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Employee Relations News

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Greg Reiffel HR & IR Consulting

2016 marks my 30th anniversary of providing professional HR/IR and other related services to businesses across a number of industry sectors.

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"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 42nd edition:

In The Hitchhiker's Guide to the Galaxy by Douglas Adams, "The Answer to the Ultimate Question of Life, the Universe, and Everything" is 42, calculated by an enormous supercomputer named Deep Thought over a period of 7.5 million years. Unfortunately, no one knows what the question is.

Scary Pink-haired cook fairly dismissed

Ms Janine Budden v Finke Enterprises Pty Ltd ATF M&L Carlson Family Trust T/A Fused Cafe Pender Place [2016] FWC 562 (U2015/13072). SAUNDERS, C. 8 FEBRUARY 2016

By way of introduction, this matter covers a range of considerations in relation to unfair dismissals, including:

- An employer's ability to dictate a professional appearance standards;
- Intimidating conduct to other employees (including "balance of probability".
- Making derogatory remarks about the employer (even if after-hours).
- Ms Budden was employed by Fused Café Pender Place as a part-time cook from 6 February 2015 to 21 September 2015.
- On 15 April 2015, Ms Budden signed Finke Enterprises' Employee Code of Conduct requiring her to have a professional appearance at work.
- Fused Café, at Ms Budden's request, agreed to being involved in a breast cancer fundraiser – donating 10 cents from every hot beverage sold and donate some of the proceeds of pink slices to be made by Ms Budden.
- Ms Budden had her hair dyed fluorescent pink in preparation for her involvement in the breast cancer fundraiser.
- Ms Budden was given a formal verbal warning by her manager for:
    - The colour of Ms Budden's hair; and
    - Other staff feeling uncomfortable and scared of Ms Budden.
- Ms Budden was not happy about the direction given to her to change the colour of her hair.

- As to the other staff feeling uncomfortable and scared of Ms Budden, the Manager file note describes the issue in the following way:

  "…various staff had come to me feeling intimidated by Janine and 'scared' of her reactions if they make a mistake or need to discuss complex orders. This had led to the feeling of anxiety for them in the workplace. I advised Janine that in light of this she needs to be very careful in the way she communicates with fellow team members. I advised that it was not her responsibility to discipline or discuss issues with staff directly and any problems need to be bought [sic] to the attention of management directly, and we would organise training or to speak to staff ourselves. Janine did state 'this is ridiculous they should just do their jobs properly and then we would have no issues'. She asked that I give her the names of people who had reported the issue to me. I stated that I was not going to do that as the issue was in regards to bullying and I did not want her to speak to the people involved (as she had done in the past). I stated that while I myself am not intimidated by her, I can understand why other staff are, and it was vital that her behaviour change."

- Ms Budden spoke to a Ms Carlson by telephone in relation to the warning she had received earlier in the day from Ms Bowen. Ms Carlson gave evidence that during her telephone discussion with Ms Budden, Ms Budden "became hostile quite quickly, yelling, swearing, demanding I explain my decisions and reasons" for the direction not to attend work with fluorescent pink hair.

The Commissioner found:

- On the balance of probabilities, that Ms Budden yelled, swore and became "heated" during her telephone discussion.

- Notwithstanding the fact that Ms Budden believed in her own mind that she was in the "right" because she had dyed her hair for a charitable cause, that did not entitle her to speak to Ms Carlson, the owner of the business in which Ms Budden worked, in the way that she did.

- Even though the issue of hair colour was not directly addressed in the Code of Conduct, the direction given to Ms Budden not to attend work with fluorescent pink hair was a reasonable and lawful direction by the employer, particularly in circumstances where patrons at the Fused Café could see Ms Budden in the kitchen and from time to time Ms Budden had cause to interact with some patrons at the Fused Café.

- Another employee asserted that Ms Budden was very angry that she had to change the colour of her hair and Ms Budden said to her *"would you like me to show you what it [my hair] looked like before they f***ing made me change it?"*

- Ms Budden met with Mr Carlson at a table in the Fused Café. Ms Bowen was a witness to the discussion between Mr Carlson and Ms Budden. Mr Carlson outlined to Ms Budden what had occurred over the past week, including the reports they had received from staff as to what Ms Budden had said to staff.

- Mr Carlson told Ms Budden that loyalty is important to him, and the reason loyalty is important is that "when you bad mouth Lauren and myself to a room full of staff members it has to come back to me." Ms Budden then said to Mr Carlson "are you sacking me?" Mr Carlson replied "I'm sorry Janine". Ms Budden then stormed off. Ms Budden returned on two or three occasions to the table at which Mr Carlson and Ms Bowen were sitting to make comments such as "you talk about professionalism. I am the most professional person in the kitchen", "you have lost one of the best cooks you have had", and "you can't sack me without paying my leave and entitlements" before storming off again on each occasion. On one of these occasions Mr Carlson told Ms Budden that she would be paid her full entitlements.

The ambit of the conduct which may fall within the phrase "harsh, unjust or unreasonable" was explained in *Byrne v Australian Airlines Lt* by McHugh and Gummow JJ as follows:

"… It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of misconduct which the employee acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the

personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

The Commissioner deciding:

"…*I am satisfied that Finke Enterprises had a valid reason to dismiss Ms Budden based on her conduct. In particular, an employer has an obligation to ensure the health and safety of its employees in the workplace. That obligation extends to ensuring that an employee such as Ms Budden does not interact inappropriately with other employees in the workplace, particularly where such conduct is likely to, or does, have a negative impact on the health, well-being and/or performance of other employees in the workplace, as Ms Budden's conduct did. Further, it is inappropriate for an employee to make derogatory remarks to other employees about either their employer or a lawful and reasonable direction issued by the employer…Although this conduct occurred outside the workplace, Finke Enterprises is entitled to rely on such conduct because:*

(a) viewed objectively, Ms Budden's conduct was likely to cause serious damage to the relationship between her and Finke Enterprises, particularly in circumstances where the remarks were made to another employee at an event where a number of the employees from Finke Enterprises were present and the remarks related to a direction and warning which had been given to Ms Budden only three days earlier; and

(b) Ms Budden's conduct in making the derogatory remarks damaged Finke Enterprises' interests.

"Ms Budden asserts that the real reason for the termination of her employment was the fact that she dyed her hair fluorescent pink. I am satisfied…that was not an operative reason for the termination of Ms Budden's employment.

"The event that tipped Finke Enterprises "over the edge" from issuing an oral and then a written warning…to deciding to dismiss Ms Budden…was her derogatory remarks…Those remarks, together with the earlier inappropriate interactions between Ms Budden and staff at the Finke Café, resulted in Mr and Ms Carlson forming the view that they had no trust or confidence in, nor any loyalty from, Ms Budden.

"…Finke Enterprises' reasons for Ms Budden's dismissal were, in my view, sound, defensible and well founded, and were not be capricious, fanciful, spiteful or prejudiced."

"Notification of a valid reason for termination must be given to an employee…in explicit and plain and clear terms. In Crozier v Palazzo Corporation Pty Ltd a Full Bench of the Australian Industrial Relations Commission dealing with a similar provision of the Workplace Relations Act 1996 stated the following…:

"As a matter of logic procedural fairness would require that an employee be notified of a valid reason for the termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified…[It] would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."

…A more fulsome discussion of the reasons would likely have taken place had Ms Budden not "stormed off", on a number of occasions, from the discussion."

Opportunity to respond:

"An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. This criterion is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.

> *"I am satisfied that Ms Budden had an opportunity to respond to the reasons for her dismissal…Ms Budden did not take up much of that opportunity because she repeatedly "stormed off"…"*

Support person:

There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> *"This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."*

Warnings:

> *"In this case, the reasons for dismissal related to Ms Budden's conduct, rather than her performance, so this consideration is not relevant".*
>
> *"…I am satisfied that the failure by Mr Carlson to inform Ms Budden of the precise details of the derogatory remarks she was alleged to have made to staff on the prior evening would not have changed the outcome".*

Conclusion

> ***"..**I am satisfied the dismissal of Ms Budden was not harsh, unjust or unreasonable. Accordingly, I find Ms Budden's dismissal was not unfair. The Application is therefore dismissed."*

Commentary

This is an interesting case on a number of levels; mainly because the applicant was not provided with procedural fairness. Normally an angry exchange such as this would result in the meeting been drawn to a close, with the applicant being suspended on full pay until s/he was in a fit state to hold a cogent conversation.

Off work for more than 12 months because of non-work related injury, but reinstated

Peter Norman v Lion Dairy and Drinks Milk Limited. [2016] FWC 840, (U2015/7090). BARTEL, DP. 10 FEBRUARY 2016.

This is an interesting case that examines a number of areas, including:

- Inherent requirement of the job, reasonable accommodations (in the face of conflicting medical advice);
- Reinstatement;
- Loss of trust and confidence;
- The opportunity to respond; and
- What is "harsh."

Mr Peter Norman (the applicant) was dismissed from his position as Maintenance Technician (Fitter) at the Salisbury Plant of Lion Dairy and Drinks Milk Limited (the employer or the respondent) on 15 April 2015. The letter of termination of the same date stated that the applicant was no longer able to perform the inherent requirements of his position.

The applicant had a skydiving accident in February 2014 in which he fell approximately 10 metres and sustained multiple fractures. He did not return to work after the accident, but maintains that he was fit to resume his normal duties in March 2015.

The respondent's decision to dismiss was based on independent medical evidence, and was after the applicant's position was held open for more than 12 months.

Post-dismissal, the applicant obtained short-term casual employment, but was now on unemployment benefits. He stated that he has had difficulty obtaining employment because of his age and location.

Both parties presented "expert" medical witnesses, with one medico giving the analogy of:

> *"An AFL player who suffered a trauma or injury, with medico clearing the player as fit to return to football, but it is up to the coaches and trainers to determine if and when the player returns".*

The DP considered:

> *"In this matter it is the applicant's capacity, rather than conduct, that is in issue. The Commission is required to consider and make findings on whether, at the time of dismissal, the applicant was able to perform the inherent requirements of his position based on the medical and other evidence. If not, then consideration is to be given to whether he would be able to fulfil his position at some time in the future and whether* ***reasonable modifications*** [my emphasis] *could be made to accommodate any restrictions or limitations that he may have".*

And found:

> *"Accordingly I find that the restrictions suffered by the applicant when assessed by Dr Graham on 5 March 2015 were predominantly connected to the trauma he suffered and the healing process. The applicant could, and I find that he did continue to improve after this date.*
>
> *"In J Boag and Son Brewing v Button the worker had permanent restrictions and was unable to fulfil the inherent requirements of his original position. The employer had arranged for other workers to assist Mr Boag in his role over a period of many months. It was held at first instance that Mr Boag performed the inherent requirements of his position as it had been modified by the employer when it made available the assistance of the other workers. On appeal the Full Bench held that it is the substantive role and not any modified, restricted duties or temporary alternative position that must be considered.*

In terms of the respondent must be provided an opportunity to respond to the reasons for dismissal must be a fair and adequate opportunity, the DP cited the views of Chief Justice Wilcox as stated in *Gibson v Bosmac Pty Ltd*:

> *"Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However…[this] does not require any particularly formality. It is intended to be applied in a practical common-sense way so as to ensure that the affected employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section."*

The DP took into account the respondent's:

- Age and location.
- May be harsh in its consequences for the personal and economic situation of an employee.
- Where the dismissal caused damage to the employee's reputation which restricted the ability to obtain further employment.
- Where an employee is engaged under a subclass 457 visa faced deportation as a consequence of the termination.
- Where the employee had extensive and exemplary service, was the primary breadwinner for his family and was unlikely to secure further employment because of his age.

The applicant sought reinstatement to his former position.

Reinstatement was recently considered at some length in *Nguyen and Le v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* (*Nguyen*). Considering a range of authorities the Full Bench stated:

> *"We would observe that to describe reinstatement as the 'primary remedy', is to simply recognise that reinstatement is the first, perhaps even the foremost, remedy under the Act. The relevant question in determining whether to grant the remedy of reinstatement of an employee in relation to a dismissal that is found to have been 'unfair' is whether reinstatement is appropriate in the particular case."*
>
> *"Reinstatement might be inappropriate in a whole range of circumstances, for example if such an order would be futile such as where reinstatement of an employee would almost certainly lead to a further termination of the employee's employment because the employer has since discovered that the employee engaged in an act of serious misconduct which was only discovered after the employee's termination or if the employer no longer conducts a business into which the employee may be reappointed. The fact that the employer has filled the position previously occupied by the dismissed employee would rarely, of itself, justify a conclusion that reinstatement was not appropriate"*

The Full Bench then considered the approach to be adopted in considering an argument that reinstatement would be inappropriate because there has been a loss of trust and confidence:

- Whether there has been a loss of trust and confidence is a relevant consideration is not the sole criterion or even a necessary one in determining whether or not to order reinstatement.
- Each case must be decided on its own facts, including the nature of the employment concerned. There may be a limited number of circumstances in which any ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
- Ultimately, the question is whether there can be a sufficient level of trust and confidence restored to make the relationship viable and productive.

Finding

The DP reinstated the applicant, with the amount of monies paid in compensation for loss of remuneration to discussed by the parties (there will be some discount).

Until next time…

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