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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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Quote of the day

"A coach is someone who can give correction without causing resentment." -John Wooden

Introduction

In this edition:

- A refusal for a blood test is deemed reasonable – but the covert recording (not related to the matter) is considered misconduct.
- A supervisor who exposed himself to a number of employees was deemed to be lawfully dismissed. But was it okay that that company had a barrister and instructing solicitor against a self-represented person with little English and no idea of how the FWC operates.
- New Long Service legislation coming to Victoria.

Drug Testing and covert recording

Shannon Green v Lincon Logistics Pty Ltd T/A Lincon Hire & Sales. [2017] FWC 4916. (U2017/3305). Platt, C. 20 September 2017.

There are two main issues to this case. Firstly, whether the non-compliance with a blood test for detecting drugs and/or alcohol is a reasonable and lawful instruction; and secondly that "covert recording" of conversations was deemed by the Commissioner to be misconduct.

Mr Green was employed as an Elevated Work Platform Operator at Lincon for 5 ½ years. His work was considered "high risk".

Following an incident at the workplace, all employees were required to undergo an alcohol and drug test by way of "observed" urine sample. It was also claimed that a number of anonymous phone calls were made to the company alleging that the applicant was drug-affected at the time. Despite these allegations, the applicant returned a "negative" sample.

Further anonymous phone calls alleged that the applicant had diluted/substituted his urine sample.

The company responded by requesting that the applicant undergo a blood test. The applicant said he was willing to take another urine test, but refused the blood test.

The company, on the basis that it had in place a contract of employment with the applicant and a drug and alcohol policy, summarily dismissed the applicant – without any payment of notice period.

There was also mention of the recording of telephone conversations by the applicant and his supervisors unrelated to this matter (eg not happy with working away from home and trying to get his father a job). Frankly, it is not explained why this came into contention, but the Commissioner took it into account. It was

also found that the employee was not happy with his employment with the company. Again, I am not sure of the relevance.

In any event, the Commissioner found:

- The request for a blood test was a departure from the company's usual practice of urine sampling.
- That the person conducting the sample was concerned that there was anything amiss.
- In the absence of an express policy provision permitting blood testing, and the availability of other testing options which were not of such an invasive nature the request to undertake a blood test for testing for the presence of drugs was not a reasonable request.

In relation to the covert (but unrelated) recording, the Commissioner found:

> *"The covert recording …was inappropriate and falls within the meaning of misconduct. It is a factor which weighs against a finding that the dismissal was harsh, unjust or unreasonable".*

The applicant secured alternative employment about two to three weeks after the dismissal, but $622.05 per week less than he was being paid by the company.

The Commission, in finding against the company awarded compensation in the amount of $8,150.21, which represents the amount Mr Green would have been paid if he had continued to work at Lincon for a period of 8 weeks (including any notice obligation) following the dismissal subtracting 20% for misconduct (being the covert recording).

Flowery Flasher dismissed for serious misconduct

Manuel Maciel v Lynch Admin Services Pty Ltd T/A Lynch Group. [2017] FWC 4914, (U2017/4835). Cambridge, C. 28 September 2017.

Whilst the facts of this matter were found in the company's favour – that the applicant did wave his willy at other employees on two occasions on separate days (as caught on CCTV and complaints from four employees) "bluntly and steadfastly denied that he had indecently exposed himself at work at any time". The issues that pricked my interest were far less puerile.

The applicant in this matter was a supervisor for the receivables area of a company described as operates a business described as the largest wholesale floral supplier in the southern hemisphere. He had been employed by the company for some 25 years, having started as a labourer and over the years was promoted to supervisor.

Without going too much into the toing and froing of the case, the main points that I found of interest were that:

- The company was represented by a barrister, who in turn was instructed by a solicitor.
- Although the applicant initially indicated an intention to engage lawyers, he represented himself at the Hearing, and he was assisted by a Portuguese language interpreter.
- The Commissioner noted in his decision that the applicant subsequently floundered in his self-representation both in his understanding of what was required and the fact that everything had to be carefully checked to ensure that the translation from Portuguese to English and vice versa was accurate.
- As there was a fundamental dispute about the facts, the Commissioner had to determine if the incident occurred. In the Commissioner's own words:
  "factual contest has involved serious misconduct with some level of potential, attendant criminality [indecent exposure]*. However, the matter must be determined on the balance of probabilities, the civil standard of proof as it is described, and not the criminal standard, which requires proof beyond any reasonable doubt. It is well established by cases…that the civil standard of proof should be elevated commensurate with the seriousness of the conduct under examination. However, such elevation of the civil standard does not translate into the criminal standard, and a matter remains to be determined on the balance of probabilities albeit that in more serious cases, a more exacting or stringent satisfaction would be required".*

- Soooo…"on the balance of probabilities" did the incident occur? And the more serious the allegations, the greater the responsibility it is on the employer to prove it.

Not surprisingly, the Commissioner found that it was a "righteous" dismissal and notwithstanding by inference the applicant was found to be a degenerate and liar. I cannot help but to wonder why the Commissioner allowed the matter to progress where the applicant was clearly not up to task of defending himself against a legal team in a hostile environment. Whilst this was unlikely to alter the outcome; it does smack of unfairness.

Long Service Leave changes to hit Victorian businesses

Long service leave (LSL) is a uniquely Australian entitlement with its origins in the colonial public services of SA and Victoria. Historically, it was awarded to employees who had provided long service in the colonies to enable them sufficient time to visit the United Kingdom. Therefore, Australia is the only country where there is a legislated right to LSL. [Long Service Leave in Australia: Towards a National Minimum Standard].

The *Long Service Leave Bill 2017 "Making Long Service Leave Fairer for Everyone"* has had its second reading speech in the legislative assembly, which means it will become law in the not-too-distant future.

The new legislation will not change the basic premise of Long Service Leave, that is, a reward for a worker's service with the one employer. Also, the basic entitlement to leave, roughly 13 weeks leave after 15 years will not change.

However, employers who fall under the Victorian Act, should ensure that (a) their payroll people are fully aware of the changes and (b) consider how these changes will affect your business and think about having an EBA and policies to manage the changes.

The changes being:

- An employee will be able to take a minimum of one day of LSL.
- An employee will be able to take LSL after seven years continuous service.
- The calculation of LSL entitlement will be calculated by using the average hours over the previous 12 months, or five years, or the full period of continuous employment whichever is the greater.
- Where the employee does not have fixed hours of work, or if their hours of work change one or more times in the 12 months preceding the taking of LSL. This will be changed so that averaging will apply if the hours of work change one or more times in the two years before LSL is taken.
- Any period of paid parental leave (or other form of paid leave) will count as service. Any period of unpaid parental leave (or other form of unpaid leave) up to 12 months at any one time will also count as service. Unpaid parental leave (or other unpaid leave) beyond 12 months will not count as service, but will also not break continuity of service.
- A period of unpaid leave beyond the initial 12 months will not count as service unless the parties agree otherwise.
- Sick or carer's leave, whether paid or unpaid, will continue to count as service (ie no change).
- Where employment ends for any reason, and the employee is re-employed by the employer within 12 weeks, employment is considered to have been continuous. However, the period that the employee did not work is not counted as service.
- Casual and seasonal workers have the same rights and entitlements as other workers, unless specifically stated otherwise. Further, the current LSL Act states that generally where there is a break in engagements greater than three months, continuity of service is broken. This general rule will be retained, but there will be a number of exceptions including where the casual or seasonal employee is on parental leave. This recognises the right that casual and seasonal employees have under the Fair Work Act to take parental leave.
- Transmission of business: There will be greater consistency with section 311 of the Fair Work Act. Where work is outsourced by one employer to another. If an employer contracts out work to another employer,

and as a result an employee ceases work with the first employer, and commences work with the second employer, their service with the second employer is taken to have commenced on the day they started work with their first employer. Similarly, if the contract ends, and the work and employee return to the first employer, service with the second employer is also counted.

- There will greater powers for the production of documents and penalties will be substantially increased for breaches of the LSL provision by employers.
- It should be noted that the Bill makes it clear that any existing arrangement in another Act or federal workplace agreement or award will override the Victorian LSL Act, to the extent of any inconsistency.

Until next time....

Greg Reiffel
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