



MEMBER UPDATE

AFPA Industrial Dispatch #32 **31 July 2018**

Welcome to edition 32 of the AFPA Industrial Dispatch, a regular bulletin from the Legal and Industrial Team to keep our members up to date with significant industrial issues.

CURRENT SIGNIFICANT ISSUES

Commonwealth Ombudsman Reviews

In the financial year ending 30 June 2017, PRS finalised 348 Category 3 Code of Conduct allegations. 115 were established (33%).

Those employees received a minute from Professional Standards (PRS) informing them of the established findings. The last paragraph of that letter reads:

Should you be dissatisfied with the outcome of this complaint or with the complaint process, you may raise your concerns with the Commonwealth and Law Enforcement Ombudsman, who can investigate complaints about the actions of AFP members and about AFP policies, practices and procedures.

Some employees decided to take up the suggestion by writing to the Ombudsman, though we are only aware of very few cases in the last five years that the Ombudsman has decided to fully review.

We thought it important to alert you to the following paragraphs, that are taken from one letter from the Ombudsman explaining that his office would not review the concerns raised by our member [the emphasis is ours]:

Before turning to the details of your complaint it may be helpful if I first explain that the role of the Ombudsman's office is to assess whether an agency appears to have acted in accordance with the relevant legislative and administrative requirements, has given appropriate consideration to relevant information when making a decision and, in all the circumstances, the decision made or action taken was not unreasonable.

The Ombudsman cannot require or direct an agency take a specific action or make a specific decision. It is not our role, nor do we have the power to substitute a new decision or compel agency to take any action.

In our capacity as the Law Enforcement Ombudsman, we review the AFP's complaint handling processes and its internal investigations to ensure that the relevant policies and procedures are adhered to and that the outcomes are reasonable. We do not reinvestigate those matters or substitute our own view is for those arrived at in the initial investigation. It is not our role, nor do we have the power to substitute a new decision or compel the AFP to take any action.

Recall to duty whilst on leave

It is a timely reminder that during your period of approved leave you cannot be required or directed to perform duty or be placed on call, unless you agree to return to duty where it is deemed operationally necessary.

If in these circumstances you do return to duty, the recall to duty provisions do not apply as you are considered to be resuming duty in accordance with your expected or scheduled pattern of attendance.

No win-no fee lawyers - reminder

'No Win No Fee' lawyers are not always what they appear to be.

A 'no win no fee' agreement usually means that your lawyer will not charge you for professional fees and some expenses if your claim/suit is not successful. However, this does not preclude you from being liable for the other party's court costs. You may be liable for thousands of dollars in the event you lose your case and the presiding judge awards costs against you.

In addition to this, if you lose your case, the usual practice is that you will also be billed for your own disbursements and a range of associated costs for your case, including the costs of any counsel your solicitor has engaged. *Be aware that if you win your case your disbursements will usually not be recovered from the other party and possibly not all of your legal costs, hence you will have an out of pocket amount at the end of your matter.*

In addition, as advertised, if you do win your matter, you will be required to pay agreed fees, and legal costs are not automatically awarded or able to be awarded in every jurisdiction. You could still be significantly out of pocket.

We recommend you always examine any lawyer's 'no win no fee' policy and costs agreement very carefully and remember to read the fine print before you commence any legal proceedings.

Discrimination under the Fair Work Act 2009

AFPA Members are reminded that for discrimination to be found it must fall within one of the relevant Federal laws which prohibit discrimination.¹ Prior to making a claim of discrimination, it is important that a claim is recognised under the Federal laws and relevant case law. Unfortunately, making a complaint of discrimination is not likely to be recognised if the relevant legal tests are not satisfied.

The AFPA can assist Members if they wish to make a claim under the *Fair Work Act 2009* ('FW Act'), but claims made under other relevant Federal laws will likely require external advice at a member's own costs or contacting the Australian Human Rights Commission (AHRC) about your rights under the other Federal laws.

Section 351 (1) of the FW ACT does provide Members with protections against discrimination in the workplace based on a wide range of attributes including "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".

For discrimination to be found a Member must demonstrate that the employer has either: (a) dismissed them; (b) injured him or her in their employment; (c) altered their position to their prejudice, or (d) discriminated between them and other employees and have done this because of an attribute listed under s 351(1) of the FW Act.

The 'because of' is an important qualifier; members must be able to provide unequivocal evidence that the decision was made solely because of the attribute. If an employer can demonstrate that their decision was not based on a prohibited reason; in this case, an attribute under s 351 (1), then the Fair Work Commission or Federal Court will not find that you have been discriminated against.

¹ *Racial Discrimination Act 1975; Sex Discrimination Act 1984; Disability Discrimination Act 1992; Age Discrimination Act 2004; and Fair Work Act 2009.*

If you are being told otherwise or have any questions, please contact Anish (anish.prasad@afpa.org.au) or Matt (matthew.peterson@afpa.org.au) to discuss further.

INDUSTRIAL QUERIES

If you have any industrial queries or queries about issues raised in this Dispatch, please contact Sharon, Anish, Matt or Sam at afpa@afpa.org.au or call us on (02) 6285 1677.



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