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Greg Reiffel Employee Relations News

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Greg Reiffel HR & IR Consulting

"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.

I had a number of comments emanating from my previous newsletter, which reflected on my training and experience with an aboriginal health service, I thought the following from Nigel (career expert supremo) was the quirkiest:

Nigel Phillips
to me

Loved reading this one greg! From one gubba to another... we "gubba" improve the way we do things by starting in our own back yard or it will be "moomba" for all of us!

Rgds Nigel

In this edition:

- Social Media Policy breach, terrorism and the Fair Work Act
- FWC does not interfere with operational requirements of University that resulted in redundancy
- It (the employment) ended with a kiss and reinstatement
- When does termination take effect?

Social Media Policy breach, terrorism and the Fair Work Act

Mr Nirmal Singh v Aerocare Flight Support Pty Ltd [2016] FWC 6186. (U2015/12518). HUNT, C. 13 SEPTEMBER 2016.

Mr Singh commenced employment with Aerocare on 18 August 2014 in the role of Airline Service Agent. He was employed as a casual employee on a regular and systematic basis. Aerocare is a national aviation ground handling and services company. Its employees include baggage handlers, titled Airline Service Agents.

Mr Singh's employment was terminated on 8 October 2015 by letter that he would not be offered any further shifts because he had breached Aerocare's social media policies, and his social media comments had jeopardised Aerocare's relationship with its client and its brand.

In short, Mr Singh publicly published his support for ISIS/ Hizb ut-Tahrir and its actions/activities and made radical statements against the Australian Government. His main defence being that his posts were designed to be that of "sarcasm," stating that he never supported ISIS or any religious extremism and that his religion (Sikh) did not support religious extremism.

The respondent contended that within the security environment of commercial passenger aviation, the defence of "the post is actually sarcastic", or "I was only joking" is not an acceptable explanation. It may be an offence under the *Aviation Transport Security Regulations 2005* (the Regulations).

The Regulations relevantly provide:

"9.01 Threats regarding aviation security

(1) A person must not, while at a security controlled airport or on board an aircraft, engage in conduct that a reasonable person could interpret as a threat to commit an act of unlawful interference with aviation.

Penalty: 50 penalty units.

(2) An offence against subregulation (1) is an offence of strict liability.

Examples of conduct for subregulation (1):

Making jokes about bombs in baggage

Leaving articles of baggage unattended."

The Commissioner:

- The assessment of whether there was a valid reason for Mr Singh's dismissal based on his conduct involves a characterisation of the nature and gravity of that conduct having regard to the SM Policy, and relevant consideration of required conduct in the high-risk security environment of an airport workplace.
- The ISIS post caused Mr Singh's fellow employees to be alarmed and concerned. Mr Rumac and Mr McCaughey did not suspect that Mr Singh had made the post; other than somebody else using Mr Singh's Facebook profile, they knew that he had made the post as they had knowledge that it was his Facebook profile, despite the alias.
- I do not accept Mr Singh's contention made during the meeting of 8 October 2015, in his evidence and in submissions that because he made the ISIS post away from the airport, it is not related to his employment.
- In circumstances where an employee's alleged misconduct occurred outside of work it is necessary to identify the principles defining the extent to which the employer is entitled to regulate, and take disciplinary action in relation to, "out of hours" conduct. The usually applicable principles were stated in *Rose v Telstra Corporation Limited* to be as follows:

"It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

  - the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
  - the conduct damages the employer's interests; or
  - the conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee. Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct."

- Accepted that the ISIS post did breach the SM Policy, and Mr Singh had been afforded relevant training in relation to the policy and required standards of employees in a high security-risk environment, in light of Mr Singh's response, I do not find there was a valid reason for the dismissal.
- I find that there was nothing that Mr Singh could have said that would have convinced Aerocare to make a decision other than to terminate his employment.

- A more thorough investigation, including obtaining a written account from Mr Singh would have satisfied Aerocare that Mr Singh did not support ISIS. A reasonable conclusion would then be that the ISIS post was an incredibly stupid post to have been made.

Despite this, the Commissioner found:

> *"My finding, however, should not suggest that it is acceptable for employees in the relevant airport environment to post what appears to be support for a terrorist organisation and explain it away as sarcasm, comedy or satire. Mr Singh did a very stupid thing. I expect that even if the ISIS post had been made within the 'Australia, The Last Castle' secret Facebook group, he would have met with derision and likely reporting to authorities of his post.*
>
> *"The ISIS post does not even have the look of sarcasm. It is not witty. It is not funny. It is a ridiculous post".*
>
> *"…I find that Mr Singh's dismissal was harsh, unjust and unreasonable.*
>
> *"…Mr Singh's statement to Aerocare on 8 October 2015 is that he is a prolific poster, making 10-20 posts on social media per day.*
>
> *"I have determined that Aerocare is to pay to Mr Singh the amount of $4,800 less tax as required by law. The amount of $4,800 represents eight weeks' wages, less 40% for misconduct…"*

Commentary

This decision may set a dangerous precedent and should be appealed. In my humble opinion, the logic leading to the findings are flawed and should be appealed. There may even be a valid reason for a ministerial review of this decision. The employer did everything right (right policy, right training), the applicant tried to hide behind the subterfuge of an alias and when caught out, his only demesne: "only joking". The Commissioner had an opportunity to make an example of this serious misconduct and failed.

FWC does not interfere with operational requirements of University that resulted in redundancy

Professor Nicholas Smith v James Cook University. [2016] FWC 6010. (U2016/2766). SENIOR DEPUTY PRESIDENT RICHARDS. 14 SEPTEMBER 2016

Professor Nicholas Smith's position was declared redundant by James Cook University, receiving a redundancy payment of some $127,000, plus payment for accrued entitlements.

Whilst this matter involved a number of aspects, I found the most interesting to be the Commission's recognition that the University was able to change its business model, as described by the SDP:

> ***"…****the University has taken a deliberate and considered decision to better align its research resources and efforts to achieve what are its effective business objectives…approach[ing] the development of its strategic review systematically and carefully. It did this to more effectively deploy its finite resources…in which it could realistically achieve a globally competitive research effort."*

It should be noted that the University followed all its procedural obligations.

By way of commentary, this decision recognises that it is not up to the FWC to decide whether the decision taken by (in this case) the University was right, wrong or indifferent. The decision focused clearly and simply on the **operational requirements** of the business.

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It (the employment) ended with a kiss and reinstatement

Francis Logan v Bendigo Health Care Group. [2016] FWC 6780. (U2016/7692). COMMISSIONER RYAN. 23 SEPTEMBER 2016

The Applicant was employed by the Respondent as an enrolled nurse from 2004 and dismissed on 26 May 2016, for serious misconduct following a complaint that the applicant touching the hand and kissing a patient on the forehead and saying, "Goodnight and God bless."

The Commission noted that the serious misconduct identified in the letter of termination did not describe the nature of the serious misconduct.

Mr Logan conceded that his conduct crossed the boundary, with the Commissioner noting the differing "boundaries", noting:

> *"…there are different boundaries, the evidence, in terms of the relationship that should exist between patients and nursing staff, identifies where clear boundaries are and where fuzzy boundaries are. Rather than have a debate about whether or not there's a fuzzy boundary or a clear boundary, it is sufficient, for the purposes of finding a valid reason, to accept Mr Logan's own admission that his conduct crossed a boundary, and a relevant boundary at that".*

The Commissioner finding:

> *"I'm supported in finding that there was a valid reason for dismissal, based upon the kissing of a patient on the forehead…that kissing a patient is never appropriate…it's never appropriate, it's sufficient, even if I reduce that down to 'normally not appropriate'…and the admission by Mr Logan that he had crossed a boundary…"*

> *"…within the context of the policies of the Respondent, that the conduct of Mr Logan was unsatisfactory behaviour but not misconduct…[but] unsatisfactory behaviour that justifies the imposition of a sanction."*

The Commissioner ordered reinstatement.

Commentary

The commissioner, in this matter, obviously did not feel that the "punishment" fitted the "crime". No doubt the respondent will now reflect on their policies to ensure that this behaviour is not repeated.

When does termination take effect?

Amanda Colledge v Bakersfield Holdings P/L atf Separovic Family Trust. [2016] FWC 6707. U2016/2910. Clancy DP. 16 September 2016.

This matter related to an "extension of time" application, which turned on the facts of whether the dismissal was effective from the last day of work, or on the completion of the notice period.

The DP determined that termination of employment is effective from the conclusion of the notice period.

Until next time…

Greg Reiffel
Principal Consultant