



This issue of my newsletter, I have examined a couple of recent cases relating to whether an employee has resigned or been terminated at the behest of the employer. The SDP Richards decision is of particular interest because it finds that the employee was terminated, but was fair.

Can I re-emphasise the importance of the fund-raising effort of the OzChild Kokoda Challenge team. Caps and shirts were handed out today labelled "Kokoda Challenge Team" with Phil ruefully stating this shirt and cap cost me \$7,000.

Details of how you can assist OzChild in this venture can be found at the conclusion of this newsletter. (PS: I mischievously claimed that the total has risen from some \$14,000 to \$35,000 because the generosity of the readers of this humble communique. If you know someone who would like to be a sponsor, I again make the offer to contact me and I will put you in touch with our fundraising people, **and free advertising in this newsletter.**

Dismissed, Terminated or Dismissed

In this matter ¹, in which the DP found the applicant to have resigned his employment, there was a very complicated matter of whether the actions of the employer's employees (involving physical threats because the applicant had brought to the employer's attention alleged shortcomings).

The applicant had in fact resigned by SMS, stating that he would provide reasons for his resignation at a later time, and arrangements were made by mutual agreement when he was to return company property.

It is apparent that the applicant had second thoughts and sought reinstatement through the FWC.

In the end, the DP preferred the employer's evidence over that of the applicant. In doing so, the DP considered the provisions of the FWA, including:

"386 Meaning of dismissed

*A person has been **dismissed** if:*

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

¹ Ashu Kamboj –v- Polyseal Waterproofing (Victoria) Pty Ltd T/A Polyseal – Victoria (U2013/17721) [2014] FWC 6479, Kovacic, DP

And used a number of well-established precedents, including:

In Mohazab v Dick Smith Electronics Pty Ltd (No 2) (Mohazab) the Industrial Relations Court of Australia in dealing with the issue of whether a termination was at the initiative of the employer stated:

“... When an employee has no effective or real choice but to resign it can hardly be said that the termination of her or his employment is truly at the employee’s initiative.”

Ms Karen Boylan –v- Pilbeam Hall P/L ATF The Pilbeam Hall T/A Mick's Sports Store (U2014/741)
[2014] FWC 6423. Richards SDP

In this matter, the applicant claimed to have been terminated, whilst the employer maintained that she had resigned.

In an interesting twist, the SDP found that the employer had indeed terminated the applicant. Then went on to find that the applicant was fairly dismissed and therefore found in favour of the employer.

The Applicant claimed that she was not given any explanation for her dismissal other than that she was informed by her employer, “to take your pay and get the f**k out of my store.”

With that, the Applicant claimed that she collected her personal belongings and left the store.

The Applicant claimed that she returned to work a few days later to collect her certificate of separation. Ms Hall was said to have stated to the Applicant that the certificate of separation was being organised and that the reason given for the separation was that the Applicant had ceased work voluntarily for reason that she had: “walked out during your shift so that means that you quit.”

The SDP found:

“On the balance of probability, I accept that Ms Hall directed the Applicant to leave the workplace in the context of a second emotional charged exchange, and by so doing, the Applicant reasonably concluded that she had been dismissed by her employer. That is, it was no longer a reasonable option for the Applicant to return to her place of employment following the tenor of the exchange that occurred between them.”

and

“To this I add that [the employer] (without the benefit of any human resource expertise) did not set out to dismiss the Applicant. It was her conduct in the heat of the moment that gave rise to the dismissal (arguably best characterised as constructive dismissal in the end). Ms Hall for her purposes continued to assume that the manner of the Applicant’s departure from work ... indicated that the Applicant had “quit” her job.

In finding in favour of the applicant (and then in favour of the employer) the SDP stated:

“These matters turn on a particularly fine judgement. But in the end, I consider that when the contextual circumstances I have set out above are all taken into account, the dismissal, as it was, was not harsh, unjust or unreasonable.

“It may not frequently be the case that a dismissal in which a valid reason has been established... nonetheless will result in a finding that the dismissal was not harsh, unjust or unreasonable. But having heard the witnesses (an important opportunity in the context) and taking into account all the circumstances of this case, it appears to me that this judgement best reflects the totality of the unfortunate circumstances that arose in a marginal and very small enterprise in a regional location with slender resources, and where both the Applicant and the Respondent bear some responsibility for the situation in which they found themselves.”

Putting these decision into the HR context

When it comes to dismissals, I have already commented previously that it is a billion dollar industry. In my opinion no terminations should be undertaken before the HR department has reviewed the situation first.

This can usually be done when cooler heads prevail, and ensuring due process is afforded.

I am sure, like me, you have received phone calls from irate line managers who just want to rid themselves of an employee. A short reminder of they be required to prove their actions in the witness box usually calms things down...

Until next time...

Greg

<http://www.everydayhero.com.au/event/2014OzChildKokodaChallenge>



OzChild's 2014 Kokoda Challenge: \$96K for 96km to help protect the rights of Australian children.

No Australian child should be at risk of abuse, trauma, social exclusion, poor education outcomes, family disconnection or mental illness – but they are.

Our team's goal for the Kokoda Challenge is \$96K for 96km.

We want to raise \$1000 per kilometre for every step of the 96km journey to provide hope and ensure support for at risk and vulnerable children who face challenges every day.

Each \$1000 will make a difference – it can allow 28 children the opportunity to participate in playgroup sessions.

Playgroup activities aid early development including language, cognition and fine motor development skills. This enables children to develop their social skills and identity, and gives them confidence!

“OzChild needs your support! Help OzChild make a difference in the lives of children and give them a chance to shine. You can learn about the team taking on the Kokoda Challenge and donate through our [Everyday Hero](#) page.”

Play your part today and donate to help us raise \$96K for OzChild - because every child deserves the chance to shine.



About OzChild

Every child has rights - observing these rights and ensuring the safety and protection of our children is at the heart of OzChild's work. For more than 160 years OzChild has been protecting the rights of Australian children and making sure they have the best opportunities for a brighter future. The children we work with are often abused, vulnerable and disadvantaged and it is our role to protect them, nurture them, develop them and give them a voice.

Our programs range from foster care for children aged 0 – 18 who can no longer live at home; services for children with disabilities; support such as counselling for families experiencing difficulties; respite for families whose children often have complex needs; education and development programs and scholarships for disengaged and underprivileged youth.