

CEO COPS A\$350,000 FINE AND 15 YEAR BAN

The James Hardie case serves as a timely reminder for all in-house counsel to keep and maintain accurate records of directors' meetings. In *Australian Securities and Investments Commission v McDonald* the NSW Supreme Court recently upheld a decision finding 10 former executives and directors of ABN 60 Pty Limited, formerly James Hardie Industries Limited, liable for their "flagrant" breaches of duty in misleading the public about an asbestos compensation fund. A report released by James Hardie claimed that a 'fully funded' compensation trust would be established to support claimants who had contracted asbestos related diseases. Justice Ian Gzell found that the directors ought to have known that the media release was misleading and that it would influence the market. The company made persistent false representations in relation to the fund without sufficient evidence to support these statements. The Court found that the company had breached its continuous disclosure obligations under the Corporations Act. The heaviest penalty imposed was on former Chief Executive, Peter MacDonald, who was fined A\$350,000 and was banned from managing a company for 15 years.

General Counsel - 7 year ban and fine of \$75,000

Peter Shafron, James Hardie's former general counsel, was banned for seven years from managing a company and was fined A\$75,000 for his involvement in the company's decisions. Mr Shafron failed to advise the board that the media release "was expressed in too emphatic terms concerning the adequacy of the funding available to meet all...asbestos claims". As general counsel, Mr Shafron must have been aware that if the company released a misleading public statement that was potentially harmful, it risked contravening the Corporations Act. The Court held that it was Mr Shafron's duty to warn the company that the contents of the release were too emphatic.

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In light of this decision, it would be prudent for in-house counsel to ensure that documents provided to the board are accurate, and to take personal records of all meetings. The Court was of the view that Mr Shafron ought to have known that the economic reports supplied to the directors

were preliminary reports and that they should not have been relied on. In order to reduce the risk of prosecution, in-house counsel should keep a table of information provided to the company and note any qualifications made on the information given.

EMPLOYEE SLEEPOVERS? IT'LL COST YA...

Sleepovers are a widespread practice in New Zealand and facilitate overnight care arrangements for individuals with intellectual and physical disabilities. In *Idea Services Limited v Dickson*, a Full Court of the Employment Court considered whether sleepovers constitute “work” for the purpose of the Minimum Wage Act 1983 (‘MWA’) and therefore whether employers are required to pay employees for every hour of a sleepover, including those hours where employees are asleep.

Facts

- Mr Dickson was a Community Support Worker.
- Idea Services Limited required Mr Dickson to ‘sleepover’ at a community home between the hours of 10pm and 6am.
- During the sleepover period, Mr Dickson was free to sleep, rest or engage in activities that would not disturb the residents.
- Mr Dickson was required to attend to the needs of residents during a sleepover and would be paid his normal hourly rate for every hour that he was awake and attending to the residents.
- When he was not required to attend to residents Mr Dickson would sleep and rest.



- During a sleepover Mr Dickson was not allowed to consume drugs or alcohol.
- During a sleepover Mr Dickson could not leave the home or have visitors without prior permission.
- Mr Dickson was paid a sleepover allowance of \$34 per night (in addition to any hourly rate he received when he attended to residents).
- Mr Dickson’s daytime hourly rate was \$17.66.

Claims

- Mr Dickson argued that under the MWA he was entitled to be paid the minimum wage for every hour of his sleepover, even whilst he was asleep.
- The MWA states that an employee “shall be entitled to receive from his employer payment for his work at not less than that minimum rate”.
- “Work” is not defined in the MWA.

Issues

- Whether sleepovers constitute “work” under the MWA and Idea Services Limited is thereby required to pay Mr Dickson the minimum wage for every hour that he engaged in a sleepover, even for the hours when he was asleep.
- If sleepovers constitute “work” under the MWA, can the MWA be satisfied if at the end of each pay period Mr Dickson received not less than the minimum rate (\$12.50 per hour) for the total number of hours worked during each period? (‘the averaging argument’)
- Or whether the MWA requires Mr Dickson to be paid at no less than the minimum rate for each and every hour worked.



Decision

- The Full Court held that time Mr Dickson spent engaged on sleepovers formed part of his “work” under the MWA and that “*he is entitled to payment at not less than the prescribed minimum rate for all of that time.*”
- In reaching this decision the Court considered three things:
 - *Constraints on the employee* — included impact on the employee’s social and family life, privacy limitations, loss of home

comforts and requirements of remaining quiet and avoiding alcohol and drugs.

- *Responsibilities of the employee* — ensuring safety of residents and the premises, providing timely care and support to residents’ needs during the night. The Court distinguished these duties and responsibilities from those of an on-call worker or worker at home.

- *Benefit to the employer* — The Court considered that the importance of the role affected the question of whether the period would be considered work. The more critical the role to the employer the more likely it was that the employee would be found to be engaged in work.

- The Court found that

Mr Dickson could only engage in a limited range of activities while engaged in a sleepover and that his privacy was limited.

- Disturbances are unpredictable in their frequency and timing and the responsibility of community service workers during sleepovers were “*relatively weighty*”.

Averaging Argument

The Court did not decide the ‘averaging argument’ and called for further submissions. The potential impact of the decision was such that Business New Zealand and the New Zealand Council of Trade Unions have been given the opportunity to

comment on the issue. The Court's decision on the averaging argument is yet to be released.

Appeal

Given that the long-term outcome of the case involves potentially additional costs of over \$100 million to those in the care industry, the decision

of the Full Court on the issue of whether Mr Dickson was performing "work" during sleepovers has been appealed to the Court of Appeal. We will keep a close watch on the case and update readers of any developments.

SACKED FOR SENDING CONFRONTATIONAL EMAILS

The Employment Relations Authority awarded an Auckland Accountant just over \$17,000 after she was sacked for sending confrontational emails to other staff and enquiring into complaints made against her. Vicki Walker worked as a financial controller at ProCare for two years before her dismissal in December 2007. ProCare stated that the emails Ms Walker sent to fellow staff often contained bold font, block capitals and use of the colour red. ProCare argued that Ms Walker's emails



caused disharmony amongst the staff and that the staff found the emails confrontational. ProCare dismissed Ms Walker after she sought to view the complaints laid against her by fellow staff members regarding the emails. ProCare claimed that releasing details of the complaints would only

escalate the tension further and would result in a formal investigation.

Before the Employment Relations Authority, Ms Walker stated that while some emails could have been worded differently, ProCare did not have a policy or guide relating to email use and therefore it was unclear what was acceptable. The Authority found that Ms Walker had not received any formal warnings and that the dismissal was unreasonable and unjustified. Ms Walker

was a competent employee and was committed to getting the job done. The Authority awarded her \$11,500 for hurt and humiliation suffered as a result of the shock dismissal, \$2,638 in lost wages and \$3,000 to represent the difference between her former and current salary.

PERSONAL GRIEVANCE RAISED OUTSIDE 90 DAYS RULED OK—\$35,000 DISTRESS DAMAGES UPHeld

The recent Court of Appeal decision in *Commissioner of Police v Hawkins* upheld a decision of the Employment Court ruling that an employer can impliedly consent to a personal grievance being raised outside the 90-day time limit.

Facts

Mr Hawkins was a police sergeant stationed at Taumarunui. In 2001 Mr Hawkins applied to disengage from the police on medical grounds. That application followed an enquiry into allegations that he had assaulted two young men in the police cells in 2000. Two medical professionals supported Mr Hawkins's disengagement, which had immediate effect. Mr Hawkins was charged with two counts of assault but was discharged under the Crimes Act 1961. In 2003, Mr Hawkins raised a personal grievance for constructive dismissal against the police commissioner, claiming that he had been subjected to bullying tactics by his commanding officer. Mr Hawkins had written letters in September and October 2001 indicating his intention to bring a claim. The Commissioner claimed that Mr Hawkins had disengaged voluntarily and had not raised a personal grievance within the 90-day limit.

The Law

Section 114 of the Employment Relations Act (ERA) states that;

“Every employee who wishes to raise a personal grievance must...raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action

alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.”

Decision of Employment Court

- The Commissioner impliedly consented to the personal grievance being raised outside the 90 day time limited.
- The fact that Mr Hawkins disengaged voluntarily from the force did not prevent him from raising a personal grievance (but this might be relevant to remedies).
- Mr Hawkins was “*constructively and unjustifiably dismissed from his employment*”.
- The cause of his resignation was the “*ongoing betrayal of his trust and confidence in the police administration*” due to the failure to rectify the “*systemic dysfunction*” in the Taumarunui police station, which caused Mr Hawkins to become unwell.
- Inspector Allen's actions wrongly and actively encouraged his resignation and the reasons behind Mr Hawkins's resignation were foreseeable to the Commissioner.
- Mr Hawkins was to be reinstated to his former position or a position no less advantageous and he was to receive a sum representing his loss of remuneration from June 2001 until his reinstatement (to be reduced by amount of remuneration received by Mr Hawkins

personally as shown in his accounts for that period).

- Mr Hawkins was awarded compensation of \$35,000 for hurt and humiliation and \$56,000 in costs (being 66% of Mr Hawkins costs and disbursements relating to the personal grievance).

Issues on Appeal

The Commissioner of Police appealed on the following questions of law:

- Does the ERA require the employer to have turned its mind to the 90 day period and agree (expressly or impliedly) to proceed?
- Does consent have to be pleaded by the employee?
- Could the Court reinstate Mr Hawkins given that he had previously disengaged on medical grounds under the Police Act, and given that it was nearly seven years since his departure?
- Does disengagement under the Police Act preclude an award for loss of income?
- Was compensation of \$35,000 excessive?

Decision of Court of Appeal

Appeal Dismissed.

- The Court found that it was common ground between the parties that the personal grievance was raised outside the 90-day period.
- The question of whether consent occurred is a matter of fact and degree.
- The ERA does not require an employer to turn its mind to the 90-day period and agree (expressly or impliedly) to proceed.

The claim was not out of time (whether it is seen as implied consent or what would reasonably be regarded as not out of time by an objective observer).

- It was open to the Employment Court to order reinstatement. Reinstatement is the primary remedy under s125 of the ERA and it is a stand alone remedy that is not ousted by the voluntary disengagement procedure.
- The voluntary disengagement procedure did not preclude an award for loss of income.
- The Court said that it is difficult to attempt to “*rigidly*” cap awards and whilst \$35,000 was undoubtedly high, it was within the Employment Court’s jurisdiction to make this award under s.123(1)(c)(i).

WHEN CAN EMPLOYERS LAWFULLY EMPLOY STRIKE-BREAKERS?

The case of *Finau v Atlas Speciality Metals Limited* (ASML) that was mentioned in our October 2007 Newsletter has recently been heard in the Court of Appeal. The issue surrounding the appeal was whether the Employment Court correctly interpreted s.97 of the Employment Relations Act, which sets out conditions that apply to situations where employers employ or engage an individual to perform the work of a striking or locked out employee.

The facts of this case involved some workers going on strike. The employer, ASML, asked some of the non-striking workers (“A & B”) to do the work of their striking colleagues. A & B refused. ASML suspended A & B on the basis that their refusal to follow instructions had resulted in them becoming a party to the strike. The Employment Court held that the word “work” in s.97 meant the “*type of work usually done*” by the striking worker and therefore, if a non-striking employee normally undertook this type of work then requesting them to perform these tasks would not engage s.97 as it would simply be asking the employee to perform his or her normal duties. The New Zealand Amalgamated Engineering, Printing and Manufacturing Union appealed the decision.

Court of Appeal Decision

The Court of Appeal considered the meaning of the phrase “*the work of a striking or locked out*

employee” as used in s.97. The Court considered the wording of s.97 in light of the purpose of the section. The Court found that the focus should be on the work that, but for the strike (or lockout), the striking employee would have been doing at the time in question. The Court outlined the three criteria that need to be fulfilled if another person is to do the work of a striking employee. These are:



1. The substitute employee must already be employed at the time the strike commences (i.e. cannot circumvent a strike by hiring new workers/contractors **unless** for reasons of safety or health);
2. The substitute employee must not have been employed principally for the purpose of performing the work of a striking employee; and
3. The substitute employee must agree to perform the work the striking employee would have been doing.

The Court stated that “*working out*” what the employee would have been doing (in general terms) involves the parties dealing with each other in good faith. Employers will need to ask themselves whether they are requiring a non-striking employee to place him or herself in a scene where but for the strike, he or she would not have appeared in. If the answer is yes, then that employer will need the non-striking employees to **consent** to do the work. In this case, A & B did not consent to performing

work that but for the strike would have been performed by the striking workers. The employer was not entitled to suspend A & B for refusing to do so. The Court noted that there was no need to investigate A & B's terms of employment or how often they engaged in the work of the striking employees. All that mattered was whether A & B were being asked to do the work that would have

been performed by the striking employees on the day in question. The Court did state that it was open to the employer to find other employees (i.e. X & Y) to do this work. If X & Y agreed, then the employer could require A & B to do the work X & Y would otherwise have been doing, provided that this work was within A & B's skills and competencies.

HOLIDAYS ACT REVIEW—MISSION IMPOSSIBLE?

The Holidays Act 2003 is currently being reviewed by a Ministerial Advisory Group. The purpose of this review is to clarify the complex provisions contained in the Act and ensure that the Act has smoother application. The Minister of Labour, Kate Wilkinson, remarked that the Act has been *“widely criticised for its complexity and generic approach, resulting in significant compliance costs”*. The Advisory Group, consisting of both business and union representatives, will not reduce the Act's current entitlements but will seek to reduce the Act's ambiguity and give it a greater level of flexibility. The review will consider the following issues:

The calculation of relevant daily pay

The need to ascertain an employee's 'relevant daily pay' stems from the requirement to calculate payment for any public holiday, alternative holiday, sick leave or bereavement leave taken by an employee.

The majority of employees have their 'relevant daily pay' calculated by working out the amount that they would have received if they had worked on

the relevant day. This calculation includes overtime and incentive payments that the employee would have received on that day. However, the calculation is less straightforward for employees who work on commission or on an on-call basis. In these cases, 'relevant daily pay' is generally calculated by reference to the employee's gross earnings for the last four weeks. Consequently, these calculations will not necessarily reflect the true relevant daily pay of the particular employee, especially if the employee has taken leave or received a bonus payment within that four week period.

Trading the fourth week of annual holidays for cash at the employee's request

The proposal to allow employees' to 'cash up' their fourth week of annual holidays is being considered. The review will consider the benefits and associated costs of the proposal and whether any protections will need to be put in place for employees. Under the current Act, an employee's entitlement to annual holidays remains in force until the employee has taken all of the entitlement as paid holidays or ceases employment.

The potential benefits of allowing employees to take cash in lieu of holidays include assisting employees who are in financial difficulty and enabling employers to reduce significant leave balances that may have accrued. If accepted, the fourth week 'cash up' could not be discussed at salary negotiations and could only be raised at the employee's request.

Transferring the observance of public holidays

The Holidays Act 2003 sets out 11 public holidays (Christmas Day, Boxing Day, New Year's Day, January 2nd, Waitangi Day, Good Friday, Easter Monday, ANZAC Day, Queen's Birthday, Labour Day and Provincial Anniversary Day). Under the current legislation, the parties are unable to

transfer the observance of public holidays listed in the Act to another day (e.g. observe Ramadan instead of Good Friday) unless the employee works past midnight on a public holiday. The Ministerial Group is looking to establish rules in order to ensure that transfers are legitimate and are the choice of the employee.

Submissions in relation to the review have now closed. The Ministerial Advisory Group will consider the feedback and submit a report by December 2009. The Holidays Act generally works well for '5 day a week' work situations. Many of the difficulties with the Holidays Act stem from its application to businesses that operate 24 hours over 7 days. The mission is to try and get one size to simply fit all.

OVERSEAS SNIPPETS

United Kingdom:

Colleagues made me feel like a prostitute

Mihaela Popa, a Romanian Accountant, is suing PricewaterhouseCoopers for £40 million in an unprecedented racial discrimination claim. Ms Popa alleges that she was the subject of racist bullying and was ignored for promotions throughout her employment at London's PricewaterhouseCoopers. Among her claims, Ms Popa states that colleagues responded to her questions with sexual innuendo and that she was made to feel like a prostitute because she came from Eastern Europe. Senior managers often gave her menial tasks, such as filing, and when she inquired into why she was given unskilled work one manager replied that "*someone was needed to mop up the shit*". Other staff members



believed that she was a communist spy and was working for the Romanian undercover police. It is claimed that the company informed her that she could be a future partner but Ms Popa felt that her opportunities and career had been ruined and she resigned.

**United Kingdom:
'Unemployment hits 14-year high'**

Unemployment has hit a 14-year high in the UK. According to CIB, unemployment increased by 281,000 in the three months leading up to May. Experts expect that it will peak at around 3.03 million in the second quarter of 2010.

**United Kingdom:
Lying 'lay person' Ordered to pay
Ex-Employer's Costs**

The case *Dunedin Canmore Housing Association v Donaldson* involved a claimant bringing proceedings in response to allegations that she had breached a compromise agreement. The claimant argued that she had not breached a confidentiality clause under this agreement. Although the Tribunal found that the claimant had in fact made disclosures to two people, it refused to award costs against her because it held that it was necessary for her to bring proceedings against those allegations. On appeal, the Court held that there was no basis for the Tribunal's view that the proceedings were 'necessary' or that the claimant had no other alternative (especially where she knew her assertions were false). The Court stated that the fact that the claimant was a lay person was not relevant and that the important question was whether she had or had not approached the case honestly and reasonably. It was found that she had not approached the case honestly and reasonably. The Tribunal's decision on costs was reversed and the claimant was ordered to pay her former employer's legal costs.

**US:
Two Former Managers Misuse Trade Secrets
but Escape Damages**

A federal appeals court has upheld a decision that found two former managers of Pilgrim's Pride Corporation not liable for damages, despite a lower court having found that they misused trade secrets after their employment ended. Pilgrim's Pride was established in 2003 after it purchased ConAgra Poultry Co. Barry Spain and Darrell Raduechel, both long serving employees of the company, were responsible for handling the company's sales to its largest clients. After Pilgrim's Pride purchased ConAgra, Raduechel was under the impression that he would be offered a renewed compensation program by January 2004. Raduechel and Spain began planning a proposed business partnership in case 'things did not work out' with Pilgrim's Pride. The pair rejected the compensation offers made in May, and started operating their partnership, bringing with them the two largest customers from Pilgrim's Pride. Pilgrim's Pride brought claims of breach of fiduciary duty, civil conspiracy and unjust enrichment. The appeals court upheld the lower court's ruling that Raduechel and Spain did not proximately cause Pilgrim's to lose its two biggest customers, because once the partnership was forced to stop operating, the company did not get those customers back.

**Australia:
Women still trail in pay stakes**

Recent research in Australia has found that a woman entering the workforce today will retire having earned approximately \$1 million less than

a man doing the same work. This woman will also receive less than half the superannuation that her male counterpart will receive.

Recent statistics also indicate that women are now more likely to gain tertiary qualifications than men. Even though this may be the case, graduate women will earn around \$2,000 less than male graduates upon entering the workforce. After five years this gap expands to around \$7,400. At a higher level, fewer than 2% of listed companies in Australia have a female CEO, and only 1 in every 12 board directors are female.

Australia: Cap on Senior Executive's Termination Payments



The Australian government has recently released further regulations as part of its proposed amendments to the Corporations Act. The regulations follow the introduction

of the Corporations Amendment (Improving Accountability on Termination Payments) Bill in June 2009 as part of proposed reforms to the law governing termination payments. If passed, that bill would prevent a company from paying its directors or senior executives termination benefits of more than one year's base salary without obtaining the approval of the company's shareholders. Currently, such approval is required only when seven years' total remuneration is to be paid.

The latest regulations have been described as closing various loopholes in the original proposal. A person's annual 'base salary' (i.e. the maximum amount able to be paid without shareholder approval) would essentially amount to that person's annual fixed remuneration. Termination payments caught within the cap would include benefits such as pension payments, out of court settlements, and restraint of trade payments. Statutory payments (like long service leave), reasonable redundancy payments that are company policy for all employees, and certain superannuation payments would be excluded.

At present New Zealand has no equivalent provisions.



RIGHT-SIZING TOOLBOX SESSION

With the current global economic downturn putting the squeeze on many businesses, it is important that managers and staff are up to date with the law around restructuring and redundancy. Quigg Partners are offering Employment Law Toolbox sessions in 2009 which can assist businesses, both small and large, to accommodate the credit crunch through 'right-sizing' their operations. These can be held in your workplace or in our private seminar rooms.

Toolbox sessions can be tailored to suit your needs and may also cover:

- Effective Disciplinary Procedure - managing difficult employees
- Bill of Rights, Privacy, OIA, Codes of Conduct and Conflict of Interest issues
- CEO/Board Relationships - special considerations

ENQUIRE NOW

On a no obligation basis enquire now about the option(s) that may best suit you by contacting Michael Quigg on 474 0766 or email michaelquigg@quiggpartners.com

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