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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

"Empowering businesses through practical and strategic IR & HR solutions"

Employee Relations Newsletter

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Introduction

Welcome to Edition 61. You may have noticed that I am embracing technology of late ☺, in the way I have been delivering my newsletters, and now introducing my new website at:

<https://www.gregreiffelconsulting.com.au/>

Give it a click and let me know what you think.

Thank you, Ester, and all the team at AWD for their creative and practical help. Highly recommended.

Family fun in Fair Work (aka when family mixes with business) – Constrictive dismissal & more

Ms Catherine Sirl v HK Group Pty Limited t/a Buzzbee Long Day Care Centre. [2017] FWC 543 (U2016/10383). Sams. DP. 28 February 2017.

Whilst I am confused as to the direction the DP took in this matter, which reads more like a soap opera than the normal run-of-the-mill "constructive dismissal" case, the DP has been extraordinarily thorough in the examination of the subject – especially (to my mind) the outcome was blatantly obvious.

This recent matter caught my interest at a number of levels:

- Why does it take 63 pages to determine a jurisdictional issue?
- Why did the DP express this simple jurisdictional matter (whilst unhappy family circumstances) in such an emotional manner?
- The DP gave no explanation why the applicant was allowed to be legally represented. The respondent had legal support up until three days before the hearing, but was represented by a family member at the hearing proper.
- There were a number of references to the Muslim faith, especially divorce practice. Why?
- The DP accepted secret (illegal?) recordings into evidence.
- The DP confirmed that the FWC did not have the jurisdiction to deal with matter of underpayment of wages.
- The respondents, "shot themselves in the foot" by being taped discussing how they had claimed more government monies than that they were entitled, which the DP is to report to the appropriate authorities.
- **However, if you cut through the soap opera of this unfortunate matter, there is what I believe to be chapter and verse on the concept of "forced resignation" that is the constructive dismissal.**

And most of importantly, dear reader, do I compress 63 pages into a simple newsletter? I will do my best...



- The Kassem's owned and operated a Child Care business. They also used the service for the care of their own children. It was a "small business" and therefore (subject to jurisdiction) the Fair Work Act's Small Business Fair Dismissal Code would apply.
- Overseen by the family patriarch, Mr Hafez Kassem, it was a close-knit family group. That **was** until there was a marriage-split, as described by the DP:

"Regrettably, this case has disclosed the ugly and tragic consequences of a family business in upheaval as a result of a very bitter marriage breakdown between the patriarch's son, Mr Jihad Kassem and his ex-wife, Catherine Sirl, both of whom worked at the ... Childcare Centre), at Busby, New South Wales - one of three owned by Mr Kassem".

Described by the DP as *"being a very troubling and distressing case"*, there were a number of what are usually straightforward factual matters, which in this case were hotly contested:

The applicant and her husband briefly reconciled, but the relationship soon deteriorated again. There were several heated arguments and her husband left the rented home she lived in (owned by the Kassem's) with her five children. Her husband divorced her under Islamic conventions on 29 July 2016. Mr Kassem dismissed her two days later.

It would appear that the family members (excluding the applicant) met at the Centre on a Sunday, at which time they removed files, changed the locks and padlocked the entry gate with a large chain. At 5.00 pm Mr Kassem contacted the applicant by phone, stating words to the effect:

"Listen Catherine, I heard what happened between you and Jihad and I'm not happy, Jihad is very upset and I'm sure you are too but I think it's best for your safety and the service that you don't come back to work. I don't want you to return to the Centre."

When the applicant said that she wished to discuss the matter further and collect her belongings from the centre, she was advised not to attend during the Centre's opening hours. Later agreeing to meet at 8.00 that evening.

When she met with Mr Kassem, her two sisters-in-law and one of her brothers in law were present. She claimed she felt "very intimidated" and a little frightened. She switched the record function on her phone and recorded part of the meeting without the Kassem's knowledge or consent.

The meeting consisted mainly on requests for Centre property and security codes to handed over.

When the applicant requested monies owed to her, Mr Kassem stated:

"Don't worry we'll give you whatever you want. We are going to pay you whatever you are owed. We will pay, we will pay."

The applicant also asked for a termination letter and requested reimbursement for items she had purchased for the Centre, using her own money.

It was submitted and not contested that:

Was dismissed 31 July 2016, without notice - literally locked out of the Centre and forced by Mr Kassem to stay



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away from the Centre and stay with her children, until the issues with her ex-husband were resolved. This was the same person who had:

- Physically assaulted the applicant on numerous occasions;
- Been the subject of two AVOs;
- Misappropriated \$107,000 from their joint account and stole money and property from her;
- Accused the applicant of being a thief;
- Accused the applicant of being unfaithful; and
- Incited his father to lock her out of her place of employment.

The applicant is also the sole carer of five children, aged between 4-16 years.

The Respondent made allegations of theft, misuse of Business money, insubordination, fraudulent time entries of work hours and misuse of Business money to pay herself amounts which she was not entitled to. The DP noting:

"In this regard, it is submitted that if it is found that there was a dismissal, it was not hard, unjust or unreasonable; it was, lawful and reasonable in the circumstances".

In putting to rest the applicant's claim for unpaid entitlements, the DP stated:

"It is respectfully submitted that notwithstanding the Applicant's right at law to claim entitlements, it is not within the Jurisdiction of the Commission in an unfair dismissal application, to consider and/ or make orders in relation to the Applicant's annual leave or long service leave.

"Any evidence before the Commission in this respect should be not be admitted.

"Any orders sought in this respect should be dismissed."

In relations to the taped conversations, the DP stated:

"Before considering the substantive issue in this case, I am bound to record a matter, about which I have grave concerns. It emerged in the tape-recorded conversations tendered in evidence, which I listened to, in their entirety, after the decision had been reserved.

*"The meeting on 31 July 2016 between the applicant, Mr Kassem and Rosette was recorded on a mobile phone and the tape together with the tape recordings of the conversations on 1 and 9 August were also tendered in evidence. While not transcribed, the tapes were accepted, without objection...**Accordingly, the tapes form part of the formal record of proceedings**". [My emphasis].*

The DP set out in the decision what was said on tape, and concluded:

"This extract would appear to establish the existence of a regular practice of the Centre of management falsely claiming a higher number of children attending the Centre over five days, when in reality, there was a much lower number of children, attending over only two or three days, or not at all. It would also seem that to corroborate the false number of children attendees, the rostered staff cooperated by falsely signing their timesheets for five days, when in fact, they were only working two or three days. There may also be an element of parental complicity, whether knowingly or unwittingly, by the creation of false records of their children's attendances, which were signed off by parents, potentially in exchange for a discount to their childcare fees. Regrettably, the implications of this



evidence are in my view, very worrying.

"... the Federal Government provides Commonwealth childcare subsidies, either direct to parents or to the childcare provider... the falsification of childcare numbers, or at the very least, the falsification of the employment records of employees, are serious matters, which would likely be of interest to the relevant authorities.

"While I do not intend to make any further assumptions, let alone definitive findings of what this evidence reveals, it is incumbent on me, in the office I hold, to refer this matter to the appropriate Commonwealth/State Authorities. I shall ask the Commission's General Manager to provide this decision to the relevant agencies".

Islamic law

In commenting on Islamic marriage, the DP noted:

"In December 2015, the applicant and her husband reconciled, but the relationship soon deteriorated again. There were several heated arguments and her husband left the rented home she lived in (owned by the Kassem) with her five children. Her husband divorced her under Islamic conventions on 29 July 2016. Mr Kassem dismissed her two days later.

"Mr Kassem said that the family was not happy about the applicant returning to her husband, because she had had an affair. However, he had not threatened to disinherit his son if he remarried (under Islamic Law) the applicant. (Mona then helpfully explained to the Commission the processes of remarriage and divorce under Islamic Law, which I need not repeat here. I also note that the applicant had been a Catholic and had converted to Islam)".

The "real" case: "Dismissed" or "Resigned"

This is where the DP provided chapter and verse on the subject. I will provide a couple of the citations here, please reference the full decision for the entire story should you find yourself in such a situation.

- Further explanation can be found in the Explanatory Memorandum to the *Fair Work Bill 2008* at paragraphs 1528-1530 as follows:

"1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., Mohazab v Dick Smith Electronics Pty Ltd (1995) 62 IR 200).

"1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).

"1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:

- where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
- where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign".



*“The Full Bench of the Federal Court of Australia recently traced the **history** of the concept of ‘termination of employment at the initiative of the employer’ beginning with the ILO Convention in 1982 and highlighting the well-known case of Mohazab as continuing to be ‘good authority’ on the subject. In Mahony v White [2016] FCAFC 160, the Court said at paragraphs 19-23:*

- the employer’s conduct must be weighed objectively;
- forced resignation may result from some action on the part of the employer intended to bring the employment to an end or an action which would, on any reasonable view, probably have that effect;
- an employer may be found to have constructively dismissed an employee notwithstanding that it did not engage in the relevant conduct with the subjective intention of forcing the employee to resign;
- while an “important feature” of constructive dismissal, it is not sufficient that “the act of the employer results directly or consequentially in the termination of employment and the employment relationship is not voluntarily left by the employee.”

The DP, returning to the matter at hand found:

*“It is undoubtedly correct that Mr Kassem did not, at any point, expressly use direct language such as ‘you are dismissed’; ‘you are fired’; ‘leave now and don’t come back’; ‘your employment is terminated’ or even ‘you are finished with us.’ Nor did the applicant ever receive a letter terminating her employment. Nevertheless, exclusive reliance on these factors is not, in my opinion, decisive as to whether the applicant was dismissed. The gist of the respondent’s case focused entirely on the fact Mr Kassem did not use direct language to dismiss the applicant and that while she had requested a termination letter, it was not provided because she had not been dismissed, but had resigned of her own accord. **The mere absence of a termination letter is not conclusive as to whether an employee has been dismissed. The respondent’s reliance on this fact, does not take its jurisdictional objection very far**”. [My emphasis].*

“In my opinion, the words used by Mr Kassem, in the context of the views he held at the time and the actions taken by him and others of his direct family, were entirely inconsistent with the notion of an employee voluntarily leaving their employment; rather, the conduct evinced a clear intention that the respondent no longer wished the applicant to remain in employment at the Centre. Let me explain by firstly examining the background to Mr Kassem’s comments and the actual words used.

“Mr Kassem believed that the applicant was involved in an affair with another man because his son had told him so. He claimed the applicant had, in fact, confirmed her extra marital affair to him. Of course, the applicant has strenuously denied ever having an affair; let alone admitting to doing so. However, whether she had, or had not been so involved, is not material to the issue to be determined here. What is relevant is what Mr Kassem and the family believed about the affair. Mr Kassem also understood the alleged affair was the basis of an earlier breakdown of the marital relationship in 2015. Members of Mr Kassem’s family were very unhappy with the applicant and the situation. They believed what their son and brother had told them and that he was the person who had been grievously wronged. Moreover, Mr Kassem’s evidence was that his first loyalty was to his son. Mr Kassem had been told by his son that the applicant intended to steal property from the Centre. It was hardly a rosy character portrait Mr Kassem had in mind.

In commenting on the disparity between the written submission and verbal evidence of Mr Kassem, the DP found:

In a confusing and meandering cross-examination, (as evidenced by the transcript), it is apparent Mr Kassem has difficulty expressing himself in English, although he appeared to understand most of Mr Hanna’s questions. This observation is meant as no criticism. However, the clear and plain language



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*used and detailed concepts he expressed in his written statement, appear to me to tell quite a different story. **I have little confidence that Mr Kassem was the author of his statement.** [My emphasis].*

“Given I have serious concerns about Mr Kassem’s evidence generally, it must cast some doubt on whether Mr Kassem was really ‘pulling the strings’ (the decision maker) as to what was intended by other members of his family, in respect to the applicant’s ongoing employment. He seems to have accepted, without question, his son’s allegations, without ever having a discussion with the applicant; notwithstanding, they were said to have previously enjoyed a good relationship. Had the situation between husband and wife become so toxic and bitter, that Mr Kassem acted entirely on the say so of his family? Were words then suggested to him in order to set up a false scenario of the applicant having ongoing employment, when the reality was to ensure she was never to return to the Centre?”

“In short, I am satisfied that the words acknowledged to have been said by Mr Kassem were no more than a ‘smoke screen’ to disguise the respondent’s real intention of ensuring the applicant’s termination of employment - one way or another”.

The DP continuing:

“More telling than this, is that there was not a scintilla of evidence of any warnings, counsellings or disciplinary action or indeed, any communication to the applicant in which she was directed to change any of the management and accounting practices she had adopted, or exercised on Mr Kassem’s behalf throughout her employment.

Concluding

“For all the above reasons...I am satisfied that the actions of the respondent had the intention of bringing the employment to an end, or at the very least, had the probable result of bringing the employment relationship to an end. Accordingly, the respondent’s jurisdictional objection is dismissed”.

The DP, whilst indicating that he had sufficient views on whether the dismissal was fair or not, he invited the parties to submit further evidence by 14 March 2107.

Until next time....

Greg Reiffel

Principal Consultant