



This issue of my newsletter, I have found three cases that the FWC has found in favour of the employer. The subject matter piqued my interest as they involved:

- Drugs
- Redundancy
- Resigned/terminated?

Also the final chapter of the OzChild “Kokoda Challenge Team” can be viewed at the end of this document.

WEEKEND CHOOFER’S POSITIVE DRUG TEST LEADS TO FAIR DISMISSAL

In this case,¹ the Applicant was employed by the Respondent in November 2006. In April 2011, he was promoted to the position of team his place of work was Sydney Airport. The work performed by the Applicant was considered to constitute “Safety Sensitive Aviation Activities” for the purposes of the *Civil Aviation Safety Regulations 1998*.

The Applicant reported for work at 6:00 AM and was informed at 10:00 AM by his supervisor, that he was required to undertake a drug and alcohol test. The Applicant immediately informed that he had taken marijuana the Saturday prior. He was required to undertake the test.

The applicant provided a urine sample at the Sydney Airport Medical Centre. The test was overseen by Dr Phonesouk. The Applicant returned “a non-negative result” for drugs and was stood down from duties pending receipt of a report from the Medical Review Officer.

Finding that the Applicant had tested positive for cannabinoids and that he should be managed in accordance with the Respondent’s Drug and Alcohol Management Plan (DAMP).

After a meeting involving his union and written response, a further meeting was held where the Applicant’s employment was terminated by a letter of that date. The Applicant was paid out his accrued annual leave, his long service leave and four weeks’ pay in lieu of notice.

The VP concluded that:

“I have considered the applicant’s length of service, work record and his personal and economic circumstances and I am not satisfied that these factors negate the serious misconduct engaged in by the Applicant. I am not satisfied that the Applicant’s dismissal was harsh.”

Commentary:

This matter succeeded because, the applicant could not argue against the facts (ie he had tested positive to marijuana), but thought he should be excused from the positive reading because he was not “impaired.”

¹ Sharp v BCS Infrastructure Support Pty Limited (U2014/634) [2014] FWC 7310 VICE PRESIDENT CATANZARITI

The company had in place a policy, due process was followed and this was accepted by the VP.

FWC WILL NOT INTERFERE WITH REDUNDANCIES UNLESS UNLAWFUL

The Applicant in this case² contended that as of early March 2014 the employer was in a potentially buoyant business environment for reasons of a new marketing program and that there was a prospect of additional employment opportunities as a result.

Around September 2013 the employer employed a consultant, whom it promoted to a senior consultant position in March 2014.

A little less than two weeks following the promotion of the new senior consultant, the Applicant received the redundancy correspondence as set out above.

The Applicant contended - as far as I interpret the Applicant's submission - that the redundancy could not be genuine redundancy as she was merely shunted aside, as it were, by another consultant promoted into her position. This indicated that the Applicant's position was never made redundant as such, but it was that a newly promoted employee stepped into her position and she was dismissed.

The SDP's view was that:

"...the Act does not extend to an examination of the reasons for the selection of the Applicant's position for redundancy:

Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal.

"The Applicant may have another avenue for a remedy if she had been selected for redundancy because of her gender or family responsibilities, and so forth. Such grounds may support an application under Part 3-1 of the Act. But no such argument was made here, and this application would not have been an appropriate forum for such concerns to be agitated.

"In the circumstances here, the process of selection of the Applicant's position for redundancy (vis a vis the other senior consultant in the Brisbane office) is not a relevant consideration for the determination of the jurisdictional question."

Commentary

The redundancy process is one fraught with a number of employment law issues. I believe this decision got down to the employer choosing one employee over the other. The SDP in this case has made it clear, insofar as the person chosen for redundancy is not done on the process does not breach (say) discrimination laws, it is up to the employer who they believe is best suited to carry on the business.

² **Ms Penelope Behan v Risk Strategies Pty Ltd** (U2014/1677) [2014] FWC 7176 SENIOR DEPUTY PRESIDENT RICHARDS

DID SHE JUMP OR WAS SHE PUSHED?

In short, this matter³ involvement a real estate agent and the journey of shifting of the “goal posts” which finally led to the “resignation”. The Commissioner found in the Applicant’s favour – awarding her \$35, 026 plus other statutory entitlements.

The Commissioner considered:

“386 Meaning of dismissed

(1) 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** (my emphasis) *because of conduct, or a course of conduct, engaged in by his or her employer.*

And (amongst other citations):

“In ABB Engineering, the Full Bench said that:

“Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer’s conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer’s conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.”

Commentary

We should be aware of the “resign or be sacked” scenario has been writ in stone for decades as “constructive dismissal”. As always, these “easy outs” are tested by the FWC and the outcome is usually in favour of the employee.

Until next time...

Greg Reiffel

³ Ms Dawn Harrison v Crawford Realty Karratha Pty Ltd T/A Crawford Realty Karratha (U2014/4131) [2014] FWC 6930 COMMISSIONER CLOGHAN

Thank you!



Last week a team of OzChild staff and supporters completed the 96 km Kokoda Trek, raising funds to go towards supporting our most vulnerable children – those affected by abuse, neglect or exploitation. These are the hidden children - the children most of us never see.

Our trek went across jungles, rivers and creeks over muddy, rocky, steep and forested terrain. The days were hot and humid and the nights cold, often with the risk of torrential downpours. The trek was rough, narrow and required constant concentration to avoid slips.

We couldn't have done it without you. Because of your generosity and the kindness of others like you, we raised **\$65,000**, which will go a long way in supporting children in need.

The money you donated will allow children to heal and grow in healthy homes; it will provide them with educational support, mentors, therapeutic treatment and many other programs that ensure every Australian is given the chance to shine.

If you'd like to find out more about how your donation is going to make a difference in the life of a child, please sign up to our newsletter at www.ozchild.org.au.

Yours in making a difference,

The OzChild Kokoda Trek Team

