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Taliban taunter taken to task, dismissed unfairly dismissed but overturned at appeal

Toll Holdings Limited t/a Toll Transport and Toll Transport Pty Ltd t/a Toll Priority v Joseph Johnpulle. [2016] FWCFB 108 (C2015/4453). HATCHER, VP, KOVACIC, DP, BISSETT. 11 JANUARY 2016.

Toll appealed against a decision of Commissioner Riordan. Commissioner Riordan ordered, among other things, the reinstatement of Mr Joseph Johnpulle to his employment with Toll. Mr Johnpulle had been dismissed by Toll for serious misconduct on 9 February 2015.

Mr Johnpulle's dismissal arose out of an exchange which occurred between him and a fellow Toll employee, where Mr Johnpulle had said to him words to the effect of "Does Islam say to kill?", "Younas, are you from the Taliban?", "I enjoy seeing people having their heads cut off, do you enjoy it too?" and (after Mr Karzi remonstrated with him about these topics of conversation) "No, I am just asking, because people think everyone from Afghanistan is a Talib". Mr Johnpulle's version of events was radically different. He said that Mr Karzi had a history of expressing his personal and religious beliefs at work, and in the course of a conversation between them on 7 January 2015 had asserted that the American Army was killing innocent people in Arab countries and had actually perpetrated the much publicised ISIS beheadings, and said words to the effect of:

"See what's happening in my country, in Afghanistan. The Americans have gone in there was some stupid Afghans have joined the Americans and they are raping the mothers, daughters, and sisters of Afghanistan ... Joe, if someone raped your mother, or sister, or daughter, what would you do? You would have to defend her, right?"

Mr Karzi complained to the management of Toll about the incident, an investigation occurred. "As often happens, this investigation went beyond the complaint" it and examined other matters, namely earlier incidents between Mr Johnpulle and Mr Karzi. Ultimately Mr Johnpulle was required to respond to four allegations in total, including he had said to Mr Karzi words to the effect of "Younas, what the Taliban did in America was very good. I enjoyed when the building was coming down. Did you like it or not?" The third "Younas, it's good what the Taliban did to America. Look what they are doing to the Afghan people." The fourth "Oh Younas, last night I watched a video. The Taliban was killing someone."

It was further alleged that the second and third of these incidents had been the subject of earlier complaints by Mr Karzi to his Team Leader, Mr Mostafa Fath, that after the second incident Mr Fath had told Mr Johnpulle to cease conversing with Mr Karzi about such matters and that Mr Johnpulle had agreed to do so.

Mr Johnpulle denied all these allegations, including that Mr Fath had spoken to him as alleged. However Toll's management found that all the allegations were substantiated and were set out in a letter stating that Mr Johnpulle's "inappropriate and offensive comments to Younas Karzi indicate a pattern of unacceptable behaviour, particularly when

you were asked by Younas and team leader Mostafa Fath to cease and particularly because you indicated you would". The letter concluded by informing Mr Johnpulle that he was dismissed with immediate effect, and would be paid one month's wages in lieu of notice and any accrued entitlements.

The hearing before the Commissioner ran for three days and involved a large number of witnesses who gave conflicting evidence about the conduct of Mr Johnpulle and Mr Karzi. It is sufficient to say that while a number of witnesses gave evidence which supported Toll's conclusion concerning the allegations against Mr Johnpulle, other witnesses gave evidence supportive of Mr Johnpulle's assertion that it was Mr Karzi who had a history of making inflammatory religious and political remarks in the workplace.

The Commissioner found:

"I find that Mr Johnpulle made comments to Mr Karzi...which caused him distress and anxiety. I have no reason not to believe the evidence of Mr Karzi in relation to the comments that he attributes to Mr Johnpulle on that day. As such, I find that there was a valid reason for the termination of Mr Johnpulle."

However, the Commissioner also found that:

*"...Mr Johnpulle was not given a formal warning. In relation to any form of a disciplinary process, Mr Johnpulle had been spoken to on two occasions by his leading hand Mr Fath, a leading hand who has no direct control, in a disciplinary sense, over Mr Johnpulle. **It is a quantum leap from an informal verbal warning for conduct which may be bordering on inappropriate, to being terminated for serious misconduct** [my emphasis]..."*

- That the investigation process was flawed.
- That there was a hostile work environment at the relevant site in which some employees had engaged in intimidation, vilification and harassment.
- That Mr Karzi was not fearful or concerned about working alongside Mr Johnpulle after the incident.
- That Mr Johnpulle had not been given any formal warning about his earlier conduct prior to dismissal.
- That Mr Johnpulle had behaved inappropriately by professing to have no recollection of the incident when first asked about it.
- That it was grossly unfair to Mr Johnpulle that the involvement of the Transport Workers' Union (TWU) delegates on his behalf was treated by Toll as a "key component" of the decision to dismiss him.
- That Mr Karzi had behaved towards another employee (Mr Tony Monda) in a manner that was equally offensive and inappropriate but this had not been dealt with consistently compared with Mr Johnpulle and had not even been investigated.

The Commissioner concluded that because of the above points *"He was not afforded a fair go"* and ordered that Mr Johnpulle be reinstated, with no loss of continuity of service, and back payment of seven weeks' ordinary pay, less the amount paid to him in lieu of notice, and also that he **"be issued with a final warning ... to remain on his file for a period of 12 months"**. [My emphasis].

The Commissioner also stated:

"Mr Johnpulle's conduct cannot be condoned in 2015. It is highly offensive and inappropriate to insinuate or assert that one's religion or culture can be generalised in the manner in which occurred in January. I also believe that Mr Karzi should be issued with a formal warning. Making comments about other religions, or comments in relation to the supremacy of his religion, in the workplace, are also inappropriate and a breach of the policies of Toll. I so order."

Toll appealed and the decision was set aside pending a further hearing.

The Full Bench found that it was flawed in three ways:

1. The Commissioner erred in not taking into account as a significant consideration:

- That Mr Johnpulle had engaged in the earlier instances of conduct as alleged;
- Had been told not to engage in that conduct again and had agreed he would not do so.
- On each occasion it was essentially the same conduct as that which the Commissioner found occurred on 7 January 2015 and constituted a valid reason for dismissal.
- In those circumstances that earlier conduct could not fail to be a relevant matter.
- Mr Karzi and had persisted in that behaviour notwithstanding that he had been told by the Team Leader to cease such behaviour and he had agreed to do so.
- That was necessarily a highly material consideration which, while not necessarily being determinative, was adverse to the conclusion that the dismissal was harsh, unjust or unreasonable. It was also relevant to the issue of reinstatement, since it went to the degree of risk that Mr Johnpulle might repeat such behaviour in future if reinstated.
- Did not have regard to the fact that Mr Johnpulle's misconduct was not isolated but was part of a "pattern of unacceptable behaviour". That was an error in the exercise of his discretion of the type described in *House v The King* as a failure to "take into account some material consideration".

2. The second error was that the Commissioner gave no reasons for his determination to order the remedy of reinstatement:

- Toll opposed reinstatement, and called evidence and made written and oral submissions in that connection, the Commissioner was obliged to give reasons for his decision to order the remedy of reinstatement. The obligation to give reasons was described by the Full Bench in *Barach v University of New South Wales*:

"The duty to give adequate reasons for decision has been considered on many occasions. Important public policy considerations underlie this duty. In particular, the reasons for decision must be sufficient to allow the parties to exercise such rights of appeal as may be available and to enable an appeal bench to determine whether or not error has occurred in relation to a decision. Consequently the reasons given must articulate the essential grounds for reaching the decision and must address material questions of fact and law in a manner which discloses the steps which lead to a particular result. However the reasons for decision of a tribunal member need not be lengthy or elaborate and need not spell out every detail in the reasoning process or deal with every matter of fact or law which was raised in the proceedings."

3. Acted beyond power in ordering that written warnings be issued to Mr Johnpulle and Mr Karzi:

- Did not identify the source of power to make such orders.

"It may not be inappropriate in certain circumstances for...the Commission to express an obiter view in an unfair dismissal decision that a person who is to be reinstated should be issued with a warning, but it is quite a different thing to purport to order this".

There was no basis for Mr Karzi to be the subject of any substantive order in proceedings to which he was not a party, and the purported order directed to him necessarily involved a denial of procedural fairness. The Decision was therefore attended by jurisdictional error.

Employee arrested for theft and fraud found to unfairly dismissed.

Linda Sika v Khaled El-Sheikh Pty Ltd atf the El-Sheikh Practice Trust T/A Tristar Medical Group. [2016] FWC 316 (U2015/11587). GOOLEY, DP. 15 JANUARY 2016.

Ms Linda Sika's employment was terminated by Khaled El-Sheikh Pty Ltd on 27 August 2015. Ms Sika was employed as a hospitality worker in a café operated by Khaled. The employment was terminated for serious misconduct. Her termination letter said that her employment was terminated immediately due to gross misconduct, including theft and fraud.

[The commissioner permitted the respondent to be legally represented as it was not opposed by the applicant].

Khaled submitted that her conduct in voiding certain transactions was misconduct justifying her dismissal.

There is no dispute that Ms Sika had been voiding transactions made by customers and/or entering no sales when in fact sales had occurred.

The café, like many businesses, had a float for the till. For cash transactions, when a customer buys a product, the details of the transaction are entered on the till and monies taken and placed in the till. At the end of the day, a printout of the transactions is produced. The money from the till was placed in the safe overnight and the next morning the Manager reconciled the amounts and after taking account of the float, the till either matched the total on the printout or it was under or over. The Manager provided reconciliation details to the finance department once a week and the monies were banked.

It was Ms Sika's evidence that Mr Martin Saxby, her Manager, "came to me one day and said that the safe money was down, and he asked if I could do some voids in the morning – cash sales – to get the safe back up to its original amount." [Voiding involved ringing up the order taking the money and then voiding the sale.² It was her evidence that she placed the monies received from void sales in the till].

CCTV footage and till receipts showed Ms Sika and Mr Saxby voiding each of the sales on the morning of 27 August 2015. She continued to do cash sales until she was told to stop. She had no idea how much the till would be over or under when she voided sales.

Ms Sika said there were no standard procedures and as Mr Saxby was her direct boss, she did what he asked her to do. Ms Sika had worked in the hospitality industry for a long time and she agreed that this practice was not the norm.

It was her evidence that she never took any monies from the business. She never thought that there was anything wrong in what was being done despite not being asked to do this by any other manager in her years working in hospitality.

At the beginning of 2015, Ms Carolyn Chamberlain commenced working at the cafe. It was her job to close up at the end of the day. As part of the job, she counted the monies at the end of the day and reconciled the amounts. Ms Chamberlain immediately noticed that the amount in the till was out by \$20 to \$30. She spoke to Mr Martin Saxby, the Manager, who told her that "you girls make mistakes all the time so I just don't ring a few things up and put the cash in the till." Ms Chamberlain continued to count the monies and it was regularly out by \$20 to \$30.

She did not do anything about this because she was new.

Ms Chamberlain then noticed that the amounts that the till was over were increasing and she spoke to Mr Saxby again and he told her that it was not her job to count the monies and that she should just put the money in the safe. Despite this instruction, Ms Chamberlain continued to count the monies but no longer recorded how much over the till was.

Ms Chamberlain discussed this with a co-worker but they did not consider that they could report it because the Manager's mother in law was the receptionist at head office and she thought that it would get back to Mr Saxby and

she would lose her job. The co-worker reported to Ms Chamberlain that Ms Sika was doing something with the tills each lunch time when she was not in the café. Subsequently, Ms Chamberlain observed Ms Sika counting the money in the till.

On about 11 August 2015, Ms Chamberlain rang head office and alerted them to her concern that money was being taken from the café. As a result, arrangements were made to review the CCTV footage, the till reports and the monies in the safe. Ms Chamberlain said that Ms Josephine Capogreco, the HR Manager, came to the café that night and every night from then on to count the money in the safe and she was required to countersign the totals.

Ms Chamberlain said that she did not initially report what she saw because she thought reporting it would jeopardise her career because Mr Saxby and Dr Khaled El-Sheikh were extremely close.

Ms Karen Cross, the Finance Team Leader, gave evidence that the Manager in this case, Mr Saxby, was responsible for bringing the banking into head office and he had a very autonomous role and following the allegations she arranged for the tills to be examined, but it was only possible to obtain historical data going back to 5 August 2015. From viewing the historical data and the corresponding CCTV footage, Ms Cross formed the view that both Ms Sika and Mr Saxby were stealing money...from \$60 to \$160 each day.

The information was provided to the police and to the company director who decided that Ms Sika's employment must be terminated. The police did not want the staff to be alerted to the investigation until such time as they had arrested them. There was a concern that if the staff knew about what was going to happen, evidence could be destroyed.

On 27 August 2015, Ms Sika was arrested and taken to the police station where she was questioned. She was released without charge but advised that there was an on-going investigation. That afternoon, she was telephoned and told that her employment was terminated for serious misconduct, namely theft and fraud, and that she would be provided with a letter of termination.

The Commission found:

- The allegations of theft and fraud are serious and I am required to find on the balance of probabilities that the conduct complained of occurred.
- In this case, I am not satisfied that Ms Sika is guilty of theft or fraud.
- There was no direct evidence that Ms Sika received any monies taken from the business.
- The evidence established that there were discrepancies between the monies in the safe and the monies provided for banking.
- There was no evidence that Ms Sika took this money or received a share of this money. She denied taking any monies and it was not put to her in cross examination that she received a financial benefit from the actions of Mr Saxby.
- I am also not satisfied that Ms Sika intended by her actions to facilitate anyone else stealing from Khaled. In those circumstances,
- I am not prepared to infer that she was involved in defrauding her employer or stealing from her employer.

However, it was put that her conduct in voiding transactions was still serious misconduct and provided Khaled with a valid reason for terminating her employment. Ms Sika described her decision to follow her bosses' instructions as silly...that it was not done maliciously or dishonestly.

It was unreasonable for Ms Sika to fail to properly record the sales she made. It is also difficult to understand how Ms Sika could have thought that having more money in the till than was showing on the till reports was reasonable.

The DP found:

*"I am not satisfied that Ms Sika's conduct can be justified because her Manager told her to do it. While I am not satisfied that she deliberately or maliciously misled her employer, her actions in failing to accurately record the sales enabled her employer to be deceived about the café's takings. In a cash based business, **an employer is***

entitled to trust its employees to accurately record the takings. [My emphasis] *Whether the till is under or over, the employer is entitled to receive accurate information.*

“That conduct provided Khaled with a valid reason to terminate her employment.”

Whether Ms Sika was notified of that reason?

- Ms Sika was not notified of the reason before the decision to terminate her employment was made because the police did not want the termination to occur until after the arrest for fear that information would be deleted.

Whether Ms Sika was given an opportunity to respond to any reason related to the capacity or conduct of the person:

- Ms Sika was not given an opportunity to respond prior to the decision being made. She was never provided with an opportunity to respond to the contention that the voiding of transactions over such a long period of time was itself a valid reason to terminate her employment.

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:

- There were **dedicated human resources staff** and again the failure to afford Ms Sika with any opportunity to put her version of events **weights in favour of a finding that the dismissal was unfair***.

*[Ed note: HR under scrutiny again!]

Any other matters that the FWC considers relevant:

- It was submitted the dismissal was harsh given her personal circumstances. It was her evidence that because of the allegations and her arrest her reputation has been permanently damaged. Ms Sika, at the date of the hearing, had not been charged with any offence.

In conclusion, the DP found:

“I accept that Khaled followed police advice about not terminating Ms Sika’s employment prior to their investigation. However, there was no reason why after Ms Sika had been released by the police, Khaled could not have met with Ms Sika and provided her with an opportunity to explain her version of events.

“Khaled terminated Ms Sika’s employment for theft and fraud. Had Ms Sika been afforded an opportunity to explain her reasons for voiding the transactions and been afforded the opportunity to explain that she did not take any monies, Khaled may not have reached the view that she was guilty of theft and fraud. She was entitled to that opportunity and the failure to provide her with that opportunity means that the dismissal was unfair.”

In finding in Ms Sika’s favour and noting that she was not seeking reinstatement, Ms Sika was awarded \$936.51 and \$88.97 to her superannuation fund (noting that this amount was arrived at by a 10 per cent deduction for misconduct).

Until next time...