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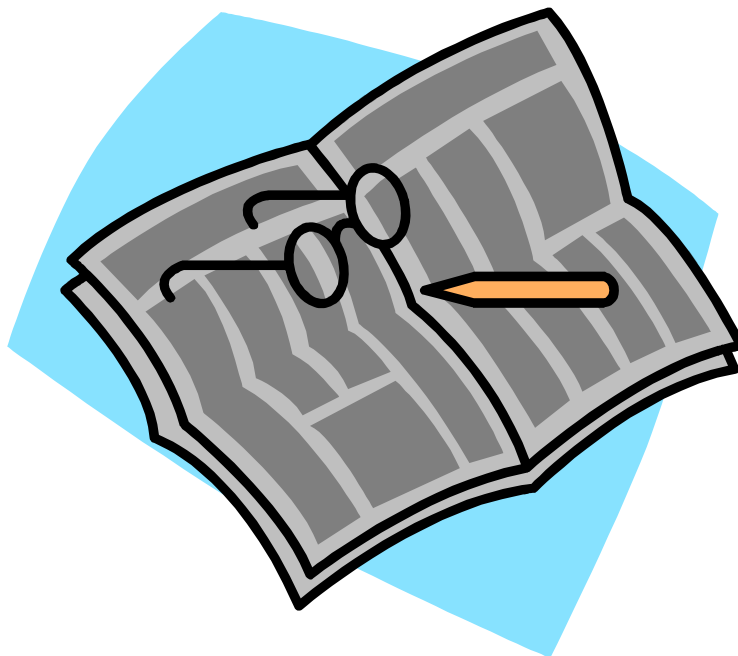
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**Easy HR Newsletter
April 2005**

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The Loud Ear of the Law

A technical officer suffered acoustic trauma when a senior constable activated a siren as a joke. Since no noise management policy, instruction about the dangers of exposure to noise or even hearing protection had been provided, the employer was found guilty.

A technical officer working for NSW Police was inspecting a new four-wheel drive police vehicle outside the workshop when a senior constable inside the vehicle sounded the siren. The senior constable later apologised for his action, saying he had only been "mucking around" and the whole thing had been "a joke gone wrong". The technical officer, however, suffered acute acoustic trauma to his right ear, and balance disturbance.

Testing sirens was a common occurrence in the workshop yet there were no set procedures nor were there signs to warn personnel to wear hearing protection when it occurred.

After the accident, the employer introduced a noise control policy and provided instruction and directions that alerted employees to the dangers of excessive noise. Activation of sirens other than in circumstances that were safe was prohibited.

The technical officer was a member of the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales and, as a result of the incident, the General Secretary of the union instituted proceedings against the technical officer's employer.

The employer was charged with failure to ensure the health and safety of its employees in breach of s 8(1) of the Occupational Health and Safety Act 2000 (NSW). The particulars of the charge included failure to:

- prevent another employee from activating the siren
- have in place a noise control policy
- provide information and training about noise, the range of health effects caused by noise from sirens and the appropriate control measures.

The employer pleaded not guilty to the charge, arguing that there was no evidence that having a noise control policy and providing information and training to staff would have made any difference to the senior constable's action.

In court an expert witness on noise said the pain threshold occurred at about 120 dB. The technical evidence indicated that the siren on the car could emit sound pressure levels up to 129 dB(A) at one metre. The expert witness also said the Code of Practice for Noise Management and Protection of Hearing at Work ought to state that employees should not be exposed to sound pressure levels greater than 115 dB for longer than one second without adequate hearing protection, and added that, in his opinion, not enough guidance was given in the code on how to develop and implement practices for noise management and hearing protection.

The court found that, if the employer had had a noise management policy and provided adequate training and information about the serious injury that can be caused by exposure to noise, the senior constable would not have been tempted to play his practical joke and no risk to health and safety would have arisen. The charge had been made out and the employer was guilty.

Submissions on penalty were to be heard at a later date (Cahill v State of New South Wales (NSW Police) [2005] NSWIRComm 33, 17 February 2005).

Wish I Said That....

"We learn from experience that men never learn from experience" G.B.Shaw 1856-1950

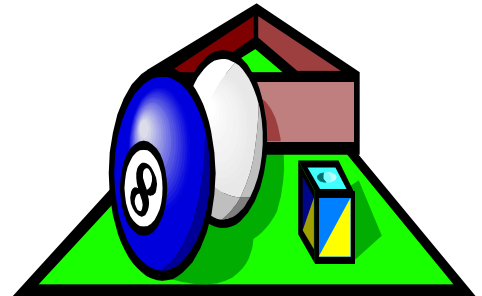
New Benchmark for "Employer of Choice"

There are many enterprises, both large and small, that covet the description "employer of choice" but the benchmark has been raised by an animation studio in San Francisco.

Pixar Studios employs about 800 people that work on their 6.5 hectare lot. The company was founded in 1986 by George Lucas. It is now run by chairman and chief executive officer Steve Jobs and president Ed Catmull.

A visit to the animators headquarters in San Francisco would make any office worker jealous with its in-house tennis courts, massage rooms, swimming pool and food court equipped with a wood-fire pizza oven. There's also a fully equipped games room with air hockey and billiards.

"Once you know that people are the most important thing in the business, it becomes straight forward about the kinds of choices you make," Pixar trainer Randy Nelson said. "Of course you are going to have massage therapy and a fitness centre... of course you are going to have opportunities for people to exercise together, play together and learn together."



In partnership with Walt Disney Pictures, Pixar has created a host of world-famous films including Toy Story (1995), A Bug's Life (1998), Toy Story 2 (1999), Monsters, Inc. (2001), Finding Nemo (2003) and The Incredibles (2004).

Life's Like That

A 22-year-old man sliding down a ski run in California, crashed into a lift tower and died. He was sliding on a makeshift sled of yellow foam. The lift towers are meant to be cushioned by this foam, and the tower he hit was the one from which he had stolen the foam to make his sled.

Fortean Times

Choosing Your Superannuation Fund

From 1 July 2005, employees will be able to choose into which super fund their superannuation contributions are paid. The Government has estimated that Super choice will affect 4.82 million employees and 654,000 employers.

A recent survey commissioned by the Association of Superannuation Funds of Australia (ASFA) suggested that only around eight per cent, or 456,000 employees, will make a move.

Pro-choice advocates argue the changes will promote competition and efficiency within the superannuation industry, leading to improved returns and lower fees and charges for all superannuation fund members.

Choice would be particularly appealing to part-time workers and to people who have several jobs, as they will be able to direct all their superannuation contributions into one superannuation fund. This should reduce costs and help eliminate "lost" super accounts with small balances.

Are You Entitled To Choose Your Super Fund

Not all employees will have superannuation choice under the changes.

Employees who will not be entitled to choose their own superannuation fund are:

- public sector employees;
- those whose employer makes superannuation contributions under, or in accordance with, a state industrial award or workplace agreement; and
- some defined benefit fund members.

There are a number of types of workplace agreements that are exempt from choice legislation.

- Certified Agreements - Certified agreements are agreements between employers and unions that represent the employees of the company or can be between employers and their employees. Certified Agreements can be Federal or State based. They may nominate superannuation funds for the employer to make contributions.

- Australian Workplace Agreements - Australian Workplace Agreements (AWAs) are individual contracts between an employer and an individual employee. They may nominate a superannuation fund for the employer to make contributions.
- State Awards - State awards are industrial instruments that provide a minimum set of conditions for either whole industries or for specific employers. The majority of state awards apply to industries rather than specific workplaces or employers. State awards can apply to both private and public sector employees.

How to Change Funds

The industry has developed a standard choice form for advising your employer of your superannuation choice. This form offers employees two options: Do nothing, or Choose a fund. It includes tips for comparing funds under the four headings: Fees, Death and Disability Cover, Investment Choice and Investment Performance.

Obligations In Relation To Existing Employees

An employer subject to choice must give a standard choice form to each employee eligible for super fund choice. Employers must give each member of staff employed by them as at 1 July 2005 a *standard choice form*. This must occur before 29 July 2005.

Obligations In Relation To New Employees

- Each new employee employed after 1 July 2005 must be given a *standard choice form* by the employer within 28 days of commencing employment.
- If an employee has previously not exercised a choice but asks the employer for a *standard choice form*, that form must be given to them within 28 days.

Where an employee has chosen a fund that is no longer an eligible choice fund, the employer must, within 28 days of becoming aware, give the employee a *standard choice form*.

A *standard choice form* must also be given to an employee within 28 days, where the employee has opted for the default fund and the employer changes the default fund.

So What Do You Do Now?

Chasing higher returns and switching for performance however may not always be to the employees advantage as all funds warn that historical performance should not be an indication of future performance. The low performing fund of last year that you are switching from could well be the stellar performer of next year.

With regard to fees, even small differences over a working life of over thirty years can make a material difference to the retirement nest-egg.

The place to start evaluating any fund is by taking a good look at its product disclosure statement (PDS). The PDS sets out the fund's performance, fees and other information, such as insurance. Compare the statements of your current fund with the fund that you are considering changing to and see which best meets you requirements and expectations. It is important to be thorough with your research.

Want More Info

- Contact your current super fund
- Association of Superannuation Funds of Australia Limited
<http://www.asfa.asn.au/super/rpm.cfm?page=choice>
- Chioce Of Superfunds
<http://www.choiceofsuperfund.com.au>

Fairs Fair

"A Nairobi physician, after removing a bean from a young girl's ear, jammed it back in when her parents came up short on cash for the \$6 operation."

The Edge, Oregonian



When you Gotta Go, Think Twice!

A factory worker sacked for taking too many toilet breaks was not unfairly dismissed, a full bench of the AIRC has reaffirmed.

In the appeal, the worker argued a single commissioner failed to fully investigate her version of the incidents and a related breach of the certified agreement by her employer, Rheem Australia.

Both arguments were tossed out by a full bench consisting of VP Michael Lawler, DP Patricia Leary and Cmr Barbara Deegan. It said commissioners were not bound by the traditional rules of evidence. They could form an opinion based on the 'credit' of the parties and available evidence, and without the need for cross-examination, it said. The bench also rejected the worker's claim she was wrongly denied a four-week period in which to demonstrate an improvement in attendance, as required under the certified agreement. 'In our opinion the term 'absenteeism' [in the CA] refers to attendance at work late, leaving work early or failing to attend work at all', the bench said. 'The actions of the appellant that led to her dismissal were, as the commissioner preferred, more properly characterised as misconduct.'

The bench was told the worker repeatedly failed to comply with directions that she seek permission from a supervisor before leaving her workstation to go to the toilet or for other purposes - and that such absences be limited to 10 minutes. The bench was told that, up until 2000, there had been an informal arrangement allowing workers two unofficial breaks of 20 minutes in each shift. This was scrapped in 2000 and all workers were required to seek permission for any absence. Rheem said the worker was officially warned twice for ignoring the requirement. The matter came to a head in 2003, with the company citing 11 separate incidents over nine continuous working days where the worker had absences of greater than 10 minutes each, three of which were unauthorised.

Workforce, February 2005

What Do You Notice About Your Employees?

When it comes to safety, what does it take for most employees to receive the personal recognition they need and desire? Three examples:

1) Carol places a hard hat on her head over 2,000 times a year. No one notices. However, one day, because she is in a hurry, Carol forgets to put her hard hat on and her behaviour finally receives recognition.

2) John, a supervisor who rarely has to fill out accident reports because his crew members work safely, does a poor job completing his first one this year. His recognition: a returned form with the word "incomplete" stamped on it.

3) Though David's department obtains some acclaim for going six months without a lost-time or Workcover recordable injury, only after he becomes a vital statistic and ruins his department's record does he receive the personal recognition he needs and desires. Unfortunately, it doesn't feel pleasant this time.



Safety Stuff 244

Did you Know

The inedible or even poisonous mushroom like fungi are not called toadstools because toads actually use them as stools. The word derives from the German tod and stuhl, meaning "death stool," in reference to the poisonous nature of many of these fungi.

Daffy Definition

Committee: A group of people who individually can do nothing but as a group decide that nothing can be done. Fred Allen

Dismissal for Refusal to Take Random Drug Test Unfair

An employee who was dismissed for failing to take a drug test has succeeded in his unfair dismissal claim, despite admitting that he would have failed the drug test.

This case serves as a warning that employers need to take into account a range of factors before terminating an employee for failing a drug test or for refusing to take a test. There is a danger in adopting pre-determined sanctions for non-compliance as this can produce an outcome that is perceived to be unfair.

Employers should also ensure that the contents of a drug policy are explained to staff so they are aware of the potential consequences of testing positive to, or refusing, a drug test.

The applicant was a forklift driver and operator at a hay processing plant and had signed an Australian Workplace Agreement (AWA) which contained a drug and alcohol policy (the Policy). The Policy provided for random testing as well as testing where there was suspicion that a particular employee was under the influence of alcohol or illegal drugs. The Policy described the consequences of non-compliance as follows:

- an initial refusal to take a drug test would immediately incur a final warning notice;
- failure to comply with a second requested drug test would result in termination; and
- being under the influence of alcohol or an illegal drug would result in instant dismissal.

In April 2001, management received reports that night shift employees may have been smoking marijuana at the workplace. One month later the employer conducted random drug and alcohol testing of employees at the end of a shift.

The applicant was directed to provide a sample of his urine as part of the random drug test. The applicant had smoked marijuana before attending work and thought it would be detected by the urine test. When the applicant asked what would happen if he refused to take the test, he was told that he would initially receive a written warning. The applicant refused the test and was issued with a written warning. He was then asked to reconsider his decision. The applicant took some time to reconsider his decision before finally rejecting the test. He was then given a final warning and termination notice.

At trial, the applicant gave evidence that he would rather have his employment terminated than return a positive drug test as he considered that this would have a greater impact on his future employment prospects.

Decision at first instance

At first instance, the South Australian Industrial Relations Commission (SAIRC) held that there was no valid reason for the termination of the applicant's employment. Commissioner Dangerfield held that the drug and alcohol policy in the AWA did not give the employer authority to conduct random urine drug testing. As a result, the applicant's refusal to take the test did not provide grounds for the termination.

Commissioner Dangerfield found that the Policy was ambiguous and internally inconsistent because it did not clearly define whether blood or urine testing would be used for random testing. He was also critical of the fact that the urine test undertaken by the applicant only detected the presence of marijuana and could not be used to assess whether the applicant was impaired by marijuana. Commissioner Dangerfield pointed out that there was no evidence that the applicant's work performance had been impaired by his use of marijuana.

The Policy was considered to be unreasonable because of the stark choices that it presented the applicant in terms of how he would conduct his private life. The Commissioner found that the job the applicant performed was not sufficiently exceptional to warrant a zero tolerance policy towards drugs.

Furthermore, the Commissioner held that the termination of the applicant's employment was harsh, unjust and unreasonable in the circumstances and ordered the employer to pay \$37,000 in compensation.

Appeal to Full Bench

On appeal, a Full Bench of the SAIRC found that the employer was authorised to conduct random urine testing under the terms of the AWA. However, the Full Bench refused the appeal on the basis that the employer had acted unreasonably in terminating the applicant's employment.

The Full Bench accepted that, on the basis of the information provided by his employer, the applicant thought he would be dismissed from his employment if he failed the urine test. However, the employer had given the applicant the wrong impression in this regard. The terms of the AWA entitled the employer to impose sanctions that may include termination of employment.

The Full Bench found that if the employer had not given the applicant the wrong impression, the applicant would have appreciated that he would not necessarily be dismissed if he returned a positive test and, as a result, may not have refused to take the test.

In addition, the Full Bench was critical of the fact that the employer had adopted a pre-determined attitude about non-compliance with the Policy. The Full Bench quoted a previous decision of the SAIRC in which it was said:

there is no descriptive check list by which to determine whether the conduct complained of justifies summary dismissal, but rather, that each case must be decided on its own particular facts, taking into account all relevant circumstances.

In the circumstances, the Full Bench held that it was unjust and unreasonable for the employer to rely upon the applicant's refusal to take the test in terminating the applicant's employment. The Full Bench dismissed the employer's appeal.

The most important factor to keep in mind when drafting a drug policy is whether the policy is appropriate to the circumstances of the workplace. The policy should go no further than is necessary to protect an employer's legitimate interests.

For example, while a 'zero tolerance' policy may be appropriate in workplaces where heavy machinery is being operated, it may not be considered reasonable to have such a strict policy in an office environment. This case confirms that judges are reluctant to uphold drug and alcohol policies that impose restrictions on what employees can do in their private lives.

Employers should also be aware that it will be more difficult to defend a dismissal where there is no evidence that the employee's performance was impaired by drugs or alcohol.

This case also raises some other issues to keep in mind in relation to drug policies, such as:

- whether the method of testing (e.g. breath, saliva, urine, blood) is able to measure an employee's impairment, not merely detect the presence of drugs or alcohol;
- whether the sanction imposed for refusing to take the test is harsher than the penalty for failing the test;
- whether the drug and alcohol policy is developed in consultation with employees (this was taken into account by the SAIRC in construing the terms of the policy); and
- whether the policy is properly explained to employees such that they are aware of the consequences of non-compliance.

Golden Plains Fodder Australia Pty Ltd v. Ashley Perkins [2004] SAIRCComm 44 (19 August 2004) *Employment Factbook November 2004*

Tenth in Line

A young journalist, eager to begin his career, found what seemed like the perfect job advertised in the local newspaper. He called the newspaper and was informed that applicants would be interviewed at 10:00 the next morning.

With resume in hand, the young man arrived early the next morning. To his dismay he found nine other hopeful journalists in line ahead of him. He quickly reviewed the situation and then wrote a note which he handed to the secretary with the message that it was important that the boss see it immediately. When her boss read it he grinned and found himself eager to meet the young man who had written the note.

The note read: "Dear Sir: I'm the young man who is tenth in line. Please don't make any decisions until you see me".

The Speakers Sourcebook. Glen Van Ekeren

Survival Tips When You Are Out On the Town

Next time you are too drunk to drive, walk/crawl to the nearest pizza shop. Place an order, and when they deliver it, ask if you can catch a ride home with them. 😊

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