



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:

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Please consider me should you require a HR or ER/IR person on a full-time, temporary or contract basis.

Constructive dismissal/overseas employees counted to exclude small employer test, valid reason despite serious procedural flaws¹

Mr Ramsay was employed by Hoover Container Solutions Pty Ltd from January 2014 until 21 April 2015, where he was given "Hobson's Choice" of either resign and he would be paid four weeks' in lieu of notice and his outstanding annual leave or he would be dismissed without notice or accrued entitlements.

[Pause for thought: at this stage we have a "constructive dismissal" and the threat of unlawful retention of an accrued entitlement. Not looking good. Read on...]

The employer told Mr Ramsay of a long list of concerns he had with his conduct and performance and then Mr Ramsay said that he had probably better fall on his sword and then they had negotiated the payment of four weeks in lieu of notice.

Predictably, the Commissioner found that the employer:

"...had decided to terminate Mr Ramsay's employment in the telephone conversation on 21 April 2015. I am satisfied that Mr Jennings outlined in very considerable details a very long list of alleged misconduct and poor performance. I am satisfied that Mr Jennings made it clear to Mr Ramsay that he would only receive four weeks' notice payment if he resigned. I prefer the evidence of Mr Ramsay on this issue and accept that Mr Jennings told Mr Ramsay that he would be dismissed without notice if he did not resign. I am satisfied that Mr Ramsay was constructively dismissed. The actions of the employer led to the ending of the employment relationship."

Whilst not germane to the decision (Mr Ramsay had more than 12 month's service – the minimum requirement for a person to apply for an unfair dismissal if the employer employed fewer than 15 employees), the Commissioner stated that, despite the employer only having five (5) employees in Australia

"...the company was overseas owned and employed 5 people in Australia but up to 300 worldwide. I will determine this matter on the basis that the small business code does not apply."

Mr Ramsay received a detailed written warning on 22 October 2014 which listed a number of concerns about conduct and performance and which advised that failure to improve or any repetition will result in action including termination of employment.

The incident which led to the dismissal on 21 April 2015 was the alleged failure to complete the log book for the company vehicle in an accurate and timely manner and the related inability to account for the level of fuel purchases.

¹ Mr Craig Ramsay v Hoover Container Solutions Pty Ltd. (U2015/7499) [2015] FWC 6704. ROE, C. 29 SEPTEMBER 2015.¹

Mathematics was then bought to bear; when the company showed that during the period from 16 February 2015 to 10 April 2015 620 litres of fuel had been purchased using the company fuel card. The car used approximately 1 litre for each 10 kilometres. He denied that he used the fuel card to purchase anything else but fuel. He therefore accepted that about 6200 kilometres should have been travelled during the period in question. The log book first produced showed that 2201 kilometres had been travelled.

Despite this, the Commissioner decided:

"I do not find that Mr Ramsay was guilty of theft or fraud. It is possible that the problem was due to the failure to properly fill in the log book by reference to the odometer. However, I am satisfied that the failure to complete the log book accurately when directed to do so does constitute a valid reason for dismissal related to the conduct of Mr Ramsay.

"In reaching this conclusion I take into account that Mr Ramsay received a written warning on 22 October 2014. One of the issues in that warning related to alleged inappropriate use of the company credit card and poor handling of documentation."

The Commissioner then found that the dismissal was fair, because Mr Ramsay:

- Was notified that the primary reason for the dismissal; and
- Had adequate opportunity to respond to the allegations a number of days prior to the dismissal.

In commenting on the "deficiency" in procedural fairness, the commissioner found:

"I accept that his opportunity to respond to the proposed termination of his employment was limited in the telephone conversation on 21 April 2015. The procedural deficiency was not serious in the circumstances of this case. The failure to provide a reasonable opportunity to respond at the dismissal meeting can lead to a dismissal being unfair. However, in the circumstances of this case this is not a strong factor given the prior warning and the earlier requests for the information and the earlier opportunity to provide an explanation."

And in relation to the ability to have a support person:

"Mr Jennings did not refuse to allow Mr Ramsay to have a support person, although there was no reasonable opportunity to have one given the telephone call was not organised in advance. This is a neutral factor."

Conduct v Performance:

*"The dismissal related to **conduct not performance** and there had been a prior warning about alleged related conduct. This is a neutral factor."*

Despite ruling that the respondent was **not** a small employer:

"I am not satisfied that the size of the employer or the lack of human resource management expertise impacted the manner of the dismissal. This is a neutral factor."

And finally:

"I take into account that Mr Ramsay was paid four weeks in lieu of notice, notwithstanding that his entitlement under the NES was two weeks. I do not consider there to be any other relevant matters."

The Commissioner then dismissed the application.

Commentary

Whilst agreeing that the outcome was correct, I find this decision to be quite baffling in its logic:

- The employer was found to have employed 300 people, despite only five of those being in Australia (a moot point, but one that may be used a precedent for future cases).
- Whilst finding that Ramsay was dismissed (ie he did not resign), the Commissioner made comment as to the threat of withholding of annual leave (unlawful).
- The lack of procedural fairness in this matter was (in my humble opinion) at the higher end – especially given the fact the Commissioner trading the respondent as a large employer:
 - Sacked by telephone; and
 - No meeting = no support person and opportunity to respond.

In short folks, keep this decision in your back pocket for use in the future.

Until next time...

Greg Reiffel
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