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Employee Relations News

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Hi and welcome to my fifth newsletter. Please feel free to contact me to include content that may be of interest to you.

I have also attached the OzChild Kokoda Challenge as a separate flyer and request that you may wish to display on notice boards as you feel is appropriate.

In addition to the usual FWC decision that have caught my eye, I thought it might be instructive for some reader that unfair dismissal decisions actually directly flow from the relevant sections of the Act. That is, the decision often sets out the requirements as headings and tests the evidence against each the provisions.

"Letter of the week"

"Dear Greg

Good stuff!

Have heard a number of employers complain about the right of entry provisions being ignored by unions (particularly CFMEU and Metals) and when complained about, the FWA just blah blah on about being more conciliatory when dealing with these unions! As 22 out of the last 28 FWA appointments have been from the trade union officialdom is it any wonder our manufacturing industry has gone to China.

I think there should be more discussion on the confusion being generated by employees not liking their "performance review" and claiming they are being bullied by reason of a poor performance review.

Many organisations I've worked with in the past saw PA's as either:

- *A PITA.*
- *Major intrusion in their time constraints.*
- *Too difficult.*
- *Poor appraisal system or forms didn't allow the PA to be effective.*

Some organisations didn't do PA's for senior managers or general lower rung employees and very few conducted ongoing follow-up reviews to ensure poor performers didn't remain until the next review.

Given the (lack of) people skill competence displayed by many middle and senior managers, it won't be long before the "bullying" will be a regular feature of many FWA hearings.

Regards

Doug"

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Thanks Doug.

The three areas you covered of Right of Entry, Performance Appraisals and Bullying claims will have differing connotations to different readers:

- As mentioned in a previous edition, there are mooted changes to the FWA which will impinge on union right of entry to workplaces. This will have little impact on employers who allow unions to set the agenda. Employers should set the ground rules early and be consistent in their application.
- Performance Appraisals. As HR professionals, our greatest challenge is to educate our line managers that PA's are not to be used as a disciplinary process (which should be done as the breach occurs – not wait until the annual review). My personal view is that the terminology should be changed to (say) to Development Review. No participant (ie management and employees) should participate until trained in the process, thus creating a level playing field. And how many employers have in place 360 degree feedback. I was asked to produce one once only, with the CEO balking at it when he found out that he would come under the scrutiny of his own employees!
- With bullying I believe this will find its own level. Certainly the FWC has set out what it believes to be reasonable management action, but on the other hand there is really nothing in it for employees (in particular their no-win no-fee representatives).

Recent Decisions

Applicant used abusive and offensive language and behaved in aggressive manner toward manager and had unauthorised absence from work

In this matter[1] I will go through the steps of the decision to illustrate the FWC's adherence to the unfair dismissal provisions of the FWA.

The dismissal of the employee in question was the result of serious misconduct arising out of meeting with his supervisor relating to unauthorised absences during which the Applicant is alleged to have used "crude and extremely profane language...[in that] during the meeting the Applicant, amongst other things, said to [his supervisor] 'you are a big fat c***. You are not helping with my stress levels'".

The DP in finding against the applicant was required to consider:

- Whether the application was made within the period required (21 days).
- Whether the person was protected from unfair dismissal (ie size of business).
- Whether the dismissal was consistent with the Small Business Fair Dismissal Code.
- Whether the dismissal was a case of genuine redundancy.

[1] Mark Baldwin v Scientific Management Associates (Operations) Pty Ltd (U2014/390) [2014] FWC 5174 Gostencnik, DP

"Harsh, unjust or unreasonable"

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) Whether the person was notified of that reason; and

(c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) If the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) Any other matters that the FWC considers relevant.

Valid reason

There must have been a valid reason for the dismissal of the Applicant related to the Applicant's capacity or conduct, although it need not be the reason given to the Applicant at the time of the dismissal. The reason should be "sound, defensible and well founded" and should not be "capricious, fanciful, spiteful or prejudiced." Where, as in the present case, the Respondent relies on conduct of the Applicant to justify its decision to terminate his employment, I must be satisfied that the conduct as alleged by the Respondent occurred. A mere suspicion of conduct does not amount to a valid reason.

Notification of the valid reason

Notification of a valid reason for termination should be given to an employee protected from unfair dismissal before the decision is made, in explicit terms and in plain and clear terms

> "As a matter of logic 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. Section 170CG(3)(b) and (c) 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."

The requirement to notify of the reason, together with the requirement to provide an opportunity to respond to the reason in s. 387(c), involves consideration of whether procedural fairness was afforded the Applicant before his dismissal was effected. Satisfaction of the notification requirement will usually require a straightforward factual inquiry to be made, namely: what was the Applicant told about the reason for the dismissal, before the dismissal took place?

Opportunity to respond

An employee protected from unfair dismissal should be given an opportunity to respond to any reason for dismissal relating to the conduct or capacity of the employee. The consideration of whether and to what extent that opportunity was given is to be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality.

> "In considering whether the Commissioner was satisfied that the dismissal of the Appellant was harsh, unjust or unreasonable the Commissioner was required to take into account, *inter alia*, whether the Appellant was given an opportunity to respond to any reason related to his capacity or conduct. This opportunity must have been afforded to the Appellant **before a decision to dismiss is made** [my emphasis]. The process involved in providing the Appellant with such an opportunity does not require formality and is to be applied in a common sense way, to ensure that the Appellant has been treated fairly. In this regard we reject so much of the Appellant's submissions which asserts that this requires an employer to conduct a meeting with the employee to inform the employee of the reasons for the proposed dismissal or otherwise provide the employee with an opportunity to address the concerns in writing."

Unreasonable refusal by the employer to allow a support person

If an employee protected from unfair dismissal has requested that a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse to allow that person to be present.

Warnings regarding unsatisfactory performance

If an employee protected from unfair dismissal is dismissed for the reason of unsatisfactory performance, the employer should warn the employee about the unsatisfactory performance before the dismissal. Unsatisfactory performance is more likely to relate to an employee's capacity than their conduct. For the reasons given earlier in this decision I am satisfied that the Respondent dismissed the Applicant for reasons relating to conduct and not his performance..

Impact of the size of the Respondent on procedures followed

The size of the Respondent's enterprise did not impact on the procedures followed by the Respondent in effecting the dismissal. Nor was any submission made by either party, which would suggest that this factor is a material consideration in the context of this case.

Absence of dedicated human resources management specialist/expertise on procedures followed

The absence of dedicated human resource management or expertise in an employer's enterprise may also impact on the procedures followed by an employer in effecting a dismissal. The evidence in this case so far as it relates to this consideration is uncontroversial. It is clear that the Respondent

not only had access to dedicated human resources expertise but that it used that expertise. This factor is a neutral consideration in the context of this application.

Other relevant matters

I have taken into account that the Applicant had not been previously counselled about his use of inappropriate language. I do not place much weight on this fact because it is not suggested that the Applicant has previously used highly offensive and personalised language directed towards a superior and that this has been tolerated. Moreover the Applicant has accepted that he had received training about appropriate conduct and language.

I have also taken into account, that which appears to be accepted by the Respondent, that the environment in which the Applicant worked, which is controlled by the Australian Army, is one in which a degree of swearing appears to be tolerated and where swearing is not uncommon. However as I have indicated above, there is a qualitative difference between swearing in the workplace *per se*, and swearing at a manager that involves highly offensive and personalised language.

Finally I have taken into account the fact that the Respondent accepts that a relevant factor in determining whether the Applicant's employment should have been terminated and in assessing the seriousness of the conduct was the Applicant's anxiety condition, and relevantly, whether that condition contributed to his behaviour on 20 January 2014. The Applicant did [not] call any medical evidence which would suggest that his condition contributed to his conduct...Ultimately I have come to the view that this is not a factor which weighs in the Applicant's favour.

Commentary

The above case is illustrative of most recent unfair dismissal matters. If employers word their termination polices in these terms and train their delegated managers (who have such authority) in proper disciplinary and termination practices, then all should go well.

If the dismissed employee then takes action to file for unfair dismissal, then I urge more employers to take "it all the way" to arbitration. Then seek costs against the ex-employee and (if relevant) their no-win no-fee representative to recover costs. If this were to occur more often, it is my belief that such spurious claims would fall dramatically.

Until next time...

Greg