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Legal Solutions newsletter

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News

Out-of-hours Conduct

An employer has been able to successfully argue that they were entitled to terminate the employment of an employee who was caught drink driving with a BAC of 0.154 in his private car outside of work hours as this conduct impacted on the importance of the employer's brand and reputation as a responsible producer of alcohol.

The employee was allegedly charged with drink driving and as a worker in the packaging department of the James Boag Brewery in Tasmania, notified his employer who met with him on a number of occasions after standing him down with full pay.

The employer argued that that they needed to demonstrate leadership on responsible drinking and its commitment in this area was proved by contributions to alcohol research, and to educational and counselling services promoting responsible alcohol use.

The employer also had a responsible drinking policy which obliged employees to *"not engage in alcohol-related behaviour out of work hours that has the potential to adversely affect Lion Nathan's reputation and credibility as a producer and marketer of alcoholic beverages committed to promoting the responsible use of alcohol."* It was also a serious breach of the policy if a person was found driving above the legal limit whether it was for business or not.

Notably the employee concerned had received training in this policy and the policy had been in place for five years.

Commissioner Deegan found that there was a valid reason for the termination of the employee. The Commissioner indicated that the company's responsible drinking policy was lawful, reasonable and formulated so as to protect the company's legitimate business interests. The employee was aware that this policy extended to prohibit drink driving in out-of-work hours and in non-work vehicles, and the employee was aware that the company would consider a breach of this policy, a serious breach which could lead to the termination of his employment.

Although the Commissioner indicated that not every policy of an employer will be found to be reasonable, particularly where the policy constrains the activities of employees outside of working hours, the difference in this matter was that the relevant policy had a necessary connection to the workplace.

Nick Kolodjashnij v Lion Nathan T/A James Boag & Son Brewing (2009) AIRC 893.

Misconduct within the Workplace

In this case, the AIRC reinstated the employment of a Defence employee after he had been terminated for storing 115 pornographic images on the employer's IT system.

The Defence Department had terminated the employment of the technical officer after finding the images as they were deemed inappropriate and storing them breached the Code of Conduct and values of the Australian Public Service.

The employer referred the employee to Employee Assistance Program (EAP) during the investigation process and the employee claimed that the EAP counsellor had indicated to him that dismissal would be very harsh for a first offender and no-one would have time to read the Deptartment's guidelines about inappropriate material, which the employer

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claimed was a dishonest statement as to what the counsellor had discussed with him.

The images had been stored on a "H" drive but had never been accessed, forwarded or dealt with again, and the employee alleged that he had received the images from his supervisor in 2004.

Commissioner Cargill rejected the employer's assertion that the employee had been dishonest in attributing comments to the EAP counsellor. However, the Commissioner did indicate that the employee's actions of saving images amounted to misconduct which was a valid reason for termination and that the employer had provided procedural fairness to the employee when dealing with this matter.

Upon consideration of the employee's *"25 years of unblemished service"* without counselling or warning, the Commissioner found that the dismissal was harsh as it was *"both disproportionate to the gravity of the applicant's misconduct and because of the consequences of his personal situation…"* which included his medical conditions, his financial commitments and his contrition.

In ordering reinstatement, the Commissioner did not require the Defence Deptartment to pay for remuneration lost since the employee's dismissal in May, as the employee's actions contributed to his loss of employment and therefore some penalty should apply.

Peter Bates v Commonwealth of Australia (Department of Defence) (2009) AIRC 899.

Extension of time for Unfair Dismissal Applications

As you may be aware, the new provisions of the *Fair Work Act 2009* requires a person to lodge an unfair dismissal claim within 14 days, rather than 21 days as provided by the previous *Workplace Relations Act 1996*.

In this case, SDP Kaufman has indicated that the new test for considering out of time applications is stricter than under the previous legislation.

Section 394(3) of the *Fair Work Act 2009* provides that an extension can only be granted if it is satisfied that there are exceptional circumstances which was not a requirement under the previous Act.

In this matter, the employee resigned from the Warringarri Aboriginal Corporation on the basis that she was forced to do so because of the conduct of the employer. She then lodged her unfair dismissal application between 7-9 days out of time and her reasons for doing so were that she was *"culturally sung"* which meant by the time she resigned she was in such mental distress she couldn't look after her affairs and spent two weeks at her brother's house in bed.

SDP Kaufman indicated that the applicant had sought legal advice a short time before her resignation and had been contemplating resignation for some time and therefore this weakened her reasons for making the application out of time.

Fair Work Act 2009 is required to take into account the merits of the case in determining whether there were exceptional circumstances justifying an extension of time, as set out by section 394(4).

In this matter, the unfair dismissal claim made by the Applicant was precluded from the jurisdiction of the *Fair Work Act 2009* anyway as the Corporation was not a trading or financial corporation.

Bernadette Shields v Warringarri Aboriginal Corporation (2009) FWA 860.

Income threshold for Unfair Dismissals

Under section 382 of the *Fair Work Act 2009*, employees have to be covered by an award or agreement or earn less than the income threshold in order to be entitled to lodge an unfair dismissal claim. The income threshold as of 1 July 2009 is $108,300pa based on the last 12 months before the dismissal.

In this matter, the employer maintained that the applicant was outside the jurisdiction as he had earned $109,133 in the 12 months before he was terminated which included $78,000 in wages and $26,100 in living away from home allowance and $4,133 in health insurance which meant he was $833 above the income threshold.

SDP Acton indicated that it was relevant that the ATO regarded an allowance as a living away from home allowance where it was reasonable to conclude that some or all of it was compensation for additional expenses incurred by employees because they were required to live away from home to perform their duties and responsibilities.

It was also relevant that the portion of the allowance that was compensation was tax exempt.

The Applicant was employed on a 457 visa and was

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required to live away from his usual residence which was in the UK and live in Australia for the first 13.3 weeks of the last 12 months before he was dismissed to perform his duties for CLS. As such, SDP Acton said it was reasonable to conclude that more than $833 of the living away from allowance that CLS paid to the employee over the first 13.3 weeks was compensation for the additional accommodation expenses he incurred in living in Australia.

Therefore, more than $833 in this allowance was found to be not earnings within the meaning of section 332 or other benefits as defined by the regulations but compensation and therefore the jurisdictional objection made by CLS was dismissed as the Applicant was not considered to have "earned" over the income threshold.

Mr Lee C v CLS Pty Ltd (2009) FWA 779.

Drug and Alcohol Testing

In this matter, the employer and the union agreed to have Fair Work Australia determine whether random testing should be introduced as part of its arbitration for a new enterprise agreement.

The employer wanted to introduce a random testing program whereby qualified personnel would conduct the testing and a medical practitioner would also be appointed to assess the results of the drug and alcohol tests.

The union opposed the introduction of random testing and asserted that the company had not conducted a risk assessment and relied on Canadian case law that random testing is *"an unjustified affront to the dignity and privacy of employees which is beyond the balancing of any legitimate employer interest."*

SDP Hamberger said that it was relevant that the company had an absolute obligation under OH&S laws to ensure safety on site given the storage of hazardous materials and therefore random drug and alcohol testing was justifiable.

However, SDP indicated that the drug and alcohol policy of the company concentrated on disciplinary procedures in the event of a positive test which would lead to dismissal of an employee rather than on rehabilitation.

SDP ordered the company to separate their drug and alcohol policy from their disciplinary policy and also amend it to provide employees with the result of any test and assistance for return to work, and that if a positive test is produced, then employees are provided with access to sick leave.

Caltex Australia Limited v Australian Institute of Marine and Power Engineers, The Sydney Branch, The Australian Workers Union (2009) FWA 424.

Please contact Workforce Legal Solutions should you require assistance with the drafting and implementation of a drug and alcohol policy within your organisation.

Workforce Legal solutions

Thank you to all our clients for your patronage during our second year of business in 2009.

Wishing you all a very Merry Christmas and a Happy and Safe New Year for 2010.

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