GD News

Gillis Delaney Lawyers

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Increase In Retirement Age - What Does This Mean For Insurers?

The Rudd Government has announced that the pension age for Australians will be increased from 65 to 67, the first major change for men in 100 years. The retirement age for many Australians has been moved to 67.

This announcement has no doubt sounded warning bells for all insurers who will now be faced with personal injury claims where injured persons will argue that it was always their intention to continue to work until retirement age. Effectively the costs of personal injury claims are likely to blow out with an increase in allowances for economic loss with major claims likely to be based on an additional two years loss of wages and superannuation.

Those on workers compensation benefits will also be winners. In New South Wales, whilst a worker is incapacitated, weekly payments of compensation must be paid to the injured worker up to one year after the retiring age provided their incapacity continues beyond the retiring age.

"Retiring Age" is defined in the legislation as the age at which a person would, subject to satisfying any other qualifying requirements, be eligible to receive an aged pension under the Social Security Act of the Commonwealth. Accordingly, workers will be entitled to receive weekly payments of compensation until they are 68 years of age. In addition, if a worker is injured on or after reaching their retiring age of 67, they will be entitled to continue to receive workers compensation payments for a further 12 months after the first occasion of incapacity for work resulting from that injury. There is likely to be confusion as to whether weekly compensation is payable for the additional 2 years where a worker was injured before the change of the retiring age as one reading of the current legislation is that compensation is payable based on the retiring age and if that changes so be it, compensation should be payable to the new retiring age.

Perhaps we will see some legislative clarification in due course. No doubt WorkCover will need to clarify this issue.

Further, for Work Injury Damages claims the legislation does not refer to "Retiring Age" but makes reference to the age 65 and provides :

> *"In awarding damages for future economic loss due to deprivation or impairment of earning capacity or (in the case of an award of damages under the Compensation to Relatives Act 1897) loss of expectation of financial support, the court is to disregard any earning capacity of the injured worker after age 65."*

So will we also see legislative change to address this situation and permit Work Injury Damages to be calculated to age 67.

No doubt actuaries will now be recasting estimates for claims for general insurers and the Workers Compensation Schemes throughout Australia will be considering the real impact of the change in the retirement age.

Change is certainly on the way.

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michael Hayter mkh@gdlaw.com.au
Nicholas Dale.nda@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Marcus McCarthy mwm@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
David Collinge dec@gdlaw.com.au

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Inside

Gillis Delaney Lawyers
Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

Businesses Face Major Challenges With an Overhaul to the Trade Practices Act.

The Minister for Competition Policy & Consumer Affairs, Chris Bowen MP, has recently announced that “unfair” terms in non-negotiated standard form contracts will be targeted under the Government's initiative to implement consumer law reforms with amendments to the Trade Practices Act. A Bill will be introduced to Parliament in June this year with the provisions expected to come into operation by the beginning of 2010.

The introduction of national "unfair contract terms" law will:

- protect consumers by removing unfair terms in standard-form contracts that are used to harm and exploit customers, including business customers, and can reduce competition by limiting customer choice and the ability to exit ‘bad’ deals;
- achieve national consistency in the regulation of unfair contract terms;
- apply to all sectors of the economy as part of the generic national consumer;
- apply to individual consumers as well as business-to-business transactions;
- apply to standard form contracts for the supply of goods or services;
- apply to standard form contracts for transfer of land; and
- apply to standard form contracts that are either a financial product or a contract for the supply, or possible supply, of financial services,
- apply to standard -form contracts entered into or varied after 1 January 2010.

This national approach will ensure that there is national consistency in consumer protection.

The changes will allow for terms in standard form contracts to be declared unfair, which will have the effect of voiding the provision and exposing the contracting party to penalties, damages and other remedies.

Under the proposed legislation an unfair term of a standard form contract will be void however the contract continues to bind the parties if it is capable of operating without the unfair term.

A term of a standard form contract is **unfair** if:

- it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

In determining whether a term of a standard form contract is unfair a court may take into account such matters as it thinks relevant, but must take into account the following:

- the extent to which the term would cause, or there is a substantial likelihood that the term would cause, detriment (whether financial or otherwise) to a party if it were to be applied or relied on;
- the extent to which the term is transparent;
- the contract as a whole.

A term is **transparent** if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

A term of a standard form contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

The following are examples of the kinds of terms of a standard form contract that may be unfair:

- a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

- a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- a term that limits, or has the effect of limiting, one party's right to sue another party;
- a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;
- a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;
- a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

In addition the Government will also have power, by regulation, to declare particular terms in standard form contracts to be prohibited. Prohibited terms will be void and a party that includes or relies upon a prohibited term (or purports to do so) commits a civil offence.

A person must not include, or purport to include, a prohibited term in a standard form contract of such a kind and a person must not apply or rely on, or purport to apply or rely on, a prohibited term of a standard form contract of such a kind. However the contract continues to bind the parties if it is capable of operating without the prohibited term.

If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether another party was given an effective;
- opportunity to negotiate the terms of the;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;
- any other matter prescribed by the regulations.

The proposed amendments will have a significant impact upon all businesses that utilise standard form agreements.

Businesses using standard form agreements will need to conduct a thorough review of their contractual arrangements well in advance of 1 January 2010 implementation date.

All businesses will need to tackle the challenges of redrafting contracts with "transparency" and with terms that do not cause significant imbalance in the parties' rights and obligations arising under the contract and are reasonably necessary in order to protect the legitimate interests of the business which is advantaged by the terms.

Employer's Liability For Shooting Of An Employee

The liability of owners of licensed premises and security companies who provide services to those premises for injuries caused by criminal activity continues to interest the NSW Courts.

The NSW Court of Appeal has recently had cause to consider a claim by an employee of a security company who was shot and injured during his employment by a perpetrator associated with a patron who had been refused entry to the premises and involved in an altercation with a number of bouncers employed by the security company. The perpetrator was a brother of one of the persons involved in the altercation.

Sosaia Mahina, a security guard of Tongan extraction, was working outside Rogues Nightclub in Oxford Street, Sydney. One night he was the victim of random and unpredictable criminal behaviour when he was shot. He had worked at the Club for about six months and was highly regarded by his supervisor, a gentleman of Maori extraction who was larger and taller than him, as a great guard who was extremely reliable and could handle himself in a fight and was someone who could be relied on if there was any trouble. Mahina was placed on the door with two other security guards who performed different functions including scanning potential patrons with metal detectors to ensure they were not carrying any weapons or dangerous or undesirable objects.

Whilst working the front door several young men of middle eastern or Lebanese appearance were involved in a scuffle with Mahina's supervisor. According to the supervisor there were approximately six men in the group who were fit and strong and who had exhibited aggressive tendencies when standing in the queue. Mahina came to the aid of his supervisor, punches were exchanged and Mahina had his shirt ripped and red marks on his face and he returned punches and at least one of the men in the group sustained a bloody face. The scuffle broke up after about ten minutes and the men were told to leave. When they were a short distance away one of the group threw a bottle which struck one of the bouncers. A short time later Mahina found that his new motor vehicle which was parked in a nearby street had been badly damaged and the front and rear windows had been smashed.

Mahina remained on duty at the front door after the incident when a male dressed in a long black coat with a black beanie pulled down over his eye brows, approached Mahina, stared at him then pulled out a hand gun from inside his coat and started shooting. Six shots were fired and three hit Mahina.

Mahina sued his employer for damages for his injuries alleging the employer had been negligent.

There was some dispute in the case as to whether or not the participants in the fight had made threats to come back and kill Mahina or simply had threatened the bouncers to come back and deal with the bouncers. Mahina contended that he asked his supervisor to be rotated into the Club and that he had asked to go home and that the supervisor had gone to a cupboard and produced four baseball bats which were then placed at the door in case there were further problems.

In the original trial Mahina's evidence in this regard was accepted. The employer of Mahina was found to have been negligent for not rotating Mahina into the Club away from the front of the Club.

The security company appealed. It was argued that it was not foreseeable that a brother of those involved in the fight would return and shoot Mahina in circumstances where they could be easily apprehended. It was also argued that in all likelihood Mahina would have been shot in any event as he could have been shot when leaving the Club at any time or at the end of a shift.

The Court of Appeal considered that the original Judges' findings were correct and that the employer had breached its duty of care. It was noted that the threats that were made were not mild but were the threats of aggressive, young angry men. It was noted that the threats "We're going to come and get you. We're going to kill you." were threats which were made and it was foreseeable that notwithstanding the nature of Mahina's employment as a bouncer, refusal to rotate him involved a risk of injury to him in the event the perpetrators or someone on their behalf returned to carry out that threat.

The employer also argued that it would not have been a reasonable response to the risk to rotate Mahina. This argument was rejected quickly by the Court of Appeal despite the contention that the incident should have been seen as an extreme event not to be anticipated as a likely result.

The Court of Appeal noted that the relevant risk was that the perpetrator of the threat or someone on his behalf was likely to return. The Court of Appeal noted:

> *"A threat to return to kill clearly carried with it the potential use of a lethal weapon whether it be a gun, an iron bar or a knife. The aggression and anger exhibited by the issuer of the threat carried with it the likelihood that if the threat were carried out, the fact that there might be witnesses would not have been a deterrent."*

On this basis the suggestion that the damage was not reasonably foreseeable was rejected.
The decision sounds a clear warning to all security companies that where bouncers are exposed to incidents, action needs to be taken to deal with any concerns an employee may have in relation to those incidents particularly where there is a possibility of retaliatory action or possible confrontation at a subsequent time.

In this case the Club owners were not sued presumably as the Club acted reasonably when engaging the security company and the case demonstrates that the engagement of security services by licensed premises can be an effective tool in avoiding claims for injuries resulting from criminal conduct of disgruntled, intoxicated or violent patrons.

Spillage On The Road Leads To Successful CTP Claim Against Nominal Defendant

In NSW the Motor *Accidents Compensation Act, 1999* governs claims for damages for injuries sustained in motor vehicle accidents. The Act requires an injury to be "caused by the fault of the owner or driver of a motor vehicle" and "in the use or operation of the vehicle". In addition the injury must occur during the driving of the vehicle, a collision or action taken to avoid a collision or the vehicle running out of control, or such use or operation by a defect in the vehicle. We note the legislation was amended on 1 October 2006 to remove the defect element of the definition.

From time to time cases come before the courts that give rise to arguments that the circumstances of the accident do not fall within the definition "in the use or operation of the vehicle". So what about an accident which occurs when a motor vehicle looses control on the road due to a spill of diesel left by an unidentified vehicle.

The NSW Court of Appeal in *Dominello v Dominello & The Nominal Defendant* recently concluded that a driver of an unidentified vehicle had most probably left off a cap on a diesel tank which allowed the diesel tank to spill diesel as it negotiated a bend and these actions amounted to fault on the part of the driver of the vehicle in the use or operation of the vehicle.

At 1.00 am one morning Mr Dominello was driving a High Ace van on the Pacific Highway near Grafton when it left the road hitting a tree. Mrs Dominello, a front seat passenger, was injured. The Dominellos had stopped at Grafton for petrol, drinks and sandwiches and the accident occurred 16 kms south of Grafton at a part of the highway which crosses a crest and takes a reverse curve downhill at a grade. The speed limit was 100 kmph and there was an 85 kmph advisory speed sign. There had been light rain throughout the night and the road was wet but it was not raining at the time of the accident. The driver lost control of the van on a left hand curb when it slid right and then left before running off the carriageway hitting a tree. Interestingly a Police officer who had approached the scene approximately ten minutes after the accident, momentarily lost control of his vehicle as he was travelling 70 to 75 kmph at the same location. A person from the State Emergency Services arrived shortly thereafter and also momentarily lost control on the left hand curve at 50 kmph and crossed the centre line and regained control.

Mrs Dominello sued her husband and the Nominal Defendant who is responsible for the negligence of an unidentified driver. In the District Court the judge awarded Mrs Dominello $2,775,035.00 and found that the driver of the vehicle had been negligent but the claim against the Nominal Defendant did not succeed.

The trial judge found that a substantial quantity of diesel had fallen from a southbound vehicle onto a relatively short section of the highway and the driver was travelling at a speed in the order of 100 kmph. The RTA covered the highway to absorb the diesel after the incident.

The Court of Appeal after considering the findings of the trial judge and the evidence found that the driver of the vehicle had been negligent. The original trial judge had found that the driver's speed was about 100 kmph which was the cause of the accident because it increased the risk of injury. One judge in the Court of Appeal did not consider the driver's speed amounted to negligence however the majority did. The majority noted that the trial judge had found that the driver would have regained control of his van almost immediately if he had been travelling at 75 to 80 kmph and if that were correct Mrs Dominello's injury was materially contributed to by a breach of duty by the driver, namely driving at a speed in excess of a speed at which a driver, taking reasonable care would have been driving. If he had not been driving at an excessive speed, he would have been able to regain control of his van after it skidded on the diesel.

The Court of Appeal noted reasonable drivers drive at the speed they do not simply to enable them to keep their own vehicle on the road but to enable them to deal with many but regrettably not all, of the multitude of misfortunes that can impact on vehicles driving on the road. The majority noted that the excessive speed of the vehicle and the diesel on the road were each

necessary conditions for the accident to occur. If one had been absent the accident would not have occurred. It was noted that "if a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendants conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury".

The Court of Appeal however did not agree with the Judge's findings against the Nominal Defendant. It was noted that there were a number of hypotheses as to the source of the diesel on the road including a left open diesel tank after filling at Grafton, cracks on diesel tanks on trucks, sudden fractures of diesel tanks and damaged auxiliary diesel tanks on heavy vehicles. As Handley AJ noted the legal test in such a case is as follows:

> *"Many hypotheses may be put which the evidence does not exclude positively, but this is a civil and not a criminal case. We are concerned with probabilities not possibilities . . . where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is not a matter of conjecture . . . but if circumstances are proved in which it is reasonable to find on a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise."*

The Court of Appeal concluded the evidence supported inference of a full fuel tank on a heavy truck with an open filler as the most probable source of the spill. More probably than not the open filler would be the result of the driver's negligence and failing to replace or properly replace the fuel cap. It was noted that there were only self serve fuel stations in Grafton.

On that basis the Court of Appeal concluded that there had been negligence on the part of the driver of an identified vehicle. The Court of Appeal also concluded the injury was caused by the driver's fault during the driving of a vehicle by a defect in the vehicle, its open fuel tank. It was noted that a vehicle fitted without a fuel cap has a defect and it has another defect if a fuel cap is not fitted or not properly fitted. The passive condition of the fuel tank without its fuel cap which permitted the spillage to occur was a decisive element in the cause of the accident.

So at the end of the day Mrs Dominello was successful in her claim against both her husband and the Nominal Defendant that was responsible for an unidentified vehicle. As is often the case an accident is the result of more than one thing that goes wrong and in this case it was the diesel on the road which resulted from a fuel cap being left off and the excessive speed at which Mr Dominello was driving that caused the accident.

Diminution In Value Or Rectification Costs- What Is The Proper Measure Of Damages?

In Tabcorp Holdings Pty Ltd –v- Bowen Investments Pty Ltd the High Court has provided a warning the diminution in value of property caused by a breach of term of a contract by a party may not always sound in damages equivalent to the diminution in value caused by the breach. In fact a party may be liable for rectification costs which substantially exceed the diminution in value caused.

Bowen Investments Pty Ltd ("the Landlord") was the owner of a building in Melbourne. In early 1997 the Landlord had constructed a foyer using expensive, specialized granite and timber, and glass. Shortly after that, the tenant, Tabcorp Holdings Pty Ltd ("the Tenant") had entered into occupation of the building under a lease.

The lease was for 10 years with two 5 year options to renew ("the Lease"). It contained a clause forbidding the Tenant to make substantial alterations to the premises without the prior written approval of the Landlord ("the Covenant").

About 6 months into the Lease, the Tenant demolished the interior of the foyer and erected a new foyer to a different design. The Tenant was aware that written consent from the Landlord to do what the Tenant had done was needed, and that that consent did not exist.

In fact, 15 minutes before a meeting involving the Landlord and the Tenant, the director of the Landlord arrived to find the foyer being demolished. Despite her protests, the destruction continued on that day, and construction of a new foyer was completed about a month later.

The Landlord succeeded at the trial in a claim for common law damages in relation to two breaches by the Tenant of the Covenant – first - the destruction of the old foyer and - second - the construction of a new foyer. The damages were

calculated as the difference between the value of the property with the old foyer and the value with the new foyer constructed by the Tenant, a modest difference.

The Landlord appealed from the trial judge's decision. The Full Federal Court increased the judgment sum to $1.38m being $580,000 as the cost of restoring the foyer to its original condition and $800,000 for loss of rent during the restoration. The Tenant then appealed to the High Court seeking restoration of the trial judge's figure.

At trial, the Landlord's only claim for damages for breach of contract was based on a breach of the Covenant. The High Court held that clauses like the Covenant are legitimate to protect the Landlord's interests because if the Landlord learns of a threat to make a substantial alteration to the premises without its written consent, it can apply quickly for an injunction. In this case, the Landlord did not know the Tenant would make substantial alterations so suddenly and therefore could not apply for an injunction, but the Court found that fact did not prevent damages being assessed for a breach of the Covenant.

The High Court rejected the Tenant's argument that the appropriate measure of damages in this instance was the diminution (i.e. reduction) in value of the premises stating that such an argument is based on the incorrect notion that anyone who enters into a contract is at complete liberty to break it provided damages are adequate to compensate the innocent party are paid.

Although diminution in value can in some instances of breaches of contract be the correct measure of damages, in this case, the High Court affirmed the long-standing principle that where a party "sustains a loss by reason of a breach of contract, [it] is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".

That was because here, the Landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages was the loss sustained by the failure of the Tenant to comply with the Covenant; and that loss is the cost of restoring the premises to the condition in which they would have been if the Tenant had not breached the Covenant.

The Court decided that the diminution in value measure of damages will apply where the innocent party is "merely using a technical breach to secure an uncovenanted profit."

The Court also decided that diminution in value is the correct method to calculate the Landlord's compensation if the expenditure necessary to rectify the defect in the building was out of all proportion to the benefit to be obtained, but cases where a Court had applied that method were different on their facts to this case.

The Court found that if the benefit of the Covenant was to be secured to the Landlord, it was necessary that reinstatement damages be paid, and it was not unreasonable for the Landlord to insist on their payment.

<u>Betterment discount?</u>

In theory, if the Landlord expended the money awarded as the damages (with interest earned) after the Lease expires in 2012 or 2017 on rebuilding the foyer, it would be better off than it would have been if the Tenant had not breached the Covenant. That is so because if there had been no breach, the Landlord would have retaken possession of the foyer which had been subjected to 15 or 20 years' wear and tear so that, as the trial judge found, the foyer would likely require refurbishment.

The judgment strongly suggests that had the Tenant requested a discount in the damages awarded against it to take account of this "betterment" issue, and if it had tendered appropriate evidence, a Court would have to apply a discount to the damages awarded to the Landlord. The Tenant did not tender any such evidence, so that matter did not form part of the High Court's reasoning.

<u>Date of assessment of damages</u>

The High Court held that the Landlord would carry out any reinstatement of the foyer in either 2012 or 2017. Its judgment also makes it clear that:

- Sometimes when damages are awarded in relation to loss arising from the need to spend money in future or from the suffering of a future incapacity, they are awarded on the basis of an estimate as to the amount required at a future date, and discounted down to present value, leaving the plaintiff to invest the damages and employ the increased sum at a future date; and

- A second approach is to assess damages for breach of covenant as at the date of breach of contract. In that event it would be normal to order that the damages carry interest from the date of breach of contract.
- In this case a third approach was used. The damages figures selected by the Full Court were based on the Landlord's claim. The precise amount of that claim was uncontroversial once reinstatement was accepted as the basis. The claim was not based on 1997 construction costs, but on construction costs at around the time of the trial, partly 2004 costs and partly 2006 costs.

In the circumstances of this case, the potential difficulties arising from the calculation of damages by reference to rates that do not fall into either of the first 2 categories above were be put to one side because the Tenant did not take any issue on this subject.

The Court dismissed the Tenant's appeal. The tenant was liable for rectification costs and loss of profits during the rectification works and these damages substantially exceeded the diminution in value caused.

Not A Valid Offer Of Compromise

In previous editions of GD News we have discussed the impact of offers of compromise. An offer of compromise is a formal Court document served pursuant to the *Uniform Civil Procedure Rules* where, if the party who serves the offer does better than the offer if the matter proceeds to judgment, that party can make an application that the costs be paid on an indemnity basis from the day after the day the offer is made. Offers of compromise can put considerable pressure on parties to resolve matters as they can present a real risk for both claimants and defendants to claims. Offers of compromise must be open for at least twenty eight (28) days unless there is a hearing date, at which time the offers can be open for a lesser period of time, however there is then a question as to whether or not the offer was open a reasonable time for a party to obtain proper instructions on the offer. Offers of compromise are significantly more effective than Calderbank offers and it is very difficult to present an argument that an offer of compromise is invalid or should not be relied on. A recent decision of the Court of Appeal does however demonstrate that Offers of Compromise can be overcome.

In the decision of *Nazzareno Pittorino - v- Sharmain Yates*, the Court considered the appropriate costs order that should be made where an offer of compromise had been served. The proceedings arose out of a motor vehicle accident that occurred in 2004. The matter proceeded to hearing and on 23 November 2007 the trial judge entered a verdict in favour of Yates against Pittorino in the sum of $378,501.00. On 25 February 2007 Pittorino had served an offer of compromise pursuant to the Uniform Civil Procedures Rules, 2005 in the sum of $400,000.00 plus costs. Pittorino therefore made an application to the Court pursuant to the Rules that Yates pay Pittorino's costs on an indemnity base as and from 26 September 2007, the day after the offer was served.

The trial judge refused the application and ordered that Pittorino pay Yates' costs of the proceedings.

In coming to his decision the trial judge considered the medical evidence available to Yates at the time of the offer and the fact that medical reports had been recently served in late August and early September. The offer of compromise was served on 25 September and in the trial judge's view, it was reasonable for the Yate's solicitors to obtain further medical evidence and it was unreasonable to expect they would be able to do so by the last day the Offer of Compromise was open. The trial judge reached his decision on the basis that a report from an orthopaedic surgeon should have been available to Yates before a final decision was made in relation to acceptance of the Offer of Compromise.

Pittorino appealed. As the matter was an issue in relation to costs it was necessary for leave to be obtained from the Court of Appeal before the appeal could be heard and leave to appeal was granted. The Application for Leave and the substantive appeal were heard concurrently.

The Court of Appeal noted that on 17 October 2007, six days before the offer of compromise would expire, Yates' solicitors informed Pittorino's solicitors that Dr Ellis orthopaedic surgeon had been qualified and was to see Yates on the day the offer of compromise was to expire. A request was made for the offer be kept open for a further seven days to allow the medical report to be obtained and Yates could decide whether or not to accept the offer following receipt of that report. The request was partly acceded to, until 26 October. In His Honour's opinion, it was unreasonable to expect that Yates' solicitor would be able to obtain a report from an orthopaedic surgeon by 26 October.

The majority of the Court of Appeal agreed with the trial judge.

The Court stated:

> *"In my view the purpose of the rule under consideration is to avoid the very situation that occurred in the present case. The relevant principles to which I have referred do not require an offeree to accept an offer that may well be inimical to his or her interests. Nor do these principles require an offeree to be placed under undue and unfair pressure to accept an offer in circumstances where, as in the present case, a further medical report, the production of which was then in the pipeline, would have accepted justified rejection of the offer. The subject law is intended to operate fairly as between the parties and in particular, to avoid inappropriate circumstances, one party exerting undue pressure on the other in a manner that is unreasonable. Indeed, it is intended to afford an offeree an opportunity, if the circumstances so warrant, to make an informed and reasoned judgment whether or not to accept the offer."*

The appeal was therefore successful.

Justice Handley was however in dissent. Justice Handley notes that the offer was open for twenty eight days and served on the day the case was not reached and adjourned until the next sitting, a little under two months away. In Justice Handley's view this cannot be characterised as unreasonable.

Perhaps a surprising result. The offer of compromise was open for the twenty eight day period of time as required by the Rules, however, the majority of the Court of Appeal formed the appeal that the plaintiff ought to have the opportunity to examine a report from a treating orthopaedic surgeon prior to determining whether or not to accept the offer. It will be interesting to see if other decisions follow suit.

No Indemnity Costs In Work Injury Damages Claims

In a recent edition of GD News we discussed the NSW Court of Appeal decision of *Smith - v - Sydney West Area Health Service (2)* in which the Court of Appeal considered the cost provisions in relation to work injury damages claims.

As discussed in that article, the provisions in relation to costs in work injury damages claims are very different to the costs provisions that generally apply to proceedings in the District and Supreme Court and offers made at a work injury damages mediation (that is a pre-requisite to the commencement of a work injury damages claim in the District Court) can have a significant impact on costs payable. But what effect do Calderbank offers (written offers open for a specific time period) have in a work injury damages claim?

The NSW Court of Appeal has recently handed down another decision (Chubs Constructions Pty Limited - v - Chamma) involving costs in work injury damages proceedings. Chamma suffered serious injury on 18 June 2004 when he fell during the course of his employment. Chamma commenced proceedings in the Supreme Court seeking damages for personal injury against the head contractor at the worksite ("Solomon") and his employer, Chubs Constructions Pty Limited ("Chubs"). The proceedings were lengthy and continued for about five weeks. Prior to the commencement of proceedings a mediation had been held in the Worker's Compensation Commission.

Two offers of settlements were made prior to the commencement of proceedings. On 31 August 2006 a Calderbank offer was made by Chamma to settle the claim for past and future economic loss (the only damages payable in a work injury damages claim) by accepting $550,000.00 plus costs. A further offer was made at the mediation to accept $500,000.00 plus costs. This offer was made to both defendants and was framed as an offer to accept a certain figure for economic loss rather than a figure in settlement of the work injury damages claim.

Judgment was handed down on 5 March 2008. The trial judge entered a verdict against Solomon for $1,402,46.00 and against Chubs for $890,676.00. Following the judgment submissions were made in relation to costs. The trial judge, after hearing the submissions, ordered that Chubs pay 25% of Chamma's costs on a party / party basis (approximately two thirds of costs payable up to this time) up to 15 September 2006, at which time a formal offer had been made, and thereafter on an indemnity basis. Chubs appealed in relation to this decision and submitted the appropriate order should be that Chubs and Chamma bear their own costs of the proceedings as a consequence of the regulations that govern work injury damages claim. Chubs argued that the offer made by Chamma at the mediation was not a proper offer as it was an offer in relation to the claim for economic loss.

The two issues before the Court of Appeal were whether or not the trial judge had the power to orders that costs be paid on an indemnity basis and whether or not the trial judge had the power to order that Chamma's costs be paid on a party / party basis.

The Court of Appeal noted:

> *"It is certainly the case that Clauses 110 and 113 appear to pre-suppose that there might be an order for costs on an indemnity basis or that a court might have the power to make such an order. That may reflect the fact that Section 346(2) of the WIM Act, contemplates that the regulations may provide for the awarding of costs on other than a party / party basis. However, the restrictions on the awarding of costs in work injury damages cases found in Clauses 89 to 94 of the Regulations only permit the awarding of party / party costs. Neither Clause 110 nor Clause 113 operates to confer a power to award costs on any other basis. Clause 110 deals only with issues relating to the assessment of costs. Clause 113 ensures Division 4 does not limit any power of the Court to determine that costs be on an indemnity basis. However, before such a power can be exercised, it must have been conferred. For the reasons I've explained, the legislative has not conferred such a power in work injury damages cases. The peremptory terms of Clauses 89 to 91 leave no discretion to order costs on any basis other than as set out in those provisions."*

The second issue was in relation to the offer made at mediation. That offer was made to both defendants and the Court of Appeal found that the offer complied with the *Workers Compensation Regulations* despite Chubs arguing that it did not and in these circumstances Chamma was entitled to recover at least some of his costs on a party/party basis and the Court of Appeal ordered that the appropriate amount was 25%.

So what was the end result? Chamma did not obtain an indemnity costs order but obtained an order that 25% of his costs of the trial be paid on a party / party basis by Chubs. It should be noted that Soliman were also a party to the proceedings and Chamma also has the benefit of a party/party costs order against Soliman.

OH&S Roundup

Directors Escape With Modest Penalties

The Industrial Relations Commission has recently handed down a series of judgments which deliver hope to directors of companies who are sole shareholders or principal shareholders of the company in that those directors may not continue to receive significant fines for breaches of the Occupational Health & Safety Act where the company is prosecuted and fined and the director is prosecuted by virtue of the deeming provisions in the legislation that provides persons concerned in the management of the company is deemed to have committed the same offences as the company.

Effectively the Court has determined that where the Company will be imposed with a substantial fine and the director has also been prosecuted, if the impact of the fine on the company flows through the director by virtue of the director's shareholding in the Company the fine imposed on the director should be moderated down.

In *Inspector Webster - v - AGG Concreting Pty Limited, Darryl Coffey and Stephen Stathis*, WorkCover brought proceedings for a breach of Section 8 of the Occupational Health & Safety Act against the Company as well as proceedings against the two directors who were charged pursuant to Section 26 of the Act which provides that directors of a corporate defendant are deemed to have committed an offence where the Company has committed the offence.

AGG Concrete Pty Limited operated a business supplying concrete placing and finishing services and associated labour. AGG engaged Proline Pumping Pty Limited to supply plant and equipment for the provision of concrete pumping and they also supplied a concrete pump linesman. AGG were working on a two storey building and Proline Pumping Pty Limited was engaged in the pour for the second storey. Scaffolding had been erected partly around the outside of the building but there was no scaffolding or fall protection to the front section and the driveway towards the front of the building. The two directors of the Company were aware of the deficiency of the scaffolding and lack of fall protection. Whilst cleaning the hose after operating the pump, the pump linesman had his back to the leading edge, there was no scaffolding or handrails and as a result of the pressure in the line the pump hose moved suddenly causing him to lose his balance and fall to the ground six metres below.

AGG had not undertaken a full risk assessment of the task of pumping and placing concrete. AGG did not require Proline Pumping Pty Limited to supply a Safe Work Method Statement. There was no site induction for the injured contractor. Coffey was the sole shareholder of the company but had always operated AGG as an equal partnership effectively sharing the profits between Coffey and Stathis.

It was submitted by the Company that this was a small company. Its financial means were limited and these matters should be taken into account in assessing the quantum of the penalties. It was also argued that Stathis and Coffey's penalty should

be reduced as they would ultimately suffer the brunt of any fine imposed on the company. Having regard to the seriousness of the offence the Company was fined $70,000.00. However there was good news for the directors. The Court noted that the Company and the defendant were all prosecuted arising out of the same incident. They were all guilty of the same offence. The directors were only susceptible to prosecution because they were directors of the defendant corporation and they are taken to have contravened the same section as the corporation. The Court noted that where the directors are also the shareholders and have been prosecuted in concurrent proceedings arising out of the same incident and constituting in effect the same breach of the OH&S Act it was appropriate to ameliorate the penalty on the directors and in this case, each director was fined $3,500.00.

In another prosecution arising out of the same incident Proline Pumping Pty Limited had pleaded guilty to the offence, however two directors at the time of the offence, Joyce and Corrigan were also prosecuted.

It is interesting to note that the prosecution against Proline Pumping Pty Limited was dismissed despite a plea of guilty. The reason the prosecution was dismissed was that the Company had been sold prior to the prosecution commencing and the directors and/or shareholders in that company had no involvement whatsoever in any culpable conduct and the incident had occurred well prior to the acquisition of the defendant company. It was also noted that the directors of the company now intended to have the company de-registered and taking into account that it had not traded for a long time after being acquired by the new owners, there seemed little point in assessing a penalty having regard to the specific deterrent effect on this defendant. The Court found that there would be no utility in imposing a penalty on Proline Pumping Pty Limited. No doubt this increased the penalty for the directors of Proline Pumping Pty Limited at the time of the incident and as can be seen the Court is seeking to impose the liability and responsibility for penalties on those who truly conduct the business.

The directors were actually prosecuted for a breach of Section 8 of the *Occupational Health & Safety Act* rather than under Section 26, the deeming provisions. Each director was fined $18,000.00 for the offence. The decision to charge the directors for their own breach of section 8 rather than under the deeming provisions no doubt occurred as a consequence of the sale of Proline Pumping Pty Limited.

Finally in *WorkCover - v - Global Crown Constructions Pty Limited & Ivanovski*, Boris Ivanovski and Global Crown Constructions Pty Limited pleaded guilty to breaches of the Occupational Health & Safety Act arising as a consequence of a fall through a skylight by a subcontractor who was not wearing a safety harness.

The subcontractor had accidentally stepped on a skylight that was not load bearing whilst he was not wearing a safety harness. One of the subcontractors was in the process of undoing the screws on the ridge capping which had to be removed in order to anchor the harness to the roof structure. An alternative anchor point was available by using a Tbar connection that was attached to the gutter of the roof. The Industrial Court noted the Safe Work Method Statement did not adequately control the risks associated with working on the brittle and fragile roof. The company was aware of the brittle skylight panels and did not provide any temporary walkways or roof ladders for work upon the roof. Further, it did not install any warning signs alerting the roofing subcontractors of the presence of brittle skylight panels and did not erect physical barriers around or on top of the skylight panels. It was noted no roof boards, walkways or other items of plant were provided upon the roof. A Prohibition Notice was issued after the incident and the corporation subsequently purchased portable static lines which were now utilised where possible.

Neither the company or Ivanovski had any prior convictions.

The Court was presented with evidence that the Company was in a difficult financial situation with liabilities exceeding assets and Ivanovski's expenditure exceeded his income. The Court noted in reality the Company will be unable to pay any fine no matter how little the amount. Further any cost order would exacerbate that situation. Ultimately the Court imposed a fine of $75,000.00 on the Company. However, the Court noted that as Ivanovski was the sole shareholder of the Company the ultimate burden of the financial penalty would fall on Ivanovski only. Therefore Ivanovski should be treated leniently in the penalty he received and he was fined a modest sum of $1,000.00. The Court noted that if it intended to impose a substantial penalty on the Corporate Defendant it was appropriate to reduce Ivanovski's penalty. The Court noted that this approach was available when both the Company and the director were sued at the same time and sole shareholder and the director was the sole shareholder.

Ultimately that may mean that the Company proceeds to be liquidated however Ivanovski will not have a substantial fine.

As can be seen there is hope for directors of companies who are sole shareholders or principal shareholders of the company

as those directors may not continue to receive significant fines for breaches of the Occupational Health & Safety Act where the company is prosecuted at the same time as the director.

Bankrupts Still Have To Pay OH&S Fines

In a recent decision of the Industrial Commission Justice Haylen in *Inspector Batty - v - Brian John Goldsmith* has confirmed that a fine imposed by the Industrial Relations Commission for a breach of the Occupational Health & Safety Act was not provable in bankruptcy and therefore would not deprive the bankrupt's creditors to access to any available funds. Effectively the Court will impose a penalty on the individual and suspend the operation of the fine and the amount payable until after the bankruptcy period.

In this case Goldsmiths Frames & Trusses Pty Limited had breached the *Occupational Health & Safety Act* when a worker working in the vicinity of a conveyor had his right hand and arm caught in the in-running nip points formed between the conveyer belt and the tail roller of the conveyor. Following an investigation of the accident by WorkCover Inspector Batty prosecuted Mr Goldsmith as the director of the company alleging a breach of Section 8 of the Occupational Health & Safety Act by operation of the deeming provisions in the Act. The company was placed into administration and subsequently liquidation prior to the commencement of proceedings against the director. In addition, the director entered into bankruptcy prior to sentencing.

The Court, when considering sentencing, noted that it may be appropriate to impose a fine but postpone its operation so that it does not become payable until a bankrupt finds their feet and are able to pay the fine. It was also noted that it may be appropriate to moderate down the fine in circumstances where a defendant is a bankrupt.

Having regard to the nature of the offence and the maximum penalty of $55,000.00, the Court noted that a penalty of $9,000.00 to $11,000.00 would be appropriate. However, given the bankrupt status and other mitigating factors, the Court determined that an appropriate penalty was $3,000.00. WorkCover also sought its costs of $22,000.00 but the Court moderated the costs allowance down to $2,000.00. The payment of the penalty and costs was deferred by the Court until the bankruptcy period ended.

So, at the end of the day a bankrupt must still pay fines and costs imposed for breaches of the OH&S Act after his bankruptcy period and cannot avoid these fines as part of the bankruptcy. However there will may some where the Court will find the offence proven but refrain from imposing a fine.

Suspension Of Weekly Benefits for Failure to Co-operate at a Medical - Is Turning Up At a Medical Enough?

Section 119 of the Workplace Injury Management and Workers Compensation Act, 1998 (the "1998 Act"), provides an insurer an opportunity to suspend benefits of compensation payable to an injured worker if the worker refuses to submit him or herself for an examination arranged at the direction of the employer. Section 119(3) provides benefits can be suspended if the injured worker in any way obstructs the examination and benefits are suspended until the examination has taken place. But what happens if the injured worker attends but does not co-operate? Is turning up enough?

This issue was recently determined in the appeal decision of The Ironbark Café & Restaurant - v - Galiatsatos in the Workers Compensation Commission.

Galiatsatos sustained an injury on 11 July 2007. Her treating orthopaedic surgeon wrote to the insurer on 5 November 2007 recommending, in effect, she undergo psychological assessment. Her general practitioner had certified in medical certificates she had an adjustment disorder. These certificates were relied upon by the insurer when making payments of compensation.

The insurer arranged an examination with a psychiatrist on 29 January 2008. She attended the examination although the psychiatrist noted she was highly un-cooperative and refused to answer any questions he had asked.

The Scheme Agent contended her conduct at the appointment constituted a refusal to submit herself under the terms of Section 119(3) of the 1998 Act. Benefits were subsequently suspended from 4 April 2008 after she failed to attend a second examination arranged with the psychiatrist.

An arbitrator in the Commission found Galiatsatos had in fact submitted herself to the examination on 29 January 2008. Furthermore, the arbitrator found the WorkCover Guidelines prohibited the examination in the first instance because there was

no evidence her treating medical practitioners were requested to provide a report concerning the alleged psychological injury. The arbitrator found:

> *"In my view, unless and until the insurer had sought clarification from the treating general practitioner it was not entitled to arrange an independent medical examination by a psychiatrist."*

He further found that:

> *"In the absence of treatment from a psychiatrist, the respondent/insurer was not entitled to an independent medical examination by a psychiatrist."*

The arbitrator proceeded to find Galiatsatos totally incapacitated and awarded benefits pursuant to Section 40 at the maximum statutory rate.

The employer appealed. The employer argued that the worker must submit to an examination and fully comply with the doctor's requests. It was submitted Galiatsatos had not done this. It was further submitted, given the examination was with a psychiatrist, her refusal to answer any questions the doctor asked can only sensibly be regarded as refusal to submit as required by Section 119. A psychiatrist is dependent upon analysing answers to questions when conducting an examination.

The Deputy President did not agree. The Deputy President concluded:

> *"It seems to me that submitting involves a process of surrendering in the sense of ceasing to resist. By submitting to a medical examination a worker is obliged not to resist the examination. The worker is not, however, required to assist in the examination or take active steps to make the examination easier for the examiner. In this case the applicant would not provide a detailed history because it had already been provided in documents that were available to Dr Lee. Whilst Dr Lee would have preferred more information he nonetheless proceeded to make a diagnosis and express an opinion concerning the causes of that diagnosis or whether or not the applicant was fit for her pre-injury duties. In my view the applicant had submitted to the examination."*

As can be seen, if an injured worker attends an examination, and does not cooperate, they may well have submitted to the examination in the terms of Section 119 and any attempt to suspend benefits will be problematic.

Proving Noisy Employment

The NSW Workers Compensation Commission recently re-examined the use of noise studies in industrial deafness claims. Following on from the previously contentious Riskaloski decision, Acting Deputy President, Deborah Moore, re-examined the key elements of an industrial deafness claim in *Despotoski v Qantas Airways Ltd [2009] NSWWCCPD 42.*

The worker was a 60 year old employee of Qantas and claimed to have been exposed to significant noise from aircraft engines whilst loading and unloading catering trucks in the dock area up until 1998. Whilst there was no dispute between the parties that the worker suffered from industrial deafness, the question remained whether Qantas was responsible for that loss.

Qantas relied upon a workplace noise survey carried out in June 2008. Noise testing was carried out at the food preparation facility and the aim of the survey was to obtain typical ambient noise profiles in defined zones of the facility. The highest noise exposure was for an operator involved in taking food to an aircraft where the measured noise dose of 82 dBA was within the maximum 85 dBA noise exposure criterion. Employees would also experience a peak noise of 127 dBA for one second during the eight hour shift. This was under the peak noise allowance of one second at 140 dBA.

The worker claimed that a noise survey taken in June 2008 was not relevant to the work performed in the area he claimed to have suffered his industrial deafness in 1998. Nevertheless the worker failed to adduce any evidence to show the conditions tested were any different from those he experienced during his employment and there was no evidence from the worker as to the noise levels he claimed he was exposed to. He simply made a broad criticism that his duties somehow differed from those carried out by the test operator.

Deputy President Moore took the view that once a noise survey was in evidence, the onus then rested on the worker to respond with appropriate expert evidence. Simple medical evidence prepared by an ear, nose and throat (ENT) specialist would not meet that requirement. In this matter the worker was unsuccessful, not because he failed to establish that he suffered from industrial deafness, but he failed to establish on the balance of probabilities noisy employment.

The decision highlights the efforts by employers in recent years to defeat the growing trend of industrial deafness matters. Employers, rather than Scheme Agents acting for WorkCover, are carrying out their own noise studies when hearing loss claims are lodged. Despite the ever present difficulties in mimicking the exact circumstances of the noise exposure at the time of the study as compared to the time of injury, the Commission is prepared to accept favourable noise studies, in the absence of contrary expert evidence, that employment was not noisy.

The legal position in demonstrating noisy employment is somewhat at odds with the WorkCover guidelines furnished to the Scheme Agents following the original Riskaloski decision. The guideline given to the Scheme Agents was not to insist upon the worker providing a noise or acoustic survey and rely upon simple medical evidence of an ENT and a statement of the worker setting out the purported noise exposure. One wonders if there may be some amendments in any forthcoming legislative to formally shift the onus to the employer to rebut the assertion of noisy employment. In the meantime, employers who are often subject to hearing loss claims, will view a general noise study as a cost effective way to manage the premium impact caused by the cost of industrial deafness claims brought against them.

Contractor Found To Be An Employee Despite Working For Others

In the matter of Freestone - v - Morris & Partners Pty Limited, the Australian Industrial Relations Commission (the "Commission") has found the relationship between a business and its contractor was in fact one of employer and employee.

Freestone provided bookkeeping work for Morris & Partners Pty Limited ("Morris and Partners"), a company owned by Freestone's sister and brother in law. Freestone had performed the bookkeeping work for over 10 years. Freestone invoiced Morris & Partners on an hourly rate each month. The invoices were on a letterhead of a business name owned by Freestone called Select. Select was a film library business Freestone was running from her home.

Freestone operated other businesses during her 10 year engagement with Morris & Partners, including a fruit juice franchise, a reflexology clinic, a water purification franchise, a jewellery business and a business that sold magnetised goods.

Freestone alleges her services were terminated because she asked about superannuation contributions for the work she was doing for Morris & Partners. Freestone brought a claim for unfair dismissal pursuant to Section 643 of the Workplace Relations Act, 1996. Morris & Partners brought motion claiming the Commission did not have jurisdiction to determine the claim for unfair dismissal as Freestone was not an employee.

The Commission determined Freestone had been engaged as a part-time employee. Whilst Morris & Partners did not receive the exclusive services of Freestone as a bookkeeper, she was found to be a part-time employee. It was noted she was under the exclusive control of the employer when she performed her work for Morris & Partners and could not sub-contract the work to any other person. All of her equipment and supplies for performing her work were provided by Morris & Partners.

The Commission determined Freestone's claim for unfair dismissal could continue.

The determination that Freestone was an employee rather than a contractor no doubt will not assist family relations if she brings, as she will be entitled to, a claim for annual leave, long service leave and possibly for the sick leave for her sick days during her 10 year tenure with Morris & Partners. Further, if she has suffered an injury within the meaning of the Workers Compensation Act, 1987 (as amended), she could access the benefits of Morris & Partners' workers compensation policy.

The Courts have previously determined that simply calling a person a contractor is not the sole test as to whether or not the person was in fact a contractor or an employee. The Commission in Freestone focused on a number of factors which indicated Freestone was an employee rather than a contractor. The fact the arrangement between Freestone and Morris & Partners required Freestone to provide her services exclusively and under the direct control of Morris & Partners when she worked there was sufficient to sway the Commission to determine she was a part-time employee. The billing arrangements and description by Morris & Partners of Freestone as a contractor did not divert the Commission from finding that the real situation was one of an employer and employee.

Swearing At Manager Valid Reason For Termination

Leadbetter filed an application in the Australian Industrial Relations Commission against his employer Qantas Airways Limited ("Qantas") claiming his termination was:

- unlawful on the grounds he was a member of a union; and
- harsh, unjust or unreasonable.

Leadbetter's employment was terminated following various incidents during the period 8 December 2006 and 6 April 2008. The pivotal incident which caused Qantas to terminate Leadbetter's employment was an allegation Leadbetter had engaged in personal abuse to one of his managers.

Leadbetter was employed to work on the tarmac at Brisbane Airport. He was filling out a Safety or Near Miss Notice with a Compliance Officer who had trouble answering one of the questions. A manager was contacted by telephone. The manager asked whether Leadbetter had injured himself. The Compliance Officer put down the telephone and made the enquiry of Leadbetter. Leadbetter swore at the manager and called him a derogatory name. Qantas investigated the incident. Qantas considered the worker's actions serious misconduct and terminated his employment.

Leadbetter brought a claim pursuant to Section 643 of the Workplace Relations Act, 1996 denying he had abused the manager and claiming there was a culture of strong language in the workplace and as such the words he allegedly used were not out of the ordinary.

Evidence was brought before the Commission that Leadbetter had been counselled on previous occasions in relation to swearing. Leadbetter denied he had sworn at the manager and referred to a derogatory name because of his nationality. The Commission found Leadbetter's evidence lacked credibility and it preferred the evidence of the events from the Compliance Officer and the manager as to what Leadbetter actually said.

The Commission found the language used was directed personally to an individual and was demonstrably abusive. The language was designed to denigrate the manager in a particularly aggressive and demeaning manner. It was also found that language was structured so as to convey a threat.

The language was in direct violation of the Qantas Standards of Conduct. The Standards of Conduct included that all employees must be aware of the Standards and the conduct required of them as individuals and members of a work team. Qantas was committed to providing a work place free from discrimination, harassment, threats, intimidation and humiliation. All employees were expected to be aware of and comply with the standards and where breaches did occur, disciplinary action could be taken. Where serious cases of breach occurred, action may also include termination of employment.

The Commission noted:

- there was a valid reason for the termination related to the employee's or conduct;
- the employee was notified of the reasons of termination. Leadbetter received a letter detailing the allegations;
- the employee was given an opportunity to respond to any reason for his termination. After receiving the letter outlining the details of the allegations from Qantas, Leadbetter responded in a letter prepared by a representative of the Transport Workers Union.
- The only other matter the Commission considered relevant was the allegation there was a culture of bad language within the work place. The Commission heard evidence that Leadbetter had been issued a warning in January 2008 in relation to the use of bad language. It accepted he was aware of the Standards of Conduct Policy.
- It was satisfied Leadbetter was aware of the ramifications of inappropriate and abusive language at the work place and that ignorance of the existence of any such ramifications did not have any role to serve in a mitigating circumstance.
- Whilst there had been acrimony between Leadbetter and managers of Qantas in the past the Commission was satisfied there was no relation between the termination of Leadbetter and his union membership.

Consequently the Commission was satisfied the termination was neither unlawful, harsh or unjust.

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