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Greg Reiffel Employee Relations News

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

In this Edition:

Mother's evidence on her son's behalf refuted by "inference".

Sam Chisholm v Coates Hire Operations Pty Limited T/A Coates Hire [2016] FWC 3653, (U2015/15205). KOVACIC, DP. 6 JUNE 2016

The applicant in this matter, Mr Chisholm, was dismissed by Coates following a Mr Chisholm's company provided vehicle being crashed into a tree. Mr Chisholm denied driving the vehicle. This matter is of interest because of the lack of direct evidence that the applicant was the driver, and DP analysing the case by "inference"; providing a High court "checklist" to follow in such circumstances.

Noting "the balance of probabilities" is not mentioned once within this matter.

Mr Chisholm commenced employment with Coates on 24 August 2011 and at the time of his dismissal was working as Assistant Branch Manager at Coates Queanbeyan (NSW) Branch. At about 9.00 pm on 21 October 2015 the company vehicle allocated to Mr Chisholm was involved in a single vehicle accident.

Coates stood Mr Chisholm down on full pay pending receipt of a police report regarding the incident. Later that day, Mr Chisholm sent an email to Coates stating:

> *"Hello all, after discussions with my lawyer he wants a written reference to what I am stood down and a referral with evidence win [sic] what policy I've breached. I'm clearly denying all accusations and will need to seek compensation if a proven answer cannot be given. Further more [sic] my lawyer wants an indication of finalising the situation as police investigations with Coates as police investigations can go on and never end without a decision."*

Coates then telephoned Mr Chisholm and discussed Coates undertaking its own investigation into the incident rather than awaiting finalisation of the police investigation. Mr Chisholm was amenable to that approach and attended an interview on 3 November 2015 with his mother as his support person.

Following the investigation (in which Mr Chisholm attended with his mother as support person), Coates sent Mr Coates a "{show cause" letter and subsequently terminated his employment with payment of one month's notice.

Mr Chisholm's defence was that the keys for the company vehicle where lost or stolen and he was not the driver at the time of accident. He argued that he had been dismissed as a result of assumptions with no actual evidence that proved anything to be true.

Coates submission was:

- Mr Chisholm had shown reckless lack of care for its property, breaching its policies and consequently creating a risk to his safety and that of third parties.
- Mr Chisholm had advanced no logical reason why he would place takeaway food and trays of raw meat in the vehicle, then return to the Golf Club prior to making the decision to not drive.
- There was no evidence of any items being stolen from the vehicle (consistent with theft).
- When Mr Chisholm telephoned Mr Cheney at the accident scene he unnecessarily put his mother on the phone and avoided further discussion.

- Mr Chisholm's mother, without being asked or prompted, volunteered "he's been with me all night".
- This contradicted Mr Chisholm's evidence that he had only been with his mother after she picked him up from about 8.00 to 8:30 pm that evening.
- The accident scene was on the most direct route between the Golf Club and Mr Chisholm's home address.
- The policeman stated that he:

    - Had picked up Mr Chisholm and his mother to take them to the Queanbeyan police station to be interviewed he observed that Mr Chisholm had been drinking fairly heavily. observed that Mr Chisholm had been drinking heavily;
    - At the accident scene he saw no signs of the car having been broken into;
    - There was quite a lot of blood and bits and pieces on the vehicle's airbags [although] when he picked Mr Chisholm up he did not notice any visible signs of bruises or cuts;
    - A witness had advised that a person matching Mr Chisholm's appearance had been running away through the bushes and was later seen at a nearby service station on the telephone in tears talking to his mother.

The DP, considered Selvachandran v Peteron Plastics Pty Ltd which states (in part):

> *"…the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason." (Underlining added)*

The DP drew upon a number of citations, in matters where there was no clear factual evidence (ie "guilt by inference" (my words), the principles in such maters being:

- An inference is assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts;
- The drawing of an inference is part of the process of fact finding;
- An inference can be drawn if it is reasonably open on the basis of agreed or proved facts;
- The question whether a particular inference can be drawn from the facts found or agreed is a question of law;
- Where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference;
- The circumstances must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture;
- Matters to be taken into account in drawing an inference include circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed;
- Generally it is not lawful to take into account moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations;
- The degree of probability required to found the necessary inference will depend on the nature of the proceeding:
    - In a criminal case the facts must be such as to exclude reasonable hypotheses consistent with innocence, in a civil case you need only circumstances raising a more probable inference in favour of what is alleged;
    - A party's failure to give evidence on some issue in cases where it is within that party's power to provide or give evidence, may result in more ready acceptance of the evidence for the other party or the more ready drawing of an inference that is open on that evidence." (Underlining added)

In dismissing the application, the DP found:

> *"While I acknowledge that based on the material before the Commission it is not possible to be absolutely certain that Mr Chisholm was driving the vehicle on 21 October 2015 when it crashed, drawing on the decision in Smith, I believe that the material points to Mr Chisholm having been the driver at the time of the accident."*

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Absenteeism dismissal fair and could have been serious misconduct.

Aaron Portelli v Polar Fresh Cold Chain Services Pty Ltd t/a Polar Fresh[2016] FWC 3519, (U2016/4254).Hatcher, VP. 6 June 2016.

Polar Fresh had a major problem with its employees taking excessive unplanned leave. It instituted policies, fact sheets, and more rigorous approach to the problem.

Comment: This case only fuels the reasons that employers are no longer employing people – choosing to use labour-hire agencies instead. This in turn has changed the industrial landscape where we have a generation of workers who may never enjoy "permanency" in employment. This lack of job security comes with its own set of problems. Mr Portelli may well become a "poster child" for labour hire firms. GR.

Mr Aaron Portelli was a "*Team Member*" with Polar Fresh Cold Chain Services Pty Ltd. He was dismissed on 29 January 2016 with four weeks' pay in lieu of notice for a serious breach of a "*Final Formal Warning*" concerning absenteeism, in that he had failed to attend for work on 24 January 2016 and had taken leave for that day which was not pre-approved or for the purpose of personal/carer's leave.
Polar Fresh has in recent years experienced high levels of absenteeism among its permanent workforce, with each employee on average taking 15 days per year of paid and unpaid sick leave. It has adopted policies and procedures to attempt to address this. In particular, it has since about mid-2014 more rigorously enforced the evidence requirements for the taking of personal/carer's leave. It also produced a "fact sheet" on taking leave and distributed this to all its employees.

Mr Portelli commenced employment with Polar Fresh on 8 January 2008 as a full time Team Member in the warehouse performing duties which included the operation of a loader and work in the despatch office. Since mid-2014 he has been subject to a number of instances of counselling or disciplinary action in relation to absenteeism, which included that he was required to provide appropriate documentation such as a medical certificate to support any future absences for personal/carer's leave absences.

At the time of dismissal, Mr Portelli's attendance record was:

- In the two years prior to the date of his dismissal, Mr Portelli had been absent on paid or unpaid personal/carer's leave for a total of 340 hours.
- The absences occurred over a total of 54 days (whole or part days).
- There were 36 single day absences.
- In the fortnight prior to the absence on 24 January 2016 which caused his dismissal, Mr Portelli had taken personal/carer's leave on three other days.

In dismissing the application and Mr Portelli's "excuses", the VP found:

> *"It is well arguable that Polar Fresh would have been entitled to summarily dismiss Mr Portelli, and deny him his long service leave on the basis that he had committed serious and wilful misconduct. However they treated him generously by dismissing him with a payment in lieu of notice and paying out his long service leave, which provided him with about eleven weeks' income on termination.*
>
> *"Mr Portelli was able to find new employment after a period of three weeks, albeit with significantly lower earnings.*
>
> *"I have taken into account Mr Portelli's length of service, and the fact that apart from his absenteeism there was no evidence of any problem with his work performance. However in the circumstances of this case these do not amount to significant mitigating factors.*
>
> *"Finally, it is necessary to deal with Mr Portelli's contention that he was unfairly treated compared to other employees…the only concrete example advanced in support of this contention was that of Mr Adams. That Mr Portelli considers Mr Adams' situation to be in any way comparable to his own simply demonstrates his lack of insight into to his own conduct. Mr Adams had a wholly legitimate basis to take compassionate leave and was not on a final warning. That Polar Fresh overlooked his lateness in providing evidence to support his absence was wholly understandable."*

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Signing of Deed of Release not necessary to be valid?

Robert Csontos v QT Hotels & Resorts Pty Ltd T/A QT Resort Port Douglas. (U2015/5045). Booth, C. 10 June 2016.

The main points in this matter were that:

- There had been an unfair dismissal application.
- The matter was "settled" for $1,000 at Conciliation.
- QT Hotels paid Mr Csontos the agreed $1,000.
- However, despite the agreement, Mr Csontos wanted $3,000 and failed to sign the Deed of Release.
- The matter went to arbitration with the Commissioner finding:

> *In Tomas v Symbion Health, a dismissed employee agreed orally to terms of settlement at conciliation, but two weeks later failed to sign the 'deed of release' documenting those terms. Gooley C (as she then was) said as follows:*
>
> *"In Masters v Cameron the High Court held that when parties reach agreement on terms of a contractual nature and agree that the negotiations will be dealt with by a formal contract, that the case may belong to any of three classes:*
>
> 1. *the parties have agreed on all terms and intend to be immediately bound to perform those terms "but at the same time propose to have the terms of their bargain restated in a form which will be fuller or more precise but not different in effect; or*
> 2. *the parties have agreed on all terms and intend no departure from or addition to that which there agreed terms express or imply, "but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document"; or*
> 3. *The parties do not intend "to make a concluded bargain at all, unless and until they execute a formal contract."*
>
> *"In the first two classes the High Court held that there was a binding contract.*
>
> *"I find in this case that the parties made an agreement as described by the High Court in example (2) above. The parties intended and did settle Ms Tomas's claim for unfair dismissal at the conciliation conference on the terms described by the Respondent."*
>
> *"In Howey v Mars Australia Pty Limited t/a Mars Petcare Australia, Sams DP found that the parties had reached binding settlement terms, despite the applicant declining to sign the documented version…"*

The Commissioner concluded that Mr Csontos entered into a binding settlement agreement orally … and accordingly the cause of action for unfair dismissal relief no longer exists.

Until next time…

Greg Reiffel
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