Workplace Bullying – Anti-Bullying Provisions not a Shield

The *Fair Work Act 2009* ('FWA') establishes anti-bullying provisions with the intention to prevent harm caused by instances of workplace bullying and provide a cost-effective remedy for individuals. When these protections were introduced, employers worried that employees would be able to misuse these protections, and lodge stop bullying claims to divert reasonable management actions.

Since these provisions were introduced, there has been a clear increase in the filing of these claims for improper purposes, including claims lodged in an attempt to deflect, divert or even overturn justified disciplinary actions or performance management processes, even where these processes are reasonable management actions in response to misconduct or poor performance.

However, a recent decision of the Fair Work Commission ('FWC') in *Tanka Jang Karki* [2019], has cracked down on employees using these provisions as a shield to avoid reasonable management action. Mr Karki was employed as a bellman at Star City Casino (The Star) and alleged that four incidents amounted to workplace bullying by The Star and the front office manager.

Karki alleged the front office manager publicly abused and harassed him after she observed him using his personal mobile phone whilst on duty at work, contrary to the Stars mobile phone policy, and that the warning issued by the manager after the incident was unjustified and constituted inappropriate management action. The manager first met with Karki to discuss the mobile phone incident, and raised other issues including Mr Karki's customer service. He claimed this was harassment. The manager also held a second meeting to discuss the CCTV footage of the mobile phone incident, which he claimed was further intimidation, and that the warning issued was unreasonable. Additionally, after Karki lodged the stop bullying claim, he was issued a final written warning from The Star's General Manager, who had observed Karki spitting into a rubbish bin in a public area, which was confirmed by CCTV. Whilst Karki alleged this was because he had bleeding gums, no evidence was tendered to prove this.

The FWC held that the actions taken by the front office manager and The Star constituted reasonable management action and not workplace bullying. The Commission reassured employers, stating that where a workplace has concerns regarding an employee's conduct, and can prove that the conduct occurred, it is entitled to conduct disciplinary processes. Further, it was critical of Karki's failure to utilise The Star's detailed anti-bullying regime and reiterated that the FWC would not usually intervene in a bullying grievance unless the employee had initiated and/ or completed internal process.

The FWC dismissed Karki's application, noting that it was not acceptable to use the FWC's stop bullying jurisdiction as a shield and that such conduct could be viewed as a potential abuse of process. Employers are entitled to counsel and discipline in line with internal policies and issue directions where necessary. Employers that can demonstrate that their actions are reasonable can defence any application and should not be concerned by threat of such claims.

If you have any questions regarding workplace bullying, please call the VANA Workplace Relations Team on (03) 8540 7000.

Super Obligations – When Does an Employer Pay?

Superannuation (super) can be a cause of confusion for employers. Many employers wonder when they have to pay super and what hours attract super obligations, particularly when an employee is paid on an annualised salary.

The Full Federal Court has overruled a previous decision and clarified what hours of pay attract super in relation to annualised salaries. In the now overturned decision in *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd [2018*], it was found that BlueScope Steel should have made superannuation contributions to employees who worked additional hours and public holidays who were employed on an annualised salary.

In this case, the Australian Workers' Union pursued proceedings against BlueScope Steel, arguing that additional hours and public holiday components of employee's salaries fell under the term of ordinary hours of work, and therefore should have attracted super payments. The court agreed with this argument, finding that hours worked beyond fixed hours may be so regular and normal that they become ordinary hours of work.

However, BlueScope Steel appealed the decision *in BlueScope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] and the Full Federal Court has now overturned the previous ruling, finding that employers only need to make super payments on standard hours at ordinary rates of pay. This decision was made on the basis that the court had incorrectly decided that there was only a 'theoretical' difference between ordinary hours and additional hours and public holiday work.

Of importance, in the Court's decision was the definition of 'ordinary hours' under the *Superannuation Guarantee (Administration) Act 1992* (SGA Act). It was decided that ordinary hours of work, refers to standard hours at ordinary rates, distinct from additional hours at higher rates.

As the annualised salary was calculated to remunerate for having to work additional days and long hours (and therefore paid at a higher rate than the base salary), only ordinary hours of work, at the ordinary rate of pay was held to attract super contributions.

Chief Justice Allsop said that the super legislation did not intend to give super benefits for the total salary and is a system designed to provide and encourage national savings for retirements based on standard hours at ordinary rates.

This case highlights employer's super obligations in relation to annualised salaries and highlights the complexities that employers face. The Australian Taxation Office (ATO) is the main authority regarding superannuation obligations and has detailed information available on its website.

If you have any questions regarding the above, please phone the VANA Employment Relations Team on (03) 8540 7000. Alternatively, you may wish to contact the ATO.

The Importance of Keeping Accurate Employee Records

The Fair Work Ombudsman (FWO) has recently commenced its first legal action under the new serious contravention provisions of the Protecting Vulnerable Workers laws within the *Fair Work Act 2009* (Cth) (FW Act) which came into effect in September 2017. It varied the FW Act to:

- Increase penalties by up to 10 times for a new category of 'serious contraventions';
- Make it clear that employers cannot ask for 'cashback' from employees;
- Increase penalties for breaches of record-keeping and pay slip obligations;
- Provide that employers who do not meet record-keeping or pay slip obligations and cannot give a reasonable excuse will need to disprove wage claims made in a court (reverse onus of proof);
- Strengthen FWO's powers to collect evidence in investigations; and
- Boost powers to hold franchisors and holding companies responsible for breaches.

The FWO alleges that IE Enterprises Pty Ltd, trading as Uncle Toys and its director engaged in serious contraventions in relation to maintaining employee records and pay slip obligations. It is alleged that Uncle Toys failed to issue pay slips, failed to keep records, failed to pay employees in full and made unlawful deductions. In addition, Uncle Toys is alleged to have provided misleading pay slips which contained an incorrect business name and an invalid Australian Business Number.

Under s 557C, Uncle Toys will bear the burden of disproving the allegations that it failed to keep adequate records and comply with pay slip obligation. If it is found that Uncle Toys did breach its obligations in relation to pay slips, it faces maximum penalties of $630,000 per breach for the company and $126,000 per breach for the individual (which is 10 times the penalties that would ordinarily apply) in relation to the serious contraventions alleged against it.

FWO has alleged that IE Enterprises Pty Ltd t/as Uncle Toys and its director engaged in further serious contraventions under section 557A of the FW Act such as paying workers unlawfully low rates from as little as $6.70 an hour and did not pay some employees at all for some hours worked. The alleged underpayments of individual employees range from $395 to $5,041 and none of the underpayments have been rectified. The contraventions are considered serious because Uncle Toy and its director refused to rectify the non-compliance, despite extensive engagement with the FWO. The FWO is also seeking a Court order requiring Uncle Toys and its director to back-pay eight employees in full. A directions hearing is listed to be held in the Federal Circuit Court at Melbourne in August 2019.

The employees were mostly in their 20s and were from various countries such as Malta, the Netherlands and Korea.

This case demonstrates the importance of ensuring that employers maintain accurate employee records. If you have any questions regarding employee records, please contact the VANA Employment Relations Team on (03) 8540 7000.