Employment Disputes in the Not-for-Profit Sector

Practical Tips and Helpful Strategies

16 September 2021

Joseph O’Mara

TOOMEY PEGG
LAWYERS

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ABOUT THE AUTHOR

JOSEPH O'MARA BBus LLB (HONS)

Joseph O'Mara is an Associate at Toomey Pegg Lawyers. Joseph practises mainly in commercial and not-for-profit law with a focus on employment and intellectual property law.

In the not-for-profit area, Joseph assists charities through the establishment phase (from advising on the initial concept, the drafting of an appropriate constitution through to establishing the structure and registration with the ACNC). Joseph advises established charities on a variety of issues including constitutional reviews, governance, intellectual property, mergers and acquisitions, charitable investment fundraising and employment law issues.

Toomey Pegg Lawyers
Level 8
50 Carrington Street
SYDNEY NSW 2000
AUSTRALIA

+61 2 8297 1000

jomara@toomeypegg.com.au

www.toomeypegg.com.au

1. Introduction

Australia's system of employment law, which is underpinned by the *Fair Work Act 2009* (Cth) (containing the National Employment Standards) and Modern Awards and Enterprise Agreements, provides powerful protections to employees and vulnerable workers, but also creates a challenging business environment for employers who must balance the needs and rights of their employees with their need to achieve their organisation's objectives.

The business environment is arguably even more challenging for the often less resourced charity and not-for-profit sector, while at the same time, many charities and not-for-profits experience difficulty being across the ever-expanding area of employment law.

This paper explores various categories of disputes that arise in the context of the employment relationship and provides practical tips and strategies to prevent and manage these disputes.

2. Statutory Framework

The *Fair Work Act* covers most employees within Australia. Contained within the *Fair Work Act* are the National Employment Standards (NES), which provide minimum entitlements to all employees covered by the *Fair Work Act*. It is not possible to contract out of the minimum entitlements provided under the National Employment Standards (or an applicable Modern Award or Enterprise Agreement).

For many employees, the National Employment Standards are supplemented by the provisions of their employment contracts and/or terms set out in an applicable Modern Award or Enterprise Agreement.

Part 2-1 of the *Fair Work Act* describes the relationship between the National Employment Standards and applicable Modern Awards or Enterprise Agreements. As a general rule, where entitlements overlap, an employee will receive whichever entitlement is most favourable, but will not ordinarily receive a double benefit (see section 55(6)(a) of the *Fair Work Act*). For example, where the National Employment Standards provide an entitlement to 20 days of

annual leave per annum for full-time employees, but an Enterprise Agreement provides for 25 days of annual leave per annum for full-time employees, an employee will be entitled to 25 days of annual leave per annum, but not 45 days of annual leave per annum.

While the *Fair Work Act* is the primary source of law applicable to the categories of disputes set out in this paper, other statutes also apply to certain disputes involving bullying, sexual harassment and discrimination.

Part 4 of this paper will briefly summarise the specific law applicable to a number of categories of dispute.

3. Preventative measures: contract, policy and process

Part 4 of this paper explores practical tips and strategies for managing various categories of disputes, but there are several preventative measures that an organisation can implement to lay a foundation for preventing disputes and, if necessary, managing any disputes that arise.

There are no measures that will absolutely prevent all disputes, but the measures outlined in this paper should be of assistance.

3.1. Employment contract

It is not mandatory to have a written employment contract, but a written employment contract serves several valuable functions, including clearly identifying the key terms of employment and expanding the rights and obligations of employers and employees.

Disputes can often arise over the terms of promises or arrangements that are made verbally, whether prior to the commencement of employment or during the employment. Good practice is to express those discussions formally in the written employment contract, or a written amendment to the employment contract.

Depending on the nature of a position, a written employment contract can provide for a probation period, typically a period of between three and six months that gives an employer time to assess an employee's performance and

suitability to the position. Probation periods may be passed, failed or extended . Employers that use probation periods strategically are better placed to assess whether an employee is a good fit for the employer's organisation. Although there is no concept of a probation period in the *Fair Work Act*, under section 382 of the *Fair Work Act*, employees are only protected from unfair dismissal where they have served the minimum employment period, defined by section 383 as 6 months for most employers and 12 months in the case of a small business employer.

If appropriate with regards to an employee's level of seniority, remuneration and access to commercially sensitive information, an employment contract could provide for post-employment restraints, including restraints on working for a competing business, non-solicitation of clients and non-solicitation of employees. Although restraints can be difficult and costly to enforce, if nothing else, restraints can act as a deterrent.

Employment contracts should be reviewed and updated as an employee progresses in seniority. An increase in remuneration can present an opportunity to offer an employee a new contract, with more extensive obligations.

3.2. Policy

Policies are another important preventative measure and risk management tool with regard to disputes. Often employment contracts contain a term that requires an employee to abide by the employer's policies and procedures, together with a statement that the employer's policies and procedures do not form part of the contract of employment. This is so that employees are bound by the employer's policies and procedures, but employers cannot be liable for a breach of the employment contract if they fail to act in accordance with a policy or procedure.

Employees also have a duty to comply with an employer's reasonable and lawful directions, which is another way to give force to policies and procedures.

Topics commonly covered by workplace policies and procedures include:

- code of conduct;
- occupational health and safety;

- email and internet use;
- drugs and alcohol;
- anti-discrimination and harassment;
- grievance handling (often including procedures for investigating complaints);
- discipline and termination (often including procedures for investigating complaints and managing performance); and
- social media.

Clearly expressed policies and procedures can benefit both employers and employees by providing processes to follow in the event of a dispute and setting clear expectations of acceptable behaviour.

3.3. Fair process

Certain policies, such as a grievance handling policy or discipline and termination policy, may prescribe processes for managing disputes.

It is important that the processes set out in written policies and the processes actually implemented by employees are fair processes. A fair process benefits both employers and employees and usually involves:

- an investigation of all relevant matters;
- the employer giving an employee every reasonable opportunity to respond to allegations;
- the employer allowing the employee to invite a support person to important meetings; and
- the employer making findings based upon reasonable grounds.

An employee is less likely to challenge disciplinary action, and will usually have less grounds for challenge and any challenge will usually be more difficult, where an employer has followed a fair process.

4. Types of disputes with examples

The final part of this paper considers the law applicable to the following types of disputes with examples of those disputes and practical tips and strategies:

4.1 Conduct & Performance;
4.2 Bullying;
4.3 Discrimination;
4.4 Sexual harassment;
4.5 Wages;
4.6 Casual Employment;
4.7 Mandatory Vaccination.

4.1. Conduct & Performance

The most common employment disputes relate to issues of conduct and performance. The issue of conduct concerns an employee's behaviour in the workplace and whether it can be characterised as misconduct or serious misconduct The issue of performance concerns an employee's ability to perform a job. Although the two concepts are distinct, they often overlap. For example, employers sometimes face a tactical decision whether to address an employee's misconduct or undertake a performance review process. In some cases, an employment contract may also include underperformance as misconduct.

A potential difficulty for employers is that a dismissal may be considered unfair because of a defect in process, notwithstanding that the employer had a valid reason for dismissal. This should motivate employers to follow a fair process whenever it is reasonably practicable to do so. However, employers may take some comfort from the recent decision of *Parris v St Kevin's College* [2021] FWC 2341. In that decision, which concerned a teacher's unfair dismissal application, the Fair Work Commission weighed the seriousness of the employee's misconduct against the defects in the employer's process. The Commission ultimately determined that the seriousness of the employee's conduct, which involved inappropriate hugging of several students, a tweet about a "wet dream" and the storage of hardcore pornography on a school device, outweighed the defects connected with the employee's dismissal, including the fact that the employee was not notified of all the reasons for his dismissal, the employee was not given an opportunity to respond to all reasons

for the dismissal and the employer provided a positive reference, which undermined its position on the seriousness of the employee's behaviour.

This decision also identifies several areas where the employer's investigation and dismissal process were inadequate. Even though the employer was ultimately successful in defending the unfair dismissal application, it may well have been the case that the employer could have avoided a costly, distracting and embarrassing trial if it had followed a fairer process.

Practical Tip: Independent Input

Wherever reasonably practicable, an employer should seek to give carriage of an investigation to people independent of the dispute. In small organisations, this may require the involvement of a non-executive board member or, where resources allow for it, an external lawyer. A lawyer could be engaged to prepare an investigation process, conduct the investigation or conduct a more limited review to identify any areas where the investigation process could be strengthened.

Note that where an employer engages a lawyer (or other external agent) to conduct an investigation, the employer and external investigator should be careful not to misrepresent the investigation as an independent investigation where the investigation is conducted for the benefit of the employer and paid for by the employer.

Workplace investigations commissioned for the dominant purpose of obtaining legal advice may also be subject to legal professional privilege, which means that an organisation will not be required to disclose the contents of the investigation to employees, provided that privilege has not been waived. This was illustrated recently in *Tainsh & Willner v Co-Operative Bulk Handling Ltd* [2021] FWC 3381, where the employer's claim for privilege was upheld and it was confirmed that disclosure of the conclusion or effect of legal advice does not necessarily give rise to a waiver of privilege in respect of the whole advice.

Another area where disputes can arise that is connected with conduct is in the taking of personal/carer's (sick) leave. It can be difficult for employers to challenge an employee taking extended sick leave, but very easy for an employee to obtain a Doctor's certificate. Section 352 of the *Fair Work Act* and Regulation 3.01 together provide that an employer must not dismiss an employee due to a temporary absence from work due to illness or injury. An employee's absence ceases to be temporary where it exceeds three consecutive months of unpaid leave, or three months of unpaid leave in a 12 month period. If an employee is receiving workers compensation, an employer must also have regard to workers compensation legislation as temporary absences do not include absences from work while an employee is receiving workers compensation. By way of example, under section 248 of the *Workers Compensation Act 1987* (NSW), it is an offence for an employer to dismiss a worker if the worker is dismissed because the worker is not fit for employment as a result of the injury and the worker is dismissed within 6 months after the worker first became unfit for employment.

In *Wildman v IMCD Australia Limited* [2021] FCCA 1161, the employer formed the view that an employee's illness was not genuine and that the employee was instead disgruntled by the employer's decision to change the employee's location of work, in circumstances where the employee had provided a series of medical certificates over a period of more than 3 months which did not disclose the nature of the employee's illness. The employer directed the employee to attend medical examinations, permit the employer to contact his doctors and to attend meetings with the employer. The employer sought to rely on its right to request evidence of the taking of leave under section 107 of the *Fair Work Act* and dismissed the employee after the employee refused to comply with the employer's requests. The Court found in favour of the employee and held that the employer's directions were not lawful and were not reasonable. The Court went on to find that the employer had taken adverse action against the employee in connection with the employee's exercise of his workplace right to take personal leave by coercing him not to exercise his workplace right and by dismissing him because of his exercise of this workplace right.

Practical Tip: Managing Sick Leave

Employers will put themselves in a stronger position if they request reasonable evidence from employees on sick leave at an early stage (such as after two or three consecutive days of sick leave), rather than allowing long periods of absence with only limited explanation. It is also prudent for employers to seek advice at an early stage on how to manage an employee suspected of abusing sick leave entitlements.

4.2. Bullying

Under section 789FC of the Fair Work Act, a worker who reasonably believes that they have been "bullied at work" may apply to the Fair Work Commission for a *'stop bullying'* order under section 789FF.

The stop bullying jurisdiction is available to the same broad category of "worker" as that defined in the *Work Health and Safety Act 2011* (Cth) (other than members of the Defence Force). Contractors, subcontractors, outworkers, apprentices, trainees, work experience students and volunteers, including the board members of a not-for-profit can apply.

If the Fair Work Commission is satisfied that a "worker" has been bullied at work and there is a risk that the worker will continue to be bullied at work, the Fair Work Commission may make any order it considers appropriate to prevent the worker from being bullied at work, but may not order the payment of a pecuniary amount. The kinds of orders the Fair Work Commission may make include orders to change a worker's shifts, changes to reporting lines and changes of work locations. This jurisdiction is less frequently invoked as it does not provide for financial remedies and only applies to workers that are currently engaged in an organisation.

Importantly, the stop bullying jurisdiction does not apply to reasonable management action carried out in a reasonable manner. The more an organisation can underpin employee management with fair and reasonable policies and procedures, that are fairly applied, the more likely the organisation will be able to rely on the "reasonable management action" defence. As noted by the Commission in *Application by Katrina Hohn* [2020] FWC 5053 at [21],

'The test to be applied is whether the management action was reasonable, not whether it could have been "more reasonable" or "more acceptable."'

> ***Practical Tip: Tactical Tool***
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> The recent decisions of *Soni v Berwick Waters Early Learning Centre* [2020] FWC 4149 and *Katrina Hohn* [2020] FWC 5053 demonstrate a willingness of some employees to use a stop bullying application as a tactical tool to delay or provide leverage during a performance review process, even if the allegations of bullying are without merit. Employers should take all bullying claims seriously and address each claim on its merits. This does not necessarily mean that an employer must halt an ongoing performance review process, but it might mean that an employer should involve someone else in their organisation (or, in some circumstances, someone outside the organisation) who is more distanced from the dispute to take over the performance review process, and another person to investigate the bullying allegation.

4.3. Discrimination

Discrimination is a complex area of law and there is a plethora of legislation that could apply to discrimination within an organisation, including:

- *Age Discrimination Act 2004* (Cth);
- *Australian Human Rights Commission Act 1986* (Cth);
- *Disability Discrimination Act 1992* (Cth);
- *Fair Work Act 2009* (Cth);
- *Racial Discrimination Act 1975* (Cth);
- Sex *Discrimination Act 1984* (Cth),

as well as other legislation in each state and territory.

This paper briefly considers discrimination in the area of employment, but certain charities and not-for-profits will also need to consider discrimination in other areas, including education, goods and services, accommodation and membership.

Many charities and not-for-profits are also closely following the progress of the Religious Freedom Bill, which has undergone several rounds of revision and, if enacted, will have implications for religious organisations and their employees.

Section 351 of the *Fair Work Act* prohibits an employer from taking adverse action against an employee or prospective employee because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Discrimination in the *Fair Work Act* comes within the Fair Work Commission's "General Protections" jurisdiction, which means that if an employee is dismissed and discrimination is involved or alleged, it could form the basis of an adverse action claim.

The issue of discrimination arose recently in the decision in *Stuart v Toni* [2021] FCCA 1520, which concerned an adverse action claim by a pregnant employee who, on paper, was classified as a contractor. The Court analysed the factors for and against the worker being classified as an independent contractor and concluded that the worker should be classified as an employee. The factors supporting the conclusion that the worker was an employee included that:

- the worker was remunerated on an hourly basis, not on the basis of producing any particular outcome;
- the terms of written contracts are not determinative and the Court is not bound by the parties' description of their relationship;
- the contract included terms reflective of an employment contract, including a restraint of trade;
- the existence of an ABN does not, of itself, mean that a worker is carrying on a business on their own account; and
- the worker was not generating any goodwill on her own account, rather she was assisting the employer's business to grow and maintain its goodwill.

Having found that the worker should be classified as an employee, the Court went on to find that the employer had engaged in discrimination and adverse action by dismissing the employee because of her pregnancy and family or

carer's responsibilities. This case is a reminder that, in an adverse action claim, the employer has the onus of rebutting the presumption that an action was taken for the particular reason or with the particular intent (in whole or in part) alleged by the employee.

> ***Practical Tip: Managing risk of an adverse action claim***
> Not all claims of discrimination are legitimate or can be substantiated. If discrimination is alleged prior to termination of employment, it should be appropriately and separately investigated and addressed. If an employer decides to terminate an employee's employment in circumstances where discrimination has been alleged, but did not in fact occur, the reasons for termination should be clearly documented and communicated.

4.4. Sexual harassment

Sexual harassment is a blight on workplaces and an issue that intersects with several areas of law, including discrimination law, workplace health and safety law and criminal law.

Along with a steady increase in damages awarded in sexual harassment cases,[1] there have been several recent developments in this area of law. In March 2020, the Human Rights Commission published the 'Respect@Work: Sexual Harassment National Inquiry Report', which provided various recommendations as to how sexual harassment in the workplace can be addressed in an holistic and comprehensive manner.

In response to that report, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* was introduced to federal parliament, proposing several amendments to the *Fair Work Act*, the *Sex Discrimination Act* and the *Australian Human Rights Commission Act*, including:

- clarifying that harassing a person on the basis of sex is prohibited under the *Sex Discrimination Act*;
- broadening the coverage of the *Sex Discrimination Act* to include members of parliament, judges and their staff;

[1] See for example *Hughes v Hill* [2020] FCAFC 126, where compensation of $170,000 was awarded to the complainant or *Golding v Sippel and The Laundry Chute Pty Ltd* [2021] ICQ 14, where on appeal, total compensation was increased by nearly $100,000 to $158,702.

- extending the timeframe for which a complaint can be made to the Australian Human Rights Commission;
- clarifying that a complaint of victimisation can be considered as either a civil or criminal matter;
- clarifying that sexual harassment can be a valid reason for dismissal under the *Fair Work Act*;
- clarifying that the Fair Work Commission may make orders to stop sexual harassment in the workplace.

The Bill has passed both houses of parliament and is expected to be enacted shortly.

In January 2021, Safe Work Australia, published several guides to preventing workplace sexual harassment. In its guidance for small business, Safe Work Australia outlines seven steps to prevent workplace sexual harassment:

1. Create a safe physical and online work environment.
2. Implement safe work systems and procedures.
3. Create a positive and respectful workplace culture.
4. Implement (appropriate) workplace policies.
5. Provide information and training (on appropriate and inappropriate conduct).
6. Address unwanted or offensive behaviour at an early stage.
7. Encourage workers to report sexual harassment.
8. Respond to reports of sexual harassment.
9. Talk to your workers.[2]

It is clear that addressing sexual harassment in the workplace requires an holistic approach, that incorporates culture, policies, communication, training and responsive processes. The recent developments in this area of the law could present organisations with a good opportunity to introduce or refresh policies and procedures, employee training and other preventative measures.

[2] Safe Work Australia, *Preventing workplace sexual harassment – guidance for small business* (January 2021) <https://www.safeworkaustralia.gov.au/sites/default/files/2021-01/workplace_sexual_harassment_small_business_information_sheet.pdf>.

It is also important to note that the workplace could extend to remote working locations, places where a worker is engaging in work-related activities such as conferences, work trips and work-related social events and online.

Unfortunately, sexual harassment can and does occur within charities and not-for-profit organisations. Further, we are aware of sexual harassment continuing to occur during lockdowns through unsupervised online interactions between employees. Even small organisations should consider if employees could be vulnerable to sexual harassment and what measures should be implemented to reduce the likelihood of this occurring.

> ***Practical Tip: Separate Representation***
> Sexual harassment is an offence committed by organisations as well as individuals. Where an allegation of sexual harassment is made against an employee, an organisation should be very wary of engaging external lawyers to act on behalf of both the organisation and the accused individual as there may well be a conflict of interest.

4.5. Wages

Although many organisations intend to pay above the minimum wage prescribed under the *Fair Work Act* (currently $20.33 per hour) and the minimum rates set out in applicable Modern Awards, employers should regularly review employee award classifications, salaries and rates of pay to ensure that they are satisfying their minimum obligations.

National wage increases are usually introduced with effect from 1 July of each year, but in 2021 wage increases under certain Awards, including the *General Retail Industry Award 2020,* have been staggered to take effect at later times in the year.

> ***Practical Tip: Classification Errors***
> Recent instances of wage underpayments by some of Australia's largest businesses show that it is not enough for an organisation to rely on its payroll software, particularly where Modern Awards are unclear or where there are multiple ways of classifying a worker, whether as an employee or independent contractor, or as a permanent or casual employee.

> Organisations should conduct their own assessment using available tools such as the Fair Work Ombudsman's "Find my award" tool[3] and the ATO's "Employee/contractor decision tool"[4]. An organisation should then consider engaging an external advisor to review their decision.

Below are some examples of common wage disputes:

- an employee claims that they should be classified in a different way to the classification assigned by the employer;
- an employee claims that they are entitled to various payments under an award, including leave loading, overtime and allowances, even where the employee is paid well above the Award rate;
- a contractor claims that they are entitled to be paid superannuation;
- a casual employee claims that they are entitled to long service leave;
- an employee asks for payment of a discretionary bonus.

An employee's remuneration extends beyond salary and monetary allowances to non-financial benefits. In *Bradley v Solarig Australia Pty Ltd* [2021] FWC 2805, the employer withdrew an employee's use of a company car for personal use after he collided with a kangaroo while driving to work. The employee claimed that he had been constructively dismissed because, while his employment continued, the value of his remuneration had been reduced by around 15 per cent. The employee was successful, which shows that employers must be careful when withdrawing benefits, even if those benefits are not specifically part of a written employment contract.

4.6. Casual Employment

WorkPac Pty Ltd v Rossato [2020] FCAFC 84 is one of the most high profile of recent employment law cases. In that case, the Full Federal Court held that a casual employee was an employee who had *"no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work"*[5]. The Court found that Mr Rossato was a permanent employee, not a

[3] Fair Work Ombudsman, *Find my award,* < https://www.fairwork.gov.au/awards-and-agreements/awards/find-my-award/>.
[4] Australian Taxation Office, *Employee/contractor decision tool,* <https://www.ato.gov.au/Calculators-and-tools/Host/?anchor=ECDTSGET&anchor=ECDTSGET/questions/ECDT#ECDTSGET/questions/ECDT>.
[5] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, at [31].

casual employee (as classified by his employer), as he had a firm commitment to ongoing work. To add insult to injury, the Court found that certain entitlements (such as paid annual leave, paid carer's leave and payment for public holidays) were due to Mr Rossato and that his employer was not entitled to restitution or to set-off the payments made to him under the casual contracts of employment. That decision, as well as *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 rattled many employers as it created uncertainty as to the classification of casual employees and the potential liabilities of employers.

Postscript: The Full Federal Court's decision in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 was overturned by the High Court of Australia in August 2021 in its decision in *WorkPac Pty Ltd v Rossato & Ors* [2021] HCA 23. This decision has limited broader significance in light of the amendments to the Fair Work Act discussed below.

In response to the Full Federal Court's decision and prior to the High Court's decision, and following consultation between employers and employee representatives, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* was enacted and largely took effect from 27 March 2021. The amending act introduced a statutory definition of "casual employee" to the *Fair Work Act*, which focuses on the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work and provides that, the nature of the employment, whether casual or ongoing, needs to be determined at the outset, as opposed to relying on periodic assessments of the relationship as it develops over time. For the purposes of determining whether this criteria has been met, regard must only be had to the following circumstances prescribed by section 15A(2) of the *Fair Work Act*:

- whether the employer can elect to offer work and whether the employee can elect to accept or reject work;
- whether the employee will work only as required;
- whether the employment is described as casual employment; and
- whether the employee will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument (a Modern Award, an Enterprise Agreement, a workplace determination or a Fair Work Commission order).

This is intended to provide greater certainty to businesses, though the provisions are complex.

The new Division 4A of the *Fair Work Act* also imposes an obligation on employers to offer permanent employment to regular casual employees not covered by a Modern Award/Enterprise Agreement who have been employed for 12 months and who, during at least the last 6 months of that period, have worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time or part-time employee.[6]

However, an employer is not required to offer permanent employment where there are reasonable grounds not to, including if the position will cease within the next 12 months, the hours will be significantly reduced, there will be a change in the days or times the employee works which cannot be accommodated or the offer would not comply with a recruitment or selection process.[7] These provisions mirror the provisions already in place in many awards and are supported by a Casual Employment Information Statement published by the Fair Work Commission, which employers must give to casual employees upon the commencement of employment.[8]

Finally, the amending Act introduced a statutory offset mechanism so that employers will not have to pay twice for the same entitlements.[9] For example, this will protect employers from paying both a casual loading to employees and paid annual leave if the employees are later found to be permanent employees, rather than casual employees.

> ***Practical Tip: Review of Casual employment arrangements***
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> If your organisation has not already done so, now would be a good time for your organisation to review its casual employment arrangements and introduce systems to offer permanent employment to eligible casual

[6] See section 66B of the *Fair Work Act 2009* (Cth).
[7] See section 66C of *Fair Work Act 2009* (Cth).
[8] See section 125B of the *Fair Work Act 2009* (Cth).
[9] See section 545A of the *Fair Work Act 2009* (Cth).

employees and provide Casual Employment Information Statements to new employees.

4.7. Mandatory Vaccination

An emerging area of disputes relates to COVID-19 vaccinations and mandatory vaccinations generally. As at the date of this paper, the National Cabinet has mandated that all residential aged care workers must have at least received the first dose of a COVID-19 vaccine, whilst in NSW vaccinations for all school staff will be mandatory from 8 November 2021.

The position is less clear in other industries, but alongside the well-publicised decisions by large employers such as SPC, Telstra and Qantas to make vaccines mandatory, the Federal Government has indicated that employers are permitted to mandate COVID-19 vaccinations in the workplace if it is reasonable to do so in all of the circumstances, and that employers should take into account:

- public health advice;
- the industry in which the organisation operates and whether it is an essential service;
- the availability of vaccinations;
- discrimination law;
- an employer's consultation obligations, including under a Modern Award or Enterprise Agreement; and
- the extent to which employees are required to interact with other persons.

Although there is yet to be a mandatory COVID-19 vaccination test case, in April 2021, the Fair Work Commission handed down its decision in *Barber v Goodstart Early Learning* [2021] FWC 2156, which concerned a decision made by a not-for-profit organisation providing childcare and early learning to require all staff to obtain an influenza vaccination and its decision to terminate the employment of an employee who refused to be vaccinated.

In dismissing the unfair dismissal application, the Commission was careful to note that the decision was made on its particular facts:

> *"I note that curiosity surrounding vaccination is at an unnatural high; protection against COVID-19 is becoming a tangible reality for the population and guidance surrounding how this will be administered in the workplace is scarce. As will be seen from the highly detailed evidence below, this decision is relative to the influenza vaccine in a highly particular industry. While this may seem obvious to most, given the climate we find ourselves in, it feels appropriate to make this declaration."*[10]

Notwithstanding the caveat expressed above, the Commission provided the following guidance on what may constitute a reasonable and lawful direction:

> *"What can be considered reasonable will likely differ for each individual employer. So much is almost certain when considering the unique regulatory obligations and industry practices that an employer can face. This is only compounded by the case law, which provides that it is not the role of the Commission to interfere with the right of an employer to manager their own business. The choice of the employer need not be the most reasonable decision, but simply fall within the realm of reasonableness. Given that reasonableness is a question of fact and balance, it is difficult to predict what will be considered reasonable en masse."*[11]

In relation to the employer's decision, the Commission held that the policy was reasonable for the following reasons:

- it was made pursuant to the employer's legal obligations under work health and safety legislation and as a childcare provider;
- it was made pursuant to recommendations from various government institutions;
- the employer considered it necessary to ensure the safety and welfare of employees, children and their families; and

[10] *Barber v Goodstart Early Learning* [2021] FWC 2156, at [13].
[11] Ibid, at [309].

- the policy was reasonably adapted to employees because it allowed for medical exemptions.

Practical Tip: Alternatives to Mandatory Vaccination

The Australian government has placed the onus on employers to decide whether or not to mandate COVID-19 vaccinations for their employees, but it is not a decision that should be taken lightly and one about which reasonable minds may well differ. Before resorting to mandatory measures, charities and not-for-profits may be better placed to encourage workers to be vaccinated based on an ethic of care for the persons for whom the organisation caters.

5. Conclusion

Employment law is a complex area of law, which means that there are many ways in which disputes can arise. Understanding the legal framework, and having fair and reasonable employment contracts, policies and procedures in place will greatly assist charities and not-for-profits to prevent and manage disputes.

Practical Tip: Stay Calm and consider early intervention