0438 906 050 greg@gregreiffelconsulting.com.au gregreiffelconsulting.com.au ABN: 35 968 039 202

GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

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

Employee Relations Newsletter

Edition 66 **19 September 2017**

Remember:

I am available to assist businesses with their "people" issues. Please visit my website for further information:

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

Introduction

In this edition, "beware the employee that appeals an unfair dismissal decision" and a perplexing Full Bench decision on an employee who had permission from his supervisor to take home food from the supermarket at which he worked – end in dismissal.

I have also appended a link to a video on workplace policies.

Quote of the day

> *"I heard Lou Holtz once say, " never complain. 80% of people don't care and 20 % are glad that it is you having the problem"*

Costs awarded by Full Bench against ex-employee (or "No money – you pay in instalments")

NSW Trains v Mohammed Ayub [2017] FWCFB 4801, (C2017/1585). VICE PRESIDENT CATANZARITI, VP, HAMILTON, DP, COMMISSIONER RIORDAN, C. 14 SEPTEMBER 2017.

Mr Ayub filed an appeal against a decision of Senior Deputy President Hamberger which dismissed an application by Mr Mohammed Ayub for an unfair dismissal remedy. The appeal also lost as Mr Ayub failed to show that it would be in the public interest to grant permission to appeal.

NSW Trains then lodged an application for costs, claiming that:

- Mr Ayub's appeal application was made vexatiously.
- Mr Ayub's appeal application was made without reasonable cause or without reasonable prospects of success.
- Mr Ayub unreasonably continued the matter.
- SDP Hamberger found that there was a valid reason for termination of employment.
- Mr Ayub has shown a tendency to pursue vexatious claims in the past and that Mr Ayub's continued to press allegations and claims against NSW Trains which were previously identified as vexatious and unsubstantiated.
- Mr Ayub's application did not disclose any appealable error, nor did the submissions identify any error of law or any issue of public importance as required by the Act.
- Mr Ayub's application to appeal was without reasonable cause or reasonable prospects of success, and that a reasonable person in this circumstance would have conclude that there were no reasonable prospects of success.

NSW Trains attached a detailed itemised schedule of costs to the costs application, which shows that the total costs and disbursements claimed by NSW Trains is **$3,384.00**.

Mr Ayub's response:

The FB noting that the two emails making up his submissions in response to the costs application did not address the grounds put forward in NSW Trains' costs application. The submissions largely address the merits of the matter:

- Claims made against Mr Ayub were unsubstantiated, and NSW Trains never undertook a proper investigation of the allegations.
- NSW Trains did not follow a due process before dismissing Mr Ayub.
- Mr Ayub did nothing wrong.
- Due to lack of work and the difficulty in finding work at his age, Mr Ayub submitted that he **does not have the ability to pay any costs**.

The FB considered *Nilsen v Loyal Orange Trust*, in which North J said in relation to earlier provisions which enabled costs to be order if an application was 'vexatious'…:

> *"The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the concept to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage: see Attorney General v Wentworth (1988) 14 NSWLR 481 at 491."*

It is not enough to satisfy the requirement in s.611(2)(b) that an application be made without reasonable cause or without reasonable prospects for success that allows Mr Ayub's case to be rejected: *General Steel Industries Inc v Commissioner for Railways*. As a Full Bench of the Commission said in *A Baker v Salva Resources Pty Ltd*:

> *"The concepts within s.611(2)(b) 'should have been reasonably apparent' and 'had no reasonable prospect of success' have been well traversed:*
>
> - *'should have been reasonably apparent' must be objectively determined. It imports an objective test, directed to a belief formed on an objective basis, rather than a subjective test; and*
> - *a conclusion that an application 'had no reasonable prospect of success' should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable."*

To gain permission to appeal, he needed to demonstrate some public interest such that permission to appeal should be granted which related to or arose out of his appeal grounds. The appeal grounds and his submissions claimed error in the evidentiary findings without providing any demonstration of error, let alone error which raised issues of public interest.

After the hearing, Mr Ayub sent correspondence to the Commission, in which he stated that the "only people who are in breach of conduct are the officials who backed each other in the cover up". Mr Ayub sent further correspondence, whereby he alleged that it was an "underworld figure" that "plotted" his dismissal.

The FB finding:

- In exercising the discretion to order costs, the Commission must exercise its powers in a manner which is 'fair and just' and considers 'equity, good conscience and the merits of the matter.'
- Decided not to award full costs, given the deliberate choice of NSW Trains to incur costs when it was aware that it was not necessary to put submissions, nor to appear. We also consider that it would be inappropriate to order no costs at all. We have decided to award 15% of the costs incurred by NSW Trains.
- Given the difficult financial position that Mr Ayub claims to be in, we are prepared to provide for these costs to be payable in instalments of 3 equal monthly payments.

Commentary

$3,384.00 seems like a piddling amount to chase an ex-employee for. And maybe this is the real reason the FB only awarded 15%. That is, the FB had made its decision. The matter was concluded. So was it worth the time and expense for NSW Railways (a very large employer) for an outcome of three monthly payments of $169.20?

Employee "harshly" dismissed for taking home stock "with permission"

Mr Robert Johnson v Northwest Supermarkets Pty Ltd T/A Castlemaine IGA [2017] FWCFB 4453. (C2017/3304). ROSS, J, DEPUTY PRESIDENT COLMAN, DP, CIRKOVIC, C. 28 AUGUST 2017.

Mr Robert Johnson's employment with Northwest Supermarkets t/a Castlemaine IGA was terminated summarily on 7 February 2017. He was found to have taken three items of produce from the Castlemaine IGA where he worked.

The original unfair dismissal application was heard by Deputy President Hamilton, who found that, although Mr Johnson's action was authorised by a supervisor, it breached company policy and constituted a valid reason for his dismissal. The Deputy President dismissed Mr Johnson's application.

Mr Johnson left the store with three products for which he had not paid. The products were a ham bone, a 100g sample of smoked salmon, and a 100g sample of prosciutto. The samples and the ham bone were wrapped and signed by Mr Johnson's manager, Ms Royal. Mr Blake, a director of the company, stopped Mr Johnson as he was leaving work, searched his bag and discovered the items. Mr Johnson said that his supervisor had authorised him, and others, to take certain items (samples and offcuts) without payment. Mr Blake's evidence was that the items were 'saleable items' and there were clear policies against theft and removing stock without payment. Mr Johnson signed the relevant policy when he commenced employment in 2008. The police were called to the store but no charges were laid.

Mr Johnson applied for permission to appeal, which was granted – as in the FB's view, the DP's decision did not consider the proportionality of *summary* dismissal (ie did the punishment fit the crime?).

The FB agreed that Mr Johnson acted in breach of the Respondent's policy and that this constitutes a valid reason for termination of his employment. While there was a valid reason for the termination of Mr Johnson's employment they noted that there were a number of mitigating circumstances.

The FB ultimately found that the decision to terminate Mr Johnson's employment was harsh considering:

- Mr Johnson had been authorised to take the items.
- Eight other employees were also engaged in the same practice.

In terms of remedy - Reinstatement is not sought in this case and in those circumstances, we are satisfied that it would be inappropriate to order reinstatement. The FB then referred the matter Commissioner Cirkovic for determination of money to be paid.

Commentary

I am a more than a little perplexed by this decision. To my mind, the only person who was in breach of the policy was the supervisor who provided written permission to the employees to take the goods.

We also don't know what happened to the other eight employees.

My advice in this matter would have to put the supervisor on a final warning and re-educate all employees on the policy.

I suppose, I can empathise with the Director, who was watching his profits walk out the door?

0438 906 050 greg@gregreiffelconsulting.com.au gregreiffelconsulting.com.au ABN: 35 968 039 202

External link

In this informative video, CGW Partner Belinda Winter discusses some of the workplace policies that all employers must have in place.

http://www.mondaq.com/article.asp?articleid=629476&email_access=on&chk=1273585&q=644109

Until next time....

Greg Reiffel
Principal Consultant