



GREG REIFFEL CONSULTING

HUMAN RESOURCES & INDUSTRIAL RELATIONS

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Employee Relations Newsletter

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There was a song (which I can't remember the name of) containing the lyrics "a-fightin" and a-theivin" (Deep Purple?), and this newsletter is dedicated to these topics. It should be noted that I draw inspiration for these matters based on recent matters upon which I was called in for assistance.

Timesheet "mistake leads to valid dismissal

Celeste Ryan-Dengate v Sunraysia & Murray Group Training Ltd [2017] FWC 2086 (U2016/14308). Gooley, DP. 13 April 2017

In this matter, the DP has taken a zero tolerance to timesheet tampering. The DP made it abundantly clear that the onus lies with the employee to complete the timesheet honestly. Further noting that "fraud" was not required to be proven, and any such matter was worthy of summary dismissal. The punishment, well and truly, fitting the crime.

In summary, this was the theft of paid time; and (I believe) that this decision should sound a warning to employees who take from their employer things of which they are not entitled – whether it be "time" or material items.

The Applicant in this matter, Ms Celeste Ryan-Dengate was employed by Sunraysia & Murray Group Training Ltd ("SMGT") on a traineeship from 21 March 2016 until her employment was terminated on 9 November 2016. She was undertaking a Certificate 3 in Business Administration. The "practical" work was provided by Regional Building Consultants however at all times she was an employee of SMGT.

SMGT was granted permission to be represented by a paid agent (mainly) due to it having no dedicated HR. The Applicant was represented by her father.

There were a number of timesheet "irregularities", including the claiming of time worked when on leave and the alteration of timesheets after they had been signed.

The Applicant acknowledged the discrepancies, but said they were "honest mistakes", contending that no fraud was intended.

The DP noted that the Applicant had proven that she knew how to complete a timesheet having done so on numerous occasions, including the correct manner in which to claim leave, stating:

*"In the absence of any reasonable explanation of how or why this occurred I am satisfied, on the **balance of probabilities**, she did not do this by mistake". [my emphasis].*

Confirming:

"By altering her time sheets after they were signed and by claiming hours worked when she was ill, Ms Ryan-Dengate did not comply with her obligations as an employee".

In placing the entire onus of timesheet accuracy on the Applicant the DP added:



"I do not accept that the punishment did not fit the crime. An employer is entitled to expect employees to accurately complete time sheets. To not do so results in payments being made that are not owed. While the amount overpaid was not quantified it was not disputed that Ms Ryan-Dengate was paid for work not performed.

"Nor do I accept that it was the failure of SMTG to review the time sheets that enabled this to occur.

"It was submitted that the dismissal was harsh because it was a summary dismissal. I do not agree. Given I have not accepted that this was an honest mistake I do not consider that the summary nature of the dismissal means that the termination was harsh".

"I will stab you the heart"

I will not labour the point that society seems to getting more violent, but what about the violence in the workplace?

The following is matter which I was required to investigate recently. Like the previous case, I draw inspiration from the actual workplace experience upon which I was required to provide advice, and is provided for your guidance and comment (I love feedback)! (Obviously), in keeping with my confidentiality at all costs policy, all parties will remain anonymous – except to say that this occurred in a male dominated blue-collar environment.

The "employee"

By way of background, the "employee":

- Made full admissions (albeit stating he acted under provocation).
- Is of African descent and a devout Muslim. Has been in Australia for over 30 years, coming here a young person.
- Has very high morals and takes his faith (Islam) very seriously.
- Has eight children, the youngest is two months. He also has a second job. Despite the obvious lack of sleep, he can spend up to three hours per day travelling to and from work and is described by his supervisors as a good worker who is reliable, and undertakes tasks that others refuse in an uncomplaining manner.

The incident

A group of four employees (including a supervisor) were finishing off their shift and standing around planning for the next day's work, when the conversation turned to soccer. The "employee" was told by another person in the group that he and another person in the group used to play together (meaning in the same soccer team) – "but not in a gay way". After which laughter ensued.

Th "employee" misheard and believed that he was being called "gay", telling me later that this one of the greatest insults that can be directed at a person of the Muslim faith.

The "employee" claims that he felt he was the butt of the joke and he believed that he was betrayed by people who hew considered to be his friends. The "employee" became very agitated and angry and said to the other employee who made the comment "I will stab you in the heart".

In advising the "employee" that such a response was entirely inappropriate, he advised me that he felt he had been stabbed in the heart emotionally. He agreed that he was very loud and aggressive, saying that this is how he always responds to things that upset him.



The group tried to calm the “employee” down, but he was inconsolable. The “employee” was also later approached in the carpark and the one of group (on his own) offered an apology, again explaining it was meant to be humorous.

Whilst, at the time, the person who was the target of the “employee’s aggression was scared and intimidated, they continue to work in a collegiate atmosphere “as is nothing has happened. It was general consensus by the group (not the “employee”) that such matters should be resolved locally and not be the subject of a formal investigation, as such disputes are not uncommon and nothing ever happens once everybody calms down.

Legal consideration

There is an abundance of workplace law decision in the area of workplace violence, which has led to a “checklist of sorts”:

- In the absence of extenuating circumstances, dismissing an employee for fighting or assault will not be viewed as harsh, unjust or unreasonable (in other words, a “fair” dismissal).
- The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the length of service of the employee, their work record, and whether he or she was in a supervisory position.
- Relevant considerations include whether the dismissed employee was provoked and whether he or she was acting in self-defence.
- All of the circumstances surrounding the incident and not merely establish who the aggressor was.
- The employer’s need to establish and retain discipline amongst its employees.

Overall, in the absence of extenuating circumstances, dismissing an employee for fighting or assault will not be viewed as harsh, unjust or unreasonable.

The authorities are clear that the Commission must take into account all of the circumstances surrounding the incident and not merely establish who the aggressor was.

One such outlier is an appeal in the (then) Australian Industrial Relations Commission, against a decision by Williams, SDP 25 February 2000 by Tenix Defence Systems Pty Ltd (C No. 31465 of 2000) in relation to termination of employment K Fernley and Tenix Defence Systems Pty Ltd (U No. 30520 of 1999) Ross, VP; SENIOR DEPUTY PRESIDENT Polites, SDP, Smith, C, 22 MAY 2000. The appeal was dismissed.

This case cited numerous authorities (which I will include here), the main points that caught my attention were:

- *“We do not discern any error in the manner in which his Honour approached this issue. The Appellant’s policy is relevant but it is not determinative of the matter before the Commission.*
- *“Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.” [Ed: It’s okay to have a policy, but you must still must properly investigate the matter]*
- *“Generally, fighting at the workplace is not to be condoned if, for no other reason the threat it imposes to occupational health and safety. Reinstatement of an employee dismissed for fighting would ordinarily seem to be inappropriate. However, **consideration must be given to all the circumstances surrounding the incident that gave rise to the termination**”. [My emphasis].*



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- In matters involving misconduct there is an **onus on the employer to establish that the misconduct took place**. [My emphasis].
- Serious misconduct will usually justify summary dismissal and will rarely support a finding that a dismissal was “harsh, unjust or unreasonable”.

Your thoughts?????????

Until next time...

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