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Employee Relations News

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Verbal aggression 1: An angry outburst and threatening phone calls make for fair dismissal[1]

The Respondent is a publicly funded native title representative body in New South Wales. It has a number of divisions including the Strategic Development division and the Legal division. The Applicant was employed as a Senior Lands and Notification Officer in the Strategic Development division, prior to her redundancy.

The Applicant was employed in the legal division of Land Titles Office in the position of Lawyer, and then promoted to the position of Manager, Status Branch within Crown Lands, before being made redundant.

As a result of her long experience in the area, the Applicant had developed significant expertise and experience in the investigation of land titles devoting long hours to her work, to the extent that the respondent forbade her from working weekends without permissions.

Over this period the Applicant's relations with other staff deteriorated. There were complaints about personal behaviours affecting others and a particular tension developed between the Applicant and the head of the Legal division, Ms Mishka Holt. The Applicant's manager, Ms Hariharan, stated that the Applicant was a difficult employee.

The Applicant had made a bullying complaint against Ms Holt.

The Respondent advertised a vacancy for a lawyer in the Legal division. The Applicant submitted an application. She was not granted an interview but did not discover this fact until she opened and read an email sent to staff asking them to keep noise to a minimum while the interviews were proceeding.

Mr Tonna, the Applicant's closest friend in the workplace, with the two of them regularly having coffee together, stated that:

> *"When I received the all-staff email, almost immediately Sonia, who I believe had also received the email at the time, stood up and said words to the effect:*
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> > *'F**k NTSCORP. They don't treat me as a lawyer. I'm not going to do any more of the project tables. Mishka Holt – she'll get hers.'*
> >
> > *The words directed at Mishka Holt were very aggressive and caused me a great deal of concern as to Mishka's safety."*

Mr Tonna was sufficiently concerned by the tone and content of the Applicant's outburst that he reported his concerns to management.

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[1] Sonia Hughes v NTSCORP Limited. (U2014/12897) [2015] FWC 6045. LAWLER, VP. 2 SEPTEMBER 2015

Ms Holt was heavily pregnant at the time. The CEO, Ms Rotumah, was sufficiently concerned to instruct Ms Holt to leave the workplace and work from home.

The Applicant clearly regarded the actions of Mr Tonna as amounting to personal treachery. She left two threatening telephone messages on Mr Tonna's phone. The threats were menacing and unpleasant.

The Applicant refused to participate in any disciplinary process, asserting that a decision to terminate her had already been made.

The VP findings:

> *"I found this a difficult matter to decide. Counsel for the Applicant advanced forceful arguments in support of a finding that the dismissal was harsh even if the Applicant's conduct amounted to a valid reason for the dismissal. Given the Applicant's genuinely held belief that she was not being treated fairly by the Respondent, an outburst on learning that she had not even been afforded an interview for the position in the Legal division might not, of itself, have justified dismissal, particularly* ***if the Applicant had apologised or shown some remorse or regret****. Instead, the Applicant made threats to Mr Tonna and* ***showed no interest in engaging with management over the incident****.*
>
> ***"In determining whether a dismissal was harsh, unjust or unreasonable it is necessary to accord a "fair go all round" and not simply to view the matter from the perspective of the employee.*** *When that approach is adopted I am unable to find that the dismissal was harsh, unjust or unreasonable."*

Verbal aggression 2: An angry outburst, Facebook and e-mails make for fair dismissal[2]

The Applicant was dismissed from his employment as a Funeral Consultant with Alfred James & Sons Pty Ltd) on misconduct grounds related to an incident involving another employee, Ms Diane Sloan:

> *"At approximately 12:00 noon on 17 May 2015 the Applicant was observed by Ms Sloan to be walking past the office. Whilst doing so, Ms Sloan asked the Applicant what he was having for lunch. The Applicant said words to the effect that 'I don't know, what are the girls having?' Ms Sloan told the Applicant that the other employees had left to get their lunch as they could not find the Applicant. According to the evidence given by Ms Sloan, the Applicant:*
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> - *Exploded and said "I can't believe they couldn't find me, I've been in the cottage cleaning my a*se off while you've been sitting around doing nothing" and he pointed his finger at Ms Sloan and said that she was the worst offender;*
> - *became louder, pointing his finger and speaking so quickly that Ms Sloan could not understand all that he was saying;*
> - *looked menacing and very angry and Ms Sloan felt intimidated; and*
> - *then stormed out of the office.*

According to the Applicant, he was offended and hurt at being excluded by the staff members and that this was one incident too many. He said that whilst he waved his finger at Ms Sloan it was not in a menacing fashion but rather it was his habit to use his hands whilst expressing himself.

The DP found that the dismissal was not unfair and that his application should be dismissed, finding that:

- The Respondent has…a number of workplace policies including a Code of Conduct and a Workplace Harassment and Bullying policy. These policies were signed off as acknowledgement by applicant.

- During the proceedings the Applicant displayed a tendency to play down his responsibility for many of the events which were the subject of evidence, including his **failure to accept reasonable propositions put to him** by the Respondent during cross-examination about the abusive nature of the content of emails sent by the Applicant and Facebook posts made by the Applicant following his dismissal. This affects his credibility.

- A HR consultant was brought in to investigate the matter. Her notes and subsequent e-mails represent a contemporaneous record of the events.

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2 Christopher Mulroney v Alfred James & Sons Pty Ltd T/A Alfred James Funeral Homes. (U2015/8433) [2015] FWC 6215. GOSTENCNIK, DP. 9 SEPTEMBER 2015

- The Applicant's conduct …was inconsistent with the Respondent's workplace harassment and bullying policy and in breach of its Code of Conduct.

There were prior incidents:

- The first is involving the unauthorised use of the Respondent's motor vehicle. The Applicant was counselled in relation to this conduct which he acknowledged.

- The second incident a final warning given to the Applicant arising from that which was described as "defaming comments about the company and management to another staff member and threatening physical violence to a manager. Later that same day during a telephone discussion between Mr Murray and the Applicant, about the Applicant's access to a suit, Mr Murray gave evidence that the Applicant became quite aggressive and shouted and swore at him.

- **It is clear that the Applicant was upset during the telephone discussion and that he swore. Such conduct in a work environment or dealing with co-workers is inappropriate all the more so when the conduct occurs during a conversation with one's manager**. I am satisfied on the evidence that the final warning given to the Applicant in relation to both of the aforementioned incidents was an appropriate response and was justified.

- **I have also taken into account that the Respondent seems to have shown earlier tolerance of misbehaviour that might in and of itself have founded a valid reason for dismissal.**

- I have also taken into account the vitriolic emails sent and Facebook posts made by the Applicant following his dismissal. These demonstrate that the Applicant **accepts no responsibility** for his conduct and has little regard for the impact on others of his words and actions. The emails and Facebook posts reflect poorly on the Applicant.

Commentary

Going by these decisions, it would appear that committing the crime without contrition is basis for a fair dismissal. Of course, in both cases procedural fairness was followed, and we know that the second that the employer had in place important policies that the applicant had signed off.

"Tennis tragic" fairly dismissed for attending Australian Open after having leave application refused [3]

This matter reinforces a number of important points:

- Leave without pay is at the discretion of the Employer.
- An employee is obligated to carry out an employer's lawful orders.
- Pursuant to a contract of employment, a fundamental obligation is to turn up for work. Failure to do so is serious and wilful misconduct.
- It would be unsporting to criticise a decision to attend the Australian Open.

The Applicant in this matter was described as a "tennis tragic" which ultimately was her undoing. She applied for leave during the (my description) the summer season of tennis in Australia, including the Australian Open, where she attended between seven and 10 tennis matches.

Some leave was approved up to the end of December, but the rest was rejected due insufficient leave to cover the period of her requested absence. Despite this, the Applicant not only proceeded on leave, but took a further two week's sick leave with certificate.

Mrs Gluyas was directed to attend work as normal between 19 and 30 January 2015. Mrs Gluyas was also advised that failure to attend work, as directed, may result in disciplinary action against her which could result in termination of employment.

Mrs Gluyas failed to attend work between 19 and 30 January 2015 inclusive (being at the Melbourne tennis).
On 22 January 2015, Mrs Gluyas was informed of her unacceptable conduct in not attending work as directed, and required to attend an interview on 2 February 2015. The correspondence advised Mrs Gluyas that if the allegations were sustained, it could result in disciplinary action up to and including termination of employment.

3 Mrs Lynn Gluyas v Australian Western Railroad Pty Ltd T/A Aurizon. (U2015/682) [2015] FWC 6161. CLOGHAN, C. 11 SEPTEMBER 2015

Following the meeting was sent a letter: "Show cause why employment should not be terminated". Mrs Gluyas provided a response to the "show cause" correspondence on 4 February 2015. Aurizon advised Mrs Gluyas that it had given consideration to Mrs Gluyas' response to the Employer's "show cause" letter, however, her employment was terminated with immediate effect and with five (5) weeks' pay in lieu of notice.

The Applicant's submission is essentially that the dismissal was disproportionate to her conduct.

The Commissioner made the following observations:

- The Applicant concedes that she failed to attend work between 19 and 30 January 2015; and, in doing so, failed to comply with Aurizon's written direction to attend work between 19 and 30 January 2015.
- Mrs Gluyas concedes that Aurizon may have had a valid reason to terminate her employment.
- Contrary to many applications before the Commission which consist of allegations and denials, this is an application where the Applicant cannot, and does not, deny the conduct which led to her dismissal.
- I find…that Mrs Gluyas failed to attend work between 19 and 30 January 2015 without lawful cause and contrary to a written direction from her Employer. In doing so, I am satisfied that Aurizon had a valid reason to terminate Mrs Gluyas' employment."
- Leave without pay is at the discretion of the Employer. Further, it is not mentioned in the Applicant's contract of employment.
- As a definite "tennis tragic", it would be unsporting to criticise Mrs Gluyas' decision to attend the Australian Open…[however] she had to manage her obligations and responsibilities to her Employer.
- While Mrs Gluyas was not summarily dismissed for serious misconduct, I am satisfied, on the evidence, that her refusal to attend work between 19 and 30 January 2015 so that she could attend the Australian Open, was wilful, deliberate and inconsistent with her contract of employment.
- At a very basic level, an employee is obligated to carry out an employer's lawful orders. Pursuant to a contract of employment, a fundamental obligation is to turn up for work.
- Mrs Gluyas wilfully and deliberately flouted an essential contractual condition to attend work.

Until next time…

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