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**Employee Relations News**
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In this edition, I have published three decision commentaries that I thought may be of interest to my readership friends, including:

- Go straight to jail, do not collect…anything.
- Drug and Alcohol testing – the FWC's view.
- Two into one won't go – how to conduct a redundancy.

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

***Fast fact:***
In its first annual report since the introduction of the new Anti-bullying provisions, the FWC has had 197 "stop bullying" applications to:

- 59 applications withdrawn with case management team or with Panel Head prior to substantive proceedings.
- 34 applications withdrawn prior to proceedings
- 63 applications resolved as a result of a listed conference, hearing, mention or mediation before a Commission Member or listed mediation by a staff member.
- 20 applications withdrawn after a conference or hearing and before decision
- 21 applications finalised by decision

## Go straight to jail, do not collect…anything.

In this matter [1] an ATO employee was sacked due to his being convicted of two counts of indecency on a person who was under 16 years of age outside of Australia. At the time of the hearing the Applicant was in jail.

The ATO terminated the Applicant's employment because he breached the APS Code of Conduct.

> *"The APS employee must at all times behave in a way that upholds the APS values and the integrity and good reputation of the APS"…and "that the APS has the highest ethical standards".*

The ATO submits that the Applicant was not dismissed because the imprisonment resulted in the termination of the employment contract by reason of its frustration.

The Applicant protested his innocence and intention to appeal the convictions (although no appeal had been lodged at the time of hearing). He also relied on a number of arguments, including that the convictions had no link to the employment relationship, the conduct occurred outside Australia and was in an exclusively private context.

***Frustration of Contract***

The DP found against the ATO on this point (therefore making providing him with jurisdiction to hear the matter under the unfair dismissal provisions, because:

[1] Kevin Cooper v Australian Taxation Office [2014] FWC 7551 (U2013/15300) DEPUTY PRESIDENT LAWRENCE

> *"In the circumstances of this case, it seems to me that the submission must fail because the contract was, in fact, still in operation at the time of dismissal on 11 October 2013. The Applicant was suspended from duty on 21 December 2012. On 23 January 2013 he was advised of an internal investigation and accessed his leave. The suspension was re-confirmed in March 2013, after sentencing. The Applicant then cooperated, especially thorough his solicitors, in the investigation carried out by Roy Davey for the ATO. The Applicant did what he was required to do by the ATO, consistent with the contract. I find therefore that the contract of employment of the Applicant was not frustrated and was still on foot and capable of being performed at the time of the dismissal."*

Put simply, the Applicant was not incarcerated at the time of the dismissal, and so technically could still work.

***Valid Reason***

However when it came to the merits of the application, the SP found (in citing other precedents):

> *"A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal."*

The SP also drew the distinction between private and public employment, stating:

> *"It seems to me that the general approach of the Commission…needs to be applied so that the test is appropriate to the circumstances of the employment relationship. Private, for profit employment will be different to the school situation…In this case, public sector employment is under consideration."*

And,

> *"The Applicant's convictions were for a serious offence which was clearly unethical. I find that the Applicant was in breach of the Code of Conduct.*
>
> *"I accept also that public sector employment has a special value. This is particularly so with an agency like the ATO which must maintain the confidence of the general public in dealing with their taxation and financial affairs."*

As such,

> *"Given the nature of the employment and the convictions in this case, the action taken to dismiss by the ATO, is in my view…*
>
> - *Convictions for such unethical actions caused serious damage to the employer/employee relationship.*
> - *The employer's interests and reputation, as summarised in the Code, were potentially damaged.*
> - *The conduct was incompatible with the employee's duty as an employee especially as his position involved supervision of other employees."*

The SP concluded:

> *"Having found that the Applicant's convictions put him in breach of the Code, I find that the ATO's action in carrying out a formal investigation and ultimately dismissing the Applicant was a reasonable response to a difficult situation. I find that, in the circumstances of the case, there was a valid reason for the dismissal of the Applicant."*

**Commentary**

There appears to be three main points to taken away by this decision:

1. The Applicant was technically employable at the time of the dismissal, so the "frustration" argument failed.

2. The policies and codes of conduct carry great weight -including the words "at all times" imposing into the private life of the employee.

3. (Apparently) there is a distinction between the conduct of a private sector and public sector employee.

## Drug and Alcohol testing – the FWC's view.

In this "dispute resolution" [2]the employer's (DP World) drug testing regime was objected to by the unions (MUA and TWU). There were also a number of technical issues, but the crux of the dispute was:

Saliva v urine testing; and

Two strikes and you're out (current), three strikes and you're out (union position).

The DP examined this case in great detail citing medical opinion on each drug group, and the contradictory opinions of the benefits of saliva v urine testing. Further commenting on what should happen when a "non-negative" result is found.

After weighing up (quite a number of pages) all the pro's and con's, the DP found (in part):

- *The method of testing for drugs in an initial random test (initial test) and a second test designed to confirm the results of the initial test (confirmatory test) is to be by way of oral fluid and not urine.*
- *Confirmatory tests for drugs are to test for the same drugs as the initial test.*
- *In the circumstance that an individual returns a non-negative result in an initial and confirmatory test it would not be unjust or unreasonable for testing of that individual to be undertaken from time to time for a period of 6 months after return to work utilising oral fluid testing.*
- *It is not unjust or unreasonable for a MUA delegate not to be present to observe the conduct of the random selection of individuals for testing undertaken by an independent third party provider using the Randomiser App.*
- *In relation to disciplinary policy clause 6.5 of the Policy is not unjust or unreasonable in providing for "appropriate disciplinary action". DP World*

[2] **The Maritime Union of Australia v DP World Brisbane Pty Ltd; DP World (Fremantle) Limited; DP World Melbourne Limited; DP World Sydney Limited** (C2012/1405) [2014] FWC 1523 DEPUTY PRESIDENT BOOTH

> *should not rigidly apply any arbitrary rule concerning disciplinary action such as "two strikes and you are out" or "three strikes and you are out".*

**Commentary**

Drugs and alcohol in the workplace is not a new issue. Testing now has a national Standard, this is relatively new.

Employers should protect themselves from unsafe workers (drug affected individuals) by having in place:

- Policies adopting the employer's stance on such matters (ie I have seen "instant dismissal" to "rehabilitation"). These policies should be implemented in a fair and constant manner.
- Contracts of Employment should allow for random drug testing/medical screening or at least where there is a "reasonable suspicion" that the employee may be medically unfit to work.
- Induction programs should emphasise the consequences of policy breaches.

## Two into one won't go – how to conduct a redundancy

Fundamentally this matter [3] was the result of a restructure where two employees were undertaking duties that the company determined only required one person.

In short the company relied on external benchmarks that suggested a workers' compensation claims case manager should be able to manage approximately 80 claims, whereas the total of claims open at the time of the review that were being handled by the two positions was only 63. A decision was therefore made by the business to make one of the two positions redundant.

The Applicant argued that it was not a genuine redundancy because:

- The work he previously performed was still being done by the other remaining Workplace Injury and Return to Work Coordinator, Ms Mathieson. This demonstrated, he submitted, that the employer had not decided that his job was no longer required to be performed by anyone.
- In deciding to make his position redundant, Menzies wrongly compared his job, and workload, to that of a Case Manager, when the role of a Case Manager was significantly different in nature and not fairly comparable.

I have provided the actual wording of the decision, as is an exemplary example of how to undertake "procedural fairness":

> *On 22 July 2014, Mr Low was invited by email to attend a meeting with Mr Borg at about 4:30 pm. He was not advised of the purpose of the meeting. When he attended the meeting, Mr Allan was present. He was advised that it was likely that he would be made redundant, and would need to meet with Mr Borg at 9:00 am the following day. He was handed a letter bearing that day's date, which stated (omitting formal parts):*

[3] **Tebikenibeu Low v Menzies Property Services Pty Ltd** (U2014/11250) [2014] FWC 7829 VICE PRESIDENT HATCHER

> *"The purpose of this letter is to advise that the Company has undertaken a recent review of its operational requirements in light of various cost and profitability issues facing the business.*
>
> *As a result of this review, the Company is considering a restructure which we anticipate will involve the position of RTW becoming no longer required by the company.*
>
> *Unfortunately, a potential outcome of this restructure is that your position may be redundant. Your position has been selected taking into account the needs and objectives of the business.*
>
> *We are giving consideration to whether there are any other available positions in the business or associated entities for which you are qualified and suited. At this stage, we have not been able to identify any available positions.*
>
> *However, we would first like to consult with you regarding the potential redundancy including any measures that may be available to avert or mitigate adverse effects on you.*
>
> *Therefore, I am advising you that a meeting will be held with you at 9 am Wednesday 23rd July 2014 at the Kensington Office to discuss these matters.*
>
> *Subject to the consultation process, your employment may be terminated by reason of redundancy."*

*Mr Low met with Mr Borg the following day at 9:30 am as directed. He brought Ms Lucy Gildersleve with him as a witness.*

*Mr Borg advised Mr Low that he has been made redundant effective immediately.*

*Later on 23 July 2014, Mr Low was provided by Menzies with a termination letter bearing that day's date and signed by Mr Borg which stated (omitting formal parts):*

*Mr Low submitted that his dismissal was not a case of genuine redundancy for*

*I will deal with these submissions in turn.*

*I reject the first submission. It is well established that the fact that the duties of a particular job or position which has been abolished have been re-allocated to another position or positions as part of an employer's restructure does not alter the fact that the employer no longer requires that position or job to be performed by anyone. Here, Menzies had two positions of Workplace Injury and Return to Work Coordinator. It has decided to abolish one of those positions, and have the holder of the remaining position perform all of the work previously done by both the position holders…*

***The second submission is not relevant to my consideration. It is not the function of the Commission, in determining whether a dismissal is a case of genuine redundancy, to form a view about the merits of the decision to make a position redundant. Whether it was objectively fair or justifiable to decide to abolish a position is beside the point, as long as the employer acted as it did because of changes in its operational requirements**. [My emphasis].*

*I find that Mr Low's dismissal was a case of genuine redundancy. His application must therefore be dismissed, and I so order.*

**Commentary**

- The most interesting part of this decision is that the employer undertook a formal "spill" of positions and subjected the employees to interview for the one job. Thus pitting one employee against the other.
- The company also used very good procedures to ensure that procedural fairness was applied.
- And finally, we now have a benchmark for the number of RTW coordinators we need!

***Until next time…***

**Greg Reiffel**