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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

"30 years of providing practical Industrial Relations/Human Resources solutions to employers"

Employee Relations News

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Introduction

I recently reached out to my LinkedIn connections to promote this newsletter, and I must say I was pleasantly surprised by the positive response.

The main purpose of this newsletter is to provide information to my readers on the latest IR trends, and practitioners (including myself) with the "good bits" that can be used in day-to-day dealings with employee issues.

I rely mainly on referrals, and I would appreciate any "warm leads" that you be able to provide. Whilst my office is located in the western suburbs of Melbourne, I do travel. Your consideration is warmly appreciated.

I have attached a list of my services for your information.

In this edition

Drive drugged and you're fairly dismissed (despite procedural flaws)

Michael Albert v Alice Springs Town Council[2017] FWC 73 (U2016/10304). Wilson, C. 10 JANUARY 2017

Background:

- Michael Albert was employed by the Alice Springs Town Council from 16 September 2013 until his dismissal 27 July 2016.
- He drove a Council truck that was involved in an accident. He was found not to be at fault. Police and ambulance attended the accident scene. Albert was breathalyzed by the police for alcohol and was found to be zero BAC.
- However, Council ordered that albert attend a pathology service for a (urine) test for drugs.
- The drug test showed the presence of cannabis metabolite within the sample tested, to the level of 1100 µg/L against a "cut off" of 15 µg/L. That is, some 73 times over the "cutoff" level of that more precise testing, conducted through mass spectrometry in accordance with the Australian Standard on the subject is 15 µg/L, meaning that amounts lower than that level would not be reliably detected by the test.
- Albert conceded he had used marijuana on the previous Sunday night (two days prior to the accident) which occurred on Wednesday, 20 July 2016.
- The Council has a Drug and Alcohol policy which provides for consequences of breaching the policy.

The commissioner found:

> *"The context of the workplace includes one in which employees, such as Mr Albert, are required to operate large items of plant and equipment. The Town Council is also a regional employer which desires to be an exemplar to its community, which itself suffers from the ill-effects of drug and alcohol abuse on a daily basis. It submitted that the Commission should have regard to the following matters of context about the operational requirements of its business;*
>
> *"Furthermore, the Applicant worked in a section of the Alice Springs Town Council which is highly visible to the public. Due to the nature of his position, most of his work is done within the public eye and a positive result of 73 times more than the cutoff point is not only a danger to himself or other workers, but it does not reflect well on the reputation of his employer.*
>
> *"The Alice Springs Town Council is a local government authority and its ongoing and continued management of civil services in a township of about 28,000 residents is reliant on public trust and goodwill to ensure that infrastructure projects, involving a lot of concrete works, are finalised as these often cause disruptions to traffic flow and peaceful surroundings. The Alice Springs Town Council cannot afford to be impacted on its reputation by the perception of the public that their visible and public employees are users of prohibited drugs and there is no consequence to it.*
>
> *"The fact that the positive result of the Applicant's confirmatory drug test analysis is so in excess of the cutoff point meant that the Employer did not have any other option but to regard the behaviour of the Applicant as flouting the essential conditions of the contract of employment.*
>
> *"The Applicant is also in the position of working with very heavy machinery and as such performs safety-critical work. On the day of the accident, the Applicant was driving a concrete truck from the Hino 500 series. Even though the Applicant's impairment was not in question on the day, the context of his safety-critical work is afforded more weight within the application of the policy and* ***breaching the zero-tolerance policy is a valid reason for dismissal****."* [My emphasis].

Adding:

> *"The likelihood that Mr Albert did not appear impaired to the police and ambulance crew does not change my finding that the Town Council held a valid reason for his dismissal".*

In considering the "procedural" aspects of the dismissal, the Commissioner referenced *Wadey v YMCA Canberra:*

> *"For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that there is a valid reason for dismissal…*
>
> *"[T]he opportunity to defend, implies an opportunity that might result in the employer deciding not to terminate the employment if the defence is of substance. An employer may simply go through the motions of giving the employee an opportunity to deal with allegations concerning conduct when, in substance, a firm decision to terminate had already been made which would be adhered to irrespective of anything the employee might say in his or her defence. That, in my opinion, does not constitute an opportunity to defend".*

Whilst finding that Albert was not provided with an opportunity to respond to the Council's reasons for his dismissal, the Commissioner referenced numerous citations, including the following:

> *"It is not axiomatic that a failure to accord an employee with procedural fairness in the form of an opportunity to respond to an employer's reason for dismissal will lead to a finding that an employee has been unfairly dismissed.*
>
> *"In Hafer v Ensign Australia, Commissioner Platt found that a failure to give an employee, dismissed for drug use, an opportunity to respond to the reasons for termination would not have had any bearing on the outcome of the disciplinary process.*
>
> *"…in relation to matters of misconduct generally, that in circumstances in which procedural faults are established that two questions arise for consideration; did the seriousness of the misconduct outweigh any procedural faults and would the procedural faults have affected or altered the ultimate outcome of the dismissal?"*

The Commissioner deciding:

> *"At the time of the motor vehicle accident Mr Albert was obviously driving a significant sized truck on a public road. That he was not at fault in the accident is not relevant; instead what is relevant is that he was driving while under the influence of a drug...I am satisfied that the Town Council was entitled to consider the circumstances as an extremely serious breach of its requirements.*
>
> *"In Mr Albert's case, I find that the seriousness of his actions outweigh the procedural faults of the Town Council in its decision to dismiss him, and I find that had the procedural faults been remedied, they would have been unlikely to affect or alter the ultimate outcome of the matter.*
>
> *"As a result, I find that Mr Albert was not unfairly dismissed, and his application is in turn dismissed".*

Commentary

Well, I'm confused. Most cases that I have reported on have "procedural fairness" holding sway over a "valid reason". Three cheers for common sense on this occasion.

Notwithstanding the strength of having a Drugs and Alcohol policy AND following it through.

"Unfair" application eight weeks out of 21-day time limit allowed to proceed.

Scott Ciantar v UGL Operations & Maintenance Pty Ltd [2016] FWC 6658 (U2016/7532). RYAN, C. 29 SEPTEMBER 2016.

In a *newsletter-first*, I have received a communication from an employee advocate, **Lucio Matarazzo**, who brought to my attention a case in which he was involved relating to a matter that was eight week's "out-of-time" and includes the FWC's views on hat can be "exceptional circumstances" and "representative errors".

Ed: "Representational error" has always fascinated me. In any other circumstances, this would be a claim of negligence (that why there PI Insurance).

By way of background:

- Mr Ciantar was dismissed from his employment with UGL 21 March 2016 and filed the application in this matter on 8 June 2016 some 8 weeks outside the 21-day time limit.
- The FWA permits the Commission to extend the 21-day limit in "exceptional circumstances".
- The Commissioner heard this matter over two days: the first day to hear evidence from the union (AMWU) and the second from the employer.
- The union blundered in firstly not lodging the "unfair", and then wrongly lodging a "notice of discontinuance. This leads to the argument of "representative error".

The meaning of "exceptional circumstances" was considered in *Nulty v Blue Star Group Pty Ltd* where the Full Bench said:

> *"In summary, the expression 'exceptional circumstances' has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe 'exceptional circumstances' as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural 'circumstances' as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of 'exceptional circumstances' includes a combination of* ***factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon****." [My emphasis].*

The Commissioner, in considering *Cheval Properties P/L (t/as Penrith Hotel Motel) v Smithers* noted that:

> *"It is clear…that the Commission does not require an applicant to provide credible reasons for every single day of the period of delay. Rather the applicant cannot leave a significant part of the period of delay unexplained".*

The Commissioner then analysed each period of the time between the dismissal and the following 11 weeks, finding:

> ***"…*** *the conduct of Mr Ciantar and those he interacted with in relation to his unfair dismissal claim…Mr Ciantar has provided a credible reason for the delay…clearly show[ing] that exceptionable circumstances were present which were not of Mr Cinatar's making but which significantly impacted on him and caused him to not make the current unfair dismissal application [within time]".*

Commentary

It is clear that the main reason the application was allowed, was the tenaciousness of *Cinatar's* pursuit of the matter, and the mistakes of the Union.

As I mentioned earlier, this is unfair both on the applicant and respondent, as I believe "representative error" is something that should not be considered (and it has held up for many years in the FWC) because it is a prime facie case of professional misconduct. And, that folks, is why we have Professional Indemnity insurance.

Until next time…

Greg Reiffel
Principal Consultant