

Employment & Industrial Alert

May 2007

Employers Beware - Dismissals Can Backfire (2)

Our March 2007 Employment and Industrial Alert dealt with two decisions where dismissal cases did not go as employers had intended. This alert concerns two further decisions that have lessons that can be learned on termination of employment by employers. The two decisions were dealt with by the Australian Industrial Relations Commission on Notices of Motion to dismiss the applications for relief from termination of employment.

1. Bolzonello v Pronto Software Pty Ltd [2007] AIRC 208

This decision delivered on 19 March 2007 by Commissioner Smith concerned the employee's application pursuant to section 643 of the *Workplace Relations Act* that his termination of employment on 23 November 2006 was harsh, unjust or unreasonable pursuant to section 643(1)(a).

The employer filed a Notice of Motion and sought that the matter be dismissed on two grounds:

- The Application was frivolous, vexatious and lacking in substance; and
- The applicant was not employed under award-derived conditions.

The arguments raised by the employer were rejected and perhaps could be framed in the *cute or unusual* arguments category.

The applicant's annual income was \$95,000.00 plus superannuation and life insurance and he was employed as a pre-sales consultant. The argument raised by the employer was there was no relevant award that covered such work. The Commissioner found it quite easy to find that such employment could be covered by an award - the Commercial Sales (Victoria) Award 1999.

→ It seems to us it would be unusual where an award could not be found to cover most employment type occupations. Nevertheless the award conditions provision is something that can be reviewed when looking at arguments that might be raised in assessing Applications for relief under section 643.

Secondly, the employer raised the argument that the parties had entered into a contract such that no claim could be brought, that is the matter had been settled. An examination of the contract or agreement revealed it covered what were in fact the employee's legal entitlements on termination and no more. Clearly no consideration passed for an agreement that could be found to be *attributable to giving up a statutory right*.

→ If parties are looking to settle a matter such that it would not end up in the Commission, they need to clearly state terms and provide consideration such that the matter is in fact settled.

2. Michael John Allen v BUSES Queensland [2007] AIRC 200

This is a decision of Senior Deputy President Richards and delivered on 9 March 2007.

The employer was of the view the employee had abandoned his employment. Once the employee had filed an Application under section 643 of the *Workplace Relations Act*, the employer filed a Notice of Motion to dismiss the Application on the basis that it was frivolous, vexatious or lacking in substance on the basis the employment was not terminated but that he had abandoned his employment on Friday, 24 November 2006.

Deputy President Richards found the basis of the Notice of Motion could not be made out and the words used by the employer in an exchange with the employee on 24 November 2006 were such *it provided reasonable scope for the applicant to infer that the respondent had formed the view that his conduct, of whatever kind prior to or at 24 November 2006 was such that it no longer sought to employ him.*

There were various contests in the evidence about what was actually the situation regarding the ending of the employment but the content of the conversation and a reference to having *you sacked yourself* by the employer to the employee caused Deputy President Richards to find the case not made out by the employer.

→ An employer should have a proper process in place and be aware of what words that can and cannot be used in taking steps to terminate an employee and what an employee may infer from conduct and words at time of termination.

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