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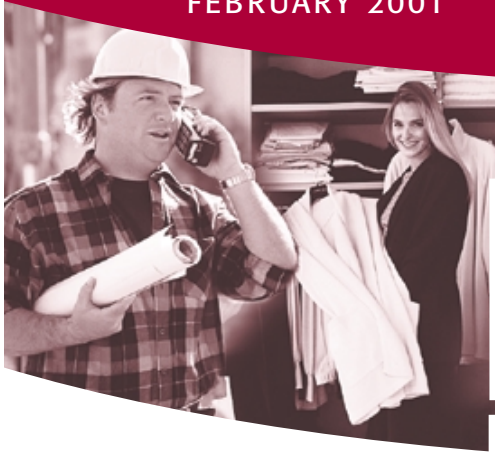
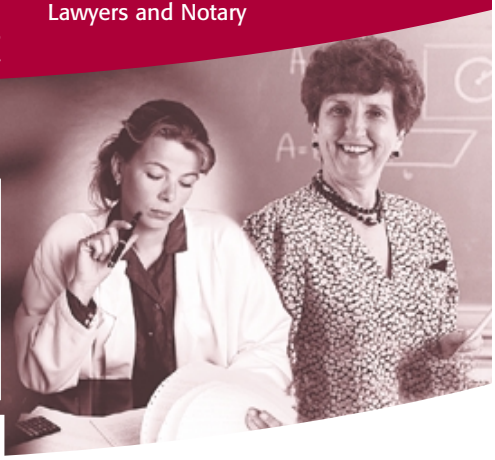
Lawyers and Notary





M&M at work

Editorial

By Patrick Mullins

We have been reading all sorts of horror stories about cases decided under the unfair dismissal legislation. Stories about employees who have stolen from their employers and found to have been dismissed unfairly on technical grounds. The High Court's recent decision in Concut Pty Ltd v Worrell is a ringing endorsement for the right of employers to summarily dismiss employees for dishonesty.

The employee was state manager of a construction company, employed for a fixed term. He had used the time of employees of the company in constructing his own home.

There were technical arguments about the misconduct having occurred prior to him entering into the fixed term contract. The High Court has unanimously held that the dishonest conduct in the use of the employees' time for personal purposes justified summary dismissal even though that misconduct occurred before the written contract was signed. The High Court has endorsed the view long held that an employer is entitled to immediately dismiss from employment an employee who is found to have acted dishonestly.

Employees should take notice of this decision. Any dishonesty destroys the trust relationship between an employee and an employer and justifies immediate dismissal, even where there is a fixed term contract.

In this issue of M&M at Work we look at issues of casual employment, the QIRC's Pay Equity Inquiry and workplace compliance programs. On the education front, we look at the provision of special services to students with disabilities. This can be a perplexing problem for educational authorities. Similar considerations apply to eployers in making provision for disabled employees. Suzanne Wishart looks at recent decisions on the WorkCover Queensland Act 1996 which significantly affects the rights of Queensland workers.

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Smart Casual

An overview of casual employment

By Samantha Kane

With an ever increasing trend towards employment of casual workers, there is likewise an increasing confusion as to the nature of casual employment and entitlements of casual employees. In this article, we seek to provide a basic overview of casual employment and touch upon a recent landmark decision of the Australian Industrial Relations Commission ("the AIRC") which may significantly impact upon the rights of casual employees in Australia.

What is a casual employee?

A "true" casual employee is not employed on a continuing or permanent basis, but is employed under arrangements which are informal, uncertain or irregular. A separate contract exists for each period of employment (eg a shift), even if there is an expectation of further offers of work from the employer. This is distinct from a permanent employee, who may be engaged on either a full-time or part-time basis. The casual employee is paid a loading in order to compensate them for the absence of benefits such as annual leave and sick leave which are provided to permanent employees.

In practice however, many casual employees are provided with regular hours of work and may be employed by one employer for lengthy periods of time, often years. This in turn has lead to the misnomer of the "permanent casual", which legally is a contradiction in terms. Many employers prefer to pay the additional loading in return for the flexibility of casual employees, the perceived ability to hire and fire more readily, and in order to overcome issues associated with accrued entitlements such as annual leave and sick leave.

What entitlements do casual employees accrue?

Particulars of entitlements of casual employees can be found in awards applicable to the employee's workplace or industry, whether they be State or Federal awards. The majority of casual employees in Queensland are employed under State awards. Overriding each State award are the provisions of the *Industrial Relations Act 1999 (Qld)* ("the Act"). In the case of inconsistency between a State Award and the Act, the provision more favourable to the employee will apply. Below we set out the basic entitlements of casual employees under the Act:

- Annual Leave, Sick Leave, Bereavement Leave and Public Holidays

Casual employees are not entitled to Annual Leave, Sick leave or Bereavement Leave, nor are they entitled to be paid for public holidays on which they do not work.

- Long Service Leave

Casual Employees are entitled to Long Service Leave under the Act, in the same manner as permanent employees, that is, 13 weeks long service leave after 15 years of continuous service and a proportional payment if the employee leaves after 10 years of continuous service. Casual employees commenced accruing long service leave entitlements from 23 June 1990.

- Parental Leave

"Long Term Casual Employees" are entitled to take maternity leave only (as opposed to paternity or adoption leave). Long Term Casual Employees are defined as casual employees who are engaged by a particular employer on a regular and systematic basis, for several periods of employment during a period of at least 2 years immediately before the employee seeks to access maternity leave. Particulars

Continued on page 2.

Smart Casual

Continued from page 1.
of the entitlement are contained within Chapter 2, Part 2 of the Act.

- **Severance or Redundancy Pay**

Severance allowances and other separation benefits are not required to be paid to casual employees, irrespective of length of service.

- **Notice of Termination**

An employer is not required to provide notice of termination to casual employees or payment in lieu thereof under the Act.

- **Access to Unfair Dismissal Laws**

It is a common misconception that unfair dismissal laws are *not* accessible to casual employees. Rather, the unfair dismissal provisions of the Act are not accessible to " short term casual employees", which are defined as casual employees who are not employed on a regular and systematic basis for a period of at least 1 year and who have a reasonable expectation of further employment by the employer. Employers should be aware that, in dismissing a casual employee of more than 1 year's service, procedural fairness should be followed in a similar manner to that followed in relation to permanent employees.

Recent AIRC decision

On 29 December 2000 the AIRC handed down its decision in response to an application by the metal worker's union to make variations to the Federal metal worker's award to provide certain protections to casual employees. The AIRC varied the award to provide that casual employees engaged on a "regular and systematic basis during a period of 6 months" will be entitled to elect to convert to permanent full-time or part-time employment.

In reaching its decision to amend the award, the AIRC expressed concern in relation to the ever increasing phenomenon of the "permanent casual" and the potential diminution of award entitlements of those casual employees.

Whilst at present the decision is limited to the metal industry, it has drawn considerable interest from many industries, including the hospitality industry, where casual employment is prevalent. The ACTU is examining the decision to consider launching a test case in relation to other casual employees throughout Australia.

Conclusion

The uncertainty and confusion surrounding entitlements of casual employees illustrates the vital importance of carefully considering the true status of those labelled as "casual employees" and of gaining a full understanding of award and statutory entitlements applicable to those employees.

Pay Equity Inquiry

By Elizabeth Sheehan

In September 2000, the Minister for Employment Training and Industrial Relations directed that an inquiry be held by the Queensland Industrial Relations Commission on pay equity in Queensland. The Inquiry is currently underway and the Commission is due to hand down its report at the end of March 2001. The inquiry is being undertaken by Commissioner Glenys Fisher.

The principle of pay equity goes further than the notion of equal pay. Equal pay means equal pay for the same work and has been an established principle of our industrial relations system for decades. Pay equity on the other hand is defined in the *Industrial Relations Act 1999* as equal remuneration for men and women workers for work of equal or comparable value. Pay equity principles are designed to ensure that the work of employees in female dominated industries and occupations is properly valued and in consequence is properly remunerated.

The principle of pay equity is not new to Queensland. The Queensland Industrial Relations Act requires the Industrial Relations Commission to perform its functions to further the elimination of discrimination and to ensure equal remuneration for men and women.

Despite this, there is evidence that a gender pay gap exists in Queensland. The inquiry discussion paper states that in Queensland the female to male average weekly ordinary time earnings ratio is around 84%. The gender earnings gap is slightly smaller in Queensland than the national figure.

The inquiry is to consider:

- The extent of pay equity in Queensland. The Commission is not required to examine all industries and occupations, but is to include an examination of the findings of the New South Wales inquiry into pay equity and their relevance to Queensland.
- The adequacy of current legislative arrangements for achieving pay equity.
- The New South Wales Equal Remuneration and Other Conditions Principle and the Tasmanian Pay Equity Principle and their relevance for Queensland. The Commission is to prepare a draft principle which may be adopted in Queensland.

From the terms of reference, it can be seen that this inquiry is not the first of its kind and it is building on the work of similar inquiries in NSW and Tasmania.

Special needs in scho

By Pat Mullins

Schools are vulnerable to complaint of breach of the *Anti-Discrimination Act 1991 ("the Act")* or of the *Disability Discrimination Act 1992* in circumstances where a school declines to enrol a disabled prospective student on account of that student's disability.

It can be the case that a school may not have the resources or ability to properly cater for a student with a very severe disability.

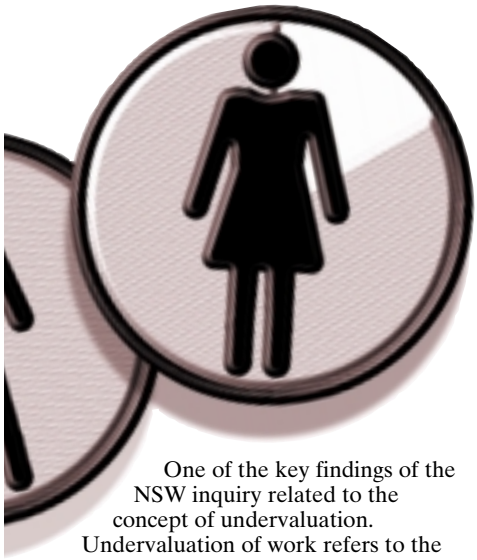
Section 7 of the *Anti-Discrimination Act 1991* prohibits discrimination on the basis of impairment. Effectively discrimination may occur if there is "less favourable treatment" meted out to the disabled person as opposed to another without the impairment.

Division 3 of Part 4 of the Act prohibits discrimination in the education area.

At first glance, refusal to enrol a disabled student because of impairment could amount to discrimination in the education area.

There are however certain exemptions for discrimination in the education area. Of particular relevance in such a situation is section 44 which states:

"It is not unlawful for an educational authority to discriminate on the basis of impairment against a person with respect to



One of the key findings of the NSW inquiry related to the concept of undervaluation.

Undervaluation of work refers to the situation where employees working in a female dominated occupation or industry receive less remuneration then other employees who perform work of equal or comparative value on other industries.

The NSW inquiry identified the following characteristics as providing a profile of work/occupations that tend to be undervalued:

- female dominated
- female characterisation of work
- weak unions
- few union members
- consent award/agreements
- large component of casual workers
- lack of, or inadequate recognition of qualifications
- deprivation of access to training or career paths
- small workplaces
- new industry or occupation
- service industry
- home based occupations

The NSW Inquiry identified undervaluation of work in the following industries:

- child care workers
- seafood processors (trimmers)
- public sector librarians
- hairdressers
- beauty therapists and
- outworkers in the clothing industry.

In Queensland, the industries in which more than half of the employees are female are: health and community services; education; finance and insurance; cultural and recreational services; accommodation, cafes, restaurants and retail trade. It will be interesting to observe whether the same findings will be made in relation to pay equity in these industries in Queensland.

The pay equity principles developed in both NSW and Tasmania are confined to the making and varying of awards. Both address wages and other conditions of employment and are based on work value claims which are made on a gender-neutral basis.

The Queensland Government has submitted to the inquiry that the Commission's powers in relation to pay equity should extend beyond awards to other types of applications under the act including equal remuneration orders and the Commission should play some role in the resolution of disputes about pay equity.

We will keep you informed as to the findings and recommendations of the inquiry as they are released.

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a matter that is otherwise prohibited under sub-division 1 if:

a) the person would require special services or facilities; and

b) the supply of special services and facilities would impose unjustifiable hardship on the education authority".

Section 5 of the Act defines *"unjustifiable hardship"* it provides:

"Whether the supply of special services or facilities would impose unjustifiable hardship on a person depends on all the relevant circumstances of the case, including, example:

a) the nature of the special services or facilities; and

b) the cost of supplying these special services or facilities and the number of persons who would benefit or would be disadvantaged; and

c) the financial circumstances of the person; and

d) the disruption that supplying these special services or facilities might cause; and

e) the nature of any benefit or detriment to all people concerned".

There are no helpful decisions of the Queensland Anti-Discrimination Tribunal in relation to unjustifiable hardship and when or in what circumstances that test might be met.

In *Hills Grammar School v Human Rights and Equal Opportunity Commission* the Federal Court dealt with a similar matter although the provisions of the *Disability Discrimination Act 1992 (C'th)* were the applicable legislation.

In the *Hills Grammar School* matter the Human Rights and Equal Opportunity Commission had considered the issue of the defence of unjustifiable hardship and had concluded that the school had unlawfully discriminated against the prospective student who suffered from spina bifida.

The Federal Court dismissed an application brought before it for judicial review of the Commission's decision.

One avenue open to a school in this position is to make an application under section 113 of the Queensland Act.

Full evidence would have to be available as to the special support or program which would be required to accommodate the student. The supply of those programs or support would need to be costed. At the end of the day however whether or not unjustifiable hardship could be made out will depend on the precise factual circumstances of each case. These therefore are matters which require expert legal advice and assistance. A professional judgment needs to made. School principals are often too close to the issues to make that professional judgment. There is no substitute for experienced but timely legal advice.

Workplace Compliance Program

By Samantha Kane

The development of Human Resource Policies in a business, no matter what size, is of vital importance to help that business meet its various legal obligations. Human Resource Policies should operate to inform all employees including management, of their mutual rights and obligations. For any business to operate effectively, it must be able to do so in a way that not only meets its legal obligations but enables employees to perform their work in a way that respects the rights of others.

A strategic alliance between Mullins & Mullins Lawyers, with specialist expertise in employment and discrimination law, Service Industry Alliance Group (SIAG), a specialist Human Resource and Industrial Relations consultancy and AusSAFE Consulting, Professional Occupational Health and Safety Consultancy Services, has been forged to enable a unique service to be provided that brings together the resources of these organisations.

This alliance can provide any organisation with a core collection of Human Resource Policies specifically tailored to meet its needs and that comply with the relevant regulations and legislation. In particular, assistance may be provided with developing and implementing Anti-Discrimination and Sexual Harassment and Occupational Health and Safety Policies to ensure compliance with current legislation. A strategy to implement these policies effectively can also be provided.

These policies are in line with industry "Best Practice" and provide a strong foundation to support an organisation's continued growth. In addition, these policies:-

- help to ensure that an organisation complies with relevant legislation when completed;
- help to limit liability for senior management in regard to non-compliance; and
- provide the framework for an organisation's performance management system.

Should you wish to obtain any further information in relation to the Workplace Compliance Program, please contact Samantha Kane at Mullins & Mullins.

Pregnant pause

MIM recently stood down a pregnant underground diesel worker when a company doctor determined that she was unfit for underground duties due to the risk of lead contamination. The worker claimed that lead contamination was a risk for its entire workforce, not just pregnant women. The Queensland Industrial Relations Commission ordered that the worker be transferred to administrative duties.

Section 36 of the *Industrial Relations Act 1999* applies when the work of a female employee is, because of her pregnancy or breastfeeding, a risk to the health of the employee or her child. The risk is to be assessed on the basis of a doctor's certificate or the employer's Workplace Health and Safety obligations. The employer must temporarily adjust the employee's working conditions or, if this is not feasible, transfer the employee to work that is, as nearly as possible, comparable in status and remuneration to their present work. If that is not available, the employee is entitled to maternity leave or any available paid sick leave.

Employers must take care to consider whether the work performed by a pregnant worker poses a genuine risk due to her pregnancy and if necessary make efforts to find comparable work. Otherwise employers may face a discrimination claim or other industrial action.

Is drug addiction a disability?

The Federal Court recently considered the issue of whether drug addiction constitutes a disability within the meaning of the Federal Disability Discrimination Act 1992 ("the DDA").

The Applicant had for some years been opioid dependant, having been previously addicted to heroin and a regular user of prescribed methadone. Following an incident at the community club at which he was a member, the Applicant disclosed to the club that he was opioid dependent and on the methadone program and that his demeanor was not due to intoxication.

Medical opinion, which had not been sought by the club, did not require the abstention of alcohol for those on the methadone program. The Applicant was eventually expelled from the club and lodged a complaint under the DDA. The Court concluded that the opioid dependence suffered by him was a disability within the meaning of the DDA.

Whilst this case does not deal specifically with discrimination in the work area, the case illustrates that it may be unlawful in some circumstances for an employer to dismiss, fail to employ, or subject a person to detriment on the basis of a drug or alcohol addiction.

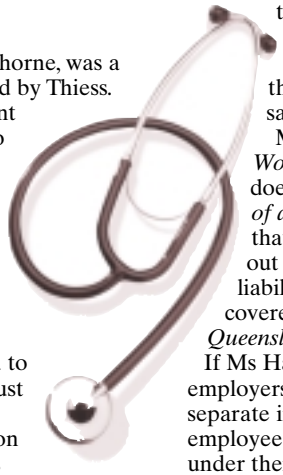
Common law damages claims by employees - are you covered?

By Suzanne Wishart

Both employers and employees alike will be watching with interest the decision of the Court of Appeal in *Hawthorne -v- Thiess Contractors Pty Ltd & WorkCover Queensland.* The issues for consideration by the Court of Appeal will affect the rights of an employee to sue their employer for damages at common law for injuries sustained in the course of their employment and the entitlement of the employer to rely on the cover afforded by its WorkCover policy.

The Facts

The appellant, Ms Hawthorne, was a project manager employed by Thiess. As part of her employment duties she was required to travel to Malaysia where she contracted Cytomegalovirus (CMV) for which she made a WorkCover statutory claim for compensation which was accepted in January 1995.



Ms Hawthorne returned to work in late 1996. In August 1997 she became ill again with fatigue and depression and her statutory benefits claim was reopened. Her claim was accepted and she was ultimately assessed as having a permanent impairment. In finalisation of her claim by WorkCover she received a lump sum compensation payment.

In May 1999 Ms Hawthorne's solicitors advised WorkCover that she would be bringing a claim for common law damages. They sought to have the assesssment of permanent impairment recognised as a fresh injury sustained in 1997. The purpose of this was to circumnavigate the three year time limit which applied in respect of the 1995 injury.

The employer and WorkCover objected to Ms Hawthorne's claim. She applied to the court for a declaration that she was entitled to commence and prosecute such proceedings without having to comply with the provisions of the *WorkCover Queensland Act 1996.* His Honour Justice Williams found that she had not suffered an injury within the meaning of the *WorkCover Queensland Act 1996* and was therefore precluded from pursuing a claim for damages against her employer independently of the Act.

His Honour dismissed the Applicant's application with costs. He noted that the Act regulates and limits access to common law damages. *"That is done for the express purpose of insuring that the scheme remains fully funded and that premiums are kept to a reasonable level".*

Ms Hawthorne has appealed from this decision to the Court of Appeal claiming that she is not precluded from bringing a proceeding for damages by the operation of the *WorkCover Queensland Act 1996* and that she should be allowed to proceed as against her employer outside the scope of the Act.

The *WorkCover Queensland Act 1996* was enacted against the background of concern as to the solvency of the Workers' Compensation fund. It sought to implement a structured scheme which effectively abolished any entitlement on the part of an injured worker to commence proceedings against their employer unless a Claimant has complied with certain steps prescribed under the Act. Ms Hawthorne has not satisfied these steps.

Ms Hawthorne argues that the *WorkCover Queensland Act 1996* does not *"cover the field of liability of an employer to employee"* and that an employer ought to take out private insurance in respect of liabilities for which they are not covered under the *WorkCover Queensland Act 1996.*

If Ms Hawthorne's claim is successful employers would be required to have separate insurance for liability to employees for injuries not covered under their WorkCover policy.

The matter is listed for hearing by the Court of Appeal on 30 March 2001.

If Ms Hawthorne's appeal is successful it would be considered by many an opening of the floodgates for employees injured at work who were unable to satisfy the provisions of the 1996 Act, entitling them to bring proceedings against their employer outside of the WorkCover legislation. We anticipate that many employers would be left in the position where they are not entitled to rely on their WorkCover policy and do not hold appropriate insurance from which they could claim and seek indemnity for such a claim.

Employers should be checking their current insurance policies to ascertain whether they are covered for such a claim.

Any decision by the Court of Appeal may not be the final chapter in this saga as the parties could seek leave to appeal to the High Court.

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