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News

Recent Cases

Collier v Austin Health & Ors [2011] VSC 344
27 July 2011

In this case, Justice Bell found that the Victorian Civil and Administrative Tribunal ("VCAT") had wrongly dismissed an employee's claim that she had been discriminated against because of her mental illness.

The employee had been a food services worker at the Austin Hospital for ten years and during that time had suffered bipolar disorder, but was able to carry out her duties and was promoted to Assistant Manager in 1998.

In 2004 and 2005 the employee was placed under unreasonable pressure and hours of work and her health deteriorated so that she spent nearly two months in hospital. The Hospital accepted responsibility and she was paid workers' compensation.

After the first breakdown, Collier returned to work on suitable duties, but after the second breakdown, when Collier attempted to return to work, the Hospital refused to place her on a return to work program, despite the fact that her treating practitioner and the Hospital's doctor certified that she was fit to return to work on graduated program. The Hospital then terminated her employment.

An internal email written shortly after Ms Collier was terminated indicated that it was best to get Ms Collier off the Austin's books rather than rehabilitate her.

VCAT rejected Ms Collier's claim of discrimination *"because in this type of case it was impossible to identify a suitable comparator"*.

Justice Bell indicated that to establish her complaint, Ms Collier had to meet the discrimination test in the Act. By that test, discrimination occurs when someone is treated to their detriment on the basis of an attribute (like sex, age, disability) when compared with someone without that attribute in otherwise the same or similar circumstances.

Furthermore, Justice Bell indicated that on VCAT's interpretation of the statutory provisions of the *Equal Opportunity Act*, no Victorian worker would be protected by the Act from disability discrimination when refused return to work on the basis of a disability, even if fit, willing and able to gradually to return to the duties of their employment.

The correct interpretation of these provisions is that the proper comparator in this case is a worker with a different disability to the particular disability which the complainant has, who (like the complainant) is fit, willing and able to return to graduated work and who is otherwise in the same or similar circumstances.

Justice Bell set aside the VCAT ruling and ordered that the case be heard again.

Mark Notman v Neway Transport (2011) FWA 5162
9 August 2011

In this matter, an employee who was a delivery truck driver had been employed for ten years and upon returning to the company's depot went to the toilet. However, a female cleaner was near the washbasins cleaning the facilities at the time, and had placed her cleaning bucket in the doorway of the toilets.

The cleaner indicated that the employee had

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lifted his leg to step over the bucket, whilst unzipping his pants. The cleaner did not see the employee urinating and she stepped outside.

The cleaner indicated that she felt "humiliated and disrespected" by the employee's actions as other employees usually indicated that they wanted to use the toilet when she was in there cleaning.

The company was found to have accorded the truck driver procedural fairness by providing him with a letter requesting an explanation of his actions and meeting with him that day and then granting him a further period to respond to the allegations. The driver provided a written response but then refused to discuss the matter further with management and was thereby terminated.

Commissioner Michelle Bissett found that although the company had a valid reason for terminating the driver as his actions breached the company's conduct policies, he had been terminated for urinating in front of the cleaner which was not correct.

As such, it was decided that his termination was disproportionate to the driver's actions and therefore, he was awarded $1,600 in compensation.

Always take care when terminating employees on the basis of misconduct. The actions of any employee need to be properly investigated and then put to the employee for response and any letter of termination must correlate to the actions substantiated by way of the investigation process, so as to avoid a finding as in this case.

Please contact Workforce Legal Solutions on (03) 9505 6221 should you require assistance in conducting either preliminary or full investigations within the workplace or when terminating staff on the basis of misconduct.

Shannon Dawson v Railway Transport Services Pty Ltd T/A Cartage Australia (2011) FWA 4915
4 August 2011

In this unfair dismissal case, a truck driver had been employed with the company for seven months when he clocked on at 4.30am for work. However, managers sent him home after they smelt alcohol on his breath, and he appeared unsteady and slurred his words.

The company did not provide the driver with an opportunity to explain his actions but simply notified him two days later when he was on his way to work that he was terminated

The company did not have a "zero tolerance" drug and alcohol policy but its policy indicated that an employee could be counselled, given a formal warning or dismissed.

Commissioner Bissett find that although the dismissal was valid, given that it is a breach of legislation to drive a truck with a blood alcohol content greater than zero, she found that the company failed to advise the driver that an outcome may be termination of his employment or provide him an opportunity to respond or provide evidence about his blood alcohol content, which the Commissioner later said the employee could have obtained by going to a doctor or a police station and performing a blood alcohol test.

Fair Work Australia ordered the employee $9,891 in compensation which was equivalent to seven weeks' lost wages.

Workforce Legal Solutions recommends that Employers review their current Drug and Alcohol Policy and Procedure and then ensure that any drug or alcohol issues with employees are handled in accordance with their policy and procedure.

Damian O'Keefe v Williams Muir's P/L T/A Troy Williams The Good Guys (2011) FWA 5311
11 August 2011

In this unfair dismissal application, Fair Work Australia heard that the Applicant had worked for the Employer for almost four years when his employment was terminated on the basis of serious misconduct with three weeks' notice.

The company indicated that there were two incidents of serious misconduct:

The first was commentary posted by the Applicant on his Facebook that *"Damien O'Keefe wonders how the fuck work can be so fucking useless and mess up my pay again. C..ts are going down tomorrow"*.

The Applicant had been having discussions with the Operations manager, Ms Kelly Taylor, for some time either directly or by email regarding his pay issues.

The second was that the company believed that the comment *"c..ts are going down tomorrow"* constituted a threat to Ms Taylor.

At the hearing, the Applicant indicated that his Facebook page was set to maximum privacy setting and only his select group of friends (70 People) could only see what he had written. Of these 70 people, there was about 11 co-workers who could have seen the entry posted.

The following day after the entry was posted, the company indicated to the Applicant that they thought that what he had written was his "letter of resignation". The Applicant claimed that he was told to *"resign now or I will sue you"* by the Director of the Company, Mr Troy Williams, and that he could not call him a "c..t" and the Applicant indicated he was referring to Ms Taylor.

The Applicant allegedly that Mr Williams grabbed him and physically pulled him towards the office door. Mr Wiiliams denied this and indicated that as the Applicant made no move to leave the room he guided him towards the door.

The Applicant received a letter of termination days later providing him with three weeks' notice and leave entitlements.

Deputy President Swan found that the Applicant's conduct was repudiatory conduct which amounted to serious misconduct.

The fact that the comments were made on the Applicant's home computer, out of work hours did not make any difference. The comments were read by work colleagues and it was not long before Ms taylor was advised of what had occurred. Fair Work Australia agreed with the company's submission that separation between home and work is now less pronounced that it once used to be.

The unfair dismissal application was dismissed.

Workforce Legal Solutions has acted for many clients, particularly in the last year, covering actions taken by staff on Facebook as well as by way of other technology, so it is becoming quite prevalent.

As such, we suggest that employers are mindful to update their Code of Conduct or develop a new Social Media Policy to cover such situations that may arise.

John Seaman v BAE Systems Australia Logistics Pty Ltd (2011) FWA 7005
4 November 2011

In this case, a senior warehouse operator who had been working for the company for some 15 years, and had a clean employment record, took a dislike to one of his colleagues.

The operator's employment was terminated by the company on the basis of serious misconduct on 10 March, 2011 as he had allegedly racially vilifying, verbally abusing and physically threatening another employee, including by calling him a "fucking nigger" on two occasions on 4 March 2011.

Commissioner Roberts found that the operator did abuse another worker by using the term "nigger" in an aggressive manner and that the words were either accompanied by, or shortly followed by, behaviour which this worker was entitled to consider intimidating. That the operator's actions on this day followed earlier occasions on which he had spoken to this worker in a manner designed to be insulting and demeaning.

The Commissioner also found that the operator was notified of the reason for his dismissal and that he was given an opportunity to respond and have a support person present to assist him in discussions relating to the dismissal.

FWA found that the applicant's dismissal was not harsh, unjust or unreasonable and the application was dismissed.

Interestingly the company had also provided the other worker (Mr Saba) a written warning for his role in the alleged altercation with the Applicant on 4 March 2011. The Commissioner noted that although it was not proper to make a formal finding in relation to this, he did recommend that the company remove any warning to Mr saba regarding this incident from his personnel file as Mr Saba was the victim of vile abuse (from the Applicant) and the Commissioner saw no reason why he should be punished for anything he did on that day. He indicated that Mr Saba was entitled to be outraged by his treatment at the applicant's hands and to provide a vogourous response to such treatment.