

ADDRESSEE: PUBLIC HEALTH MEMBERS
FROM: CHIEF EXECUTIVE OFFICER
DATE: NOVEMBER 2007
SUBJECT: WORKPLACE RELATIONS UPDATE

Dear Member,

1. Employee dismissed for reporting her employer.

In this case, the Western Australian Industrial Relations Commission found that an employee's dismissal was justified because the employee breached her obligation of fidelity owed to her employer.

Facts:

The employee, Ms Reid, was employed as a practice manager of a general medical practice. The employer was Hendrik Swanepoel. The employee's employment was terminated after an incident that saw her complain about her employer to an external professional body about certain practices occurring in the medical practice before discussing her concerns with her employer.

It was standard practice that the receptionist and 'clinical assistant' in the medical practice, Ms De Lange, would give patients injections (excluding narcotics) under the employer's supervision. The employee was concerned that Ms De Lange was giving patients injections without instructions, in unsafe circumstances and in view of other patients.

The employee then reported her concerns to the Central Wheatbelt Division of General Practice (the 'Division'). The employee submitted a report about the circumstances to the Division. She did this without expressing her concerns to her employer or questioning Ms De Lang about the abovementioned practices. Another employee persuaded the employee to discuss the matter with the employer. On doing so the employer terminated her employment.

The employee claimed that she had been harshly, oppressively or unfairly dismissed. The employer claimed that he had terminated her employment on the basis of poor performance and her reporting him to the relevant Division of General Practice.

Decision:

The Commissioner found that the employee had an obligation to raise her concerns about the conduct of staff in the practice after gathering the facts of what had occurred. She did neither of these things. The Commissioner found that the employee's conduct was incompatible with, and destructive of the employment relationship. He found that the employee's conduct was a ground for dismissal.

Jennifer Joy Reid v Hendrik Swanepoel [2007] WAIRComm 966

2. Employee was reinstated after the employer's investigation was found to be lacking.

Facts:

In this case an employee's employment was terminated for breaching the company's harassment policy. The employee had previously been issued with a first and final warning in relation to an incident with a female employee he supervised that allegedly breached the company's harassment policy. After being issued with the first and final warning the employee was required to undergo counselling and training in anti-harassment and EEO practice.

The company then dismissed the employee for misconduct, on the grounds that he breached the company's harassment policy by using inappropriate language when he spoke to another employee. There was a dispute about the exact language used and whether it was inappropriate in the circumstances.

Decision:

The Commissioner found that the investigation by EDI Rail into the incidents was done in a 'cavalier fashion', failing to conduct a proper interview with relevant employees. The company did not put the precise nature of the allegations to the employee and it failed to make findings of fact. The Commissioner also found that the first and final warning which had earlier been issued to the employee was not justified.

The Commissioner found that there was no reasonable basis for the company to decide that the employee had breached its policies to justify his dismissal. And further, there was a pattern of the company accepting complaints about the employee's conduct at face value, often without any attempt to obtain the employee's side of the story. This pointed to 'significant deficiencies' in the way the company investigated allegations against the employee. It was ordered that the employee be reinstated on terms and conditions at least equal to those he enjoyed before his dismissal. The employee was also awarded money for lost earnings.

Implications:

This case has important implications for all employers. Whenever there is a complaint made about an employee, ensure that you follow your company's policies and procedures and always afford your employees procedural fairness in any investigation that is carried out.

Rowley v EDI Rail Pty Ltd [2007] AIRC 753

3. Consultation and redundancy

A recent decision of the Full Bench of the AIRC demonstrates that where an employer is obliged to consult with employees regarding redundancy, it is important to comply with these obligations. This case also demonstrates that where there is a failure to comply with such obligations, it does not necessarily result in the reinstatement of the terminated employee(s).

UPDATE

Facts of the case

Telstra decided to restructure a part of its business, which led to the positions of four employees being made redundant. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) invoked the dispute resolution procedures of the *Telstra Redundancy Agreement 2002* (the agreement) and referred the dispute to the AIRC. The CEPU sought orders for the reinstatement of the four Telstra workers on the grounds that Telstra had failed to consult with them according to clause 7.3 of the agreement. Clause 7.3 required Telstra to consider measures to avert any proposed redundancies and measures to mitigate the adverse effects of the retrenchments.

At first instance, Commissioner Smith found that Telstra had not complied with its obligations under clause 7.3 and determined that two of the four employees be reinstated, the third employee be reinstated on the fulfilment of conditions and that the fourth employee be left without a remedy. Both Telstra and the CEPU sought leave to appeal Commissioner Smith's decision to the Full Bench of the AIRC.

The appeal

In the appeal, Telstra argued that the AIRC had no jurisdiction to deal with the matter as the AIRC's power was limited to disputes between Telstra and its employees. Given that the employees in question were retrenched, they were no longer employees of Telstra. The Full Bench disagreed and found that the dispute settlement procedure of the agreement was not dependant on employees remaining in the employment of Telstra. Therefore the AIRC has jurisdiction to hear the appeal.

The decision

The full bench found that the obligation to consult arose only once a decision to close down a work site and retrench employees had been made. The Full Bench found that the clause required Telstra to display a "preparedness to consider actions which may better assist employees to better manage the effects of the termination" and give the CEPU an opportunity to persuade Telstra to modify such decisions. However, the Full Bench found that there was no obligation for Telstra to do anything else than provide the employees and the union with an opportunity to consult.

The full bench argued that although Telstra had discussed the redundancies with the employees and the CEPU, these discussions were limited to the effect of the restructure on the redundant employees and did not specifically address measures to avert the proposed redundancies and mitigate its effect on the employees. On this basis, it was held that Telstra did not meet its obligation to consult as required under clause 7.3 of the agreement.

The Full Bench found that although Telstra had not complied with its obligation to consult with employees and the union, it did not then follow that Telstra was required to reinstate the affected employees. A factor in the decision not to reinstate the employees was that the employees had elected to be made redundant rather than be redeployed.

Implications for employers

If an obligation exists to consult with unions regarding a potential redundancy, the obligation must be complied with. However such an obligation only requires employers to consult and does not require an employer to act in accordance with union directions or proposals to modify or revoke a particular decision.

Telstra Corporation Limited v CEPU [2007] AIRCFB374



UPDATE

4. Restraint of trade clause enforced

In this case the NSW Supreme Court granted an injunction restraining a real estate agent from soliciting work from clients of his former employer.

Facts of the case

The former employee was a property manager employed by RE MAX Gold to manage its rental properties. In July 2004 he entered into a contract of employment with the employer which included a confidentiality clause. An annexure to the contract contained a restraint of trade clause which forbade the employee from soliciting clients of the employer. The restraint was enforceable for two years after the employee's departure. The annexure also contained a further clause requiring the employee to acknowledge that all confidential information was the property of the employer.

The employee resigned in June 2007. He began contacting clients of RE MAX advising them that he was leaving and that he would inform them of his new place of employment. He e-mailed RE MAX's rent roll to himself before leaving his employment. When RE MAX protested, he claimed to destroy the information.

In August 2007, RE MAX sought an injunction to restrain the former employee from soliciting its clients. It was granted until a later hearing.

The decision

The Court found that although the rent roll contained information that was confidential, not all of the information contained within it was confidential, and it was to be expected that the former employee carried some of that information around in his head. However, the former employee could not have known all of the information contained in the rent roll or he would not have needed to e-mail it to himself. The Court was suspicious that the former employee had actually destroyed the information contained in the rent roll.

The Court granted the injunction which restrained the worker from soliciting clients of his former employer until January 2008.

Wentworth Partners Estate Agents Pty Ltd trading as RE MAX Gold v Gordony [2007] NSWSC

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UPDATE