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## In this Edition:

- [Dismissal because of policy breaches raises a number of interesting points.](#)
- [Bong Nong given the Gong – Synthetic Cannabis.](#)

## Dismissal because of policy breaches raises a number of interesting points

Ms Michelle King Prouds Jewellers Pty Ltd. [2016] FWC 1369 (U2015/14118). Hunt, C. 27 April 2016.

This is a most interesting case as it explores a number of issues, including:

- An employee's obligation to bring any observations of breach of company policy to the attention of management.
- Serious misconduct, not necessarily being a valid reason for dismissal.
- The infallibility of written records of interview not being of great concern.
- The length of service and age of the employee.

Ms King commenced employment with Prouds on 10 March 2008 as a part-time Sales Assistant. During 2013, Ms King acted as an Assistant Store Manager and then acting Store Manager. From August 2014, Ms King was permanently employed as an Assistant Store Manager at various Prouds and Angus & Coote stores.

Prouds summarily dismissed Ms King for serious misconduct. Despite the summary dismissal, Prouds elected to pay her four weeks in lieu of notice.

Allegations that led to Ms King's dismissal were:

- Created layby's without the customer being in the store;
- Created layby's without a deposit;
- Layby payments made for product without the customer being in store;
- Alleged bullying of a team member;
- Staff discounts provided to a friend;
- Processed a 'special order' and then cancelled the 'special order';
- Awareness of 'numerous fraudulent layby's conducted by Tracey to gain sales and achieve store budget';
- Writing up her own repairs; and
- A small number of additional allegations not pursued by Prouds.

Ms King's argued that her actions were minor administrative errors, and not serious enough to warrant termination of her employment; and had an unblemished work history until the decision was made to terminate her employment for serious misconduct.

The Commissioner found:

- Ms King was not prepared for the meeting of 23 October 2015.
- Ms King did not give enough importance to the suspension letter and letter of allegations of 22 October 2015.
- Handwritten notes taken at the meeting would not contain every word answered by Ms King, there may have been additional words used by Ms King. Even if those words were said by Ms King, and not recorded, they do not alter, in my view to any significant degree, the misconduct engaged in by Ms King.
- Ms King has admitted that she knew what she was doing was wrong. If Ms King obtained a staff price. It does not matter that each pen refill, of which there were four, were nominal in value.
- It was Ms King's responsibility to her employer to protest her previous manager's policy breaches to the manager. If the protest fell on deaf ears, Ms King's responsibility was to report the incident to a higher level of management. Instead, Ms King signed her name against the staff discount register, therefore knowingly completing a false business record.

The Commissioner also considered Ms King's period of service and her age:

*"In Sexton v Pacific National (ACT) Pty Ltd, Vice President Lawler noted:*

*'Relevantly advanced age and long service can render harsh a termination that would not be harsh in the case of identical conduct by a younger person with relatively short service. Nevertheless, age and length of service simply remain a factor to be taken to account in considering whether the termination was harsh, unjust or unreasonable and in applying the principle of a "fair go all round".'*

*"Ms King's employment with Prouds was in excess of 7 years, and she had an earlier unblemished record. These are clearly relevant and significant matters in the consideration of whether the dismissal was harsh, unjust or unreasonable".*

The commissioner also made some interesting observations relating to the reference to **"serious misconduct"** referencing a full bench decision in *O'Connell v Wesfarmers Kleenheat Gas Pty Ltd* [2015] FWCFB 8205 (18 December 2015, which in turn referenced *Rankin v Marine Power International Pty Ltd* Gillard J stated that:

*"There is no rule of law that defines the degree of misconduct which would justify dismissal without notice" and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship.*

*"...wilful or deliberate conduct inconsistent with the continuation of the employment contract, serious and imminent risk to health and safety or the viability of the business, theft, fraud, or assault, intoxication at work and refusal to carry out a lawful and reasonable instruction may [be grounds] that there is a valid reason for dismissal,*

*"It must also be acknowledged that the application of the exemption) from the requirement to provide the NES entitlement to notice [and redundancy payment]"*.

The point being that the Commissioner found that there was no nexus between "serious misconduct" and a "valid reason" for dismissal.

The Commissioner concluded:

- If the reason for Ms King's dismissal had been a single company policy breach, made inadvertently, I would have been inclined to the view that the dismissal was harsh. However, I have found that Ms King knowingly breached company policy [on a number of occasions] and that
- Ms King had opportunity to address these issues with senior management and failed to do so.
- Notwithstanding Ms King's length of service, her previous unblemished work history, and the consequences of her dismissal, that Prouds was entitled to conclude that there was no basis for confidence that Ms King would comply with Prouds' company policies in future if her employment continued. For that reason, Ms King's dismissal cannot fairly be characterised as a disproportionate response to her conduct.
- The decision by Prouds to pay to Ms King four week's payment when the termination was viewed by Prouds as constituting serious misconduct, assists with reducing some of the understandable financial concerns that Ms King would have had on termination.

## **Commentary**

Prouds was successful in defending this case because it:

- Had policies in place which were known to the employees and properly applied.
- Conducted an investigation following due process.
- Was found to be generous when providing (what amounted to an “ex-gratia”) payment of four weeks, which may have offset – to a small degree - the “length of service argument”.

## **Bong Nong given the Gong – Synthetic Cannabis**

Colin Wright v AGL Loy Yang Pty Ltd. [2016] FWC 1941 (U2015/12039). WATSON, VP. 11 MAY 2016.

This matter proceeded by way of “determinative conference.” At the conference the parties advised that had reached an agreement that if Mr Wright:

- Consumed synthetic cannabis prior to, or during, his journey from work on 27 August 2015, following the completion of his shift on that morning his dismissal would stand; and
- Did not consume synthetic cannabis, AGL conceded that there would be no impediment to Mr Wright returning to work.

This was an interesting scenario in that the incident that led to the dismissal (ie the smoking of synthetic cannabis) was alleged to have occurred at the end of Mr Wright’s shift.

By way of background:

- Mr Wright was employed by AGL as a Mine Operator at Loy Yang, a power station and coal mine in the Latrobe Valley.
- He had been in that employment since August 2012 when AGL became the operator of Loy Yang A. However, at the time of the dismissal he had been continuously employed at the power station and coal mine by various operators of Loy Yang A for 30 years.
- Mr Wright’s duties included the operation of large mining plant including dredgers, bulldozers, stackers and conveyor systems. Further duties also included the operation of the control centre, the isolation and ‘making safe’ of plant and conducting inspections and reporting on issues.
- AGL had policies relating to Code of Conduct, Alcohol and Other Drugs Management Policy.

Mr Wright was dismissed from his employment on 17 September 2015. AGL terminated Mr Wright’s employment following an investigation and show cause process concerning an incident whereby AGL determined that Mr Wright had used synthetic cannabis in the car park prior to leaving work on the morning of 27 August 2015. The use of synthetic cannabis on 27 August 2015 is disputed by Mr Wright.

Evidence was given concerning previous incidents involving Mr Wright’s use of synthetic drugs in the workplace, including on 28 March 2013 and 8 January 2015:

- 28 March 2013 Mr Wright was observed in a severely impaired state by employees. He started to hallucinate and felt convulsions and was unable to speak. During the investigation that followed, Mr Wright advised that this was as a result of a bad reaction to the synthetic substance combined with the consumption of prescription medication. No formal disciplinary procedures were implemented, however AGL advised Mr Wright that it was unacceptable to be at work while affected by an incapacitating drug.
- 8 January 2015 Mr Waterhouse found Mr Wright in the toilet holding a smoking device, a water bong. Mr Wright accepts that he was smoking synthetic cannabis with the bong. As a result of this incident, AGL issued a final written warning to Mr Wright on 29 January 2015. The letter indicated that Mr Wright was required to complete a residential drug and alcohol rehabilitation program for a minimum of 10 weeks. It was stipulated that Mr Wright would meet the costs of the rehabilitation program, however AGL ended up paying for the majority of the costs.
- After Mr Wright completed the rehabilitation program a return to work plan was prepared. Mr Wright signed this return to work plan, acknowledging that failure to adhere to the requirements of the plan may result in the termination of his employment.
- Mr Wright was involved in a car accident on the morning of 27 August 2015 after concluding a night shift.
- He had drove through the front of three houses, and told police that he finished work and decided to smoke a synthetic substance before driving home. The police subsequently advised AGL.

- One of the attending police officers photographed a “smoking pipe” which was located in the centre console of Mr Wright’s vehicle.

Mr Wright evidence was:

- On 27 August 2015 he worked a 12 hour night shift that finished at about 6.00 am. He says that it was a difficult shift because whilst driving down into the mine with his shift partner passed out while sitting next to him. Mr Wright could not get a response from him. Mr Wright arranged for medical assistance and resumed his work after the ambulance arrived.
- He remembered feeling tired by the end of the shift. He believes this was due to a combination of the stressful events concerning his shift partner and the fact that he had only recently returned to working night shifts.
- Mr Wright stated that when he arrived in the car park, he went directly to his car, got in and drove off.
- The road was very wet and visibility was poor.
- He went through the roundabout and then ploughed into the yards of the two closest houses, going through their fences as he did so. He then hit a veranda, causing the roof to collapse and kept going until he hit another fence.
- He has a vague recollection of seeing people milling about him at a time that he believes must have been after the accident. He remembers seeing people in uniforms but cannot recall whether they were police, ambulance or other emergency personnel.
- Has no recollection of having a conversation with anyone at the scene of the accident. If he did speak to someone, he does not know what he said. He could not recall telling the police officer that he had smoked synthetic marijuana.

On the evidence, the most probable cause of the accident was fatigue, given that it was established on the evidence that Mr Wright had very recently resumed night shifts, it had been a difficult shift, and fatigue was one possible cause posited by Mr Wright’s treating doctor at the hospital, and was accepted as a possible explanation by police.

The sample of Mr Wright’s blood taken at the hospital was tested and the results were negative for delta-9-tetrahydrocannabinol, as well as other drugs.

In an attempt to establish that he had not taken synthetic cannabis Mr Wright did not obtain a test for the presence of this substance until 8 September 2015, well after the incident and his discharge from hospital. He was also aware of difficulties in detecting these substances.

The VP finding:

*“In all of the circumstances I find that on the balance of probabilities Mr Wright smoked synthetic cannabis prior to or during his journey from work on the morning of 27 August 2015. I find that his statements to the police at the accident scene are a reliable record of the circumstances and that his denials of drug use to AGL and in his evidence before the Commission should not be accepted.*

*“Given the agreement of the parties that the determination of this issue will essentially determine the application, I proposed to issue an order dismissing Mr Wright’s unfair dismissal application”.*

**Until next time...**

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