

MOONLIGHTING TRUCK DRIVER'S DISMISSAL UNFAIR

A DELIVERY DRIVER WHOSE EMPLOYMENT WAS TERMINATED AFTER HE WORKED FOR HIS EMPLOYER'S CUSTOMER DURING HIS ANNUAL LEAVE HAS BEEN AWARDED \$12,864 COMPENSATION AFTER THE FAIR WORK COMMISSION FOUND HIS DISMISSAL WAS HARSH, UNJUST AND UNREASONABLE.

In mid-May 2014, a Moonlighting truck driver requested annual leave for the first week in June, telling his employer that he needed to register his car. Despite the fact that the company's policy required two weeks' advance notice for annual leave, his manager agreed to the request – after all, the driver had been working for the company for over six years and had a previously unblemished record. After the driver had received permission to take the annual leave, he was then contacted by one of the company's customers. The driver had, in the course of his employment, frequently made deliveries to this customer and had developed a good working relationship with its director. The director offered the driver a full-time position, which he refused. However, he was also offered and accepted freelance driving work for that business. After accepting the freelance work, the driver (amongst other things) asked his colleague to spread a rumour that he was leaving to work for that business in the hope that his employer might pay him more to keep him. However, the company's General Manager attended the customer's workshop and witnessed the driver loading a truck there. He approached the driver and asked him what was going on. He told his Manager that the customer had needed a hand

and he had "needed the extra cash." When the driver returned from annual leave, he was told that working for the company's customer was a conflict of interest (that is, he was in breach of an implied contractual duty of fidelity and good faith) and that he could either resign or be sacked. The driver ultimately agreed to "resign" and signed a resignation letter drafted by his employer.

When has a person been "dismissed"?

The Fair Work Act 2009 (Cth) (Act) provides protection for (certain eligible) employees from being unfairly dismissed. That protection is only available if the employee has been dismissed at the employer's initiative. A resignation will be considered to be a constructive dismissal (i.e. tantamount to a dismissal at the employer's initiative) if the resignation was forced or given under pressure, such as where the employee was given an ultimatum to resign or be fired. In this case, the employer argued that the driver had voluntarily resigned and was therefore ineligible to bring an unfair dismissal application. However, the Commission rejected this argument, saying the notion that the driver voluntarily resigned to pursue

other career goals was "nonsense". Commission Vice President Hatcher found that the driver was given the choice of resigning or being dismissed and that in the circumstances the driver felt (understandably) that he had no choice but to resign. His Honour therefore concluded that the driver was "dismissed" for the purposes of the Act. Having found that the driver was dismissed, the Commission turned to an assessment of whether that dismissal was harsh, unjust or unreasonable (or in other words "unfair").

When has a person been "unfairly" dismissed?

The Act sets out a number of factors that the Commission must take into account in determining whether a dismissal is "unfair". At its simplest, the Commission is making an assessment as to whether there was a valid reason for the dismissal; and a procedurally fair process.

Why was this dismissal found to be unfair?

The Commission held that the termination of the driver's employment was unfair because there was neither a valid or legitimate reason for the termination nor a procedurally fair process. While, at first glance, the Commission's decision may seem surprising, the company (aside from denying that the employee had been dismissed) failed to provide a substantial defence to the proposition that if there was a dismissal, it was unfair. Vice President Hatcher commented that the real reason for the driver's dismissal was in fact obscured because of the company's dishonest denial that there was a termination. However, his Honour said that the real reason appeared to be the driver's apparent dishonesty in working for the company's customer when on a period of annual leave, which his Manager had thought he'd taken to register his car. Vice President Hatcher held that there

was no evidence that the work the driver had done for the customer was work that might otherwise have been done by the company and so no conflict of interest arose. Interestingly, the Commission further found that "undertaking secondary employment which does not encroach on the primary employer's field of business does not contravene the implied contractual term of fidelity and good faith. Nor does the implied term impose any duty upon the employee to disclose secondary employment of this nature". Accordingly, his Honour found that there was not a legitimate reason for terminating the driver's employment. Furthermore, as the real reason for the dismissal was never disclosed to the driver, the Commission found that the driver was denied procedural fairness as (amongst other things) he was never given a proper opportunity to respond to the employer's decision to terminate his employment. The Commission noting that the so-called procedures adopted in dismissing the driver were "entirely illegitimate".

Conclusion

While there are a number of terms implied into all contracts of employment (whether they are written or otherwise), such as an employee's duty of good faith and fidelity, these implied terms can be of limited effect (as this case demonstrates). This judgment would probably have been different if there had been an express term requiring the disclosure of, or employer's consent to undertake, secondary employment. Employers should be clear about their expectations regarding secondary employment in their employment contracts, particularly given this judgment, which makes it clear that unless there is a real or perceived conflict of interest to an employer's business, undertaking secondary employment may not of itself be a valid reason for terminating an employee's employment. 



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