Legal Solutions newsletter

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Award Service

Clients on retainer arrangements have access to our Awards page. The Fair Work Commission recently updated the following awards incorporating a minor change to the clause relating to Superannuation.

- MA000100—*Social, Community, Home Care and Disability Services Industry Award* 2010
- MA000034—*Nurses Award 2010*; and
- MA000027—*Health Professionals and Support Services Award 2010*.

News

Amendments to the *Fair Work Act 2009*

Amendments to the *Fair Work Act* commenced on 1 January 2013.

Amongst the changes to the Act has been a change of the Commission's name and is now known as "Fair Work Commission". Refer to the old name at your peril.

The time limit for lodging unfair dismissal applications has been increased from 14 to 21 days. The Act has reduced the time limit for lodging a general protections (adverse action) application arising out of a dismissal from 60 to 21 days. So it seems 21 days is all the rage.

These revised time limits only apply to employees who have been dismissed on or after 1 January 2013.

Recent Cases

Fortunato Perri v Anglo Italian [2013] FWC 10
10 January 2013

In this case which was widely reported in the mainstream media, the Commission effectively ruled that the traditional disdain shown by Australian workers towards management does not constitute grounds for dismissal.

The Applicant was, according to his ex-employer, a good concreter. But after 15 years with Anglo Italian Concrete, it was a smile at the wrong time that cost him his job. Or was it a smirk?

The Applicant won an unfair dismissal claim against Anglo Italian, which summarily dismissed him last April after he either smiled or smirked during a meeting called only to warn him over a dangerous safety breach. He had had a good record at the company.

The Applicant had been at a Deer Park building site operating a trowel driver, a piece of heavy machinery for smoothing

Fortunato Perri, very fortunate indeed (Photo courtesy *The Age*)

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concrete. The Applicant was seen giving a colleague a lift for about 20 metres on the machine, something he later admitted was extremely dangerous.

The Respondent told the commission the breach could *''have resulted in them probably dying, one of them at least, if not being severely injured, and we don't want that behaviour in our workplace''.*

But when the Applicant was interviewed a month after the incident, he either smiled or smirked at his boss. He was then sacked, a move that the Fair Work Commission ruled was unfair.

The Construction, Forestry, Mining and Energy Union, which represented the Applicant, told the commission it was *''inherently unreliable to dismiss a worker based on one person's interpretation of that worker's facial expression''.*

Another worker who was with the Applicant when he was sacked said his manager had said in a raised voice: *''Don't be a f---ing smart arse; we could have you sacked for this.''* The Applicant is said to have replied: ''If *you want to sack me, then sack me,''* after which he was told to get out.

Always take care when terminating employees and never on the basis of their conduct at a meeting, or for that matter, an alleged smirk.

Please contact Workforce Legal Solutions on (03) 9505 6221 should you require assistance in terminating staff on the basis of misconduct.

Daniel Breglia v B.V. Skelton Pty Ltd T/A Skelton Sherborne [2013] FWC 13
11 January 2013

In this matter, the Commission heard evidence of the Applicant's unsatisfactory work performance over an extended period including a failure to be available to take customer phone calls, return phone messages or respond to emails. The Respondent had provided the Applicant with a mobile phone and laptop to enable him to meet customer requirements.

On occasions, the Applicant left the office early contrary to the employer's express direction and further, the Applicant did not return after jury duty, nor contact the Respondent to inform his absence from work. The Commission found the reason for the Applicant's dismissal related to his unsatisfactory performance was valid.

The interesting aspect of this case is that the Commission found that whilst it might have been desirable for the employer to have given the Applicant formal written warnings or kept records of counselling discussions, there was no obligation on the employer to do so. The Commission was satisfied that the employer's relatively small size and lack of dedicated human resource management specialists impacted significantly on procedures followed but still upheld the dismissal.

Mr David Taleski v Virgin Australia International Airlines Pty Ltd T/A Virgin Australia [2013] FWC 93
11 January 20113

An employee's desire to grow their hair long can often pose a curly problem.

The Applicant advised his employer that he wished to grow his hair longer for religious reasons to mourn the death of his mother. He later changed the reason from a religious to a medical one said to be body dysmorphic disorder.

The employer explained to the commission that male employees were required to have their hair groomed in line with the employer's "Look Book".

After approximately six months, the employer instructed the Applicant to cut his hair in which the Applicant provided eight medical certificates over a period of approximately 18 months. It was contended by the Respondent that none of the medical certificates provided a clinical diagnosis, a link between the Applicant's condition and his inability to cut his hair, or a timeline/treatment plan.

The Commission was satisfied that the medical certificates did show these things and that the

Applicant was receiving management regarding his body image disorder which related to the length and that he had anxiety about cutting his hair. Further, the Applicant's doctor had developed a mental health plan and had referred him to a psychologist whose assessment was that successful treatment may take a considerable period of time.

The employer submitted that the Applicant did not intend to comply with the "Look Book". The Commission ruled that to the best of his ability, and within the framework of a body image disorder relating to the length of his hair, the Applicant's intention was to comply with the "Look Book" and he made several attempts to do this by trying different hairstyles and wearing a wig.

The Comission found that there was no valid reason for the Applicant's dismissal and that the outcome had been predetermined prior to the allegations being formally put to Applicant. Further, the Commission found that the employer treated the Applicant differently to another employee who suffered from same condition and who was non–compliant with the "Look Book" but who had been allowed to fly.

The Commission's order for the Applicant to be paid $26,000 compensation was granted a stay so an appeal could be heard

Moumtzis v Dolina Fashion Group P/L [2013] FWC 501
23 January 2013

A textbook case for those employers keen to book an appearance before the Commission and be ordered to make a substantinal compensation payout.

In this case, a long-serving fashion designer was given no written notice to attend a meeting with the Managing Director to discuss her performance and subsequently the following day was given a termination letter with—in the Commission's own opinon—an extremely limited opportunity to respond.

Incrediby, though the Respondent employed 65 workers, there was no Human Resources advisers.

The Commission heard that the employer had previously commended the Applicant for her performance and was paid a $20,000 bonus. The Respondent contented that the termination was on the basis that the Applicant, *"had not achieved the profit margins of the business, she was purchasing fabric that was too expensive and from local rather than overseas suppliers and that her winter range was not selling in stores."*

At the meeting, the employer offered the Applicant the opportunity to continue working as a consultant and on refusing suggested the Applicant instead resign.

The Commission found there was no valid reason for dismissal relating to capacity or conduct, nor was any evidence presented that the Applicant was warned about unsatisfactory performance.

The Respondent was ordered to pay 22 weeks' compensation estimated to be a Prada bag short of $50,000.