

the front page

a seasonal bulletin for self insurers
workers compensation + OH&S + workplace relations

Mirror Mirror On The Wall, Who Is The 'Fairest' Of Them All?: Kirstin Follows

Goldman Sachs JBWere Services Pty Ltd v. Nikolich: Sherene Khalil

A Timely Reminder - Know Your Obligations: Nadia Spiller

MIRROR MIRROR ON THE WALL, WHO IS THE 'FAIREST' OF THEM ALL?

Kirstin Follows - Senior Associate

WHAT IS THE FAIRNESS TEST?

The Howard Government has amended the WorkChoices Legislation with the introduction of "The Fairness Test". The Fairness Test involves compensating employees that trade off certain award conditions in workplace agreements regulated under that legislation. It only applies to an agreement lodged on or after 7 May 2007 with the Workplace Authority. The Test applies to Australian Workplace Agreements where the annual salary is \$75,000 or less and to all collective agreements. It applies when the AWA or collective agreement expressly excludes or modifies one or more of the protected award conditions.

The protected award conditions are:

- penalty rates, including working on public holidays and weekends;
- shift and overtime loadings;
- monetary allowances;
- annual leave loadings;
- public holidays;
- rest breaks; and
- incentive-based payments and bonuses.

THE WORKPLACE AUTHORITY

The Workplace Authority has replaced the Office of the Employment Advocate. Its role is review workplace agreements and apply the Fairness Test. In doing so, it considers both the monetary and non-monetary compensation offered, relative to what would have been payable under the relevant award. In most cases, this will mean a higher rate of pay in lieu of protected award conditions that have been modified or removed.

In establishing what is fair compensation, as with the pre WorkChoice no-disadvantage test, the Workplace Authority will consider the work patterns of the employee. For instance, whether the employee would be required to work shift work, or at weekends. In appropriate circumstances, The Workplace Authority may also consider other factors such as the industry, location and economic circumstances of the business and the specific employment circumstances or opportunities of the employee. It may take into account all relevant working arrangements and non-monetary entitlements, including family friendly conditions.

The recent amendments to the legislation prohibits employers from:

- Forcing existing employees to agree to the removal or modification of protected award conditions;
- Offering "take it or leave it" AWA's in a transmission of business situation.

The Workplace Relations Act previously prohibited an employer from forcing employees to accept a workplace agreement, whether individual or collective. However, to strengthen this protection, the Act has been amended to



expressly prohibit an employer from forcing an existing employee to agree to remove or vary a protected award condition which is supported by the Fairness Test.

CONCLUSION

The Fairness Test aims to provide fair compensation for the removal or variation of protected award conditions. It is, in part, a return to the no disadvantage test which applied to workplace agreements prior to WorkChoices. It is part of the Government's response to much publicised criticism of its WorkChoices legislation. A change in Government at the forthcoming election will see further amendments to what is already complex legislation and with an emphasis on reforming the agreement making process.



Kirstin Follows
Senior Associate
kfollows@mrlaw.com.au

GOLDMAN SACHS JBWERE SERVICES PTY LIMITED v. NIKOLICH
7 AUGUST 2007
Sherene Khalil - Articled Clerk

This decision has far reaching implications for companies, particularly with respect to HR policy manuals.

Wilcox J, in the original hearing of the matter before the Federal Court, found that the Employer's HR Policy document entitled "Working with Us" formed part of the employment contract and that the Employer's breach of this policy entitled the worker to significant compensation, in excess of \$500,000. This included damages for past and future loss of income and general damages for psychiatric injury.

BACKGROUND

Mr Nikolich commenced employment with Goldman Sachs JBWere Services ("the Employer") in May

2000 as an investment advisor. He was provided with a HR manual entitled "Working with Us" with his letter of offer of employment.

As a result of restructuring, Mr Nikolich felt aggrieved and filed a grievance against his Manager regarding the allocation of client accounts. This was not addressed and Mr Nikolich left work on sick leave due to stress related illness. Five months later, he was advised by his doctor not to return to work for medical reasons. The Employer responded by terminating Mr Nikolich's employment. Mr Nikolich then commenced proceedings on the basis of breach of contract, unlawful termination on the basis of mental illness and misleading and deceptive conduct, contrary to the Trade Practices and Fair Trading Acts (NSW).

ORIGINAL HEARING

Wilcox J found that the Employer had breached Mr Nikolich's contract of employment by failing to meet its own obligations as set out in its HR policy document "Working with Us" when it failed to address Mr Nikolich's complaints.

The Employer argued that the HR document was not binding as it was its right to issue lawful and reasonable directions to its employees. Employees, in turn, were obliged to comply with such directions. Wilcox J, however, found that this document did more than direct how employees should conduct themselves. Wilcox J found that the Employer had breached the provisions dealing with health and safety, harassment and resolution of grievances.

THE APPEAL

The Full Court of the Federal Court dismissed an appeal by the Employer and confirmed that the provisions relating to employees health and safety were binding on the Employer.

The Full Court also found that the way Mr Nikolich's complaint was handled caused the psychological damage, not the reallocation of client accounts. This is the significant part of the decision. The Full Court's decision suggests that if Mr Nikolich had not suffered a psychiatric illness but had simply been distressed and humiliated, he may have been able to pursue general damages,

as the Employer's HR policy was designed to prevent the distress and humiliation of employees.

CONCLUSION

Not all terms of HR policy documents will automatically form part of an employee's contract of employment. However, employers should pay special attention to the drafting of such documents, as Courts will closely examine such documents to determine whether it is contractually binding. Where certain terms are found to be contractually binding, any breach of such a term may result in an award of damages beyond loss of income.



Sherene Khalil
Articled Clerk
skhalil@mrlaw.com.au

A TIMELY REMINDER - KNOW YOUR OBLIGATIONS!
Nadia Spiller - Senior Associate

PROSECUTIONS 2006

The Victorian WorkCover Authority ('VWA') has recently released the publication "Prosecutions 2006"¹. Prosecutions 2006 contains summaries of health and safety prosecutions and accident compensation prosecutions. The cases reported involve employers, employees and other duty holders such as suppliers of plant, who have breached the workplace safety laws. This article will focus on cases where employers and workers have failed to comply with their obligations under the WorkCover Scheme.

All stakeholders have well established obligations under Victoria's Accident Compensation Act ("ACA"). Most stakeholders understand these obligations, however, these obligations are not always met. In most cases, breaches could have been avoided. The usual explanation for the breach is ignorance of the obligations and/or complacency.

The release of Prosecutions 2006 is a timely reminder to all stakeholders in Victorian Workers' Compensation schemes to familiarise themselves with their obligations under the various statutes in this area. The release of Prosecutions 2006 is also a timely reminder for all stakeholders to review their claims management processes, particularly their means of detecting possible risks (eg fraudulent workers) and the processes for investigating these risks.

EXAMPLES

A good starting point in identifying obligations in the Worker's Compensation area is the VWA's online claims manual which lists over 50 individual offences. The following are some examples of breaches and recent prosecutions:

Worker:

- Providing false information;
 - Working while on benefits; or
 - Submitting a fraudulent claim.
-
- In *VWA v Stanley Dinowicz*, the defendant was employed as a boilermaker, suffered an injury and lodged a claim which was accepted. He continued to submit Certificates of Capacity which declared that he was unfit for any form of work and received weekly compensation payments. Surveillance disclosed that the defendant had worked in a maintenance business. The defendant pleaded guilty and Her Honour, Magistrate Stewart, recorded a conviction in under section 82 of the *Crimes Act 1958* and section 248 of the ACA and placed the defendant on a Community Based Order (12 months, performing 125 hours of unpaid community work over six months). She also ordered the defendant to pay back \$42,871.12 in compensation payments, plus costs.

Employer:

- Failing to have a Return to Work Plan;
- Failing to offer suitable employment; or
- Failing to forward a claim within the statutory time period.

¹ Worksafe Publication, Legal Services and Investigations Division, published 20 July 2007. Example from "Prosecutions 2006".

M+R = The Thinking Client's Law Firm

- In *VWA v Computer World (Victoria) Pty Ltd*, the worker was employed as a store manager by the defendant company. She suffered an injury and submitted a claim for compensation which was accepted. The letter of acceptance advised the defendant of its obligations to prepare a return to work plan and that it was obliged to do so by 28 October 2005. On 2 March 2006, the defendant sent a return to work plan to the worker. This was the first contact the worker had with her employer in relation to the plan. The defendant entered a guilty plea and His Honour, Magistrate La Rosa, dismissed the matter noting the charge under section 242(6) of the ACA was proven and ordered the defendant to pay costs.

Service Provider:

- Claiming for services which were not given; or
- Providing false invoices, medical certificates or information.
- In *VWA v Daryl Frederick Warner*, the defendant was a remedial masseur providing services to WorkCover claimants. Between August 2002 and July 2004, the defendant provided approximately 58 false invoices to the VWA for payment. Consequently, monies were paid by the VWA to which the defendant was not entitled. The defendant entered a guilty plea. Deputy Chief Magistrate Grant, did not record a conviction under section 248 of the ACA, but fined the defendant \$5,000.00 plus costs.

CONCLUSION

These prosecutions for breaches of obligations under the various statutes have the two fold effect of ensuring those who breach the law are held

accountable and they also send a message of deterrence to the broader community. The consequences of prosecutions are far reaching. A conviction can seriously affect a company's self insurance licence, ability to tender for contracts and an individual's capacity to find further employment.

All stakeholders have an important role in detecting abuse, non compliance and maintaining the integrity of the compensation and OH&S system. We recommend that all should review their obligations. Should you require assistance in reviewing your claims management processes and/or reminding your company of its obligations, we can assist. We can also provide advice and assistance when you face potential prosecution or investigation. If a VWA investigator arrives at your premises to investigate an alleged breach, you should immediately contact us.



Nadia Spiller
Senior Associate
nspiller@mrlaw.com.au

The Team:

Bruce Butler	Partner
Sean Millard	Special Counsel
Kirstin Follows	Senior Associate
Steven Notarianni	Senior Associate
Nadia Spiller	Senior Associate
Sherene Khalil	Articled Clerk

something for the back page

date for the diary — Seminar — Victorian County Court — Thursday 25 October 2007 — 3:30 pm

Mock Serious Injury Trial: a first hand look at the use of evidence at hearing: evidence in chief and cross examination of our Plaintiff introduced at the Autumn Seminar, to be followed with a discussion of evidence at common law proceedings (numbers will be limited).

Drinks to follow at 5:00 pm.

Counsel: Phillip Ginnane (Barrister) and Bree Knoester (Barrister), with Fiona McLeod (Senior Counsel) presiding.

RSVP by Friday 19 October 2007 (tel: 8624 2056)