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Employment Law Update

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Can my Misdirected Text Justify my Dismissal?

Have you ever accidentally sent a text message to the wrong person? The consequences can be awkward, and may be disastrous if the content is inappropriate. In the recent decision of *Nesbitt v Dragon Mountain Gold*, the Fair Work Commission upheld the dismissal of an employee who had accidentally sent a text message to her General Manager.

Ms Nesbitt sent a text message in which she referred to the General Manager as *"a complete dick … we know this already so please try your best not to tell him that regardless of how you feel the need."* It was intended for a plumbing contractor (her daughter's boyfriend) who was about to do some work for the company but it was in fact sent it to the GM instead.

Shortly afterwards, Ms Nesbitt sent the General Manager another text, saying in part *"Rob I need to explain...that message came across so wrong. Rob…that is not how I feel. My sense of humour is to exaggerate…That was a joke within our family...It is so far out of context... Please forget it and just go on as normal. I am very very sorry. It is not how I feel."*

The company terminated her employment.

The Fair Work Commission interpreted the first text as saying that the General Manager was an idiot or fool, with the addition of "complete" emphasising how much of an idiot or fool he was, in Ms Nesbitt's view.

The Fair Work Commission didn't accept that the text should be seen as a joke: *"It was far from a "light hearted insult," it was a hurtful and unpleasant appraisal of the Chairman and Managing Director of her Employer, for whom she earned $95,000 per annum."* In fact, in a small business setting, the Fair Work Commission agreed with the employer that the text was serious misconduct, justifying dismissal without notice.

This case demonstrates that even if an employee does not (or does not intend to) direct a particular comment to someone, it can still justify dismissal if serious enough.

There have been many other cases where an offensive or disrespectful comment comes in the form of swearing at someone in the workplace. Generally, for swearing to justify summary dismissal, it needs to be directed at someone and not merely conversational (though this depends on the work context and the frequency of conversational swearing), and said in a manner which is intended to denigrate, offend and undermine the authority of, the other person.

The niceties of whether an incident of abuse will justify termination with notice, or summary termination (without notice) require consideration of the whole context – size of the business, prevailing culture, background between the players, what exactly was said, who else heard it, length of the employee's service, the employee's record, and whether a first and final warning or other disciplinary step short of termination would be more appropriate.

To find out more about what is acceptable workplace conduct and what conduct will or will not justify dismissal, please contact our Employment Law team:

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Changes to Annual Leave

As part of its four-yearly review of modern awards, the Fair Work Commission has examined the issues of excessive annual leave and the cashing out of annual leave – both common issues for our employer clients.

Some employees are so committed to work that they take little leave (which is less than ideal for their ongoing wellbeing, and which results in ever-increasing provisions in the accounts as pay levels increase), or see the accrual as a cash nest egg payable on eventual termination, rather than an opportunity to take a break.

Proposed changes by the Fair Work Commission may make these issues easier to handle.

Excessive annual leave

The review noted that employees with excessive annual leave could have negative cash flow impacts on employers when it came to paying out annual leave if they left their job. The proposed changes will give more definition to an employer's right to direct the employee to take leave.

The Fair Work Commission has proposed a new model term about excessive annual leave be included in 70 awards and, potentially, in all modern awards. This will allow employers to direct employees with excessive accrued annual leave (more than eight weeks for non-shift workers and 10 weeks for shift workers) to take leave, provided that:

1. before directing leave to be taken, the employer has requested a meeting with the employee and has genuinely tried to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual without the need for a direction
2. the directed leave won't result in the employee having less than six weeks accrued annual leave left
3. the directed leave is for at least a week
4. notice of at least eight weeks and not more than 12 months is provided to the employee of the directed leave
5. any existing agreed leave arrangement is taken into account (so if an employee with 12 weeks accrued already has a month's leave booked, a direction won't be appropriate).

Cashing out of annual leave

The Fair Work Act currently sets out that annual leave can't be cashed out unless in accordance with provisions under an award or enterprise agreement. This means it's generally illegal as most modern awards don't provide for the cashing out of annual leave (except at the end of the employment).

The Commission has proposed a new model term about cashing out of annual leave which will allow an employer and employee to agree to the employee cashing out accrued annual leave if:

1. each cashing out of a particular amount is agreed by a separate written agreement
2. the employee is paid the full amount that would have been payable had the employee taken the leave at the time that it is cashed out
3. the cashing out won't result in the employee's remaining accrued entitlement being less than four weeks, and
4. the employee doesn't cash out more than two weeks in any 12 month period.

Changes to Annual Leave cont.

Both these proposed changes are subject to more submissions and hearings, with a further hearing currently listed for 7 August, 2015. Given that the timetable for the four-yearly review goes up to December, these changes are unlikely to come into force until 2016.

Should you wish to find out more about how these changes will affect you, please contact our Employment Law Team:

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Government Crackdown on 457 Visa Breaches – 10 Key Requirements

On 20 May 2015, the Federal Court of Australia handed down the largest ever court imposed fine for breaches of the Subclass 457 business sponsorship program to Choong Enterprises. An operator of restaurants and cafes in Darwin, the company acted as a sponsor for 10 employees from the Philippines, who travelled to Australia on 457 visas.

A 457 business sponsor's primary obligation is to ensure that the sponsored employees are employed the same on terms and conditions to those of an Australian employee for an equivalent role in the same position.

Not only was Choong Enterprises not paying entitlements such as loadings, sick leave and superannuation contributions, it was also paying below the award minimum at approximately $12 per hour. In addition to award minimums, the Migration Regulations also provides a minimum salary threshold of $53,900 per annum. In this case, the salaries being paid by Choong Enterprises to their 457 visa holders ($45,220 per annum) was below the minimum salary threshold. Thanks to these underpayments Choong Enterprises had to pay between $6,000 - $20,000 to each of the seven underpaid employees, as well as penalty payments to the Commonwealth, ranging from $450 - $7,000 per employee.

Choong Enterprises also fabricated documents in an attempt to prove compliance with its obligations, and recovered the fees charged by its migration agent from the sponsored employees, which is prohibited under the Migration Regulations.

The court penalised each of the breaches that occurred in respect of each of the employees, and fined Choong Enterprises a total of $175,400.

Government Crackdown on 457 Visa Breaches – 10 Key Requirements cont.

In response to this finding, Senator Michaelia Cash, Assistant Minister for Immigration and Border Protection, said:

"The stiff penalty this company has received should send a warning to other sponsors: if you fail to meet your requirements, my Department may impose administrative sanctions, issue an infringement notice, execute an enforceable undertaking, or apply to the Federal court for a civil penalty order. The overwhelming majority of businesses act in good faith and therefore have nothing to fear, but we want to send a strong message that if you breach your obligations, you can expect to face the consequences."

True to the Minister's word, from 1 July 2015, Taskforce Cadena is enforcing the sponsorship requirements applicable to all approved 457 business sponsors. Headed by the Department of Immigration and Border Protection and the Fair Work Ombudsman, the Taskforce will also involve the Australian Federal Police, Australian Securities and Investment Commission, Australian Tax Office and other agencies.

If you are currently an approved business sponsor and/or employ 457 visa holders in your business, it's perhaps an opportune time to make sure you're meeting your sponsorship requirements.

The 10 key requirements are to:

1. ensure equivalent terms and conditions of employment
2. pay travel costs to enable sponsored persons to leave Australia
3. pay costs incurred by the Commonwealth to locate and remove unlawful non-citizens
4. keep records
5. provide records and information to the Minister
6. co-operate with inspectors
7. provide information to the Department when certain events, such as termination of employment occur
8. ensure the sponsored person works in the nominated occupation
9. not recover certain costs such as migration agent costs from the visa-holder, and
10. ensure that you are contributing to the training of Australians in your industry.

For further advice on whether you are meeting your sponsorship obligations, please don't hesitate to contact our Employment Law and Business Migration team:

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