

Employee Relations News

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Greg has over 25 years' experience in Human Resource Management and Employee/Industrial Relations, with qualifications in IR and HR, Training & OH&S systems. EBA's, unfair dismissals and policies/employee handbooks are a speciality.

Experience includes peak employer bodies such as the VECCI and Civil Contractors Federation, NFP, Local Government, and manufacturing.

for further information, please see my LinkedIn profile:

https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

Please note that my availability will be limited over the next couple of months, having just accepted an assignment for an organisation transitioning to a central HR model.

In this edition

- Closed shop equals open cheque-book in MUA case.
- Lazy forger reinstated.
- Youth Justice worker dismissal upheld for violence against a client.
- The principles relating to resignation v termination

Closed shop equals open cheque-book in MUA case¹

In a recent case in the federal court, hefty awards were made to two people (the "Loves") who were refused work by Offshore Management Services (OMS) because they were not members of the Maritime Union of Australia (MUA).

Ironically, the MUA was on the receiving end of eight charges relating to the refusal to allow the Loves union members.

Outcome:

- A penalty of \$79,200.00 to the MUA.
- The MUA pay Mr Bruce Love \$352,100.00 and Mrs Lynne Love \$371,200.00.
- OMS to pay the Loves one-third.

The Court also left the door open for the payment of any interest and costs.

¹ Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd [2015] FCA 275.

Lazy forger reinstated²

For purposes of establishing a valid reason for the dismissal of Mr Samaras, BoysTown relied upon his conduct in forging client signatures on 13 occasions in respect of three separate clients, along with Ms Samaras' lack of honesty in disclosing the forgeries prior to discovery, which was a breach of BoysTown values and behaviours relating to integrity, honesty and accountability.

There is no dispute that Mr Samaras forged the signatures as alleged.

In forging the 13 signatures in relation to the three client files, Mr Samaras revealed a lack of sufficient regard to the professional and ethical framework in which the BoysTown organisation sought to conduct its business.

However, the DP concluded that Mr Samaras' conduct must be contextualised:

"His actions were not intended to procure a benefit for himself.

"At most, the only benefit that he accrued was being able to conclude the administrative requirements of archiving files more expeditiously than by completing the required procedures. That is, the forging of the signatures saved him some time.

"The signatures that were forged were in relation to three clients who had completed the Youth Connections program some nine months previously. The files were inactive, and were being closed, once again, for purposes of archiving.

"There was no pattern - or evidence of any further or more widespread - incidences of signatures being forged by Mr Samaras at anytime."

The DP conceded that:

"While his employer is right to sanction Mr Samaras' conduct in this regard, viewed objectively I do not consider the conduct to have been maliciously motivated or to be of such consequence (for the purposes of funding or perceptions by external stakeholders) that it warranted his dismissal.

"In addition, there does not appear to have been any discernible damage (to BoysTown's public reputation or its funding prospects) arising from Mr Samaras' conduct."

"In essence, Mr Samaras unwisely overlooked his training and the obligations imposed upon him by his contract of employment and his employer's procedures manuals, and (as he put it) lazily rushed to close a small number of files."

² Mr Theodore Samaras v BoysTown (U2014/15031) [2015] FWC 1762 SENIOR DEPUTY PRESIDENT RICHARDS

“When viewed in this important, wider context, I do not consider Mr Samaras' conduct to be of such an extreme nature that it warranted his dismissal. Nor do I consider that the scale and nature of the conduct was such that it on its own was sufficient to sever the bond of trust and confidence between Mr Samaras and BoysTown.”

The outcome being that the applicant retained his employment, but lost the continuity of service (ie he was not paid for the time of dismissal to reinstatement).

Comment: It is therefore appropriate that when making a decision to end someone's employment, be aware that the punishment must fit the crime.

Youth Justice worker dismissal upheld for violence against a client³

Mr Danny Vulic was a Youth Justice Worker at the Parkville Youth Justice Precinct who was dismissed following what DHS found was misconduct by Mr Vulic where he used excessive force on a client.

The DP found:

“The decision to dismiss was based on the CCTV footage together with an earlier final warning for assaulting a client. During cross-examination, Mr McCann agreed that other members of the team dealing with the client also had their arms holding the neck or head.

“I have viewed this footage. This is a confronting environment and it is clear that a number of Youth Justice Workers had arms or legs around the clients face, neck and body. However, I also see that in the opening seconds of the confrontation that Mr Vulic appears to grab the client around the neck.”

The DP also applied the test in *Bringinshaw v Bringinshaw* [(1938) 60 CLR 336] [my emphasis]. He then considered that:

- Mr Vulic has a Bachelor of Arts in Justice Administration and this together with his training leads me to conclude that he is sufficiently aware of his role and responsibilities when operating in the Juvenile Justice System.
- The other relevant factor is that Mr Vulic was on a final warning for physically assaulting a client in 2012.
- The possible impact of the termination of employment on Mr Vulic's career in Juvenile Justice.

And concluded that the termination of Mr Vulic's employment was not harsh, unjust or unreasonable.

³ Mr Danny Vulic v Department of Human Services (U2014/8801) [2015] FWC 1872. DEPUTY PRESIDENT SMITH

The principles relating to resignation v termination

⁴In considering this matter the DP must be satisfied that Ms Woodiwiss was dismissed at the initiative of the employer, or whether she resigned, and examined the following overriding principles:

- *“To be effective, a resignation must be clear and unambiguous. Account needs to be taken of the context in which statements are made and the ensuing circumstances.*
- *If words of resignation are unambiguous then prima facie an employer is entitled to treat them as such. However when words are spoken or actions expressed in temper or in the heat of the moment or under extreme pressure, a reasonable period of time should be allowed to elapse, and if circumstances arise during that period which gives rise to a question as to whether the resignation was really intended and that further inquiry is warranted, then such inquiry is ignored at the employer's risk.*
- *If the employee's words are not ambiguous, or have a clear meaning, he or she will be treated as having resigned, irrespective of whether they were intended to bear that meaning, unless the words of resignation were uttered in the heat of the moment or as a result of pressure exerted by the employer.*
- *There is no general duty on an employer to ensure that an employee, using apparently unambiguous words of resignation, intended to resign. “*

In all the circumstances I conclude that that Ms Woodiwiss resigned her employment with the respondent. Accordingly the application for an unfair dismissal remedy is dismissed.

Until next time...

Greg Reiffel
Principal Consultant

⁴ Ms Kristina Woodiwiss v Alanvale Apartments & Motor Inn. (U2014/16717) [2015] FWC 1822. DEPUTY PRESIDENT ABEY