



# GREG REIFFEL CONSULTING

HUMAN RESOURCES & INDUSTRIAL RELATIONS

## Employee Relations Newsletter

Edition 83

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*"My business grows by referrals. I would appreciate it if you would pass my details on to your colleagues, clients or associates who could benefit from my skill-set."*

See <https://www.gregreiffelconsulting.com.au> for further information.

### Quote:

*"If you think you can, you can. And if you think you can't, you're right."* Mary Kay Ash.

### In this Edition

Neo-Nazi Smerff unfairly dismisses employee (warning MA15+)

In what I believe to be a first, the FWC has published its first MA15+ (Strong language) decision.

As its turns out, it is not a reasonable direction, if such direction is provided in a threatening manner. Read on...

Great article on why 2019 is poised to be a dynamic year for workplaces in Australia

After years of inactivity, some significant legislative change may be in the wind. Workplace change will be driven by the public's notion of 'a fair go', seeking to restore a perceived imbalance between business and workers. Whatever your perspective, there is a workplace system that is, in many respects, broken. Read on...  
[http://www.mondaq.com/article.asp?articleid=773434&email\\_access=on](http://www.mondaq.com/article.asp?articleid=773434&email_access=on)

### Neo-Nazi Smerff unfairly dismisses employee (warning MA15+)

Mr Jordan Lamacq v Smerff Electrical. (U2018/5137) [2019] FWC 181. Asbury, DP. 14 January 2019.

Mr Hickey is the managing director of a small electrical company. The applicant was a first-year apprentice.

Mr Hickey had a belief that a former employee had stolen from him in relation to a fuel card and a cash job (ie a job that "off-books" for the company). Evidence was provided that it was common practice for Mr Hickey to allow employees to fill their own personal vehicles using the fuel cards; whilst cash jobs were permissible insofar that Mr Hickey approved them.

MR Hickey was of the belief that a former employee did a cash-job without his permission and provided the applicant with an ultimatum to provide with the ex-employees new work details by a certain date. Mr Hickey, having found the street in which the cash-job was carried out, proceeded to door-knock each of the premises in that street in an attempt to find out which was the one the cash-job had been carried out.

Over a period of two days, there was an exchange of emails/texts between Mr Hickey and the applicant. I cannot put these into print as they would most likely be rejected by your email filters. The information can be found using the following link and reading paragraph 35 onwards:

<https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc181.htm>

Mr Hickey also had issues with the FWC's process:

*"No conciliation is possible. Jordan [Lamacq] will not be re-employed. He will not get any money. And neither will this organisation. I will not enter into any conciliation and I will not waste an hour filling out these forms UNTIL somebody investigates the theft by Jordan and ... of which I have enough evidence to convict ... 3 times over and I think enough to convict Jordan...Jordan is a thief. When somebody starts an investigation into the theft then I will participate in this charade. Until then you get nothing. I will answer your call but don't Expect any effort to participate. Jordan is a thief..."*

And:

*"Oi I am not seeking an adjournment this is not a court. I will not be there. The thief can have his day I don't care but it won't be the 15th. Pick another day after the 18th and I may or may not show then depending on whether someone has investigated his theft or not."*

He also referenced the FWC: *"court/tribunal/whatever you call this event"*.

And when he file the required form, it contained the reason for the dismissal as:

*"...serious misconduct based on his fraudulent misuse of company property and failure to carry out a lawful and reasonable instruction that was consistent with his employment contract"*.

The contract referred to contains various clauses relating to use of company property and cash-jobs, and a novel clause, which the decision quoted:

*The contract makes for interesting reading. In relation to wages it states at 5.1:*

*"You will be paid Weekly at the rate of \$15 per hour. If you are unhappy with your wage, you can f\*\*k off. Nobody is forcing you to work here."*

No conciliation conferences were held, and the matter went straight to a "determinative conference" as neither party was represented.

Mr Hickey sought a number of adjournments because he needed more time:

*“...to file additional material on the basis that he was defending a number of charges associated with installing security equipment without a permit and **using a carriage service to offend “terrorist wives”**. Mr Hickey also asserted that various pieces of computer equipment that he required to defend [the applicant’s] application had been **confiscated by Police**.*

*“Mr Hickey included links to Smerff’s website to evidence his need for an extension of time in which to file his material. The website gave every indication that Mr Hickey (who refers to himself as the **“Nazi Sparky”**) had gone to great effort to create and post a wide range of offensive material despite the alleged confiscation of his computer equipment”. Emphasis added.*

The FWC adding:

*“Mr Hickey said in response that the information posted on his website represents fair and accurate reporting as he sees it. Mr Hickey also said that prospective employers of [the applicant] are free to call him for a reference. It is the case that Mr Hickey’s website (to which he emailed me a link) contains various derogatory posts about persons who have offended Mr Hickey including a number of Queensland Judicial Officers and the former employee”.*

Mr Hickey also used this time to threaten the applicant by email:

*“[The applicant] tendered an email dated 20 August 2018 (also tendered by Mr Hickey) in which Mr Hickey stated that [the applicant] should google the name of the other dismissed employee and that:*

*“If you cancel your Friday extortion attempt [FWC proceedings] before close of business tomorrow I will refrain from publishing the [applicant] version. Do you really want my entry being number 1 of page 1 of google search results for [applicant]?...*

*I should include cash payment for my lost time as well, but I will settle for complete “abandonment of your extortion attempt by tomorrow afternoon or you will have your own page 1 like [former employee]. And I am not finished with him yet.”*

Whilst arguing that the applicant was provided with a deadline to provide information being a “reasonable and lawful instruction”; the FWC had a decidedly different view, describing the communications by Mr Hickey to the applicant as “...threats and abusive commentary...”

Finding that:

*“...Mr Hickey dismissed [the applicant] because he would not assist Mr Hickey in his pursuit of revenge against the former employee. While Mr Hickey believed that the former employee*

*had been stealing from him, there was no basis for believing that [the applicant] was guilty by association of the same conduct.*

*“The manner in which the request for information was couched and the fact that there was also a request that Mr Hickey provide the address of the former employee’s new workplace, made it **entirely reasonable that [the applicant] did not respond.***

*“However, any legitimacy about the issues that Mr Hickey may have raised with [the applicant] is lost by virtue of being couched in terms so offensive that **no employee should be expected to endure such treatment.** [Emphasis added].*

And finding the dismissal to be unfair, the FWC turned its attention to compensation:

*“In all of the circumstances I have concluded that [the applicant] would likely have remained in employment for a further period of twelve weeks. **I make this finding with some difficulty.** To find that [the applicant] would not have remained in employment for any lengthy period because of the **appalling manner in which he was treated** by Mr Hickey has the effect of limiting the amount of compensation that can be awarded to [the applicant] and **rewarding Mr Hickey for that behaviour.** However, on the basis of the evidence before me I cannot be satisfied that employment would have extended beyond the twelve weeks that I have determined”. [Emphasis added].*

The applicant was awarded \$11,400.00.

### **Commentary**

Words fail me...

### **Great article on why 2019 is poised to be a dynamic year for workplaces in Australia**

After years of inactivity, some significant legislative change may be in the wind. Workplace change will be driven by the public’s notion of ‘a fair go’, seeking to restore a perceived imbalance between business and workers. Whatever your perspective, there is a workplace system that is, in many respects, broken.

We can also expect some clarity on legal issues where there has been recent uncertainty. Workplace culture and broader social issues will continue to be tested in industrial tribunals and the media.

[http://www.mondaq.com/article.asp?articleid=773434&email\\_access=on](http://www.mondaq.com/article.asp?articleid=773434&email_access=on)

*Until next time...*

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