

## Article Information

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# Dishonesty or merely an incorrect explanation? The decision in *Qantas Airways Limited v David Dawson* [2017] FWCFB 1712

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**Tim Capelin, Partner**, and **Amrita Howell, Associate** discuss the decision and the key take home points for employers.

The decision in this case follows a theme present in a number of recent cases where Tribunal members make wrong decisions influenced by sympathy towards the former employee.

### Decision at First Instance

[Dawson v Qantas Airways Limited \[2016\] FWC 8249](#) concerned the alleged unfair dismissal of Mr Dawson, a flight attendant who was a long standing employee of Qantas for 28 years. Mr Dawson was dismissed for stealing alcohol from a flight from Perth to Sydney and at the time of the dismissal was 50 years of age.

When the flight landed, the crew members were taken into a room and searched. Mr Dawson was found to have one can and one bottle of beer in his jacket, a 50ml bottle of gin in his bag, and two 50 ml bottles of vodka in his pockets.

Following the search, Qantas wrote to Mr Dawson and asked him to respond to the allegations of theft. In his initial response, Mr Dawson said that the beer and the gin were inadvertently pocketed by him as a result of serving passengers, and speculated that the gin may have got into his bag from a hotel mini bar the day before the flight. However, in a later response Mr Dawson admitted to taking the two beers from the ice draw, but continued to assert that the vodka was inadvertently taken. He said he did not know how the gin came to be in his bag.

In dismissing Mr Dawson, Qantas not only relied on the theft, but also Mr Dawson's misleading and deceptive responses during the investigation.

At first instance Deputy President Lawrence found that there was a valid reason for the termination, however took into account the following in determining that the dismissal was harsh:

- Mr Dawson's 28 years of unblemished service for Qantas as a long-haul flight attendant;
- The small value of the items stolen;
- Mr Dawson's age of 50 meant it would be difficult to get another job, certainly as a flight attendant;
- Although Mr Dawson gave an incorrect explanation, he did correct it; and
- Mr Dawson had a number of medical and family issues prior to the incident;

Deputy President Lawrence awarded Mr Dawson the maximum compensation of \$33,731 equivalent to 26 weeks of his earnings, on the basis that Mr Dawson would have remained a flight attendant for the rest of his working life, which could have been 15 years or more.

Unsurprisingly, Qantas appealed the decision.

## **On Appeal**

In January this year, a Full Bench of the Fair Work Commission quashed the decision. The Full Bench allowed the appeal on the basis that the Deputy President failed to take into account an important material consideration, that being, the employee's dishonesty. At paragraph [31] of the appeal decision, the Full Bench said:

"We are of the view that the Deputy President, by describing the Respondent's conduct as merely an "incorrect explanation", understated the severity of the Respondent's conduct and, that as a consequence, mistook the facts before him."<sup>[1]</sup>

The Full Bench noted that it was clear from the investigation that Mr Dawson did not provide a truthful explanation of how the alcohol came into his possession, and that the Deputy President failed to take into account he was dishonest. In particular, the appeal decision noted that Mr Dawson only changed his position when he was confronted by findings that the hotel did not stock miniature bottles of alcohol.

Subsequent to the appeal decision, the matter was reheard on the papers by the Full Bench on 31 March 2017. In that decision, the Full Bench found that Mr Dawson was not unfairly dismissed and Mr Dawson's claim for relief was dismissed. The Full Bench said that whilst they empathised with Mr Dawson's personal, family and financial circumstances, these did not outweigh the prohibited conduct.<sup>[2]</sup>

## **Lessons for employers**

The decision at first instance was cause for concern as it essentially meant that a dishonest thief could be awarded the maximum compensation in unfair dismissal proceedings. However, employers should take some comfort from the Full Bench decision which correctly found that even such circumstances as an otherwise longstanding and unblemished employment record, should not be enough to outweigh proven serious misconduct.

We also note that Qantas' success in this case is also attributable to its handling of the investigation process. Despite catching Mr Dawson with the stolen items in his pockets and in his bag, Qantas nonetheless gave him an opportunity to respond to the allegations of theft. Qantas also allowed Mr Dawson to have a support person present at all meetings and notified him of the reasons for termination. Accordingly, the Commission was unable to point to any procedural unfairness in terminating Mr Dawson's employment.

This decision reemphasises the importance of ensuring natural justice in investigations into suspected employee misconduct, in order to ensure robust and defensible outcomes.

*Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.*