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Senior HR Advisor's comments used as reason for appeal¹

This matter involves an application for costs orders arising from an appeal against the decision of Ryan C in U2014/8741. It is also a lesson that HR professionals ought to be dispassionate in their work.

Whilst this matter related to a number of factors and costs were awarded, the Commissioner stated:

"The primary evidence that the First Respondent's application for permission to appeal was vexatious or brought for an ulterior purpose is found in the Applicant's supporting witness statement, which refers to comments made by Cate Morris, the First Respondent's Senior HR Advisor:

"...[e]ven if you win, we'll appeal the decision. And if we lose that we'll appeal the appeal and go to the Federal Court".

"The above comments were made before Commissioner Ryan issued his decision and directly meets the first definition of vexatious: the proceeding was continued with the intention of harassing the Applicant and causing him to incur unnecessary legal costs.

"However, for the purpose of the costs application, I am prepared to proceed on the basis that on 17 December 2014 the Respondent's Senior HR Advisor did say, "even if you win, we'll appeal the decision. And if we lose that we'll appeal the appeal and go to the Federal Court".

"This statement alone is insufficient to satisfy the Commission that the Respondent initiated the appeal proceedings vexatiously". [My emphasis].

Telephone dismissal end in tears (for the employer)²

The employer in this matter refused outright to cooperate with the directions of the FWC, to the extent of hanging up on a FWC representative who tried to contact the employer.

As such the FWC ran the case based on the evidence of the applicant alone.

The applicant had worked for the employer for a period of approximately 3 years. At the time of dismissal the applicant worked as a Retail Store Manager in Wollongong.

On or about 2 January 2015, the applicant received a telephone call from a *Mick Smith* who worked at the employer's Canberra office. In the course of this telephone call *Mr Smith* alleged that the applicant was being investigated in connection with the alleged sale of illegal substances. Mr Smith then told the applicant that he was to be dismissed from his employment. Later receiving a letter confirming the dismissal of the applicant "*by cause, effective immediately.*" The letter of dismissal provided no further explanation for the reason or reasons for dismissal.

The unchallenged evidence of the applicant has established that he had been dismissed from his employment in an extraordinarily abrupt manner and without proper explanation or reason being provided.

The evidence has not revealed any valid reason for the dismissal of the applicant. The uncontested evidence has established that; (a) the applicant was dismissed, and; (b) the dismissal was harsh, unjust or unreasonable.

The Commissioner found:

"Upon any analysis and particularly in the absence of a valid reason for dismissal, the applicant's dismissal was manifestly harsh, unreasonable and unjust.

"The conduct of the employer in respect to the dismissal of the applicant and in regard to these proceedings before the Commission has been highly regrettable. The applicant's claim for unfair dismissal has been established."

The Commissioner decided that an amount approximating with 18.43 weeks remuneration at the ordinary weekly rate before dismissal should be Ordered as compensation to the applicant. That amount is \$17,880.00.

Offering job back does not negate unfair dismissal³

This matter whilst dealing with a jurisdictional matter relating to whether the applicant's employment was in fact terminated, had a couple of interesting aspects that are worthy of mention.

Firstly, the employer sought and was granted permission to appear, and for witnesses to give evidence, by telephone. The DP found that to do otherwise would have been required to close down its business to attend the hearing. The ex-employee was offered the opportunity to appear by telephone but elected to appear in person. [Ed: Whilst I agree with the pragmatism of this new system of telephone justice, I do wonder about the transparency. Eg: swearing in witnesses? Who is actually in the room – a "paid agent" maybe? Body language cannot be determined.]

Secondly, according to the DP there was no dispute that the ex-employee was dismissed by one person then the decision was reversed by another.

The DP:

"I do not accept this submission for two reasons. Firstly, once Mr Stephens dismissed Mr Laidlaw, the contract of employment was terminated. Once terminated, the contract of employment could not unilaterally be revived; that is, Mr Pickering could not reinstate that contract of employment without the agreement of Mr Laidlaw. Mr Laidlaw did not agree.

² Mr Luca Balatti v Aussie Supplements Pty Ltd ABN: 30 135 045 082. (U2015/301) [2015] FWC 4674. Cambridge, C. 10 July 2015

³ Mr Daniel Laidlaw v The Trustee for TF and CA Pickering Family Trading Trust T/A Biloela Dry Cleaners and Laundry Service (U2014/7188) [2015] FWC 3069. Asbery, DP, 26 June 2015.

The decision of Birrell v Australian National Airlines Commission supports this proposition. In that matter, a decision of his Honour Justice Gray, after reviewing the limited authorities, his Honour stated:

“These authorities all support the view that unilateral withdrawal of a notice of termination of a contract of employment is not possible. In principle, this conclusion must be correct.”

The ex-employee was found to be (a) dismissed and (b) unfairly dismissed and awarded \$5,625 less tax.

Breach of duty of confidentiality confirmed as serious misconduct by FWC⁴

The respondent is an insurance company which specialises in truck insurance. The applicant saw an niche in the market to set-up an Association of which he would recruit members. Unfortunately for the applicant, he used his employer’s time, e-mail and customer lists in recruiting these members. The respondent later secured sponsorship that would have been in direct conflict with the applicant’s Association.

In dismissing him summarily (ie without notice) for serious misconduct, the respondent relied on the applicant’s contract of employment and code of conduct, both of which set out provisions relating to confidentiality and conflict of interest.

In finding that there was a valid reason for the termination, the Commissioner stated:

“Mr Post ignored directions from NTI’s Managers that his involvement with Transafe must be managed to avoid any conflict between the interests of NTI and the interests he was pursuing on behalf of Transafe and to ensure that he was complying with the obligations in his employment contract. Other than a disclaimer referring to Transafe found in some emails sent by Mr Post the evidence is he took no action to comply with his Managers’ directions in this regard. Instead he continued to pursue his interests in Transafe contrary to the interests of NTI and in ways that were in conflict with his employment obligations to NTI.”

FWC finds poor performance valid reason for dismissal⁵

A Performance Evaluation Review was conducted by Mr Alexander with Mr Harborne in early May 2014. The Review identified a number of areas where Mr Harborne had not met elements of his job description.

The Review report identified a number of required actions for Mr Harborne, e.g. “Continue to progressively promote innovative product and scale back on commodities” and “Targeted product suite focus required with forward planning to secure ongoing sales/forward orders”.

Mr Harborne received notice of his termination in a letter from Mr Alexander dated 25 August 2014 which stated:

“We consider that your performance is still unsatisfactory and have decided to terminate your employment for the following reasons:

- *Failure to meet planning and reporting functions to a required level*
- *Failure to achieve forecasted sales results”*

Mr Harborne submitted that his sales forecasts were not achievable due to a number of factors, including:

- *product line unavailability - in his application Mr Harborne cited a number of products which were not available, resulting in orders being cancelled or not placed;*
- *the closure of Imtrade’s Wagga Wagga depot which resulted in increased transport costs for clients and in turn lead customers to source product from alternative suppliers;*
- *the pricing of products;*

⁴ Steven Post v NTI Limited T/A NTI (U2014/14956) [2015] FWC 3911. Williams, C. 9 July 2015.

⁵ Robert Harborne v Imtrade Australia. (U2014/12850) [2015] FWC 4297, Kovacic, DP. 26 June 2015.

- *quality issues with some products; and*
- *drought conditions in northern New South Wales.*

In dismissing the application, the DP stated:

“Taking into account all of these factors, I am satisfied that there was a valid reason for Mr Harborne’s dismissal. Drawing on the language of the decision in Rode’s Case, I am satisfied that the reasons for Mr Harborne’s termination are defensible or justifiable on an objective analysis of the relevant facts and were not ‘capricious, fanciful, spiteful or prejudiced.’

“[The FWA] (e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal.

“...Imtrade first raised its performance concerns with Mr Harborne in the May 2014 Performance Evaluation Review. The material before the Commission suggests that the purpose of the Performance Evaluation Review discussion was to try and assist Mr Harborne to improve his sales performance and the quality of his planning and reporting. Despite the market difficulties existing in New South Wales, I accept that Mr Harborne was given sufficient opportunity and guidance on how he might improve his performance in these areas.”

The DP concluded:

“Drawing on the above analysis, I find that despite the difficult market conditions in New South Wales, there was a valid reason for Mr Harborne’s dismissal related to his performance, that Mr Harborne was notified of Imtrade’s concerns about his performance, that he was given an opportunity and assistance to improve his performance, and that there are no other relevant considerations.

Until next time...

Greg Reiffel
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