INDUSTRIAL RELATIONS UPDATE

September 2019

Secret Recordings—Are They Any Use?

Many harassment and bullying allegations come down to one person's word against another's. Where there is a bono fide complaint but the targeted person is unable to substantiate it, they're tempted to try some amateur sleuthing. The same goes for employers who suspect employees of malfeasance.

But there are rules about evidence. Improperly or illegally gained 'evidence' is usually not admissible. This was highlighted recently in a case where the Fair Work Commission refused to admit secretly recorded conversations that a complainant wanted to use in her bullying case.

The employee attended a meeting with her employer and recorded the conversation without his knowledge. The employee asked the FWC to accept the recording as evidence in support of her position, but the employer objected on the grounds it was illegally obtained.

The FWC outlined the legal setting, saying the Commonwealth Evidence Act was useful to the FWC to apply to this scenario. That Act permits a court to exercise discretion in cases where improperly or illegally obtained evidence is sought to be admitted.

The FWC indicated it did not have the jurisdiction to determine if the recording had been illegally obtained, but that didn't matter, because it would not be admitted. While some reasons for that decision turned on the facts of this case, the wider issues of the secrecy of the recording held sway.

The FWC quoted a previous case dealing with a similar problem, which said "*Unless there is a justification, I consider the secret recording of conversations with co-workers to be highly inappropriate, regardless of whether it may also constitute a criminal offence in the relevant jurisdiction. The reason it is inappropriate is because it is unfair to those who are secretly recorded. They are unaware that a record of their exact words is being made. They have no opportunity to choose their words carefully, …. or to put their best foot forward in presenting an argument or a point of view. The surreptitious recorder, however, can do all of these things, and unfairly put himself at an advantage.*"

There will be cases where a recording, not acquired according to law, will nevertheless be admitted. For the FWC to exercise this discretion will depend on, among other things, the capacity of the evidence to confirm what occurred, the importance of the evidence to the case, the nature of the offence complained of and the difficulty (if any) of obtaining the evidence without impropriety or contravention.

Also, in some cases, the 'illegal' gathering of evidence may have occurred through inadvertence, e.g. insufficient signage warning of surveillance cameras. That would tend to mitigate an impropriety argument.

What is clear is that unless there is a strong case made out for admitting such evidence, it's not going to happen. The FWC went on to say "*once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This is potentially corrosive of a healthy and productive workplace environment.*"

Kelly Walker (No. 2) [2019] FWC 4862 (18 July 2019)

Yet Another Trucking Inquiry

Transport operators and their clients need to be aware that the Senate has launched the latest in a long line of enquiries into 'a safe viable sustainable and efficient road transport industry'. Ghosts of the Road Safety Remuneration Tribunal have been seen in parliament house hallways. Submissions close 17th October 2019.

Factor in Super Increases

Enterprise agreements being negotiated now, and wage increase budgeting generally, will need to include consideration of super increases scheduled to start in July 2021. That's less than two years away. The federal government has indicated it will not delay the planned increases of the levy beyond the pause already in place. This means the levy goes to 10% on the 1st July 2021, and in further 0.5% steps until it reaches 12% in July 2025.

Personal Leave is by the Day, not the Hour

Once again an employer has fallen into the trap of applying a notional 7.6 hours day to sick leave entitlements for workers on 12 hour shifts, only to be have that approach struck down by a majority Federal Court decision. But negative reaction to the decision from employers and interveners in the case has been swift and it is likely to be appealed.

The employees claimed that the NES provides an entitlement to 10 *days* leave each year. That meant, if they were sick on a day when they normally worked 12 hours, then they should be paid that day's normal wage. That was their normal day.

The employer, adopting the traditional approach of saying that 10 days is really two weeks, at 38 hours per week, only paid 7.6 hours pay for the sick leave. While this might seem fair, bearing in mind the typical work day could be thus described, it is not what the legislation says. The employer argued that taken to its logical extension, a worker on 12 hour shifts could end up being paid 120 hours sick leave a year, whereas a 'normal' worker would get only 76.

But the court dismissed this argument, saying that the Act doesn't talk about hours, it specifies days. The employer also argued that the Act provides for the accrual of personal leave "according to the employee's ordinary hours of work". This , it said, meant 38 ordinary hours. Again the majority disagreed, saying the ordinary hours these shift workers worked totaled twelve hours per shift, so they were entitled to 10 days at twelve hours each.

The dissenting judgement essentially agreed with the employer's view that there was an inherent inequity in the scheme approved by the majority. Whether this decision is left to stand remains to be seen, especially given the intervention of the federal government supporting the company.

Until any further litigation runs its course, employers should take care how they accrue personal leave and how shifts longer than the nominal 7.6 hours per day are described in company documentation. If for example a 12 hour shift includes some overtime component, that should be spelt out, as personal leave would not be due for that portion. But otherwise, according to the decision, an employee validly absent for their usual day's work on personal leave is entitled to be paid whatever it is they would have earned had they been at work, regardless of the length of the shift on that day.

Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138 (21 August 2019)

Capacity, and the Inherent Requirements of the Job

If an employee can no longer do the job they were hired to do, there is no barrier to employment termination provided proper enquiries are made into the facts at or near to the time of the termination. An employer who did that has successfully defended an unfair dismissal claim.

A storeperson was injured in a non-work related accident and had over 12 months off work before the employer dismissed her. The company took account of medical reports which demonstrated the employee's capacity to work in the area she previously worked was severely curtailed. Both physical and psychological injuries affected her ability to perform her role. Not least of these were her loss of concentration powers, a particularly risky proposition in a warehouse with forklifts flying about.

The Fair Work Commission examined the evidence which showed expert opinion had informed the employer's decision, with a key opinion indicating the employee would be struggling to perform any duties. Crucially, these opinions were given at the time, or shortly before the termination took place. This underpinned the valid reason for the dismissal. The evidence showed the employer examined opportunities to assist through job modifications and waited over a year before acting, all to no avail.

The FWC decided that "*weight should be given to the lengthy period that the (employer) kept the (employee's) position open, and the procedurally fair process conducted by the (employer)".*

Miss Carley Jack v Sigma Healthcare T/A Sigma Healthcare [2019] FWC 6364 (13 September 2019)