

JUDGMENT CALL

A Snapshot of Current Fair Work Australia Decisions

A creation of the new national workplace relations system that came into effect as a result of the *Fair Work Act 2009*, Fair Work Australia (FWA) became the preliminary arbiter for disputes involving employers, employees and their unions as of 1 July 2009.

Specialist Fair Work Divisions were also created in the Federal Court and the Federal Magistrates' Court to hear certain matters arising under the *Fair Work Act 2009*.

Since then, these bodies have been responsible for a myriad of decisions relating to awards, enterprise agreements, bargaining disputes and unfair dismissals.

In this edition of Employment Alert, we take a closer look at some recent decisions of the FWA and the Federal Court, and the potential implications they present for employers.

SMS Sacking Not Fair

The method used to terminate an employee's employment may be relevant in considering a claim for unfair dismissal.

In *Phuong Truong v Mekong Australia Pty Ltd T/A Findon Rightprice Pharmacy* [2010] FWA 2466, the employee alleged that she had been unfairly dismissed. One of the grounds for her claim was that she had been informed of the dismissal via SMS and subsequently by email.

While FWA found that Ms Truong's role had genuinely been made redundant, it expressed strong reservations about the manner in which her dismissal was effected and expressed the view that informing an employee of their termination by SMS and later by email would not be fair or equitable.

Rash Sacking Decision Declared Unfair

Employers should never jump to conclusions about an employee's absence from work without giving the employee an opportunity to explain.

In *Rizwan Ahmad Khokhar v Bytecraft Systems* [2010] FWA 3913, the FWA ordered an employer to pay a former employee twelve weeks pay as compensation for dismissing the employee on the mistaken belief that the employee had dishonestly skipped a shift to attend the company Christmas party.

The FWA commented that, "due process requires that rather than jump to a conclusion, the employer could have and should have investigated further whether the employee had an explanation which brought their initial conclusion into question".

Dismissal based on failure to follow directives upheld

Employees who fail to follow the directives of their employer without an appropriate reason to do so can expect some form of discipline from the employer. If the situation warrants, their employment may be terminated.

In *Wayne Darvell v Australian Postal Corporation* [2010] FWAFB 4082, the Full Bench of the FWA upheld the dismissal of an employee who refused to unload a truck on bogus health and safety grounds.

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The employee argued the employer had not terminated the employment of other employees who had previously engaged in the same conduct.

The Full Bench upheld the decision as the employee unreasonably failed to follow a work directive. The treatment of other employees engaging in the same conduct was not considered similar, as employees have different work histories and respond in different ways when questioned on performance. These matters should be considered in context.

Employee work record was not considered

Employers need to consider employee work record and length of service before deciding to terminate.

In *Mr Mohamed Ahmed v Webforge NSW Pty Ltd* [2010] FWA 4053 an employer terminated the employment of a supervisor who breached safety protocols. The employer believed termination was necessary in light of safety policies and the supervisory nature of the role of the employee.

The employee had 15 years of service with the employer with a clean work record. SDP Cartwright found that while the breach was serious, the failure of the employer to take into account the employee's service record and consider alternatives to dismissal was harsh and resulted in a compensation payment of 9 weeks wages to the employee.

Ordered Back to Work

Reinstatement is the primary remedy for unfair dismissal and employers should always be aware of this possibility in defending unfair dismissal claims.

A welder was reinstated to his role by the Federal Court in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus Pty Ltd* [2010] FCA 611. The employer was found to have contravened adverse action provisions in dismissing the employee.

Justice Lindsay Foster found "compelling evidence" that the employee was dismissed because of his role in representing his workmates in their attempt to negotiate a new industrial agreement with the employer. In this matter, the employee had been dismissed soon after enterprise bargaining negotiations had broken down.

While being mindful of the difficulties both parties would face with an order of reinstatement, the Court nonetheless felt that reinstatement was appropriate due to the "serious" contravention of the adverse action provisions and the hardship the employee would experience if left without work.

Investigation process was not adverse

The adverse action provisions in the *Fair Work Act* will not be breached where an employer provides an employee with a reasonable direction.

In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2010] FCA 590 the Federal Court found that an employer did not breach the adverse action provisions in directing an employee to attend a meeting regarding an investigation into a workplace incident. There was a dispute concerning the presence of a HR manager at the meeting. The workplace agreement provided certain people could attend disciplinary meetings in certain situations. The meeting was not disciplinary and formed part of an investigation. The employer indicated the investigation would continue without the employee and a decision made based on the evidence available.

The employer dismissed the employee based on the result of an investigation in which the employee eventually provided a written statement. The adverse action claim was unsuccessful as nothing the employer or its managers had done constituted an injury or a threat to injure the employee in the

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exercise of his workplace rights. In fact, the meeting was scheduled to assist the employee by giving him the opportunity to provide his version of events.

Employers need to follow industrial bargains

Employers are required to follow terms of their enterprise agreements. This includes where the enterprise agreement requires consultation with employees over major changes to terms and conditions of employment.

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)* [2010] FCA 652 (22 June 2010) the Federal Court found that the employer and its subsidiaries failed to consult with the employees and their union over an introduction of workplace changes in preparation of part privatisation. The Court found that the failure to consult was flagrant and, "occurred in the most obvious and compelling circumstances for which a consultation clause was designed."

The only consultation over the changes was a request for employee feedback after the decision had been made. The employer's failure to consult denied itself of benefits associated with employee input in the consultation process. QR was required to pay penalties of \$396,000 and its subsidiaries were ordered to pay penalties of \$331,000 and \$33,000 respectively.

Implications for Employers

These cases emphasise:

- procedural fairness by affording an employee the opportunity of responding to any allegations or concerns relating to conduct or performance;
- the manner in which termination is effected is important – simply terminating by SMS and/or email will not be appropriate;
- reinstatement is the primary remedy in an unfair dismissal application;
- employee work history and length of service should be considered by an employer before making a decision to terminate;
- the wide application of the new adverse action provisions;
- the requirement for employers to follow terms of their enterprise agreement and significant consequences for failing to do so

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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