



EVERYTHING MATTERS

Keeping out of trouble: recent case law relevant to higher education employers

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Prevalent issues in the workplace

- Return to work arrangements
- Succession Planning
- Employer related social functions
- What constitutes discriminating behaviour
- The impact of policies on employment
- What warrants a fair dismissal

Key issues in considering case law



- Is court a game of choice?
- Important to stay abreast of ever-changing standards set by Courts and Tribunals
- Good processes remain very important
- Don't let the law get in the way of pragmatic human resources practices

Return to work



Case study:

St Joseph's Hospital Ltd v Correy (EOD) [2008] NSWADTAP 4

Facts

- Nurse ('N') returns to work after taking maternity leave
- N requests to be rostered back into previous area
- Instead, N rostered to work in different areas
- Hospital ('H') argues that N had no right to expect to resume the same position
- N claims she had been treated less favourably than a person without carer's responsibilities in similar circumstances

Case study (cont.)



Held

- There was no nexus between N's responsibility to care for her infant and H's decision to return her to a different area
- H was within its rights to treat N as it would treat another nurse (without carers responsibilities) returning to work

Implications

- Employers should be aware of their obligations when dealing with employees returning from leave
- An employer will be liable for discrimination on the grounds of family responsibilities during employment where:
 - there is a link between the act causing the complaint; &
 - the employee's family commitments

Succession Planning



Case study: succession planning vs. age discrimination

***Morgan v Austin Health* [2007] VCAT Ref No. A64/2007**

Facts

- M (71 years old) worked as a sessional specialist at a hypertension clinic in a hospital ('H')
- M undertook 5 of the 10 sessions held at the clinic on a fortnightly basis
- In the interests of succession planning, M's sessions were reduced to 2 and the remainder were reallocated to younger specialists
- M argued his age was the major reason for the reduction

Succession Planning (cont.)



Held

- H's restructure proposal was undertaken with the best intentions of the hospital & its decision to reduce M's sessions would have been the same no matter his age
- H did not intend to ease M out of his duties
 - M was still head of the relevant clinic
 - M was regarded as the supreme expert in the area & it was thought other practitioners could learn from his continued presence

Implications

- Awareness that restructuring may create tensions within an organisation
- Ensure any restructuring activities are undertaken substantially for the improvement of business and not for any ulterior purpose

- Apply for exemptions from equal opportunity & discrimination laws
 - e.g. *Raytheon Australia Pty Ltd & Ors* (July 2007)
 - Defence contractor sought exemption from racial discrimination laws to satisfy US security conditions
 - e.g. *Hobsons Bay City Council (Anti-Discrimination Exemption)* [2008]
 - Age discrimination exemption sought to implement retirement scheme for employees over 55

Employer Related Social Functions



Employer responsibility for employee actions outside work

- Private party incidences
- Employer sponsored functions
- Cases
 - *A v K Ltd & Z (Anti-Discrimination)* [2008]
 - *Telstra v Streeter* [2008]
 - *Fox v AIRC* [2007]

Employer Related Social Functions (cont.)



Case study:

***A v K Ltd & Z (Anti-Discrimination)* [2008] VCAT 261**

Facts

- A alleged that Z (a colleague) sexually harassed him on two separate occasions
- Occasion 1
 - Z made inappropriate comments towards A during a private function followed by the sending of many inappropriate text messages from a work phone after the function

Employer Related Social Functions (cont.)



- Occasion 2 allegedly happened after a company sponsored function where employees/clients gathered at a bar
 - Company paid for alcohol and accommodation at a hotel
 - A remembered waking up in Z's hotel room the next morning & being subjected to an intimate act
 - Z denied any such act & argued that A was so drunk that Z took A to his own hotel room
- A also alleged that the employer ('E') be held vicariously liable for Z's actions

Employer Related Social Functions (cont.)



Held

- [Occasion 1] Complaint dismissed as the harassment occurred in circumstances where the employment was an incidental factor
 - Party occurred on a Saturday at a commercial hotel where only minority of guests were employees
- [Occasion 2] Weight to be given to A's evidence having regard to his intoxication is a matter for a full hearing at the tribunal
 - Matter referred & to be decided at a future date

Employer Related Social Functions (cont.)



Case study:

***Telstra v Streeter* [2008] AIRCFB 15**

Facts

- Employee ('S') sacked for sexual harassment after having sex in the presence of colleagues after a work-related party
- The incident occurred in private paid hotel room
- S was subsequently reinstated after the AIRC found that her behaviour was not sexual harassment

Employer Related Social Functions (cont.)



- T (employer) sought to have the decision overturned on the basis that S was consistently dishonest during an internal investigation

Held

- S not to be reinstated as her dishonesty destroyed her relationship of trust & confidence with T
- N.B. Original decision regarding sexual harassment was not found to be incorrect

Employer Related Social Functions (cont.)



Case study:

***Fox v AIRC* [2007] FCAFC 150**

Facts

- Employee ('F') sacked after an incident between him & a colleague ('X') in which he threatened her with physical & sexual assault
- Incident occurred after the trivia session of a trivia night at a bar where colleagues were socialising
- Nobody saw the incident but it was covered by a security camera

Employer Related Social Functions (cont.)



- F argued that since nobody saw him do it, nobody can prove the incident occurred & therefore he did not do it
- The AIRC questioned F's credibility & affirmed the employer's ('E') decision to sack F
- Notably, the AIRC's decision came 12 months after the hearing
- F appealed to the Federal Court which quashed the AIRC's ruling on the basis:
 - delay raised concerns about the accuracy of recollecting witnesses observations

Employer Related Social Functions (cont.)



- F was not given an adequate opportunity to provide an explanation
- The Commissioner's reasons for the decision were phrased in similar terms to that of E's termination letter

Held

- Ultimately, this case ended up in the Full Federal Court which upheld F's sacking
- F now has appealed to the High Court

Implications

- Employers may be held liable for employees' actions at social functions
- Line between a private function & a work sponsored social function is hazy
- Higher education employers should be mindful of what events they sponsor
 - Alcohol paid for?
 - Public venue or paid for private premises?
 - Who is present?

III Health Termination of Employment



Case study:

Duma v Mader International Pty Ltd (Anti-Discrimination) [2007]

Facts

- Employee ('D') took indefinite/unpaid sick leave for a period of 3 months
 - D suffered from back pain & depression
 - At the time of injury D had minimal paid sick leave remaining
- Employer ('M') sent letters to D requesting a likely return to work date
 - D did not respond as his doctor could not identify such a date
- M sacked D
- D alleged he was discriminated against as a result of his injuries

III Health Termination of Employment (cont.)



Held

- Indirect discrimination & ordered to pay compensation
- Although M would have treated any other employee the same way, M's actions were unreasonable
 - D had medical certificates demonstrating his long-term unsuitability for work
- Sacking would have been reasonable if:
 - D's condition had been less serious
 - D had been absent for greater than 3 months

Disability Discrimination in Education



Case study:

Turner v State of Victoria (Anti-Discrimination) [2008] VCAT 161

Facts

- T was a student who was impaired with a brain dysfunction
- The State of Victoria (S) required T to access her educational needs without an ongoing teachers aid
- T consequently struggled with aspects of her curriculum including participation

Held

- S had indirectly discriminated against T due to her impairment
- The condition imposed on T was unreasonable & prevented her from obtaining a successful education
- Compensation of \$82,000 awarded

Impact



Implications

- Tread cautiously
- High standards set for large educational institutions

Policies that bind you



Case study:

Nikolich v Goldman Sachs JB Were Pty Ltd [2007] FCAFC 120

Facts

- N's (employee) employment was terminated after many disputes with management over the allocation of clients
- N claimed the he was harassed & the employer (G) failed to promptly or adequately deal with the issues
- G's work policy amongst other things
 - provided for dispute resolution procedures
 - included a commitment to provide a safe & healthy work environment

Policies that bind you (cont.)



- N argued that G breached the employment contract by not adhering to its policy principles

Held

- Although the policy was not incorporated into the employment contract it was binding
 - All employees were provided with a copy upon joining
 - Employees could be disciplined for breaching the policy
 - Managers were expected to follow policy guidelines

Implications

- Employers must be acutely aware of their policies as they are likely to be incorporated into employment contracts
- Identify methods of ensuring such policies are not binding
- Evaluate current policies to identify likelihood of past breaches

The safety of contractors



Case study:

***Rorato* (NSW Industrial Court)**

Facts

- X was hired to R through P (contracting company)
- X was badly injured after an incident involving a forklift at R's loading docks

Held

- R was fined under the relevant OH&S legislation for not providing a safe working environment
 - R did not provide any training to X prior to commencement
 - R had an obligation to ensure the loading docks operated safely
- P was also found liable
 - Failed to ensure that R provided safe working premises for X

What's unfair?



Plethora of issues in termination of employment cases which affect both employers & employees

Cases

- *Choong v Bridgestone Australia Ltd* (29/02/08)
- *Fangridas v Australia Postal Corporation* (29/02/08)
- *Mr Marek Dariusz Mischczuk v GSL (Australia) Pty Ltd* [2008] ('Marek')
- *Wayne Edward Collins and Commissioner of Police* [2008] NSWIRComm 30 ('Wayne Edwards')

What's unfair (cont.)

Case study:

***Choong v Bridgestone Australia Ltd* PR980932 (29/02/08)**

Facts

- C worked for B before being sacked
- C claimed under unfair dismissal
- B argued that C was not an employee but rather a contractor

Held

- Unfair dismissal laws were not available to C as C was not B's employee
- C was employed by X (labour hire firm) and contracted to B
 - Annual leave, superannuation and PAYG payments were handled by X
 - B paid C for his services but on X's invoices
 - C made no effort to become B's employee

What's unfair (cont.)



Case study:

Fangridas v Australia Postal Corporation PR980958 (29/02/08)

Facts

- F was employed by A & sought a transfer to another location within the company
- F's request was rejected upon which he provided his resignation in writing
- F gave one week's notice during which period he changed his mind and wanted his job back
- A refused to reinstate him

Held

- F's resignation was valid & A did not have to give him his job back
 - Resignation was in clear language & left no doubt as to F's intention

What's unfair (cont.)



Marek

Facts

- M was a security guard at a detention centre (V)
- M was responsible for securing the perimeter of the property
- He was found sleeping at his post whilst on duty with his shoes off
- M was sacked and argued unfair dismissal since:
 - He was not asleep
 - Removed shoes because it was too hot

Held

- M was not entitled to be reinstated
- M failed to stay alert thereby breaching a core requirement of his duties

What's unfair (cont.)

Wayne Edwards

Facts

- A police officer (“P”) was involved in a drink driving accident in which his passenger’s wrist was broken
- P (who blew 0.153 BAC) was dismissed as his actions were deemed to discredit the NSW Police Force
- P was out celebrating the news that he was to become a father for the first time

Held

- P’s dismissal was unfair as the Police Commissioner’s failed to consider:
 - P’s previously unblemished record
 - The impact P’s termination would have on his young family
 - P had undergone counselling and repaid his debt to society
 - It was momentary reckless error of judgement
- P deserved a second chance
- P was to be reinstated at a location of the Commissioner’s choosing



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