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Employee Relations News

Edition 16 **5 February 2015**

Welcome to Edition 16, where I look at:

- Taking home shower notes breaches privacy and ends employment.
- What you need to win an appeal.
- McDonald Murholme ("Winners for Workers") NW/NF lawyer has costs awarded against him, and loses two "adverse actions" in the Federal Court. These decisions also provide clarity on "temporary absence" and "adverse action claims".

Taking home business documents to use against another employee backfires (and loses on appeal).[1]

This is a matter that started as a dispute between two employees. The Applicant in this case took home "private documents" that were for use in the care of residents, with the Applicant arguing that she wanted to prove (by these documents) that to her employee was not performing her duties properly.

However, this tactic backfired with the Applicant (a casual carer), dismissed for "*the unlawful removal of company documentation from Braemar Village, containing private and confidential information of residents, for personal use*".

The documents in question were "shower schedules" and contained information on w*here the residents live, what room they live in, what care they had provided to them and also contained information on a resident who had passed away.*
The DP stated (in part):

> "*Another reason the Applicant gave to justify her taking the documents was that the Respondent provided documents to third parties. The example she gave was the Respondent provided documents to the FWC for the purpose of these proceedings. The comparison of documents for proceedings of this nature being provided to establish a case in the FWC and the taking of documents by the Applicant is* ***bizarre*** [my emphasis]."

In the subsequent appeal, the [ex-employee] made various allegations against the business. The FB's response was:

> *"The fact that the appellant has made a range of serious allegations concerning the standard of the care afforded to the respondent's residents does not attract the public interest for relevant purposes because the allegations are not rationally connected to the…dismissal. [There was no] evidence which would support the proposition that the…dismissal was for the purpose[e] of "silencing" the employee concerning these allegations, and we can identify no such evidence ourselves.*
>
> *"If the appellant wishes to pursue these allegations, then the appropriate place to take them is the regulator of residential aged care, which we understand to be the* ***Australian Aged Care Quality Agency*** [my emphasis]. *We do not consider that there*

[1] **Xiaoqin Hua v Braemar Presbyterian Care** (U2014/12080) [2014] FWC 8633, DEPUTY PRESIDENT MCCARTHY.

is anything otherwise raised by the appellant's appeal which attracts the public interest."

What is required to be a successful appellant?[2]

The above matter was appealed. I have examined this FB decision in the context of what is needed to mount a successful appeal. In the case cited, this FB went against the applicant because the "*public interest not enlivened*".

In this decision the FB considered the following:

Section 400(1) (of the FWA) provides that permission to appeal must not be granted from such a decision unless the Commission considers that it is in the public interest to do so. Appeals on a question of fact may only be made on the ground that the decision involved a "*significant error of fact*"

The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment. In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> *"... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."*

It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.

However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.
Aged care worker dismissed for taking documents home (ending dispute with a fellow employee)

No-Win No-Fee solicitor's run of bad luck?

Prominent NWNF law firm McDonald Murholme (*"Winners for Workers"*), seems to have set the year off to a poor start, with:

- ***Costs awarded against Alan McDonald[3] personally because (Mr McDonald),***

> *"…failed to articulate a proper factual and legal basis for it in his pleading, or in particular when sought. Whether he did so with some ulterior motive or purpose, or wilfully closing his eyes to his professional obligations, are not conclusions I am prepared positively to reach on the evidence before me."*

[2] **Xiaoqin Hua v Braemar Presbyterian Care** (C2014/8119) [2015] FWCFB 396. JUSTICE ROSS, PRESIDENT, VICE PRESIDENT HATCHER, COMMISSIONER CARGILL.

[3] **BRENDAN RYAN –v- PRIMESAFE, BRENDAN TATHAM, and DEREK HUMPHERY-SMITH, VID 287 of 2014, MORTIMER J**

And as such:

"Mr Humphery-Smith is entitled to be compensated for the legal costs he incurred in relation to this proceeding, during the period he was obliged to retain Hall & Wilcox to represent him, excluding any costs attributable to the application in the Fair Work Commission. Mr McDonald should bear those costs personally. Costs are payable on a party and party basis."

- ***Fail in Federal Court (1)[4]:***

In this adverse action matter, the employer wished to change the employee's job due to restructuring (and poor operational performance of the employee).

This case also explores the role of the court in relation to claims of adverse actions.

The Applicant viewed this as a demotion despite the only changes to the contract of employment being:

- May be required to work on public holidays;
- An extension of the notice of termination period from one month to three months' written notice; and
- A more onerous restraint of trade clause.

The Applicant contended that Dulux breached a "protected right" because he had exercised the following workplace rights:

- The right to a working environment that was safe and without risk to his health;
- The right to make a complaint; and
- The right to take paid personal leave on each of 28 and 31 May 2013.

In dismissing the claim, the DP stated:

> *"A general protections proceeding is not a broad inquiry as to whether the applicant has been subjected to a procedurally or substantively unfair outcome. As Gray, Cowdroy and Reeves JJ said in Khiani v Australian Bureau of Statistics [2011] FCAFC 109 at [31]:*
>
> > *'A general protections application is not intended to provide an opportunity for the appellant to raise whatever issues she wishes to about the validity of the steps taken before her dismissal. The crucial issue in such an application is the causal relationship between adverse action and one or more of the factors mentioned in the various provisions of Pt 3-1. The issue is whether the person who has taken the adverse action has done so because the person against whom the adverse action has been taken has one or more of the relevant characteristics or has done one or more of the relevant acts.'*
>
> *"In Sperandio v Lynch [2006] FCA 1648 at [91] Jessup J said:*
>
> > *'Turning to s 170CK(2)(a) of the Act, the "reason" to which that provision refers is, I consider, the temporary absence from work. For an employer to act in breach of the provision, there must be an awareness that the absence was because of illness or injury, and the absence must be the reason for the termination. Or, to put it defensively, an employer will succeed in avoiding an adverse finding under the provision upon proving either that he or she did not know the reason for the absence or that he or she did not terminate the employment by reason of the absence. In the present case the respondents have not proved either: indeed, I find the contrary in each case.'"*

[4] **FEDERAL COURT OF AUSTRALIA, Ermel v Duluxgroup (Australia) Pty Ltd (No 2) [2015] FCA 17,**

- ***Fail in Federal Court (2)[5]:***
    - Employee that was dismissed for misconduct claimed that she was dismissed because she was a union member.
    - Failed to convince Judge – application dismissed.

Until next time…

Greg Reiffel
(including Greg Reiffel HR & IR Consulting)

Remember, I am currently searching for contract (under my own ABN) or permanent 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

Greg Reiffel HR & IR Consulting

[5] FEDERAL COURT OF AUSTRALIA. Curatolo v Skye Children's Co-Operative Ltd [2015] FCA 14. VID 367 of 2014. **JESSUP J.**