

Court fines employer who deliberately sacked worker with cancer to avoid paying sick leave

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The Federal Court has been highly critical of a business which sacked a long-term employee to prevent him from taking sick leave after he was diagnosed with cancer.

The employee was owed about 500 hours' sick leave when he told his employer he had cancer.

In response, the man's employer placed continuous pressure on him to resign for over a month.

After having no success, the employer told the man he did not believe there was anything wrong with him and subsequently dismissed him.

The employee was not paid sick leave, wages in lieu of notice or annual leave entitlements which were valued at about \$16,000.

At one stage, after a concerted campaign to coerce the employee to resign, the employer threatened to physically throw the man - who had worked at the business for more than nine years - off the premises.

Following legal action by the Fair Work Ombudsman, Justice John Gilmour has penalised the business and its operators a total of \$41,500 and severely criticised their behavior.

Perth businessman Pasquale Minniti has been fined \$6500 and the private company he jointly runs with his wife, AJR Nominees Pty Ltd, has been penalised a further \$35,000.

Minniti and AJR Nominees - operators of panel beating and spray painting business Hi-Lite Automotive on Beechboro Road, Bayswater, have until May 25 to pay the fines.

Fair Work Ombudsman Natalie James says the employer's conduct in this matter was appalling and the Court has signalled a warning that similar behavior from others will likewise not be tolerated.

"It beggars belief that an employer would behave so callously as to try to prevent a long-serving employee from accessing a lawful entitlement in a time of need," she said.

During the Court case, positive references were submitted that Minniti was of good character, but Justice Gilmour found that his conduct during proceedings "ultimately became dishonest as he manufactured false evidence and adduced false evidence at trial".

Justice Gilmour noted that Minniti spent nine months in jail in 2008 for dishonesty, including attempting to induce a witness to give false testimony, false declaration and corruption - saying "this serious criminal record rather rebuts the contention that Minniti is of good character."

The employee, a spray painter, told Minniti in December, 2010, that he had cancer. He had worked at Hi-Lite Automotive full-time for more than nine years and had accrued considerable paid personal leave.

Justice Gilmour found that Minniti responded by pressuring the employee to resign in a "concerted campaign" over six weeks to prevent him accessing his paid personal leave.

Minniti accused the employee of malingering, telling him he did not believe there was anything wrong with him - and on one occasion rang the employee's General Practitioner to try to get information on his medical condition, the Court found.

Justice Gilmour also found that in February, 2011, Minniti accused the employee of "making up his illness and then not only told him to leave, but threatened to physically throw him off the premises".

The employee was "coerced and then dismissed at a time he was most vulnerable" and "suffered financially at the time when he was confronting his serious medical condition".

"He was about to start chemotherapy. Instead of receiving several months of sick pay that he had accumulated over nine years of employment, he was dismissed by his employer and paid nothing," Justice Gilmour said.

The Court found that the workplace contraventions were deliberate. "There was nothing inadvertent about Minniti's conduct in this case. He did not proceed upon a mistaken view of the law," he said.

He went on: "It cannot be said that the Respondents were unaware of the legal consequences of their conduct ... Minniti wanted to make it look as though (the employee) had resigned in order to avoid paying him his accumulated personal leave."

Justice Gilmour criticised Minniti for his conduct at the contested hearing, saying his defence was based on "manufactured evidence and lies".

"Minniti ran ... a dishonest defence," he said. "There was not, until after judgment in the trial on liability, any acceptance of wrongdoing by him. His expressions of remorse are belated and other than in relation to the question of specific deterrence, I give no weight to them in my assessment of appropriate penalties."

The behaviour of Minniti and AJR Nominees was "objectively serious and warrants a significant deterrent penalty".

"The need for general deterrence in the present case is strong and the law should mark its disapproval of the respondents' conduct and impose a penalty at a level which will serve as a warning to like-minded employers," Justice Gilmour observed.

Minniti's submission that media coverage of the case adverse to him should be a mitigating factor in determining penalty was dismissed.

"The publication of information about compliance activities is an important part of the (Fair Work Ombudsman's) role as regulator of workplace laws," Justice Gilmour noted.

In his 18-page written decision, Justice Gilmour said that "the workplace rights sought to be protected in this case were fundamental and were all in the NES (National Employment Standards)."

"The right to take personal leave (in this case sick leave) is a very basic workplace right. The NES (also) provides that accrued untaken annual leave should be paid when the employment ends," he said.

Justice Gilmour also noted that the employee had a right to five weeks' notice of termination, or payment in lieu - also provided for under the NES.

While the employee has since received about \$16,000 from AVR Nominees for the entitlements he was originally denied, Justice Gilmour noted that it had been "an arduous journey" for the man.

The Court heard submissions that Minniti had "made a clean break with his past and has been responding well to therapy and counselling."

The Court was told that Minniti "is sober and faces his past actions with regret, but with honesty. He realises now he treated his worker with indifference and anger borne out of his own frustrations with life."

In response, Justice Gilmour said: "It is hoped that this will enable Minniti to put his personal and business life on a stronger footing, as well as enable him to confront and deal with the consequences of his serious contraventions, including the payment of any penalties."

It unlawful to take adverse action against an employee, such as dismissing them, to prevent an employee from exercising a workplace right, such as accessing a lawful entitlement to take leave.

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