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Workplace Relations Gazette

2nd edition

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- 2005 Winner ALPMA/Locus Innovation Awards for innovative CN|Direct

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From the Partner

We are delighted to publish the 2nd edition of the Workplace Relations Gazette.

As with the 1st edition of the Gazette, which was extremely well received by our firm's insurer, broker, professional and corporate clients, this edition considers recent decisions involving a wide range of professionals, including medical practitioners, real estate agents and senior bank managers.

In this edition, we provide employers and insurers with a synopsis of practical and noteworthy cases with a focus on unfair dismissal, bullying, adverse action, breach of contract, general protections and penalties and sentencing, and work heath and safety.

This Gazette contains recent decisions considered by the courts and highlights the importance of not only having in place appropriate policies and procedures but ensuring that they are put into practice. Regardless of the merits of a position taken by an employer, the failure to apply appropriate policies and procedures can be deleterious.

As a premier legal service provider with teams in both Brisbane in Sydney, we trust the 2nd edition of the Workplace Relations Gazette will be a useful resource for our readers. We would welcome your feedback on this edition and any suggestions for our future editions (feedback@carternewell.com).

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Case Note

James Willis v Marie Gibson; Capitol Radiology Pty Ltd; Peita Carroll [2015] FWC 1131 and [2015] FWC 3538

Notwithstanding initial findings of bullying in the course of disciplinary action, significant improvements meant no ongoing risk and no basis for bullying order.

Mr Willis was a recently employed radiologist working for Capitol Radiology, embedded within a GP practice. He had recently moved to take up the new role, and was still in probation. The General Manager (**GM**) and Human Resources Manager (**HRM**) of the employer arrived unannounced at the particular workplace and '*berated*' Mr Willis while undertaking investigations regarding his performance. A disciplinary process was commenced, and some days later a letter of warning was issued.

Mr Willis initiated a bullying complaint before the Fair Work Commission (**FWC**). The employer applied to have the complaint struck out on the basis that the actions complained of were reasonable management actions undertaken in a reasonable manner, and thus excluded from the scope of bullying and outside the FWC's jurisdiction.

In considering the employer's objection, Commissioner Lewin noted that Mr Willis had been placed in an ambiguous and confusing situation in which he was required to take direction from the practice manager of the GP despite not being his employer. The issues in question were largely as a result of his very recent commencement, and could have been addressed through more benign communication. The FWC was critical of the way the investigation had been undertaken and the lack of forewarning to the employee, and considered the conduct of the GM and HRM to be '*unreasonably abrupt and threatening*'. Accordingly, it was not reasonable management action carried out in a reasonable manner and the jurisdictional objection was dismissed.

Some months later the application progressed to a substantive hearing. Following on from the consideration of the jurisdiction, Commissioner Lewin reiterated that the initial actions of the employer were not reasonable management action done in a reasonable way, and concluded that in the circumstances the conduct satisfied the test for bullying. Particular regard was had to the vulnerability of the worker while on probation after having recently moved, and the escalation of

initial performance management to discipline. However, since the initial finding on jurisdiction the employer had taken a very different approach. The disciplinary notice had been withdrawn. The two managers originally involved had no further involvement, and the matter had received direct attention by senior management. A reasonable performance management and review process had been implemented and considerable restraint had been shown in the face of inflammatory communications by the employee. The subsequent management action could not be faulted. In those circumstances, the Commissioner concluded that there was no risk of further bullying and therefore no legal or factual basis for any order.

Case Note

YH v Centre and Others [2014] FWC 8905

Application for an order to stop workplace bullying rejected where interpersonal conflict and 'very heavy-handed' performance management was insufficient to justify an order.

The facts

YH, a Melbourne childcare centre worker, sought an order to stop workplace bullying against her co-worker ET for '*hostile*' behavior and against the centre's director, Ms LI, as a result of the way Ms LI handled YH's complaint against ET.

YH claimed that ET's bullying behavior covered a three year period from 2010, when ET allegedly asked YH inappropriate questions about a co-worker's sexuality and, on another occasion, interrupted her by shouting '*this is all nonsense!*'. YH also claimed that ET had undermined YH's credibility and put her down in front of other staff at a Christmas party.

ET responded that YH avoided certain tasks that she was required to perform in the centre and in 2014, ET had raised a number of complaints about YH with LI. YH received warnings as a result of those complaints. When YH apologised to Ms LI, stating that this was the first time she had made one of the identified errors, ET contradicted YH, said she had done it before and called her a liar.

A meeting was held in February 2014 to discuss the verbal warning issued to YH about her work performance, and to discuss YH's attitude towards ET and the need for her to be more considerate towards other staff. YH subsequently raised the bullying allegations against both ET and LI. In response, the centre's committee of management conducted an investigation and found the claims were unsubstantiated.

Issue

1. Did the actions of ET and LI constitute either workplace bullying or 'unreasonable behaviour'?

Decision

The Fair Work Commission (**FWC**) found that YH's evidence lacked credibility and held little weight. YH seemed to be difficult to supervise and avoided unpleasant tasks in the workplace. ET, in all likelihood, was quick to express criticism and sometimes used an angry voice or body language. Overall it was observed that YH and ET probably did not like each other and may have even been mutually hostile towards each other.

Despite evidence of poor behavior, the FWC was unable to determine who started the unpleasant behavior and was also unable to discern that it amounted to unreasonable behavior, let alone repeated unreasonable behaviour with a risk to health and safety. It was observed that although in some cases interpersonal conflicts or workplace gossip can be bullying behaviours, the ones exhibited in this case were not.

'Despite evidence of poor behaviour, the FWC was unable to determine who started the unpleasant behaviour and was also unable to discern that it amounted to unreasonable behaviour.'

The FWC decided that LI's disciplinary practices were not examples of unreasonable behavior towards YH nor did they create a risk to health and safety. In making this finding, the FWC considered that LI's disciplinary steps were '*very heavy-handed*' and did not sufficiently acknowledge the possibility that the matters reported to her by ET might be incorrect. It was also observed that the centre's committee of management would benefit from the provision of training around supervisory communication styles and methods. Nevertheless, it was found that it was not unreasonable of LI to pursue the complaints and that communications to YH were not carried out in an objectively unreasonable manner or in a way that would create a risk to health and safety. On that basis the FWC dismissed YH's application.

Case Note

Rachael Roberts v VIEW Launceston Pty Ltd [2015] FWC 6556

Real estate agent found to have been bullied at work through unreasonable behavior by the office administrator, including de-friending on Facebook.

Ms Roberts was a real estate agent with View Launceston. She alleged that over a 14 month period she was repeatedly bullied primarily through the unreasonable behaviour of the office manager, Mrs Bird. She particularised eighteen separate allegations of bullying. The Fair Work Commission (**FWC**) analysed each of them in turn, and found that nine of the eighteen were substantiated. While the exercise was factually driven, the unreasonably behaviour substantiated included:

- Being belittled, and responded to in an aggressive and rude manner;
- Having administrative work on her property listings delayed to make her look unprofessional;
- Referring one of Ms Roberts' clients to a collection agency when Ms Roberts had made arrangements for delayed payments;
- Being spoken to abruptly and in a condescending manner, being ignored, and being treated differently from others in terms of day to day office activities.

Matters came to a head in January 2015 following Ms Roberts raising a concern with the principal about her listing not being given adequate window space. Ms Roberts alleged an altercation then took place the following day between her and Mrs Bird, and that Mrs Bird was aggressive and accused her of being disrespectful and undermining her authority. Ms Roberts alleged she was humiliated and in a very distressed state and left the office crying. A short time later she sought to check if Mrs Bird had made a Facebook comment about the incident, only to find that Mrs Bird had deleted her as a Facebook friend.

In contrast, Mrs Bird asserted that when she asked Ms Roberts about her concerns she became argumentative and that things got heated on both sides. Mrs Bird acknowledged that she had told Ms Roberts that her behaviour reminded her of '*… a school child or girl going to the teacher to tell on the other child.*'

The Commission commented:

> '*The evidence of Ms Roberts as to Mrs Bird defriending her on Facebook immediately after the incident is supported by a contemporaneous text message between Ms Roberts and Mr Bird. It was not refute (sic) by Mrs Bird in evidence. This action by Mrs Bird evinces a lack of emotional maturity and is indicative of unreasonable behaviour, the like of which I have already made findings on. The 'school girl' comment, even accepting of Mrs Bird's version of events, which I am not, is evidence of an inappropriate dealing with Ms Roberts which was provocative and disobliging.*'

It should be noted that half of the allegations of bullying were not accepted. Putting aside those rejected for lack of evidence, various other actions asserted as bullying were found to be not unreasonable:

- Not being allowed to adjust the temperature settings on the air conditioner;
- Not being permitted to take a laptop home;
- Locking of the petty cash and stamps draw;
- Being required to wear a uniform when others were not required to do so;
- Directing potential clients away from her towards new starters;
- Overhearing telephone conversations (in a small office).

The FWC concluded that the claimant had been subjected to repeated unreasonable behaviour over an extended period of time. Having received evidence of a diagnosis of depression and anxiety, with medication and treatment by a psychologist, the FWC was satisfied that behaviour posed a risk to health and safety. Accordingly the statutory test for bullying was satisfied.

The employer contended that because an anti-bullying procedure and manual had been established since the incident, there was no risk of bullying behaviour occurring at work in the future.

The FWC commented:

> '*I respectfully disagree with this submission. The evidence at the hearing was that [the respondents] did not consider that any of the behaviour complained of constituted bullying. A lack of understanding as to the nature of the behaviour displayed at work has the proclivity to see the behaviour repeated in the future by Mrs Bird. I conclude that there is a risk of Ms Roberts continuing to be bullied at work.*'

A stop bullying order was proposed. The matter was referred for a conference as to other practical orders to be made in the context of the specific business.

Case Note

CF and NW v Company A and ED [2015] FWC 5272

First contested bullying orders made by FWC where there was ongoing fear for safety notwithstanding a change in the employment of the perpetrator.

The facts

In *CF and NW v Company A and ED* the Fair Work Commission (**FWC**) issued a stop bullying order for the first time following a contested hearing. In this matter, two female employees of a real estate company alleged that their supervisor, a property manager, engaged in bullying behaviour by belittling them, swearing and using other inappropriate language, engaging in physical intimidation and slamming of objects on desks, and by threats of violence. Neither of the two employees felt they could safely return to the workplace, and both had sought medical treatment. In response to the complaint, the property manager resigned and took up employment with a related company at a different location, but there was ongoing interaction between the two businesses and the property manager was seconded back to the original business for a short period.

Issue

1. Does the perpetrator ceasing employment with the employer mean that there is no ongoing risk of bullying so as to prevent an order being made.

Decision

Commissioner Hampton found that bullying had taken place and that, notwithstanding the change in employment status of the perpetrator, given the ongoing interaction between the businesses there was a material risk of further bullying in the workplace by the relevant individual. On the evidence, the Commissioner was satisfied that *'without measures being implemented to set and enforce appropriate standards of behaviour in the workplace there was a risk of further relevant unreasonable conduct'*.

Two types of orders were made. The first related to the specific behaviour and minimising the contact between the perpetrator and the two employees involved going forward. The second type related to the broader culture of the business, and required the implementation of anti-bullying policies, procedures and training, and ongoing reporting arrangements. The orders were issued with an expiry date of 24 months.

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Matthew Payten is a Special Counsel in Carter Newell's Litigation & Dispute Resolution team, specialising in workplace relations, occupational health and safety and significant commercial disputes. Matthew has over 15 years experience acting for corporations, insurers and GOCs with a particular expertise in the resources, industrial and construction sectors. His broad experience extends across all aspects of the workplace including incident management, prosecution defence (occupational health and safety, wage claims and environmental harm), employment terminations, injuries, discrimination and restraint of trade. More broadly he has extensive commercial litigation experience handling contractual and other disputes for a range of mining, industrial and construction firms.

Prior to joining Carter Newell, Matthew was in-house legal manager and corporate counsel for a worldwide diversified natural resource company.

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Case Note

Commonwealth Bank of Australia v Barker [2014] HCA 32

The High Court held that there is no implied duty of mutual trust and confidence in the terms of employment in Australia.

The facts

Mr Barker was made redundant by the Commonwealth Bank of Australia (**CBA**) in April 2009, after some 27 years employment. It was a term of his employment contract that he would be entitled to a retrenchment payment if CBA was unable to redeploy him into an appropriate alternative position.

Due to a lack of administrative foresight, Mr Barker's work email account was suspended shortly after he was notified of the potential redundancy resulting in him not receiving a number of emails regarding his redundancy, redeployment opportunities, and the availability of Career Support etc. CBA's allocated Career Support employee received the emails intended for Mr Barker, however she did not make any attempt to speak to or see him prior to the termination of his employment.

Only one employment opportunity of relatively commensurate level was available prior to Mr Barker's termination. However (as the court at first instance found) it was unlikely that he would have successfully secured that role given his lack of relevant knowledge and experience in that area of banking operations. In the absence of achieving redeployment, Mr Barker was paid a retrenchment package of approximately $180,000 in accordance with his contract.

Mr Barker subsequently commenced proceedings against CBA in the Federal Court alleging, amongst other matters, that CBA was '*in breach of the implied term of mutual trust and confidence and resulted in [Mr Barker] being denied the opportunity of redeployment and the opportunity to thereby retain his employment…*'

Essentially Mr Barker argued that CBA had not been sufficiently proactive, cooperative and accommodating in finding an alternative position for him and that such failures amounted to a breach of (the asserted) implied term of mutual trust and confidence; entitling him to damages over and above his retrenchment package.

Issue

1. Do all Australian employment contracts include an implied term of mutual trust and confidence?

Decision

The High Court acknowledged that there was an implied duty of mutual trust and confidence recognised in English common law. The High Court observed however that whilst UK Courts had found it necessary and appropriate to imply such a duty in their jurisdiction it did not mean that such a duty ought also be implied into Australian employment contracts. The High Court commented that Australian courts must '*subject [foreign rules] to inspection at the border to determine their adaptability to native soil*'.[1]

The High Court held that in order for a duty of mutual trust and confidence to be implied into Australian employment contracts, it must be demonstrated that in the absence of such an implied term, '*the contract would be deprived of its substance, seriously undermined or drastically devalued*'.[2]

Given the existence of fiduciary elements in the employment relationship, the already accepted (in Australia) implied duties of fidelity and cooperation, and an extensive body of legislation and industrial instruments, the High Court was unwilling to find that a further implied term of mutual trust and confidence was necessary in order to give meaning to Australian employment contracts.

The High Court noted that the Australian legislature has (since 1994) made provision for employees to make unfair dismissal claims, albeit with a restriction of availability to employees earning less than a specified amount (currently referred to as the '*high income threshold*'). As Mr Barker's earnings exceeded the high income threshold, he was excluded from making a statutory unfair dismissal claim and thus sought instead to rely on the common law for his cause of action. The High Court held, however, that:

> '*…the Australian parliament has determined what remedies are to be provided for unfair dismissal and it has determined who may seek them… Contrary to [Mr Barker's] contention, this does not create a gap which the common law can fill.*'

The High Court did, however, hold that the CBA had breached the terms of his employment contract by failing to pay Mr Barker four weeks' notice in addition to the retrenchment package and ordered that the CBA pay Mr Barker an additional amount of approximately $11,700 plus interest.

[1] Per French CJ, Bell and Keane JJ at paragraph 18.

[2] Per French CJ, Bell and Keane JJ at paragraph 29.

Case Note

Dmitri Gramotnev v Queensland University of Technology [2015] QCA 127

The Queensland Court of Appeal finds that, with one exception, EBA terms, policies and international covenants are not part of a contract of employment.

The facts

Mr Gramotnev had been employed by the Queensland University of Technology (**QUT**) for a period of approximately 11 years prior to his dismissal for misconduct on 3 July 2009.

Mr Gramotnev commenced proceedings against QUT in the Queensland Supreme Court, raising numerous allegations of breach of contract in the period between 2004 and his dismissal in 2009.

Mr Gramotnev argued, amongst other matters, that QUT breached:

- The terms of the relevant enterprise bargaining agreements (**EBA**) by failing to properly consider his several applications for promotion and by failing to provide a safe work environment. Mr Gramotnev argued these terms formed part of the employment contract;
- The terms of QUT's policies and procedures regarding promotions, code of conduct, vision goals and organisational values, and equal opportunity and diversity. Mr Gramotnev argued these terms formed part of the employment contract;
- A number of articles of the International Covenant on Economic, Social and Cultural Rights. Mr Gramotnev argued that these articles formed implied terms of the employment contract; and
- An implied term of the employment contract requiring QUT to create and maintain a safe work environment.

Issues

1. Do the terms of an EBA form part of the employment contract?
2. Do policies and procedures form part of the employment contract?
3. Do international conventions form implied terms of the employment contract?
4. Does an implied term of health and safety form part of Australian employment contracts?

Decision

The Court of Appeal considered the terms of Mr Gramotnev's letter of offer, which relevantly provided that *'the terms and conditions of your employment are prescribed by the relevant enterprise bargaining agreements'*. While the court accepted that some terms of the EBAs formed part of the employment contract, the majority of the terms relied upon by Mr Gramotnev in this case were found in the objects clause and provided that the objectives of the EBA were to, amongst other things, *'foster the development of a positive and productive workplace culture'*. Where terms of an EBA are aspirational, the court held that there can be no promissory obligation that might operate as a contractual term.

The court also considered the terms of Mr Gramotnev's letter of appointment, which relevantly provided that *'your employment conditions include the provisions of [QUT's policies and procedures]'*. Again, the court accepted that some terms of QUT's policies and procedures formed part of the employment contract, including the provisions of the Senior Staff Disciplinary Policy requiring that any allegations of misconduct or serious misconduct would be dealt with by the procedures outlined in the policy. However, the majority of QUT's policies and procedures set out expectations or aspirations as to the standards it expects staff members to achieve. They did not comprise contractual promises by QUT.

Following the decision of the High Court in *Commonwealth Bank of Australia v Barker* [2014] HCA 32, the court held that articles of the International Covenant on Economic, Social and Cultural Rights should only be implied if those implied terms were necessary to give business efficacy to the contract. The court held the implication of the articles was not necessary and, in any event, observed that the Australian law of contract is not affected by the operation of international conventions in the absence of explicit legislation to that effect.

The court acknowledged that it has long been accepted that, in addition to the corresponding duty of care in tort, an employer also owes a contractual duty to take reasonable care for the safety of an employee. The implied term advocated by Mr Gramotnev, however, required QUT to create and maintain a healthy and safe workplace environment. The court held this was more onerous than the contractual obligation acknowledged by previous cases, and further held it was not necessary to imply the more onerous obligation in order to give business efficacy to the contract.

As a general comment, the majority of the arguments advanced by Mr Gramotnev were premised on a fundamental misunderstanding of provisory obligations capable of forming contractual terms. Mr Gramotnev's arguments would have required the employer to guarantee that each and every individual employee comply in all respects with its policies and procedures, something no employer could do.

Case Note

Russo v Westpac Banking Corporation [2015] FCCA 1086

Federal Circuit Court finds the wording of an employment contract incorporated a policy on discretionary bonuses and was binding, and that discretion must be exercised reasonably.

The facts

Mr Russo commenced employment for Westpac in May 2009 as a senior manager. Pursuant to his employment contract, Mr Russo was entitled to a salary of $200,000 gross per annum plus a bonus of up to $70,000 gross per annum *'at the absolute discretion of Westpac'*.

In the 2009/2010 financial year, Mr Russo achieved his full bonus of $70,000.

On 20 October 2011, Mr Russo's position was made redundant. Had he remained employed by Westpac, his bonus for the 2010/2011 financial year would have become payable on 1 December 2011. Mr Russo's supervisor elected not to pay Mr Russo any bonus in respect of the 2010/2011 financial year, claiming that Mr Russo was not entitled to a bonus in circumstances where Mr Russo's employment had ceased prior to the bonus becoming payable, and Mr Russo had in any event failed to meet performance targets. Westpac defended its decision on the basis that the bonus was only payable *'at the absolute discretion of Westpac'* and it is not the role of the court to second-guess business judgments made by Westpac.

Mr Russo argued that he was entitled to a bonus payment on the grounds that:

- His employment contract provided that, upon termination for redundancy, Mr Russo's entitlements *'will be determined'* in accordance with Westpac's policies. One such policy was Westpac's incentive policy;
- Although the employment contract also provided that *'policies do not form part of the contract of employment'*, the rules of contractual interpretation dictate that general exclusionary clauses do not override specific inclusionary clauses. Accordingly, while the policies may not have had contractual force at any other time, they did have contractual force upon redundancy as per the redundancy clause. As such, any breach of policy by Westpac would amount to a breach of contract;
- Westpac's incentive policy provided that, in the event of redundancy, an employee is entitled to a

pro rata bonus payment;

- Westpac's incentive policy further provided that, in assessing an employee's bonus entitlement, Westpac must conduct regular formal performance appraisals and must assess the employee's performance against specific criteria. In Mr Russo's case, Westpac failed to conduct the regular performance appraisals as required, failed to assess Mr Russo's performance against the relevant criteria, and assessed his performance against various other criteria which did not form part of the incentive policy;
- Had Westpac complied with the terms of the employment contract and the terms of the incentive policy, Mr Russo would have received a bonus payment in respect of the 2010/2011 financial year.

Issues

1. Do policies and procedures have contractual force?
2. Where a bonus is discretionary in nature, does an employer have unfettered discretion in relation to payment of the bonus?

Decision

The court rejected Westpac's arguments that its policies and procedures were aspirational and did not have contractual force. The court accepted that this may well be the case in another scenario, however in the context of a redundancy the employment contract specifically incorporated Westpac's policies and procedures and obliged Westpac to follow them.

The court further rejected Westpac's argument that its managers had an *'absolute discretion'* in relation to decisions regarding bonus payments. Relevantly, the discretion was limited by the requirement that Westpac comply with the terms of the employment contract and its policies and procedures. Further, even in the absence of policies and procedures, if an employment contract provides for a discretionary bonus, the discretion *'…should not be construed so as to give the appellant a free choice as to whether to perform or not a contractual obligation…There may be many circumstances in which it would be legitimate, and conformable with the purposes of the contract, not to pay the bonus…What, however, would not be permitted is an unreasoned, unreasonable, arbitrary refusal to pay anything, come what may…'.*[1]

The court held that Westpac had exercised its discretion in a manner that was not in line with its policies and had therefore breached the employment contract.

The court therefore ordered Westpac to pay Mr Russo his full bonus of $70,000 plus legal costs.

In a subsequent decision (*Russo v Westpac Banking Corporation (no. 2)* [2015] FCCA 1668), the court considered whether Westpac should be ordered to pay Mr Russo's costs on an indemnity basis following Westpac's rejection of an offer of compromise in the amount of $50,000.

Westpac argued that costs should not be ordered on an indemnity basis on the grounds that it was not unreasonable for Westpac to reject the offer in circumstances where there was a large degree of uncertainty surrounding the amount of bonus which would have been payable, if it was payable at all. The court rejected this argument, noting that:

> *'There is great uncertainty in the outcome of most, if not all, genuinely contested cases. To allow uncertainty in the outcome of litigation as a reason for displacing the presumption in favour of indemnity costs would remove from most genuinely contested cases the incentive…to parties to seriously consider and attempt to compromise their disputes.'*

Accordingly, the employee's costs incurred after the date of the offer were ordered to be paid by Westpac on an indemnity basis.

[1] Per Allsop P in *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 [5-6].

Case Note

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; CFMEU v Director, Fair Work Building Industry Inspectorate [2015] HCA 46

High Court clarifies that submissions by the prosecution on penalty, including joint submissions agreed as part of plea deal, are admissible in civil penalty matters.

It had long been the practice of counsel for the prosecution to make submissions to a court regarding an appropriate sentence, or range of sentences, in the circumstances of a particular case. In negotiating a plea of guilt, it was common for respective counsel to reach agreement as to the appropriate penalty. While such agreements were never binding and were in the nature of a joint submission to the court, and the ultimate sentencing decision was always a matter for the independent discretion of the court, it was highly persuasive and usually adopted. This played an important role in the plea bargaining process, as leniency in the sentence often accompanied a guilty plea, and without some measure of certainty as to the likely penalty a defendant may be less likely to plead guilty.

However, in *Barbaro v The Queen*[1] the High Court rejected this practice for criminal matters on the basis that such submissions were mere statements of opinion and were not statements of law or fact which a sentencing court could properly consider.

Questions remained as to whether this principle extended also to civil penalty matters such as those found in the *Fair Work Act 2009* (Cth) and the *Fair Work (Building Industry) Act 2012* (Cth). In May 2015, the Full Court of the Federal Court[2] held that it did, on the basis that there was no substantive reason to differentiate in this respect between criminal and civil remedy proceedings. However, the High Court has now unanimously rejected that proposition, finding that sentencing submissions, including joint submissions on '*agreed*' penalties, are appropriate in civil penalty matters:

> *'there is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions*

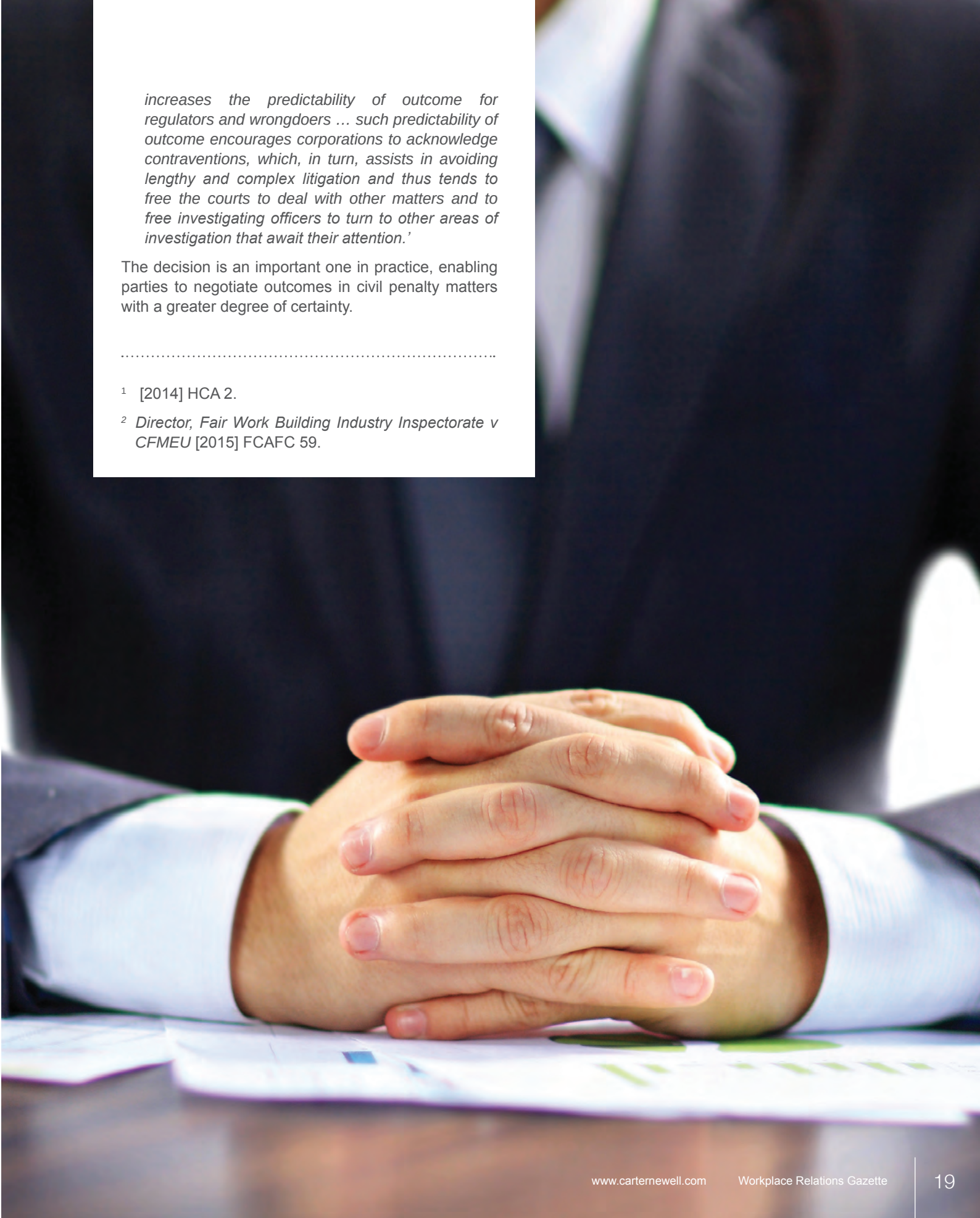
increases the predictability of outcome for regulators and wrongdoers … such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention.'

The decision is an important one in practice, enabling parties to negotiate outcomes in civil penalty matters with a greater degree of certainty.

……..

[1] [2014] HCA 2.

[2] *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCAFC 59.



Case Note

Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd [2015] FCA 492

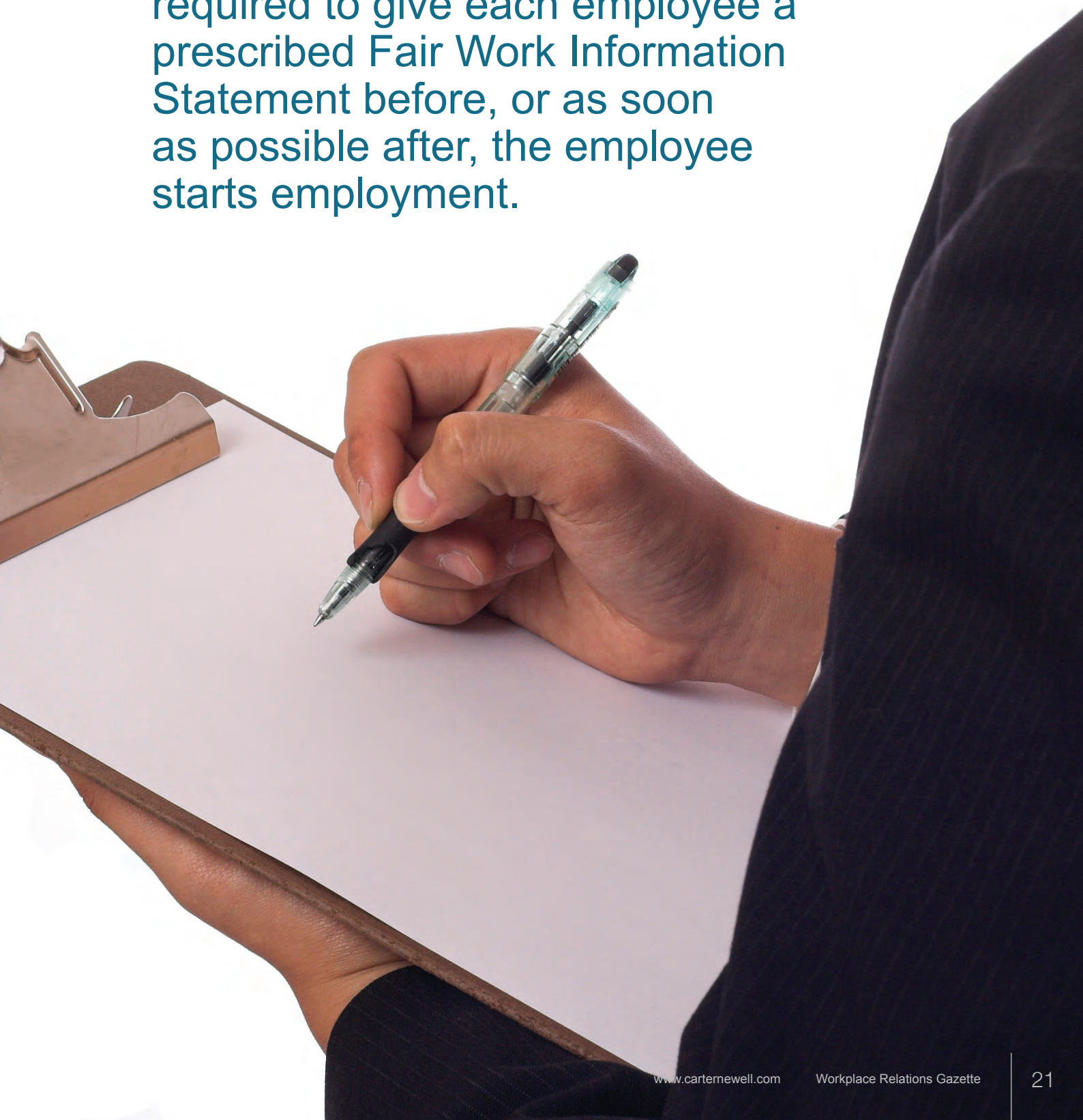
Assessment of penalty for breach of the FW Act for failing to provide Fair Work Information Statements to employees.

Section 125 of the *Fair Work Act* (**FW Act**), part of the National Employment Standards, requires an employer to provide its employees with a prescribed '*Fair Work Information Statement*' before, or as soon as practicable after, commencing employment. In *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* the defendant, an interior fit-out and plastering contractor to various construction projects in Sydney, plead guilty to failing to meet employment entitlements under an enterprise agreement, failing to maintain records, and failing to issue the requisite Fair Work Information Statement to its employees.

Of interest, the penalty issued by the Federal Court for failing to distribute Fair Work Information Statements was set at $20,000 (four times the $5,000 which had been agreed between the parties as part of a plea deal). Penalties for a breach of this obligation have typically been modest and viewed as a breach of a procedural nature, less significant than substantive breaches such as those relating to payment obligations. However, the court here expressed some concern regarding the approach of the defendant towards compliance, described as '*at least cavalier*' if not wilful, to the disadvantage of its employees:

> *'A significantly different approach, it will be noted, has been adopted in determining the appropriate penalty for the failure to provide a Fair Work Information Statement. The requirement imposed by s 125 of the Fair Work Act to provide such a Statement to an employee, it is respectfully considered, is an important means to ensure employees are informed of their rights. This may be seen as assuming even greater importance where the work-force consists of many persons not fluent in English. The provision of such Statements, translated into different languages, at least provides some measure of assurance that they are made aware of their rights. A failure to be made aware of one's rights places an almost insurmountable obstacle in the path of those who may need to exercise those rights.'*

Under the FW Act, an employer is required to give each employee a prescribed Fair Work Information Statement before, or as soon as possible after, the employee starts employment.



Case Note

Ben Loakes v CFMEU, Qld and NT Divisional Branch [2015] FWC 5058

FWC dismisses unfair dismissal application of CFMEU employee notwithstanding procedural failings.

Mr Loakes was an employee and elected organiser for the Construction, Forestry, Mining and Energy Union (**CFMEU**). He was responsible for the Central Queensland region, which included major LNG construction sites at Curtis Island near Gladstone. He was terminated from his employment for performance related issues and '*gross neglect of duties*', which included failing to attend work sites and failing to respond to members' needs.

Other than a peek behind the curtain of the CFMEU to observe their inner working, the case is perhaps most interesting in terms of the process followed by the CFMEU in terminating the organiser. Mr Loakes had not been issued with any written warnings regarding his performance. He was invited to a meeting via text message, without any indication of what the meeting was regarding. He was not invited to bring a support person. Loakes was confronted at the meeting with various allegations regarding his performance and asked to respond, before being given a pre-prepared letter by the CFMEU Branch Secretary terminating his employment. In the letter of termination, the CFMEU purported to withhold payment of notice and benefits until all union property in his possession was returned. The CFMEU had not followed their own procedure regarding the dismissal of elected officials, which required a meeting of the Divisional Branch Executive (**Executive**). After the requirements of the CFMEU rules were raised by Mr Loakes, a hearing before the Executive took place (which Mr Loakes refused to attend on the basis of prejudice and that the outcome was predetermined) which confirmed his dismissal.

On any other occasion, the CFMEU may have been quite critical of these matters and advocated that such procedural flaws ought to render the dismissal unfair. It is interesting then to see the CFMEU make contrary arguments when it is the employer. Ultimately, and perhaps fortunately for the CFMEU, the employee and his advocate were their own worst enemies. The Fair Work Commission (**FWC**) concluded that it was satisfied that there was a valid reason for dismissal and that any concerns with the initial process were overcome by the hearing before the Executive and outweighed by the substantive evidence against

Mr Loakes. While it was accepted that he had not been formally warned about his performance or that his position was in jeopardy, and that he was not given much time to consider the allegations before responding, the FWC concluded '*he could have been under no illusions that his performance was not what the Union hierarchy expected*' given the accepted evidence of informal warnings. The FWC considered that it was '*a bit rich'* for Mr Loakes to seek to impugn the process when some of his own explanations for his conduct were withheld and only raised for the first time in the FWC hearing itself. Criticism of the CFMEU for failing to follow its own rules was rejected given that when the rules were subsequently followed the employee refused to cooperate, actions that the FWC viewed as '*foolhardy and risky*'.

Ultimately, this case is a strong example of the impact the candour and credibility of a party and their representatives have in a jurisdiction which is dealing with notions of '*fairness*'. Mr Loakes was found to be an '*argumentative, evasive and unresponsive witness, whose evidence as to the complaints against him was either implausible, contrived or both … (and) particularly prone to exaggeration*'. His approach was referred to as '*disingenuous and sanctimonious*' in failing to acknowledge a single instance of mistake, fault or error of judgment on his own behalf even in the face of corroborating evidence. The FWC was also strongly critical of the employee's industrial advocate and the way in which the matter was argued. It is clear that notwithstanding what on their face may have been reasonably strong arguments as to potential procedural unfairness, neither Mr Loakes nor his advocate did the case any favours. It is perhaps best summarised in the following passage:

> *'I might have found myself with much more sympathy for the applicant if he had been honest with himself and this Commission and at least have accepted some fault - no matter how small. But when clear and undoubted evidence is available to contradict the 'spin' and implausible excuses, he should not be a bit surprised by the outcome.'*

Case Note

Phillip McClelland v International Parking Group Pty Ltd T/A Metro Parking Management Pty Ltd [2015] FWC 3708

The FWC upheld the employer's jurisdictional objection to an application for an unfair dismissal remedy, finding that although the relevant casual employee had regular and systematic employment, there was no expectation of ongoing employment.

The facts

Mr McClelland had been employed by Metro Parking Management as a casual car park attendant for a period of approximately nine months, when he was informed by his employer that no more shifts were available.

Mr McClelland's letter of appointment stated that he was being engaged to work at Liverpool Hospital car park in order to fill a gap caused by the long term illness of a permanent employee. When the relevant employee returned to work, Mr McClelland was transferred to work at St George Hospital car park, where another employee was on extended sick leave. Following this employee's return to work, Mr McClelland was transferred to Randwick Hospital car park, where another employee had resigned due to a serious illness.

Mr McClelland worked at Randwick Hospital car park for a period of approximately four months, while the employer made arrangements for a permanent employee to fill the role of the employee who had resigned.

In February 2015, Mr McClelland was informed that a permanent employee was to fill the role vacated by the sick employee and that Mr McClelland would therefore not be offered any further shifts.

Mr McClelland argued that he was protected from unfair dismissal because he had served the minimum employment period as a casual employee working regular and systematic hours and he had expected that his employment would be ongoing.

The employer argued that Mr McClelland was not protected from unfair dismissal because:

- It was always their intention to contact Mr McClelland if any further shifts became available. Accordingly, Mr McClelland had not been

dismissed at the initiative of his employer; and

- Mr McClelland's period of service as a casual employee did not count towards the minimum employment period because there was no reasonable expectation of continuing employment.

Issues

1. Was the employee dismissed at the initiative of the employer?
2. Was there a reasonable expectation of continuing employment on a regular and systematic basis?

Decision

In considering whether the employee was dismissed at the initiative of the employer, the Fair Work Commission (**FWC**) accepted that Mr McClelland had been specifically informed by his employer that he was not being dismissed. However, the reality of the situation was that the employer did not intend to offer Mr McClelland any shifts for the foreseeable future. In those circumstances, the FWC queried *'how long is it reasonable for a casual employee to wait without an offer of a shift before the employee considers that the employment relationship has been brought to an end by the employer?'*.

The FWC held that the answer will depend on the nature of the engagement, but in circumstances where an employee has enjoyed regular and systematic shifts, it would be reasonable for an employee to consider the employment relationship at an end *'when the employer elects not to provide the shifts anymore'*. Accordingly, the FWC was satisfied that Mr McClelland had been dismissed at the initiative of his employer.

In considering whether there was a reasonable expectation of ongoing employment, the FWC recognised that there was a continuing employment relationship between the parties for so long as Mr McClelland was required to cover for employees who were absent due to illness. He knew his casual engagement was to fill one or more short term gaps. Although Mr McClelland had expressed the hope and desire to be converted to a permanent employee, there was nothing to suggest that Mr McClelland *'could have reasonably expected to have been retained in employment in the absence of a staffing gap'*.

The jurisdictional objection was upheld and the application for unfair dismissal remedy was therefore dismissed.

Case Note

Maria Panera v Qantas Airways Limited [2015] FWC 4527

The FWC upheld the dismissal of an employee dubbed 'Lady Bountiful' notwithstanding a rushed termination process designed to avoid a redundancy payment.

The facts

Ms Panera commenced work at Qantas in 1986 when she was 25 years old. In April 2014, Ms Panera expressed interest in a voluntary redundancy. Qantas accepted, and provided Ms Panera with written notice that her employment would cease on 10 June 2014, at which time she would be paid a severance payment and any accrued entitlements.

Ms Panera was employed in the position of a Customer Service Agent Ticketing and Sales at the Sydney International Airport. Her role largely involved day of travel bookings and did not involve making travel bookings at large.

Shortly before her employment was due to cease, Qantas conducted an investigation which revealed at least nine instances of Ms Panera booking discounted airfares for friends, family, acquaintances and colleagues by:

- Overriding the reservation system in order to book discount fare classes which were not available on the relevant flights;
- Backdating fare quotes in order to access early bird pricing which was not otherwise available;
- Allowing stopovers at no extra charge contrary to the fare rules; and
- Failing to charge cancellation and change fees which were otherwise payable.

Qantas terminated Ms Panera's employment with effect from 6 June 2014, thereby avoiding the obligation to pay a severance payment on 10 June 2014.

Qantas argued that dismissal was justified and characterised Ms Panera's actions as *'misconduct relating to provision of discounted tickets and a failure to charge for booking changes that did not appropriately arise in the course of Ms Panera's duties or for any authorised operational reason'*.

Ms Panera argued that there was no valid reason for dismissal in circumstances where Qantas had never clearly communicated that the ticketing techniques and procedures she had used were not permitted.

Ms Panera further claimed her dismissal was unjust or

unreasonable because Qantas had failed to monitor compliance with its policies and manage its risk and had failed to provide her with a fair termination process.

Finally, Ms Panera claimed her dismissal was harsh in circumstances where the dismissal rendered her ineligible to receive a redundancy payment.

Issues

1. Was there a valid reason for dismissal?
2. Is an employer required to proactively monitor compliance with its policies?
3. Did the truncated termination process render the dismissal unfair?
4. Did the impending redundancy payment render the dismissal harsh?

Decision

The Fair Work Commission (**FWC**) was satisfied that there was a valid reason for dismissal, having found that:

- Ms Panera's conduct involved deliberate breaches of policy and fare rules; and
- Although Ms Panera did not make any personal financial gain from her conduct, she ensured that her friends, family, acquaintances and colleagues received a financial benefit while Qantas suffered a corresponding financial detriment.

In determining whether the dismissal was harsh, unjust or unreasonable, the FWC acknowledged that Ms Panera had a long and unblemished employment history with Qantas, and further acknowledged that her termination had a particularly devastating effect in circumstances where she would have otherwise been entitled to a significant severance payment. This was not, however, sufficient to render the termination harsh in the circumstances.

The FWC found that the procedures adopted by Qantas were inadequate in terms of providing Ms Panera with an opportunity to respond. Although she had been given an adequate opportunity to respond to the allegations of misconduct, she was provided with only approximately 24 hours to address what outcome should arise from Qantas' findings of misconduct.

However, the FWC held that *'no further opportunity to make submissions on merit or mitigation could, should or would have made any difference to the decision to terminate Ms Panera's employment'*.

Accordingly, the FWC upheld the termination and dismissed Ms Panera's application for unfair dismissal remedy.

Case Note

Tamer Selcuk v Epworth Foundation T/A Epworth Hospital [2015] FWC 4367

FWC orders an employer to pay the employee's legal costs on a party-party basis following an unsuccessful application for permission to appeal, but finds in the particular circumstances that it has no power to order costs against the employer's representative.

The facts

Mr Selcuk was terminated from his employment, with the employer citing serious misconduct as the reason for dismissal.

Mr Selcuk made an unfair dismissal application, which ultimately found that Mr Selcuk's conduct did not rise to the level of serious misconduct as alleged. The Fair Work Commission (**FWC**) did, however, find that Mr Selcuk had engaged in misconduct and that there was a valid reason for a dismissal. For a number of reasons, including the failure by the employer to apply consistent disciplinary sanctions against other employees involved in the misconduct, and the failure by the employer to provide Mr Selcuk with a proper opportunity to consider and respond to the material relied upon in support of the dismissal, the FWC found the dismissal was harsh, unjust and unreasonable.

The employer sought permission to appeal the FWC's decision but permission to appeal was refused because the employer failed to convince the Full Bench that there was an appealable error or any issue of importance of general application so as to enliven the public interest. The Full Bench further expressed the opinion that the grounds of appeal did no more than voice the employer's *'dissatisfaction with the result at first instance'*.

Following the unsuccessful application for permission to appeal, Mr Selcuk sought costs orders against the employer and the employer's legal representative.

Issues

1. In what circumstances will costs orders be available against a party following an unsuccessful application for permission to appeal?
2. In what circumstances will costs orders be available against a party's legal representative following an unsuccessful application for permission to appeal?

Decision

The FWC observed that, as a statutory tribunal, it has no inherent power to make costs orders. Any such costs orders must therefore derive from the *Fair Work Act 2009* (Cth) (**FW Act**).

Mr Selcuk relied upon s 401 of the FW Act in support of his application for costs against his employer's legal representative on the grounds that the representative caused costs to be incurred:

- Because the representative had encouraged the employer to continue the matter in circumstances where it should have been reasonably apparent that the employer had no reasonable prospects of success; or
- Because of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

The FWC was ultimately not required to inquire into the reasonableness of the representative's conduct, having found that s 401 only confers power on the FWC to make costs orders in relation to the unfair dismissal proceedings itself. As Mr Selcuk was seeking a costs order in relation to an application for permission to appeal, the FWC had no power to make a costs order against the employer's representative.

In relation to the application for costs against the employer, Mr Selcuk argued pursuant to s 611 of the FW Act that:

- The employer made the application for permission to appeal vexatiously or without reasonable cause; or
- It should have been apparent to the employer that the application for permission to appeal had no reasonable prospect of success.

The FWC accepted that proceedings will be considered vexatious where the predominant purpose of the proceedings is to *'harass or embarrass the other party, or to gain a collateral advantage'*. The FWC was not satisfied that the application for permission to appeal was vexatious in the circumstances of this matter.

The FWC also accepted that a proceeding cannot be said to have been without reasonable cause or without reasonable prospects of success simply because the argument proves unsuccessful. However, in circumstances where the Full Bench had observed that the grounds of appeal did no more than voice the employer's *'dissatisfaction with the result at first instance'*, the FWC held that it ought to have been reasonably apparent to the employer at the time of filing that the application for permission to appeal had no reasonable prospect of success.

The FWC therefore ordered that the employer pay Mr Selcuk's costs in respect of the application for permission to appeal on a party-party basis.

Case Note

RailPro Services Pty Ltd v Flavel [2015] FCA 504

Federal Court finds that normal human reactions such as nervousness are insufficient to put an employer on notice of a disability in an adverse action claim.

Under s 351 of the *Fair Work Act* (**FW Act**), an employer is prohibited from taking action adverse against an employee because of a defined attribute, such as race, sex, age, physical or mental disability or marital status. A reverse onus of proof applies, in that it falls to the employer to prove that their reasons for taking action were not unlawful. As a result of this reverse onus, the adverse action laws have proven a fertile ground for employees. The recent decision in *RailPro Services Pty Ltd v Flavel* provides a useful illustration of the operation of the adverse action laws in the context of allegations of discrimination, and the difference between adverse action discrimination under the FW Act and the State and Federal anti-discrimination laws.

Flavel was an experienced train driver who commenced employment with RailPro in April 2011. In October 2011 while undergoing training he was involved in an incident in which the train he was driving collided with another train, causing approximately $5m damage. Separately, Flavel had been in training far longer than usually expected, and had failed to demonstrate competent knowledge of the train routes. Internal investigations into the incident concluded that Flavel and a supervisor were at fault, that their conduct was sufficient to justify termination of employment, but that as a result of mitigating circumstances a final warning should be issued and competency assessment undertaken. Following the incident, Flavel was offered counselling, which he declined. He did not sustain any physical injury or take any time off work, although his wife had written to the company indicating Flavel was '*punishing himself and overwhelmed with grief*'. In late November 2011, Flavel was required to undertake competency assessment on various train routes. On the first attempt, on being told that consistent with company policy he could not use his notes, he refused to drive the train and advised the assessor that he '*felt violently ill*' about the prospect of doing so. On completion of the journey, Flavel was called into a meeting with senior management, at the conclusion of which his employment was terminated because of his failure to demonstrate competence in the driving of his allocated routes. Some months later he was diagnosed as suffering from Post Traumatic Stress Disorder (**PTSD**) as a result of the original rail incident. Flavel commenced action against RailPro on various bases, including s 351 of the FW Act, asserting that adverse action was taken against him by reason of his mental disability.

At first instance, Judge Simpson of the Federal Circuit Court considered RailPro management to have knowledge of Flavel's psychological condition by virtue of his complaint of feeling violently ill, the note from his wife, and by virtue of the company's evidence that it was aware that accidents may have adverse mental effects on individuals. The court went on to find RailPro breached s 351 of the FW Act as follows:

> *'I find that the respondent's termination of Mr Flavel's employment was because of Mr Flavel's mental and physical disability which reason for dismissal is unlawful pursuant to s15(2) of Disability Discrimination Act 1992 (Cth). This reason for dismissal is in breach of s351 of the Act.'*

Issues can immediately be seen with this reasoning. Whether or not there was a breach of the *Disability Discrimination Act1992* (Cth) is not the relevant test in an adverse action case under the FW Act. State and Federal discrimination legislation is in different terms, and includes extended definitions of discrimination to include indirect discrimination (which may arise where there is no intent to discriminate per se, but where the imposition of a requirement has a discriminatory impact on one person when compared with others). On appeal to the Federal Court, Justice Perry confirmed that discrimination under the FW Act is more restrictive, and applies only where an employer acts directly '*because of*' the relevant attribute, such attribute being a '*substantial and operative reason*' for the decision. While s 351(2)(a) of the FW Act does provide that there is no breach of the FW Act by action which is not also unlawful under applicable State or Federal discrimination laws, that essentially adopts the defences available under those legislative schemes, rather than broadening the scope of discrimination under the FW Act itself.

Furthermore, Justice Perry noted that RailPro's management could not act '*because of*' a disability that they did not know existed, nor could reasonably have known existed given the minimal symptoms observed at the time. A disability under the FW Act '*does not include ordinary human responses to particular circumstances, such as nervousness*'. Merely because Flavel had an '*attack of nerves*' on one occasion was no reason to conclude that the employer's managers had knowledge of a disability, particularly given the absence of any other complaint, any time off work, and the refusal of counselling. Accordingly, the claim for discrimination under s 351 of the FW Act was dismissed.

Ultimately, Flavel did have some measure of success on other grounds. He had a legal duty under the *Occupation, Health, Safety and Welfare Act (SA)* to take reasonable care to protect the health and safety of himself and others at work, and to withdraw himself from work if he was unfit for duty. Accordingly, separate to discrimination, he alleged that adverse action was taken against him because of the exercise of a workplace right under s 340 of the FW Act.[1] While the Federal Court accepted RailPro's argument that Flavel's competence or lack thereof in the performance of his duties was a valid reason for terminating his employment in these circumstances, the court concluded that RailPro had failed to address whether Flavel was unfit for duty on the day in question (which was a separate consideration to whether or not they had knowledge of a disability) and whether that was one of the operative reasons for the decision to terminate. Accordingly, the employer had not satisfied the reverse of proof, and Flavel was entitled to succeed.

As a result of the appeal and the more limited findings, damages for distress and hurt for the dismissal were reduced from $25,000 to $7,500. Damages for economic loss attributable to the dismissal (as distinct from those attributable to the injury itself) were remitted to the trial judge for determination.

The moral of the story is that the adverse action regime under the FW Act remains a minefield given the reverse onus of proof, such that employers must be very clear (and careful) as to the reasons why decisions are taken and ensure that appropriate evidence regarding those reasons is led at any hearing. However, there are some positives. The recognition that broader concepts of discrimination in State and Federal anti-discrimination laws, such as indirect discrimination, have no relevance to considerations under the FW Act is welcome and confirms other recent decisions,[2] as is the recognition that normal human reactions to stressful situations, such as nervousness, nausea, sadness, etc are by themselves insufficient to find that an employer had knowledge of a disability. As the test of whether adverse action was '*because of*' a disability necessitates some level of knowledge regarding the disability, the level at which the manifestation of symptoms triggers the requisite knowledge remains an important factual issue.

[1] A workplace right is defined to include a responsibility under a workplace law. A workplace law includes State OHS laws.

[2] *Hodkinson v Commonwealth* [2011] FMCA 171.

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Michelle has acted in personal injury claims, professional negligence actions, disciplinary proceedings, employment practices liability claims, defamation, misrepresentation, breach of contract, property damage claims and fraud and fidelity claims.

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Case Note

Brett McKie v Munir Al-Hasani & Kenoss Contractors Pty Ltd (in liq) [2015] ACTIC 1

The ACT Industrial Court dismissed the charge against Mr Al-Hasani, finding that he was not an 'officer' for the purposes of the Work Health and Safety Act 2011 (ACT).

The facts

Mr Al-Hasani was employed as a project manager by Kenoss Contractors Pty Ltd (**Kenoss**) and was responsible for managing a number of projects, including a major road resurfacing project.

As part of the road resurfacing project, two compounds were established by Kenoss. The main compound housed site offices, while the second smaller compound was used solely for the purpose of storing construction materials.

On 23 March 2012, a worker, Michael Booth, died at the smaller compound in the following circumstances:

- Mr Booth, being an employee of a contractor to Kenoss, was instructed to deliver materials to the main compound, but for whatever reason he delivered the materials to the smaller compound instead;
- Prior to 23 March 2012, Kenoss had instructed workers to stop using the smaller compound. The evidence demonstrated, however, that the smaller compound was not locked or decommissioned and workers had continued to use the smaller compound;
- There were a number of live electrical wires overhanging the smaller compound at a relatively low height, which were obscured by foliage. In addition, on the day of the accident, there were significant wind gusts which would have set the lines into motion;
- There was no signage or other warning in the smaller compound regarding the presence of low hanging live electrical wires; and
- When Mr Booth tipped his load, the bucket of the truck contacted with the electrical wires and Mr Booth was electrocuted.

Despite being aware of the presence of the electrical wires, and despite having been personally served with a prohibition notice in 2008 regarding working near power lines, Mr Al-Hasani failed to take any adequate measures to ensure the safety of workers attending the smaller compound.

He was prosecuted for a category 2 offence under the

harmonised *Work Health and Safety Act 2011* (ACT) (**WHS Act**) in his capacity as an '*officer'* of Kenoss.

Issues

1. When will a person be considered an 'officer' for the purpose of the WHS Act?
2. Was Mr Al-Hasani an 'officer' for the purpose of the WHS Act?

Decision

The Industrial Court held that Kenoss had a clear duty of care to all persons visiting the smaller compound. The court further held that duty was clearly breached by failing to take adequate measures to address the risk posed by live overhead electrical cables. Accordingly, the court found the offence proved in relation to Kenoss.

However, in relation to the charge against Mr Al-Hasani the court required proof beyond reasonable doubt that Mr Al-Hasani was in fact an '*officer'* for the purpose of the WHS Act, and that he had failed to relevantly exercise due diligence in his capacity as an '*officer'*.

While the court was satisfied that Mr Al-Hasani's multiple failures to ensure safety compliance proved a lack of due diligence on his part, the court was not satisfied that Mr Al-Hasani was an '*officer'* for the following reasons:

1. Although the WHS Act does not require that an '*officer'* be a director as contemplated by the *Corporations Act 2001* (Cth), it does require that the person:
   (a) Participates in making decisions that affect the whole or a substantial part of the business; or
   (b) Has the capacity to affect significantly the financial standing of the business; or
   (c) Be a person in accordance with whose instructions or wishes the directors of the business are accustomed to act.
2. The evidence did not demonstrate that the directors of Kenoss were accustomed to acting in accordance with Mr Al-Hasani's instructions or wishes, nor did the evidence demonstrate that Mr Al-Hasani had the capacity to affect significantly the financial standing of Kenoss.
3. In determining whether Mr Al-Hasani participated in making decisions that affect the whole or a substantial part of Kenoss, the court observed:
   (a) Although Mr Al-Hasani had operational responsibility for the delivery of projects by Kenoss, *'…the concept of an officer should be viewed through the prism of the organisation as a whole rather than a particular function in which the individual was engaged';*
   (b) There was no evidence that Mr Al-Hasani had power to engage or terminate employees, commit corporate funds, provide direction as to which projects should be pursued by Kenoss, or sign off on tenders;
   (c) Mr Al-Hasani's participation in the business was operational. Whether it went beyond that to being organizational was speculative and unproven.

The court observed that Mr Al-Hasani had responsibilities as an employee of Kenoss, but he had not been charged in his capacity as an employee. As the court could not be satisfied beyond a reasonable doubt that Mr Al-Hasani was an '*officer'*, the charge against him was dismissed.

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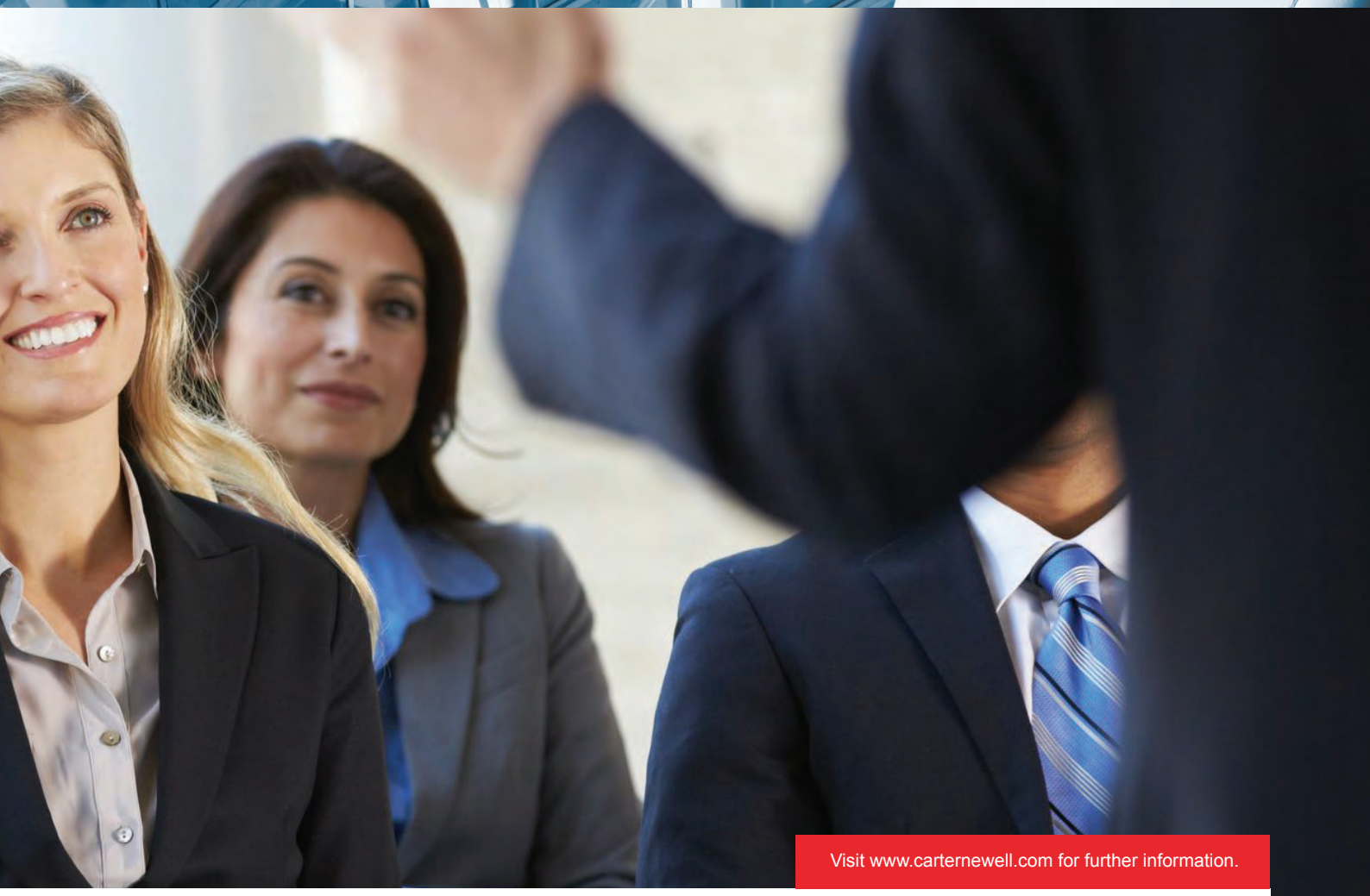

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