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Employee Relations News

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Greg Reiffel HR & IR Consulting

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Drug tested employee's termination found to valid despite testing inconsistencies and lack of procedural fairness

Nicholas Hafer v Ensign Australia Pty Ltd T/A Ensign International Energy Services[2016] FWC 990 (U2015/10423). PLATT,C. 22/2/2016

The applicant, Mr Nicholas Hafer lodged unfair dismissal application against his former employer Ensign Ensign Ensign after returning a positive test result for drugs, in breach of Ensign's "zero tolerance" drug and alcohol policy which formed part of the terms and conditions of his employment.

At the time of his dismissal, Mr Hafer was engaged as a Derrickhand, working at the Santos Moomba Gas Fields, performing drilling services for Santos, a client of Ensign. Mr Hafer had been employed by Ensign for 3 years and 11 months at the time of his termination.

Mr Hafer contended, that:

- He does not use drugs;
- He was not impaired by drugs whilst at work;
- The first sample and its subsequent testing was unreliable; and
- The secondary test conducted at the request of Ensign returned a negative result.

Mr Hafer further contended that his dismissal was harsh, unjust or unreasonable and argued that:

- Ensign did not ask Mr Hafer to explain the positive test result;
- The initial Santos drug test was not a test required by Ensign or carried out in accordance with the Fitness for Work and Other Drug Policy and Testing Procedure (Fitness for Work Policy);
- The Urine Drug Testing Form completed by the Santos tester indicated that the screening device used for the test had expired, which was evidence of poor quality control in the testing process and called into question the validity of the test result;
- Mr Hafer was not provided with the Santos sample and the failure to invite Mr Hafer to retest the Santos sample denied him procedural fairness;
- Ensign had an obligation to investigate the validity of the negative test result but did not do so;
- Ensign did not take steps to address the disparity between the two tests results depriving Mr Hafer of procedural fairness; and
- Reliance on the Santos test alone without investigation or independent verification further deprives Mr Hafer of procedural fairness.

Ensign contended that there was a valid reason for the termination of Mr Hafer's employment as:

- The test conducted by Santos was conducted in accordance with the Australian Standard AS/NZS 4308:2008 (Australian Standard) at the time of collection and testing and therefore there is no basis to undermine its quality;
- The positive test result was a breach of the "zero tolerance" approach to drugs provided by the Fitness for Work Policy;
- The "zero tolerance" approach is warranted given the type of worked being performed by Ensign employees, the heavy machinery used and potential risk to health and safety that arises from the work being performed;
- Mr Hafer was aware of the zero tolerance policy and its consequences; and
- The decision to terminate based on the Santos test was made for several reasons:
    - It was conducted by a specialist in the field of drug testing using a method which complied with the Australian Standard;
    - The Ensign test was not conducted in a controlled environment; and
    - The Ensign test indicated that the sample may have been diluted.

The Commissioner found that the Ensign test to be unreliable, and preferred the outcome of a NATA controlled Santos negative sample results could be relied upon.

The Commissioner adopted the definition of a valid reason set out by Northrop J in *Selvachandran v Peteron Plastics Pty Ltd,* which states*:*

> *"In its context in s.170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly."*

The Commissioner finding:

- The Applicant contended that there was insufficient evidence to support a summary termination. In my view this overstates the onus on the employer. The test in s.387(a) of the FW Act does not require that the employee's conduct justified summary dismissal, or was "serious misconduct," or whether the employer had a right to dismiss at law.
- The Applicant contends that in the absence of intent to breach Ensign's agreement and policies, there was no valid reason for dismissal…there is no requirement for the Respondent to establish intent on behalf of the Applicant. In any event…I have found that the Applicant was (or should have been) aware that there was a risk that had he been tested his arrival at the Santos site, he would have failed the test.
- Mr Hafer's counsel referred to the use of the word "wilful" in the termination letter and submitted that Ensign had an obligation to show that the conduct complained of was wilful in order to have a valid reason for termination. I do not agree that this is correct in law. In my view, in order to establish a valid reason Ensign must demonstrate that Mr Hafer breached the Fitness for Work Policy, not that any breach was wilful or constituted serious misconduct.
- The results of the analysis of the Santos sample detected the presence of Amphetamines, Methamphetamine and Cannabinoids. I have not been persuaded that the manner in which the Santos sample was obtained has adversely impacted its reliability. I have concluded that the analysis result is evidence of the presence of Amphetamines, Methamphetamine and Cannabinoids in Mr Hafer's system at the time of the test. In my view, the contradictory results of the Ensign sample analysis has been appropriately explained and does not dissuade me from accepting the result of the Santos sample analysis.

Concluding:

> ***"****Based on the evidence before me, on the balance of probabilities, I find that at the time Mr Hafer arrived at the Santos site Mr Hafer had Amphetamines, Methamphetamine and Cannabinoids, in his system in breach of the terms and conditions of his employment. In my view this represents a valid reason to terminate Mr Hafer's employment".*

Fair & reasonable?

An employee protected from unfair dismissal must be advised of a valid reason for termination prior to the decision being made. In *Crozier v Palazzo Corporation Pty Ltd* the 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 logical procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified…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."*

"Ensign should have met with Mr Hafer, formally advised him of the Santos test result and that it was proposing to terminate his employment and sought his response".

"Although Ensign failed to give Mr Hafer an opportunity to respond to the reasons for termination, I do not believe Mr Hafer's response would have had any bearing on the outcome of the disciplinary process …"

The Commissioner concluding:

> *"FWA must consider all of the above factors in totality. It is intended that FWA will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative."*

And:

> **"…**at in *Sharp v BCS Infrastructure Support Pty Limited* the Full Bench stated that:
>
> > *"…employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable. Likewise, depending on all the circumstances, it may be reasonably open to find that a dismissal effected pursuant to such a policy was not unfair."*

I have taken into account all submissions and evidence. Although there were **procedural defects** [my emphasis] in the conduct of the termination meeting, in my view this did not affect the outcome of the termination.

Commentary

The take home message in this decision is that the Commissioner found:

- The employer had a policy which the employee was bound by and was aware of both the policy the consequences of the breach of the policy.
- The tests were carried out by a NATA accredited laboratory.
- The severity of the outcome was consistent with the risk to health and safety.

Of most interest (to me), is the Commissioner took the approach that, at least in this matter, following due process (under the FWA) did not over-ride the validity of the termination.

However, (whilst it's not the FWC's role to administer criminal law), I have yet to read a decision that reflects the taking of illegal substances – by definition – is against the law and a blight on society. And, by extension, the workplace.

Workers must be advised of Transfer of Business in writing by NEW employer

Ms Tahanee Kakoschke v BG & BJ Pty Ltd T/A Wantirna South Studfield Newsagency [2016] FWC 1074 (U2015/15269). GOSTENCNIK, DP. 26 FEBRUARY 2016

This decision was in relation to the counting of service from the old employer to the new employer. The fact that the new employer did not put in writing to the employee that it would not recognise service from the old employer meant that the previous service was NOT counted.

The Applicant commenced her employment with BG & BJ Pty Ltd t/a Wantirna South Studfield Newsagency (Respondent) a few days after the Respondent acquired the business formerly conducted by Hi-Rail Pty Ltd t/a Wantirna South Studfield Newsagency (old employer) on or about 25 May 2015.

The Applicant's employment with the Respondent ended on or about 5 November 2015.

Was there is a live question as to whether there was a dismissal within the meaning of the FWA?

The Respondent maintains that the application should be dismissed because the Applicant had not at the time of the dismissal served the **minimum employment period**.

Continuous service is defined in s.22 of the Act and that section relevantly provides that if there is a transfer of employment, any period of service of the employee with the first employer counts as service with the second employer and the period between the termination of employment with the first employer and the start of the employment with the second employer does not break continuity. It does not, however, count towards the employee's period of continuous service.

In relation to a transfer of business, a transferring employee is an employee whose employment with the old employer has been terminated, who within three months of termination becomes employed by the new employer and who performs work for the new employer that is the same or substantially the same as the work performed by that employee for the old employer.

The sale of business contract contained provisions which deal with the transfer of assets of the business from the old employer to the Respondent. Thirdly, it is not in dispute that the Applicant commenced employment with the Respondent within a period of three months of the termination of her employment with the old employer, and it is apparent that the work the Applicant performed for the old employer, that is performing the work of a sales assistant, is the same or substantially the same as the work that she performs or performed for the Respondent.

The FWC was therefore satisfied that there was a transfer of business and I was also satisfied that, the Applicant, was a transferring employee within the meaning of the Act in relation to the transfer of business.

However, in the case of a transferring employee in relation to a transfer of business where the old employer and the new employer are not associated entities, prior service with the old employer may not be recognised if the **new employer informed the employee in writing before the new employment started that the period of service with the old employer would not be recognised.**

The Respondent conceded that she did not provide the Applicant anything in writing which would advise the Applicant of that fact, but says that it was communicated to the Applicant by the Respondent orally. It is sufficient to note that even if it did occur, it is not a sufficient basis to conclude that the prior service with the old employer would not be recognised for the purposes of the minimum period of employment because it is clearly set out in the FWA that the notice to the employee **must be in writing.**

The jurisdictional objection raised by the Respondent was therefore dismissed.

See also: Holly Gregory v Shaver Shop Pty Ltd [2016] FWC 1323 (U2016/4098), GOOLEY, DP. 1 MARCH 2016

Until next time…

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