



In this edition

- Apprentice alleged “punch” by manager. Manager admits “tap”. What’s the outcome?
- Costs: to award or not award – that is the question?
- No-win-no fee article draws comments.

Apprentice alleged “punch” by manager. Manager admits “tap”. What’s the outcome?

In a decision¹, that reads like a “whodunit”, if it weren’t for the decision summary (read “spoiler”), the outcome would have been quite a mystery. And not to mention it involves motor bikes (retail).

Fundamentally, there were a number of complaints by (apprentice) alleging that his (manager) Mr Minear:

- Was abrupt in dealing with him.
- Punched him in the arm at least once a month despite requests to stop doing so.
- Referred to him as a “f**king idiot” and consistently asked him if he had got “f**ked up” on weekends.
- Belittled him in front of a customer.
- Refused to respond to his requests for help.

There was also a reference that the manager stored inappropriate material on his employer-provided mobile phone.

Ed. note: both sides were legally represented, what I believe to be a very straight forward matter, in the SDP’s own words “There is little dispute about the background to the matter.”

In a subtle side-swipe at the HR investigation process, the SPD stated:

*“Notwithstanding that Mr McLaren-Gates disputes each of these assertions, I have accepted the Peter Stevens advice that the termination of his employment occurred because of the punching allegation. In this regard I note that **there is no evidence that indicates that the other allegations made by Mr Minear were investigated or taken into account in the termination of employment decision.***

*“Notwithstanding this, I have concluded that the various **allegations of bullying and inappropriate behaviour** made by Mr Minear, separate from the punching allegation, all fall into a category of allegations which, **without proper investigation and the provision of an opportunity for a response** by Mr McLaren-Gates, are not able to be described as misconduct.*

*“Human Resources Manager, interviewed each of the employees who reported to Mr McLaren-Gates, including Mr Minear. They then interviewed Mr McLaren-Gates and concluded that he admitted hitting Mr Minear on more than one occasion. They suspended the meeting to seek **advice from an employer association** and confer with Mr Munro, a Director of Peter Stevens, **before deciding to terminate Mr McLaren-Gates’ employment.**”*

“Guilty” or “no guilty”?

The apprentice:

“From about 3 months into working at Harley Heaven he has punched me in the arm at least once a month leaving bruises (thinking he is joking around with me) every time he comes to the computer or walks past me I flinch because I am waiting to be punched in the arm, I have wanted to turn around and hit him back but not once have I

¹ Ashley McLaren-Gates vThe Trustee of the Peter Stevens Motorcycle Retail Business Trust T/A Peter Stevens Motor Cycles [2015] FWC 3041 (U2014/15585). SENIOR DEPUTY PRESIDENT O’CALLAGHAN, 8 MAY 2015.

ever retaliated and punched him back as I do not want to jeopardise my job and knowing him he would turn it back on me. I have also asked him to stop on numerous times but he just say's some smart alike remark (sic)".

The Manager:

*"In contrast, in his evidence, Mr Minear said that the last time that Mr McLaren-Gates hit him was some two months prior to the termination of Mr McLaren-Gates' employment. Additionally, I have concluded that Mr Minear's complaint that he was frequently hit by Mr McLaren-Gates must be seen in the context of his broader suite of complaints about Mr McLaren-Gates which **were neither investigated, substantiated, or conceded** [my emphasis]. Mr Minear also agreed that horseplay and limited physical contact occurred in the workplace and that there were occasions when he tapped Mr McLaren-Gates on the shoulder to get his attention."*

The SDP noted that evidence relative to the hitting or punching allegation was that he understood from the Peter Stevens policy requirements that no physical contact was acceptable. The manager demonstrated how he had made physical contact with the apprentice:

*"...a loosely closed fist to lightly hit Mr Minear on the upper arm. I have concluded that this reflected physical contact...this contact could have been painful...but it was not the catalyst for [the]complaint...[the] complaint was made two months after his last assertion of physical contact. Nonetheless, that physical contact was **inconsistent with the Peter Stevens policies** [and]...it was directed at an apprentice with limited workplace experience and represented misconduct. On the evidence before me, I regard it as wilful misconduct because Mr McLaren-Gates' evidence indicates that it was deliberate.*

*"On the material before me, **I am unable to describe it as serious misconduct but accept that it was clearly inappropriate**" [my emphasis].*

The plot thickens...

Advised of a "support person?"

*"...whilst...the initial interview with Mr McLaren-Gates ... by advising him that he was going to be asked some questions about some complaints made by Mr Minear and could have a support person, **I am not satisfied that Mr McLaren-Gates was made aware that the matter could result in the termination of his employment**" [my emphasis]. Further, I am not satisfied that...he was advised of the possibility of employment termination and **given the opportunity to respond to that possibility**". [My emphasis].*

Valid reason:

"...I am satisfied that Mr McLaren-Gates' misconduct in making physical contact with Mr Minear represented a breach of the Peter Steven's policies and expectations of him as a manager so that it was a valid reason for the termination of his employment."

But...

"Notwithstanding this finding, I am not satisfied that the intensity and the precise nature of that conduct and the extent to which it reflected normal and accepted workplace behaviour in Mr McLaren-Gates' workplace have been established so as to make termination of employment the only appropriate outcome."

Conclusion

The SDP concluded that the termination:

- Was not unjust because he was guilty of misconduct which would represent a valid reason for his dismissal.
- Notwithstanding this, the termination was unreasonable in that it was not based on facts *"...as distinct from inferences which arose from the manner of the investigation undertaken..."*
- That the nature and intensity of the physical contact.

- The termination to be harsh in that it was disproportionate to the misconduct
- Further, it was harsh in terms of the manner in which the employment termination was effected.

The SDP, therefore concluded the termination to be unfair and awarded \$9,117.00, less tax.

Commentary:

- Having policies in place that are known and enforced = good.
- Proper and thorough investigation = bad.
- Not advising of the possible outcome if the investigation finds fault = bad.
- There is difference between a “tap” and a “punch” – but both are physical contact.
- Ensure that employees are aware that they must complain earlier rather than later.

Again (unfortunately) here is a decision that has its outcome based on the “procedural” = bad.

Costs: to award or not award – that is the question?

There have been a string of decision relating to litigants seeking costs against each other. Here are a few examples:

Application for costs dismissed².

- The application was commenced without reasonable cause.
- The Applicant was unsuccessful in making his view that his performance was not inadequate. This view that his view was genuinely held.
- The offer of settlement was not generous.

Application for costs refused twice³.

- The Commissioner in the first instance, refusing costs on discretionary grounds.
- A person should bear their own costs in a matter before the Commission.
- It would be contrary to that general principle to make an order in this matter when the Applicant had promptly withdrawn her application upon being advised of the nature of the employer’s objections.
- Some of the Respondent’s submissions reflect his animosity towards the Applicant. *“We suspect that it is reciprocal.”* This has resulted in some matters being raised which are either irrelevant or of only marginal relevance.

Applicant awarded approximately half of costs claimed as lump-sum.⁴

- Decision at first instance found applicant unfairly dismissed and compensation awarded.
- Applicant then sought costs order against respondent, submitting that the respondent's conduct to unfair dismissal application was made without reasonable cause or vexatious and had no reasonable prospect of success.
- Further submitted costs were incurred due to respondent's misleading assertions regarding legal representation, interruptions to proceedings and failure to put forward evidence.
- Commission held hearing and determination of unfair dismissal application was unreasonably delayed as a result of respondent's conduct and extended beyond what is regarded as reasonable in mounting a rigorous defence.

² Mr Gabriel Avila v City Central[2015] FWC 2940 (U2014/13629). VICE PRESIDENT WATSON. 7 MAY 2015.

³ Appeal by Mark Jackson Racing t/a Hackenbush Lodge against decision in transcript of Roe C of 23 January 2015 matter number U2014/15149 Re: McAlpine. C2015/1674 [2015] FWCFB 2303. Catanzariti VP, Harrison SDP, Bull C. 29 April 2015.

⁴ Johnston v The Trustee for the MTGI Trust t/a Macquarie Technology Group International U2014/345 [2015] FWC 996 Boulton J. 30 April 2015.

Employer awarded costs⁵

- North J said "*a proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party or to gain collateral damage.*" Applicant found not to have acted vexatiously.
- I am not satisfied that when she made the application, Ms Craig knew that her claim was bound to fail.
- I am not satisfied that Ms Craig could have known when she made her application that Dunsborough was small business. The size of a small business is determined by counting all employees in the business and any associated entities. Whether there are associated entities is within the knowledge of the employer, not the employee.
- Once the Respondent had filed its material, it should have been reasonably apparent to the Applicant that she had no reasonable prospects of success, particularly as she had no evidence to contradict the evidence of the Respondent.
- Ms Craig relies upon her ignorance of the statutory requirements. The Applicant had been advised by FW of the requirements set out in the Act about the minimum period of employment. She had been provided at that time with a copy of the letter to be relied upon by the Respondent.
- Further, the Respondent had put the Applicant on notice about the basis of its objection. It continued throughout this time to seek to engage with the Applicant but she ignored those requests.
- On any objective basis, it should have been reasonably apparent to the Applicant that her application had no reasonable prospects of success.

Employer awarded \$2,260 in costs⁶

- Ms Chen's conduct in not discontinuing her application at an earlier time was unreasonable and this caused Monash to incur costs.
- Ms Chen was unrepresented, "*she was not an unsophisticated litigant and she was aware of the preparation necessary to conduct litigation.*"
- When Ms Chen was put on notice she sought to substitute her unfair dismissal application for a general protections application and when she was advised that she could not do so she discontinued her unfair dismissal application and filed a general protections application where the same objections would apply.

Costs application is dismissed⁷

- The application was not an unreasonable act or omission.
- She did not notify the Commission that her application had been adjourned and that she was not pursuing her claim. This resulted in the Association advising the Commission of the progress of the matter before the WAIRC. The only costs the Association incurred as a result of that omission was the costs of the email.
- Ms Conder was invited to discontinue her application.
- "*Even if the necessary conditions for awarding costs exist, the decision to award costs is discretionary. In this case, I have not found that the necessary preconditions existed for the awarding of costs. Therefore the costs application is dismissed.*"

⁵ Craig v Dunsborough Beauty Spa U2014/15364 [\[2015\] FWC 2861](#). Gooley DP. 27 April 2015.

⁶ Chen v Monash University U2014/16593 [\[2015\] FWC 2798](#). Gooley DP. 27 April 2015.

⁷ Conder v Lower Great Southern Family Support Association t/a Lower Great Southern Family Support Association (LGSFSA) U2014/6233 [\[2015\] FWC 2556](#). Gooley DP. 28 April 2015.

Exit IR Club? Enter No Win No Fee?

I penned an article some time ago alementing the multi-billion dollar "no-win-no-fee industry". If you wish to revisit go to: https://www.linkedin.com/pulse/20140814065613-122714661-exit-ir-club-enter-no-win-no-fee?trk=eml-pad-b-art-0&midToken=AQHZccVnHVpJ_A&fromEmail=fromEmail&ut=240iq8fTrYkSM1

Here are some comments on the article:



Tony Pitman 1st

Director at Tony Pitman and Associates Pty Ltd

great article Greg. It's time the focus shifted from processes that make the boss look good (and feeding lawyers by getting rid of those employees who dont) to creating a work place culture that sees leadership and management as positions of responsibilityresponsibility to genuinely care for the workers they employ, to improve their lives by improving their workplace performance and satisfaction. NWNF lawyers are easily fed by profit and ego driven bosses who want to establish a "success identity" rather than a productive work force with a "win win win" mindset. Yep one to many "wins" in there - the third is for the wider community health and the GDP by cutting out unnecessary work induced mental health and industrial expenses



Greg Halse 1st

Partner Crossroads Human Resources

Greg...I agree with your disappointing conclusions This quagmire is a productivity sapping embarrassment and our political parties just don't have the leadership to tackle this seriously. The likes of you and I will just need to improve mgt practises.



Mark Griffin 1st

Horticulturist/ Photographer

Let's face it Greg, we live in a world constructed by lawyers to suit themselves. A good parasite works by modifying its host to provide better conditions for itself.

Until next time...

Greg Reiffel
Principal Consultant