



WORKPLACE LAW UPDATE

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In this edition of "Workplace Law Update", we focus on several aspects of the new [Fair Work Act 2009](#) ("FW Act") which may have legal or practical implications for employers – compliance with the Small Business Fair Dismissal Code and adverse action disputes. We also provide a summary of two recent employment law decisions which emphasise the far reaching consequences when businesses fail to comply with workplace obligations.

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FAIR WORK ACT

Be alert to new "adverse action" disputes: In addition to the standard grounds of unlawful termination (e.g. on the basis of a person's age, sex, disability etc), the FW Act also establishes new "general protections" for employees against breaches or threatened breaches of "workplace rights". "Workplace rights" is broadly defined to include matters such as entitlements under a workplace law or workplace instrument, participation in proceedings under a workplace law or the making of a complaint to a body that deals with workplace laws. An employee will be able to bring an adverse action claim on the basis of the breach of a workplace right for conduct which occurs during the employment relationship, as well as at the time of termination. For example, a decision to deny an employee access to training or a promotion could contravene these laws if the employer's reason is found to be in breach of a workplace right. Employers may also be faced with disputes relating to a refusal to employ a prospective employee on a prohibited ground. The maximum penalty for a breach of a workplace right is \$33,000 for a company.

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New rules regulating deductions from wages: New provisions regulating deductions from wages are now contained in the FW Act. These provisions apply to all national system employers from 1 July 2009. In most circumstances, an employer may deduct an amount from an employee's wages if the deduction is authorised by the employee (in writing), provided that the deduction is principally for the employee's benefit or is authorized by the employee in accordance with an enterprise agreement or modern award. Employers must specify the amount of the deduction in writing; and authorisations may be withdrawn in writing by the employee at any time. Employers are advised to update HR authorisation forms and employment contracts to reflect the recent changes. Employers and human resources practitioners in Victoria should also note that the *Victorian Workers' Wages Protection Act 2007* has been repealed.

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About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry ([VECCI](#)). Your business does not need to be a VECCI member to engage our services.

Smart Company Articles

Peter Vitale is a regular contributor to www.smartcompany.com.au. Feel free to browse the site and view his articles.

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UNFAIR DISMISSAL

Small Business Fair Dismissal Code: The [Small Business Fair Dismissal Code](#) came into effect on 1 July 2009 for businesses with fewer than 15 full time equivalent employees. The Code sets out the circumstances in which summary dismissal without notice or warning will be considered fair. Summary dismissal may cover cases of theft, fraud and violence. For under-performing employees, the Code requires that employees be given a valid reason, relating to why the employee is at risk of being dismissed, and a reasonable opportunity to rectify the problem. If a small business employer complies with the Code when dismissing an employee, the dismissal will be considered fair. However, if an employee challenges a dismissal in [Fair Work Australia](#), the employer will have to provide proof of compliance with the Code. Evidence of compliance may include a completed checklist (which is provided as an attachment to the Code); copies of written warnings; a statement of termination or signed witness statements.

UNLAWFUL TERMINATION

Absence on workers' compensation is not paid personal leave for temporary absence protection: The new [Fair Work Regulations](#) provide that an employee on paid workers' compensation leave is not taken to be on paid personal/carer's leave during that leave period. Under the FW Act, an employer must not dismiss an employee who is "temporarily absent from work because of illness or injury". If an employee is on personal/carer's leave for the duration of the absence, this may amount to a temporary absence and the employee may be protected from being terminated for being absent from work. The Regulations now provide that a period of paid personal/carer's leave does not include a period of absence on paid workers' compensation. However, employers should seek further advice before terminating the employment of employees on worker's compensation, as separate limitations under State workers' compensation legislation may be applicable.

TERMINATION OF EMPLOYMENT

Employer obliged to follow grievance procedure: In the case of [Van Efferen v CMA Corporation Limited](#), the Federal Court has awarded compensation to an employee in the amount of \$274,288 because the employer failed to follow the grievance procedure clause in the employee's AWA. The employer became dissatisfied with the employee's behaviour and in response relocated him from Port Hedland to Geelong. The employee was then made redundant as there was no work for him to perform in Geelong. He alleged that his employer breached the contract of employment by failing to follow the mandatory grievance procedure. The employer claimed that it was under no contractual obligation to observe the grievance procedure for what it claimed was a non disciplinary approach to the employee. In a significant judgment, the Federal Court found that the employer should have followed the grievance procedure. Damages were assessed on a contractual basis. Employers must be careful to comply with grievance procedures and disciplinary procedures when dealing with employee performance issues.

DISCRIMINATION

Substantial compensation for sexually harassed employee: In the case of [Poniatowska v Hickinbotham](#), the Federal Court has awarded an employee \$466,000 in damages as a consequence of workplace sexual harassment. Over the course of her employment, the employee was subjected to inappropriate conduct including degrading comments in front of colleagues; harassing emails, sexually explicit text messages and requests for sex by a co-worker. The employee was terminated for alleged poor performance. The significant compensatory damages took into account lost remuneration, pain and suffering and medical expenses for depression and anxiety. Employers are strongly encouraged to develop policies for dealing with complaints of sexual harassment and discrimination in the workplace. Failure to address complaints properly may have significant effects for both employees and employers.

FAIR WORK ACT: PRACTICAL TIPS FOR EMPLOYERS

Employers must be prepared for the fair work system: [CCI Lawyers](#) can assist employers in understanding and complying with new obligations under the Fair Work Act in the following areas:

- Review existing employment contracts and workplace policies (such as redundancy, termination and anti-discrimination policies) to ensure compliance with the fair work system;
- Consider industrial relations strategies relating to expiry of current workplace agreements and plan for enterprise bargaining;
- Understand obligations in relation to bargaining for new agreements and devise industrial relations strategies in response to industrial action;
- Brief managers, executive teams and board directors on obligations under new legislation;
- Consider which modern awards may cover employees from 2010 and identify strategies for minimising the impact of awards on high income employees (\$108,300 +).

ISSUES FACING YOUR BUSINESS

What workplace law issues confront your business? [Click here](#) to provide us with your suggestions or feedback about the areas of workplace law you would like to know more about in future issues of "Workplace Law Update".
