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Are the Terms in Place – Indemnities and Uncertainties

In Australia, the provision of temporary workers to host employers is not uncommon. There are a number of benefits to using labour hire employees, such as reduced costs and downtime, a specialised recruitment process, large skill pools and flexibility. Ordinarily, the terms and conditions by which labour hire employees are supplied will be covered by a written agreement. Often those agreements will contain clauses that impose an obligation that one party indemnify the other in relation to a claim, or a requirement that a party takes out insurance for the benefit of both.

The NSW Court of Appeal has recently considered the scenario where there was a dispute between the host and labour hire employer as to whether or not the terms of an agreement were still in place after the term of the agreement had expired in circumstances where there labour continued to be supplied and a labour hire employee was injured, and if so, how the indemnity provision in that agreement should be interpreted (*CSR Limited v Adecco (Australia) Pty Ltd).*

Mr F was a truck driver employed by Adecco Industrial. Mr F sustained personal injury when he was driving a defective truck at a CSR concrete plant in Batemans Bay from around September 2002 until March 2003. He continued to work at the plant at Batemans Bay until he was dismissed from employment in December 2004. Mr F ultimately required back surgery for the injuries that he had sustained whilst driving the truck.

It was contended by CSR that Mr F's services were supplied by Adecco Australia, a related entity, pursuant to a "Supply Agreement for Labour Hire Services" that had been entered into for a two year term on 1 April 2000.

That agreement contained an indemnity clause which provided in part:

> "*23.2 Any loss or damage to property of CSR, real or personal caused or contributed to by the Supplier or its employees, agents, sub-contractors or Temporary Staff.*

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Notwithstanding any other provision of this Agreement, the Supplier indemnifies CSR against:

23.2.1 any claim by Temporary Staff for personal injury and/or property damage arising out of or in connection with the performance of Assignment duties where; and

23.2.2 any liability to any person (including the Supplier and any workers compensation insurer claiming in the name of the Supplier) in respect of or in connection with such personal injury and/or property damage."

"Temporary Staff" was defined as "*an individual employed by [Adecco Australia] to work in an Assignment for CSR*."

"Assignment" was defined as "*the task(s) to be undertaken… by Temporary Staff.. as specified in the Order*."

The agreement expired on 31 March 2002 at which time it was extended by agreement until 30 June 2002 and subsequently 31 July 2002. Between 31 July 2002 until around May 2004 Adecco Australia and CSR were attempting to negotiate a new agreement. Negotiations ultimately broke down. Whilst the agreement was negotiated, Adecco Australia continued to supply labour to CSR and payment was made for that labour.

Mr F commenced proceedings against his employer, Adecco Industrial, making a claim for damages as a consequence of the back injury he sustained due to driving the truck. Holcim and CSR were ultimately joined to those proceedings as defendants. Holcim and CSR subsequently cross claimed against Adecco Australia claiming, amongst other things, indemnity pursuant to the labour hire agreement.

Mr F's claim for damages against Adecco Industrial, CSR and Holcim ultimately resolved. The outstanding issue as to whether or not CSR was entitled to be indemnified by Adecco Australia was left to be determined by the Court.

CSR's argument was that although the Agreement had formally expired, the relationship between CSR and Adecco Australia continued on the basis of an implied contract that contained the same terms and conditions as the Agreement that had formally expired, at least until the end of March 2003 which was when Mr F ceased driving the relevant truck.

At trial, Justice Adamson in the Supreme Court found in favour of Adecco Australia and found that CSR had failed to establish that Clause 23.2, the indemnity clause, formed part of any agreement with Adecco Australia during the period in which Mr F's cause of action arose. Further, her Honour found that in any event Mr F was not "Temporary Staff" as he was not "employed by" Adecco Australia "in an assignment for CSR".

Adecco Australia argued that Clause 23.2 did not extend to claims that were contributed to or caused by CSR's fault, however her Honour Justice Adamson rejected that submission. This had no practical effect given her Honour's finding that the indemnity clause did not apply.

CSR appealed.

The Court of Appeal came to a different view and allowed the appeal and ordered that Adecco Australia indemnify CSR pursuant to the indemnity clause in the Agreement.

Justice McColl, who delivered the leading judgment, noted the question as to whether an implied contract following on the expiry of an express fixed term contract may be inferred, turns on an objective enquiry.

Her Honour Justice McColl stated:

"*The Primary Judge, with respect, failed to apply the objective, a reasonable bystander, test. Rather, it is apparent that her Honour was of the view that, in order to infer there was an implied contract under which the Agreement was extended, it was necessary to identify communications between the parties 'confirm [ing] the terms of their continuing relationship pending further agreement'*.

To the extent this statement implies the parties had to refer expressly to the contract continuing, it flies in the face, with respect, of the notion of an implied contract.

What CSR had to establish was that the parties continued to act as though the Agreement still bound them after the term expired. In such a case, the Court may infer that the parties have agreed to renew the express contract for another term or the Court may infer an implied contract drawing on some of the terms of the earlier contract, but omitting others".

It was noted that CSR continued to place orders with Adecco Australia after 31 July 2002 continuing beyond March 2003. CSR also continued to pay Adecco Australia pursuant to the same terms and conditions. Justice McColl was of the view that the conduct of the parties was consistent with acting as though they were still bound by the Agreement. Justice McColl was of the opinion that it would be inconsistent with the size of the companies and also with the Agreement under which they had previously operated that it continued on a quantum meruit basis or on terms that did not include indemnities.

Justice McColl noted that neither the Trial Judge nor Adecco Australia had identified any conduct which would support a departure from the terms of the Agreement.

Her Honour Justice McColl stated:

"CSR submitted, it must objectively be doubted 'whether it would ever have occurred to the parties that their 'ongoing' arrangement were governed other

than by the terms of the 'original' written contract 'save as to terms'.'

Accepting that the correct test is not the parties' objective assessment of their relationship, but, rather, that of a reasonable bystander, in my view, the latter person would be of the same view … Nothing in the negotiations, in my view, indicated that, pending any new agreement, the parties did not consider that they were not bound by the expired Agreement. Rather, it can be inferred from their silence and their continued course of dealings that they were conducting their relationship in accordance with its terms".

Having accepted that the terms and conditions of the Agreement were still in effect, her Honour Justice McColl went on to consider the construction of the indemnity provision.

The first argument raised by Adecco Australia was that the indemnity did not apply as Mr F was employed by Adecco Industrial. CSR argued that Mr F was a person "used" by Adecco Australia. CSR argued that if the interpretation of the clause by the Trial Judge was maintained, then the indemnity could be circumvented by Adecco Australia simply as a consequence of an administrative arrangement. CSR also argued that if that argument was correct the construction of clause 23.2 in effect allowed retrospective adjustment of the agreement by the internal administrative arrangements within the Adecco Group.

On this issue Justice McColl stated:

"The parties' obligations, as so understood, did not have as their object, the employment relationship between the 'individual' and the Supplier but, rather, that the 'Temporary Staff' be a person Adecco Australia made available to CSR, in the sense of to be used by CSR, to work in an Assignment. As CSR submitted, further support for the broad meaning of the words 'employed by' in the definition of 'Temporary Staff' can be found in clause 22 of the Agreement referring to 'persons employed by [Adecco Australia] under this Agreement …'. This suggests, again, consistently with clause 23.1, the notion of utilisation of the people referred to.

Such an interpretation of the Agreement is, in my view, a businesslike one. A reasonable person, in my view, would have understood the words 'Temporary Staff' where they appear in those provisions dealing with the procurement of labour under the Agreement for the express purposes of working on Assignments for CSR, to refer to those persons Adecco Australia provided for that purpose.

Similarly, when one comes to the indemnity provision, one would understand the term 'Temporary Staff' to refer to those persons Adecco Australia had supplied to undertake that work for CSR. It would not, in my view, be a sensible commercial, or consistent, construction of the Agreement to read those provisions, as Adecco Australia submits, as referring to the employment relationship.

To so interpret 'Temporary Staff' in clause 23.2 would make commercial nonsense of the indemnity provision which was clearly intended to oblige Adecco Australia to make good the loss suffered by CSR in relation to 'any claim … for personal injury … arising out of or in connection with the performance of Assignment duties' made by those individuals Adecco Australia had supplied under the Agreement".

Finally, her Honour Justice McColl considered the ambit of the indemnity provision and whether or not it applied where there was negligence on the part of CSR (which was the case here due to the supply of an unsuitable truck).

Adecco Australia argued at trial, and subsequently on appeal, that clause 23.2 was ambiguous and as such it should be construed strictly against CSR. Adecco Australia also argued that Mr F's claim did not arise out of and was not in connection with his performance of "Assignment" duties.

Her Honour Justice McColl disagreed. Her Honour was of the opinion that having regard to the words in clause 23.2, the fact that Mr F was at the Batemans Bay plant was to carry out an Assignment as referred to in the clause. The phrases 'arising out of' and 'connected with' are broad, and only require a casual or consequential relationship, whereas "caused by" requires a direct relationship. The Court of Appeal determined in this case, clause 23.2 was sufficiently clear to cover all claims, whether or not they were contributed to by CSR's negligence.

CSR's appeal was therefore wholly successful and Adecco Australia was ordered to indemnify CSR in relation to Mr F's claim for damages. One suspects that neither CSR nor Adecco Australia would have envisaged the long and lengthy battle arising from the uncertainty of the Agreement and its terms.

The judgement serves as a reminder that businesses that carry on in relationships after the expiration of a term of an agreement may be bound by those terms if they continue to supply services whilst negotiating new terms. Clear evidence will be required to dissuade a Court that the original terms should not be applied. If a party wishes to supply services after the expiration of an agreement on different terms there must be evidence of an offer to supply services on different terms and acceptance of that offer and discussions about different terms will not be enough to escape the original obligations that were put in place.

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Class Actions and Legal Expense Insurance Times are Changing

In litigation, where a defendant does not expect to be able recover costs from a party who has commenced proceedings if a claim fails, it has the option of pursuing an application for security for costs to obtain an order that plaintiff put up money to cover the likely costs payable to the defendant where a claim fails. The security can be in the form of a bank guarantee or payment into court or some other security acceptable to a defendant.

Orders for security for costs are particularly relevant in class action proceedings.

To date it has been common for after the event insurance which covers a plaintiff for adverse cost orders to be offered as the security for costs in class actions however that offer is not always accepted by a defendant and when a defendant does not accept that offer the Court will be called on to determine whether the security is adequate.

In a recent decision of *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited [2017] FCA 699* Justice Yates was called on to examine the adequacy of the terms of an after the event insurance policy as security and ultimately rejected the insurance as adequate security. This judgement will result in insurers and litigation funders returning to the drawing board to look at the drafting of legal expense insurance policies that provide cover for adverse cost orders and the potential naming of defendants as third party beneficiaries in a policy to address the deficiencies identified by Yates J that resulted in the finding the insurance was not adequate security.

BOQ is an Australian retail bank with its headquarters in Brisbane, Queensland. DDH is a public company and operates and administers a financial product known as a Money Market Deposit Account (MMDA) as agent for BOQ.

Petersen alleges that DDH and BOQ are responsible for losses caused to it and the Group Members of a representative proceeding commenced in the Federal Court arising from certain alleged failures in the operation of the MMDAs held by Sherwin Financial Planners' clients including Petersen. The alleged failures relate to transactions said to have been carried out fraudulently on the MMDAs by SFP over a period of approximately 9 years from 10 March 2004 to 24 January 2013.

Petersen entered into a litigation funding agreement with Vannin Capital Operations to fund representative proceedings against BOQ and DDH.

BOQ and DDH sought an order for security for costs and Petersen conceded an order for security was appropriate and offered commercial litigation insurance (also known as "adverse costs" or "after the event" insurance (ATE insurance) underwritten by AmTrust Europe as security. The AmTrust policy indemnifies Petersen for defence costs up to $5.5 million. The insurance was arranged by the litigation funder Vannin Capital Operations and the insured was Petersen. The litigation funding agreement required Vannin to provide Petersen with Security for Costs (as defined in the Funding Agreement), when required, by means which include an ATE policy.

The AmTrust policy was offered as security to BOQ and DDH. BOQ and DDH contended that the AmTrust policy did not provide sufficient or adequate security for their costs and rejected the offer. They submitted that the appropriate form of security was payment into court or the provision of a bank guarantee. DDH indicated that an appropriately worded unconditional indemnity in its favour from AmTrust Europe might provide sufficient security. BOQ reserved its position in that regard. No unconditional indemnity has been offered as security for BOQ and DDH's costs. Only the AmTrust policy was offered.

The Federal Court has power to order a party in proceedings to provide security in such amount, and given at such time and in such manner and form, as the Court determines is appropriate. The Court has the power to determine the manner in which security is provided and can consider the adequacy of any security offered. As appropriate security could not be agreed the Federal Court was called on to make a determination on the security that should be provided and whether the AmTrust ATE policy was adequate security. Ultimately Justice Yates determined the insurance was not adequate after examining the policy terms and the beneficiaries to the policies and the steps that would need be undertaken by BOQ and DDH to secure monies from the insurer if Petersen did not seek to enforce its rights under the policy or AmTrust did not comply with its obligations under the policy.

There was no evidence that Petersen could satisfy an adverse cost order and Petersen relied on the ATE insurance to be able to do so. However ATE Insurance can be enough as Justice Yates noted:

"I am persuaded that, depending on the circumstances of the given case, an appropriately worded ATE policy might be capable of providing sufficient security for an opponent's costs. In coming to this conclusion, I bear in mind that, although courts are accustomed to ordering security in the form of payment into court or by provision of a bank guarantee, on present authority it would be wrong to see those forms as the only ones that could satisfy the requirement for sufficient security. Whether, of course, the AmTrust policy provides sufficient security for BOQ's and DDH's costs is a separate matter"

Justice Yates noted when looking at the sufficiency of an ATE policy the Court must undertake a form of risk assessment in order to determine whether an ATE policy will stand as sufficient security in the circumstances of a given case.

The Court noted this requires more than a consideration of the policy terms and conditions, their contractual effect and how readily they might be or are likely to be legitimately avoided.

Justice Yates noted:

- *"The consideration of "sufficiency" must go further and extend to a practical assessment of the risks involved in having the benefits of the insurance, when called upon, turned to the account of those for whom security is to be provided."*

The ATE policy was rejected by Justice Yates as adequate security for the following reasons noted in the judgement:

- *"the insured is the party against whom a final costs order might be made (Petersen), not the parties who have the benefit of that costs order and who are seeking the benefit of the security (BOQ and DDH). Petersen and Mr and Mrs Petersen have given undertakings to the Court, which include undertakings to the effect that Petersen will make claims on the AmTrust policy to meet any adverse costs order; that the claims will be progressed by Petersen expeditiously; and that Petersen will pay to BOQ and DDH such amounts as are paid to it by AmTrust Europe in respect of Petersen's liability to BOQ and DDH. However, the undertakings do not include an undertaking to sue AmTrust Europe on the AmTrust policy to enforce any legitimate claim that AmTrust Europe is not prepared to meet. There is no mechanism by which the respondents(BOQ or DDH) can compel Petersen to sue on the policy. Further, Petersen's present impecuniosity shows that it is unlikely to have the financial wherewithal to do so.*

- *"the undertakings that Petersen and Mr and Mrs Petersen have given are undertakings given to the Court. They are not undertakings given to BOQ or DDH. BOQ and DDH have no contractual rights against Petersen or Mr and Mrs Petersen in that regard. Even if Petersen and Mr and Mrs Petersen were to give undertakings to BOQ and DDH .. there is no evidence to suggest that those undertakings, of themselves, would provide BOQ and DDH with sufficient security. Petersen is known to be impecunious. Mr and Mrs Petersen's financial position is not known. And Vannin is not itself prepared to come forward and provide security (other than by payment of the premium for the AmTrust policy), even though it has an obvious commercial interest in the outcome of the litigation."*

- *"although the position faced by BOQ and DDH by reason of the first two matters is ameliorated to some extent by the possibility of proceedings under s 4 of the Civil Liability Third Party Claims Against Insurers) Act 2017(the Act commenced in June 2017 and permits direct actions against insurers by persons entitled to compensation from an insured), there remain a number of difficulties and potential obstacles to BOQ and DDH effectively or conveniently deploying that provision…Section 4 of the CL(TPCAI) Act confers a local statutory right. An effective exercise of that right requires the presence of the insurer within the jurisdiction. AmTrust Europe is not present in Australia, let alone New South Wales. Moreover, as the CL(TPCAI) does not create surrogate contractual rights in favour of the third party against the insurer, BOQ and DDH, unlike Petersen, do not have the benefit of AmTrust Europe's agreement under clause 15.1 of the AmTrust policy to submit to the jurisdiction of courts in New South Wales. Thus, BOQ and DDH would be left to find some available and proper basis on which they could seek leave to serve AmTrust Europe outside Australia. To add to this complication, s 5 of the CL(TPCAI) Act would impose on BOQ and DDH the need to obtain leave to bring or continue the proceeding against AmTrust Europe in any event. Section 5(4) of the CL(TPCAI) Act shows that the insurer has an interest and right to be heard on that question. Thus, even at the point of seeking leave to proceed under s 4, BOQ and DDH would be faced with the task of suing a foreign defendant with no presence in Australia, with the attendant cost, expense and uncertainty that such a course would entail….In short, in proceedings based on s 4 of the CL(TPCAI) Act, BOQ and DDH would be in no better position, and in certain respects could well be in a materially worse position, than Petersen would be in if Petersen were to sue AmTrust Europe on the AmTrust policy.*

- *"clause 3.2 of the AmTrust policy provides for the consequences on non-disclosure, including in clause 3.2.1 AmTrust Europe's entitlement to reduce its liability under the AmTrust policy, or even cancel the policy, on the basis of non-fraudulent disclosure. BOQ and DDH do not know what information has or has not been provided to AmTrust Europe in relation to the proposal put forward to it. I have already referred to the paucity of the evidence concerning the circumstances in which the AmTrust policy was obtained for Petersen.*

- *"the AmTrust policy does contain a significant number of exclusions from liability and other conditions affecting Petersen's legal entitlements under the contract of insurance. Whilst Petersen argues, in line with the United Kingdom cases,*

that the likelihood of these exclusions and other conditions becoming operative is "theoretical", I think that caution should be exercised in using that expression. In the present context, the expression "theoretical" reflects a value judgment that depends on whose risk is being assessed….The AmTrust policy contains a number of provisions .., including provisions that require Petersen to consult with and obtain the Case Manager's approval before taking certain steps. Further, under clause 2.1.12 of the AmTrust policy, AmTrust Europe will not pay any claim caused by or attributable to Petersen continuing in the litigation where the Case Manager has formed the view that it is more likely than not that Petersen will lose the litigation. The provision is subject to the Case Manager giving approval to Petersen to continue with the litigation, but it is difficult to see why, in those circumstances, the Case Manager, acting in AmTrust Europe's interests, would give such approval. Moreover, when AmTrust Europe determines that there has been a breach of the AmTrust policy, it has a right of cancellation. If AmTrust Europe cancels the policy then, under clause 6.3, it will not be liable to pay the insured liability incurred after the date of cancellation. … I accept that, in relation to Petersen's potential liability for costs, AmTrust Europe is likely to be subject to greater risk under an unconditional indemnity in favour of BOQ and DDH than it is under the AmTrust policy in favour of Petersen. Correspondingly, I would accept that security in relation to Petersen's potential liability for BOQ's and DDH's costs, in the form of Petersen's contractual entitlements under the AmTrust policy, presents greater risk for BOQ and DDH than would an unconditional indemnity from AmTrust Europe which is irrevocable and which BOQ and DDH could enforce in their own right.

- *"it is possible that the AmTrust policy could be cancelled before a costs order is made against Petersen and, hence, before a legal liability arises to which the AmTrust policy can respond. Petersen argued that the only consequence would be that, because of a change in circumstances, the respondents could approach the Court to ask that the proceeding be stayed until replacement security is provided. This, however, would be of little comfort to the respondents. Upon cancellation – an event over which the respondents have no control – the security they had would have evaporated, with no guarantee that replacement security could be, or would be, provided in relation to costs they had already incurred."*
- *"I raised the question of what would happen to the proceeds of payment under the AmTrust policy if Petersen were to be placed in liquidation. I do not think that that possibility can be brushed to one side. ..It is enough for me to form the view, as I do, that there is a real question as to whether the insurance proceeds would be made available to BOQ and DDH in the event that Petersen were to be placed in external administration because of insolvency. It is quite possible that those proceeds would simply form part of the corpus of assets available to creditors generally.*
- *"clause 4.8.1 of the AmTrust policy provides that Petersen will instruct its solicitor to resist any application for the summary assessment of the respondents' costs. Clause 4.8.2 provides that Petersen will instruct its solicitor to resist any application by the respondents for their costs unless Petersen has the Case Manager's approval not to do so. These clauses refer to costs at any stage of the proceeding. They have the real, not merely "theoretical", potential to interfere with the obligation imposed on parties and their lawyers by s 37N of the Federal Court Act to conduct the proceeding in a way that is consistent with the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. "*

As can be seen the Court was concerned over a large number of issues but most predominantly whether the proceeds of the insurance are easily available to persons who are not beneficiaries and whether the policy can be cancelled.

The ATE policy in this case was not adequate. That is not to say that an appropriate policy will not be adequate.

The concerns expressed by Yates J need to be addressed by ATE insurers if ATE insurance in Australia is to play an ongoing role in the provision of adequate security in Australian class actions. Strategies to address those concerns are likely to include:

- inclusion of defendants as third party beneficiaries under an ATE policy taken out by a plaintiff;
- restricting rights of cancellation for non-disclosure;
- inclusion of jurisdiction clauses where insurers agree to be bound by Australian law and the judgments of Australian Courts;
- rescoping the control that an insurer will have over the conduct of the litigation.

The adequacy of ATE insurance offered as security in class actions throughout Australia is likely to be a real issue in every situation where ATE insurance is offered as security or where additional security is required as proceedings progress. Representatives in Class Actions may be confronted with challenges to the adequacy of ATE insurance for any top up of security already in place.

One thing is certain, litigation funders, legal expense insurers and those who have or are considering ATE insurance to provide security for costs against adverse cost orders now need to look very closely at the terms of the insurance provided and the beneficiaries under the policy. If an ATE policy is not adequate security for an adverse cost order it has no immediate value to the litigation funder who will need to put adequate security for costs in place.

Perhaps we will see a change in strategy from litigation funders with ATE insurance being put in place for the true benefit of the funder. . This strategy will see litigation funders named as interested parties in the ATE insurance they arrange for a Representative in the class action. The risk of non payment by the insurer will be the litigation funder's risk. The necessary security for the proceedings could be provided by the litigation funder with the funder bearing the cost of providing the security until it is released when the proceedings are successful or the insurance proceeds are utilised to satisfy any adverse cost order or the security is called on to satisfy the adverse cost order. In this strategy it is the funder that will need to drive the collection of the insurance proceeds for its benefit.

Legal expense insurance will remain a feature in the provision of security for class actions however the game has become a little more complex in light of *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited .*

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Insurance Policy covers omissions as well as negligent acts

The NSW Court of Appeal recently considered an appeal by an insurer who argued it had no liability to indemnify its insured by reason of the insured's negligent failure to provide health services.

In *AAI Limited t/as Vero Insurance v GEO Group Australia Pty Limited*, GEO was the operator of the Parklea Correctional Centre. A prisoner brought a claim in negligence for personal injuries he sustained as an inmate at Parklea against GEO and other parties.

The inmate's claim for damages was settled by GEO and those other parties. GEO cross claimed against its insurer, Vero, seeking indemnity pursuant to a "medical malpractice civil liability insurance policy" which GEO held at the relevant time.

GEO was contractually obliged to the State of NSW to provide psychological and counselling services to inmates at Parklea. A variety of other medical services were agreed between GEO and the State to be provided to inmates by Justice Health, a NSW Government health services provider.

The evidence was that upon his arrival at Parklea, the inmate was assessed by employees of Justice Health in the prison reception area. He advised them he was taking medication for schizophrenia and depression but he was never provided with any medication to address those conditions nor was he seen by any psychologist or counsellor in the following three days.

The inmate then jumped off an upper level landing at Parklea and suffered serious injuries.

For the purpose of the cross claim by GEO against Vero, GEO repeated the allegations of negligence made by the inmate against GEO.

GEO contended that Vero was liable to indemnify it under the Vero policy.

The insuring clause of the Vero policy was in the following terms:

> "*The Insurer will indemnify the Insured against civil liability for compensation and claimant's costs and expenses in respect of any Claim or Claims first made against the Insured and notified to the Insurer during the Period of Insurance resulting from the conduct of the Healthcare Services*".

The relevant issue before the Primary Judge, Justice Schmidt, was whether this was a claim resulting from GEO's conduct of the healthcare services.

"Healthcare services" was defined in the Vero policy to be:

> "*… the healthcare services described in the Schedule, and no other, of the Policyholder*".

In the policy schedule, the description of healthcare services was:

> "*… the provision of medical services and treatment including services and treatment provided by psychologists and counsellors*".

There was no issue that GEO owed a duty of care to the inmate to ensure the psychologists and counsellors it employed at Parklea assessed him at the time of his admission.

It was also not in dispute that the settlement was reasonable.

At first instance, Justice Schmidt held that the inmate's complaint about GEO's management of the operation of the Centre was not confined to the provision of custodial services but extended to include the contractual obligations to provide health services and its failure to do so in this case.

The Primary Judge found in favour of GEO and ordered Vero to indemnify GEO for the full amount of the settlement.

Vero appealed. The Court of Appeal unanimously dismissed Vero's appeal.

Justice Payne wrote the leading judgment (with whom Macfarlane and Simpson JJA agreed).

Vero submitted the proper characterisation of the inmate's claim against GEO was that GEO failed to provide him with medical services or treatment. Specifically the inmate's claim arose because GEO did not provide the inmate with any services or treatment by the psychologists or counsellors of GEO.

So characterised, Vero submitted the claim was not within the scope of the insuring clause.

GEO submitted the "conduct" by GEO of healthcare services included the omission to provide such services in accordance with the system for the provision of healthcare services which GEO had established.

Payne JA agreed with GEO. His Honour held:

> "*An objective observer would conclude that the parties intended that the conduct of the healthcare services included an omission by GEO to provide those healthcare services*".

Further, his Honour stated:

> *"… GEO's claim was a result of the conduct of the healthcare services; it arose directly from the faulty operation of the system GEO had devised and implemented to address the risks to the mental health of inmates …".*

Justice Payne went on to say:

> *"Properly construed, the conduct of healthcare services by GEO involved more than acts and omissions of a particular counsellor or psychologist in the course of a consultation with a particular inmate. The conduct of healthcare services extended to acts and omissions in identifying and assessing inmates for the purpose of determining which further health services and treatments were required".*

Accordingly Vero's appeal was dismissed.

The significance of this case is to remind us that the conduct of a particular insured, in the provision of services will always require an assessment of the acts and omissions in the provision of those services.

The Court of Appeal's ruling is consistent with the legal authorities which confirm that a contract of insurance must be interpreted in a manner which is consistent with its commercial purpose, viewed objectively.

Here, the Court of Appeal held that the proposition for which Vero contended would have been inconsistent with the commercial purpose of the insurance contract.

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Customer or employee – it makes all the difference

In New South Wales, whether a person has a claim for damages against their employer or an occupier of premises will have a significant impact on the damages that can be recovered. In a claim against an occupier pursuant to the *Civil Liability Act* 2002, an injured person is entitled to recover damages for non-economic loss, economic loss, out of pocket expenses and domestic assistance. There is no threshold impairment to trigger an entitlement to damages rather there is a threshold for non economic loss which is 15% of the most extreme case. On the other hand, a claim against an employer for work injury damages cannot even be commenced unless the injured person has sustained a 15% permanent impairment (a much higher threshold). Even then, after complying with a number of necessary procedural requirements, damages can only be awarded for economic loss.

Although on most occasions it will be clear as to whether or not a claim arises out of employment, sometimes an issue will arise. This occurred in the recent decision of the NSW Court of Appeal in *Tran v Vo*.

Thi Ngoc Hien Vo was a casual employee at a shop, Thu Phun Desserts, in Cabramatta. The shop was run by Hung Vien Tran and Thuy My Le.

On 13 February 2012 Vo went into the shop at around 5 to 5:30pm to buy a drink. When she arrived at the shop, Ms Hoa, who was also a casual employee at the shop, asked Vo if she would help clean the floor and also help her with cleaning the sugar cane juicing machine. At the time, the tiled area was wet and slippery and Vo slipped. When she slipped, the sugar cane juicing machine was operating and her left hand entered a void in the juicing machine that was used to insert sugar cane and other items for crushing, which caused significant injuries to her left hand.

Initially, Vo made a claim for workers compensation which was accepted. Vo was paid $183,811.36 in workers compensation.

Vo subsequently commenced proceedings against the shop owners in their capacity as occupier.

Tran and Le's public liability insurer argued that Vo was not entitled to commence proceedings as her injury had arisen out of or in the course of her employment. As such, it was necessary for her to comply with the pre-requisites pursuant to the *Workplace Injury Management and Workers Compensation Act* 1998 ("WIM Act"). Vo argued the accident did not arise out of or in the course of her employment as she had not been working at the time.

The matter proceeded to hearing in the Supreme Court before Justice Hall. The Trial Judge determined Vo

was not an employee as she had fixed working days on Wednesday, Thursday and Friday and she was not asked or directed to work on the Monday when she sustained injury. Further, on the day of the accident she did not attend the shop in her capacity as an employee and as such there was no basis for the contention the accident arose out of her employment.

Further, Justice Hall found Tran and Le liable as the risk was readily foreseeable and precautions such as the fitting of interlocking guarding on the machine ought to have been taken. There was also an argument at trial in relation to estoppel given that compensation payments had been made, however that was not pursed on appeal.

It was accepted by Vo at trial that she could not retain both workers compensation payments and common law damages.

At trial, Vo was awarded damages totalling $512,764.94.

Tran and Le appealed.

On appeal, Tran and Le submitted the injuries sustained by Vo met the description of personal injury "arising out of" or "in the course of" her employment and therefore, as she had not met the requisite threshold to bring a claim for work injury damages, such a claim could not be pursued.

Tran and Le submitted on appeal the relevant question to be considered was:

> "*Did Tran and Le either expressly or impliedly induce or encourage Vo to engage in the activity at her employer's premises on 27 March 2012*?"

It was argued that the task Vo was undertaking was one which she would normally perform as part of her employment and which she had been requested to undertake by another employee. Further, the task was undertaken at her employer's premises and was ultimately for their benefit. Further, Tran and Le contended the injury was attributable to a feature of the premises that was related to Vo's employment.

In contrast, Vo contended she was a casual employee who worked rostered days and the accident did not occur on any of those days; she was not required to work on the day of the accident; she went to the premises not to perform work but to buy a drink and the date of the accident was not the only time she had been asked to assist. Vo also contended there was no evidence to suggest that the employer was aware of the voluntary assistance that Vo would provide to her friend and nor was this was endorsed by the employer. Further, no payment was made in relation to the voluntary assistance either on this day or on any occasion.

Justice Payne who delivered the leading judgment commented:

> "*This focus on encouragement and inducement given to an employee to engage in an activity or be at a particular place, outside of the worker's working hours, is at the heart of the present case*".

Justice Payne in his judgment examined the circumstances noting:

> *"In my view, at the time of the accident the respondent was not acting in the course of her employment. The evidence was that when asked to work, the respondent would receive a telephone call from the second appellant, not Ms Hoa, and would be asked 'can you come in and work?'*
>
> *The activity engaged in at the time of injury, assisting her friend with cleaning, was not induced or encouraged by the appellants. When analysed in the injury by reference to a place, the shop premises, the appellants did not induce or encourage the respondent to be there.*
>
> *At the time of the injury the respondent had attended the shop premises to purchase a soft drink. This was not as a result of any encouragement or inducement by the appellants. As earlier noted, the argument advanced by the appellants on the appeal for the first time, that Ms Hoa, as agent, encouraged or induced the respondent to be at the place or engage in the activity leading to her injury, should be rejected".*

Justice Payne concluded that Tran and Le did not know that Vo was present on the day or that they were ever aware she would attend the shop premises on days she was not working.

Justice Payne concluded:

> *"A finding that the injury occurs during the course of employment, requires identification of an inducement or encouragement by the employer of the performance of the activity which led to the injury, or inducement or encouragement by the employer to be at the place where the injury occurred".*

The end result was that Vo was not an employee and so she was entitled to retain her damages that had been awarded pursuant to the *Civil Liability Act* 2002 (less the worker's compensation payments she had to repay). It should be noted that the judgment does not open the gate to employees to sue their employer in their capacity as occupier for negligence arising out of the use of premises; the critical issue was whether when Vo was at the shop she was in the course of her employment.

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Centrelink carer's allowance – is it indicative of earning capacity?

Persons injured may be called on to care for others after an accident and consequently receive a Centrelink Carer Allowance. When a person pursues a personal injury claim there are usually arguments about earning capacity and an issue arises as to whether the receipt of a carer allowance is evidence of a residual earning capacity and should be taken into account in the assessment of damages.

Those issues were examined by the Supreme Court in *Assurance Australia Limited t/as NRMA Insurance v O'Rourke* (2017) NSWSC 494.

The claimant was involved in a motor vehicle accident on 20 March 2011 and at the time was employed as an assistant aged care nurse. Following the accident she ceased work and her parents began to reside with her in 2013. The claimant was granted a carer's allowance by Centrelink to care for her elderly mother.

Liability for the accident was admitted by the insurer and the claim proceeded to assessment at the Claims Assessment & Resolution Service (CARS). In the assessment, the insurer argued the allowance for economic loss should be reduced to reflect a finding the claimant had a residual earning capacity, noting she was in receipt of a carer's allowance of $648.00 per fortnight. The CARS assessor dismissed this argument and preferred the claimant's medical evidence of no residual earning capacity. In particular the CARS assessor noted there was no evidence as to whether the carer's allowance was paid on the basis of physical care or merely supervisory in nature.

The insurer challenged the finding of the CARS assessor in the Supreme Court. Davies J held the claims assessor did not fall into error by making a finding the claimant had no residual earning capacity notwithstanding the receipt of the Centrelink Carer's Allowance. It was highlighted the payment being made pursuant to the *Social Security Act 1991* could either be for providing attention and supervision and not strictly for the provision of physical assistance.

There was no evidence before the claims assessor that the Centrelink payment was for the provision of physical assistance. Davies J noted if this evidence was adduced it then may have been open to the assessor to find the claimant had some residual earning capacity. Without that evidence, the evidence of the payment of an allowance was not enough to ground a finding there was a residual earning capacity.

Although in this case the insurer was unsuccessful in arguing there was residual earning capacity evidenced by the carers allowance, the gate has been left open to an argument that where the carer's allowance is paid for the provision of physical assistance, it is open to CARS or a Court to determine this is evidence of economic capacity. Of course, an argument of this nature will be balanced against the other evidence in the claim and in absence of specific evidence of a carer's allowance being granted for a particular reason, it remains to CARS or the Court to determine that the allowance is simply for support and supervision and should not impact on any assessment of economic loss.

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CONSTRUCTION ROUNDUP

Practical completion not retrospective

After seventeen years of operation of the *Building & Construction Industry Security of Payment Act 1999* (NSW), most people involved in the construction industry are well aware that in order for a person carrying out construction work to be entitled under the Act to make a payment claim, a reference date must first have arisen. Accordingly the parties to construction contracts often go to great lengths to identify in their contracts with specificity the dates on or time periods within which reference dates will arise.

In the recent Supreme Court and NSW Court of Appeal proceedings of *Abergeldie Contractors Pty Limited v. Fairfield City Council* [2017] NSWCA 113, a very specific provision of a contract required the courts to examine the exact date upon which practical completion had occurred in order to be able to identify the date upon which a reference date had arisen.

In this case Fairfield City Council had sought to undertake major road works involving an upgrade of sections of Wetherill Street, Wetherill Park. The council engaged Abergeldie Contractors under a contract which was largely in the form of AS4950-2006 but included a number of specific amendments.

One of these amendments provided that for the purposes of the security of payment legislation only two reference dates would arise following practical completion being achieved. The first of these allowed a progress claim to be submitted immediately after practical completion and the second related to when the contractor submitted its final payment claim. The payment claims were to be made on the 28th day of the relevant month.

Abergeldie notified the superintendent on 16 September 2016 that it was of the view that practical completion had been achieved on that date

and it requested that a certificate of practical completion be issued in accordance with the contract.

On 25 November 2016 the superintendent issued a certificate of practical completion which indicated that practical completion had been achieved on 16 September 2016. That same day (25 November), the contractor submitted a payment claim to the superintendent.

On 7 December 2016 the Council issued a payment schedule indicating that no amount would be paid since practical completion had occurred in September and there was no valid reference date which permitted a payment claim to be made in November.

The contractor applied for an adjudication of its payment claim and obtained a determination in its favour. The Council applied to the Supreme Court for a declaration that the payment claim had been invalid and for the determination to be quashed.

Upon hearing the matter Justice Ball granted that relief. The contractor then appealed to the Court of Appeal.

The question on appeal was whether practical completion of the work had occurred (as the Council had submitted) on 16 September 2016, with the result that the relevant reference date was 28 September 2016. Alternatively, had practical completion occurred (as the contractor had claimed) on the date on which the certificate of practical completion was issued, namely 25 November 2016, with the result that the relevant reference date was 28 November 2016?

Basten JA (with whom Beasley ACJ and Meagher JA agreed) delivered the principal judgment. In doing so, his Honour cited authority that in construing the contract the Court should prefer the construction which accords with the intention which might be derived from the parties' knowledge as to the surrounding circumstances and the commercial purpose of the contract.

In the contract, the definition of "practical completion" required certain conditions to be met. Some of these conditions required the superintendent to form an opinion about a state of facts.

The contractual provision in relation to the issuing of a certificate of practical completion also spoke of that certificate "evidencing" the date upon which practical completion had been reached. This would be consistent with practical completion occurring when the certificate itself was issued.

The thrust of the contractor's case was that practical completion could not occur retrospectively without its knowledge. Otherwise it could be deprived of the opportunity (and right) to make a payment claim.

Basten JA noted in this regard that if practical completion was deemed to have occurred retrospectively, this would have consequential effects which would be inconsistent with the commercial context in which the contract operated.

In this regard, a number of obligations in any construction contract are affected by the achievement of practical completion, separate from the entitlement of a contractor to submit a payment claim.

Usually, one of these provisions requires the contractor have the care of the whole of the work under the contract up to the date of practical completion, at which time responsibility passes to the principal. Any lack of certainty as to the precise date upon which that event occurred would potentially be commercially disastrous. Both parties must know the date of practical completion so that the appropriate insurance coverage can be arranged or cancelled.

Similarly the contractor must know the timeframe within which he must remove all temporary works for construction plant (often required within 14 days of the date of practical completion).

It is also necessary to be precise about the date of practical completion in order to be able to assess whether the principal is entitled to any liquidated damages for delay or conversely whether the contractor is entitled to an early completion bonus for achieving completion prior to the contractual date for completion.

Upon reviewing these factors, Basten JA stated that the achievement of practical completion depended upon the satisfaction of the superintendent as to whether the elements of practical completion had been satisfied, and the communication of this state of satisfaction by the issuing of a certificate of practical completion to the contractor. The date that practical completion had occurred was therefore the date that the certificate had been issued, not a retrospective date.

It followed that in the current case practical completion had been achieved on 25 November 2016 when the certificate had been issued by the superintendent. By the operation of the amended terms of the contract, the relevant reference date was 28 November 2016. Because a reference date had arisen, the payment claim was valid and thus the adjudicator had the requisite jurisdiction to make his determination.

Since many disputes in the construction industry are based on a difference of opinion as to when practical completion has occurred and the rights and entitlements that flow from that date, the Court's comments in this case are likely to be argued over and re-examined for some time to come.

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The Zepinics formally declared to be vexatious litigants

In our November 2016 newsletter we discussed the multitude of proceedings that had been commenced by Vito Zepinic and members of his family against Chateau Constructions (Aust) Pty Limited stemming from a dispute over the quality of work carried out at Mr Zepinic's house at Turramurra.

Mr Zepinic was once the security consultant for convicted Bosnian war criminal Radovan Karadzic and despite having no medical qualifications had previously passed himself off as a psychiatrist in Australia and England.

In his dispute with Chateau Constructions, Mr Zepinic had initiated no less than 10 separate appeal proceedings (including two special leave applications to the High Court), culminating in the sale of Mr and Mrs Zepinic's house at Turramurra to pay for the costs incurred by Chateau Constructions in defending Mr Zepinic's various claims.

On the last occasion before the Supreme Court of New South Wales in late 2016, Justice Pembroke had warned Mr Zepinic that if any further proceedings were commenced by him, he (and his family) may be declared vexatious litigants under the *Vexatious Proceedings Act 2008* (NSW).

However it appears that Mr Zepinic did not heed the judge's warning: a month later he sought leave to appeal from his decision to the Court of Appeal and in December sought leave to appeal to the High Court. Both applications were dismissed. Not surprisingly, Chateau Constructions then applied to the Supreme Court for orders pursuant to the *Vexatious Proceedings Act* that Mr Zepinic be declared a vexatious litigant. A person who is declared a vexatious litigant is prevented from being able to commence proceedings in any Court in the relevant jurisdiction either in relation to a specific matter or at all, unless that person first obtained permission from the Court.

Justice Pembroke was allotted the task of considering whether such orders should be made in relation to Mr Zepinic. Justice Pembroke first noted that as a matter of public policy vexatious litigation is a drain on the limited and finite resources of the courts. This results in not only harassment, worry and expense to the opponents of the vexatious litigant but also causes unreasonable delay to those who have a genuine grievance who need the attention of the Court.

His Honour also noted that Mr and Mrs Zepinic had at times sought to address the gaps in their previous evidence by claiming new evidence had arisen that required a fresh review by the court. However, this fresh evidence (mainly copies of correspondence) had numerous inconsistencies and "curious features" that his Honour noted suggested that they were not genuine. Understandably, in the earlier proceedings the Courts had not considered this "evidence" to be sufficient to reverse the findings previously made. However if such evidence had been manufactured in order to give grounds to the Zepinics to continue to make claims against Chateau Constructions, this indicated their disregard for the search for justice.

Justice Pembroke commented that Mr Zepinic's failure in the early proceedings and the unwillingness of the Court to accept his new evidence "seemed only to propel him to new heights of litigation hysteria". Accordingly Mr Zepinic initiated no less than four appeals and one set of fresh proceedings in the six months following the failure of his most recent claim.

Justice Pembroke stated he was "more than satisfied" that he should make the orders that had been sought by Chateau Constructions. He added however that the phenomena of the vexatious litigant is a subject of considerable psychiatric, not merely legal, discourse, generally subsumed under the diagnosis of "delusional disorder" and sometimes referred to as "curious paranoia".

His Honour commented that the litigant's enthusiasm and passionate engagement in his quest for supposed justice obscures the essential unreality of its expectations, blinds him to the chaos that his pursuit has created and renders him oblivious to the waste and expense he has generated or the disproportionate Court time that he has consumed. Such a litigant's level of pre-occupation, ruminative thinking, pedantic attention to the minutiae of his case and dogged persistence serves only to hinder the efficient administration of justice. It is usually made worse by extravagant language, repeated assertions of fraud and the constant denunciation of the tactics or behaviour of the opposing party.

Accordingly Justice Pembroke made the orders as sought.

As an interesting postscript, despite representing himself in the multitude of Court proceedings that had preceded this hearing, on this occasion Mr Zepinic chose not to make any appearance at all. One wonders whether he will seek leave to appeal from Justice Pembroke's decision.

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EMPLOYMENT ROUNDUP

Dismissal from employment due to inappropriate use of a workplace email system

The use of electronic communication is a vital part of any modern workplace. Nevertheless the crossing of the professional boundaries in the use of company emails can have serious ramifications for an employee. This is demonstrated in the recent Industrial Relations Commission decision of *Bellenger v Mid North Coast Local Health District* (2017) NSWIRComm 1019.

Ms Bellenger commenced work with her employer, Mid North Coast Local Health District, on 27 September 2004. Ms Bellenger was an assistant to the district manager when her employment was terminated on 15 January 2016 following a finding by her employer she had used her employer's email system inappropriately. A review of Ms Bellenger's work email revealed she had received, stored and sent significant quantities of emails which were considered to be pornographic and generally inappropriate in nature. Some 1,256 of those types of emails had been stored in a specific folder named "Funny Emails". A number of similar emails were found elsewhere within Ms Bellenger's general email folders.

Ms Bellenger was suspended on 9 September 2015 pending an investigation into allegations she had breached the email policy of her employer. She was advised on 3 December 2015 the allegations had been substantiated in that the investigation determined the degree of evidence relating to Ms Bellenger's conduct was overwhelming following documentary evidence discovery and partial admissions made by Ms Bellenger. In her subsequent show cause response, Ms Bellenger submitted she had been an exemplary employee with an impeccable work history. She contended her employer's email system should have prevented unwanted, unwelcome and inappropriate emails to infiltrate the system. Ms Bellenger submitted that the employer's IT system had failed and had appropriate filtering systems been in place, the folder of inappropriate emails may well have been removed.

Ms Bellenger accepted there had been notice of the condition of access on her login screen. Nevertheless she claimed few of the staff read the conditions of access as it was set over three screen pages. She further claimed she had moved the non work related emails to her funny emails folder so as not to impede her ordinary work. She also claimed she was unaware of the email communications policy which had been released in 2009 and updated in 2012 prior to the allegations of inappropriate email use had been put to her. The employer's analysis of her work email account revealed email traffic to current and former employees of the employer, third parties and family members. She was dismissed with notice following the investigation and her show cause response.

Ms Bellenger brought proceedings in the Industrial Relations Commission for unfair dismissal and argued that her dismissal was harsh, unreasonable and unjust.

The Commission did not agree. Justice Stanton determined that from 2005 and specifically from at least 2009 and 2012, the employer had implemented a series of workplace policies which made it abundantly clear to employees there was a prohibition on the sending and receipt of inappropriate emails in the workplace. These policies were reinforced and in the Commissioner's view were triggered at the point of user login which required their mandatory acceptance by ticking a pop up box. The Commissioner was of the opinion there was no argument that this procedure was at least in place from 2012.

The Commissioner was satisfied the employer took steps to inform employees about the 2012 email code of conduct so as to ensure they fully understood their obligations, were familiar with its content and were aware of the hierarchy of disciplinary action that may be taken in the event of a breach. Ms Bellenger had breached the employer's email policies by sending, receiving and storing inappropriate and other offensive emails on her work computer so as to breach the employer's email code of conduct.

Ms Bellenger argued her long and exemplary service should mitigate against the ultimate sanction of dismissal. The Commissioner expressed the view that the long period of service would also entitle the employer to expect employee conformance.

The Commissioner was satisfied the conduct relied upon by the employer to dismiss Ms Bellenger had occurred and the investigation concerning the allegations was properly conducted and she was afforded procedural fairness.

The question that remained was whether the dismissal was harsh, unreasonable or unjust?

The Commissioner noted that employers face potential liability arising from their common law duty of care to their employees and members of the public. Employees may be subject to obligations and required to conduct themselves in the workplace in a particular way or to meet particular standards or observe particular constraints. For these reasons it is entirely reasonable, and often necessary, for employers to put in place policies requiring mandatory compliance at all times. The Commissioner formed the view, having regard to all the material before the Commission, that Ms Bellinger's dismissal was neither unreasonable nor unjust in all of the circumstances of the case.

Even though the dismissal was reasonable the question remained whether the dismissal was harsh. When considering whether the dismissal was harsh, the Commissioner took into account various balancing factors concerning Ms Bellenger's likely difficulty in obtaining alternative employment in the regional area she was located in and her family and financial circumstances. The Commissioner also took into account the fact that Ms Bellenger had not previously been cautioned about misconduct. Against that backdrop the Commission determined Ms Bellinger's dismissal was harsh.

Ms Bellenger's service was not a mitigating factor in the claim and reinstatement was impracticable. Reinstatement was not an option given the gravity of the misconduct. The employment relationship had irretrievably broken down and the employer's contentions there had been a loss of trust and confidence was demonstrated. The issue to be determined where the dismissal was harsh was the appropriate period of notice and despite over 12 years of service, it was determined Ms Bellenger should have received eight weeks pay at the ordinary rate of pay applicable to her at the time her employment ceased.

This decision demonstrates that provided an employer conveys to its employees an appropriate and reasonable policy on conduct in the workplace concerning the use of emails and the internet, an employee can be terminated for breaches of that policy. Of course, prior to termination, the employer needs to conduct appropriate investigations to ensure the evidence is consistent with breaches of the policy and the employee is given an opportunity to respond to any allegations. The only comfort for an employee in a situation where there is overwhelming evidence of a breach of the communicated policies is that in all the circumstances the termination of that employee may still be harsh, even if it is not unjust or unreasonable. This may still allow an employee to avail themselves of some financial redress from the employer, even if it does not result in their reinstatement.

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Varying Redundancy Pay

In last month's GD News, we looked at the ability of an employer to make an application under Section 120 of the *Fair Work Act 2009* (Cth) to reduce the amount of redundancy pay an employee is entitled to.

That section allows the Fair Work Commission to reduce redundancy pay if:

- the employer obtains other acceptable employment for the employee; or
- the employer cannot pay that amount.

Last month's article focused on whether other employment found for two former employees by an electrical contracting company was "other acceptable employment".

Another recent case (*Norwest Child Care Centre Pty Limited v Cathy Paul & Ors* [2017] FWC 3113) focuses on the issue of whether it was – or was not – the employer who obtained the replacement employment.

The employer operated a Child Care Centre (NCCC). The directors of the employer were sisters.

In partnership the sisters owned the land upon which NCCC operated – and leased it to the employer for that purpose.

Each of the sisters separately an interest on one or more other child care centres in the surrounding area.

In March 2016 the sisters began discussions to sell the land upon which NCCC operated, and entered into a contract of sale in June 2016. The settlement date was 15 November 2016.

Initially, the sale contract provided that the lease to the employer was to be assigned by the sisters to the purchaser on the settlement date. Consequently, the employer would continue to lease the land so that it could continue to operate the NCCC for three years after sale of the land.

Shortly before settlement, however, the lease between the sisters and the employer was amended, at the request of the purchaser, giving the owner the right the right to terminate the lease for demolition. The benefit of being able to issue a demolition notice was assigned to the purchaser at settlement.

On the settlement date, the incoming purchaser gave the employer notice that it wanted to demolish the premises and, consequently, it required the NCCC business to close by 14 January 2017.

The next day there was an all staff meeting. As a consequence of receiving the Demolition Notice, the employer gave notice of termination to its employees with effect from 23 December 2016.

The employer classified employees into 3 groups:

- employees with less than 12 months service were told their employment would cease and their annual leave would be paid out;
- employees intended to be offered positions with other child care services operated by the sisters were told that there were potentially available position at other centres operated by the sisters, and were invited to arrange an interview to consider such a role; and
- employees who were to be provided with outplacement support, but not necessarily offered employment with an associated facility.

Some employees were made what was purported to be offers of employment by child care facilities associated with the sisters.

The NCCC closed on 23 December 2016. All employees had their employment terminated on that date by reason of their positions being made redundant.

Following the cessation of their employment all of the employees commenced employment with a new employer either immediately or shortly thereafter. The dispute between them and the employer was whether the employer had obtained that employment for each of them.

The case involved 12 former employees, and the outcome of the employer's application to vary redundancy pay varied depending on teach employee's particular circumstances.

Of interest, however, is the application of the accepted principles the Commission applied in reaching its conclusions as to whether the employer had "obtained" employment.

Having reviewed the authorities, the Commission found that its task was to assess each application by applying the rules, including:

- "obtains" does not mean actually obtain in the fullest sense, but something less;
- it do not impose an absolute test on the employer's ability to "obtain" alternative employment ;
- the focus is on the action of the employer that causes the alternative employment to become available to the redundant employee
- it is not enough for the employer to,
  - encourage or facilitate a process,
  - secure (from the potential new employer) an opportunity to apply or to participate in a recruitment process, and
  - bring the employee and the potential new employer together,
- the test is to be "realistically assessed in the practical circumstances of each case" ,
- obtain employment means "to procure another employer to make an offer of employment which the individual may or may not accept as a matter of his or her choice"
- the employment "must be the result of the conscious, intended acts of" the employer.

Of key significance in this case was the role of outplacement services provided by the employer.

The evidence indicated that all staff were informed that the centre was to close down and how the centre would take specific steps to find new and suitable employment. Staff were individually interviewed as soon as practically possible to find out what their individual needs were.

The outsourcing specialist engaged by the employer was tasked to do whatever was needed to help find staff new work. She undertook considerable actions to individually tailor staff resumes, find out what sort of work employees were looking for and tailor job interviews accordingly, set up interviews for terminated employees, get feedback from employers on interviews and the like.

The Commission looked at the particular circumstances of each former employee in turn. Strikingly, in a number of instances where the consultant had organised an interview which lead to new employment, the Commission found that the employer had not "obtained" the new employment.

The Commission's view, in many cases, was that the outplacement consultant (and hence the employer) had done no more than "encourage" the former employee or "facilitate a process" through which the former employee secured new employment.

The finding of the Commission, in these cases, was that the new employment was not a result of the conscious and intended acts of the employer, and thus did not result in it obtaining other employment for the employees.

One wonders what more the employer could have done in the circumstances. If finding an available position; arranging an interview; and encouraging a former employee are not enough, what will be?

The case seems to set the bar very high. It may well be the subject of an appeal.

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Misconduct trumps redundancy entitlement

An employee has alleged that in order to avoid paying him a redundancy payment, the employer initiated an unwarranted investigation into the employee including:

- searching the employee's email history for any material that may constitute grounds for misconduct;
- initiating disciplinary proceedings including suspension from his employment;
- requiring the employee to submit to a medical examination as a condition of granting an extension of time to respond to allegations; and
- the termination of his employment on the basis of misconduct.

The employee commenced adverse actions proceedings in the Federal Circuit Court of Australia.

In a decision dated 5 May 2017 the Court noted that Section 340 of the *Fair Work Act 2009* provides that a

person must not take adverse action against another person because that other person has a workplace right, has or has not exercised a workplace right, proposes or proposes not to exercise a workplace right or takes any action to prevent the exercisable workplace right by the other person.

The Court noted there must be a causal connection between the taking of the adverse action and the workplace right or its exercise by the employee. If an employer takes adverse action against an employee for other reasons not specified in Section 340 of the Act, the adverse action is not actionable under the *Fair Work Act*, 2009.

The employee claimed he possessed a number of workplace rights, namely:

- a right to redundancy payment should his position with the employer become redundant;
- a right to make a complaint or enquiry about his employment; and
- a right to enjoy his personal leave without being bothered by his employer whilst he was taking that leave.

The Court examined whether or not a right to redundancy payment was a workplace right.

The employee argued his employment contract provided if his position became redundant he was "entitled to a redundancy payment calculated at the rate of two weeks of salary for each year completed …".

However as noted by Mansfield J in *Barnett v Territory Insurance Office* (2011) 196 FCR 116 a contractual entitlement was not generally seen as a workplace right for the purposes of Section 341. It was noted an employment contract is not a workplace law, workplace instrument or an order made by an industrial body.

Whilst a contractual entitlement to redundancy payment was not a workplace right in the sense as defined in Section 341, it was however a "safety net contractual entitlement" as defined by Section 12 of the *Fair Work Act 2009*. It was determined the employee's entitlement to a redundancy payment under the *Fair Work Act 2009* (a workplace law) allowed a Court to enforce that entitlement.

The employer accepted it took adverse action against the employee by sending him a letter requiring him to respond to certain allegations, suspending him from his duties during the investigation and subsequently terminating his employment.

As the employee brought an adverse action claim, Section 361 of the Act was triggered and the burden of onus of proof fell upon the employer to show that the adverse action taken against the employee was not for a prescribed reason or for reasons which included a prescribed reason.

The court found an entitlement for redundancy pay as a safety net entitlement was a workplace right. As such the employer was required to prove the termination of the employee was not as a result of the employee's workplace right to a redundancy payment.

Although the decision to make the employee's position redundant occurred during the investigation into the employees conduct, the employer was entitled to complete the investigation. At the conclusion of the investigation, the employer determined the employee's employment should be terminated for misconduct. As such although the employee's position was made redundant, the reason for his dismissal was not as a result of his workplace right to redundancy pay.

It should also be noted the Court found that although the employee's position was made redundant, he still could have been redeployed into another position within the employer before a decision had to be made that the employee's employment was to come to an end as a result of redundancy. The employer had only made a decision to determine the employee's position was no longer required - it had not determined to end the employee's employment because of redundancy.

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WORKERS COMPENSATION ROUNDUP

The threshold for "workers with high needs" and secondary psychological injury

One of the key reforms of the 2012 Legislative Amendments was the introduction of Section 39 in the *Workers Compensation Act 1987* ("1987 Act"). This Section provides for the termination of an entitlement to weekly payments of compensation following the completion of an aggregate period of 260 weeks weekly compensation. An exception is for workers who are assessed with more than 20% whole permanent impairment ("WPI"), who are defined as workers with "high" needs for the purposes of the legislation. For the purposes of Section 39, the degree of permanent impairment that results from an injury is to be assessed in the manner prescribed by Section 65.

It should be noted that Section 38 does not apply to an injured worker if an approved medical specialist has declined to make an assessment on the basis that maximum medical improvement has not been reached and the degree of WPI is not fully ascertainable or the insurer is satisfied the degree of permanent impairment is likely to be more than 20%, irrespective

of whether the degree of permanent impairment has previously been assessed.

Section 322A of the *Workplace Injury Management and Workers Compensation Act* 1998 ("1998 Act") allows for a further assessment being of WPI resulting from a worker's injury for the purposes of Section 39. However, only one further assessment can be made.

The impact of these provisions will be felt in the latter part of this year when many workers are expected to be no longer entitled to benefits. The most significant impact will be felt in the latter half of December 2017 and the first half of January 2018.

Some workers who are likely to be impacted by the changes are seeking to have their degree of impairment for various body parts assessed to attain an assessment in excess of 20% WPI.

A recent Presidential determination in the Workers Compensation Commission has provided clarification that an assessment of permanent impairment in respect of a secondary psychological condition is precluded by Section 65A of the 1987 Act for the purposes of determining whether a worker has greater than 20% whole person impairment for the purposes of application of Section 39.

The worker's Counsel argued the preclusion in Section 65A, having regard to impairment of symptoms resulting from a secondary psychological injury, negated the operation of Section 65 and constituted error.

The Deputy President noted the definitions of a "worker with high needs" – greater than 20% WPI and a "worker with highest needs" – greater then 30% WPI, required that the degree of permanent impairment had been assessed for the purposes of Division 4, of which both Sections 65 and 65A formed part.

Furthermore, Section 331 of the 1998 Act provided medical assessments were subject to the provisions of the Workers Compensation Guidelines. The Guidelines note that a primary psychiatric injury is distinguished from a secondary psychiatric or psychological condition and no permanent impairment assessment is to be made of secondary psychiatric or psychological impairment.

The Deputy President confirmed the preferable construction was that assessment "for the purposes of Division 4" involves an assessment consistent with the process of assessment of WPI for the recovery of compensation for non economic loss. As the Scheme makes no provision for assessment of permanent impairment in respect of a secondary psychological condition, there was no basis on which to argue that regard could be had to a secondary psychological condition when determining the relevant thresholds for workers with high needs and highest needs.

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Performance appraisals and psychological injury

In NSW, the *Worker's Compensation Act* 1987 provides that in claims for psychological injury, an employer is not liable to pay compensation pursuant to Section 11A(1) of the 1987 Act if the injury was "wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

In a recent decision in the Workers Compensation Commission the employer denied liability for psychological injury on the basis that the injury had occurred as a consequence of a performance appraisal.

The employee claimed that he sustained a primary psychological injury during the course of his employment, in the form of an adjustment disorder with a depressed and anxious mood. The employer argued the psychological injury was wholly or predominantly caused by action with respect to performance appraisal. The onus rests upon the employer to demonstrate that this was the case. In this case the arbitrator determined the employer had failed to discharge its onus with respect to the fundamental threshold issue, namely that the employee's psychological injury was wholly or predominantly caused by the performance appraisal.

Although it was true the employee was distressed at being placed on a performance improvement plan, the evidence clearly established there were a number of

other factors experienced in the workplace which contributed to his psychological injury, not all of which could remotely be described as falling within the concept of performance appraisal. These included excessive demands being placed upon him, the demands of difficult clients, the incidents where he was criticised by other employees which he perceived as being inappropriate and demeaning, his perception of events in the workplace being unsupported, the removal of his client accounts from him and discussions concerning management of his mental health issues relating to a pre-existing bipolar disorder.

Where employees establish there are other factors than disciplinary action or performance appraisals that contribute to their psychological injury the injury will not be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers..

The circumstances of employment need to be looked at as a whole and the sequence of events must be closely scrutinised. Employers are liable to pay compensation where factors other than performance management contribute to an employee's psychological injury.

Compensation for a psychological injury arising in the course of employment is payable unless there is clear cogent evidence that a psychological injury is wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer in any performance management.

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