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NSW Government CONNECT

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Inside this issue

Welcome

As this year draws to a close, it is a good opportunity to reflect on some of the employment law issues that have dominated the year.

This year has seen a public focus on appropriate behaviours at work. We began the year with a lot of media attention on workplace relationships – and the risks associated with "dating" colleagues. The year is now ending with a focus on sexual harassment at work. In both cases, we have seen persons in positions of influence and power falling short of the standards expected in today's workplace.

The management of mental health at work remains a going concern for HR and employment lawyers. We continue to see challenges to employer requests for further information about an employee's medical condition. The debate rages on with no appreciation for the benefits of cooperation.

Complaints of "bullying" remain prevalent. Though, in our experience, it is often a case of a misunderstanding or a disgruntled employee misconceiving reasonable management action. Responding to these complaints has its challenges.

In this edition of NSW Government Connect we tackle some of these issues.

Bartier Perry also finishes the year with a couple of notable additions to our team. In June 2017, we were joined by Darren Gardner and in October 2017 by Andrew Yahl. Darren has 25 years' experience in legal practice, and a wealth of employment law experience having acted for a number of NSW Government entities. A client has told us that Darren has an elegant way of finding solutions to complex problems!

From everyone here at the Bartier Perry Workplace Team, we wish you a Merry Christmas and Happy New Year. We look forward to working with you in 2018.

James Mattson
Practice Leader
Workplace Team at Bartier Perry

Secondary employment: the risks for employees working other jobs

Australia can be an expensive place to live. Earlier this year, both Sydney and Melbourne made it into the top six least affordable housing markets in the world. Cost of living expenses are increasing.

In that context, it is perhaps unsurprising that employees are increasingly working multiple jobs to make ends meet. While the endeavour is commendable, a number of risks arise from secondary employment.

In this article, we examine a few recent decisions of the NSW Industrial Relations Commission dealing with secondary employment. But first we examine the regulation.

The *Government Sector Employment Regulation 2014*

Clause 7 provides:

(1) A Public Service employee is not to undertake any other paid work without the permission of the agency head.
(2) This clause does not apply to a person who is:
(a) employed in casual employment, or
(b) working part-time,
during the period that the person is not required to perform duties in the Public Service, but only if the performance of those duties is not adversely affected and no conflict of interest arises.

The prohibition is clear, the exception limited to a discrete category of employee and the purpose of the regulation is apparent: to ensure safety, performance and impartiality. Many policies may contain similar expectations.

An employee must assist in managing secondary employment

Mr Phillip Grafton was a full-time employee of Waverley Council. During the day, he worked as a 'Public Place Cleaner'. Unbeknownst to the Council, Mr Grafton also worked full-time hours as a night-filler at Woolworths. Incredibly, he maintained these two full-time jobs for two full years before the Council realised.

It all came crashing down for Mr Grafton when he injured his wrist. Mr Grafton made a workers' compensation claim and the Council became aware of Mr Grafton's second job.

A significant risk of secondary employment is fatigue. Studies have shown that the effects of a lack of sleep are comparable to alcohol consumption. Employers would not allow an employee to attend to work under the influence of alcohol.

Wary of its own obligations, Council asked Mr Grafton to attend a fatigue specialist to determine whether his body could sustain his work schedule. If the specialist agreed that Mr Grafton's work hours were sustainable, the Council said it would consent to an application for secondary employment. Mr Grafton did not agree to attend. So, the Council terminated Mr Grafton's employment.

The Commission found that the dismissal was not harsh, unreasonable or unjust: *Grafton v Waverley Council (No.2)* [2017] NSWIRComm 1020. Mr Grafton's excessive work hours were not only a threat to himself, but potentially to others. For the safety of all involved, the Council had to deal with that threat and Mr Grafton would not co-operate.

A second job may mean you've given up your first job

In *Vassella v Ambulance Service of NSW* [2017] NSWIRComm 1018, Mr Scott Vassella, a manager of insurance claims at the Ambulance Service, suffered some stress from alleged mis-management. Mr Vassella filed a workers' compensation claim. That claim was approved and Mr Vassella began receiving payments. After obtaining a medical opinion that he was fit to work anywhere but at the Ambulance Service, Mr Vassella obtained a full-time position at Warringah Council. Mr Vassella did not seek the Ambulance Service's approval for this secondary employment. He also continued to receive workers compensation.

> A significant risk of secondary employment is fatigue. Studies have shown that the effects of a lack of sleep are comparable to alcohol consumption.

After about three months, the Ambulance Service found out about Mr Vassella's other job. Council terminated Mr Vassella's employment, saying that he had abandoned his employment.

Mr Vassella filed an unfair dismissal claim and lost. The Commission decided that getting a second full-time job (in direct conflict with his substantive employment) is pretty clear evidence that you've abandoned your first one.

A dishonest secret

Finally, we look to the unfair dismissal claim brought by Ms Khiloud Shakir, a disability care worker employed by the NSW Department of Family and Community Services: *Shakir v Department of Family and Community Services* [2017] NSWIRComm 1040.

In August 2014, Ms Shakir lodged a workers' compensation claim as a result of stress resulting from an altercation at work. She claimed total incapacity for work. Surprisingly, that 'total incapacity' did not stop Ms Shakir from securing other employment. She obtained a second job performing essentially the same role, but for a NGO.

Ms Shakir remained silent about her second job in all of her subsequent workers' compensation forms. She was paid for having total incapacity. So, when FACS eventually found out, Ms Shakir was dismissed.

The Commission found Ms Shakir's deceptive conduct to be fundamentally inconsistent with the relationship of honesty and trust required in employment. *"That conduct was misconduct", the Commission said, "[her] active deceit struck at the heart of the employment relationship"*. Ms Shakir lost her unfair dismissal claim.

Conclusion

Secondary employment is not a right. Employers have duties to protect the health and safety of all of their employees. Conversely, employees have important obligations including:

- to co-operate in managing safety;
- to fulfil their employment contract; and
- to act in the best interests of their employer, which includes avoiding conflicts of interests.

Secondary employment challenges these duties and obligations. Reasonable discussions about secondary employment and managing the above duties and obligations are necessary.

Managing risk and avoiding victimisation when responding to workplace complaints

When an employee lodges a bullying or sexual harassment complaint against a colleague, employers are faced with complex intersecting obligations and a need to act.

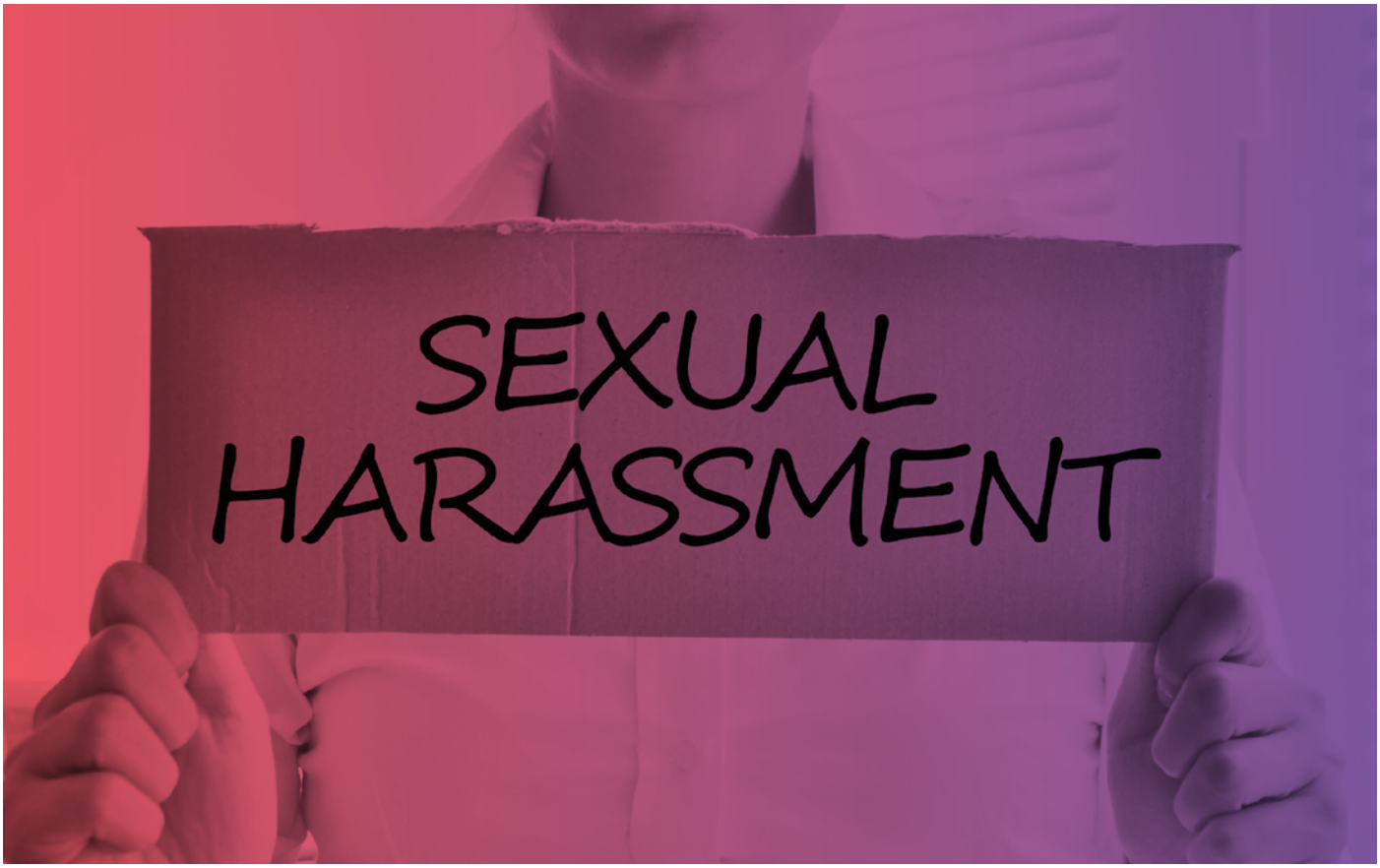
A workplace investigation will often be commissioned. The "accused" is usually entitled to a chance to respond. Employers will try to not prejudge the complaint. The employer must also ensure, so far as is reasonably practicable, a safe workplace for all while the investigation takes place. Work must continue. A risk assessment is undertaken and colleagues may be separated.

A recent decision of the NSW Civil and Administrative Tribunal in *James v Department of Justice, Corrective Services NSW* [2017] NSWCATAD 238 considered the difficult process of managing such an investigation and how steps, apparently taken in the interest of safety and investigation integrity, were nevertheless found to be victimisation under the *Anti-Discrimination Act 1977* (NSW).

The facts

Ms Rita James made a complaint of sexual harassment against her Director and employer, Corrective Services, to the Anti-Discrimination Board. Subsequent to this complaint Ms James then lodged a much larger complaint, a part of which concerned an allegation that *'during the night* [her Director] *put his hand on my backside and squeezed'.*

Ms James' treating doctor certified Ms James unfit for work unless Corrective Services could ensure that she did not have any contact with the Director. Corrective Services said that this could not be guaranteed. It was



thus determined that Ms James would not return to her original workplace until the investigation was finalised. Ms James was found an alternative position at another location, 35 kilometres away.

Corrective Services investigated Ms James' allegations of indecent assault and the allegations were found to be unsubstantiated.

After the investigation, Ms James was not returned to her original workplace because of safety concerns, including to not cause her distress should she have contact with her Director. Ms James was not returned to her original workplace even after her Director had himself been relocated to another area.

The dilemma

Ms James alleged that her treatment during and after the investigation, in being relocated to a different workplace and not returned, was detrimental conduct amounting to victimisation.

A natural tension arises. Complainants should not be treated differently for speaking up. Similarly, the accused should be presumed innocent until the facts are known. Most employers when confronted with a serious complaint would undertake a risk assessment and put in place interim measures to ensure immediate safety and workplace functionality. One such measure could include relocating the complainant, particularly in response to medical restrictions issued by their treating doctor.

There may be many reasons for implementing such interim measures including:

- to ensure safety (including mental wellbeing) whilst the investigation determines the veracity of the allegations;
- to preserve the integrity of the investigation process; and
- to balance business needs, ensure work continues and services are provided.

These were some of the reasons offered by Corrective Services in deciding to relocate Ms James. But was a reason for also relocating Ms James the fact she made a complaint?

The law

To be successful in a victimisation complaint, a person must be able to prove that they have been subjected to some detriment because they made a complaint or claim about conduct that would offend the Act: see s 50 of the Act.

Under the Act it is not unlawful to do something *"if it was necessary"* to do it because of a legal obligation under other legislation: see s 54 of the Act. In Ms James' case, Corrective Services said it was obliged to relocate Ms James because of its workplace safety obligations.

The outcome

Relocating Ms James to a workplace 35 kilometres away from her normal place of work was a detriment; it required her to travel an extra two hours a day. The sole issue in the case therefore was why did Corrective Services relocate Ms James during the investigation and not return her after the investigation?

Ms James made a complaint. But for the complaint, she would not have been relocated. However, did the making of the complaint motivate the actions of Corrective Services or was it other concerns, such as ensuring workplace safety, that were the reasons for relocating Ms James?

Corrective Services explained its decision as follows:

[It was] *further determined that the complainant could not be returned to the Complex due to the ongoing investigation into an alleged assault by the Director against the complainant*

…

Therefore, in accordance with the Respondent's WH and S obligations, relocation is also necessary to protect the integrity of the investigation process.

The Tribunal understood that message to mean that Ms James was not returned to her workplace because of her complaint.

> Complainants should not be treated differently for speaking up. Similarly, the accused should be presumed innocent until the facts are known.

The Tribunal rejected the defence that Corrective Services' actions were reasonable. Such a defence is not available under the Act, the Tribunal said. It was also not clear that relocation was necessary to ensure compliance with workplace safety obligations.

The Tribunal was not impressed with the need to ensure safety as a justification for the relocation. Apparently, Corrective Services had allowed the Director and Ms James to be in the same room during an interview process for a new role; undermining the safety concern. By inference, the Tribunal deduced there was no lawful explanation for not returning Ms James to her role, especially after the Director had moved.

The Tribunal found that Ms James was victimised and awarded her $20,000 as general damages.

Lessons

What is an employer to do in these circumstances? It is a difficult balancing act. There is a need to balance competing obligations, ensure a fair investigation process, provide a safe workplace and make sure the complainant is not victimised.

A lesson from this case is that automatically moving the complainant may not be the best response. Any measures taken should follow a proper risk assessment and consultation with those affected. Alternatives to relocating a complainant could be:

- managing working hours, access and exit from the workplace etc. to minimise interaction during the investigation;
- moving the employees to different areas or different levels in the same workplace;
- have supervised interactions and or appointing another employee to act as an intermediary between the parties;
- if there is a need for the parties to communicate about work matters having all communication through the intermediary; or
- following the finalisation of the investigation process, consider engaging in a facilitated workplace conflict resolution process or mediation.

Ultimately, the aim is to ensure a professional, safe and workable relationship. The making of a complaint and the outcome will inevitably cause tension and make the relationship difficult. But the complaint also presents an opportunity to move forward. By focussing on a measured and tailored response to a complaint and any perceived risks, employers minimise the prospect of a victimisation complaint.

"I'm sick ... and that's that" : Managing employee absences

Employees (and their unions) may sometimes hold the belief that an employer may not question their absence from work or challenge their medical certificate. *"It's my right to take sick leave",* they may exclaim.

A manager may fear challenging this employee, and prefer to not have a difficult conversation. Maybe they have heard an Industrial Commissioner say "[w]*here the certificate states that the employee will be absent on a particular date it must be assumed that the doctor found the employee incapable of working on the specified date".*

Employers do have the right to manage absences. To ensure business services are delivered effectively and efficiently, employers must manage resources (including staff) and discharge their legal obligations (including safety) with full and proper information to make the right decisions. Employees are obliged to cooperate.

Dishonesty and misuse ... an obvious basis to challenge

An employer may question absences and medical certificates in cases of suspected forgery or misuse.

Examples of misuse include employees:

- undertaking secondary employment whilst allegedly absent for 'viral illness';
- providing a medical certificate but attended a football match instead.

But be cautious to not jump to conclusions. An employee unwell for work (due to the anxiety and stress of the workplace) may nevertheless be fit to engage in other activities, such as appearing on the television show *'Beauty & the Geek'.*

Public functions and a contract to fulfill

Many government organisations have important statutory and public functions including to provide community services efficiently and at good value for residents and ratepayers. To discharge these functions it is necessary to manage employee absences and the resulting costs.

Underpinning every relationship is an employment contract. A commitment given by an employee to their employer is to attend work, as agreed, and to perform the duties of employment to the best of their ability, in the best interests of their employer.

Sick leave

Yes, an employee can be given leave from their contractual commitment, if sick. However, two important qualifications need to be made to that broad statement:

> firstly, sick leave is not an entitlement but a *contingent* benefit;
> secondly, sick leave is available when the employee is unfit to attend to duty because of illness or injury – that is, they may be ill or injured but still able to work.

Award entitlements and reasonable proof

An industrial instrument may say something about the requirement to provide proof of absence.

For example, the *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009 usefully provides that paid sick leave "is subject to the employee providing evidence which indicates the nature of illness or injury and the estimated duration of the absence"* (clause 80.6). And whilst there are some limitations on seeking *"evidence of illness"* for absences less than two consecutive working days (clause 80.1), it is apparent that employers:

> can question an absence claimed to be because of illness or injury; and
> are not limited in seeking appropriate and necessary additional information to discharge duties and responsibilities.

Workplace safety - a fundamental responsibility

An employer has a positive duty to ensure, so far as is reasonably practicable, the safety of employees and

others at work. To discharge this duty, an employer needs to be properly informed.

As such, it may be reasonable and necessary for an employer to require an employee (who is certified fit to return to work by their doctor) to undergo an independent examination by a company doctor. This is to ensure that the worker is not exposed to unacceptable levels of risk.

It is also important to keep in mind that employees have duties under work health and safety legislation. These duties include ensuring that their acts or omissions do not endanger them or others; and that they co-operate and comply with lawful and reasonable directions and policies of their employer.

The common law says

The common law implies into the employment contract a term:

… that an employer be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. Likewise, an employer should, where there is a genuine indication of a need for it, also be able to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness.

An employee who does not comply with such requests, may provide a valid reason for dismissal.

The answer is ... it is okay to (reasonably) ask questions

Yes, it is ok for an employer to ask questions. Indeed, an employer should do all that is reasonably practicable to ask and inform itself on employee absences from work to ensure that there are no work, health and safety risks.

So, when a Qantas captain challenged Qantas questioning his medical certificate and continued absence for mental illness, the Federal Court usefully observed:

An employee's statutory, certified agreement or analogous industrial award based entitlement to take sick leave does not displace the contractual relationship in which, at some point, the employer is entitled to make its own business arrangements to adjust for the impact that the leave caused by the sickness of the employment will have on it and to address its obligations under the Work Health and Safety Act

Of course, there are limits to what can reasonably be asked. If the sick leave absence is not work related, then it is rarely relevant what caused the illness or injury. It may also be unlawful to ask an employee to disclose their disability in circumstances where a person without a disability would not be required to do so.

Whilst not easy, managing absences is an important part of a manager's role. Knowing you may reasonably ask questions and manage any absence, gives confidence to do so.

It is consistent with employer duties of care though to reasonably ask an employee if they can safely perform the inherent requirements of their job. Where there is claimed incapacity, it will be reasonably necessary to ask whether any reasonable adjustments, or special services or facilities may be needed, so that the ill or injured employee can return to work safely or to decide if such accommodations would cause unjustifiable hardship to the employer.

Good management means asking the right questions

Whilst not easy, managing absences is an important part of a manager's role. We recommend:

- engaging with the ill/injured employee early and regularly (but not be harassing);
- talk to the employee (not just about incapacity but) about their fitness, and what they can safely do;
- where possible, liaise with them and their doctor, or other occupational health and safety experts, about a safe and healthy return to work (with any reasonable adjustments if necessary); and
- remember, the end goal, to achieve a timely, functional and safe return to work.

Managing absenteeism is difficult, but knowing you may reasonably ask questions and manage any absence, gives confidence to do so. If you would like advice on navigating these, and other obligations (such as discrimination), please give us a call.

A settlement is a settlement

We all have experienced the difficult disgruntled employee that consumes all the oxygen in the workplace and leaves HR and management with no time to get on with business. And despite no wrongdoing by the organisation, it eventually makes more sense to do a deal with the employee, end their employment and bring all the disputation to an end.

It has been said by many an Industrial Commissioner, the money spent settling such disputes is money well spent. There may be some truth to those words when considering the cost and legal expense in having to continue to manage and deal with them. Nevertheless, tensions about spending public funds when there is no wrongdoing remains a legitimate countervailing consideration.

Another factor against such "commercial" settlements is the fact that sometimes this disgruntled employee will not stop their pursuit regardless of what they are paid. They will complain and complain even after the ink has dried on the settlement terms.

A well drafted settlement document is vital. It is worth its weight in gold, as is demonstrated by these recent cases.

It's an abuse of process to bring another claim after settlement

We recently acted for the employer in *Fadheel v Douglass Hanly Moir Pathology Pty Ltd* [2017] FWC 3382.

Ms Fadheel brought a number of proceedings against her employer, including a bullying application. After a number of conferences before the Fair Work Commission, a settlement agreement was signed by the parties in February 2017. Under the agreement, in return for her resignation, Ms Fadheel was paid a significant settlement. She accepted the payment.

"Unbelievably, the ink was hardly dry on the terms of settlement when, just 13 days later, [she] *lodged* [another claim]", the Commission said exasperated. As the Commission observed, *"the terms of settlement could not have left the applicant (or anyone) with any doubt at all that she had agreed not to lodge or continue any claim".*

Ms Fadheel brought a new claim to challenge the cessation of her employment. *"Utterly appalling conduct",* the Commission said*, "for which [she] should be ashamed of".*

In that context, the Commission found the filing of the claim after the settlement was an abuse of process. The abuse is not only in the fact that the subsequent claim is made despite the settlement, but also that the claim is made to harass, and is harassing of, the employer. The Commission ordered Ms Fadheel to pay the company's legal costs on an indemnity basis.

Undeterred, Ms Fadheel commenced proceedings in the Federal Circuit Court. The Court dismissed her claim as having no prospects of success because of the settlement agreeing to release the employer from all claims: *Fadheel v Douglass Hanly Moir Pathology Pty Ltd* [2017] FCCA 2659.

"I was forced to sign"

Invariably, a disgruntled (and now former) employee will assert they were forced to sign the settlement agreement or were under some special disadvantage at the time of signing. These arguments are made in an attempt to set aside the deal. This was the allegation in *Valenzuela v Commonwealth Bank of Australia* [2017] NSWSC 1243.

In this case, Ms Valenzuela had settled earlier proceedings following court conducted mediation. In return for a payment, Ms Valenzuela released the Bank from all matters relating to the proceedings, her employment and its cessation. So, when Ms Valenzuela brought subsequent proceedings seeking damages relating to her employment, the Bank pleaded the settlement deed in defence.

The Supreme Court observed that it would not *"set aside the Deed of Release on the basis that there was some inequality of bargaining power".* It is normal for mediation, and settlement discussions, to involve some stress and anxiety and disparity of positions.

Equally, the mere fact that the Bank had two lawyers at the mediation and Ms Valenzuela was self-represented may have put Ms Valenzuela at *"some disadvantage"* but not a special disadvantage that would justify setting aside the Deed.

Ms Valenzuela complained that in the mediation she was threatened with the prospects to pay legal costs if she lost her case. *"There would in my view be nothing unusual or inappropriate in that subject matter being addressed* [in mediation]", the Court said *"even though that may appear intimidating".*

It is not enough for an employee to assert pressure or some disadvantage as an explanation for signing a settlement document. It must be established that as an employer, you made some unconscientious use of your superior bargaining power to the detriment of an employee who suffers from some special disability or disadvantage. In this case, Ms Valenzuela was not such a person.

This was also the outcome in Fadheel. Ms Fadheel argued that if she did not accept the settlement offered by the employer then her employment would have been terminated and she would not have received any compensation without pursuing a claim. The Court said the fact Ms Fadheel *"felt that she was under some pressure to enter into the [a]greement, … does not provide a reasonable basis for concluding that the agreement might be unenforceable".*

Tips for doing a deal

Any settlement will only provide peace of mind if:

1. You keep good records of the settlement discussions, including any evidence and observations that the settlement deal is freely entered into without disability.
2. You make sure the terms of settlement record all matters in dispute in the recitals to give full context to any release of claims.
3. The release clause itself deals with the subject matter covered by the release by specifically identifying each matter settled along with a broad release in respect of any matters relating to the employment, any entitlements and the cessation of employment.
4. You make the release effective immediately on signing (as the employee can sue for breach of the agreement if payment or other benefits are not provided).

Want to know more?

Our dedicated team of lawyers have a wealth of knowledge and expertise from working with NSW Government.

JAMES MATTSON

T 02 8281 7894
M 0414 512 106
jmattson@bartier.com.au

James has worked for Bartier Perry for over 15 years acting for all levels of government and private sector employers. James often appears as an advocate in cases and specialised in managing difficult employees and litigants. James is the author of the Employment Law chapter in the legal text, Social Media and the Law.

DARREN GARDNER

T 02 8281 7806
M 0400 988 724
dgardner@bartier.com.au

Darren Gardner is an accomplished and experienced senior lawyer who has advised employer clients in the private and public sectors for over 24 years on employment, industrial relations (IR), and work health and safety law. He is an Accredited Specialist in Employment and Industrial Law.

DEANNA OBERDAN

T 02 8281 7963
M 0402 233 669
doberdan@bartier.com.au

Deanna has gained a wealth of experience and knowledge in employment and industrial relations over the last 16 years, having advised a range of corporations on various employment issues and industrial disputes.

AMBER SHARP

T 02 8281 7885
M 0404 860 244
asharp@bartier.com.au

A self-confessed workplace relations nerd, Amber has over 15 years' experience as a workplace relations lawyer. Clients love her straight talking and solutions oriented approach. Amber is a strategic litigator who specialises in termination and discrimination disputes. Amber has extensive State government experience.

We believe in helping workplaces work and business and people prosper.

RYAN MURPHY

T 02 8281 7924
rmurphy@bartier.com.au

CLAIRE LIMBACH

T 02 8281 7967
climbach@bartier.com.au

DANIEL MACMAHON

T 02 8281 7814
dmacmahon@bartier.com.au

ANDREW YAHL

T 02 8281 7870
ayahl@bartier.com.au

Your thoughts and feedback

Thank you for taking the time to read our NSW Government Connect publication. We hope you found it informative.

If you have any comments on this issue, or suggestions for our next issue, we'd love to hear from you.

Please email **info@bartier.com.au**

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Our practice has corporate clients from a wide range of industry sectors, and appointments to statutory bodies from all levels of government.

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> Estate Planning & Litigation, Taxation, and Business Succession

> Workplace Relations

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Bartier Perry Pty Ltd
Level 10, 77 Castlereagh St
Sydney NSW 2000 Australia

DX 109 Sydney
PO Box 2631
Sydney NSW 2001

T +61 2 8281 7800
ABN 30 124 690 053
bartier.com.au