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# Employee Relations News

**Edition 2** **5 August 2014**

Thank you for your positive feedback for my first edition of this newsletter.

As promised, this edition is much smaller, and deals with the issues relating to the employment and training contracts, final warnings, and the appeals process.

I hope you find it of interest.

"Remember: feel free to comment. Feedback is always welcome."

Kind regards

**Greg Reiffel**

## Final warning, dismissal of employment and training contracts, leading to (unsuccessful) unfair dismissal application and appeal

This matter[1] relates to an errant bus driver who was under final warning for poor driving, however was dismissed for abusing a fellow worker in what the Commissioner described as *"unreasonable, offensive and derogatory"*.

The Applicant denied the allegations. This was in the face of a number of incident reports attesting to the exchange between him and the other employee, which had reduced the female employee to tears. There was also CCTV footage.

The Applicant's defence (in part) was:

> *"Well, I put it to you I gestured with my hands but politicians gesture with their hands. I'm Italian. It's not offensive. There's nothing in that. We all at times gesture with our hands. I mean it wasn't offensive. It wasn't loud. It wasn't - there was nothing in it. It was a simple conversation."*

The Commissioner found that the employer has acted promptly and afforded the Applicant procedural fairness.

However, despite the offense being unrelated to the final warning previously provided to the Applicant, the Commissioner found:

> *"The Employer, in coming to the decision to dismiss the employment, took into account the written final warning which was issued less than three weeks before the incident … I consider the Employer's actions in taking into account the final warning appropriate. Further, given the nature of the Applicant's employment and the relatively short duration of his employment, it was appropriate for the Employer to consider the entirety of [the Applicant's] performance for his period of employment. While there can be differences of view about what happened in the Drivers' Room, the final written warning and [the Applicant's] performance*

[1] Cloghan, C. [2014] FWC 864, Mr Kevin Gugliotta v Path Transit Pty Ltd (U2013/13072)

> *record were of objective assistance to the Employer when reaching the conclusion to bring the Applicant's employment to an end. I am satisfied that the reasons for [the Applicant's] dismissal were sound, defensible and well founded.*

The Applicant was also under a contract of training, which meant that the employer has an obligation to advise the department that it had terminated the contract of employment and wished that the contract of training also be terminated.

As the commissioner stated in his decision:

> *"For the purposes of this background, it is useful to set out the relevant legislative framework in relation to the suspension and termination of a training contract.*
>
> *Section 51 of the Vocational Education and Training Act 2009 (VET Act) enables the Employer to seek the Chief Executive of [the Department of Training and Workforce Development] (DOT) approval to terminate a training contract. This is what the Employer did…"*
>
> *[The Applicant] was advised by the Employer…that it had made application to terminate his training contract pursuant to Regulation 51(1) of the Vocational Education and Training (General) Regulations 2009 (**Regulations**).*
>
> *"…the DOT advised [the Applicant] as follows:*
>
> > *"...You dispute Path Transit's allegations of serious misconduct and poor work performance. You have advised us that your employment contract has been terminated and that you have lodged an unfair dismissal claim with Fair Work Australia (sic). Path Transit has provided evidence to support the employer's application for termination on the basis of serious misconduct and poor work performance. The Employer has also stated that your current employment status is suspended on full pay pending the chief executive's decision on the application to terminate the training contract.*
> >
> > *Given these circumstances the training contract will be cancelled with effect from close of business on Friday 20 September 2013 under s.60F(5) of the Vocational Educational and Training Act 1996 (the VET Act) and Regulation 44(b). This section of the VET Act provides for the chief executive of the department to cancel the registration of the training contract if the employer is not able to train the trainee adequately. In this case the chief executive is satisfied that the relationship has deteriorated to the extent that the employer would not be able to train the trainee adequately. The department will advise Path Transit of the decision to cancel the registration of your training contract."*

The Applicant then applied for permission to appeal[2] against the decision by Commissioner Cloghan. He again failed.

However, of interest to readers was the process that the full bench considered in determining the merits of the appeal.

> *"Unfair dismissal decisions, such as the one under consideration here, are discretionary in nature. The principles governing appeals against discretionary decisions are those set out in House v The King where it was held that:*

[2] Hamberger, SDP, McCarthy, DP and Williams, C. [2014] FWCFB 3982 Kevin Gugliotta v Path Transit Pty Ltd (C2014/3843)

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."*

*Section 604(1) of the Fair Work Act 2009 (FW Act) provides that a person aggrieved by a decision made by the Fair Work Commission (FWC) may appeal the decision with the permission of the FWC.*

*Section 400(1) of the FW Act provides that the FWC must not grant permission to appeal from a decision made under Part 3-2 of the FW Act unless the FWC considers it is in the public interest to do so. The way in which the public interest may be attracted has been described as follows:*

> *"... 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."*

## Commentary

As stated in my introduction, this matter covers a number of areas:

- Whilst the employer in this matter could have relied on "gross misconduct" for its decision to terminate the employee's services, it chose to rely also on the final warning
- The final warning had no relation to the reason for which the employee was dismissed. This in itself is a diversion from previous commentaries on the subject (ie warnings must be of the same nature)
- The employer ensured that it acted quickly on the (bullying) complaint, and followed due process in accordance with the requirements of the FWA
- The employee was also under a contract of training, which in itself involved its own actions
- The appeal made it quite clear that it was not the role of appellant tribunals to put their own views on a matter but to determine whether the decision being appealed was at error