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Legal Solutions newsletter

workforcelegalsolutions

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Workforce Legal solutions

Welcome to the first issue of *Legal Solutions newsletter*.

As you may be aware, Workforce Legal Solutions Pty Ltd was established in February 2008 and specialises in employment law, industrial relations, mediation, and human resources.

The philosophy of Workforce Legal Solutions is to provide timely, cost effective and excellent quality legal advice through building long-term and productive relationships with our clients.

Workforce Legal Solutions offers a range of services within its legal practice. For further details please visit our website www.workforcels.com or email our office at admin@workforcels.com.

Thank you to all our clients for your continued patronage and access of our services.

Our special thanks goes to those of our existing clients that have kindly referred our service to new clients. It is greatly appreciated, particularly with the commencement of a new consulting business.

Legal Solutions newsletter will be produced on a quarterly basis and will provide details of recent news and information for the benefit of our clients.

Website

You may have noticed that the Workforce Legal Solutions website has recently been launched.

Please go to www.workforcels.com.

The *Legal Solutions newsletter* will be placed on our website and will also be sent by email to clients on our database.

Any suggestions you may have for further inclusions on the website, including links to other sites would also be of value and can be forwarded to admin@workforcels.com.

We would like to take this opportunity to thank Publishing Solutions and Research Services (www.psrs.biz) for the production of the website and invaluable and continued IT assistance and support.

News

AIRC finds that employee who had been on sick leave and then worker's compensation leave had not abandoned her employment

Recently, a Full Bench of the AIRC overturned an earlier finding of dismissal of an unfair dismissal application.

In this matter, the company, Molly Mines suspended a female employee in September, 2007 whilst it investigated allegations that she had made about a co-worker. The allegations were later found to be unsubstantiated, so the company proposed a return to work for both workers where they would be separated from each other.

The female employee did not respond, but her solicitor informed the company that she had a medical certificate and that all enquiries should be made to him.

The female employee proceeded on sick leave and then on her previous worker's compensation leave for several months and the company repeatedly sought contact with her by way of her solicitor.

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Eight days after her worker's compensation certificate expired, the company wrote to the employee saying that they considered her to have abandoned her employment.

However, unbeknown to the company, the employee's medical practitioner had issued a new certificate and she had lodged a new worker's compensation claim.

The Full bench upheld the employee's appeal and indicated that there was a number of indicators that the company had initiated the termination of the employment. They included the fact that had the letter considering her employment to be abandoned had not been sent, then the employment would have not been terminated. In addition, the employee was on worker's compensation so the company should have made enquiries as to whether there were continuing medical certificates.

This matter was referred back to conciliation.

J Searle v Molly Mines Limited [2008] AIRCFB 1088

Transmission of business employees are covered by six months qualifying period

In an interesting decision, a majority of the Full Bench of the AIRC has held that employees who are transmitted to a new employer are required to serve a six month qualifying period before they can claim unfair dismissal.

In this matter, five aged care workers were terminated from their positions a few months after Aged Care Services Australia Group Pty Ltd took over the nursing home from Professional Aged Care Enterprises Ltd.

The new employer had indicated to the employees that they were unsuccessful in retaining full-employment during their six month qualifying period.

The new employer had provided a written undertaking to recognise prior service for calculation of entitlements to employees but had not provided an agreement to waive the six month qualifying period as provided by section 643(6) *Workplace Relations Act 1996.*

Therefore, as the five employees had not completed the six month qualifying period, they had no jurisdiction to make an unfair dismissal claim with the AIRC.

As a result of this decision, it is recommended that particular attention is paid to the drafting of employment agreements with employees that are transmitted with a business.

Aged Care Services Australia Group Pty Ltd v Ziday & Ors [2008] AIRCFB 367

Conduct after termination provides a valid reason

A Brisbane City Council suspended an employee for alleged physical threats and then terminated his employment for breach of the Code of Conduct Policy and his refusal to return property belonging to the council including a mobile phone, camera and car keys.

After the termination, the employee was convicted and pleaded guilty to six charges of theft and fraud, which included theft of some of the Council's property which was two cameras.

SDP Richards indicated that the Council were entitled to rely *"upon these late arriving facts, as they were, in order to justify a decision or buttress a decision"* to terminate the employee's employment.

Therefore this case highlights the fact that there are certain circumstances where employers can defend an unfair dismissal based on misconduct that comes to light after the termination.

In this matter, SDP Richards said that the employee had *"fatally compromised his employment contract when he pleaded guilty to the charges".*

Luke Johns v Brisbane City Council [2008] AIRC 230

Need to provide training on new policies in the workplace

An interstate truck driver was reinstated to his position with Linfox after refusing to do a drug and alcohol test as the company had not provided the employee with appropriate training on the drug and alcohol policy and could only conduct one test per year and the driver had already been tested in the previous 12 months.

The driver was terminated after refusing to undertake a saliva test that was authorised under the drug and alcohol policy which provided random testing of workers in 'safety sensitive' positions.

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DP Hamilton refused to accept that the driver had been specifically trained in the policy; had been given a copy of the policy or even a summary of it.

The driver was reinstated but compensation for lost wages was discounted as the driver had not adequately tried to mitigate his loss.

Therefore, if you are introducing new policies and procedures within the workplace, it is recommended that employers provide comprehensive training and education about any new policies to its staff.

Kidd v Linfox Australia Pty Ltd [2008] AIRC 398

Migrant demoted due to poor literacy was considered indirect racial discrimination

A company demoted a 60-year-old Macedonian-born employee to a non-supervisory role after it updated its health, safety and environment program.

The employee had been working as a rail supervisor for 31 years and left the workplace a few days after his demotion suffering stress and has not been able to work since that date.

The NSW Administrative Decisions Tribunal found that although the company believed that the employee's poor literacy of English was a safety risk, it was not necessary to demote him, when they could have trained him in the new health, safety and environment program.

The discrimination had a 'significant' effect on the employee as he was not able to return to work after he was demoted.

Tanevski v Fluor Australia Pty Ltd [2008] NSWADT 217

Employee dismissed after becoming sick whilst overseas

An employee had eight weeks' accrued annual leave and applied for four weeks' leave to visit her frail mother in India. The company approved one week's leave.

The employee became ill with lumbago and was then hospitalised with gastro whilst in India.

The employee provided medical certificates to the company, whilst in India and applied for an extension to her leave.

The company decided to dismiss the employee for failing to return to work on time.

SDP Drake found that the company had unreasonably rejected the Indian medical certificate and that her dismissal was harsh, unjust and unreasonable and ordered 13 weeks as compensation as well as outstanding sick leave until the end of the certificate.

Kaur v DHL Exel Supply Chain (Aust) Pty Ltd [2008] AIRC 457

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