



EVERYTHING MATTERS

Workplace Relations Hot Topics

Prevalent Issues in the Workplace

AHEIA Higher Education HR Conference 2009

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Date of Presentation: Thursday 26 March 2009

Workplace Relations Hot Topics



- Issues relating to Termination
 - Harsh, unjust or unreasonable
 - Operational reasons
- Sex discrimination
- Industrial action
- Discrimination taking industrial action
- Contractual and EBA issues
- Implied duty of trust and confidence

“The Snickers Bar Case”

Petrosillo v Coles Group Supply Chain Pty Ltd [2009] AIRC 3

- P employed at a Coles distribution centre
- Coworker offers P a Snicker's Bar. P eats it
- P and coworkers are interviewed by management, deny knowledge of theft
- P suspended and later terminated from job

Harsh, unjust or unreasonable termination



Senior Deputy President Cartwright

- Satisfied that P had knowledge of “check seal” policy, in light of ‘known theft’ issues
- Satisfied P knew Snickers bar did not have seal
- Did not given honest answers in the investigation
- Despite P’s positive work history, Commission held termination was valid

“The Smoking Case”

Anthony Anjel v Venture DMG Industries [2009] AIRC 155

- A manager suspects an employee is smoking in a store room
- Employee denies allegation, but is placed on paid leave while Venture investigates
- Employee is terminated for serious misconduct
- Applies to AIRC for declaration under s643(1), seeks reinstatement and lost wages

Harsh, unjust or unreasonable termination



Commissioner Foggo held:

- Preferred the evidence of management – smell of cigarette smoke, timing of events, hot cigarette butt
- Non-smoking policies well-known to employee
- Employee unable to provide good reason for being in restricted area at time of incident
- “serious risk” of smoking in chemical factory
- History of fires on premises
- Process of termination was fair

Genuine operational reasons



Palmer v Walz Construction Company Pty Ltd [2008] AIRC 336

- P was employed full time by Walz as a painter from April 2007
- P's hours changed shortly after commencing, not happy
- Develops skin allergy 3 months after commencing
- Placed on alternative duties

- Position made redundant by Walz in January 2008
- P alleges unlawful and unfair dismissal
- Walz cites "genuine operational reason"
 - Economic instability
 - Reduced amount of work available
 - Also dismissed two sand blasters and a painter
 - Report identifying P as candidate for redundancy

Genuine operational reasons



Held by Commissioner Spencer:

- Satisfied that Walz terminated Palmer and others due to economic reasons
- Reduced level of work and the resulting financial difficulties affecting the business was a valid reason for termination
- Things to note:
 - Need not be an unavoidable action – can be proactive measure
 - Definition of “genuine”: “real, true or authentic, not counterfeit”; “genuinely held” “capable of withstanding reasonable scrutiny”

Pregnancy Discrimination

Roberts v King [2009] QADT 3

- Roberts is a young apprentice hairdresser
- Claims employer began criticising her work upon discovering her pregnancy
- King abused her when she requested shift swap to attend antenatal class – claimed breach of contract
- Made jokes about sacking staff who became pregnant
- Choice between ‘keeping her job and being subject to abuse’ or ‘leaving her job and avoiding abuse and attending her medical appointment’
- Roberts resigns, claims discrimination because of pregnancy under s175(2) of the Anti-Discrimination Act 1991 (Qld)

Tribunal Member Roney:

- Tribunal accepted if Roberts had not resigned, King would have sacked her anyway
- It was irrelevant whether King had only been joking
- “Many a true word is spoken in jest”
- Accepted that King became critical of Roberts’ work once he found out she was pregnant
- Resignation was natural and foreseeable consequence of conduct which a staff member not pregnant would not have been subjected

Caelli Constructions (Vic) Pty Ltd v Construction Forestry Mining and Energy Union [2009] AIRC 172

- Caelli operate various construction sites across Melbourne
- On 18 February 2009, CFMEU organisers park vehicles at entrance gate, blocking vehicles from accessing site
- Adjacent gates not blocked
- Various work postponed, deliveries cancelled

Industrial Action



Did picket line cause industrial action?

Caelli:

- Picket line and vehicle blockade resulted in altered performance of work
- Industrial action was 'happening': s420 of the Act
- Sought order to stop industrial action: s496(1)

CFMEU

- No Caelli RCH site workers participated in picket
- Union is a third party 'communicating information' to workers
- Disruption not the result of workers instituting 'bans, limitations or restrictions on the performance of work'

Senior Deputy President Watson:

Disruption to work and deviation from normal work duties did not constitute 'industrial action' within meaning of s420 & 496 of the Act. There was no industrial action by any of the Caelli employees – the employees were ready to work.

Discrimination against employees for taking industrial action



CFMEU v Austral Bricks (Qld) Pty Ltd [2009] FMCA 143 (Federal Magistrates' Court)

- Employees took protected industrial action but following Saturday after the industrial action a supervisor did not offer 3 permanent staff who had gone on strike overtime but instead offered it to casuals
- The company breaches section 448(1)(a) ban on discriminating against employees because they had taken part in protected industrial action
- The penalty was 10% of the maximum fine of \$33,000 (i.e. \$3,300)
- The claim was brought by the CFMEU to whom the penalty was paid

Disputes arising from the terms of an EBA



National Tertiary Education Union v Victoria University [2008] FCA 1630

The dispute concerned whether a dispute about the workloads model in the Victoria University EBA was a matter that could be determined under the disputes clause even if it provided for the Vice Chancellor to ultimately determine the workload model after consultation

Ryan J held:

- That the ultimate formulation of the academic workplace model after consultation was left to the Vice Chancellor and therefore the agreement recognised that the academic workloads issue was within ‘management prerogative’
- In effect the relevant clause dealt with a dispute by enabling the Vice Chancellor to determine the matter and therefore a dispute about it could not be a matter that arises under the agreement

Implied duty of mutual trust and confidence?



Russell v Trustees of the Roman Catholic Church, Archdiocese of Sydney (2009) ALMD 1422

Issues:

1. Is there an duty of mutual trust and confidence implied in a contract of employment?
2. If so, was this duty breached when the Church undertook its investigations into allegations of sexual abuse – and in the process allegedly denied Mr Russell procedural fairness?
3. What about damages?

Implied duty of mutual trust and confidence?



New South Wales Court of Appeal held:

1. There is a duty of good faith dealings between employer and employee. The court characterised the employment relationship as one of importing duties of loyalty, honesty, confidentiality and mutual trust and said this was the subject of high authority: *Concut Pty Ltd v Worrell* (2000).
2. The court considered Mr Cooke's investigation into the allegations of sexual misconduct as "effective and thorough". The fact that Mr X had not been interviewed face to face, or cross examined at hearing, did not compromise procedural fairness and did not constitute a breach of the employment contract.
3. Was difficult to see how the Church demonstrated any element of bad faith. In the absence of a breach of contract and good faith dealings, a claim for damages could not succeed.



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Questions?

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