CLIENT BULLETIN 2018 - 06

SLEEPING ON THE PREMISES, RIGHTS REGARDING A DISCIPLINARY MEETING AND RIGHT TO DEMAND A SPECIFIC REPRESENTATIVE

On the 14th May 2018, the FWC handed down a decision in the matter of Susan Anson (SA) and Western Districts Health Service

The applicant was one of two nurses allegedly asleep on duty at 5.30am in the Coleraine campus of the employer. She and another nurse were in charge of 10 residents and seven acute care patients. Both were allegedly discovered asleep by their Nurse Unit Manager, who arrived unexpectedly early. The applicant was dismissed for being asleep, and also for repeatedly refusing directions to provide a response to the allegation or meet with her employer. She had previously refused requests to attend. She provided a variety of explanations for her refusals including insisting on a particular union representative. The employer eventually refused to allow this representative to enter the premises because of her allegedly aggressive and unsafe conduct.

Background

The employer's nurse unit manager discovered both the employee (SA) and another nurse asleep while on duty at work. Together, they were responsible for 10 residents and seven acute care patients, and this meant that no-one was available to attend to their needs.

The manager stood in front of both nurses for a while, then went off to check on the welfare of the residents and patients. She returned to the nurses and stood in front of them again to verify that they were asleep, before waking them. She then reported the incident to the HR manager.

The other nurse claimed that both of them had taken a work break together and "must have nodded off". They were required to take breaks at different times so that at least one of them remained on duty at all times.

SA denied that she had been asleep, but in any case, that she was entitled to sleep during a work break.

SA was provided with opportunities to respond to the allegations that she was asleep on the job on four separate occasions. She was directed to attend meetings or respond in writing on four occasions, but never did. Eventually, she was summarily dismissed.

SA wanted a particular union representative (Tracey Brown from HWU) to be her support person at meetings, but the employer refused to allow TB to fill that role. The employer claimed that TB's past conduct represented a threat to the health and safety of its employees, and evidence supported that claim, including evidence of bullying and other inappropriate conduct.

TB did attend one meeting but terminated it shortly after it started, claiming that she needed to examine an extra document. The employer said it would accept any other union representatives, but neither the union nor TB responded. SA refused to attend any meetings unless TB could represent her.

The enterprise agreement covering SA did not expressly require the employer to allow a support person of the employee's choice.

Evidence suggested that the two nurses were not entitled to be taking work breaks at the time they were found asleep. To be asleep at the time amounted to a breach of the nurses' duty to residents and patients and it was not authorised.

The other nurse received a written warning, after it was found there were some mitigating circumstances to explain her falling asleep, and she had cooperated in the investigation process. The FWC found that the summary dismissal of SA was not harsh, unjust or unreasonable. The evidence of the employer was more convincing than that of SA. It was not unreasonable for the employer to object to TB being present at the workplace. TB's involvement in this dispute had obstructed the employer's attempts to follow due process, for example by cancelling meetings at short notice and for spurious reasons.

Despite many requests to do so, SA failed to provide an account of her conduct on the day she was allegedly found asleep on the job.

She did not reply to the simple question of whether or not she was asleep. This amounted to failure to comply with a lawful and reasonable directive, which provided a valid reason for termination of employment. The employer had warned her that failure to respond could result in termination of employment. An employee cannot avoid termination by refusing to attend meetings, otherwise employees would routinely do it to avoid dismissal.

This case demonstrates that failing to cooperate with an employer's procedurally fair attempts to investigate allegations of misconduct can on its own provide a valid reason for dismissal, as it can amount to refusal to follow a lawful and reasonable directive.

It also appears that an employee cannot insist on having a particular person as his/her representative or support person if an employer objects to that person, provided that the employer has reasonable grounds for the objection and allows other suitable people to perform the role.

A nurse was validly dismissed for sleeping on the job and failing to cooperate with the ensuing investigation, the Fair Work Commission has ruled.

Of Note

Many clients have had experience with a union official, in particular an organiser, who has acted in the manner described in this decision. It is interesting to note the FWC comments within the decision regarding this issue.

The following is an excerpt from the decision, which can be found on the FWC website.

A v Western District Health Service, [2018] FWC 2132, 14 May 2018

"54] *In my view, the applicant breached lawful and reasonable directions, and these breaches constitute a valid reason for termination of her employment.*

Section 387(b) – notice of valid reason

[55] *The applicant was repeatedly provided with notices of the sleeping on the job allegation, and notice that she might be terminated if she did not comply with directions to attend meetings or provide her version of events in writing.*

Section 387(c) – opportunity to respond

[56] *The applicant was repeatedly provided with opportunities to respond and refused to do so. However, the applicant claimed that there was no opportunity to respond to the allegation that lawful and reasonable directions were breached. The applicant was invited to respond in writing, and was directed to do so. The applicant did respond on 18 November 2017 by stating that she was entitled to a representative of her choosing and she was unable to confirm attendance at a meeting as it would depend on Ms Brown's availability.[84] This was in effect the assertion of a view that she did not have to attend without Ms Brown, presumably that the directions were not lawful and reasonable. Further invitations and directions to respond were issued by the employer on 21 November 2017[85], and 23 November 2017[86]. The applicant could have responded by stating that these were not lawful and reasonable directions or similar words. She was put on notice that these were serious issues and that she could be terminated. She did not respond but was given opportunities to.*

Section 387(d) – unreasonable refusal by the employer to allow a support person

[57] *The employer repeatedly stated that it would allow the applicant a support person. The eventual refusal to allow Ms Brown as a support person was reasonable, for the reasons set out above.*

Section 387(e) – unsatisfactory performance

[58] *The dismissal was for misconduct not unsatisfactory performance.*

Section 387(h) – other relevant matters

[60] *Mr Lynch submitted that the employer had breached the Agreement by not having a 'meeting' as required by clause 15.4 of the Agreement. The employer met with the applicant and Ms Brown on 18 October 2017. The meeting was short because Ms Brown terminated it after a brief discussion.[87] There was some discussion about whether or not this was during the 'investigatory procedures' phase within clause 15.3 of the Agreement or the 'disciplinary procedure' phase within clause 15.4 of the Agreement. It appears that the process began as an investigation on 21 June 2017.[88] No issue was taken with employer compliance with other aspects of the investigation and discipline procedure, apart from the issue of representation, which I have already dealt with.*

[61] *It then became a disciplinary procedure on 18 October 2017, as the employer submitted: "That's the trigger point for (b) to apply. It requires the employer to form a view, on a reasonable basis. It must reasonably consider certain things. It is entirely clear that by 18 October Dr Keevy had formed that view. She had already been through an entire disciplinary process with Ms Cottier. She had already satisfied herself that Ms Anson was asleep on shift. There was no other purpose of the meeting, on 18 October, other than to ensure that Ms Anson had an opportunity to respond before appropriate disciplinary steps were taken."[89]*

[62] *Under the disciplinary procedure, the employer was required under clause 15.4(b) to notify the employee of the outcome of the investigation process, including the basis of any conclusion. Read in context, the repeated summaries by the employer of the sleeping on the job allegation meet this requirement. The employer had provided on 4 September 2017[90] a description of the alleged sleeping incident which did not change to any great extent as further material was provided. A further description of the incident was provided on 26 September 2017[91] which was similar in nature, as was the description of the incident provided on 1 November 2017[92]. The applicant agreed in cross-examination that there was little material change in these documents.[93]*

[63] *It is clear that by 18 October 2017 the employer had, in the absence of any response by the applicant, come to an outcome of the investigation process consistent with those documents.*

[64] *On 17 November 2017, in a letter sent by email headed 'Notice of Disciplinary Meeting', the*

applicant was directed to attend meetings, and advised that a refusal to attend "...may constitute 'serious misconduct' under the relevant enterprise agreement and result in disciplinary action up to and including summary dismissal...".[94] This clearly is also the expression of a view that "...the Employer reasonably considers that the Employee's conduct or performance may warrant disciplinary steps being taken" which commences the disciplinary procedure in clause 15.4(a) of the Agreement.

[65] *Subsequent letters were also headed 'Disciplinary Meeting'. On 21 November 2017, the employer again advised that this refusal to attend meetings "...may constitute 'serious misconduct' in accordance with the Enterprise Agreement, warranting disciplinary action up to and including summary dismissal..." The employer also advised the applicant that:*
"In the event that you fail or refuse to attend the above meeting or otherwise provide a written response as requested by WDHS, your conduct will be taken to be a persistent and wilful failure to comply with a reasonable and lawful direction of your employer, which may result in disciplinary action as foreshadowed above. WDHS may also proceed to make a decision with respect to your conduct and appropriate disciplinary action on the basis of the allegation without further notice, as outlined in our previous correspondence."[95]
[66] *On 23 November 2017, the employer advised that if there was no written or verbal response WDHS "...will proceed to make a determination regarding appropriate disciplinary action up to and including summary dismissal..."[96] This meets the requirements of clause 15.4(b)(i) of the Agreement even if the previous letters do not.*

[67] *In relation to clause 15.4(b)(ii) of the Agreement, the employer did 'meet with the Employee' on 18 October 2017. The applicant sought to argue that this was not during the disciplinary phase. However, none of the allegations and in effect summaries of allegations changed in any material respect between 18 October 2017 and later dates. The allegations were the same, and the outlines were to the same effect, as both the applicant[97] and Ms Brown[98] agreed. A view formed on 17 November 2017 had no further basis than one formed on 18 October 2017.*

[68] *It is implicit in the clause, in any event, that the requirement of a meeting would not extend to circumstances in which the employee simply refused to attend meetings. It cannot be the case that any employee is able to avoid termination of employment under this Agreement by the simple device of consistently refusing to attend meetings. This would mean that in effect no employee could be dismissed, because employees would simply refuse to attend a meeting. Read in context there is no indication in the Agreement that such an unusual or absurd result is intended: AMWU v Berri Pty Limited[99].*

[69] *The Agreement, and in particular clause 15 of the Agreement, are concerned with giving an employee due process while enabling an employer to raise and process issues of 'performance', 'conduct', 'misconduct', and 'serious misconduct' (clause 15.2 of the Agreement). There is little suggestion that it extends to prohibiting termination if an employee refuses to attend a meeting or makes the process unworkable. Even if there was some form of breach, it was a breach resulting from the employee's own actions and not that of the employer, and the employee cannot rely on it. The employer made reasonable endeavours to afford the applicant due process, while the applicant and Ms Brown were obstructive and uncooperative.*

[70] *The applicant submitted that there was differential treatment, because Ms Cottier only received a warning.[100] However, as Dr Keevy said, Ms Cottier was not dismissed 'due to mitigating factors', which included legitimate reasons to be tired (she travelled to Melbourne and back the previous day), and she complied with directives and participated in the investigation process.[101] The employer's letter recording the outcome of Ms Cottier's matter is consistent with Dr Keevy's evidence.[102]*

[71] *Mr Lynch submitted that evidence was led that the applicant was a positive contributor to a workplace and she gave up her time to contribute to give back to the community as well. He submitted that the applicant is 56 years old and now without a permanent job. He said that the applicant led evidence that she is finding it difficult, now that her job has been terminated, to make ends meet with her significantly reduced wage.[103] My Lynch also submitted that the applicant had 12 years of service.[104]*

[72] *The evidence of a positive contributor to the workplace is a letter relating to the Hamilton Base Bikers.[105] Mr Fitzgerald explained that this letter was generic to fundraisers, and had nothing to do with her employment.[106] I have taken the other matters into account, even though the genuine difficulties that the applicant is experiencing are of her own making.*

Conclusion

[73] *I have taken all submissions and evidence into account, including all mitigating factors and the fact that it was a summary dismissal. The applicant's dismissal was not harsh, unjust or unreasonable. She was afforded a 'fair go all round'. I dismiss the application. An order is contained in PR601987.*

Any person responsible for arranging disciplinary meetings needs to read the details and to understand the level of responsibility placed on staff and their representatives regarding attendance at disciplinary meetings.

Service for replacement staff

I have attached information regarding h! Healthcare, a service for assisting with staffing replacement.

Annual leave

A reminder that Michael and I go on leave as of the 20th July to return on the 13th August 2018. Janis Veldlwyk will be accessing our emails, so simply send them as usual. We will have access to our emails and phones where necessary, however this may not be as reliable as usual. Janis is contactable on jveldwyk @cdassociates.com.au or 0411 075 895

Please call Clare Dewan on 0412601156 or Michael Rahilly on 0408101139

CLARE DEWAN