

## Employee Relations News

Edition 44

14 April 2016



2016 marks my 30<sup>th</sup> 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."*

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### Legal firm dismisses victim of domestic violence

Alexis King v D.C Lee & L.J Lyons [2016] FWC 1664 (U2015/12294). JOHNS,C. 16 MARCH 2016

As a "side-bar", both parties in this matter sought to be represented by a lawyer. The Commissioner granted this request citing *Warrell v FWC [2013] FCA 291* due to the "...complexity of the matter, [the Commission] would be assisted in the efficient conduct of the hearing..."

The irony being that the respondent is a law firm, with the applicant a previous employee of said law firm as an "Associate" with an annual remuneration package of \$140,000.

The applicant in this matter was victim of domestic violence which caused her to be absent from work on occasion to prepare and attend court cases relating to criminal charges against her ex-partner and to settle property issues. She advised a small number of her work colleagues of this situation, however was reticent to advise the partners, according to the Commissioner.

*"...as an educated professional woman, the applicant felt a sense of shame and embarrassment about the domestic situation in which she found herself. As a result, she had confided in only a small number of people within the office about the personal matters which were distracting her from her work. She was encouraged to tell the partners but she chose not to."*

Her employer raised issues relating her diminished work performance/productivity and time-keeping.

Following a short period of sick leave, the company moved the applicant to an office closer to the manager so that the applicant could be more closely monitored.

It was during the winding up of these proceedings that the applicant was delayed and was unable to attend to matters that she had previously committed to doing. This matter was delayed which kept out of the office for longer than expected.

Upon her return, the applicant was dismissed with "immediate effect".

Procedurally, she was not provided with the opportunity to respond and was not provided with a reason for her dismissal. Her subsequent e-mails requesting that the firm reconsider its decision to dismiss her were of no effect.

The Commissioner concluded:

*"[I am] satisfied the dismissal of the applicant was harsh. Although the applicant breached her obligations to her employer by not telling them that she would not be returning to the office by 11.00 am on 23 September 2015, the consequences for her (the loss of her employment), was harsh and **disproportionate to the gravity of the misconduct** [my emphasis] in respect of which the respondent acted...[finding that] the applicant's dismissal was unfair".*

Because of the applicant's lack of communication with the partners, the Commission reduced the amount of compensation by 50 per cent, awarding \$11,064.28.

#### **Commentary**

The commissioner in this matter cited the seriousness of domestic violence and a woman's right to be protected. However, the lack of communication with the firm's management went against her, whilst the firm could have done better in the procedural stakes.

As a HR Manager, I would have asked (and we don't know if this was or was not asked) whether the applicant had any issues that was affecting her work. If the answer was "no", then the firm had every right to focus on her performance, alternatively if the answer was "yes" then reasonable accommodations ought to have been provided (eg a leave of absence).

### **"Crack sealer" dismissed by brother for drug use**

George Haslett v SuperSealing Pty Ltd. [2016] FWC 1622 (U2015/13372). Wilson, C. 18 March 2016.

George Haslett (the applicant) was employed by his brother's business, SuperSealing Pty Ltd, as a "crack sealer", working on public roads to repair cracks in the pavement. He was employed between 25 May 2003 and 23 September 2015. His son still works in the business.

Mr Haslett was dismissed in September 2015 for serious misconduct related to his drug use.

In the course of employment, he drove medium and heavy class vehicles.

His employment conditions included a telephone for work-related and private use, and a motor vehicle, including for private use, and he lived in a house owned by his brother.

It was the company's policy to drug test its employees. The applicant on one occasion admitted that he would not pass the test, and it was agreed that he take leave.

Subsequent drug tests were pre-arranged on eight (8) occasions, which the applicant only attended to two (2). Both are urine drug screens and both show the detection of amphetamine type substances. Mr Haslett puts forward about this period and earlier that he had been depressed,

After receiving the results of the first drug test, conducted on 1 September and reported on 3 September 2015, Mr Haslett was warned in writing about the consequences of the matter. The company characterised it as serious misconduct and confirmed that he was stood down without pay as a result. The company quoted its drug policy in its letter to the applicant, and included:

*"If your conduct does not improve, (or if there are any further performance or conduct issues of any kind) further disciplinary measures may be taken, which may include the termination of your employment."*

On 14 September 2015 was taken by the company representatives for a second drug test, which he did not pass either.

The commissioner considered:

*"...Mr Haslett, when he was performing work, was required to use heavy machinery with clear implications for his ability to perform that work safely if affected by certain drugs. The context also includes SuperSealing's Drug & Alcohol Policy which views alcoholism and drug use as a treatable illness, indicating that in appropriate situations where an employee's performance and well-being has been adversely affected by alcohol or drug use SuperSealing may assist the employee with referral to treatment programs. The context also includes that following Mr Haslett's failure to pass the drug screen taken on 1 September 2015, he was warned about the consequences of repetition and stood down from work without pay until he was able to pass a negative drug test, being one which indicated that non-prescription drugs were not within his system.*

*“Further it would be an incorrect reading of the policy to take the view that it is entirely up to SuperSealing to offer or arrange assistance to employees. There are mutual responsibilities under the policy, with Mr Haslett holding responsibilities for his rehabilitation as well as SuperSealing. This is also not a situation where SuperSealing have taken a purportedly “zero tolerance” approach to a test indicating an employee may be affected by non-prescription drugs. It is not even a situation where the company has dismissed an employee after a failure to pass a second drug test.*

*“Instead, it is a situation where Mr Haslett was warned after the first failed drug test about the consequences of repetition for his future employment; was then sent for a second drug test which was failed; and then was given a third chance to demonstrate that he was fit for work, which he did not take up. It was only when Mr Haslett chose not to take up the third chance afforded to him that the company moved to dismiss him”.*

The Commissioner finding that the applicant was fairly dismissed.

### **Commentary**

Simple: have you got a drug and alcohol policy? If not, I can help.

### **Interesting article on “Employment myths – busted”:**

[http://www.mondaq.com/article.asp?articleid=481300&email\\_access=on](http://www.mondaq.com/article.asp?articleid=481300&email_access=on)

### **Reminder:**

Private sector employers with more than 100 people must submit an annual report to the Workplace Gender Equality Agency. I can provide assistance with this.

***Until next time...***

**Greg Reiffel**  
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