

February 2009

In this edition of Employment Alert we bring your attention to a recent case dealing with unfair dismissal. We also alert you to the **draft modern awards** for a number of industries and occupations published by the Australian Industrial Relations Commission on 23 January 2009.

GRAND THEFT (SNICKERS BAR)

An employee who was dismissed for eating a stolen Snickers bar has failed in his unfair dismissal claim. Tony Petrosillo was employed in the Kmart section of a distribution centre operated by Coles Group Supply Chain Pty Ltd ('Coles'). Another employee threw him a Snickers bar which was "apparently taken from a case 'ripped open' in the grocery section of the distribution centre".

After this incident was reported to management, Mr Petrosillo was interviewed twice before his employment was terminated 11 days later.

On 9 January 2009, the Australian Industrial Relations Commission ('AIRC') dismissed Mr Petrosillo's unfair dismissal application, with Senior Deputy President Cartwright saying that:

- Coles had reasonable policies for the protection of its assets, including requirements that all food belonging to employees be marked with a check seal sticker, and that no food or drink be brought onto the distribution centre floor apart from bottled water.
- These policies were reinforced at team meetings.
- Mr Petrosillo's evidence that he was unaware whether the Snickers bar had a check seal or not was not credible, and he was aware of the possibility that it had been stolen.
- Mr Petrosillo gave different accounts of events during the interview process, despite being told he must be open and honest in accordance with Coles' Code of Conduct.
- Mr Petrosillo's conduct in "eating the Snickers bar in circumstances where he would reasonably suspect it was stolen and then not being open and honest in the investigation destroyed the required relationship of trust and confidence," giving Coles a valid reason for termination.
- The termination was not harsh, unjust or unreasonable.

It is interesting to compare this decision with a previous AIRC decision, in which a Qantas employee was reinstated after having been dismissed for the alleged theft or unauthorised removal of 16 individually wrapped 'Patons' macadamia chocolates and 3 individually packaged 'Emu Bottom' biscuits.

In that case, Senior Deputy President Drake found that:

- The flight attendant, Mr Woodward-Brown, had removed the items carelessly rather than deliberately.
- This was a breach of Qantas policy and provided a valid reason for termination.
- If Mr Woodward-Brown had intended to steal the chocolates or biscuits, "termination of employment would certainly have been an appropriate remedy for consideration".
- However, where there was no deliberate theft, it would be harsh, unjust or unreasonable to terminate employment without exercising discretion and considering factors affecting the removal of the property.
- Relevant factors included that staff were permitted to eat the chocolates on board the flight, that uneaten chocolates would be thrown away at the end of the flight, that there was a "culture of indifference amongst flight attendants to the chocolates and/or biscuits", that Mr Woodward-Brown had a long history of unblemished employment, and that he may have improved his compliance with company policies if given an opportunity to do so.

The key factors leading to different outcomes in these cases were that:

- In the Coles case, the employer had clear policies to prevent stock losses, and regularly reinforced and consistently applied those policies. In the Qantas case, the employer had not consistently enforced its policies and had thereby allowed a culture of indifference to certain items of property to develop.
- In the Coles case, there was doubt as to the employee's honesty in responding to questions about the incident, and the AIRC found that the employee must have been aware that the chocolate bar may have been stolen. In the Qantas case, it was not clear that the employee intended to steal the items and their removal may have simply been careless.

Employers should ensure that they:

- Do not 'turn a blind eye' to theft.
- Implement and reinforce policies to protect their property.
- Respond consistently to breaches of policy.
- Discourage a culture of carelessness or indifference to property.
- Seek advice before terminating an employee's employment for theft.

AWARD MODERNISATION UPDATE

Stage 2 Modern Awards

On 23 January 2009, the Australian Industrial Relations Commission published **draft modern awards** for a number of industries and occupations, including:

- Aged Care;
- Banking, Finance and Insurance;
- Building and Construction;
- Cleaning Services;
- Electrical, Electronic and Communications;
- Health Professionals and Support Services;
- Horticulture;
- Joinery and Building Trades;
- Medical Practitioners;
- Nursing;
- Plumbing and Fire Sprinklers Contracting;
- Road Transport;
- Telecommunications.

The Commission did not make a separate award for the **Call Centre Industry**, but instead proposes to include call centre employees in various relevant industry awards. The Modern Award for Clerks has been amended to include call centre employees.

For the first time, a federal award specific to the **Aged Care industry** has been developed. This award will cover various functions within aged care facilities, including clerical work, cleaning, food preparation and service, personal care work, maintenance and gardening. However, nursing staff and allied health professionals will be covered by separate awards.

The Commission will publish the final versions of these stage 2 modern awards by 3 April 2009.

Stage 1 Modern Awards

The Stage 1 priority modern awards were published in **final form** on 19 December 2008.

A significant difference between the draft and final forms of the Stage 1 priority modern awards was the exclusion of **redundancy pay for small businesses** from the final version. However, the modern award for Manufacturing and Associated Industries does include small business redundancy pay for the furnishing industry. The modern awards also generally provide for redundancy pay entitlements in preserved State awards to continue until 31 December 2014.

The Exposure Draft of the Modern Clerks Award included a right for **casuals to convert to permanent employment** after 6 months of regular and systematic employment. However, this right has been omitted from the final version.

The final version of the Modern Clerks Award includes **accident make-up pay**. However, it also includes a new entitlement for employers to require employees "on engagement" to **declare all workers' compensation claims** made in the previous five years.

Modern awards are due to commence operation on **1 January 2010**. In the meantime, employers should familiarise themselves with any impending changes to their employees' entitlements under the applicable modern awards.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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