Workplace Review (extracts only)

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Stephanie has extensive experience in all aspects of human resources and industrial relations, and has worked with a range of clients in areas including financial services, transport and manufacturing organisations, energy and utilities, retailers and public sector authorities. She regularly works with corporate lawyers on mergers, acquisitions and company restructurings to ensure human resources and industrial relations issues are identified early.

PORTRAIT ARTIST

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Simon is a Sydney-based artist who specialises in architecture, portraits and legal drawings. He was educated at the University of Sydney where he studied Arts and Law. To see more of Simon's art, visit his website at www.simonfieldhouse.com.

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As one of Australia's pre-eminent occupational health and safety lawyers, Michael has advised clients on the development and implementation of safety management systems across a variety of industries both within Australia, and globally. He is widely recognised as a leading commentator on OHS legislative developments and has written and lectured extensively on OHS law.

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Duncan Fletcher, Partner, Middletons

Duncan is a partner in Middletons' Workplace Relations and Safety Group. He has over a decade of experience and has advised a number of mining, construction, industrial, energy and service companies in New South Wales and Western Australia. Duncan has been involved in large-scale industrial relations and employment litigation, in developing strategies for employers and in advising on occupational health and safety prosecution and compliance matters.

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Steven is a member of the Victorian Bar and has been practising in employment, industrial, discrimination and constitutional law for more than 15 years. He advises and regularly appears for employer, union and government clients in all federal and Victorian courts and tribunals.

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Sandy has been in private practice at the Queensland Bar for 17 years. He was appointed Senior Counsel in 2009 and practises mainly in all areas of industrial, employment and administrative law in both federal and State jurisdictions.

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Captain Kirk boldly goes – *Jeffrey Phillips SC*, *Stephanie Vass* and *Justin Le Blond*

In this article, Jeffrey Phillips and Stephanie Vass consider the High Court's findings in Kirk v NSW IRC, as well as its implications for the formulation of prosecutions under New South Wales occupational health and safety law and procedure more generally for WorkCover and the New South Wales Industrial Court. 11

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Editorial

Welcome to the first issue of *Workplace Review*. This publication from Thomson Reuters will attempt, in an easily accessible and less formal way, to cover developments and trends found in industrial relations, discrimination law, employment law, human resources and workplace safety.

The past year or so has been a tumultuous one for workplace relations in Australia, including:

- the repeal of the *Workplace Relations Act 1996* (Cth);
- the commencement of the *Fair Work Act 2009* (Cth);
- a modernised award system introduced; and
- all the States (bar Western Australia) have referred most of their industrial relations powers to the Commonwealth creating, for the first time in Australian history, a single, national industrial relations system for the private sector.

On top of this, we are now anticipating a "harmonised" national occupational health and safety system with mirror Commonwealth and State legislation based on the model Work Health and Safety Bill prepared by Safe Work Australia, planned to commence on 1 January 2012.

These dramatic changes hold out some hope for a greater degree of simplicity and consistency in national regulation, which should prove a blessing for practitioners over time. However, in the short term, change means added complexity, uncertainty and ambiguity while we attempt to manage the transition from old systems to new.

It is our aim to help practitioners through this challenging period by providing practical commentary on a wide range of new developments in Plain English.

In order to cover these important workplace topics, *Workplace Review* has appointed a range of contributors from across Australia who are experts in these fields. It will be published quarterly and hopes to fill a place in the market which currently is not, in our view, being adequately covered. The publication's format, size and style of writing will make it easy for readers to keep up-to-date on topical issues. Watch out for "Implications" and "Summary" headings and bulleted/boxed text.

Workplace law is not just about new legislation and the cases being delivered. It is also about the people who practice in it. One particular feature of each edition will be an interview with a prominent practitioner in the areas covered by this publication. The first interview, included in this issue, is with the President of Fair Work Australia and former head of the Australian Industrial Relations Commission, Justice Geoffrey Giudice. The interviewee in each issue will be depicted in a portrait by Simon Fieldhouse, a former lawyer and now a full-time artist. Simon's work can be viewed at www.simonfieldhouse.com. Watch the cover of *Workplace Review* for Simon's new work and the interviewee for that issue.

The editors invite contributions from industrial relations and human resource practitioners, occupational health and safety managers, discrimination experts, judges, lawyers and academics. Short articles of approximately 500 words and longer pieces of no more than 1800 words can be submitted for publication. There will be a section in each edition allocated to the key areas of interest pertaining to the workplace. We also invite your comments for publication and/or responses to any articles published. Should you care to send a letter to the editors, please do so to the following email or postal address: lta.workplace@thomsonreuters.com or Editor – *Workplace Review*, Thomson Reuters, PO Box 3502, Rozelle, NSW 2039. If you would like to start a conversation online about what you have been reading or workplace matters more generally, visit Thomson Reuters' free *Workplace: Fair Work* portal at www.thomsonreuters.com.au/workplace. There you will also find the latest developments in workplace relations, including expert commentary, news stories and more.

We hope you enjoy this and following issues of *Workplace Review*.

Jeffrey Phillips SC (Denman Chambers, Sydney)
Neil Napper (Partner, Lander & Rogers)
Stephanie Vass (Partner, Piper Alderman)

First adverse action decision

Neil Napper*

INTRODUCTION

In the first substantive decision under the General Protection provisions of the *Fair Work Act 2009* (Cth) – *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284 (25 March 2010) – the Federal Court rejected claims by the Australian Education Union (AEU) and one of its officials, Mr Barclay, that Bendigo Regional Institute of Technical and Further Education took adverse action against him in breach of the Act when it suspended him from work because of an email he sent to union members about allegations of potential misconduct by other employees.

BACKGROUND

Mr Barclay is a senior teacher and the Sub-branch President of the AEU employed by the TAFE. As Sub-President he sent an email to union members employed by the TAFE in which he said that several union members had seen or were asked to take part in producing "false and fraudulent" documents for an audit of the TAFE to be conducted by the Victorian Registration and Qualifications Authority.

Some people who received the email sent it to TAFE management. When the TAFE's Chief Executive became aware of it she asked Mr Barclay to show cause why he should not be disciplined for failing to report the misconduct referred to in his email to senior management. Mr Barclay was suspended on full pay, had his internet access suspended and was directed not to attend TAFE premises during the suspension.

Mr Barclay and the AEU alleged that the TAFE had taken adverse action against him because he was a union official, because he engaged in industrial activity, and because he had exercised workplace rights under an enterprise agreement between the AEU and the TAFE.

LEGAL ISSUE

The issue was whether the TAFE had acted to Mr Barclay's detriment because of his position as a union official or his associated activities. The AEU argued that, in answering that question, the court must apply an objective test only and have no regard whatsoever to the Chief Executive's subjective reasons for acting as she did. The court (Tracey J) rejected that argument as inconsistent with legislative history, relevant principles of statutory construction, and authority. The court held that in determining why the TAFE took the adverse action against Mr Barclay, evidence explaining why that action was taken will be relevant.

The TAFE accepted it had taken adverse action against Mr Barclay by suspending him from duty, suspending his internet access and directing him not to attend TAFE premises. It did not, however, agree that, in requiring him to show cause why disciplinary action should not be taken against him, it had also taken adverse action. The TAFE argued that the reasons it had taken the adverse action were that: the allegations of fraud Mr Barclay raised in his email had not been raised with senior management; the email was bound to cause distress to members of TAFE staff and bring their reputation and that of the TAFE into question; and it would undermine staff confidence in the audit process. The TAFE also pointed out that Mr Barclay was employed in the TAFE unit responsible for overseeing preparation of the audit process. In the view of the Chief Executive, Mr Barclay's actions appeared to be breaches of the Victorian Public Service Code of Conduct and his obligations as an employee.

DECISION

The court accepted the evidence of the Chief Executive and found her explanations convincing and credible. Accordingly, the court found that the TAFE acted in good faith and did not take adverse action for a proscribed reason related to Mr Barclay's capacity as a union official, or *because of* his union membership or his union activities.

* Partner, Lander & Rogers.

At the time of writing, the decision is the subject of an appeal to the Full Court of the Federal Court.

IMPLICATIONS

The decision confirms that employers may discipline employees who are also union officials if they misbehave at work, provided they do not do so for a proscribed reason. It also emphasises the importance of the employer having clear, cogent and reasonable grounds for its actions in order to satisfy the reverse onus of proof that applies in such cases.

The decision provides important guidance for parties and their advisers by confirming the relevance of the *subjective* reasons of the alleged wrongdoer in taking the alleged adverse action. Clear, written evidence of those reasons will be important in helping the court decide this point. Also crucial will be the oral evidence given by the decision-maker during the hearing.

Justice Geoffrey Giudice: An insider's look at Australia's new IR system

by Steven Andrew*

The step from working as a practising barrister of the Victorian Bar to head of Australia's leading workplace tribunal almost didn't happen for one of Australia's most respected judicial figures, Justice Geoffrey Giudice.

The 63-year-old Bendigo native who is now head of Fair Work Australia (FWA) says industrial relations has been a part of his working life since he left university in 1970. But when the telephone call came in 1993 offering him a position on Australia's then-leading arbitration body, the Australian Industrial Relations Commission (AIRC), the meticulously organised barrister, for once, wasn't prepared. "Personal circumstances prevented me accepting", Justice Giudice told the inaugural issue of *Workplace Review*.

Four years later, a second call was made to Justice Giudice – and this time, he accepted.

It proved a welcome second chance. "The opportunity to head the commission – and now the tribunal – is a rare privilege; without any doubt, the high point of my career", Justice Giudice said.

That career includes 13 years at the Bar specialising in industrial relations and labour law, 11 as President of the AIRC and one as President of FWA.

SECOND CHANCE

Justice Giudice said joining the commission was a big change. "After years of arguing cases on behalf of clients, I finally had a chance to make a few decisions myself. The timing was also right – at a family level, my last child was just finishing school, so I had the time to devote to what I knew would be a very demanding role."

His subsequent appointment in 2009 as head of the AIRC's replacement body, Fair Work Australia, however, was even more eventful.

As a Howard Government appointee and former barrister representing employers, some thought Justice Giudice's days were numbered under a Labor Government eager to put its own stamp on IR.

Justice Giudice says he regards the appointment as a "compliment". "The media can sometimes read too much into these things – experience on either side of the IR fence is the key factor in deciding who is or isn't appointed. In my experience, people on the tribunal try very, very hard to be fair – and in some ways, over compensate to ensure fairness. It is not as simplistic as some believe – the government wants a spread of opinion and that's what they get."

In her 30 May 2007 National Press Club address confirming Justice Giudice's appointment to the FWA, the Deputy Prime Minister and federal Education, Employment and Workplace Relations Minister, Julia Gillard, said Labor was putting the appointments system "beyond politics". "Labor will also end the conflict of interest that has the Industrial Registrar serving two masters", Gillard said. Senior FWA staff would be answerable to Giudice, not the WR Minister.

Article continues.

* Steven Andrew is a journalist and PR manager working in the finance, legal and corporate governance sectors. Steven is the author of two Thomson Reuters' books on corporate governance – *Remuneration and Reward Strategies* and *Inside Employee Screening* (co-authored with managing partner at Harmers Workplace Lawyers, Joydeep Hor). His work regularly appears in Thomson Reuters' national IR newsletter, *Workforce*.

Portrait by Simon Fieldhouse.

WORK HEALTH AND SAFETY

Editor: Michael Tooma

Each issue, Michael Tooma brings you the hot topics happening in Work Health and Safety around the country. Here, he interviews Barry Sherriff from Norton Rose, who was part of the three-member expert panel that reviewed the occupational health and safety laws in Australia. The panel's reports formed the basis of model work health and safety laws, which will commence on 1 January 2012.

***Michael Tooma*: Why have work health and safety laws been harmonised?**

Barry Sherriff

Barry Sherriff: Harmonisation has been driven by a number of factors. Having different laws around the country produces inequity for workers and inefficiency for industry, resulting in greater cost and compromising the effectiveness of health and safety measures. Having a single set of laws can go a long way to overcoming these problems.

The process by which harmonisation has been pursued has also allowed the laws to be brought up to date, to operate more effectively with modern work arrangements and risks.

What are the key changes to be introduced by the laws?

The laws will provide for complete coverage of duties by all who are involved in work being undertaken, to protect the health and safety of themselves, people carrying out the work and those affected by the work being done. There will not be reliance on legal labels (such as employer and employee) or complex legal concepts to determine who is responsible and who is to be protected. This should produce a significant shift in mind-set away from "am I caught" to "what must I do to meet my obligations".

This change is to be affected by moving away from the employment relationship as the determinant of who has a duty and to whom it is owed. Instead, the primary duty will be owed by a person conducting a business or undertaking (PCBU) to "workers" who undertake work in the business of the PCBU, and to others affected by what the PCBU does in its business. Workers will include a broader range of people, such as contractors, on-hire workers, volunteers and students on practical placement.

Changes to consultation and workplace representation also reflect the broadening of the duties of care.

Officers will have a positive duty to exercise due diligence to ensure compliance by the PCBU. For the first time, due diligence will be clearly defined and will mean taking reasonable steps to provide for effective governance in health and safety, meeting specific criteria.

The laws introduce high penalties for serious offences. Do you think the courts will respond to that escalation in penalties as we see judgments handed down?

While the courts must follow proper sentencing procedures and criteria, they are likely to recognise the seriousness with which health and safety breaches are treated, as will be emphasised by the higher penalties in the model laws. Experience with increases in penalty levels over the last decade or so has shown that courts will respond reasonably quickly to give effect to the policy behind increasing maximum penalties.

The introduction of three categories of offence may also assist the courts in assessing the relative culpability and severity of fines imposed in specific matters.

How does consultation work under the new laws?

Consistent with the broadening of the primary duty, a PCBU will be required to consult with "workers" not just its employees.

Article continues.

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