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Employee Relations News

Edition 15 **23 January 2015**

Well, it's been a busy start to year with your kind offers of contract work. Over the past month I have:

- Assisted a company with restructuring.
- Reviewed and completed the application documentation for an EBA.
- Produced an "Employee Life-cycle" manual for a peak employer body for their web-site, with associated policies, templates (including letter of offer and contracts, fact sheets, and legislation).

That's what I love about HR, it's so diverse – never a dull moment ☺

Remember, I am currently searching for permanent or contract opportunities. I would be grateful for any leads you may have ☺ I also would greatly appreciate if you could pass this newsletter on to your business contacts**.**

I recently attended an interview, with one of the "behavioural" questions being "how would I handle a **conflict between two workers**". The answer it would appear is to sack one. See the opening case for more details.

In this edition I have also examined (in brief):

- ***"No Child left Behind"* policy breached – Bus driver loses job & unfair dismissal**[1]
- **Inherent requirements of the job**[2]
- **0.022 "bloody idiot" dismissal upheld**[3]

Fast fact:

Figures released by the FWC related to **"stop bullying orders"** July to September 2014 (latest):
*189 applications, 15 decisions, zero granted.
*Applicants alleged bullying by: Worker alleges unreasonable behaviour is engaged in by: their manager (126), another worker (40), a group of workers (13), A subordinate (1), another individual (not employed or engaged by their employer or principal i.e. a visitor to the workplace) (8), and Unknown/unclear (26).
This is addition to the first half of 2014, the Commission:
*Received more than 100 000 unique website hits regarding anti-bullying;
*Dealt with more than 3500 telephone inquiries; and
*Processed 343 applications. Source FWC reports.

1 Curtis v Transit Australia P/L t/a Sunshine Coast Sunbus U2014/12466, [2014] FWC 8679, Hamilton DP
2 Alcock v TNT Australia P/L t/a TNT Express. U2014/11580. [2014] FWC 9120. Wilson C

3 Brazell v Viterra Limited. U2014/4777. [2014] FWC 9271. Steel C

Full Bench of FWC recognises employee conflict can have adverse effects on business productivity[4]

In this matter, the Full Bench dismissed the appeal, thereby upholding the original decision by Watson, VP that the employer did fall foul of the unfair dismissal laws in sacking one of the two employees who just could not play well together.

An overview being:

- Ms Lumley was dismissed by Bremick on 3 March 2014 arising from interpersonal workplace conflict between her and another employee, Ms Nikki Cook, which had begun about a year before.
- Ms Lumley and Ms Cook worked in a small office together, and the breakdown in their relationship had a direct impact upon the efficient and appropriate performance of their work functions including their relations with Bremick's clients.
- Ms Lumley made a formal complaint alleging bullying on the part of Ms Cook in July 2013, but after an investigation the complaint was concluded to be unsubstantiated.
- The manager responsible for Ms Lumley and Ms Cook, conducted a mediation to try to resolve the conflict between them after the completion of the bullying investigation. This led to Mr Jamieson setting out work procedures which he expected Ms Lumley and Ms Cook to follow in order to avoid any conflict.
- One of these procedures was that if either of the two employees encountered any difficulty with the other, it was to be referred to Mr Jamieson in the first instance for him to deal with rather than being taken up directly with the other employee.
- The procedures were accompanied by written warnings to both Ms Lumley and Ms Cook that any failure to comply might lead to disciplinary action being taken including dismissal.

This did not succeed in resolving the conflict. Further issues arose between them, and Ms Lumley was given a further and verbal warning in August 2013. In September 2013, after yet another workplace altercation between Ms Lumley and Ms Cook, Ms Lumley was issued with a final written warning. The warning letter, dated 27 September 2013, stated among other things that:

> *"This is a final warning letter. If significant improvement in your conduct is not achieved your employment may be terminated. To reiterate, our expectation is that you comply with the mediation work practices as set out at the last mediation meeting 5th July 2013. Copy of these work practices attached."*

On 26 February 2014 there was a further altercation between Ms Lumley and Ms Cook. On Ms Cook's own version of events, she was aggrieved because she believed Ms Lumley had performed a work function which was within her (Ms Cook's) province. Ms Cook then directly challenged Ms Lumley about this, and an altercation followed which was then reported by a third party to Mr Jamieson. Ms Cook subsequently also went to Mr Jamieson and said that she thought she had no option but to resign, but Mr Jamieson dissuaded her from this course.

[After an investigation] Mr Jamieson then called a witness into the meeting, and proceeded to dismiss Ms Lumley with immediate effect. Bremick paid her one month's salary in lieu of notice together with her accrued leave entitlements. Ms Lumley was successful in obtaining new employment within a few days, albeit at a somewhat lower rate of pay.

In relation to the question of whether there was a valid reason for the dismissal, the VP' conclusion was:

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[4] Jacqueline Lumley v Bremick Pty Ltd Australia t/a Bremick Fasteners [2014] FWCFB 8278, HATCHER, VP; GOSTENCNIK, DP; RYAN, C. Appeal against decision [PR553108] of Watson, VP U2014/5867

> *"In my view, the reason for the dismissal was a valid reason and was soundly based on the conduct of Ms Lumley. The interpersonal relationships and the tension between the two employees and the comments they made to each other, if they were isolated one-off events, would not warrant termination of employment. However, as there was a course of conduct, repeated conduct, of a similar nature that arose from the friction between them, and clearly involved inappropriate conduct by Ms Lumley towards Ms Cook, in my view there was a valid reason for the dismissal."*

and

"… the issue of whether the reason for termination, which I found to be a valid reason, is nevertheless sufficient to terminate the employment in all circumstances of the case. In my view, it was open to the employer to take the decision to terminate Ms Lumley's employment because of the view that Mr Jamieson took that the interpersonal situation was not improving…"

The Full Bench found:

> *"It is clear that the appellant would have preferred for there to have been a finding that Ms Cook was principally at fault in the conflict. However that was never on the cards because, firstly, the evidence adduced by both sides was far too superficial such as to permit the kind of micro-analysis of events that would have been necessary to make a finding of that nature, and secondly, the making of a finding attributing primary responsibility for the conflict was simply not required in order to determine whether there was a valid reason for the dismissal…"*

Commentary

I think this was pretty much the answer I gave at the interview ☺. The Manager followed procedural fairness which is crucial in these matters.

Fast Fact

Safe Work Australia has released the Australian Workers' Compensation Statistics 2012-13 report.
Key findings from the report include:
-There were 117 815 serious workers' compensation claims.
-Males accounted for 63 per cent of serious claims , despite males comprising 52 per cent of the workforce.
-The average age of an employee with a serious claim was 42 years old.
-Labourers had the highest incidence rate of serious claims of all occupations —more than twice the national rate.
-The Agriculture, forestry & fishing industry had the highest incidence rate of serious claims by industry—nearly double the national rate of 11 to 1.

To view or download the report visit the Safe Work Australia website.

In brief…

***"No Child left Behind"* policy breached – Bus driver loses job & unfair dismissal[5]**

- Bus driver summarily dismissed for refusing carriage to young person in contrary to respondent policy 'no child left behind'.
- Commission found applicant breached policy.
- Valid reason for dismissal [as] employer's policy was lawful and reasonable.
- Application dismissed.

Commentary

This is just one important reason to have enforceable policies that are communicated to all employees.

Inherent requirements of the job[6]

In what appears to be a common theme from the FWC of late, if you can't meet the job requirements, the FWC can't help:

- Applicant suffered from injuries which restricted physical abilities
- Results from physical and functional assessment demonstrated applicant unable to perform heavy lifting duties.
- Found that respondent investigated whether any suitable alternative roles available.
- Unable to offer suitable alternative.
- Requirements of position were predominantly composed of manual tasks.
- Respondent's requirements for those tasks set out in **document outlining physical demands** [my emphasis].
- Practical method of determining whether or not requirement inherent to ask whether position would be essentially the same if requirement dispensed with.
- Inherent requirement includes ability to perform duties without unreasonable risk to health and safety or health and safety of others.
- Commission found applicant unable to perform inherent requirements of position. Satisfied valid reason for termination, dismissal not unfair – application dismissed.

Commentary

Another reason we have position descriptions that include a "physical demands" section.

0.022 "bloody idiot" dismissal upheld[7]

- Applicant was terminated for breach of respondent alcohol policy.
- Applicant attended work for night shift.
- Initial random breath test prescribed alcohol content (PAC) of 0.034% – second breath PAC 0.022%.
- Respondent's alcohol policy had been replaced with new policy which allowed PAC below 0.02% – previous policy zero tolerance.
- The applicant had not been trained on new policy but had been trained on previous policy. Commission found that despite respondent not conducting training on new policy the applicant's behaviour measured against any of the policies formed a valid reason for dismissal.

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5 Curtis v Transit Australia P/L t/a Sunshine Coast Sunbus U2014/12466, [2014] FWC 8679, Hamilton DP

6 Alcock v TNT Australia P/L t/a TNT Express. U2014/11580. [2014] FWC 9120. Wilson C

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Commentary

According to WorkCover NSW (for eg) publication "Alcohol & Other Drugs":

> *"If a worker refuses to be tested it cannot be presumed that they are intoxicated. Workers have a legal right to refuse to be tested,* ***unless specific legislation, contracts or employment agreements provide otherwise*** [my emphasis].

Tip: Put it in your contracts of employment and have a strong, published policy in place.

Until next time…

Greg Reiffel
(including Greg Reiffel HR & IR Consulting)