitha Nakul, and $69,000 for Mr Usha. However, given the totality principle, Justice Halley reduced the totals to $150,000 for Namitha Nakul and to $50,000 for Mr Usha.

What does this mean for employers?

This case highlights the importance of compliance with the FW Act, including the NES, and industrial instruments including modern awards. While it was noted by Justice Halley that s 577A, for serious contraventions, ‘has not been the subject of detailed consideration,’ we may see this provision become more used over time.

Therefore, employers should be aware of this provision, and the reasons for which a contravention would be considered serious, being that it was either contravened knowingly, or that it was part of a systematic pattern of conduct.

Sydney Trains Decision – Disability Discrimination

Annovazzi v State of New South Wales – Sydney Trains [2023] FedCFamC2G 542 (23 June 2023)

The Federal Circuit court recently found that Sydney Trains had unlawfully discriminated against a worker when it sacked her after finding out she had ADHD and autism, contravening s 15(2)(c) of the *Disability Discrimination Act 1992* (Cth). The employee had not initially disclosed her ADHD and autism diagnoses. Sydney trains raised that s 52(2)(b) of the *Rail Safety National Law* (NSW) required it to ensure that all workers are competent, healthy, and fit enough to work safely. Further claiming that the employee's delay in disclosing her diagnoses indicated dishonesty and raised concerns for her position in a safety critical role.

Facts and Background

In March 2017 when Ms Annovazzi applied for employment with Sydney Trains, she responded "no" to pre-employment questions which asked: "do you have a diagnosed condition for which you require reasonable adjustment throughout the selection process?" and "do you have any impairment or condition which would affect your ability to perform the job for which you have applied?".

On a subsequent written pre-employment questionnaire Ms Annovazzi answered "no" to the following questions: "Are you currently being treated by a doctor for any illness or injury?", "Are you receiving any medical treatment or taking any medication (prescribed or otherwise)?", and "Have you ever had, or been told by a doctor that you had psychiatric illness or nervous disorder?".

In cross-examination Ms Annovazzi claimed that at the time of the questionnaire she had not been taking a previously prescribed dexamphetamine for her ADHD. That she did not consider consultations with her psychiatrist to be "medical treatment". Of her diagnoses Ms Annovazzi claimed "I'm not ill. There's nothing wrong with me, and I'm not less than anybody else".

Prior to commencing training with Sydney Trains Ms Annovazzi attended a pre-employment medical assessment with Sonic HealthPlus. She claims to have told the GP about her autism, ADHD, and previous dexamphetamine prescription, although these disclosures were not included in the examination record.

Ms Annovazzi was hired by Sydney Trains in mid-October 2017 and commenced training as a passenger train driver. Three weeks into the training course she asked the train crew coordinator if she could take 5mg of dexamphetamine tablets to treat her ADHD, telling him that she had been discussing her diagnoses with SonicHealth.

The training and competence manager queried with the organisations Chief Health officer as to whether Ms Annovazzi could take the dexamphetamine and remain a "category 1 rail safety worker", the highest level of safety critical worker. The CHO responded, "The problem is that ADHD is a problem for a train driver and the condition was not declared and assessed at the pre-employment assessment so [the trainee] is temporarily unfit and should be referred back to Sonic for a [fitness for duty assessment] with a psychiatrist".

Ms Annovazzi was removed from the training program and given light duties at Sydney Trains Burwood offices.

The train crew coordinator sent a "briefing note" that the trainee failed to declare her ADHD and autism and needed a fitness for duty assessment to Transport Shared Services (TSS), an entity that provides services relating to medical assessments of employees or potential employees to Sydney Trains. The court found the briefing note to be "inaccurate", as the trainee had told him that she had declared her diagnoses during her medical assessment.

In December 2017 and then again in January 2018, Sydney Trains asked Ms Annovazzi to provide a note on her ADHD, autism, and medication from her treating doctor. In January 2018 Sydney Trains sought an update on her fitness for duty assessment from the TSS.

The TSS recommended that Sydney Trains not seek a fitness for duty assessment but rather pursue dismissal on the grounds of a "failure to declare on behalf of the employee during the recruitment process".

On January 25, 2018, Ms Annovazzi's psychiatrist provided a letter stating that he prescribed her 5mg of dexamphetamine to treat her ADHD "on an as a required basis only" and confirmed that her autism and ADHD was "no barrier to her being a train driver".

Despite this, on January 31, 2018, Sydney Trains' HR department followed the advice of TSS and dismissed the employee based on dishonesty for failing to disclose her medical history and use of prescriptions, with one week's pay in lieu of notice.

Sydney Trains Decision – Disability Discrimination - continued

Annovazzi v State of New South Wales – Sydney Trains [2023] FedCFamC2G 542 (23 June 2023)

Decision

Judge Manousaridis of the Federal Circuit and Family Court considered the interaction between several sections of the *Disability Discrimination Act*.

Under s 5(2) discrimination occurs where a failure to make reasonable adjustments results in an aggrieved person, because of a disability, being treated less favourably than a person without the disability. Under s 10 an act done for two or more reasons, where one of the reasons is the disability of a person, will be seen to have been done for that reason. Under s 15(2)(c) and (d) it is unlawful to dismiss an employee for their disability, or subject them to any other detriment.

Judge Manousaridis determined that Sydney Trains would not have dismissed a “hypothetical comparator” but rather would have followed through with the request in their “briefing note” to refer them for a fitness for duty assessment. He further found that it was not open to Sydney Trains to argue that Ms Annovazzi had been dishonest as they had not sought to confirm her claims that she had informed the GP in her pre-employment medical screening.

Judge Manousaridis was not satisfied with Sydney Train’s assertion that HR employee Ms Samassa, operating under the title of “Director, People and Change (Operations)”, was the ultimate decision maker in the dismissal of Ms Annovazzi. As it was clear that Ms Samassa “approved” the dismissal, as opposed to deciding it independently. The court found it more likely that the ultimate decision rested with someone within the TSS. And therefore, found that it was reasonable in the circumstances to make a finding that Sydney Trains had dismissed Ms Annovazzi for reasons that included, or substantially included, her ADHD and Asperger’s Syndrome. This finding was supported by Sydney Trains failing to identify or call to court, the person or persons who had made the decision to dismiss Ms Annovazzi.

What does this mean for employers?

Employers must be mindful of their obligations under the *Disability Discrimination Act 1992* (Cth). Where an employee has a disability which falls into the definition of disability within the Act, employers must ensure that they are meeting requirements to make reasonable adjustments; do not make adverse decisions based on an employee’s disability; and adhere to procedural fairness in requiring fitness for duty assessments. Employers should also be aware of how they put into effect external advice, as ultimately liability will rest on the employer.

High Court Vicarious Liability Case

CCIG Investments Pty Ltd v Schokman [2023] HCA 21

In a recent appeal to the High Court, a decision of the Queensland Court of Appeal was unanimously quashed, with a finding that an employer was not vicariously liable for a tortious incident between two employees.

Facts and Background

The incident involved Mr Schokman, who was employed as a food and beverage supervisor by Daydream Island Resort and Spa from 25 October 2016. Under his employment contract, he was required to live on Daydream Island and shared accommodation was made available to him.

From 1 November, he began sharing accommodation with another employee, Mr Hewett, who was employed as a team leader.

The incident occurred on the morning of 7 November, after Mr Hewett had been drinking at the staff bar since he finished his shift at 11pm the night before. Mr Hewett and Mr Schokman had a brief talk in their room at 1:15am regarding Mr Hewett's complaints about the management team.

However, the conversation ended when Mr Schokman told him that they would discuss it at work. Mr Schokman then went to sleep, and Mr Hewett left the room and continued drinking. Mr Hewett returned to the room at approximately 3 am and woke Mr Schokman by throwing up in their bathroom. Mr Schokman went back to sleep but woke up about 30 minutes later to find Mr Hewett standing over him, urinating on him.

Mr Schokman pushed past Mr Hewett into the hallway, where he suffered a cataplectic attack.

This case was initially heard in the Queensland Supreme Court, where Mr Schokman argued that his employer, CCIG Investments Pty Ltd (CCIG) were vicariously liable for the tort committed by Mr Hewett. At first instance, the trial judge held that the employer was not vicariously liable, although this was appealed to the Queensland Court of Appeal.

The Court of Appeal allowed the appeal and found that the case was analogous to the facts of Bugge v Brown, a High Court case from over 100 years ago. In this case, an employer was found to be vicariously liable for having an employee damage neighbouring land while lighting a fire to cook a lunch that was provided to him while working remotely. Therefore, the court found that there was a requisite connection between Mr Hewett's actions and his employment. Following this decision, CCIG appealed to the High Court.

Decision

Prior to analysing the facts in this scenario, Chief Justice Kiefel and Justices Gageler, Gordon and Jagot set out the law in relation to vicarious liability.

The question for determination was whether the 'tortious or wrongful act was committed in the course or scope of employment'. Expanding upon this, 'it is the nature of that which the employee is employed to do on behalf of the employer that determines whether the wrongdoing [was] within the scope of employment'. While 'an unauthorised, intentional, or even criminal act may be committed in the course or scope of employment,' if an employee is on a 'frolic of their own,' this will not attract an employer's liability. To determine this, the test is whether there is a sufficient connection between the wrongful act and the employment.

Mr Schokman relied again on the facts of Bugge v Brown and submitted that the tortious act of an employee was committed while the employee was on a break from their employment.

The High Court dismissed this argument on the basis that in Bugge v Brown, the lighting of the fire to cook lunch was 'a requirement of, and authorised by,' the employee's employment, but that Mr Hewett could only have been said to 'be acting in accordance with his employment contract by sharing the accommodation provided' for him. Therefore, it was held by Chief Justice Kiefel and Justices Gageler, Gordon and Jagot that 'the circumstances in Bugge v Brown are in no way analogous to the present case', and that the appeal should be allowed.

Justices Edelman and Steward also distinguished between three specific forms of vicarious liability, firstly for describing 'attributed acts', secondly for describing 'attributed liability', and thirdly for describing a 'non-delegable duty'.

In terms of applying these conceptions of vicarious liability to the case at hand, Justices Edelman and Steward dismissed the 'non-delegable duty' as Mr Schokman did not argue that CCIG was under a special duty of care 'to ensure that care was taken by [CCIG's] employees … for Mr Schokman's safety in the place where Mr Schokman was required to reside.' The first conception, for 'attributed

High Court Vicarious Liability Case - continued

CCIG Investments Pty Ltd v Schokman [2023] HCA 21

acts' was also dismissed, as CCIG was not involved in a 'joint enterprise involving Mr Hewett's negligent conduct,' and nor did CCIG 'agree to, procure, authorise, or ratify Mr Hewett's conduct.'

The second area of law involving '(true) vicarious liability', in terms of 'attributed liability', required the court to determine whether Mr Hewett's employment duties were sufficiently connected with his wrongful act. Justices Edelman and Steward found that a 'slight analogy' can be drawn between this case and Bugge v Brown, although, this analogy was not such that Mr Hewett's actions were sufficiently connected with any of his duties or powers of employment.

Therefore, it was unanimously held that the appeal be allowed.

However, Justices Edelman and Steward also mentioned in concluding that 'courts have created in vicarious liability an "unstable principle",' due to 'sinking into the "dogmatic slumber" of using vicarious liability as a broad concept … where liability arises "despite the employer not itself being at fault".'

What does this mean for employers?

This case primarily demonstrates the utilisation of the 'sufficient connection' test for determining if an action is done in the course or scope of employment for vicarious liability. However, it is also notable that this case, and particularly the comments of Justices Edelman and Steward, could signify a small step away from broader conceptions of vicarious liability in future.

Unfair Dismissal

Sarah Singh v Priceline Sutherland Pty Ltd [2023] FWC 1321

In an unfair dismissal application, the FWC found that an employer dismissed an employee without a valid reason, and because she had requested time off to care for her son in the form of unpaid domestic violence/carer's leave.

Facts and Background

The employee, Sarah Singh, was employed as a Senior Pharmacy Assistant.

On 29 December 2022, Ms Singh advised the Store Manager, Ms Cahill, that she would be unable to attend work for a few days. This occurred after Ms Singh's 9-year-old son told her that he didn't wish to stay with his father, as he, and Ms Singh, had experienced threats from her ex-husband, as well as physical, verbal, and emotional abuse.

Ms Singh returned from her emergency domestic violence leave on 4 January 2023, although left work early, as her ex-husband dropped off their son at her home, who had bruises on his face. Ms Singh then took her son to the police to provide a statement, and they notified her that he would be arrested. A domestic violence order was later granted for Ms Singh and her son, against her ex-husband.

On 5 January, Ms Singh texted Ms Cahill asking for extended leave until the 27th when her son went back to school. Ms Cahill later responded that she was unable to approve the leave, and to contact the store owner, Mr Kalache. In their conversation Mr Kalache stated, 'Unfortunately, Sarah, we can no longer have you working here anymore. I should have fired you after the last incident.' A termination letter was then emailed to Ms Singh on 12 January 2023.

The letter described various incidents that occurred throughout Ms Singh's employment, including complaints from other Pharmacy team members about Ms Singh, the incident on 27 October, further complaints from the Pharmacy team about Ms Singh, which they planned to give her a 2nd warning about, and her request for leave until 27 January, which they were going to issue a 3rd warning about. The letter stated that 'these issues combined resulted in Sarah's termination of employment.'

Decision

In consideration of whether there was an unfair dismissal, the FWC found that the reason for dismissal was because she 'requested time off … until 27 January 2023 to enable her to care for her son until he started back at school'. Given this, it was also found that this reason was not sound, defensible, or well-founded, and this 'weighs strongly in favour of a finding that the Applicant's dismissal was harsh, unjust, and unreasonable.'

While the Respondent argued that the reasons for Ms Singh's dismissal were reflected in the termination letter, the FWC stated that as these reasons 'were not discussed in the termination discussion, … [they were] no more than an attempt … to reframe or otherwise justify the reasons for the Applicant's dismissal after it occurred.'

Due to it being found that Ms Singh was not dismissed for a valid reason, this also led other factors to weigh in favour of her dismissal being unfair. These included whether Ms Singh was notified of the valid reason, and whether she was given an opportunity to respond to any reason relating to her capacity or conduct. Further, the FWC found that there was a total absence of procedural fairness in effecting the Applicant's dismissal.

In assessing remedies, it was found that reinstatement would not be appropriate that compensation of $20,906.08 was appropriate. However, due to Ms Singh's misconduct during her employment, and various contingencies, this was reduced to $17,874.70, plus 10.5% superannuation.

What does this mean for employers?

This case is an important example of what may constitute a dismissal that is harsh, unjust, or unreasonable. In these circumstances, while there was no valid reason, it was also found that the failure to notify Ms Singh of their reason and the failure to grant her an opportunity to respond weighed heavily in favour of the dismissal being unfair.

Any valid reason should be the operative reason for dismissal, and not merely be used as justification for the dismissal after it has already occurred.

The decision also serves as a reminder that all employees of employers with 15 or more staff are entitled to 10 days of paid family and domestic violence leave per year under the NES.

Good Faith Bargaining Requirements

Construction, Forestry, Maritime, Mining and Energy Union v MSS Strategic Medical and Rescue Pty Ltd [2023] FWC 655

This decision concerned an application by the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) for a bargaining order to prevent employees of MSS Strategic Medical and Rescue Pty Ltd (**MSS**) from voting on a proposed enterprise agreement. The CFMMEU claimed that MSS had not met the good faith bargaining requirements from s 228 of the *Fair Work Act* (**FW Act**), in multiple circumstances.

The proposed agreement is for MSS's emergency services officers employed at AGL's Loy Lang A power station and mine, of which there are currently 23. The bargaining between the MSS and CFMMEU began in May 2022, when the CFMMEU provided MSS with its log of claims. This was followed by an initial meeting in May, and then 11 subsequent meetings over the rest of 2022.

While the CFMMEU claimed that the last bargaining meeting occurred on 16 December, MSS provided evidence that they gave 3 offers to the CFMMEU beginning on 1 December, but all were rejected, with the final one being rejected on 16 December.

This led to MSS writing to the CFMMEU on 20 January 2023 with an updated and final offer, but this was again rejected on 23 January by the CFMMEU. The day after, MSS sent a table to the CFMMEU, setting out the company's responses to CFMMEU's claims, and reasons for their responses. It was also stated that MSS would regard bargaining to be at an impasse if the final offer wasn't accepted.

The CFMMEU still didn't agree, so MSS put the proposed agreement to a vote of the 23 employees which ended on 9 February. The agreement was rejected, 13 to 10. Following this rejection, MSS asked the employees what was important to them, which was primarily annual leave and sick leave.

MSS then contacted the CFMMEU to ask if they would support an agreement that addressed these issues of leave, although the union wanted to discuss other conditions. On 6 March, the MSS sent a proposed enterprise agreement to the CFMMEU that addressed the leave issues and said that they would consider bargaining to be at an impasse if the union didn't agree with the proposal.

The CFMMEU responded with a compromise offer, and stated that MSS must genuinely consider the proposal, or they would not meet the good faith bargaining requirements. After genuinely considering the compromise offer, MSS rejected it, and then replied to the CFMMEU that they considered bargaining to have reached an impasse. MSS then wrote to the employees to put their 'best and final offer' to a vote on 20 March. The CFMMEU wrote to MSS stating that they believed MSS was in breach of the good faith bargaining requirements, and asking for MSS to withdraw the ballot. This was replied to on 14 March by MSS, stating that they would go ahead with the ballot.

Decision

The case was heard on 16 March, after the CFMMEU applied for a bargaining order to prevent the employees from voting on 20 March. This requires a prescribed instrument, such as a majority support determination, to be in operation, at least one good faith bargaining requirement not being met, the notification requirements in s 229(4) being complied with, and that it is reasonable in all the circumstances to make an order. It was 'clear that the union had lodged a valid application, that a majority support determination had been made, and that the union had complied with the notification requirement in s 229(4)'.

The key issue was whether MSS failed to meet the good faith bargaining requirements The CFMMEU alleged that MSS had done so by:

- Refusing to attend a bargaining meeting with the CFMMEU since 16 December.
- Submitting its agreement for a vote on 20 March, without meeting with the CFMMEU to discuss their compromise offer, and without genuinely considering the offer or giving reasons for rejecting it.
- Going to a ballot without discussing the scope of the agreement with the CFMMEU, and without discussing personal and annual leave, overtime, public holidays and more in depth with the CFMMEU.
- Going to a ballot without discussing the proposed agreement with the CFMMEU.
- Putting the agreement to a ballot without bargaining having reached an impasse.

The FWC determined objectively that the parties had reached an impasse, as MSS had stated that they had given all that they were willing to give. In addition, the bargaining had been occurring since May 2022, and both MSS and the CFMMEU had made concessions.

Good Faith Bargaining Requirements - continued

Construction, Forestry, Maritime, Mining and Energy Union v MSS Strategic Medical and Rescue Pty Ltd [2023] FWC 655

The FWC also found that MSS had not failed to respond to a compromise offer, but had in fact rejected the offer, and said that they had nothing more to give.

Further, MSS did not engage in capricious or unfair conduct that undermined freedom of association or collective bargaining, due to negotiating with the CFMMEU since May 2022, and candidly communicating with the union that they would not make any further concessions.

Therefore, it was found that all of the good faith bargaining requirements had been complied with by MSS, and that the FWC had no power to make a bargaining order.

In addition to this finding, the FWC also considered whether an impasse was necessary for an employer to put a proposed agreement to a ballot without the approval of the other bargaining agent. In relation to this, the Deputy President stated that he did not consider that 'a situation of impasse is a precondition for an employer to put an agreement to the vote without the assent of all relevant bargaining representatives.' However, there 'may be circumstances in which the conduct of a ballot without the agreement of other bargaining representatives constitutes a breach of the good faith bargaining requirements.'

What does this mean for employers?

This decision both describes the good faith bargaining requirements from the FW Act, and highlights that an impasse is not necessarily required for a proposal to be put to a ballot without approval from a bargaining representative. However, employers must always bargain in good faith with all employee representatives, and should try to reach a genuine agreement.

To put a ballot to employees without agreement from employee representatives should only be a last resort, when an impasse is objectively reached. To do otherwise would open up risk of breaching these good faith bargaining requirements.

Commonwealth Bank non-compliance

In August 2023, the Finance Sector Union and the Commonwealth Bank settled a Federal Court claim for $3million.

Retail workers of the bank had been required to work through their 10-minute tea breaks, and have now been compensated for the past six years.

The paid tea breaks were an entitlement under the applicable enterprise agreement, which provided that a 10 minute paid break was required for shifts of more than three hours, and an additional break for shifts of five hours or more. The breaks were allegedly not available to employees due to understaffing.

The FSU's Federal Court application originally claimed compensation of $45 million for denial of the tea breaks, but settled for a significantly lower amount of $3 million.