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Greg Reiffel Employee Relations News

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Greg Reiffel HR & IR Consulting

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

In this edition:

"Crude, lewd and sexist comments on the two-way radio system" at lower end of the scale decision upheld on appeal.

Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal v Jodie Goodall [2016] FWCFB 5492. (C2016/4422). HATCHER, VP, WELLS, DP, JOHNS, C.

This is a classic interpretation of "whether the punishment meets the crime." The company in this matter dismissed the applicant, and one other person. It also barred a contractor, and disciplined a number of other employees.

It did so following an investigation found that the applicant (and others) had used a two-way radio to communicate in a homophobic and isomorphic manner. The channel used on the radio was meant for training purposes, with "channel 1" being the required channel for communication – also for OH&S emergencies.

In the initial matter, Saunders, C. found that:

> "The *comments made by Mr Goodall…above breached his obligations under the Code and the STM Plan in the following ways:*
>
> *(a) he made comments which may reasonably be viewed as offensive;*
>
> *(b) he demonstrated a lack of respect for other persons;*
>
> *(c) he made comments which were sexual in nature and may reasonably be viewed as offensive; and*
>
> *(d) he made comments and used language which may have offended people of a particular race/religion and which expressed and incited derogatory views of people of a particular race/religion.*
>
> "Goodall's conduct in making inappropriate comments over the two-way radio system and thereby engaging in substantial breaches of his employer's policies gave Mt Arthur a sound, defensible and well-founded reason for dismissal related to his conduct. Accordingly, I find that Mt Arthur had a valid reason to dismiss Mr Goodall related to his conduct in making inappropriate comments on the two-way radio system during the Shift."

The safety risk posed by Mr Goodall's use of Channel 6 (and thus not being contactable on Channel 1), the Commissioner ordered reinstatement without loss of service. However, did not order payment for time the applicant had been off work, this a form of penalty.

The company appealed, and the appeal was allowed by the Full Bench because it raised a "novel question":

> *"In the Federal Court Full Court decision in Coal & Allied Mining Services Pty Ltd v Lawler and others (2011) 192 FCR 78 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test…as 'a stringent one'. The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment. A Full Bench of the Commission, in GlaxoSmithKline Australia Pty Ltd v Makin, identified some of the considerations that may attract the public interest:*
>
> > *'… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.'*
>
> ***"…**we had decided to grant permission to appeal [because] Mt Arthur's appeal raised a novel question, namely whether derogatory remarks in the workplace of the type made by Mr Goodall - that is, remarks which vilify persons of a particular religion - are capable of being assessed, like most forms of misconduct, on a range of seriousness, or whether they constitute a form of misconduct which is sui generis* [ed: something that is unique or different] *and must be considered in a distinct way…For that reason, we concluded that the grant of permission would be in the public interest.*
>
> *"For example, in the Full Bench decision in B, C and D v Australian Postal Corporation the majority applied that process of reasoning in relation to misconduct in the form of bringing pornography into the workplace:*
>
> > *'The nature of material that will come within descriptors such as 'inappropriate", "unacceptable" or "pornographic" and the like will present as a spectrum. The lines of delineation between appropriate and inappropriate or acceptable and unacceptable are not sharp because they are broad, even amorphous, terms in respect of which reasonable minds might differ. Emailing pornography to a friend or other willing recipient is objectively a less serious breach of policy than emailing pornography to unwilling recipients or for the purposes of harassment."*
>
> *"We do not consider that there is anything intrinsically different about inappropriate workplace comments which involve religious vilification which precludes the adoption of a comparative analysis approach in order to assess its seriousness. That is not to say this is the only process of reasoning to be used, but only that it is one approach that might be taken by a logical or rational decision-maker.*
>
> *"Nor do we consider that the actual comparison made by the Commissioner was illogical or irrational. It is reasonable to conclude, for example, that for an employee to personally direct anti-Muslim comments at a fellow employee who is known to be of the Islamic faith is objectively more serious than the expression of anti-Muslim opinions to fellow employees who are known to hold similar views…"*

The Full Bench ultimately confirming the original decision to reinstate the applicant, with unbroken service, but not ordering payment for the time the applicant was not at work.

Volunteer or Employee (You be the judge)

Adam Grinholz v Football Federation Victoria Inc. [2016] FWC 7976 (U2016/8966). ROE, C. 4 NOVEMBER 2016.

This matter relates to a junior football coach that was paid a $4,000 pa "honorarium" and had signed a contract stating that he was a volunteer. Despite this, the applicant claimed "unfair dismissal", with the respondent raising the (obvious) jurisdictional argument that the (ex) coach was not an employee, but a volunteer.

In dismissing the matter the Commissioner made a full examination of the facts:

- Mr Grinholz invoiced the Football Federation for the payments and no taxation was deducted or GST paid.
- The initial appointment of Mr Grinholz as coach occurred through informal contacts. Mr Grinholz then provided his CV and arranged a catch-up meeting with the program head. There was no formal application process and no other candidates were interviewed.

- The Football Federation provided placements for students in the Sport and Exercise faculty of Victoria University. A student, was placed with Mr Grinholz during 2016 and Mr Grinholz signed documents on behalf of Football Federation as the supervisor of the student as the host organisation.
- There is no evidence that Mr Grinholz was ever described as an employee or told that he was an employee.
- The contract is referred to as a "voluntary services agreement"
- Mr Grinholz "Is not entitled to any fee or payment for services and the services are provided on a voluntary basis."
- "It is agreed that the Coach enters into this agreement as a voluntary and
- Football Federation has no responsibility for taxation, fines, insurance, GST.
- The arrangement can be terminated by either party on 30 days' notice. Football Federation may terminate with less notice if the code of conduct or other policies are breached or if there is substantial non-compliance with the obligations under the agreement. The coaching services are one of those obligations and those services must "satisfy the performance criteria." The "performance criteria" are – to attend 100% of the squad games and training sessions during the relevant program and to achieve 85% satisfaction (or higher) level expressed by players in the post season survey.
- The terms have been agreed.
- There has been consideration provided by each party under the terms of the contract – the provision of services and the provision of consideration through remuneration.
- The agreement is in a form which is clearly intended by the parties to be legally enforceable.
- That the relationship is not that of an independent contractor based upon the test as posed by Bromberg J in On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3).
- Consideration of the indicia to be considered an employee as identified in Abdalla v Viewdaze Pty Ltd t/a Malta Travel and updated in Jiang Shen Cai t/a French Accent v Do Rozario.

Criteria to be generally considered an employee	**Assessment of the evidence in respect to the criteria**
Employer exercises, or has the right to exercise, control over the manner in which work is performed, the location and the hours of work etc.	The evidence in respect to these matters strongly suggests that the Football Federation exercises detailed control over these matters. They determine the fixtures and training schedules, they determine the detailed policies and procedures which regulate how the work is to be performed, they require regular reporting and supervision, and they have the capacity to make appropriate directions and variations.
Employee works solely for the employer	Mr Grinholz did other coaching work. The fact that there were limitations on potential conflicts of interest does not mean that there was a strong limitation on work for others.
Employer advertises the goods or services of its business	The Football Federation strongly controlled media and other public presentation under the contract. Mr Grinholz was constrained in what he could do to independently promote his role as coach of the team.
Employer provides and maintains significant tools or equipment.	The Football Federation provided the necessary equipment for the team and its coaching.
Employer can determine what work can be delegated or sub-contracted out and to whom.	The Football Federation determined how coaching services were to be provided and what work could be delegated to others. However, Mr Grinholz could perform other independent work.
Employer has the right to suspend or dismiss the worker.	The contract provided the Football Federation with strong rights to suspend or terminate the relationship. However, these rights were similar to the rights for breach of contract. This is a neutral factor in this case.
Employer provides a uniform or business cards.	The Football Federation provided uniform which was required to be worn. Business cards were not provided.
Employer deducts income tax from remuneration paid.	Income tax was not deducted. Payment of honorarium for expenses was by invoice and ABN and there was no GST deducted. This factor indicates a volunteer relationship and not an employee relationship.

Employee is paid by periodic wage or salary	There was no payment of periodic wage. The payment of an honorarium for expenses which was reasonably proportionate to likely expenses indicates a volunteer relationship and not an employee relationship. The timing of the payments in equal instalments at the beginning and the end of the season does not suggest an employee relationship. The timing is consistent with payment for services in an independent contractor arrangement but it is not inconsistent with honorarium for expenses.
Employer provides paid holidays or sick leave to employees.	There were no paid holidays or sick leave.
The work does not involve a profession, trade or distinct calling on the part of the employee	The work of football coach is a distinct profession which is commonly but by no means exclusively performed by volunteers or independent contractors.
The work of the employee creates goodwill or saleable assets for the employer's business.	The Football Federation is a not for profit organisation. The work of coaches of junior teams does not create significant goodwill or saleable assets for the Federation. The work does create potential goodwill for Mr Grinholz's coaching business.
The employee does not spend a significant portion of their pay on business expenses.	The cost of performing the coaching role in respect to matters such as travel and food would fully or almost fully expend the honorarium paid.

The Commissioner deciding:

> *"The indicia in this case point both ways and do not yield a clear result. However, viewed as a practical matter the focus should be on whether the essential character of the arrangements is more like that of a volunteer or an employee. In circumstances where a person is engaged to perform work which contributes to the successful operation of a for profit business it will be unusual for them to be legitimately a volunteer even if there is a contract which expresses the mutual intention of the parties to enter into a volunteer relationship. In cases of not for profit community organisations where there are many volunteers involved, different considerations will need to be balanced to derive the essential character of the relationship".*

Until next time…

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