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Christmas edition



Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

Season's Greetings

2007 has been a busy year on the industrial relations front in Australia, beginning with the introduction of the controversial "fairness test" for workplace agreements, and ending with a landslide Labor victory in the Federal election due (at least in part) to a promise to wind back WorkChoices. With the possibility of further changes to industrial legislation as early as February, the Employment Relations Team at Piper Alderman wish you a merry Christmas and hope you all have the chance for a relaxing break before it all begins again in 2008 ...

Employer's decision to dismiss manager for drinking two beers at lunch upheld

The decision of the Australian Industrial Relations Commission in *Selak v Woolworths* [2007] AIRC 786 demonstrates that the Commission will enforce alcohol and drugs policies in the workplace. A timely decision to note over the Christmas season.

Facts

Mr Tony Selak was employed as a Store Manager at Woolworths' Safeway store in Southland. He had been employed by Safeway for approximately 20 years.

On 2 May 2007, Mr Selak and his Department Manager had lunch at a local hotel where they each had two pots (or middies) of beer with their food. On returning to the store, Mr Selak was informed that his employment was to be suspended immediately, as he had been observed consuming alcohol during lunch by another Safeway employee. The following day Mr Selak's employment was terminated on the basis that he had breached his employment contract and company policy.

Mr Selak subsequently brought an application under s643(1)(a) of the *Workplace Relations*

Act 1996 (**WRA**) for relief on the grounds that the termination of his employment was harsh, unjust or unreasonable.

Safeway's submissions

Safeway asserted that it had a zero tolerance alcohol policy and that consumption of alcohol during work hours breached the express terms of Mr Selak's contract of employment, as well as the company's Code of Conduct, Staff Handbook and Drugs and Alcohol Policy.

Safeway's area manager gave evidence that Store Managers were responsible for motivating, mentoring and supporting their staff about Woolworths' various policies and the zero tolerance approach to alcohol consumption applied to all employees.

Safeway argued that the contract and policies were known and understood by Mr Selak and he was aware that a breach of any of them could result in the termination of his employment. His conduct therefore amounted to wilful disobedience of a reasonable and lawful direction. Having regard to this, the nature of his position and the trust invested in him, Mr Selak was guilty of misconduct that justified summary dismissal.

Mr Selak's submissions

Mr Selak argued that no one had ever explained his contract of employment to him and asserted that while he had signed it, he had never read it in full. He said that he had not read the clause stating that no alcohol is to be consumed by employees during working hours. Mr Selak also asserted that he was never given proper training in relation to Safeway's policies and procedures as the Safeway representative responsible for his training had signed off without completing all the necessary training components.

Mr Selak was of the view that he made an honest and reasonable mistake in consuming alcohol on the day he was suspended, giving evidence that if he was aware that he could have been terminated over the two beers he had consumed with lunch, there would have been no way he would have gone out and done so.

Decision – Commissioner Grainger

Commissioner Grainger found that Mr Selak's employment had been terminated because there had been a breach of Safeway's zero tolerance policy on alcohol. The Commissioner found that this zero tolerance policy had been incorporated into the contract of employment.

The contract of employment was found to have included as a condition of employment that no alcohol be consumed by Mr Selak during working hours, including meal breaks.

The Commissioner found that Mr Selak's contention that he had not read or understood the strict no alcohol terms of his contract and company policies lacked credibility, especially since he was charged with the responsibility of overseeing 160 staff who were also subject to the same terms and policies. Mr Selak was bound by his job description as Store Manager and was expected to have known what all the company's policy documents contained.

The zero tolerance conditions of Mr Selak's contract was found to be a term of his employment by the Commission which meant that his breach entitled Woolworths to terminate his services. The fact that Mr Selak also involved a subordinate in his breach, further served to aggravate the breach.

Implications

This decision serves to illustrate that the Commission will enforce zero alcohol and drugs policies where they are unambiguous and clearly communicated, even where a breach giving rise to a termination (such as the consumption of two pots of beer) might be viewed as minor.

Important changes to OH&S legislation in South Australia

The *Occupational, Health, Safety and Welfare (Penalties) Amendment Act 2007* has recently been passed by the South Australian House of Assembly. The Act has been proclaimed to commence on 1 January 2008.

The essence of the new legislation is that it effectively trebles penalties; creates a new offence of reckless endangerment; and clarifies the liability of both bodies corporate and their officers.

Penalties

For a body corporate, or the public sector, the maximum penalty is now \$300,000 for a first offence, and \$600,000 for any subsequent offence (previously \$100,000 and \$200,000 respectively).

For an individual, the maximum penalties are \$100,000 for a first offence and \$200,000 for any subsequent prosecution.

The increase will bring South Australian penalties in line with other states.

Reckless endangerment

The "reckless endangerment" offence prohibits a person knowingly or recklessly acting in a manner in, or in relation to, a workplace that may seriously endanger the health and safety of another person. The offence covers conduct where someone is harmed or may potentially be harmed in the workplace. A person may be prosecuted for dangerous conduct despite no-one being hurt.

This new "reckless endangerment" offence replaces the current section 59 offence – which requires the prosecutor to prove that the individual or corporation **knew** of the contravention of the Act but was recklessly indifferent to it. The new offence only requires that it be shown that:

- > an individual or a corporation was reckless or consciously disregarded the safety of another in the workplace; and
- > that the health and safety of another person was harmed or endangered.

The section provides for a defence where a person was acting with a lawful excuse, to cover situations where the work undertaken by the person is inherently dangerous to others but nevertheless lawful. Unfortunately what constitutes a lawful excuse has not been defined by either the Bill or its explanatory memorandum, and will ultimately be left to be determined by the courts.

The maximum penalty for individuals for the new offence is \$400,000 and/or five years' imprisonment. The maximum penalty for corporations is \$1.2 million.

Liabilities of bodies corporate and officers

The new legislation states that where a body corporate has committed an offence, the officers are also guilty of the offence unless they can show that the offence did not result from any failure on their part to take all reasonable and practicable measures to prevent the contravention, or contraventions of a similar nature.

It is also an offence for an officer to knowingly promote or acquiesce in a body corporate's contravention of the Act. Furthermore, the knowledge or conduct of an officer, employee or agent of the body corporate acting within the scope of their authority, is deemed to be an action of the body corporate.

Implications

Employers should ensure that:

- > officers, employees and agents are aware of the new legislation and their potential liability;
- > all occupational health and safety policies are up to date and reflect the amendments; and
- > all measures taken to ensure compliance and reduce risk are documented and recorded through appropriate systems and processes.

Dismissal discriminatory even though not unlawful under the Workplace Relations Act

A recent Victorian decision, *Duma v Mader International Pty Ltd* [2007] VCAT 2288 (30 November 2007), illustrates the perils of dismissing an employee, even after an employer has complied with the requirements of the *Workplace Relations Act 1996 (WRA)*.

Mr Duma suffered an injury to his neck muscles and a cervical disc prolapse while doing mechanical work for his employer, Mader, in April 2005. He made a WorkCover claim, which was accepted, before returning to work at the end of June 2005. In November 2005, Mr Duma lodged a second WorkCover claim stating that he was again unfit for duties due to his injuries. The claim was rejected. Mr Duma did not return to work, though continued to provide WorkCover medical certificates certifying his unfitness for duties, until he was eventually dismissed in July 2006. Up until that time Mr Duma had been on annual leave (to January 2006), and thereafter on unpaid sick leave.

The WorkCover medical certificates stated that Mr Duma was unfit for duties, but did not specify when he was expected to return to work. In April 2006, Mader requested that Mr Duma provide a medical report from his treating practitioner indicating an expected return date. The letter was sent in April, three months after Mr Duma had commenced unpaid sick leave, because s659 of the WRA makes it unlawful to terminate an employee for a temporary absence from work because of illness or injury – unless the absence is unpaid and extends beyond three months. Mader was ensuring, therefore, that any action it would take would comply with s659 of the WRA.

Mr Duma did not respond to the letter, and during May 2006 Mader sent a further four letters to similar effect requesting that Mr Duma make contact and inform them of a return to work date. The letters also stated that Mr Duma's employment would be in jeopardy if he did not comply with the direction. His employment was ultimately terminated on 13 July 2006 after his final failure to reply.

Although Mr Duma was prevented from alleging unlawful termination under s659 of the WRA, that did not preclude him from alleging discrimination under the Victorian *Equal Opportunity Act 1995 (EO Act)*. The claim was heard in the Victorian Civil and Administrative Tribunal.

While both parties agreed that Mr Duma's injuries constituted an "impairment" under the EO Act, they were in dispute as to whether he had been directly or indirectly discriminated against on the basis of this impairment when dismissed.

The test for direct discrimination included the requirement that Mader be found to have treated Mr Duma less favourably than a comparator employee. In the Tribunal's view, the comparator employee was a Mader employee without Mr Duma's impairments who was on a long-term authorised unpaid absence from work. The Tribunal concluded that Mader would have treated the comparator employee exactly as it treated Mr Duma – by requesting that he or she provide a return to work date and terminating their employment if no such date was forthcoming. Direct discrimination, therefore, could not be made out.

However, Mr Duma was successful in proving indirect discrimination. Under s9 of the EO Act, indirect discrimination occurs if an employer imposes a requirement that:

- > someone with an attribute does not, or cannot, comply with;
- > a higher proportion of people without that attribute do or can comply with; and
- > is not reasonable.

Whether a requirement is "reasonable" depends on all the relevant circumstances, including the consequences of failing to comply with the requirement, the cost of alternative requirements, and the financial circumstances of the employer.

The Tribunal held that Mader's demand that Mr Duma give notice of a return date (via his doctor) constituted a "requirement" for the purposes of s9 of the EO Act. It also held that this was a requirement which Mr Duma could not comply with because of his impairment. His injuries were such that it was unknown to either Mr Duma or his medical practitioners when he might be fit to return to work. It was held that the comparator employee (who did not have the impairment) could have complied with such a requirement.

Finally, the Tribunal had to determine whether the requirement was reasonable in all the circumstances. It decided it was not. Mr Duma was certified to be unfit for all work on a long-term basis. The requirement, therefore, that he supply a date for his return to work, coupled with the threat of termination if he did not do so, was unreasonable. The Tribunal held that the requirement might have been reasonable had Mr Duma been absent for a longer period of time, or if the injury was less serious.

Mader's decision to terminate Mr Duma's employment was therefore held to amount to indirect discrimination in contravention of the EO Act.

The Tribunal declined Mr Duma's request to be reinstated to his position because the employment relationship had broken down. Mr Duma sought, in the alternative, an award of compensation to put him into the position in which he would have been had the termination not occurred – that is, compensation for

the wages he would have earned with Mader until the age of 65. However, the Tribunal was satisfied that even if Mr Duma had not been dismissed he would never have worked for Mader again. It was satisfied that Mr Duma would have remained absent from work and continued not to communicate with Mader until such a time as would have been "reasonable" for Mader to terminate his employment (so as not to breach s 9 of the EO Act). It was decided that that time would have been on or after 1 January 2007.

In addition to the compensation for the earnings that he would have earned with Mader until 1 January 2007 (which were minimal as he would have been on unpaid sick leave during that time), Mr Duma was awarded the sum of \$4,000 as compensation for the humiliation and embarrassment of the termination.

This decision should serve as a timely reminder to employers of the minefield of potential causes of action open to employees who have their employment terminated. Here, despite compliance with the unlawful dismissal provisions of the WRA, the employee was still able to succeed under state anti-discrimination legislation.

Similar legislation exists in all states, as well as at a Federal level, and for constitutional reasons applies to all employers – regardless of whether the employee is a constitutional corporation or not. It is very important therefore, particularly where an employee has work-related injuries or is absent due to illness, that an employer obtain legal advice about their specific obligations and options before any action is taken to terminate.

Employer obliged to make super contributions on a payment in lieu of notice

The New South Wales Court of Appeal in *Peter Willis v Heath Communications Network Ltd* [2007] NSW CA 313 has ruled that an employer, HCN, was obliged to make super contributions on a payment in lieu of notice.

HCN dismissed its Chief Financial Officer after a takeover and paid him six months' salary in lieu of notice, as required by his contract. The remuneration provided to Mr Willis under his contract was given as a package. The package consisted of a base salary, statutory

superannuation contributions (at the rate of 9%) and additional voluntary superannuation contributions made on Willis' behalf beyond the required statutory minimum. Effectively, therefore, Willis had salary sacrificed part of his base salary in order to receive additional voluntary superannuation contributions.

When HCN paid Willis six months' salary in lieu of notice, it calculated the payment on the base salary only. Willis commenced proceedings arguing that he was also entitled to receive six months' worth of voluntary superannuation contributions. (He did not claim an entitlement to the 9% statutory superannuation contributions.)

The Court of Appeal held that Willis had a contractual right to the voluntary super contributions and that HCN was therefore obliged to pay it. The Court held that Willis had effectively salary sacrificed part of his base salary in order to receive the additional superannuation and had a contractual right to it on termination. In doing so, the Court rejected HCN's argument that the superannuation contributions could not be claimed by the CFO because he was not entitled to receive the contributions personally.

Whether an employer will be obliged to pay a superannuation contribution on a payout in lieu of notice where an employee does not have an entitlement under their employment contract, but merely under the super guarantee legislation, is yet to be decided. In this case the trial judge (in the District Court) decided on the basis of a statutory entitlement rather than a contractual entitlement. The trial judge found that the requirement to pay super contributions extended to an obligation to pay a contribution in respect of salary or wages paid. He held that a payment of money in lieu of notice was not a payment of salary or wages and Willis had no legal entitlement to the payment of a superannuation contribution on that payment. However, on appeal the Court of Appeal decided on the basis of a contractual entitlement and did not determine whether or not this would extend to the statutory entitlement of super contributions. It is still open to argue that, by analogy with regard to a statutory right, that a payment of superannuation should also apply to payments in lieu in the same way that it would apply had the employee worked out the notice period.

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