



GREG REIFFEL CONSULTING

HUMAN RESOURCES & INDUSTRIAL RELATIONS

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Quote of the day

"Plan for what is difficult while it is easy, do what is great while it is small. The most difficult things in the world must be done while they are still easy, the greatest things in the world must be done while they are still small. For this reason sages never do what is great, and this is why they can achieve the greatness" – Sun Tzu, The Art of War.

Introduction

In this, my final newsletter for 2017, I would like to thank all my loyal clients, without which all this would not be possible and my loyal band of readers and their words of encouragement.

- Look out! The FWO are after the HR people, again.
- Strange (in my view) reinstatement decision.

HR in the firing line (again)

In yet another attack at HR personnel that follow the orders of their bosses, the FWO has put out a press release "warning" all HR managers that they are in its sights.

The case in question is *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown [2017] FCA 1301* and is a federal court decision which is over 100 pages long.

The case involved a Chinese restaurant chain that systematically underpaid its workers and falsified records. When the FWO became involved the company knowing that the "jig was up", went on a deliberate mission to falsify its employment records. The company and four of its employees were found to have breached the various sections of the FWA by underpaying its 85 employees \$583,688.68 during the period from 6 July 2013 to 20 November 2014.





Fines of almost \$400,000 were imposed: the company was fined \$301,920, the owner \$54,672, the **HR Manager \$21,760** and the store manager \$18,496. With the judge relying on case law, noting:

"It is sufficient to say that, accepting that the primary purpose of imposing a pecuniary penalty is to protect and deter, that purpose is achieved by imposing a punishment in the form of a pecuniary penalty".

Overall, the pretty good day at the office for FWO. However, the FWO "went after" the HR Manager very harshly, seeking significant penalties against her.

Fundamentally, the HR Manager was a Chinese national (now an Australian citizen) and claimed to be doing what she was told. As the decision noted:

- Her parents and Mr Chen's (the owner) parents-in-law were friends, and that she had been offered the role of human resources manager due to that family connection.
- The owner had offered and agreed for to take over the sponsorship of her 457 visa.
- She was obedient to Mr Chen because he was her boss, and that defiance of the boss by a junior employee is not tolerated in the Chinese culture in which she was raised.
- She suggested that it would bring shame on her family if she was disrespectful to Mr Chen.
- She said that she was mindful that her residential visa status was dependent on her continuing employment with NSH Restaurant Pty Limited.

However, the Judge was having none of this, citing *Fair Work Ombudsman v Wongtas Pty Ltd (No 2) [2012] FCA 30*, and drawing from this decision stating:

"The cultural and related factors relied upon by Ms Sarah Zhu cut both ways. While they might be seen to reduce, to some limited extent, her moral culpability, they also indicate that the need for specific deterrence is heightened...Balancing those factors produces little advantage either way. As a matter of evidence, the cultural factors were less than compelling and did not properly explain the duration of the contraventions. As a matter of public policy, the cultural explanation for the contraventions can only be given limited weight.

The Judge further added:

*"Before her role in the business of New Shanghai Charlestown, Ms Sarah Zhu completed a university degree and was employed by PricewaterhouseCoopers in China. Despite this, and despite being employed on a significant wage, she asserted that she had no qualifications or formal training in human resources management. It is plain, however, that **she had sufficient training or capacity to carry out the directions given to her in her role, including the creation of false records.**" [Emphasis added].*

In my humble opinion, if you undertake HR duties, you should be "on notice" as the FWO argued and was confirmed by the Judge that

*"There is nothing wrong with sending the message that an employee should indeed **resign** if that is the only alternative to continuing to participate knowingly in illegal activity, ideally coupled with **reporting the conduct**, in a case such as this, to the FWO. That would rob a primary offender such as New Shanghai Charlestown and its guiding mind, Mr Chen, of the means of having such conduct continue except by, in this case, Mr Chen's own hand." [Emphasis added].*

Commentary

Whilst there would appear little doubt that the company acted in an underhanded manner, motivated – no doubt – by greed, the position of HR Manager (whether qualified or not) is going to pay for the sins of their boss. In a job market where there are literally hundreds of applicants for each advertised HR position, and the economic realities of having to earn a living to survive, I am conflicted on the focus of the HR profession. (Having said this, I *did* resign from an unscrupulous employer some years ago).



Sick employee dismissal valid but harsh (reinstated)

Chris Papaioannou v CSL Limited (U2017/7855), Ryan, C. 6 November 2017

The applicant in this matter suffered a psychiatric illness, with the employee's medico (according to the Commissioner) outranking the employer's. Albeit, both agreed that the applicant would at some point in time (each differed in terms of a return-to-work date). The Commissioner was quite complimentary on the procedural aspects of the matter.

On my reading, the Commissioner took a very technical route of deciding that the EBA (upon which the applicant was employed) has a "salary continuance" clause, and according to the Commissioner, meant that whilst the applicant could be dismissed for misconduct, it was not fair for him to be dismissed due to his illness. The commissioner:

"Much of the case has been as to whether or not the employer should have preferred the medical evidence of the applicant's treating psychiatrist over the evidence of an occupational physician. It is entirely defensible for an employer to rely upon the report of Dr Bloom in this matter. I am more than satisfied that the employer had a valid reason for the dismissal, based upon the report of Dr Bloom".

The following dot points summarise the Commissioner's views:

- The question of capacity has been discussed in the case law and it goes to the capacity of a person to actually perform the duties which constitute the job. What those authorities do not discuss is whether the capacity includes the non-performance of the work, where the circumstances of the contract, the enterprise agreement, the award or the legislative regime or whatever other mechanism may be in place provides the capacity for a person not to perform the work whilst still performing their part of the employment relationship.
- In the circumstances of this present matter, the inability of the applicant to attend work is matched by the ability of the applicant not to attend work and receive pay by virtue of the salary continuance provisions. It is a direct factor which goes to whether or not the dismissal, even if for a valid reasons, is harsh, unjust or unreasonable.
- I come to the conclusion that the dismissal was harsh. It's harsh because in circumstances where the employment could not be carried out by the applicant because of the current incapacity of the applicant, whilst that might give rise to a valid reason for the dismissal, the dismissal itself denied the applicant the benefit of the terms of an enterprise agreement which were intentionally designed to be generous and intentionally designed to specifically cover long periods of absence by the employee.

Having made a finding that the dismissal is harsh, the Commissioner dealt with the remedy:

- Remedy is discretionary. I do not have to give a remedy. If I do give a remedy, I am required to consider whether or not reinstatement is inappropriate. The prime remedy is reinstatement. If I decide the remedy that reinstatement is appropriate, then I must order reinstatement. If I decide that reinstatement is inappropriate, then I must consider whether or not compensation is appropriate. If I decide that compensation is inappropriate, then no remedy at all is given. If I decide that compensation is appropriate, then I'm required to calculate an amount of compensation..."
- In this matter, having regard to all of the circumstances of the case, I am of the strong view that a remedy should be granted to the Applicant in this matter. The prime remedy provided for in the Act is reinstatement. The Applicant can only receive a remedy if they've asked for one and they can only receive it if there's been a finding that the applicant has been unfairly dismissed.
- In the present matter, I consider that an order for **reinstatement** is appropriate. It is appropriate in the circumstances where there is **no issue of conduct**. This is not a conduct issue, which raises questions as to **trust and confidence** in the employee. [Emphasis added]. It is appropriate because reinstating the employee puts the employee and the employer in exactly the same position they were as at the date of dismissal. The employee is not performing work but the employee is accessing and has the ability to access the salary continuation provisions of the agreement.
- A decision of the Commission in relation to a dismissal...has no bearing - and the parties need to understand this - has no bearing on any future conduct that the employer may take to dismiss the employee at any future date after the employee has been reinstated. That reflects absolutely the



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correct position of the employer that salary continuance does not make an employee immune from dismissal.

Commentary

The dot points above are verbatim from the decision. Whilst this matter was found on a technicality (my words), the comments cited may be of some use if arguing against the reinstatement of an employee. Is it me, or is the language of the decision a tad on the casual side?

Until next time....

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