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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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Disrespectful, drugged up and dishonest employee given fair go(ne)

Stephen Campbell v Qube Ports Pty Ltd T/A Qube Ports & Bulk [2017] FWC 1211 (U2016/13175). Hamilton, DP, 16 Match 2017

This is a case of a wharfie with 30 years of experience filed an unfair dismissal (and lost) where the DP found that any of the four allegations against the applicant would had been deemed a "valid" reason. Of further interest may be the DP's explanation of the rules of evidence to be followed by the FWC.

Read on…

Mr Campbell was dismissed by Qube, with pay in lieu of notice 11 October 2016 Qube Ports Pty Ltd (the employer).

Mr. Campbell had received two recent written warnings. On 8 March 2016, he was issued with a final warning for inappropriate Facebook posts on 10 February 2016 in which he described Qube's chairman as a 'pig' and was otherwise derogatory of his supervisors.

The DP stated that:

> *"There are decisions where offensive or potentially offensive Facebook posts constitute a valid reason for termination of employment in the circumstances (eg O'Keefe v. Willims Muirs Pty Ltd [2011] FWA 5311, and decisions where they do not (Eg. Linfox v. Stutsel [2012] FWAFB 7097). In this case, the Facebook post was directed at the chairman of Qube, and was shared by a number of employees of Qube…I do not need to determine if it was a* ***valid reason for termination*** *of employment.* ***I would however have come to that conclusion in the circumstances****. It is a serious matter for an employee to publicly or semi-publicly call the chairman of the company a 'pig', which is a rude and derogatory term carrying with it some contempt and hostility". [my emphasis].*

Qube social media policy that requires employees to be polite and respectful in all communications and not to damage Qube's reputation.

On 27 June 2016 Mr. Campbell was issued with another final written warning alleging that on 12 and 15 June 2016 he attended for work with medication in his system, testing positive for amphetamines and opiates in defiance of Qube's Drug and Alcohol Management policy.

Mr Campbell had received training in both the Social Media and Drugs and Alcohol policies.

I was also alleged that Mr Campbell damaged the hatch of a ship with the excavator he operating at the time.

An allegation he denies. The DP stated:

> *"This is* ***not a criminal trial*** *in which the respondent must exclude all other possible explanations for conduct. I am required to determine this matter on the* ***balance of probabilities*** *and adopt the observations of a Full Bench in Brinks Australia Pty Ltd v. TWU in which the Bench applied Briginshaw v Briginshaw…"*

The DP found Mr Campbell an unreliable witness observing:

> *"…Mr. Campbell's evidence was inconsistent, and even on the submissions of his own counsel was somewhat defensive. I would go further and say that he was reluctant to admit anything that might be detrimental to his case…"*

Mr Campbell's counsel relied upon documents that may have shed doubt on whether Mr Campbell caused the alleged damage, claiming it to be **hearsay**. The DP found, in finding that Mr Campbell *was* responsible for the damage:

> *"The document appears to fall within the exception to the hearsay rule in s.69 of the Evidence Act 1995 (Cth.): Grubisic v. Chubb Securities. The* ***Commission is not bound by the rules of evidence*** *but must have regard to them and give them weight: King v. Freshmore (Vic) Pty Ltd. Such a business record is in the circumstances an acceptable means of demonstrating certain facts in a business such as this".* [my emphasis].
>
> *"On the balance of probabilities Mr. Campbell did scratch the hold while excavating and did not report it".*

Mr. Campbell admitted taking photos on the ship on 9 August 2016. No mobile phones are to be taken on the job, as stated in the toolbox talk checklist.

On 16 August 2016 Mr. Campbell called his superior, a "f*****g liar" at the start of a disciplinary conversation about another matter.

It was also alleged by Qube that Mr. Campbell was dishonest. The DP finding:

> *"In my view for the reasons already given Mr. Campbell was not honest and truthful in the accounts that he gave to his employer and the evidence he gave about the allegations made by the employer.* ***This is a valid reason for termination of employment****".* [my emphasis].

The DP concluding:

> *"...the employee quickly found another job after termination, although casual and at a lesser pay. He was employed for 30 years and his skills are limited to stevedoring. However, he also appeared to show a less than respectful approach to management and to management policy…One would expect better after 30 years of employment. This counts against his application.*

And is dismissing the application:

> *"…the termination of Mr. Campbell's employment was not harsh, unjust or unreasonable. He was accorded a fair go all round".*

Commentary

None of this is new. Ensure polices are in place, employees are educated in them, and equally enforced without fear of favour.

But most interestingly, the DP in this matter reinforced that the FWC (my words) is not a Perry Mason trial in which the prosecutor has to prove their case "beyond reasonable doubt". The FWC can form its own view, not only based on the facts put before it, but form its own view on what should be and should not be considered.

Until next time....

Greg Reiffel
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