IRS

Industrial Relations Society of South Australia Inc

NEWSLETTER

December 2014

A Quarterly Publication

SECRETARIAT

PO Box 2062
Port Adelaide DC, SA, 5015
Email: irssa@adam.com.au
Internet: www.irssa.asn.au
Phone: 1300 918 207
Fax: 08 8125 5631

Print Post Approved: PP535216/00024

PRESIDENT'S MESSAGE

Dear Members,

Again we come to the end of a busy and interesting year, including the eagerly awaited decision of the High Court of Australia in *Commonwealth Bank of Australia v Barker*.

The Committee of Management facilitated several first class events in 2014, including the successful Convention on 17 October. The Committee is committed to organising events of relevance and interest to its members in 2015. Further detail will be provided in due course, but this will include a seminar on 17 February 2015 on the *Return to Work Act 2014* at which the Honourable Attorney-General will speak. I sincerely wish you and yours a safe and enjoyable festive season and a happy, safe and prosperous New Year.

Craig Stevens
President IRSSA

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

Employer not liable for assault at Christmas Party

BY KYLIE DUNN, IRSSA COMMITTEE MEMBER

In *Packer v Tall Ships Sailing Cruises Aust P/L & Anor* [2014] QSC 212 the Queensland Supreme Court found that an employer did not breach its duty of care to one of its employees who was assaulted during the work Christmas function.

Facts

The plaintiff, Mr Packer, was employed by Commercial Waterproof Servicing Pty Ltd (**CWS**).

CWS held its annual Christmas function for employees and their families, including children, on board a catamaran operated by Tall Ships Sailing Cruises Australia Pty Ltd (**Tall Ships**). Another business group was also on board the cruise.

Alcohol was served aboard the vessel, as well as at the landing point which was also under the control of Tall Ships.

Upon re-boarding the vessel at the conclusion of the day, Mr Packer was struck by a passenger from the other group after requesting that they cease swearing.

Mr Packer brought a claim against Tall Ships and CWS in respect of the injuries he sustained as a result of the assault and sought damages for pain and suffering, special damages for future psychiatric treatment and loss of earnings. He claimed that both CWS and Tall Ships were liable to him for his injuries on the basis that they had breached their duty of care owed to him by failing to act with reasonable skill and care to protect him against the risk of such an assault.

Claim against Tall Ships

Mr Packer argued that Tall Ships ought to have been alive to the risks associated with alcohol consumption on board the vessel and should have taken specific steps to prevent the risk posed by the other group, including by monitoring their behaviour, ceasing service of alcohol and by engaging specialist crowd controllers or other security personnel.

The Court found that Tall Ships had not breached its duty of care. Having regard to the nature of the day trip, the likely agenda for the day's activities and the fact that the passengers included children and families, the Court did not think the risk of violent, quarrelsome or disorderly behaviour was a high one in the circumstances, and it was therefore unnecessary for Tall Ships to have taken such precautions as engaging specialist crowd controllers or security personnel.

Continues over

Further, the Court considered that the assault was unprovoked, instantaneous and unpredictable and there was nothing in the conduct of the assailant's group prior to the incident which suggested that the situation was likely to erupt into violence.

Claim against CWS

The Court was also not satisfied that CWS had breached its duty of care owed to Mr Packer.

The Court considered it unrealistic in the circumstances for CWS' duty to require it to audit the conditions on the day, particularly as there was no evidence that the director of CWS was aware of any risk of the kind which eventuated, and had no control over the other passengers or Tall Ships.

The Court found that in the circumstances it was unrealistic for CWS to reasonably foresee that a boisterous group of individuals could assault one of their employees.

Mr Packer's claim was accordingly dismissed.

Implications

This case serves as a timely reminder that employers must take reasonable care to comply with their duties owed to employees.

In this instance the employer escaped a finding that it breached its duty of care owed to an employee. However, had the plaintiff been assaulted by a fellow employee the outcome may have been different.

With the Christmas season fast approaching, employers should be mindful of having well drafted policies in place dealing with appropriate workplace behaviour, including at workplace functions and events where alcohol may be consumed. Employees should also receive appropriate education on these policies.

The newest hot-shot industrial relations advocates hit Adelaide's streets

BY PETER HEALEY, LAWYER, COWELL CLARKE LAWYERS

Watch out South Australian employers and employees; a new group of highly trained industrial relations advocates have entered the market!

In October 2014 lawyers, barristers, union officials, human resources specialists, and consultants undertook vigorous advocacy training in the Fair Work Commission, as part of the Australian Labour and Employment Relations Association (ALERA) Industrial Advocacy Program**.** The training drew upon the wealth of knowledge and expertise of Commissioner Peter Hampton, Senior Deputy President Karen Bartel, former Senior Deputy President Brian Lacy and renowned industrial barrister Chris O'Grady.

Day one involved a theory component addressing everything from seeking permission to appear, adjournments, witness examination, opening and closing submissions, rules of evidence (insofar as they are relevant in the Commission), and other practices and procedures. Days two and three allowed participants to hone their advocacy skills in simulated proceedings including unfair dismissals, general protections claims, applications to stop industrial action, jurisdictional objections, majority support determinations, conciliations, and approval of enterprise agreements.

We were treated to some invaluable tips throughout the training, of which I will share my top 5 nuggets of wisdom:

1. Know if and when you need to seek permission to appear. The right to appear is not automatic for lawyers and paid agents, and they should have regard to the criteria in section 596 of the *Fair Work Act 2009* (Cth) when seeking permission.

2. Prepare written submissions where possible. This allows you to provide something tangible to the Commission member to refresh his or her memory if drafting the decision at a later date; and also offers a great plan B for your client in case you do not receive permission to appear on their behalf.

3. Always revert back to the statutory criteria. It is easy for parties to get involved emotionally in employment disputes. However, it is important to remember that the Commission is there to apply the wording of the Act to the circumstances of the case.

4. Do not be afraid of questions from the bench or to hold your ground. It was made clear that questions can sometimes be an indication that the Commission member agrees with your argument, but is trying to explore whether there are holes in that reasoning.

5. Remember to put forward evidence relevant to the remedy being sought. This may seem like an obvious point, however a surprising number of applicants do not put forward evidence of loss or mitigation of loss.

Overall the course was a tremendous success and acknowledgements should be given to ALERA, the Industrial Relations Society of South Australia, our esteemed experts, and the witnesses who volunteered their time.