

Employee Relations News

Edition 46

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

Check me out at: <http://gregreiffelhrir.com/> or [LinkedIn](#)



"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."

I also would greatly appreciate if you could pass this newsletter on to your business contacts. Thank you.

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Walter Mitty moment or a very naughty boy? Misrepresentation.

Troy Jarvis v Croker Constructions. (U2015/11964) [2016] FWC 2377. GOOLEY, DP, 19 APRIL 2016

The applicant in this matter, a Mr Troy Jarvis ("Jarvis"), worked for the company as in a non-supervisory capacity for a period of 18 months, save for the occasion where the supervisor would "get him to look after the boys" whilst he was away from the workplace.

Ms Tania Silk representing a labour hire firm visited the site in her capacity of supplying workers to the company.

Jarvis approached Ms Silk and purported to her the site supervisor. Discussions took place between Ms Silk and Jarvis in what I would describe as a business meeting. Confidential information was provided that would not normally be said. Jarvis complained to Ms Silk in relation to the quality of people she was providing to the company, including OH&S matters. He then suggested that Ms Silk and he should catch up for coffee at some stage to discuss some volunteer work he was doing. He later texted her in this regard.

By this time Ms Silk became suspicious and contacted the company's managing director, who advised Ms Silk Jarvis was not a supervisor. Ms Silk said she felt she had been lied to by Jarvis and that he had misrepresented Croker's and himself and had posed as a supervisor. She told Mr Croker she thought his behaviour was inappropriate and unacceptable.

Jarvis was a difficult employee and he had a history of poor performance and was on a final warning for an unrelated matter (unacceptable language, harassment and bullying) and had been verbally counselled in relation to other performance issues.

After the termination of his employment, Mr Jarvis contracted the Perron Group. Croker's were performing work for Perron. He reported his safety concerns to them.

In summary, Jarvis was dismissed for his conduct in representing to Ms Silk that he was a supervisor. As a result of that misrepresentation he became privy to information that would not be provided to an employee.

The DP commented:

*"[just because] the **conduct occurred does not mean that there was a valid reason for the termination of employment** [my emphasis]. [The company] submitted that Mr Jarvis 'blatantly and deliberately attempted to gather information from a third party about the company in a corrupt and dishonest manner. The applicant wilfully represented himself by posing as a supervisor and purported to be a person in authority so that a third party, who was an external supplier of the respondent would meet him.'"*

And

"...Jarvis was 'a difficult and disgruntled employee with an irrational grudge against his employer, an obsessive, obstructive and often provocative approach to safety... [and had] taken an avid, bordering on obsessive and disruptive, interest in the safety function of the company to the detriment of the role he was appointed to carry out and its responsibilities."

The DP was of the view that Jarvis had not made the misrepresentation for personal gain, did set out to illicit confidential information from Ms Silk and allegations relating to his poor work performance was not backed up in the evidence. (Jarvis' supervisor was not called as witness); and stated that:

"If Mr Jarvis was dissatisfied with how health and safety was being dealt with on site he should have raised it with more senior managers. If that was unsuccessful he could have raised it with the Work Safe WA. Mr Croker said he was experienced in OH&S issues and he should have been aware of the appropriate steps to take to resolve such issues. However he made a deliberate decision to bypass these processes and go directly to Ms Silk and raise his concerns with her."

The DP finding:

"However, I am not satisfied that Mr Jarvis' conduct warranted his dismissal. I accept his sworn evidence that he was put in charge when his supervisor left site. I accept that this did not make him a supervisor and did not entitle him to represent to Ms Silk that he was a supervisor. However, I am not satisfied he did this for personal gain with any intention to harm Croker. He acted out of his misguided belief about his responsibilities when left without supervision on site. I am satisfied that his conduct warranted a warning [my emphasis]. I am not satisfied that making that representation was sufficient to justify his dismissal. I am therefore not satisfied that there was a valid reason for his dismissal".

The Company was ordered to pay Jarvis compensation of \$9,120.00 and an additional \$866.40 to his superannuation fund.

Commentary

On the one hand, the payment of compensation (based on the company's allegations) was probably a good investment (tongue firmly in cheek). However, the fact that the supervisor was not called to give evidence was a large gap in the burden of proof, and it essential that someone must be in supervision at all times, otherwise the relevant safety will shut the site down.

Legal Privilege

The latest cases on the issue of what can and can't be called upon under legal privilege, in this this great article:

http://www.mondaq.com/article.asp?articleid=489088&email_access=on

Drugs & Alcohol (E-Alert from FWBC)

Are you concerned about drug or alcohol use on a project?

It has come to FWBC's attention today that young workers including apprentices and second and third year tradespeople are being encouraged to take ice and methamphetamines on a private building project.



FWBC has notified the relevant law enforcement and workplace health and safety agencies.

In addition, contractors who are covered by the Building Code 2013 are reminded that they have responsibilities in relation to management of drugs and alcohol on all building projects.

For private sites, contractors are required to have a work health safety and rehabilitation system that shows the way in which drug and alcohol issues in the workplace will be managed to help ensure that no person attending site to perform building work does so under the influence of alcohol or other drugs.

For sites that meet the threshold for Commonwealth funding, mandatory random drug and alcohol testing is required at least monthly.

The Building Code 2013 requires particular substances to be tested for, including methamphetamines and ice. Minimum requirements are set out in Schedule 3 of the Building Code 2013. Further information is available [here](#).

Contractors are audited by FWBC Investigators in relation to their compliance with the Building Code 2013, including their management of drugs and alcohol issues.

Contractors, workers and others who are aware of building sites with drug and alcohol issues are strongly encouraged to report these issues to FWBC, as well as other relevant authorities.

For more information, or to discuss these issues with FWBC, contact the hotline on 1800 003 338. You may remain anonymous if you wish.

Letter to the Editor

In response to my special report on the rising costs of defending dismissal cases...

Great (honest) outburst, boy the NWNFL's parasites will have you on their "hack & destroy" list.

One thing you may have overlooked in your guide to employers was to invest/select/train in good people managers as you know there are as many (if not more) employee productivity problems caused by (poor) managers as is caused by unions and government intervention.

As the majority of employers in Australia - by number - employ less than 100 employees, how many of those have some (any?) training in people managing and understanding of behaviour.

A lot of the 'flavour of the time' HR training is usually based on books/experiences of academics who in the main have as much practical work experience outside academia as the dumb politicians who tamper with the workplaces - practically [none]!

Many of the academics Covey; Drucker etc. forget the GE Electrics factor (c1930's) which no matter which behaviour theory - good; bad; and placebo - was implemented - production improved regardless. and many other theories which are slavishly followed by highly academically qualified HR practitioners who infused so much jargon into the workplace that management generally see HR as basically irrelevant in the workplace in many instances.

Whatever happened to the HR practitioner? I remember a conversation I had with a HR manager regarding some employee problems the organisation was having and I felt the high absenteeism and WorkCover issues they were having had some basis in both poor management practices and attitudes and the lack of follow up with return to work. Guess what the response was?

"I don't have much to do with WorkCover – that is handled by accounts department and we rely on our lawyers for advice on hiring and firing issues."

The [HR “professional”]:

- Wasn’t aware of the overall skill set required of the HR department to do an average job for the organisation;
- Wasn’t interested in developing her skill set further in other than HRIS and employee relations (read employee engagement); employee newsletters and employee benefits);
- Didn’t have a clue about presenting basic facts to management on their poor employment practices and attitudes to employees; and
- Had a PhD and bar in psych and arts and was studying for an MBA.

Doug

What’s *your* opinion?

Until next time...

Greg Reiffel
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