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### A study in an adverse action application

**Mrs Narghis Sultana v Thomastown Child Care Centre Inc.** [2016] FWC 422 (C2015/6192). WILSON, C. 22 JANUARY 2016

This matter relates to a general protections dismissal dispute by consent arbitration between a community-based child care centre and Ms Sultana, a Centre Carer.

The FWC did comment that such application would normally go through the unfair dismissal process, it was not critical of the path taken by the parties, that is there was no position put that Ms Sultana was dismissed because of her (lack of) performance, but rather because she had made complaints about her manager and a committee member in the course of allegations being put to her about her conduct.

In summary, Ms Sultana’s complaints were she exercised a workplace right when she:

- Complained about the role of her manager in supervising assignments that would lead to a diploma of early childhood education and care qualification;
- Complained about statements made to her by the Chair of the Committee of Management; and
- Sought a review by the Committee of Management of a formal warning issued to her regarding her conduct.

During her employment, Ms Sultana undertook training towards a Diploma of Early Childhood Education and Care. As part of her studies, Ms Sultana was required to undertake certain assignments and submit those to an external training provider, Customised Training Pty Ltd. As would be expected, those assignments related to a demonstration of competence in the workplace about the matters that had been the subject of training.

In late June 2015, a representative of Customised Training, Bethany, expressed concerns that some aspects of the assignment had been plagiarised. Bethany identified that to Ms Sultana as well as identifying it to TCCC.

In the course of the meeting on 1 July 2015 (held to discuss this matter), TCCC became concerned about another aspect of the assignment that had been submitted by Ms Sultana to her training provider. Their concern was that photographs used in the assignment of children at the Centre had been apparently used without the permission of the children’s parents. They viewed this as being a potential breach of the Child Care Centre’s policies and potentially a breach of legislation applying to the TCCC. They expressed their concern to Ms Sultana and told her that they would need to investigate what had occurred.

A further meeting was held with Ms Sultana on 3 July 2015 which was attended by Ms Sultana and TCCC. The meeting discussed TCCC’s concerns about the use in Ms Sultana’s assignment material of imagery of children without permission and sought her response.

On 10 July 2015, Ms Sultana was issued with a formal performance warning by TCCC, directly addressing the matters referred to above. Ms Sultana applied to the centre's Committee of Management on 29 July 2015 for it to be reviewed.

Following receipt of the application for review, TCCC conducted a performance review of Ms Sultana's performance at short notice. Ms Sultana was not given any specific notification that the performance review would be conducted on that day. At the conclusion of the performance review, Ms Sultana was advised performance was not at the level required by TCCC and that her services were no longer required, with the effect being that her employment would be terminated on that day.

**Note: Under an adverse action claim, the onus is on the employer to provide they did not breach the FWA, and in this case the actions taken by TCCC are presumed to have been taken for the alleged reason unless proven otherwise.**

The Commissioner cited a FB decision *Keep v Performance Automobiles Pty Ltd* (Keep):

*"It is important to note that s.361 does not obviate the need for an applicant to prove the existence of the objective facts which are said to provide the basis of the respondent's conduct. The onus does not shift from the applicant to the respondent until the applicant establishes the elements of each of the general protections upon which it seeks to rely. It is not enough for the applicant to merely make assertions regarding these elements, they must be determined objectively.*

*"The task of the FWC in a consent arbitration proceeding such as this is to determine three factual questions:*

*(i) Was the employee exercising a workplace right, within the meaning of s.341?*

*(ii) Did the employer take 'adverse action' against the employee, within the meaning of s.342?*

*(iii) Did the employer take the adverse action against the employee because of a prohibited reason, or reasons which included that reason?*

Whether Ms Sultana was fairly dismissed is not the domain of this decision, and no findings are made in that regard.

I am unable, however, for the reasons set out, to find that Ms Sultana was dismissed because of a prohibited reason, or reasons which included that reason.

### **Commentary**

Despite the reverse onus, the applicant is still required to provide that there is a genuine case to answer.

Further, I am of the view should the matter have taken the "unfair" dismissal route, there may well have been a different outcome.

### **(Poor) attempt at humour, found to lead to lack of trust and air dismissal**

Mr Claus-Dieter Hengst v Town and Country Community Options Inc. [2016] FWC 194. (U2015/12144). RICHARDS, SDP. 19 JANUARY 2016.

This matter concerns an application by Mr Claus-Dieter Hengst who is seeking an unfair dismissal remedy arising from his dismissal from his position as a Disability Support Worker and Workplace Health and Safety Advisor for Town & Country Community Options. The employer provides services on a not-for-profit basis to urban and rural communities for people with disabilities such as Down syndrome, cerebral palsy and intellectual disabilities.

On 22 September 2015, Mr Hengst explained that he was interviewing a co-worker, Mr Terry Mears, in relation to an OHS incident which occurred earlier that morning in which Mr Mears had struck a kangaroo in his vehicle. During the closing conversation Mr Hengst enquired of Mr Mears if he required any counselling over the incident. Mr Mears replied, "No". Mr Mears then added in a jocular manner: "I wasn't overly concerned for the kangaroo and it's not like I knew him personally."

With that light-hearted tone allegedly established, Mr Hengst went on to state - in what he seemingly considered to be a jocular fashion in the immediate context: "So you're ok then? You're not going to lose the plot and go home and rape your daughter or anything like that?"

Mr Mears was said to have laughingly responded to the suggestion made to him by Mr Hengst.

The comment and the resulting laughter were overheard by another member of the employer's staff, Ms Elizabeth Fazakerley. Ms Fazakerley claimed that upon hearing the comment by Mr Hengst she "sharply recoiled" and said: "Claus! That is not appropriate!"

Mr Hengst stated that his comment was immediately recognised by himself as a "slip of the tongue that just came out." As soon as he had said the offending words, Mr Hengst stated that he "tried to recover from it" (sic).

Ms Fazakerley claimed that she had been "stunned and shocked" by the comment made by Mr Hengst. The following day Ms Fazakerley spoke with Mr Evan Munroe, the Chief Executive Officer for the employer. Mr Munroe confirmed the depth of Ms Fazakerley's reaction and observed that she had been close to tears whilst talking with him.

Ms Fazakerley also stated that she further discussed the matter with Mr Hengst on 23 September 2015 and Mr Hengst had said to her that he'd "learnt from the experience and it would not happen again."

Mr Hengst was also said to have stated to Ms Fazakerley that: "How else can I learn if you do not tell me about these things?"

This was not the first occasion on which Ms Fazakerley had indicated her discomfort with his conduct. Ms Fazakerley stated that she had expressed concern to Mr Hengst in 2013 and 2014 when he wore an apron to the Christmas parties which had a representation of a woman's breasts on them (and to which tinsel had been attached).

Ms Fazakerley stated that she had also raised with Mr Hengst his conduct in relation to a disabled service user with whom Mr Hengst maintained an ongoing joke, so Ms Fazakerley had perceived it, about "patting her pussy" for him (when she returned home). Ms Fazakerley argued that the service user was embarrassed by the exchange but participated nonetheless. Mr Hengst claims there was no double entendre intended and that he knew the service user to have a cat.

Ms Fazakerley further indicated to Mr Hengst that a document under Mr Hengst's control and handed to Ms Fazakerley which lampooned office worker sensitivities about "hurt feelings" in the workplace was inappropriate and he should ensure - for his own interests - that senior staff, such as Mr Munroe, not see it. The document included a check list as to why the person filing the "Hurt Feelings Report" had filed the report:

"Reasons for filing this report. (Check box)

1. I am thin skinned.
2. I am a pussy.
3. I have woman hormones.
4. I am a queen.
5. I am a little bitch.

Name of "Real Man" who hurt your sensitive little feelings: \_\_\_\_\_"

Mr Hengst argued that he did not hand the document to Ms Fazakerley, as Ms Fazakerley asserted, but that she must have observed it by other means.

To return to the events of 23 September 2015, later that day and following his conversation with Ms Fazakerley, Mr Munroe telephoned Mr Hengst and queried his conduct and enquired as to whether he considered the comments to Mr Mears to have been appropriate.

Mr Hengst claimed that he was “gobsmacked” that the issue had been raised by Mr Munroe.

Mr Hengst initially contended the phrase was no more than “a light hearted comment”, but it “came out wrong.” Mr Munroe expressed a contrary view and claimed the comment was “not right under any circumstances and that he could not think of any place or time when such a thing should ever be said.”

Mr Hengst was said to have ultimately agreed with Mr Munroe and considered the comment to have been inappropriate. Mr Hengst went further in his statement and claims that he indicated to Mr Munroe that his comments were “stupid” and that he gave his “profuse apologies.”

Mr Munroe thereafter invited Mr Hengst to attend a show cause meeting on Friday 25 September 2015. By that time, Mr Hengst had contacted Mr Mears and apologised for his comments. Mr Mears did not consider the interaction or Mr Hengst’s comments to constitute any issue and did not wish to take any action.

At the meeting of 25 September 2015, at which Mr Hengst had a support person, Mr Hengst again was said to have been very apologetic for his conduct. Mr Hengst’s show cause response letter stated that: “My comment which was light heartedly said, in hindsight was totally out of order.”

In his statement prepared for these proceedings Mr Hengst stated in respect of his comments:

“I [...] made what I thought at the time a humorous comment, this was taken as such by the person being interviewed, but overheard by another female staff member who decided that it was inappropriate and reported it to our CEO.”

In the same statement, Mr Hengst stated: “As it was a slip of the tongue, I don’t believe it was deliberate. It was an accidental outburst.”

Mr Hengst claims that Mr Munroe’s comments over the course of the show cause interview appeared to be focused on finding reasons to dismiss him. That is, Mr Hengst claims that Mr Munroe complained of worst-case scenarios such as if a person who had been exposed to child abuse had heard the comments, and that the comments constituted sexual harassment of another female in the office, who had overheard the remarks.

Mr Hengst claimed that Mr Munroe adjourned the meeting to consider the circumstances. The meeting resumed shortly thereafter and Mr Hengst was dismissed from his employment with pay in lieu of notice period and the discharge of other accruals.

### **Consideration by the FWC**

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):

Generally, the employer will reserve the right to set expectations as to appropriate standards of conduct in communication within the workplace in the context of wider community standards, and with regard to the sensitivities associated with its own business. However, breaches of those expectations, once made out, must be considered and weighed within their particular factual matrix. Some breaches will be egregious and others less so. Particularly conspicuous or flagrant breaches may result in dismissal whilst breaches of a different order may warrant disciplinary responses of varying degrees.

The current case, however, highlights some of the difficulties in according due weight to the array of relevant considerations.

In this regard, I make the following relevant observations in respect of Mr Hengst's circumstances as advanced to me:

- The comment made by Mr Hengst is distinguishable from a comment that is designed and intended to hurt, abuse or threaten another person;
- The direct recipient of comment was not offended by the comment and expressly wished to take no action in respect of Mr Hengst's comment;
- Mr Hengst came to demonstrate remorse and contrition to his employer;
- Mr Hengst's comment was not made in a public environment or intentionally, at least so he claimed, in a context in which it could be overheard;
- The public business of the employer was unaffected by the comment as it went unheard by any member of the public (other than a single member of staff who overheard the comment inadvertently (according to Mr Hengst));
- Mr Hengst was not provided an opportunity to rehabilitate himself; and
- Mr Hengst had been employed for 18 years in his role as a disability support worker and there was no record of any other instance of misconduct on his part over that period of time.

Notwithstanding these observations, Mr Hengst's evidence presents difficulties:

- Firstly, Mr Hengst denied seeking to involve Ms Fazakerley in the exchange he had with Mr Mears. Ms Fazakerley gave sound evidence that Mr Hengst caught her eye immediately prior to making the offending comment to Mr Mears.
- Ms Fazakerley's evidence was candidly given and was free of any animosity towards Mr Hengst. Indeed, it was disclosed through cross examination, and contrary to Ms Fazakerley's wishes, that Ms Fazakerley had been disappointed that Mr Hengst had been dismissed from his job.
- Ms Fazakerley seemed to have had a view that Mr Hengst needed to be rehabilitated rather than sanctioned severely for his conduct (notwithstanding the fact that she believed she would find it discomforting to work with Mr Hengst in the future should he be reappointed to his prior position).
- Ms Fazakerley had signalled to Mr Hengst - in respect of three previous issues - that she was sensitive to aspects of his informal humour which he imported into a workplace.
- If Mr Hengst had been conscious of his duties and obligations in the workplace he ought to have fully appreciated what the response, and its ramifications, might be.
- It seems to me, moreover, that it was practically impossible for Mr Hengst to have overlooked the fact that Ms Fazakerley was seated in the same office some 2 metres from him when he made the comments that he did. His situational awareness could not have deserted him to such a degree.
- In my view, Mr Hengst was not honest in his disclosure to his employer about the nature and intent of his conduct on 22 September 2015. The intent of Mr Hengst's conduct was to engage in jocular banter with Mr Mears and at the same time cause Ms Fazakerley embarrassment and challenge her cultural sensibilities. That is, Mr Hengst's comment was deliberate and intended for a particular end, which is contrary to his various characterisations of his conduct (to which I will turn below).
- Mr Hengst did not at any stage fully comprehend the gravity of the comments that he made and their effect on those around him, particularly in an environment focused on the protection of the interests of the vulnerable in the community. It further illuminates the genuineness of the remorse which Mr Hengst came to exhibit to Mr Munroe.
- That at no point in Mr Hengst's written witness evidence or otherwise is there any suggestion that Mr Hengst offered an apology to Ms Fazakerley personally or directly or expressly.

As consequence, in my view the employer could not confidently rely on Mr Hengst's judgement in future circumstances in relation to the nature of his exchanges with his work colleagues or those vulnerable persons who utilise the organisation's services, and how and in what manner and tone Mr Hengst might represent the organisation and its values publicly (and in relation to its particular service users). This is much more than a mere concern arising from an excess of sensitivity in relation to informal behaviour in the workplace.

When these circumstances are weighed alongside other observations I have made above in respect of Mr Hengst's conduct, I have reached the view that the employer had a valid reason for the dismissal.

Mr Hengst was a long serving employee, which I have noted earlier. He had not been subject to any adverse performance management or conduct reviews in the past, either. Mr Hengst, in effect, has lost his long-term livelihood because of a single incident (at least largely so).

But that all said, when all the matters are weighed, Mr Hengst has failed to establish a sound foundation for trust and confidence on the part of his employer in his judgement in the future. I have said as much earlier. Mr Hengst's conduct, the manner in which Mr Hengst has responded to that conduct (particularly so in respect of Ms Fazakerley), the way he sought to explain that conduct, and the degree to which Mr Hengst has been open and honest with his employer about his originating motivation are all relevant factors in reaching such a conclusion.

Because of my finding as set out immediately above, Mr Hengst's application is dismissed.

### **Commentary**

To summarise, it would appear that the FWC took into consideration:

- That the workplace was that of sensitivity and retardant as it dealt with the most of vulnerable people in our community; and surmised that
- Mr Hengst could not be trusted to show tact and diplomacy into the future.

*Until next time...*

**Greg Reiffel**  
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