

WORKPLACE SOLUTIONS UPDATE

September 2006

Developments in HR & IR Law in Australia

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Special Occupational Health & Safety Alert

SPECIAL ALERT: SAFETY

This Update is a Special Alert to advise and alert you to two recent decisions of the New South Wales Industrial Relations Commission where the employer was found guilty of discriminating and victimising a worker for complaining about occupational health and safety concerns in the workplace. I hope that all friends of my practice find this Update informative.



EMPLOYERS GUILTY: Discriminating against workers who complain about workplace safety

Case One:

[Twentieth Superpace Nominees v TWU \[2006\] NSWIRComm 218 \(24 August 2006\)](#)

The full bench of the New South Wales Industrial Relations Commission stressed in this decision that the victimisation provisions contained in the *Industrial Relations Act 1996* (NSW) (“the NSW IR Act”) were intended to ensure that workers could raise workplace safety concerns without fear of losing their job or being mistreated at work.

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The Facts:

The sugar cane transport company, Twentieth Superpace Nominees, had appealed against an order of the Commission requiring it to offer employment to a worker who had complained about health and safety risks at work.

The worker in question had been an Occupational Health and Safety representative with a transport company that held a sugar cane carting contract in northern NSW. He had formally complained about potential safety risks to workers from the overfilling of cane bins. When that company lost the contract, the worker was refused employment with the new company that took over the contract, despite scoring highly in the recruitment assessments for the job.

The Transport Workers Union, on the workers' behalf, successfully sought an employment order (ie. an order that the company employ the worker) on the grounds that he was victimised for complaining about potential workplace safety risks. The union argued the company's failure to employ the worker amounted to victimisation under section 210 of the NSW IR Act.

The Decision:

The full bench of the Commission, consisting of the President, Justice Wright, Vice-President Walton and Commissioner Ritchie, stated that section 210 of the NSW IR Act is designed to protect workers who make complaints about safety and should be interpreted broadly:

"every reasonable avenue should be available to an employee to raise occupational health and safety concerns without fear of victimisation or retribution..."

Accordingly, the Commission upheld the order that the sugar cane company must employ the worker and pay him for lost remuneration.

Case Two:

[Hayes -v- Network Kitchens Pty Ltd \[2006\] NSWIRComm 1122 \(8 August 2006\)](#)

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Commissioner Cambridge of the New South Wales Industrial Relations Commission found that a furniture manufacturer dismissed a 15-year-old worker because he had called the police to attend the workplace after he was assaulted by a fellow adult worker.

The Facts:

The young worker, Hayes, began work as a labourer with Network Kitchens Pty Ltd (**Network Kitchens**) in the western Sydney suburb of Glendenning. In his third week of work, he was operating a planning machine when he skimmed the tops off two of his fingers. After receiving first aid, Hayes returned to work, but his mother later took him to a doctor who recommended that he take a few days off work in order to recover.

The proprietor of Network Kitchens told Hayes' mother that he could not afford to continue employing her son if he made a worker's compensation claim for the days he had off work. So, the young worker ended up taking three days of leave without pay and two days of sick leave.

Some months after the accident, Hayes took on an apprenticeship with Network Kitchens, but, shortly afterward the proprietor withdrew the apprenticeship after an adult tradesman, who supervised Hayes, argued with him, then grabbed and pushed him.

Hayes appealed to the proprietor of Network Kitchens for help, but such calls were ignored, and Hayes called the police. The proprietor maintained that the police visit had brought shame upon his business, and so he withdrew the apprenticeship, which Hayes took to be a termination of his employment.

Decision:

Commissioner Cambridge held that Network Kitchens had victimised Hayes under section 210 of the NSW IR Act for making a complaint about workplace safety. The Commissioner said the main reason for dismissing the young worker was his calling

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the police to the premises. The employer was ordered to pay Hayes \$4,000 in compensation for his unfair dismissal, \$10,659 for pay and benefits lost as a result of the victimisation, and a further \$1,500 to make up underpayment and \$100 for unpaid superannuation.

LESSONS TO BE LEARNT:

Listen to concerns about safety raised by workers. Do not dismiss or ignore such concerns, and do not marginalise or victimise any workers who raise any issues about occupational health and safety at work, no matter how trivial they may appear.

Document all concerns raised, and respond to them formally. It may be worthwhile developing a Safety Grievance Form for the recording of such concerns by workers, and a process that compliments this Safety Grievance Form to allow for formal consultation of safety issues raised, and response and action as necessary. Please do not hesitate to contact me and discuss the development of such processes and forms.

If you would like more information on any of the issues raised in this Update, please do not hesitate to contact **Brooke Pendlebury** on 02-9231 0250, mobile 0403 818 912, or by email info@pendlebury.com.au.

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