

# FOCUS

## WORKPLACE RELATIONS



February 2008

## DISHONESTY JUSTIFIES TERMINATION

A misconduct claim based on dishonesty can justify termination even if the breach is not otherwise serious. Lawyer Erin Hawthorne reports on a Federal Court case.

### HOW DOES THIS AFFECT YOU?

- Employers should ensure that summary dismissal provisions are carefully worded, so as to clarify the grounds on which an employer may summarily terminate the employment relationship.
- Where an employee is summarily dismissed, the reason for termination should be provided, among other things, to reduce the likelihood of unrelated claims by the employee.

As part of a performance review process, Ms McDonald received a specific direction to detail her attendance at work for the previous three weeks, including time of arrival, lunch break duration and departure. Ms McDonald responded by email saying that *'In general I arrive at 9:00 (if there is an 8:30 meeting 3 times/week I arrive at 8:15) and Depart at 5:20'*. Parnell had some evidence of the hours that Ms McDonald attended work and, at a meeting on the day after she sent her email, Ms McDonald was accused of lying about her attendance. She denied the allegation and insisted she had attended work as set out in her email. Ms McDonald was summarily dismissed by Parnell.

### BACKGROUND

Ms McDonald was employed by Parnell Laboratories (Aust). Her contract allowed for summary termination in cases of 'serious, wilful or persistent misconduct'.

Ms McDonald frequently arrived late for work. Staff requiring her authorisation reported that she was often absent and also that her work was delayed.

Ms McDonald brought a variety of claims against Parnell, including:

- that her dismissal was in breach of contract – in particular, by Parnell's failure to follow its performance counselling policy; and
- for unlawful discrimination on the grounds of family responsibilities under the *Sex Discrimination Act 1984* (Cth) – Ms McDonald alleged her late attendance was caused by her responsibilities in caring for her children.

We look at an employer's responsibility for bullying, among other issues



## THE DECISION

The Federal Court dismissed all claims against Parnell.

Justice Buchanan held<sup>1</sup> that Ms McDonald's response to Parnell's 'specific and active concern about her pattern of attendance' was:

intentionally misleading ... the response lacked honesty [and] was calculated to deny the real position about Ms McDonald's pattern of attendance ... she chose not to make an accurate or honest response because she knew the consequence for her might be serious if she did so.

Justice Buchanan commented that, in the circumstances, a 'conscientious answer' was required and found that Ms McDonald's response constituted wilful misconduct. Although the response might not have qualified as serious misconduct, the contract required only that the misconduct be wilful.

## SUCCESSFUL APPEAL IN BULLYING CASE

An employer's responsibility for bullying is not unlimited. Senior Associate Veronica Siow and Lawyer Caitlin Boyce report on a New South Wales Court of Appeal decision upholding an employer's appeal.

## HOW DOES IT AFFECT YOU?

Incidents of workplace bullying must be taken seriously and treated as a workplace safety issue.

An employer will be deemed to have knowledge of incidents of abuse in the workplace if its managers or supervisors are made aware of such incidents.

## BACKGROUND

Mr Naidu was employed by ISS Security Pty Ltd as a security guard. ISS provided security services to Nationwide News Pty Ltd (**News**), where Mr Naidu was assigned to work. By arrangement between ISS and News, Mr Naidu worked under the direct supervision of a News employee, Mr Chaloner.

Between 1992 and 1996, Mr Chaloner subjected Mr Naidu to systematic bullying, which included violent and financial threats and racial and sexual vilification, as a result of which Mr Naidu developed severe depression and post-traumatic stress disorder.

Mr Naidu brought an action in tort and in contract against ISS and News for the serious psychiatric injuries suffered by him, which he claimed were caused by Mr Chaloner over a prolonged period.

The NSW Supreme Court accepted Mr Naidu's claims<sup>2</sup> and awarded damages against News and ISS<sup>3</sup>. News and ISS appealed the decision.

## ON APPEAL

The Court of Appeal upheld the decision against News but overturned the decision against ISS<sup>4</sup>.

In relation to ISS, the court accepted that, as Mr Naidu's managers were not made aware of the situation, knowledge of the abuse could not be attributed to ISS. Without knowledge, there was no reasonably foreseeable risk of psychiatric injury, and therefore ISS could not be held liable for negligence. The court found that the knowledge of other ISS employees about Mr Naidu's situation could not be imputed to ISS, as they lacked sufficient seniority.

The court also held that ISS was not vicariously liable for Mr Chaloner's acts because:

- ISS had no control over Mr Chaloner; and
- Mr Chaloner was not acting in any way for or on behalf of ISS.

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2. *Naidu v Group 4 Securitas & Anor* [2005] NSWSC 618.

3. *Naidu v Group 4 Securitas Pty Ltd & Anor* [2006] NSWSC 144.

4. *ISS Security Pty Limited v Naidu & Anor* [2007] NSWCA 377.

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1. *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903.



# MORE ON IMPLIED TERMS

The Australian Industrial Relations Commission (**AIRC**) has provided further support for an implied duty of good faith and mutual trust and confidence in employment contracts. Senior Associate John Naughton reports.

## HOW DOES IT AFFECT YOU?

- The AIRC comments<sup>5</sup> follow a decision of the NSW Supreme Court last year in *Russell*, supporting the implication of terms of good faith and mutual trust and confidence in employment contracts.
- Until an appellate court has reviewed the scope of the implied terms, these decisions are likely to result in an increasing range of uncertain claims against employers.

## BACKGROUND

Ms Jayne Carter alleged that her dismissal from Tuftmaster Carpets Pty Ltd was unfair and for a prohibited reason (namely her temporary absence from work because of illness). Tuftmaster alleged that it did not terminate her employment. Rather, it argued Ms Carter had abandoned her employment.

## THE DECISION

The AIRC accepted Ms Carter's evidence that she was told her job could not be kept open if she was continually ill. The AIRC rejected Tuftmaster's claims that Ms Carter:

- was told that she was entitled to be absent from work; but
- had not communicated her intention to return despite being requested to do so.

The AIRC also accepted that:

- there was an implied term in Ms Carter's contract of employment entitling her to be absent from work because of temporary illness; and

5. *Ms Jayne Carter v Tuftmaster Carpets* [2008] AIRC 31.

- the actions of Tuftmaster were in breach of the implied duties of good faith and mutual trust and confidence in the employment relationship, and that this entitled Ms Carter to leave Tuftmaster's employment on the basis that she had been constructively dismissed.

In drawing that conclusion, the AIRC relied on the *Russell*<sup>6</sup> case to the effect that:

- the employer must act in good faith towards an employee in the administration of its employment contract; and
- the employer may not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence or trust between the employer and the employee.

Until there is a detailed consideration of these implied terms by an appellate court, the apparent acceptance in these cases offer further encouragement for employee claims based on general allegations of unfairness. For now, prudent employers will need to consider carefully:

- the potential scope of the implied duties; and
- appropriate measures to minimise potential liability.

## TESTING RESULT ON THE RESULTS TEST

The Federal Court of Australia recently considered a test case for a personal services business determination under the results test. Lawyer Andrew Stirling reports.

## HOW DOES IT AFFECT YOU?

When considering whether a contractor earns personal services income, it is important to look behind any contractual relationship, and consider the way in which work is performed.

6. In *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* [2007] NSWSC 104. See *Focus: Workplace Relations* – February 2007.

For the purposes of the results test, the Australian Taxation Office (**ATO**) should distinguish between income received for producing a tangible result, and income received for performing a role. Merely breaking a role down into its specific functions does not constitute being paid for a result.

A significant factor is whether payment is for producing results or an hourly contractual rate.

## BACKGROUND

IRG Technical Services Pty Ltd provided services to the Kellogg Joint Venture (**KJV**) for the design of a facility called an LNG train. The services were provided by Mr Green, an experienced instrument electrical engineer.

The provision of services was through IRG's contract with an employment agency, who in turn contracted with KJV.

IRG applied to the ATO for a personal services business determination, relying on the results test. This determination would allow IRG to pay tax at the company rate, rather than at the personal income tax rate.

The results test requires that:

- at least 75 per cent of the personal services income paid to a company be for producing a result;
- the company supply its own plant and equipment, or tools of trade, to perform the work; and
- the company be liable for the costs of rectifying any defect in the work performed.

## THE DECISION

The Federal Court held<sup>7</sup> that the results test was not satisfied. Although IRG's contract listed specific 'deliverables' that were to be achieved, payment was to be based on an hourly rate. The court decided that the 'deliverables' were simply 'the broad integers of the position undertaken by Mr Green'. Mr Green's role was described by the court as 'working as a skilled engineer ... on a particular project in careful consultation with his peers and with his supervisors to create all necessary documents for the satisfactory design and construction of a complex engineering plant'. On that basis, the court decided that the services were not for the purpose of producing a result.

The court also decided that, since Mr Green required the use of the KJV computer system and office, IRG was not required to supply the equipment necessary to produce the results.

Since IRG had failed to satisfy the first two limbs of the results test, the ATO's decision to refuse the determination was upheld.

## CONCLUSION

Contracting arrangements established to minimise tax need to be targeted towards payment for results. Payment by the hour to provide results that are analogous to the ordinary outcome of an employee's effort will be insufficient to meet the results test.

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7. *IRG Technical Services v DCT* [2007] FCA 186.



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