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# Employee Relations News

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***Note: I have spare capacity at present to assist employers to meet their requirements and/or needs, offering a service that is often more than half the cost of others, in Industrial Relations, HR, Training & OH&S systems***

***I have more than 25 years' experience and Employee/Industrial Relations, EBA's, unfair dismissals and policies/employee handbooks are a speciality. Qualifications include IR and HR, Training & OH&S systems.***

***For further information, please see my LinkedIn profile:***
https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

## Crime –v- punishment - the big dilemma in employment law.

There have been numerous cases in the past few weeks (and plenty more prior), where the FWC has found that the applicant has been terminated for a "valid" reason; but the termination failed because it was found that it was "unfair". This was due to losing one's job not being proportionate to the misconduct. In other words "the punishment did not fit the crime".

In this edition I examine, the law, relevant precedents and recent case history.

The FWA provides the "checkpoints" that the FWC must consider when determining such matters:

- Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- Whether the person was notified of that reason; and
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- Any other matters that the FWC considers relevant.

**REMEMBER: In the FWC "procedural fairness" is king.**

The "gold standard" (ie precedents) - as handed down by courts in relation to thjis subject are:

- *Crozier v Palazzo Corporation Pty Ltd, a Full Bench of the Australian Industrial Relations Commission dealing with similar a provision of the Workplace Relations Act 1996 (Cth) stated the following:*

  *"As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified…[it] would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."*

- *The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:*

  *'....It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.'*

- *A valid reason for dismissal is one that is "sound, defensible or well founded and not capricious, fanciful or spiteful". The authority for this approach is found in the often cited case of Selvachandran v Peterson Plastics Pty Ltd (1995) 62 IR 371 at page 373 which reads as follows:*

  *"In its context in s.170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, common sense way to ensure that the employer and employee are treated fairly'."*

  *A valid reason for dismissal attempts to balance, in a practical way, the needs of employees and employers.*

  *When the reason for the dismissal relates to the employee's conduct, it is necessary for the Commission to determine, on the balance of probabilities, whether the alleged conduct occurred, and if so, whether it was a sufficient reason for termination.*

- *There is a distinction between capacity and conduct. In this matter, it was the conduct of the employee that formed the basis of her termination. In King v Freshmore (Vic) Pty Ltd, a Full Bench held:*

  *"When a reason for a termination is based on the conduct of the employee, the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s.170CG(3)(a). The Commission must determine whether the alleged conduct took place and what it involved.*

  *The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination [See Yew v ACI Glass Packaging Pty Ltd (1996) 71 IR 201; Sherman v Peabody Coal Ltd (1998) 88 IR 408; Australian Meat Holdings Pty Ltd v McLauchlan (1998) 84 IR 1]."*

  *It is not the role of the Commission to "stand in the shoes of the employer and determine whether or not the decision made by the employer was a decision that would be made by the court." However, the Commission must consider the entire factual matrix in determining whether an employee's termination is for a valid reason.*

**Recent cases:**

## *1. $30,000 goes missing. Employer fails to attend hearing. Employee wins big.*[1]

The facts of this matter can be summarised thus:

- The applicant was employed by the respondent for 16 months.
- The business was sold, and the applicant was laid off for a couple of weeks to see if the business needed him.
- It came to the new owner's attention that there was a $30,000 anomaly in the ATM accounts.

[1] Mr Perrin LeFebour v Prow Pty Ltd T/A Club Bay View (U2014/199) [2015] FWC 5072. CLOGHAN, C. 28 JULY 2015

- It is clear that the applicant was the chief suspect, and a letter terminating Mr LeFebour's (the applicant) employment:

  *"I am writing to inform you that effective immediately, your employment with Prow Pty Ltd at Club Bayview and The Avenue has been terminated as a result of my enquiries into the matters discussed with yourself and Daniel regarding issues of impropriety and missing funds.*

  *The matter will be investigated further and may be referred to other authorities."*

The Commission comments as follows:

> *"Theft from an employer is generally considered serious misconduct, warranting immediate dismissal."*
>
> *"Mr Heathcote, for the Applicant, submitted that:*
>
> > *"…where for no reason, for no fault of the applicant's part, the respondent has* ***clumsily, carelessly and incompetently*** [my emphasis] *executed a dismissal without an apparent reason…"*
>
> *"On the facts and evidence, it is difficult to disagree with Mr Heathcote."*
>
> *"There is no dispute that an employer may summarily dismiss an employee for serious misconduct. However, in this case, the Applicant became aware of the alleged serious misconduct at the earliest on 6 January 2014, which is approximately* ***a month after his employment was terminated*** [my emphasis]*."*
>
> *"Where serious misconduct is alleged, the test for a valid reason remains the same – that is, whether the reason was "sound, defensible or well founded" and not "capricious, spiteful or prejudiced".*
>
> *"I have no sound evidence from the Employer regarding the alleged impropriety or theft. What documentation I have is not signed or was able to be tested."*
>
> *"The Applicant submitted that should his dismissal be found to be unfair, he is not seeking reinstatement and seeks $28,680.51 as compensation.*

In finding in favour of the applicant:

> *"The order for compensation shall be an amount of* ***$18,994.50****. The gross amount is to attract the relevant* ***superannuation*** *and taxation required by law****. [Both my emphasis].***

## *2. Angry biker*[2]

- The Applicant submitted the dismissal was harsh, unjust or unreasonable because the events leading to his dismissal were motivated by his view of the Respondent's failure to address an incident in which his motorbike had been tampered with while being parked on the Respondent's premises.
- The Applicant then attempted to contact a colleague, Paul Roffey, who the Applicant was "fairly certain" was responsible for the tampering, through various phone calls and a text message. The Applicant was terminated on following a complaint from Mr Roffey.
- The conduct said to constitute bullying and harassment involved up to 21 phone calls being made to Mr Roffey's mobile phone by the Applicant accusing him of tampering with his motorbike's brakes and leaving a post-it note annotated with the term "shit-talker" on the vehicle whilst it had been parked on the Respondent's premises.
- The Respondent's subsequently investigated the incident and found that Mr Roffey had not placed the note on the Applicant's motorbike. The investigation, also found that people within the company who "did not want to work with [the Applicant]" on account of his engaging in "threatening" behaviour.
- The Applicant subsequently participated in a telephone conversation with the Respondent to discuss the Incident and other misconduct. It was submitted that the Applicant's "manner and the tone" during that conversation left her feeling "very disturbed", particularly when the Applicant said he would deal with the situation "in his own way". The Applicant categorically denies he made any such insinuation. Ms Lesha felt "very unsafe" during the conversation to the extent she advised the Applicant that the police would be called if he was to enter the Respondent's premises. During that phone call, Ms Lesha terminated the Applicant's employment. The dismissal took immediate effect.

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[2] Brendan Cassar v All Traffic Management Services Pty Ltd T/A All Traffic Management Services Pty Ltd (U2015/2670) [2015] FWC 5123. JOHNS, C. 31 JULY 2015[2]

The Commissioner found:

> *"Having heard and considered all the evidence in this matter… The Applicant:*
>
> *(a) Made false accusations against a co-worker;*
>
> *(b) Breached company policy and the terms of his employment contract by not reporting his complaint through the appropriate channels; and*
>
> *(c) Engaged in what can only be described as highly inappropriate conduct by repeatedly calling Mr Roffey after work hours and through the night of 7 January 2015 and sending a menacing text message accusing him of wrongdoing.*

The Commission concluded that:

- The Applicant was notified of the reason for the dismissal, **but only after the decision to terminate had already been made**. [my emphasis]
- The Applicant was not given an opportunity to respond to the reason for the dismissal.
- The absence of any such dedicated HR management or expertise adversely impacted the procedures followed by the Respondent in effecting the dismissal.

Most importantly, the Commissioner:

> ***"…****is minded to conclude that the* ***decision to terminate was not proportionate to the conduct*** [my emphasis] *the Respondent submitted precipitated the dismissal."*

The Commissioner concluding that the dismissal of the Applicant was harsh, unjust or unreasonable, and therefore the dismissal was unfair.

In agreeing with the Respondent, the Commissioner submitted reinstatement would be inappropriate because of the Applicant's behaviour, particularly in respect of his "bullying and harassment" of Mr. Roffey, had been inconsistent with its expectation that all employees "should feel they are working in a safe environment, and therefore ordered a payment of **$1,022.09** by the Respondent to the Applicant.

## *3. . Zsa Zsa Gabor quoted by FWC finding that wife Sticking up for hubbie not valid excuse for terminating employment*[3]

**[Subtitle: much discussion about that "f" word]**

- Ms Coughlin commenced employment on 11 October 2013.
- Ms Coughlin's letter of appointment as a bus driver states that, while working for the Employer, she is required to comply with all company policies and procedures. The Employer's Code of Conduct which sets out the standard of behaviour expected of Greyhound employees was highlighted in Ms Coughlin's letter of appointment. Ms Coughlin was required to familiarise herself with the Employer's policies and procedures and invited her, if she had any problems complying with the policies and procedures, to speak to her manager.
- The Employer's policies and procedures relevant to this application are the Code of Conduct; EEO and Inappropriate Behaviours and The Team Member and Behavioural Explanation.
- Ms Coughlin's husband also worked as a bus driver on the Wheatstone Project. Mr Coughlin was present during an incident on 8 July 2014 which led eventually to his and the Applicant's dismissal.

The crux of this matter is that:

- Both husband and wife worked at the same workplace, and were both in the crib room when the husband went to breathalyse himself (it was the company's rule that this must be done in the presence of a supervisor). When politely reminded by another employee, the response was either:
  - "why don't you mind your own business" in an aggressive manner; or
  - "why don't you mind your own f***ing business" in an aggressive manner; and

The wife (ie the applicant), after another employee intervened the husband began verbally and physically confronting the intervening employee in an aggressive manner.

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3 Ms Susan Coughlin v Greyhound Australia Pty Ltd. (U2014/11994) [2015] FWC 2631. CLOGHAN, C.1 JULY 2015

The Commissioner finding that the wife: "…encouraged [her husband's] inappropriate behaviour by saying words to the effect of "go on, tell him, get up him", thereby inflaming a situation you initiated."

Ms Coughlin was demobilised from the Wheatstone Project for the duration of the Employer's investigation.

Following completion of the investigation, there were as number of meetings and correspondence (including a "show cause" letter), with the employer dismissing both the applicant's denials and her employment.

The Commissioner found:

> *"While this situation gives context, as does the correct procedure for alcohol testing, it does not go to the core of what the Commission has to determine and that is whether the Employer had a "sound, defensible or well-founded reason" to dismiss Ms Coughlin.*
>
> *"Workplace "incidents" occur every day in Australia.*
>
> *"This incident was over in approximately three (3) to four (4) minutes.*
>
> *"I am satisfied, on the totality of the evidence, that there was a heated argument between Mr Coughlin and Mr Lewis. Who started the incident is not relevant. However, the incident appears to have been short, sharp and brutish. The two main protagonists, Mr Coughlin and Mr Lewis' exchange views in a fairly robust way. Simply put, it was a heated argument.*
>
> *"Whether Mr Coughlin was defending his wife or Mr Lewis was defending Ms Dawson, both Mr Coughlin and Mr Lewis stood their ground.*
>
> *"In view of the situation, I am satisfied, on the* ***balance of probabilities*** *that* ***Ms Coughlin did swear at Mr Lewis on the one occasion****. However, on the evidence, I feel it would be unsafe to conclude that she inflamed the situation. I suspect Ms Coughlin was not a mute bystander.* ***Zsa Zsa Gabor once said, "Husbands are like fires – they go out when unattended".*** *In the circumstances, I am inclined to the view that Mr Coughlin was sufficiently inflamed and he did not need the wife's attention, to keep his heated argument with Mr Lewis going. [My emphases].*
>
> *"…To be candid, the only sensible people in the crib room were those drivers who brought the incident to an end. Irrespective of the differences in evidence provided to the Commission, I have to find whether Ms Coughlin's conduct was sufficient to justify her dismissal.*
>
> *"****Misconduct justifying dismissal is conduct that is so serious that it goes to the heart of the contract of employment. I am satisfied that Ms Coughlin's conduct, while unsatisfactory and probably uncalled for, was not sufficiently serious to warrant dismissal.*** [My emphasis].
>
> *"In my view, consistent with Byrne v Australian Airlines Ltd (1995) 185 CLR 410, the Employer's response was harsh because it was* ***disproportionate to the gravity of Ms Coughlin's conduct****.*
>
> *"…Ms Coughlin's conduct, on balance, was not consistent with the Employer's various policies. However, while her behaviour was, on balance, inconsistent with the policies, I am certain it was not, of itself, sufficient to warrant the maximum sanction – dismissal. In reaching this determination, Ms Coughlin should not think that the Employer was wrong to investigate the matter – it was not.*
>
> *It is difficult to conclude that an employee telling another employee to "mind their own f***ing business" is respectful or not insulting. However, the Wheatstone Project Information Handbook takes, in my view, a reasonable and practicable view when it states, "Proven repeated and/or multiple violations may constitute misconduct…" This view relates to acceptable employee behaviour in the community. Mr Ferguson submits that the* ***incident took place "not in the local community, nor was it the local catholic girl's picnic – it was in a crib room – in the North West of Western Australia".*** *[My emphasis]*
>
> *" The use of the word 'f***ing' by one employee to another in the workplace (or elsewhere) may be unpleasant and unwelcome, however, as Mr Ferguson states, it is unfortunately common language in workplaces. While not condoning the use of the word "f***ing" in the workplace, in accordance with Selvachandran, the legislative provisions must be applied in a practical common sense way to*
>
> *Shortly put, it would be unfair, unreasonable and unjust for the "sins" of Mr Coughlin to be visited upon his wife. Ms Coughlin must and had to be treated as an employee in her own right and not as the wife of another employee. On the evidence, I am not satisfied that the Employer had a valid reason to terminate the employment of Ms Coughlin.*

The Commissioner then gave the parties 14 days to settle the matter.

### 4. *Employee throws out sensitive bank information* [4]

In this matter the FWC found:

> *"In all of the circumstances of this matter, and having taken account of each of the factors set out in section 387 of the Act, I determine, on fine balance, that Ms Repici's dismissal was harsh.*
>
> *" On the one hand, there was* ***a valid reason (a serious breach of procedures) which would have had a negative impact on the Bank and its customers,*** *if any of those customers queried an action of the Bank which required access to the original document, and it was not in the customer's file. On the other hand, the actions of Ms Repici were not deliberate (the documents had been put in the Bin inadvertently, by mistake, in the context of working in a busy Branch and in the process of moving desks); Ms Repici's explanation for why the documents were placed in the Bin was reasonable and Ms Repici* ***was not accorded procedural fairness during the disciplinary process.***
>
> *"Accordingly, it follows that, pursuant to section 385 of the Act, Ms Repici was unfairly dismissed."*

The Commissioner discounted compensation to the applicant by 40% for misconduct and a further 20% for "contingencies and taxation". It should be noted that the Centrelink payments are not taken into account by the Commission in determining the amount of remuneration earned.

The Commissioner requested further information before an order for compensation was finalised.

### 5. *Altercation in the workplace*[5]

- Altercation between two employees at the workplace.
- Long serving employee.
- Applicant provoked but response beyond self-defence.
- Serious incident for individuals and other employee seeking to intervene.
- Valid reason for dismissal, but harsh in the circumstances
- Remedial benefit of reinstatement considered.
- No contrition or sense that conducts inappropriate.
- Grounds for loss of trust and confidence found, reinstatement not appropriate, compensation of 19 week's pay awarded (40% discount for misconduct).

### 6. *Reinstatement ordered*[6]

The Applicant was employed by the respondent for 18 months, commencing as a bus driver and later promoted to a team leader.

On 19 December 2014 the Applicant was pulling into the fuel bay in a bus when she crossed into the pedestrian area, narrowly missing an employee, who jumped out of the way to avoid being hit. The Applicant was issued a first and final warning for a safety breach, and the Respondent arranged Hazard Identification training.

On 3 January 2015, in the course of carrying out her Marshalling duties, the Applicant missed a bus run departing the yard. The run was also missed by the Driver, Lead Driver and Duty Manager. It was detected that the run had been missed two hours after the bus was due to leave the yard when the Driver collected her shift board. On 6 January 2015 the Applicant was requested to attend an investigation meeting to explain what happened on 3 January 2015 and how it happened.

On 8 January 2015 a show cause letter was given to the Applicant regarding the incident on 3 January 2015 and this was followed by a show cause meeting that took place on 9 January 2015 and continued on 12 January 2015.

The Applicant continued working her rostered shifts whilst the investigations and meetings were being conducted.

On 12 January 2015, the Applicant worked her rostered am shift and asked to attend the continuation of the show cause meeting at 2pm.

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4 Pasqualina Repici v Bank of Sydney Ltd T/A Bank of Sydney (U2014/15399) [2015] FWC 4571. CRIBB, C. 8 JULY 2015.

5 Mr Mark Gwatking v Schweppes Australia Pty Ltd. (U2015/331) [2015] FWC 3969. HAMPTON, C. 15 JULY 2015

6 Mrs Dell Humphries v Buslink Vivo Pty Ltd. (U2015/2674) [2015] FWC 4641. VICE PRESIDENT CATANZARITI, VP. 3 AUGUST 2015

The Respondent issued the Applicant with a termination letter dated 12 January 2015 that provided as follows:

> *"…it has been decided that your employment with Buslink VIVO will be terminated based on the following breaches of Buslink VIVO's policies:*
>
> ● ***Safety breach*** *– On 23 December 2014 your actions resulted in a serious safety breach. On this occasion you were issued a first and final written warning.*
> ● ***Procedural breach*** *– On 3 January 2015 you failed to follow procedure resulting in a service not being dispatched from Howard Spring's Depot.*

The FWC concluded that:

> *"I have some concerns with respect to the nexus drawn between the 19 December 2014 safety breach and the 3 January 2015 procedural breach such to enliven dismissal…Notwithstanding these concerns, I accept that the reason for the dismissal was due to the safety breach on 19 December 2014 and the procedural breach on 3 January 2015, both of which were acknowledge by the parties to be serious breaches of the Respondents policies. I find that there was a valid reason for the dismissal for the purposes of section 387(a) of the Act."*
>
> *"I note the oversight did not cause the Respondent any financial loss or substantial embarrassment and was not identified by way of a disgruntled customer or client complaint. Although the Respondent submitted that it could be held contractually liable for fines for missed services, the Respondent indicated that there were no fines levied in relation to the incident on 3 January 2015".*
>
> *In these circumstances, I consider that the dismissal of the Applicant was a disproportionate response and overly harsh.*
>
> *"…the fact that it may be difficult or embarrassing for an employer to be required to reinstate an employee who was believed to be guilty of wrongdoing is not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate. Ultimately the question is whether there can be a sufficient level of trust and confidence to make the relationship 'viable and productive'. In making this assessment, it is appropriate to consider the 'rationality' of any attitude taken by a party."*
>
> *"…I consider that it is appropriate to order that the Applicant be reinstated to her former employment with the Respondent [and] to maintain the continuity of the Applicant's employment."*

***Until next time…***

**Greg Reiffel**
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