ALLA & CLARS SEMINAR

19 April 2016

PRESENTER: Commissioner Leigh Johns, Fair Work Commission

CHAIR: Professor Marilyn Pittard, Monash University and Vice-President, ALLA

IN CONCLUSION:

Dr Graham Smith, Clayton Utz
Ms Emma Goodwin, Office of Fair Work Ombudsman
The anti-bullying jurisdiction two years on: sleeping tiger or Y2K bug of workplace relations - and other recent developments

Australian Labour Law Association
CLARS, Monash University, Faculty of Law
Commissioner Leigh Johns

19 April 2016
Outline – the inside view

- The Anti-bullying jurisdiction – two years of experience
  - The numbers
  - What has the Commission done with them
  - How have they concluded
- Adverse action claims – consent arbitration
- Work vs Private life
- Questions
I am here to help BUT!

- Cannot provide advice
- Information is general
- There is no substitute for taking legal/professional advice
- The views are my own and not to be taken to be those of the FWC
- FWC members are all individuals
- Don’t quote me!
Anti-bullying jurisdiction

Factors to be considered:

- Whether the individual is a ‘worker’
- Constitutionally-covered business
- At ‘work’:
  - Bowker Coombe, Zwarts v DP World Melbourne Limited t/a DP World Ors [2014] FWC FB 9227
- Repeated unreasonable behaviour
- Risk to health and safety
- Reasonable management action
Enquiries and Lodgements 2014 - 2015

Total Lodgments: 1396
Anti-bullying – The typical applicant

- An employee
- Between 30 – 60 years of age
- 55/45- female/male
- Employed > 12 months
Anti-bullying – The typical respondent

- A manager
- > 100 employees
- Metro region
- Top 5 Industries:
  - Clerical Industry
  - Retail Industry
  - Health and Welfare Services
  - Social, Homecare and Disability Services
  - Educational Services
How the jurisdiction operates

The Process

1. Application is lodged with the Fair Work Commission
2. Application is allocated to the Anti-Bullying Team for review
   - The review can include:
     • Ensuring the application is complete and valid
     • Confirming the applicant's intention to proceed
3. Application is served by the Fair Work Commission
   - The application will be served on the employer(s)/principal(s) and individual(s)
   - Responses will be sought to the application
4. Report is prepared
5. Panel Head assigns the matter

Sub-processes:
- Mediation
  - Resolved and discontinued
- Assigned to a Member for Preliminary Conference/Directions
  - Unresolved Matter further allocated by Panel Head
  - Orders to prevent bullying issued
  - Application dismissed
  - Resolution
  - Appeal by leave of Full Bench
- Hearing/Conference

AUSTRALIA'S NATIONAL WORKPLACE RELATIONS TRIBUNAL
Over all results of anti-bullying applications at the FWC

- Withdrawn prior to mediation/hearing: 24%
- Withdrawn following mediation/hearing (prior to decision): 23%
- Resolved by agreement between parties: 16%
- Resolved by mediation/conciliation: 14%
- Application withdrawn: 14%
- Jurisdictional objection upheld: 7%
- Applications granted by Commission: 1%
- Dismissed by Commission: 1%
General Protections

- Pilot of telephone conciliations by FWC conciliators – 75% resolution by agreement. Consent arbitrations
- Commenced 1 January 2014
- Only applicable in dismissal matters – s. 365 of the Fair Work Act
- 15 applications, only 1 decision
- Converting applications
Employment issues - Drug Testing

- Construction, Forestry, Mining and Energy Union-Construction and General Division v Port Kembla Coal Terminal Limited [2015] FWCFB 4075

- Sharp, Owen v BCS Infrastructure Support Pty Limited [2015] FWCFB 1033
Employment issues – Use of social media

- Sharon Bowker, Annette Coombe, Stephen Zwarts v DP World Melbourne Limited, Maritime Union of Australia (Victorian branch) and others [2014] FWCFB 9227 (19 December 2014)

- Linfox Australia Pty Ltd v Glen Stutsel [2012] FWAFAFB 7097
Separation between home and work is now less pronounced.

Out of hours conduct must be:
- Viewed objectively
- Likely to cause serious damage to the relationship between employee and employer
- Damage the employers interests
- Incompatible with the employees duty as an employee

Rose v Telstra