

[2023] FWC 3103 [Note: An appeal pursuant to s.604 (C2023/7931) was lodged against this decision - refer to Full Bench decision dated 5 March 2024 [\[2024\] FWC FB 124](#) for result of appeal.]



DECISION

Fair Work Act 2009
s.739—Dispute resolution

Anthony Duncan

v

Chief Minister, Treasury & Economic Development Directorate
(C2023/4819)

DEPUTY PRESIDENT DEAN

CANBERRA, 29 NOVEMBER 2023

Application to deal with a dispute – application dismissed.

[1] Mr Anthony Duncan (Applicant) is a full-time teacher at Lyneham Primary School. His employment is covered by the *ACT Public Sector Education Directorate (Teaching Staff) Enterprise Agreement 2018-2022* (the Agreement). He is employed by the Chief Minister, Treasury & Economic Development Directorate (Respondent).

[2] By way of an application made under s.739 of the *Fair Work Act 2009*, the Applicant seeks a review of a decision of an Appeal Panel made on 1 August 2023 (the Appeal Decision). The Appeal Decision dealt with an appeal by the Applicant of a sanction issued on 31 October 2022 consisting of a written reprimand and a financial penalty of a reduction of a pay increment level for 12 months.

[3] The event giving rise to the sanction is set out below.

[4] In this application, the Applicant seeks the sanction imposed on him “be declared a nullity”, and the loss of income because of the sanction be reimbursed to him.

[5] The application was heard by video on 24 November 2023. The Applicant was represented by Mr Hobbs, who refers to himself as a ‘legal advocate’, and the Respondent was represented by Mr Chilcott of the ACT Government Solicitor.

Statement of Agreed Facts

[6] The parties filed a Statement of Agreed facts as follows:

“Around 11:00am on Monday 16 August 2021, the Applicant, during a one-on-one conversation with his supervisor during his hours of duty, picked up a cask of wine, lifted it above his head and opened the tap to drink from it.

Mr Duncan was not responsible for students for the remainder of Monday 16 August 2021 following the incident.

At the time of the incident, the Applicant's employment was subject to the "Code of Conduct for Teachers, School Leaders and Principals" (**Code of Conduct**). Section 7.2 of the Code of Conduct relevantly provides:

Consistent with the Alcohol Policy and their responsibilities as professionals, teachers on duty must not:

- (a) be under the influence or in possession of illegal drugs
- (b) be under the influence of alcohol
- (c) supply students with alcohol, illicit drugs or tobacco
- (d) supply students with prescribed or over-the-counter medications unless authority from the parents or carers is held
- (e) consume alcohol on school premises during normal school hours of 8.30 am and 4.51 pm on Monday to Friday, except where the principal has given an exemption for special occasions at times when students are not present on the school premises
- (f) carry or consume alcohol in government vehicles, except where prior approval in writing has been given for a special occasion by the principal
- (g) allow students, regardless of age, to consume or possess alcohol at any school activity including excursions, outdoor adventure activities and camps
- (h) consume alcohol during hours of duty or when they have a continuing responsibility for students.

This includes school excursions, outdoor adventure activities and any other school activity held outside ordinary school hours.

At the time of the incident, the Applicant's employment was also subject to the *ACT Public Sector Education Directorate (Teaching Staff) Enterprise Agreement 2018-2022 (EA)*. Section H11 of the EA governed the Respondent's ability to levy disciplinary actions and sanctions against the Applicant arising out of any misconduct findings."

[7] By way of further background, a COVID lockdown was in place at that time and teachers (including the Applicant) had been given 5 days to prepare learning materials able to be used online before commencing 'remote learning' with students. The Applicant (and other teachers) were also the subject of a 'work from home' direction issued by the Respondent.

[8] It is unnecessary to set out the events that took place between 16 August 2021 and the time of the Appeal Decision on 1 August 2023, other than to note that a preliminary assessment took place in accordance with the terms of the Agreement, which led to an investigation by the Professional Standards Unit. The Professional Standards Unit issued its report on 3 May 2022, making a finding that the Applicant's conduct was 'inappropriate' and not in accordance with the requirements of the Code of Conduct.

[9] The proposed findings of the investigation were given to the Applicant, and he provided a response before the sanction was imposed. There was a large volume of correspondence from Mr Hobbs on behalf of the Applicant throughout this process.

The Appeal Panel

[10] The powers and role of the Appeal Panel are set out in clause J4 of the Agreement. Clauses J4.8 and J6 of the Agreement are particularly relevant and provide as follows:

“**J4.8** After reviewing any application under this section, the independent appeal member must, subject to subclause J4.5.3, make a determination of the appeal and do one of the following:

J4.8.1 Confirm the original decision.

J4.8.2 Vary the original decision.

J4.8.3 Prescribe that other action be taken.

J6 - Right of External Review

J6.1 The employee, or the employee’s union or other employee representative on the employee’s behalf, may seek a review by the FWC of a decision under subclause J4.8.

J6.2 The FWC is empowered to resolve the matter in accordance with the powers and functions set out in clause F6 - of this Agreement. The decision of the FWC is binding, subject to any rights of appeal against the decision to a Full Bench in accordance with subclause F6.14.”

[11] I am satisfied that the appeal was conducted in accordance with the Agreement, and the Appeal Panel (by majority), having considered all the matters before it, made a decision in accordance with J4.8 to confirm the original decision and dismiss the appeal.

[12] The right of external review (clause J6) allows the Commission to review a decision made under clause J4.8, which is the purpose of this decision.

[13] The Appeal Decision outlined in detail the background of the matter and the issues raised, which are not repeated here. Of importance is its consideration of the issues, which is set out as follows:

“Consideration of the Issues

We believe that this is a matter of relatively short compass. To begin we will not deal with the allegation of smoking as no sanction arose from the allegation. It was open to the delegate to characterise the smoking the way he did. Instead, we will concentrate on the allegation of consuming wine during a meeting with Ms Neilson.

The agreement provides that an employee may be suspended without pay where serious misconduct is alleged. In addressing this issue Mr Duncan refers to an allegation and

put forward the view that ‘no guilt can be presumed until the allegation has been proven beyond reasonable doubt’. The criminal onus does not apply here rather it is the civil onus of the balance of probabilities. As it transpired it is not necessary to deal with any conflicting views.

It appears to us that the incident as described occurred. Notwithstanding Mr Duncan's written submission that he considered ‘the allegations against me a hyperbolic and lacking in veracity and thereby vociferously denied’, Mr Duncan went on admit he was smoking but defended that smoking as not impacting on anybody and in the appeal papers it is conceded that alcohol was consumed. Mr Duncan denies he was affected by alcohol and argues that the meeting had concluded. The evidence of Ms Neilson is clear and that it was open to the delegate to conclude that Mr Duncan did consume alcohol. The fact on this aspect is uncontested.

In his defence, Mr Duncan relies on his view of ‘workplace’ as it appears in the various policies and codes of conduct he put forward. He argues that he was not in a workplace and therefore any and all findings are a nullity. He also argues that he thought the meeting was over.

We are not persuaded by these arguments. If the first argument was right, then a teacher could smoke and consume alcohol in front of children in an online classroom setting. It is misconceived. There is no doubt that Mr Duncan was at work. Indeed, the employer has a duty to ensure a safe workspace in a person's home when working from home. Relevant regulatory bodies may examine such a workplace even if it is in a home. Compensable injuries can arise from working from home. We are also not persuaded by the argument that work had finished and therefore the consumption of alcohol was a private matter. Mr Duncan was at work during normal hours of duty. The relevant policies apply.

The ACT Department of Education policies state clearly:

Staff will not consume alcohol during hours of duty or when they have a continuing responsibility for students. This includes school excursions/outdoor adventure activities and any other school activity held outside ordinary school hours.

This, in our view, constitutes a lawful direction.

The consumption of alcohol whilst at work was found to be misconduct by Mr Ackland and, in our view, such a finding was open to him. We do not comment or make any findings on the whether or not Mr Duncan was under the influence of alcohol as this is a separate matter and not pursued. No doubt the employer has alcohol and other drugs policies. Clearly if a person is under the influence of alcohol this can be regarded a serious misconduct and lead to termination of employment. Mr Duncan did not have his employment terminated.”

Consideration

[14] I agree with the Appeal Panel's consideration of the issues. In particular, I am satisfied that the Applicant was at work at the relevant time and did in fact consume alcohol. So much is clear from the statement of agreed facts.

[15] Mr Hobbs contended that the Applicant's home was not a 'workplace' and as a result he could not have been in breach of the Code of Conduct because he did not consume alcohol on school premises. Whether his home is or is not a workplace does not change the fact that the Applicant consumed alcohol whilst working and during his normal hours of duty, and further that he was subject to a 'work from home' direction at the time because of a COVID lockdown.

[16] There is no dispute that the relevant policy, which the Applicant confirmed he was aware of, prohibited the consumption of alcohol during hours of duty. It is irrelevant that the Applicant was not responsible for the supervision of students afterwards – the policy is clear that no alcohol is to be consumed during hours of duty regardless of any supervision obligations.

[17] Despite Mr Hobbs' arguments to the contrary, I am satisfied that 16 August 2021 was not a time period equivalent to school holidays, referred to as 'stand down time' by Mr Hobbs. The Respondent had provided teachers with 5 days to plan and prepare learning materials for remote learning which was to commence at the conclusion of the 5 day time period.

[18] Mr Hobbs contended that the conversation between the Applicant and his supervisor during which the Applicant consumed alcohol was 'private' and therefore not able to be acted upon by the Respondent. While the conversation between the Applicant and his supervisor may have been 'private' in the sense that they were the only two people involved in the discussion, it was a work related discussion conducted during work time. It is not disputed that the primary purpose of the discussion was to talk about how the lockdown would be managed and what the teachers had to do to prepare for remote learning.

[19] There is no doubt the sanctions imposed on the Applicant were sanctions available under the terms of the Agreement.

[20] Given the above matters, I am satisfied the sanction imposed on the Applicant was open to the Respondent, and reasonable and proportionate in the circumstances. Accordingly, I dismiss the application.

 

DEPUTY PRESIDENT

Appearances:

P Hobbs for Anthony Duncan.

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M Chilcott of ACT Government Solicitor for Chief Minister, Treasury & Economic Development Directorate.

Hearing details:

2023.

By video:

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