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RECENT CASES ON UNFAIR DISMISSAL

INTRODUCTION

Politically, industrial relations has been “flavour of the month” for some time. Despite all the changes to Workplace Relations laws, Courts and Tribunals have been quietly going about their business deciding cases that are brought before them as a result of the many and varied circumstances that occur in the workplace.

The cases that follow represent a snap shot of recent unfair dismissal cases that have been decided by the Australian Industrial Relations Commission (“AIRC”).

DRINKING AT WORK

Selak v Woolworths Ltd

Tribunal – AIRC – Full Bench (Melbourne)

Date decided - 8 February 2008

Case Facts

Mr Selak was the manager of the Safeway Supermarket at Southland. His total service with Woolworths Ltd, the owners of Safeway, over 2 periods of employment was 17 years.

Mr Selak was concerned that one of his subordinate managers at the Southland store was about to leave. He took this employee to lunch for a “mentoring session”. He did this in the hope that he could convince the employee to stay. Over lunch both Mr Selak and the subordinate manager consumed 2 pots of beer. Both employees were terminated, Mr Selak summarily on the basis of serious misconduct.

Woolworths had several policies that covered the consumption of alcohol. These policies were contained in a number of documents including the Woolworths Code of Conduct, its staff handbook, and its drug and alcohol policy. Mr Selak’s Employment Contract also contained a clause that provided that “*no alcohol is to be consumed by employees during their working hours including meal breaks*”.

AIRC Decisions

Commissioner Grainger found that the summary termination of Mr Selak was not harsh, unjust or unreasonable. Accordingly, he dismissed Selak’s unfair dismissal claim. During the course of his judgment, Commissioner Grainger noted that each of the policy documents approached the question of alcohol prohibition in a different manner. As such, they lacked clarity and precision and therefore could not give rise to a breach by Mr Selak of the terms and conditions of his employment. However, Commissioner Grainger did find that the clause in Mr Selak’s Employment Contract was clear and unequivocal. It provided a sound basis on which Woolworths could act to summarily terminate his employment on the basis of serious misconduct.

Mr Selak appealed to the Full Bench of the AIRC on grounds that Commissioner Grainger had:

- Failed to properly consider the proportionality between the sanction of dismissal and the alleged conduct of Mr Selak;
- Placed too much emphasis on the alleged breach of the Contract of Employment;
- The finding that the termination was not harsh, unjust or unreasonable was not open on the facts.

The Full Bench dismissed all grounds of appeal and found that the Commissioner’s finding that the termination was not harsh, unjust or unreasonable was open to him on the facts.

Implications

This case illustrates that one instance of alcohol consumption without any allegation of actual intoxication, can be sufficient grounds for summary termination. It also illustrates that if a particular issue is covered in more than one policy document, consistency should be maintained otherwise the policy will lack clarity and precision and therefore fail.

THEFT IN THE WORKPLACE

Whiting v Greenbank RSL Services Club Inc

Tribunal – AIRC (Brisbane)

Date of Decision – 30 June 2008

Case Facts

Debbie Whiting worked for the Greenbank RSL Services Club Inc (“the club”). Her duties included working in the club bottle shop.

On 8 December 2006, the bottle shop till was \$24.00 down. The club investigated and determined that there was only one \$24.00 transaction during the relevant period on that day. At that time, Ms Whiting was operating the till. This was confirmed by security video footage which showed Ms Whiting selling a carton of beer costing \$24.00 to a regular customer. The footage showed Ms Whiting opening the till on 2 occasions and pressing the “no sale” button. She was then seen to place something in her right hand. She then put her right hand under her shirt and appeared to place something in her bra. The club alleged that this was the missing \$24.00. Ms Whiting was suspended without pay and subsequently summarily dismissed on the “grounds of theft”.

Ms Whiting took the matter of her termination to the AIRC claiming that it was harsh, unjust and unreasonable. She claims that the customer had changed his mind about the transaction and this is what caused her to push the “no sale” button on the till. The customer was called to give evidence and denied changing his mind about purchasing the beer. It was also alleged that Ms Whiting’s explanation of events did not match what was shown on the security video.

The AIRC Decision

Commissioner Bacon found a number of inconsistencies and irregularities in Ms Whiting’s evidence. This led him to the conclusion that she “did misappropriate the \$24.00”. He found that the termination of Ms Whiting’s employment was not harsh, unjust or unreasonable. Accordingly, he dismissed her application. However, he was critical of the club for not showing Ms Whiting the security video footage. Despite this, Commissioner Bacon decided that the club’s failure to show the security video footage to Ms Whiting was not so significant “that it ought to lead to a finding that the Applicant was not provided with an opportunity to respond”.

Implications

This case shows the seriousness with which the Commission is prepared to take theft in the workplace even if the amount of money involved is modest. The summary termination was upheld despite the process being flawed by the employer not allowing the employee to view video footage from which they drew conclusions of fact which in turn formed part of their reasons for terminating the employee.

ABANDONMENT OF EMPLOYMENT OR TERMINATION BY THE EMPLOYER

Searle v Moly Mines Ltd

Tribunal – AIRC – Full Bench (Melbourne)

Date Decided – 29 July 2008

Background

Ms Searle brought an unfair dismissal claim. Her employer, Moly Mines Ltd (“Moly”) argued that Ms Searle had abandoned her position.

Commissioner Williams determined that as the termination of Ms Searle’s employment was not at the employer’s initiative, he had no jurisdiction to hear the matter.

Ms Searle appealed to the Full Bench of the AIRC. The question for the Full Bench to consider was whether Ms Searle’s employment was terminated at Moly’s initiative or whether the termination was brought about by her abandoning her position.

Facts

Ms Searle had made serious allegations against a co-worker which, after investigation were found to be unsubstantiated. During the investigation, both Ms Searle and the co-worker had been suspended. On completion of the investigation, Moly initially attempted to reach a negotiated departure arrangement with both Ms Searle and the co-worker. When this failed, they tried to have Ms Searle return to work on the basis that she would not have to work with or near the other employee.

On 31 October 2007, Moly had both telephoned and written to Ms Searle with their return to work proposal. On 1 November 2007, Ms Searle’s legal representative wrote to Moly enclosing a medical certificate which indicated that Ms Searle was unfit for work. He also indicated that all queries relating to her employment should be directed to him. Ms Searle refused to communicate directly with Moly and returned correspondence unopened.

Ms Searle continued to receive medical certificates covering her absence from work with her last certificate expiring on 22 November 2007. On 23 November 2007, she lodged a WorkCover claim with Moly, but did not provide a medical certificate.

On 30 November, Moly wrote to Ms Searle indicating that her actions constituted an abandonment of her employment and consequently a repudiation of her Employment Contract. Moly accepted this repudiation.

The actions relied upon by Moly were:

- Ms Searle's failure to communicate with them;
- The expiration of her medical certificate on 22 November with no further certificate being provided.

Ms Searle's Employment Contract had a clause that stated that "*failure to report for work and failure to notify Moly Mines for three (3) consecutive working days shall constitute abandonment of employment. If you abandon your employment, you will be terminating your contract without notice*".

Unbeknown to Moly, Ms Searle had seen her doctor on 21 November 2007 and been issued with a medical certificate covering her until 12 December 2007. As with the previously issued certificate, Ms Searle relied on statements of medical centre staff that they would send the certificate to her employer. Medical centre staff gave evidence to the effect that the certificate was posted to Moly Mines the day after Ms Searle had been seen by the doctor.

The AIRC Decision

The Full Bench of the AIRC took the view that Ms Searle's employment was terminated at Moly's initiative and therefore did not amount to an abandonment of employment. In coming to this view, they found:

- All Ms Searle's absences from work were covered by medical certificates;
- Moly was aware that Ms Searle was a WorkCover claimant from 23 November 2007;
- That Moly sent the letter of 30 November and if that letter had not been sent, Ms Searle's employment would not have been terminated;
- The abandonment clause in the contract did not apply to every absence. The Full Bench distinguished between an absence with some notice and background (such as Ms Searle's case) and one which was completely unexplained.
- As a matter of objective fact, Ms Searle was entitled to be absent pursuant to the certificate.

Implications

Employers need to be very careful when suggesting an employment relationship has come to an end due to abandonment by the employee. This is especially so in circumstances where the employee has previously been declared unfit for work.

CONCLUSIONS

As the above cases illustrate, an employment relationship can come to an end in a myriad of circumstances. In all cases employers must exercise care in terminating employees. In circumstances where there is a background of employee injury or illness, employers need to be particularly careful. However, as the first 2 cases noted above showed, dismissal of employees is warranted in clear cases of misconduct by employees.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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