Greg Reiffel: Tel: 0438 906 050 E-mail; greiffel@bigpond.net.au

Employee Relations News

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Welcome to Edition number 10! I started these newsletters as an exercise in self-discipline to ensure that I analysed the latest cases, not so much as an IR practitioner, but from the perspective of an HR generalist. It also has provided me with a platform to voice my own frustrations in what is not a perfect system. I now have some **500 readers**, who I genuinely hope benefit from my humble efforts.

Unfortunately, I am currently searching for work. I would be grateful for any leads you may have☺.

Fast fact:

FWO inspectors are able to issue on-the-spot fines of up to $2,550. Where the FWO takes legal action, each contravention can attract penalties of up to $51,000 for companies and up to $10,200 for individuals.

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- If you picket, it won't heal: High Court decision on "scabs";
- New employer takes over contract: right to redundancy?
- Assault on an Aged Care resident by employee leads to termination, but no smoking gun.
- Union appeal on EBA given the BOOT.

If you picket, it won't heal: High Court decision on "scab".

In this long running dispute between BHP Coal and the CFMEU [1] over a picket line and actions by participants in the dispute, BHP has "taken it all of the way" to the High Court of Australia…and lost.

The central case being that BHP Coal sacked a worker on the picket line because he waved a sign stating "No principles Scabs No guts".

The HC found that the sign having been supplied by the Union, and thus was furthering the cause of the campaign the union had against BHP Coal was tantamount to breach of the FWA's "lawful union activity" provisions.

It should be noted that the Justices utilised the HC's previous decision in "Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]".

[1] Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA 41 (16 October 2014)

Commentary: The moral of this story is that if you are nice to your union organiser, they (maybe) nice to you. However, there is an old truism in IR, "you get the union you deserve".

New employer takes over contract: right to redundancy?

In this matter[2], a security contractor lost the contract to another security firm.

The main thrust was that the losing bidder did not pay redundancy to employees that had successfully gained employment with the new employer.

Long story short, the applicant partially succeeded because she was able to demonstrate that the previous employer did little to gain employment and no benefits were transferable to the new employee:

The Commissioner made reference to the decision in *National Union of Workers v Tontine Fibre* where the Full Bench stated:

> *"The onus of establishing that the alternative employment in question is acceptable rests with the applicant employer. In order to establish whether the alternative employment obtained by the employer is acceptable it is necessary to have regard to such matters as pay levels, hours of work, seniority, fringe benefits, workload and speed, job security and other matters (including the location of the employment and travelling time). It is also quite clear from the text of the provision that the Commission may remove the employer's severance benefit obligations completely or may simply reduce them."*

And therefore concluded:

> *" However, I am also satisfied that the circumstances involving Ms Denise Pickering warrant further consideration, based on her own evidence and the acknowledgements made by FBIS in its submissions about her situation. She has clearly been engaged by ACG on a level of salary that is substantially below what she was paid when employed by FBIS. Whilst reluctant to single out particular employees I am satisfied her circumstances warrant differential treatment. It is difficult to be precise about how her situation should be dealt with, however, I am satisfied it is appropriate to provide her with a redundancy entitlement based on her length of service with FBIS, but to reduce that entitlement by* ***50 percent of what it would otherwise be*** (my emphasis).

Commentary: One wonders whether the cost and bother was worth the effort. But nonetheless, employers should seek advice prior to any redundancy, as it is a minefield within the minefield of dismissal laws.

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[2] FBIS International Protective Services (Aust) Pty Ltd (C2013/7271) [2014] FWC 1922 COMMISSIONER GREGORY

Greg Reiffel: Tel: 0438 906 050 E-mail; greiffel@bigpond.net.au

Assault on an Aged Care resident by employee…no smoking gun.

The Applicant v The Nursing Home (U2014/10215) [2014] FWC 6855 SENIOR DEPUTY PRESIDENT O'CALLAGHAN.

This case relied upon the word of one person against the other – both seen as "credible witnesses" by the SDP – and involved the alleged slapping of a resident.

This employment termination followed advice provided to the Nursing Home management on 29 May 2014 from another Nursing Home aged care worker, Ms X that, on 27 May 2014 she was working with the Applicant when she heard a slapping noise and the applicant subsequently said that she had slapped a Nursing Home resident in response to being slapped by the resident. The Applicant was suspended with effect from 29 May 2014. The allegation was subsequently reported to the police.

In determining the Applicant's conduct the SDP applied the long established approach in *Briginshaw v Briginshaw*:

> *".... The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found...It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues.... (References removed). But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected."*

And concluded:

> *"On very fine balance I have concluded that the evidentiary material before me was insufficient to establish to the degree necessary, a finding that, on the balance of probabilities the Applicant hit the resident. I have reached that conclusion because of the clear conflict between the evidence of the Applicant and Ms X, and the lack of any corroborating evidence to support the proposition that the Applicant hit the resident. In the circumstances before me, the approach in Briginshaw favours a finding that misconduct of the nature alleged has not been established on the balance of probabilities."*

The SDP left it up to the parties to determine whether reinstatement was appropriate, or such other remedy.

Commentary: Here is a perfect example of the laws of employment colliding with other legal obligations of the employer. In this matter, the employer obviously took the word of one employee other that of the other. This had serious ramifications for the dismissed employee, including police action and (if registered) de-registration.

As there had been no previous behavioural issues with the dismissed employee, perhaps a reinforcement of the code of conduct may have been more appropriate?

Union appeal given the BOOT.

This was an Appeal [3] by the TWU against the decision [2014] FWCA 3338 of Deputy President Sams involving the approval of an EBA.

The Agreement covers 69 casual employees engaged as bus drivers, bus supervisors or administration staff. The bus drivers transport physically and intellectually disabled school aged children between their homes and their schools. A bus supervisor is required to accompany each bus driver on every trip.

The Union's argument being that the EBA did not pass the Better Off Overall Test (BOOT) and was therefore not in the public interest with the main abjection being the "split shifts". The appeal was not granted, but the Full Bench affirmed the original find that the following matters can be "off-set" as being in favour of the employees.

The Deputy President made the following findings in relation to the BOOT:

> *"There is no doubt that the Commission may take into account non-monetary benefits under an enterprise agreement when assessing whether the BOOT is satisfied (supra above). In this case, I accept that non-monetary benefits include the following:*
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> > *(a) A Bus Driver commences his/her shift from home. As the Union conceded, this is an unusual feature within the bus transport industry. For most other operators, a driver's travelling time, to and from the depot, is in their own time. Under this Agreement, Bus Drivers have the convenience of starting and finishing their shifts from home. While I accept the advantage will vary according to distances from home and the first pick-up and last drop off, on any view, this arrangement is a significant benefit.*
> >
> > *(b) The bus may be used, with permission, for personal purposes. While I was provided with no evidence as to the extent of takeup of this concession, there is no doubt that this is a benefit; albeit a relatively modest one.*
> >
> > *(c) For those employees (25) whose primary employment is with Education Queensland, having the use of the bus to drive to and from their job at the school where they take the children is a further non-monetary benefit.*
> >
> > *(d) Split shifts vary from 50 minutes to 4 hours. As most of the Drivers are not required to work the minimum engagements of 2 x 2 hour engagements a day, they are free to return home without working the balance of the engagements.*
> >
> > *(e) All drivers are provided with a mobile phone, which they can keep if replaced.*

[3] Transport Workers' Union of Australia v Jarman Ace Pty Ltd T/A Ace Buses (C2014/4889) VICE PRESIDENT CATANZARITI' JUSTICE BOULTON, SENIOR DEPUTY PRESIDENT, COMMISSIONER CAMBRIDGE

As to monetary benefits, it is clear, as the Union accepted, that the rates under the Agreement are higher than under the Awards. The differential for Bus Drivers is 4.3% and for Bus Supervisors is 0.5%. I note that the pay rates are to be annually adjusted in accordance with the Commission's Minimum Wage Review Decision."

Commentary: This is obviously a case where the union was not supported by the workers, given that to get to the stage of union intervention; the EBA had followed due process and would have been voted in. And to do so, meant that the employer had positive relations with its workforce.

Until next time…

Greg Reiffel