The Advisor

siag

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Tolerance of bullying conduct meant dismissal unfair

Cannan and Fuller v Nyrstar Hobart Pty Ltd (2014) - FWC 5072 (19 September 2014)

The Fair Work Commission has found that while a global smelting company had a valid reason to dismiss two employees for a history of bullying behaviour, its failure to deal with their conduct over a long period and to put specific allegations to them meant that their dismissals were deemed unfair.

The two employees of the smelting company had initially accused their team leader of bullying, before an investigation into the complaint cleared the team leader of the allegations. In the course of the investigation, the smelting company became aware of further allegations, in this case against the two employees. Several statements taken during the course of the investigation contained instances of abusive, insulting, obstructive, demeaning and humiliating behaviour exhibited by the two employees.

Following the investigation, the HR manager of the company requested that the employees attend meetings to "show cause" why they should not be dismissed. The manager did not provide the witness statements to the employees, nor were they told that the HR manager had relied on parts of the statements in deciding that dismissal was justified. The employees were subsequently dismissed "due to serious misconduct."

The Fair Work Commission found that some of the allegations against the employees had not been made clear and that one of the employees had raised workplace concerns that were genuinely held. Furthermore, the employees had not been afforded procedural fairness, in that they were not given the opportunity to respond to all the reasons for dismissal.

Deputy President Wells found that the smelting company's management previously had full knowledge of the employees' behaviour, but had neither acted to dispel the conduct nor followed up on related disputes in the workplace. The Commission noted that the employees had received consistently positive rankings in their performance reviews and the team leaders lacked the appropriate training to conduct frank and transparent reviews. In conclusion, the Commission found that both dismissals were harsh and ordered that the employees be reinstated.

What does this mean for employers?

- As well as identifying a valid reason to terminate employment, employers must ensure that employees are afforded procedural fairness during the course of disciplinary investigations.
- Prior to making a decision to terminate, employees have the right to be advised of all reasons for the proposed dismissal and be given the opportunity to respond, including providing information of matters in mitigation of their actions.
- Ensure that managers and employees are provided with training regarding dealing with workplace bullying and misconduct, and are aware of policies in regards to reporting such behaviour.

Breach of policies and procedures warranted summary dismissal

Bingham v St John Ambulance Western Australia Limited [2014] WADC 122 (5 September 2014)

The WA District Court has upheld the summary dismissal of a St John Ambulance office manager, who claimed that she had acted in good faith to meet the demand for first aid training from the Western Australian mining sector, despite serious breaches by her of company policies and procedures.

St John Ambulance summarily terminated the office manager after finding that she had entered a first aid trainer's number against a course conducted by someone else; paid a trainer who was not on the organisation's payroll as an accredited employee, paid trainers higher lump-sum rates; paid herself for running a course during hours for which she was already paid and engaged her daughter to help with office archiving despite her not being on the national payroll for St John Ambulance.

The office manager claimed that she had not received proper training for her role and that St John Ambulance had made no effort to resolve any unsatisfactory performance.

However, the WA District Court found that the office manager was aware of her obligations and deliberately chose not to contact her regional manager "because she knew her actions were contrary to policy and procedure and would not be approved."

In her decision, WA District Court Judge Julie Wager found that whilst the employee had otherwise performed her work to a high standard, her breaches of established employment and payment procedures and protocols identified had "caused imminent and serious risk to the reputation, viability and profitability of St John Ambulance." In such circumstances, whilst the conduct was not criminal it constituted a breach of her terms and conditions of employment that was sufficiently serious to allow instant dismissal.

What does this mean for employers?

- Ensure that staff are made fully aware of organisational policies and procedures and that appropriate training and enforcement of policies occurs
- Employers should check their contracts of employment to understand what behaviour might amount to serious misconduct warranting summary dismissal
- Instant dismissal (without notice or payment in lieu) may occur only where the Employee's breach is sufficiently serious such that it demonstrates an intention to no longer be bound by the terms of the employment

No extra claims clause in enterprise agreement prevents policy change

Australian Municipal, Administrative, Clerical and Services Union v North East Water, Fair Work Commission, (6 October 2014)

The Fair Work Commission has held that North East Water's 2011 Enterprise Agreement (EA) did not provide authority for the company to implement changes to its motor vehicle policy, because such changes fell within the scope of the "no extra claims" clause of the EA.

The dispute before the Commission concerned a decision by North East Water to phase out the Limited Private Use category in its Fleet Management Policy. The effect of the change was that certain employees would no longer have access to company vehicles for private purposes that had previously been authorised. North East Water claimed that the changes were operationally necessary to address increases in FBT charges, which had tripled the costs for providing the entitlement.

After failure to negotiate an agreement with North East Water, the union representing the affected employees (the ASU) notified the Commission of a dispute under the dispute resolution clause of the EA. The relevant clause allowed for referral of disputes regarding the wages and conditions of employment of any employee covered by the EA, whether arising out of the operation of the EA or not, to the Commission for final determination.

The ASU submitted that the proposed change contravened Clause 4 of the EA, providing that *"The parties undertake that for the life of this Agreement there shall be no further claims in relation to salary increases or conditions of employment sought or granted, except for those granted under the terms of this Agreement."*

North East Water argued that the private use of vehicles was not dealt with in the EA, and that it was the "prerogative" of the organisation to vary its policy.

In his decision, Commissioner Wilson found that the evidence presented by the ASU demonstrated that the private use of their company vehicles fell within the matters contemplated by Clause 4 of the EA, as the existing vehicle arrangements provided *"a reward for taking on additional duties and (thus) amounted to a condition of employment."*

The Commission ultimately held that in the absence of agreement between the parties either to change conditions of employment through variation of the EA in accordance with the provisions of the F*air Work Act 2009*, or bargaining for a new enterprise agreement or through settlement of the dispute by other means, the EA did not authorise North East Water's proposed policy changes.

What does this mean for employers?

- Employers should review and understand the extent of matters which may fall within the scope of dispute resolution procedures in their enterprise agreements
- Employers should review and seek advice as to the impact of any "no extra claims" clause in their enterprise agreement/s
- Subject to the specific terms of any applicable enterprise agreement and/or contract of employment, Employers may require the consent of affected employees to implement policy changes

High Court rules termination breach of workplace conduct policy

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd - [2014] HCA 41 (16 October 2014)

The High Court has held that an employee of BHP Coal Pty Ltd (BHP) was dismissed for violating a workplace conduct policy and not, as claimed by the Construction, Forestry, Mining and Energy Union (CFMEU), for actions prohibited by the *Fair Work Act 2009 (Cth)*.

In 2012 Mr Doevendans participated as union delegate in a lawful protest against his employer, BHP, which was organised by the CFMEU. On several occasions during the protest he was observed waving a sign that read, "No principles, SCABS, No guts". With the term 'scab' historically understood to be a negative label for a 'strike-breaker' or non-striking employee, and under the circumstances believed to have been directed at his fellow employees, Mr Doevendans was subsequently terminated from his employment for breaching BHP's workplace conduct policy to 'treat colleagues with courtesy and respect'.

Upon Mr Doevendans' termination the CFMEU commenced proceedings in the Federal Court of Australia on the basis that BHP contravened section 346(b) of the *Fair Work Act*, which prohibits the termination of an employee due to their participation in industrial activity. In the first instance the Court ruled in favour of Mr Doevendans, finding that the holding of the sign "could not be dissociated with Mr Doevendans' participation in the industrial activity". Mr Doevendans' employment was therefore reinstated and a civil penalty was imposed on BHP.

On appeal to the Full Court of the Federal Court, however, it was found that the trial judge had failed to consider the general manager's reasons for dismissal, and that the employee's engagement in industrial activity did not, in fact, play a role in his decision.

The CFIYEU appealed the decision to the High Court. On 16 October 2014, by a narrow 3-2 majority, the High Court held that Mr Doevendans' termination was not in relation to or "because of" his participation in industrial activity, but rather a result of his conduct in holding up a sign displaying offensive language. This conduct was deemed to be a breach of BHP's workplace conduct policy and charter of values, and his termination was therefore not prohibited.

The majority decision noted, "Section 346 does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action."

The judges said the joint reasons of Chief Justice French and Justice Susan Crennan in *Bendigo Tafe v Barclay* demonstrated that "It is incorrect to conclude that, because the employee's union position and activities were in inextricably entwined with the adverse action, the employee was therefore immune, and protected, from the adverse action."

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We have had an overwhelmingly positive response following the successful launch of realestatehr.com.au in November. As a joint venture between SIAG and the Real Estate Institute of Victoria, **realestatehr.com.au** is a human resources, industrial relations and employment law service exclusively for REIV member employers in the real estate industry.

Members have been making the most of the new service and have found it highly effective in providing them with IR/HR resources and advice.

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FWC warns against employers "throwing the book" at workers when considering dismissal

Commonwealth Bank of Australia v Baker [2014] HC 32 (10 September 2014)

The Fair Work Commission has warned that employers should focus on employees' main areas of misconduct, rather than ancillary issues, when considering taking disciplinary action or dismissal.
The Commission upheld the decision of the employer Pilbara Mining Alliance Pty Ltd to terminate an employee, after he failed to follow a lawful direction to inspect and replace an isolator on a dump truck.

In the letter of termination issued to the employee, Pilbara stated that the termination was due to his conduct in breach of various internal documents and the contract of employment. During the course of the unfair dismissal hearing, Pilbara conceded that the employee had not breached every document referred to in the letter. Notwithstanding, the Commission was satisfied that the employee's conduct in not inspecting the isolator diligently was careless, and his further failings in relation to the repair was serious, reckless and improvident.

Despite upholding the dismissal, Commissioner Cloghan noted the tendency for Human Resources personnel to "throw the book" at employees when it comes to allegations of misconduct. The Commissioner advised it was preferable that, during the disciplinary process and any consequential termination letter, employers set out the key documents which had been breached and avoid a "scattergun" approach.

What does this mean for employers?

- The case highlights the need for employers to be clear about what specific breaches of conduct have occurred when considering disciplinary action or dismissal of an employee
- Employers should ensure that those specific breaches of conduct are presented to the employee prior to any disciplinary action or dismissal so that they have a clear understanding of why the action is being taken.

FWC to consider unions push for domestic violence leave clause for Modern Awards

As part of the Fair Work Commission's four-yearly review of modern awards, the Australian Council of Trade Unions (ACTU) is seeking to introduce an additional entitlement for employees, to take family and domestic violence leave, into all modern awards.

In its submissions, the ACTU has sought that all Modern Awards be amended to provide 10 days' paid leave for permanent employees, and 10 days' unpaid leave for casuals. The ACTU's proposed provision would allow employees to access leave to attend to matters relating to family and domestic violence, including attending court and related appointments as well as seeking legal advice and organising new living arrangements.

The proposed inclusions add to the list of "common Award issues" identified by the Commission in 2014, which include annual leave, casual employment, part-time employment, public holidays and transitional provisions relating to accident pay, redundancy and district allowances.

SIAG will provide further updates of the Commission's review of the ACTU's submission, and other proposed amendments to Modern Awards, in 2015.

Seasons Greetings

With the holiday season upon us, we reflect upon our achievements of the past year and on those who have helped shape our business.

I thank you for your continued support and look forward to working with you in the year ahead.

On behalf of the team at siag I wish all of our clients a happy festive season and a safe and successful New Year.

Brian Cook
Managing Director

siag learning links
training : development

A WorkSafe Approved Training Course

Health and Safety Representative Initial OHS Training Course

siag is offering the 5 day Health and Safety Representative Initial OHS Training Course across a range of industries. The program is interactive, informative and gives an understanding of the OHS imperatives of this role.

The program is approved by WorkSafe and can be run in groups at your organisation or for individuals as part of our public program held at siag's Melbourne office.

The learning objectives of the course are

- Interpreting the occupational health and safety legislative framework and its relationship to the HSR
- Identifying key parties and their legislative obligations and duties
- Establishing representation in the workplace
- Participating in consulting and issue resolution
- Represent designated work group members in any OHS risk management process undertaken by appropriate duty holder/s
- Issuing a Provisional Improvement Notice (PIN) and directing the cessation of work.

Entitlement

Under the OHS Act 2004 (section 67) all elected HSRs and deputy HSRs are entitled to undertake WorkSafe Victoria approved OHS training for HSRs and choose their training provider in consultation with their employer. SIAG is approved to deliver the HSR Initial OHS Training Course.

Under section 67 of the Victorian OHS Act 2004 an emploter, if requested, must allow an elected HSR and elected Deputy HSR to attend a WorkSafe approved HSR Initial OHS Training Course on paid time, pay the cost of the course and any other associated costs. Section 67 also allows HSRs to choose the approved training course they attend in consultation with the employer.

Venue: 16/75 Lorimer Street, SOUTHBANK. VIC 3006

Initial (5 Day) Occupational Health and Safety Course for HSRs, Managers and Supervisors

	$790 per person (plus gst)				
	Day 1	**Day 2**	**Day 3**	**Day 4**	**Day 5**
Feburary Course	Wednesday 4/2/15	Wednesday 11/2/15	Wednesday 18/2/15	Wednesday 25/2/15	Wednesday 4/3/15
May Course	Thursday 7/5/15	Thursday 14/5/15	Thursday 21/5/15	Thursday 28/5/15	Thursday 4/6/15
August Course	Thursday 6/8/15	Thursday 13/8/15	Thursday 20/8/15	Thursday 27/8/15	Thursday 3/9/15
November Course	Friday 20/11/15	Friday 27/11/15	Friday 4/12/15	Friday 11/12/15	Friday 18/12/15

Refund policy

**Cancellations 21 days or more from commencement date receive full refund
**Cancellations 14 days from commencement date receive 50% refund
**Cancellations 7 days or less from commencement date receive no refund

Contact **siag** on **1300** SIAGHR (1300 742447) for more information