

# Legal Solutions newsletter



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## News

### NEWS

#### Bullying laws to cover company boards

A landmark ruling handed down by the Fair Work Commission has opened the way for board directors and chairpersons to seek anti-bullying orders against each other.

In a key decision, Commissioner Hampton found that the Fair Work Act adopted a 'very wide approach' of what constitutes a 'worker'. All that was needed to satisfy the definition, ruled Commissioner Hampton was 'the undertaking of work for a person conducting a business or undertaking'.

*"Further, a broad approach to the definition recognises that workplace health and safety hazards and risks do not discriminate based on legal relationships or whether a person is paid."*

**Employers need to be alert of the broad interpretation of what constitutes a 'worker' and the potential impact on the operation of an executive board subjected to an anti-bullying claim. It is important that appropriate policies and procedures are in place covering boards and how to respond effectively to claims of bullying between executive members. Please contact Workforce Legal Solutions on (03) 9505 6221 if you need assistance with updating and developing policies and procedures in relation to anti-bullying.**

*Source: Australian Financial Review, 23 May 2017*

#### Facebook post no grounds for dismissal

The Fair Work Commission has found in favour of a salesman who was dismissed by his employer for making an 'offensive and vulgar' Facebook post during work hours.

After being alerted to the post, the managing director called the employee and in a one-minute telephone conversation told him 'to return all company property to the office' but provided no reason for his dismissal, the Commission heard. While Commissioner Gregory found the post was 'undoubtedly crude and immature' he accepted the employee's evidence that the post was not directed at his employer.

Crucially, Commissioner Gregory found that the process in which the employee was dismissed did not provide him 'any real opportunity to provide an explanation or response to the reason' for the sacking.

The employee was awarded \$6,238 in lost pay but did not seek to have his employment reinstated.

**The case highlights the importance to follow due process when dismissing employees. While dismissing an employee over the phone is acceptable if the employer cannot see the employee face-to-face, it is important that the reasons be given as well as an opportunity to respond.**

*Source: The Age, 10 Apr 2017*

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# Cases

## **Emma Dawson v Virgin Australia Airlines Pty Ltd** **[2017] FWC 3890**

**26 July 2017**

In this matter, the Applicant attempted to electronically file an application for relief from unfair dismissal on the last day of the 21-day prescribed time frame. But in a classic case of Murphy's Law—anything that can go wrong will go wrong—the application process came unstuck when the temperamental IT Gods refused to accept the Applicant's payment and it was not until the next day, being outside of the prescribed time frame that the application was successfully lodged.

Virgin Australia raised a jurisdictional objection that the application was made out of time.

Commissioner Bissett ruled that the Applicant could not show 'exceptional circumstances' existed for an extension of time and found that 'she sat on her hands and effectively did nothing until late on the 21st day after her dismissal took effect.' Commissioner Bissett also noted that 'computer failure is not an unusual circumstance. It is one of those things that inevitably occur at the most inopportune time.'

## **Ms Shirley Govender v Bupa Aged Care Mosman** **[2017] FWC 3559**

**18 July 2017**

The Applicant was employed as a Registered Nurse from September 2010 until her dismissal in November 2016 for serious misconduct.

The primary source of evidence relied upon by the Respondent to justify the dismissal was a series of videos taken by a former colleague without the Applicant's knowledge or approval. Nor was the Applicant shown a copy of the videos at her subsequent meeting with management to respond to the allegations. Commissioner Riordan noted that 'Bupa knew that they [the videos] were obtained without her consent and therefore they could not rely upon them.' After submitting her first witness statement to address the general allegations, it was only then that the Applicant was shown the videos and was denied the opportunity to respond to the specific allegations.

Commissioner Riordan found in favour of the Respondent. In a 'what-was-I-thinking-at-the-time' decision, the Applicant's legal representative only raised the issue of a *prima facie* breach of the *Surveillance Devices Act 2007* (s12) until after the horse had bolted and consented to the video being used as evidence during the hearing.

Bupa could consider themselves fortunate the case was found in their favour due to the weight of the video evidence to warrant summary dismissal.

## **WORKPLACE INVESTIGATIONS**

Whether involving bullying, fraud, harassment, misconduct or discrimination, disputes occur in the workplace. Yet few organisations have the time and experience to investigate workplace complaints.

Outsourcing investigations to an independent and qualified specialist is a practical and cost-efficient solution.

As qualified legal practitioners, Workforce Legal Solutions can conduct any workplace investigation and we satisfy the provisions of the *Private Security Act 2004*. Our 'one-stop' approach means we can also provide clients with legal advice without the need to seek separate advice.

We can conduct investigations on-site or remotely by Skype for the convenience of rural clients.

Please contact Workforce Legal Solutions on (03) 9505 6221 if you need assistance with conducting a workplace investigation.