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HUMAN RESOURCES & INDUSTRIAL RELATIONS

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Quote of the Edition

"The past, like the future, is indefinite and exists only as a spectrum of possibilities".
Stephen Hawking 1942 -2018. ☹

Resignation or Dismissal?

In this Edition, I revisit the age-old question of "did he jump or was he pushed. Or in the parlance of the workplace was the employee given "Hobson's Choice" – ie no choice at all. This is fundamental (or jurisdictional) matter that must be resolved before an unfair dismissal case can proceed.

I have examined for, your viewing pleasure, the latest cases on this subject – one involving a permanent employee, the other a casual.

The first decision is a loss/win/loss, and the send a loss.

On review (or summary) these decisions are a timely to:

- Ensure that their contracts of employment include the payment in lieu of notice upon the employer's discretion.
- Never accept resignations in the "heat of the moment". Allow a cooling-off period (the second decision allows just one hour). I suggest overnight.
- Never (ever) give an employee the choice of resign or be sacked. It's either one or the other.
- A resignation, once given, cannot be withdrawn unless agreed by the employer.
- It was reinforced in both decision that the FWC is not bound by the rules of evidence, in that the parties must be given a fair hearing.

- Policies relating to the rules of taking all types of leave are in place and followed. If there are dates that leave cannot be taken (except for exceptional circumstances) then these should be included in the policy and the contract.
- Unauthorised absences are serious misconduct, sick leave not so much.
- And most mind boggling is why, after someone has submitted their resignation, would you go to all the effort to go down the performance management road?
- A resignation should be gained in writing; however, a verbal resignation is still a resignation.

I have also included a link to an interesting article "Facing a workplace investigation by the Fair Work Ombudsman: What is at stake?"

Hope this helps 😊

Annual leave not granted, resignation = dismissal?

Mr Christopher Patterson v Re-Engage Youth Services Incorporated T/A Re-Engage Youth Services. (U2017/8214) [2018] FWC 20. Anderson, DP, 3 January 2018.

As I mentioned, this is far from a new issue. However, this 41-page decision appears to provide chapter and verse of the subject. – citing many full bench and other decisions – and applying logic that I find a little perplexing.

On the other hand (in my opinion) the company, faced with a written resignation, sought advice from an "external HR consultant" which somehow resulted in a performance management meeting being held after the resignation, which ultimately led to the Company's downfall.

There are no winners here: The Company was represented by a QC and solicitor, and Mr Patterson was also represented. Both given leave to do so by the DP. Given the outcome (warning spoiler alert) was a "half-finding" against the Company resulting in a measly $1,324.15 less tax, one wonders was it worth all the trouble and expense.

The case

Section 386 of the FW Act provides that 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.

Mr Patterson, the Applicant in this matter, is a 70-year old former solicitor and police officer with a background in criminal investigation. Rather than retiring, in March 2013 he commenced employment at the Independent Learning Centre in Mount Gambier.

Mr Patterson, claimed to have been unfairly dismissed on 10 July 2017, with the dismissal taking effect that day. In the further alternative, Mr Patterson says that if he was not dismissed by forced resignation on 10 July 2017 then he was dismissed by decision of the employer on 10 July 2017 to bring his employment to an end effective 24 July 2017 rather than 31 July 2017 as he had notified.

Long story short, Mr Patterson's wife had arranged for a family holiday to Thailand to commemorate the death of recently deceased nephew. All air-fares had been paid and the wife and other family members ensuring that they were availed with annual leave prior to booking. No so Mr Patterson, who failed to apply for leave, until some months later – and only then informally (ie not filling in the appropriate form).

Being a teacher, Mr Patterson was expected to work during school terms. As the holiday period in question was during a school term, his leave was refused.

This subsequently caused Mr Patterson some degree of consternation, resulting in stress which in turn led him to leave the workplace without telling anybody (leaving a staff member alone) and then taking sick leave without advising the Company. The sick leave was later covered by medical certificates.

The DP stated that he considered I consider that:

- Mr Patterson's 90-minute **unauthorised absence** from the workplace on the afternoon of Friday 30 June was a **serious failure warranting sanction** but, in all the circumstances, was not a valid reason for his dismissal given that he was an employee who otherwise had an exemplary record.

- The employer produced no policy at the hearing to support its claim that Re-Engage employees were required to telephone and not text notification of sick leave absences. He had previously notified sick leave absence by text without complaint by the employer.

- Mr Patterson did not breach the Company's Annual Leave Policy by making a request for annual leave without completing a leave request form. The employer's Annual Leave Policy requires an employee to submit a form at least three weeks prior to leave being taken.

The DP's logic

The DP found that Mr Patterson di not resign at the "employers initiative":

> *"I am satisfied that Mr Patterson resigned because of the employer's conduct, but I am not satisfied that he was forced to do so. I readily accept that Mr Patterson resigned under the burden of immense pressure. He felt he had to choose between his job and a family holiday that had deep personal significance [and] that if he could not have both the holiday and his job, then he would very reluctantly forgo his job for the holiday. He knew that he couldn't cancel the trip or the flights".*

The DP cited many, many instances of actions Mr Patterson could have taken, to convince his employer that he needed the leave on compassionate grounds but failed to do so, stating:

> *"To him, the situation had gone from bad to worse now that he faced the indignity of being performance managed."*

Then the DP found that that Mr Patterson was "forced to resign":

> *"Taking these factors into account, and especially the combined effect of the unilateral decision to pursue performance management after the employee's resignation and to shorten the notice period given by the employee and to deny the employee the right to work out the notice based on views arising from the performance management meeting, I consider that the employer brought Mr Patterson's employment to an end in a manner that was materially different to the terms on which he had resigned. In those circumstances* ***I characterise the employer's conduct as substituting a termination of employment at its own initiative rather than simply being conduct consequential to the resignation****".* [My emphasis].
>
> *"I have found that Mr Patterson was not forced to resign by the conduct, or a course of conduct, engaged in by Re-Engage. However, I have found that Mr Patterson was otherwise dismissed at the initiative of the employer. Thus, Mr Patterson was dismissed within the meaning of the FW Act".*

The Legal Principles

As I have mentioned this was a very lengthy decision, which brought to attention many salient case precedents. The following is a dot-point summary:

- The DP also stated that as the Company raised jurisdictional issues, it bears the legal onus of establishing that Mr Patterson was not dismissed. However, in circumstances where an employee resigns but claims their resignation was, at law, a dismissal an evidentiary burden exists on the employee to establish that the termination was at the initiative of the employer or forced by the employer's conduct. The DP cited *Australian Hearing v Peary* (2009) 185 IR 359 at [30]].

- The legal principles governing the application of section 386(1) are well established. Together with an analysis of its legislative history, they were recently set out by a Full Bench of this Commission in *Bupa Aged Care Australia Pty Ltd v Tavassoli* as follows:

  > *"There may be a dismissal within the first limb of the definition in section 386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "****heat of the moment****" or when the employee was in a* ***state of emotional stress or mental confusion*** *such that the employee could not reasonably be understood to be conveying a real intention to resign.*

*"(1) Although "**jostling**" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.*

*"(2) A resignation that is "**forced**" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in section 386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had **no effective or real choice** but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element."* [My emphasis].

- Then quoting O'Meara v Stanley Works Pty Ltd:

"In this Commission the concepts have been addressed on numerous occasions and by a number of Full Benches. In Pawel v Advanced Precast Pty Ltd (Pawel) a Full Bench said:

*'**Suppose an employee wants a pay rise** and makes such a request of his or her employer. If the employer declines and the employee, feeling dissatisfied resigns, can the resignation be said to be a termination at the initiative of the employer? We do not think it can and yet it can be said that the act of the employer i.e. refusing the pay rise, has at least consequentially resulted in the termination of the employment.*

*'This situation may be **contrasted** with the position where an employee is told to **resign or he or she will be terminated.** We think that all of the circumstances and not only the act of the employer must be examined. These in our view, will include the circumstances giving rise to the termination, the seriousness of the issues involved and the respective conduct of the employer and the employee."* [My emphasis].

- Put another way, the DP quoted from the Full Bench decision of *ABB Engineering Construction Pty Ltd v Doumit* (ABB Engineering):

*"The 'rule' is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such **a notice is given it cannot be withdrawn except by consent**. The 'special circumstances' exception…is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the*

> *notice did in fact really intend what he had apparently said by it. In other words,* ***he must be satisfied that the giver really did intend to give a notice of resignation…*** *such need will almost invariably arise in cases in which the purported notice has been given orally in the* ***heat of the moment*** *by words that may quickly be regretted.*
>
> *"The essence of the 'special circumstances' exception is therefore that, in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a* ***'cooling off' period'*** *before acting upon it...I would, however, be* ***reluctant*** *to characterise the exception as an* ***opportunity for a unilateral retraction*** *or withdrawal of a notice of resignation or dismissal since that would be to allow the exception to operate inconsistently with the principle that such a notice cannot be unilaterally retracted or withdrawn. In my judgment, the true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place – that, in effect,* ***his mind was not in tune with his words****."* [my emphasis].

The DP also described the FWC's role:

> *"****I am not bound by the rules of evidence*** *but consider them to be a good and useful general guide. I adopt the approach of the Full Bench of this Commission which recently said:*
>
> > *'The Commission is obliged by statute to perform its functions in a manner that is fair and just pursuant to s. 577(a) of the Act. Although it is not bound by the rules of evidence and procedure, the Commission tends to follow the rules of evidence as a general guide to good procedure. However, that which is ultimately required is judicial fairness, and that which is fair in a given situation depends on the circumstances.'"* [My emphasis].

A verbal resignation is still a resignation…

Miss Addy Foale v Davsan Pty Ltd T/A Seaton Hotel. (U2017/12189). [2018] FWC 1085. Anderson, DP. 21 February 2018.

Ms Foale, the Applicant, was employed by Seaton Hotel as a casual Food and Beverage Attendant from January 2017 to 10 November 2017. Her employment was regular and systematic except for absences due to injury or sickness, and she had a reasonable expectation of continuing employment on that basis

The Seaton Hotel raised a jurisdictional challenge, claiming that Ms Foale was not dismissed. It contends that she resigned from her employment on 10 November 2017 and confirmed that decision by conduct over subsequent days. In the alternative, it says that any dismissal (if found) was not unfair, as Ms Foale failed to mitigate her loss or accept offers of alternative work.

Ms Foale was self-represented but assisted by a former employee (and witness) Ms Tylor. The Seaton Hotel was represented by Ms Legoe of the Australian Hotels Association (AHA) supported by Mr Webb of the AHA as an observer. Ms Foale objected to the employer being represented by an

experienced officer of the AHA. The objection was dismissed claiming Ms Legoe, as an officer of an industrial association, was not required to obtain the Commission's permission under section 596 of the FW Act to represent the employer. However, the DP took into consideration that Ms Foale's case was being adequately presented and that the employer's case was being tested.

The Legal Principles relating to whether there was a termination are a carbon copy of the previously reported decision – including the FWC's use of the rules of evidence.

Personal circumstances also played a part, that is Ms Foale was dealing with difficult personal and family circumstances. Casual work at the hotel was her only current source of income and she was financially vulnerable. Ms Foale needed and requested more hours and approached her manager with this request. This conversation did not end well, with Ms Foale being somewhat frustrated that she was not getting the hours she wanted and her manager advising her "Rosters are performance based. At this time your attitude and work performance are not up to standard…" Ms Foale (interrupting): "I am leaving this place, this is ridiculous." The manager: "Do you want me to take you off next week's roster?" Ms Foale: Ms Foale: "Yes" (walking out and slamming the door closed). Ms Foale denied that she wished to be taken off the roster.

Ms Foale returned to her duties. Where a more senior manager met with Ms Foale outside of the hotel to review the conversation as it had been reported to him by Ms Foale's manager. Ms Foale told the senior manager that her manager had lost his cool and was taking her off the roster. She said she needed more hours and could not live on the hours rostered. The senior manager suggested Ms Foale approach her manager, apologise for having blown up in his office, explain that she was feeling stressed, seek his forgiveness and move forward. Ms Foale agreed to do this.

Ms Foale's manager then approached her in the carpark, with the DP stating that this was the probable conversation:

Manager: "I have never ever been spoken to like that by a staff member before."
Ms Foale shrugs her shoulders and rolls her eyes.
Manager: "I am new here, I am trying to bring a better culture and I don't feel you are being part of the team"
Ms Foale: "Well I am guessing that is it then; we are going to part ways"
Manager: "Yes I think that is best"
Ms Foale: "Thank you, do I have to go see Matt?"
Manager: "No you don't"
Ms Foale: "Will I be paid for the rest of the shift?"
Manager: "Yes. Matt may be in touch"

A number of text messages were exchanged between Ms Foale and the senior manager, which Ms Foale put as evidence that she did not quit, but the Hotel stating that they self-serving and an attempt to re-write history.

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The DP finding:

> *"A dismissal at the employer's initiative is commonly (but not exclusively) evidenced by a decision to dismiss and communication of that decision. There was no decision to dismiss by [the Hotel], nor communication of a dismissal or an intention to dismiss.*
>
> *"The brevity of both the first and second Foale / [manager] conversations and the imprecise language used created a certain ambiguity to Ms Foale's departure that was at odds with the clarity [the senior manager] had sought. However, none of the words used to Ms Foale…could be reasonably interpreted as a dismissal…"*
> *"There are circumstances where an employee resigning in the* ***heat of moment*** *can be said to have been dismissed if the employer acted unreasonably in relying on that circumstance without satisfying themselves that this is what the employee really intended.* [My emphasis].
>
> *"However, that is not what happened at the Seaton Hotel. Indeed, the very opposite. [the senior manager's] …with Ms Foale on that day were designed to* ***allow the heat of the initial confrontation to abate and for Ms Foale to reflect on her position****, not quit and mend relations with the manager…Ms Foale had* ***approximately an hour*** *to do that … This constituted an* ***adequate cooling off period****…"* [My emphasis].

The DP stating:

> *"While the employer can rightly be criticised for* ***not seeking her resignation in writing*** *and allowing her to leave the workplace without securing that level of clarity, Ms Foale's erratic behaviour on the day (saying she was leaving, continuing customer service after storming out, failing to apologise when given that option, declaring a parting of ways after a cooling-off period and leaving the workplace with her shift uncovered) meant that this was not a resignation made in any orthodox manner. It contributed to the ambiguity in the day's events. In any event,* ***a verbal resignation (once made) is still a resignation****".* [My emphasis].

The DP stated that he preferred the evidence of the Hotel's managers over that of Ms Foale, and the matter was dismissed.

Facing a workplace investigation by the Fair Work Ombudsman: What is at stake?

Interesting article:

http://www.mondaq.com/article.asp?articleid=683888&email_access=on&chk=1327997&q=644109

Until next time....

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