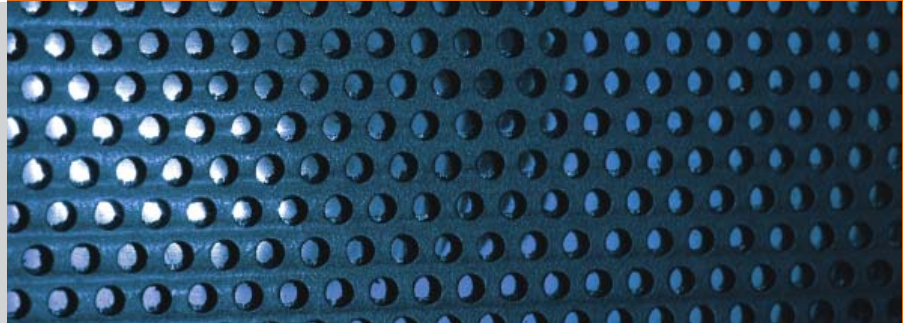


FOCUS

WORKPLACE RELATIONS



December 2007

PATTERN BARGAINING AND OTHER ISSUES

We look at pattern bargaining; whether a redundancy policy forms part of an employment contract; summary dismissals; and the vicarious liability of an employer for the actions of its employees.

Implied redundancy obligations; grounds for summary dismissal; and the vicarious liability of an employer

PATTERN BARGAINING PREVENTS PROTECTED ACTION BALLOT

A union's application to hold a protected action ballot was denied because the claims involved pattern bargaining. Partner Jamie Wells and Lawyer Andrew Stirling report.

HOW DOES IT AFFECT YOU?

- The Australian Industrial Relations Commission will not grant an application for a protected action ballot unless it is satisfied that the applicant is not pattern bargaining.

- Evidence that a union is demanding the same industrial outcomes of multiple employers may not be pattern bargaining if the union is willing to negotiate separate outcomes with individual employers.
- Multiple-business agreements can be created at the initiative of employers only, not unions.

BACKGROUND

The Victorian Branch of the Australian Nurses Federation applied to the Australian Industrial Relations Commission for orders authorising it to hold protected action ballots that would have permitted it to take industrial action during its protracted dispute with various employers in the Victorian health industry.

Although the employers' representatives did not object to the order proposed by the union, the union volunteered to the Commission during the proceedings that the union was pursuing (consistent with a resolution of a mass meeting of nurses):

- a single, multiple-business agreement in relation to general nursing; and
- a single, multiple-business agreement in relation to psychiatric nursing.



DECISION

The Commission denied the union's application to hold a protected action ballot,¹ considering that:

- the *Workplace Relations Act 1996* (Cth) did not anticipate multiple-business agreements being created at the initiative of a union; and
- the union's objective of creating single multiple-business agreements dealing with general and psychiatric nursing meant the Commission could not be satisfied that the union was not engaged in pattern bargaining, a pre-condition to it agreeing to grant the application.

INCORPORATION OF REDUNDANCY POLICY AND SUPERANNUATION PAYMENTS

Redundancy obligations are not always implied into an employee's contract of employment. Overseas Practitioner Meriel Smith and Law Graduate Gina Kawalsky report on a decision of the New South Wales Court of Appeal.

HOW DOES IT AFFECT YOU?

- For a redundancy policy to form part of an employee's contract of employment it must be incorporated into the employment contract by specific reference; or
- implied into the contract based upon the presumed intention of the employer and employee, as demonstrated by an earlier course of dealing.

BACKGROUND

Mr Willis was employed as the CFO of Health Communication Network Ltd (*HCN*). Following a takeover of HCN, Mr Willis' employment was terminated. Initially he was given six months' notice, but following concerns that he was guilty of misconduct, he was immediately terminated and paid six months' salary in lieu of notice.

Mr Willis commenced proceedings in the District Court, claiming that he was entitled to a redundancy payment, and that his superannuation payments should have been made in respect of the six months' payment in lieu of notice.

ORIGINAL DECISION

Judge Finnane rejected Mr Willis' claims. He held that although the terms of HCN's redundancy policy formed part of Mr Willis' employment contract (although he did not explain how he reached this finding), Mr Willis' position was not made redundant. Further, HCN was not liable to make superannuation contributions on his behalf, as the statutory obligation² was to pay contributions in respect of salary and wages paid, and a payment in lieu of notice was not a payment of salary or wages.

APPEAL DECISION

The New South Wales Court of Appeal upheld the original decision that Mr Willis was not entitled to a redundancy payment.³ However, it held that the redundancy policy did not form part of his contract of employment, as there was no basis on which the policy could be implied into Mr Willis' contract either as a matter of fact, or law.

In relation to the superannuation claim, the court held that Mr Willis was contractually entitled to have contributions made on his behalf, as they would have been received during the course of the notice period. On this last issue, the parties could have reached a different result by qualifying expressly the way in which an in lieu payment should be calculated.

1. *Australian Nursing Federation v Tweddle Child & Family Health Service and others* [2007] AIRC 862, Vice President Lawler, Sydney, 11 October 2007, PR 979298.

2. *Superannuation Guarantee (Administration) Act 1992* (Cth).

3. *Peter Willis v Health Communication Network Ltd* [2007] NSWCA 313.



THE 'AUSTRALIAN WAY' OR GROUNDS FOR SUMMARY DISMISSAL?

The Australian Industrial Relations Commission recently upheld the summary dismissal of a store manager for drinking alcohol over lunch. Senior Associate Luke Gattuso and Lawyer Adam Santa Maria report.

HOW DOES IT AFFECT YOU?

- A breach of a term of employment or other reasonable lawful direction may justify summary dismissal.
- If an employee is summarily dismissed, the onus is on the employer to show that the decision was sound, defensible or well-founded.
- Employers should ensure that employment agreements and company policies are consistent and clearly worded if they are to be relied upon as the basis for termination of employment.

BACKGROUND

Mr Selak was a store manager at a Woolworths Limited trading as Safeway (Woolworths) store, with approximately 20 years of service with Woolworths.

On 2 May 2007, Mr Selak discovered that another employee of Woolworths was considering leaving his employment, and Mr Selak took him out to a hotel for lunch where they each consumed two pots of full-strength beer.

Woolworths discovered that Mr Selak had consumed the beer during his lunch break, and he was summarily dismissed the next day. Mr Selak brought an unfair dismissal claim.

SUBMISSIONS

Mr Selak argued that his termination was not for a valid reason and that strict adherence to the prohibitions in Woolworths' policies would yield a termination which was harsh, unjust or unreasonable. He claimed that the failure of Woolworths to take into account the full factual context, including the length of Mr Selak's service, and the relatively trivial nature of the alleged breach, invalidated the reason for the

termination. He drew a distinction between a zero tolerance policy at a place like Woolworths as opposed to a pilot at Qantas. It was submitted that, at most, he should have been given a warning.

Woolworths argued that the consumption of alcohol during work hours was prohibited by the operation of the following documents, well known to, and understood by, Mr Selak:

- an employee code of conduct,
- an employee staff handbook,
- a Woolworths drugs and alcohol policy, and
- Mr Selak's contract of employment.

In particular, there were express terms of Mr Selak's employment contract that 'no alcohol was to be consumed by employees during work hours, including meal breaks', that he was 'required to adhere to the Company... Code of Conduct...and equity policies', and that 'if in the reasonable opinion of the Company [he was] found to be in breach of Company Policy, involved in or party to serious and wilful misconduct, or not obeying a lawful instruction, the Company may terminate the services immediately'.

THE DECISION

Commissioner Grainger held that Woolworths was justified in summarily dismissing Mr Selak because he had breached an express term of his contract of employment banning alcohol consumption during work hours.⁴

He found that Woolworths' no alcohol or zero tolerance policy was one which was incorporated in three different company documents, and although the wording in these various company documents was not precise, the clear stipulation in Mr Selak's contract of employment was enough to justify immediate dismissal. Mr Selak's breach was, with respect to that express stipulation, serious enough that it justified summary dismissal.

Commissioner Grainger held that this constituted a sound, defensible and well-founded reason for the termination of Selak's employment. He also found that the termination was:

- not harsh, because it was not disproportionate to the seriousness of the misconduct committed by Mr Selak as a store manager;

4. *Tony Selak and Woolworths Limited* [2007] AIRC 786 (26 October 2007).

- not unjust, because Mr Selak had clearly engaged in misconduct, constituting a valid reason for termination of his employment; and
- not unreasonable, given that he was a store manager with 160 subordinate staff, and had breached a term of his contract by failing to follow a lawful direction not to drink alcohol during working hours.

EMPLOYER VICARIOUSLY LIABLE FOR ASSAULT BY SECURITY GUARDS

The New South Wales Court of Appeal held a security provider vicariously liable for an assault committed by its employees. Senior Associate Luke Gattuso and Articled Clerk Ben Ryde report.

HOW DOES IT AFFECT YOU?

- In certain circumstances, an employer may be liable for an employee's unlawful conduct.
- An employer may be liable if the conduct was sufficiently closely connected to their task, or done to further the interests of the employer (as compared to a spontaneous act).
- Clear statements of responsibilities and prohibitions will reduce the risk of employers being held vicariously liable, particularly in 'high-risk' industries such as security services

BACKGROUND

Gregory Sprod was acting in a drunken, aggressive and insulting manner inside a pizza shop, prompting the owner to call security guards from Public Relations Oriented Security Ptd Ltd. After being forcefully removed, the disturbance continued outside the store, and two of the guards then took the appellant down a nearby laneway and assaulted him, resulting in permanent brain damage. Two other security guards stood nearby watching while the assault took place.

At first instance, the Supreme Court of NSW found that Public Relations Security was not vicariously liable. Justice Cooper stated the attack was severe and unnecessary and 'motivated by the blood lust of the security officers involved'.

Mr Sprod (by his next friend) appealed the decision.

THE APPEAL DECISION

The NSW Court of Appeal⁵ found Public Relations Security vicariously liable. The court held that the 'dominant cause of the assault was a desire on the part of the guards to do their duty by ensuring that the appellant would not again make a pest of himself at the shop, would not return to the shop, and would not again molest the customers'.

Justice Ipp acknowledged the difficulties in holding an employer liable for the criminal actions of an employee. In his Honour's view, the 'safest course' was to attempt to apply all of the relevant case law to the facts of the particular case, and he went on to do so. The following facts were particularly relevant in this case.

The way the four guards acted in concert (two taking the appellant down the lane, two keeping watch) was indicative of a deliberate course of conduct and not a spontaneous act triggered by personal animosity or vindictiveness.

Immediately following the attack, the guards stated to one of the pizza shop customers that the appellant would not be causing any trouble tonight as he 'had just got his head kicked in'. This comment suggested the guards were intending to further the interests of their employer.

The court found that the 'connection between the unauthorised acts of the guards and the acts which their employer, the respondent, authorised, was sufficiently close... to extend vicarious liability to the respondent for the intentional wrongdoing of its employees'.

5. *Sprod bnf v Public Relations Oriented Security Pty Limited* [2007] NSWCA 319.

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