INDUSTRIAL RELATIONS UPDATE

October 2020

Time fraud dismissal upheld

Employers are heartily sick of the opprobrium which attaches to all of them when the unions and media bandy the term 'wage theft' around. Some employers are fighting back, and the FWC has upheld an employer's actions in dismissing an employee for 'time theft'.

The employee was largely unsupervised in her day to day activities and her duties included patrol work in an employer-provided vehicle. The vehicle was fitted with a GPS device. Following a check of the GPS data log for an unrelated matter, her employer noticed travel times and distances that seemed inconsistent with her duties and entitlement to use the vehicle for other than work purposes.

A fuller examination of the data log going back over the previous year uncovered 'time theft' on an industrial scale. GPS data was matched with samples of time sheets and other activity source material and the extent of the fraud became clear. An example aired in the FWC demonstrated that in one standard 75 hour fortnight, the employee was absent from her duties for 34 hours, nearly half the time.

The GPS showed the employee often did not leave her home until 10:30am despite having an 8:30am start time. Worse, her travel went outside the district of her work area many times and she frequently stopped at her boyfriend's house which was not on her way to or from the office or other localities associated with her work, up to an hour at a time.

The employee argued that she was "working from home" but the phone and email records showed she was not. When confronted with evidence of this nature, the employee made various excuses, including trying to argue that all the calls she claimed to have had were incoming and therefore did not show up on her account. This and other fanciful answers were all rejected by the FWC which found the employer justified in dismissing the employee for "time fraud".

The employer was chided by the FWC for being asleep at the wheel and not supervising the employee better. The employee tried to argue that the employer had all the details of her travel and at no point raised any concerns with her. But the FWC said this did not in any way condone the fraud or excuse it because the employee "knew that it was wrong".

The FWC does not always adopt such a pragmatic and common sense attitude however. Employers cannot rely on it to support them on the basis that employees are adult and know very well that they are doing the wrong thing. And even when it agrees a dismissal is totally justified, the FWC often finds procedural defects to nevertheless award some compensation (see "Even bad boys are entitled to natural justice" overleaf).

Still, it is heartening to see the FWC accept that 'theft' can be a two-way street in the workplace and call it as such. The essence of the contract is that an employee is obliged to devote the whole of the time they are paid to the service of the employer and that is an *entitlement* too.

Ms Helen Bryant v Southern Midlands Council T/A Southern Midlands Council [2020] FWC 4738 (5 October 2020)

Covid-19 Award Flexibilities Extended to March

The FWC has decided to extend the operation of the award flexibilities in 74 modern awards arising from the pandemic. These awards were varied to include a special Appendix which provided for unpaid pandemic leave and the flexibility to take twice as much annual leave at half pay. Originally slated to expire in June this year, the FWC has decided to extend the operation of these provisions until 29th March 2021.

COVID-19 Award Flexibility Schedules [2020] FWCFB 5137 (24 September 2020)

Public Shame "Remedy Enough"

A spectacular falling out between an employer and his employee girlfriend has ended with the FWC saying the couple's behaviour before, during and after the parting will forever be a matter of public record. And while the FWC found the dismissal unfair, the facts in the case showed the personal relationship was what really collapsed and the employment relationship was, in a sense, collateral damage.

The FWC noted the dismissed employee had secured alternative work and the pandemic was a threat to the viability of the business so awarded no compensation. In arriving at that decision, the FWC observed *"each will be left with a public record of matters that are highly personal to them, accessible to anyone who wishes to find it on the Commission's website. That is remedy enough."*

Reputations, either way, can be trashed in these cases. This ought to be a powerful incentive to resolve matters while they are still private.

Carol Ray v Priority ERP Pty Ltd [2020] FWC 5072 (21 September 2020)

Even bad boys are entitled to natural justice

Despite an employee's appalling behaviour, albeit in a workplace where robust exchanges were not unusual, an employer has still had to cough up money to see a dismissal stand. The FWC has again criticised an employer for sacking an employee by email.

The trouble started when an employee, not known for his sunny disposition, was told to move his vehicle from a parking area he knew employees were not to use. This issue was resolved but later that day, the employee announced he intended to knock off early. His supervisor indicated he should ring the Operations Manager, which he did.

The earlier incident about the parking was raised in the call and the conversation "degenerated into an unpleasant exchange involving aggressive and abusive language. It appeared that both men raised their voices and engaged in an unpleasant argument" according to the FWC's findings.

The employee then hung up. The Manager rang back, assuming the call had dropped out, only to be told by the employee that he had hung up on the Manager. This just inflamed the situation, the employee swore some more and hung up again.

The Manager and the Managing Director later that afternoon decided this was the last straw and sent, by email, a termination letter, summarily dismissing the employee. The employee did not check his emails and presented for work the next morning only to be told to pack his belongings and leave.

The FWC went through the evidence and said swearing and yelling is hardly unusual in such settings as factories and worksites and hence, of itself, not crossing a line. But hanging up, twice, on a Manager in the circumstance where the employee has been also been abusive *was* crossing a line.

Nevertheless, the employee was not given opportunity to be heard before the axe fell. This represented a fundamental injustice. The FWC has repeatedly advised that dismissal by email or text can only be justified in the rarest of circumstances and this was not one of those.

This was particularly so here because the employee did not see the email and came to work the next morning. There was still time to dot the i's. He could have been spoken to then and given his chance to defend or explain himself.

The fact that it wouldn't have altered the outcome is irrelevant to the FWC's thinking in these situations. The denial of natural justice cost the employer $1500 in compensation.

Michael Lyle Jones v Karisma Joinery Pty Ltd [2020] FWC 5051 (25 September 2020)

Talk about the pot calling the kettle black

A union failed to abide by the award when terminating one of its employees. In a classic case of 'do as I say…', the Transport Workers' Union acted without consulting the employee as required by the award. There was no doubt her position was redundant. But after 14 years' service, she was called into the office and told she was finishing up that day. Without proper consultation, it was not a *genuine* redundancy according to law and because of that, it was "harsh and unreasonable".

The union had no explanation for this award breach. The FWC was suitably unimpressed, pointedly referring to the union's charter which includes "to promote and encourage respect within the Union and amongst Members for the dignity and worth of the human person". Not finding much respect or dignity in this shabby episode, it ordered almost $9K in compensation.

And these guys say the system isn't the problem? There's no need to simplify it to stop mistakes being made? Well, well.

Sofia Manos v Transport Workers' Union of Australia [2020] FWC 5242 (30 September 2020)