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## Dismissal for alcohol induced ‘sickie’ found to be unfair

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*Avril Chapman v Tassal Group Limited T/A Tassal Operations Pty Ltd*  
[2017] FWC 4630

### Background

Ms Avril Chapman commenced employment with Tassal Group Limited (**Tassal**) in August 2012.

At 4:46 pm on 25 April 2017, Ms Chapman telephoned Tassal and left the following message:

*‘Hi Michelle, it’s Avril one of your most loved pains in the arse. Um it’s ANZAC Day, my birthday, and I admit I have over indulged so I’m taking into account one of the golden rules be fit for work and I’m not going to be fit for work so I won’t be there. But um love ya, catch ya on the flip side.’*

Tassal proceeded to stand down Ms Chapman and required that she respond to the following allegation of misconduct: *You had deliberately made a decision to consume alcohol to the extent that you would not be fit for work on 26 April 2017 when you were required to attend and be in a fit state to carry out your duties safely.*

Ms Chapman provided a response, asserting that it was not her intention to deliberately consume alcohol to the point where she would be unfit for work; that the events of 25 April were unplanned and unexpected; and that contacting management on 25 April rather than on the morning of 26 April was the right course of action.

Tassal ultimately informed Ms Chapman that her employment had been terminated with effect on 1 May 2017 in light of Ms Chapman's response to the allegation, as well as a previous warning in December 2016 for breaching the Code of Conduct Policy (**Policy**), which arose out of a telephone message left by Ms Chapman to the effect that she had found out a close relative had advanced lung cancer and that she would not be attending work because she was 'f#\*king s#\*tfaced'.

## The Issues

The main issues in dispute were:

1. Whether Ms Chapman's conduct on 25 and 26 April 2017 constituted a valid reason for dismissal; and
2. Whether alternative disciplinary action short of dismissal would have been more appropriate in the circumstances.

## The FWC's findings

Notwithstanding that Ms Chapman's message on 25 April referred to 'over indulgence' - and that her initial response to the allegations, and her unfair dismissal application form appeared to concede that her unfitness for work related to alcohol consumption - Ms Chapman argued during the arbitration that she had not consumed alcohol on 25 April and her unfitness for work was due to fatigue. The Fair Work Commission (**FWC**) rejected Ms Chapman's evidence on this point, finding:

*'It makes no sense...that a person at 4.46 pm, some 13 hours before having to work, and before being involved in activities which might result in impairment for work would decide to predict that she will be unfit for work the next day...she could have gone to bed around then and had further sleep. Against this asserted background the prediction of incapacity due to fatigue makes little sense.'*<sup>1</sup>

Ms Chapman further argued that there was no valid reason for dismissal because the conduct relied upon for dismissal occurred

outside of work hours. The FWC likewise rejected Ms Chapman's submissions on this point, finding:

*'...the conduct, while being out of hours conduct at home has a sufficient link with the employment relationship... an employee has a general duty to take reasonable steps to be fit to perform their duties...Here [Ms Chapman] "took a sickie" in circumstances where she had voluntarily embarked upon a course of conduct that resulted in incapacity for work.'*<sup>2</sup>

The FWC therefore held that there was a valid reason for dismissal related to Ms Chapman's conduct and proceeded to consider the balance of the criteria in s 387 of the *Fair Work Act 2009* (Cth).

In this regard, the FWC found that although the earlier warning related to conduct rather than performance, it was relevant to Tassal's decision to dismiss Ms Chapman and should therefore be considered in the context of whether Ms Chapman had received any previous warnings about unsatisfactory performance.

The FWC was critical of Tassal's reliance on Ms Chapman's earlier warning for breach of the Policy. Although the earlier conduct involved time off work due to alcohol consumption, the relevant breach of Policy relied upon by Tassal on the earlier occasion was Ms Chapman's inappropriate language. The FWC held that the earlier misconduct was therefore of a different nature to the more recent failure to attend work due to alcohol consumption.

In the absence of any prior relevant warnings, the FWC held that disciplinary action short of dismissal would have been more appropriate in the circumstances and the dismissal was therefore harsh and unfair.

The FWC proceeded to consider remedy and found that reinstatement was inappropriate in light of the following conduct, which tended to suggest a relationship of trust and confidence was not capable of being restored:

- Ms Chapman's lack of insight into her conduct, noting she expressed no remorse and maintained that she had done nothing inappropriate;
- Ms Chapman's combative approach to Tassal; and
- Ms Chapman's invention of fatigue as the reason for her incapacity for work.

The FWC instead ordered compensation in the amount of \$8,229.00 – a figure arrived at by calculating the maximum amount of compensation to which Ms Chapman may have been entitled, reduced by her receipt of five weeks' pay in lieu of notice, and reduced by 25% in light of Ms Chapman's misconduct.

## Lessons for employers

The decision clearly demonstrates that employers are entitled to expect that employees will take reasonable steps to ensure they are fit for work. Where an employer has evidence of an employee deliberately embarking on a course of conduct which will render them unfit for work, there may be grounds for disciplinary action.

However, employers should exercise caution when relying on any such conduct to justify dismissal, particularly in circumstances where the conduct is an isolated occurrence or other mitigating factors are present (such as a relationship breakdown, death of a family member, etc.).

Employers should also exercise care when issuing warnings in order to ensure that the offending conduct is properly identified. In this case, the outcome may have been different if Tassal had raised concerns in the earlier warning regarding time off work due to alcohol consumption, in addition to the inappropriate language used by Ms Chapman.

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<sup>1</sup> Per DP Barclay, [35 and 37].

<sup>2</sup> Per DP Barclay [60 and 61].

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