



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: gregreiffelhrir.com or LinkedIn:

https://www.linkedin.com/profile/view?id=122714661&trk=nav_responsive_tab_profile

"My business grows by referrals. I would appreciate it if you would let me know if you have any colleagues, clients or associates who could benefit from my skill-set."

In this edition:

- Demotion not a Dismissal.
- The (rare case of) Appeal allowed.
- Courier driver finds himself in the poo (literally).

Demotion not a Dismissal ¹

The applicant, Mr Moyle alleged he was unfairly dismissed when his employer when he was relocated to a different site and advised of a reduction in his salary and classification.

MSS advised Mr Moyle that he would be transferred to either the Royal Adelaide Hospital or James Nash House. These transfer arrangements involved differing shifts. MSS stated that the transfer arrangements reflected an ordinary and customary practice within its business and involved a number of its personnel.

Mr Moyle's position was that the decision to reduce his classification from Level 5 to Level 3 and to allocate him to a roster which did not involve the same level of night shift work constituted a dismissal and that his current position represents substantially different and reduced duties...and that he had only continued to undertake the diminished duties under protest.

S.386 defines a dismissal (in part) as:

"(c) The person was demoted in employment but:

- (i) The demotion does not involve a significant reduction in his or her remuneration or duties; and*
- (ii) He or she remains employed with the employer that effected the demotion."*

The SDP considered:

- The plain words of s.386 (2)(c) must be construed such that a demotion in employment can only constitute dismissal if the employee does not remain employed by that employer and the demotion involves either a significant reduction in the employee's remuneration or duties.
- This section of the FW Act does not provide that a reduction in either duties or remuneration is sufficient, of itself, to constitute a dismissal. A mandatory requirement is that the employee no longer remains employed (per Full Bench decision in *Barkla v G4S Custodial Services Pty Ltd*).
- Also, the Full Bench decision in *Charlton v Eastern Australian Airlines Pty Ltd* provides some further insight:

"...a termination of employment occurs when a contract of employment is terminated. This necessarily occurs when the employment relationship comes to an end. However, it can also occur even though the employment relationship continues. Where a contract of employment has been terminated, but the employment relationship continues, this will be because a new contract of employment has come into existence. Therefore, whether the ... demotion involved his employment being "terminated by the employer" ...turns on whether his contract of employment was terminated notwithstanding the continuing employment relationship. This question is answered by reference to general law principles relating to the termination of contracts of employment..."

¹ Philip Moyle v MSS Security Pty Ltd [2015] FWC 8330 (U2015/12036). O'CALLAGHAN, SDP 8 DECEMBER 2015

“The question of when a demotion constitutes a termination of employment within general law principles relating to termination of contracts of employment...was given careful consideration by the Full Court of the Supreme Court of South Australia in Advertiser Newspapers Pty Ltd v IRC & Grivell.

“Unless the contract of employment or an applicable award or certified/workplace agreement authorises an employer to demote an employee, a demotion, not agreed to by the employee, that involves a significant reduction in remuneration will amount to a repudiation of the contract of employment. If that repudiation is accepted, either expressly or by conduct, then the contract of employment is terminated. If, in such circumstances, the demoted employee then remains in employment with the employer, this occurs pursuant to a new contract of employment in respect of the demoted position. It may be noted that where the employment continues with the employee allegedly acquiescing in a reduction in salary or other terms of employment, difficult questions may arise as to whether the continued employment involves the continuation of the original contract of employment (but with the employer breaching that contract by paying the reduced salary), a consensual variation of the terms of the original contract or the termination of the original contract and a substitution of a new contract of employment.”

The SDP consequently that the applicant was not dismissed because:

- The loss of shift premiums was irrelevant as the applicant was aware that this would be a result of the transfer.
- The reduction to his base wage rate was about \$1.00 per hour less... [And] this reduction cannot be regarded as significant...amounts to less than 5%.
- There is nothing in the employment arrangements which determined that he was specifically engaged at a given classification level.
- The Award did not require he must be paid as a Level 5.
- There were “Standing Instructions” (which Moyle signed) in place which allowed for the employees to be transferred and classified according to where they were transferred.
- In *Whittaker v Unisys Australia Pty Ltd* where the Court considered whether the employer’s conduct represented a repudiation of the employment contract. In that matter, Ross J stated:

“Whether there has been a repudiation in a particular case is a question of fact.

“Not every breach of contract is a repudiation and repudiatory conduct is not to be inferred lightly. Repudiation may be evidenced by a single act or by an accumulation of conduct in circumstances where no individual act on its own constitutes a repudiation.

“A repudiatory breach does not automatically terminate the contract but confers an elective right of termination on the innocent party.”

- Mr Moyle may have remained employed with MSS reluctantly, but there is nothing unique or extraordinary about that.
- And in conclusion: Mr Moyle cannot be unfairly dismissed if his circumstances do not meet the definition of “dismissed”.

Commentary

Be very wary when demoting an employee. There may be various reasons for this occurring, mostly to retain the employee’s services as opposed to terminating their services.

In this matter, the employer had both the Award and their “standing orders” (which would have had the effect of contract) in its favour.

How do your contracts stand in relation to similar approaches?

The (rare case of) Appeal allowed ²

It appears to be a rare occurrence these days that an appeal is allowed by the FWC. It is for this reason that I bring this Full bench decision to your attention.

² *Pearljit Singh v Metro T/A Metro Trains Melbourne (C2015/3464) [2015] FWCFB 6711. HAMILTON, DP, GOOLEY, DP, ROE, C. DECEMBER 2015*

The summary of this this matter is that Ms Singh, a PSO for Metro Trains, was dismissed for “interfering with a customer’s two mobile phones. That is, they went missing from the customer’s handbag and were later found in the toilets, minus their SIM cards.

A full and thorough investigation was undertaken by Metro, with the VP fundamentally agreeing with the findings of the investigation, thus determining that Ms Singh was fairly dismissed.

The FB stated:

- In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test as ‘a stringent one’. The Commission must not grant permission to appeal unless it considers that it is ‘in the public interest to do so’.
- Factors that might invoke the public interest have been held to include where a matter raises issues of importance and general application, where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counterintuitive, or the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.
- Fundamentally., the FB found that the investigation by Metro was flawed, and so then was the VP’s decision, concluding that:

“In our view this provides a basis for grant of permission to appeal. We are satisfied that it is in the public interest to grant permission to appeal. It is central to the system of justice that adequate reasons be provided and that findings be made on questions of fact and law in s.387 matters before the Commission.

“We decided to allow the appeal, to quash the decision and order, and to order that the matter be remitted to Commissioner Roe to rehear. [I left this bit in, because of the use of the word “quash”.]

Courier driver finds himself in the poo (literally) ³

Warning: do not read if offended or squeamish about bodily functions!!!

Mr Moskou was summarily dismissed on Monday 13 July 2015 for misconduct. The nature of the incident was that Mr Moskou had attended at the medical clinic at 224 Springvale Road Glen Waverley and that he had defecated in the car park and had left faecal matter and soiled toilet paper all over the car park.

It was stated that Mr Moskou was dismissed because he had defecated on a client’s premises and then failed to clean up/or make a serious attempt to clean up; he had failed to notify his employer so that remedial action could be taken and that he was not frank when the issue was raised with him.

Mr Moskou’s defence was that the dismissal was disproportionate to the gravity of the conduct. That Mr Moskou had attempted to clean up at the clinic, had tried to contact his immediate supervisor, and had not denied that the incident had occurred.

As part of his evidence, Mr Moskou provided a letter from Dr Cenap, dated 11 July 2015, which stated that Mr Moskou had gastroenteritis and that Mr Moskou could not wait to find a public toilet whilst working. The company disagreed that Mr Moskou had no other option but to defecate in the client’s car park. It did not accept the medical evidence that was provided by Mr Moskou at the time of his dismissal. This was on the grounds that the medical evidence referred to “medical condition” and not to gastroenteritis which was Mr Moskou’s reason for having to defecate at the medical clinic.

The Commissioner found:

“...I accept that... when Mr Moskou was at the medical clinic in question, he had an urgent need to defecate that he could not control. There is no evidence before me that Mr Moskou had wilfully used the medical clinic’s car park as a toilet. Rather, Mr Moskou appeared to still be embarrassed and uncomfortable when giving evidence about what had happened, some 3 months after the incident occurred. I accept the contention made on behalf of the Applicant, that no normal person would choose to do what Mr Moskou did, if there was either

³ George Moskou v Specialist Diagnostic Services Pty Ltd T/A Dorevitch Pathology. (U2015/9631) [2015] FWC 8608. CRIBB. 15 DECEMBER 2015

no need or if there was another viable option (i.e. a public toilet). Therefore, I find that Mr Moskou had no other option, other than to defecate in the medical clinic's car park, as he had an urgent need to defecate."

It was contended, on behalf of Mr Moskou, that he had tried to clean up in the dark and that he had attempted to throw away the rubbish. It was acknowledged that it was not a very elegant solution to the situation but it was argued to not be completely unreasonable. The Applicant stated that it was not indicative of misconduct.

Mr Moskou's evidence in relation to this issue was that:

- During the day of 5 July 2015, he had been feeling unwell.
- As he was walking back to the car after checking the night box at the clinic in question, he needed to defecate desperately. He said that he had no choice.
- He had gone around the corner of the medical clinic to a dark section of the car park.
- He had tried to clean it up as much as he could with tissues from his vehicle. He had also called his partner to bring some toilet paper, which she did.
- He had defecated on the gravel/asphalt and the stools were not solid. He had thrown the tissues into the garden bed and washed his hands under a tap.
- He had left the soiled tissues and toilet paper on the ground and a few probably in the garden bed.
- He had left the soiled toilet paper on the clinic's premises in an open area for someone else to pick up. He had not gone and got a plastic bag and put the soiled toilet paper in the bag.
- He should have picked up the soiled toilet paper and he could have washed down the area.
- It was just an accident. He had no idea who was going to clean up his mess.

The Commissioner concluded:

"In all the circumstances of this matter...on balance, I find that Mr Moskou's summary dismissal was harsh. This is on the basis that, although the misconduct was serious, it was not serious misconduct and the misconduct was not so serious as to warrant dismissal without notice. There was a valid reason for the dismissal and the process was procedurally fair. However, summary dismissal in these circumstances was harsh and disproportionate. What was appropriate was dismissal with notice.

"As a consequence, I consider that Mr Moskou's summary dismissal [to be] unfair..."

"The company's view was that reinstatement is not appropriate due to a breakdown in the company's confidence and trust about the employment relationship. I have carefully considered the issue of reinstatement and I find, in all of the particular circumstances of this matter, that reinstatement is inappropriate.

*"In all of the circumstances, I have decided to make an order that Mr Moskou be paid compensation of **one weeks' pay in lieu of notice**".*

Commentary

I can't help feeling sorry for the applicant in this matter. When you've got to go, you've got to go. I suppose this is what the company ultimately decided – that he had to go (tic).

And to go to all that trouble, embarrassment and expense for one week's pay, well...

Until next time...

Greg Reiffel

Principal Consultant