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Employment Alert

Full Bench clarifies unfair dismissal

B, C and D v Australian Postal Corporation T/A Australia Post (28 August 2013)

WHAT YOU NEED TO KNOW

- When hearing an unfair dismissal application, a "valid reason" is only one of a number of factors the Fair Work Commission will consider in determining whether the dismissal is "harsh, unjust or unreasonable". A dismissal may be harsh notwithstanding the existence of a valid reason.
- Even where an employee has engaged in serious misconduct in breach of company policy, factors such as an employer's failure to actively enforce the policy, a workplace culture of non-compliance, disparate disciplinary treatment of employees who have engaged in similar breaches and the age and circumstances of individual employees may result in a finding that a dismissal is "harsh" in all the circumstances.

WHAT YOU NEED TO DO

- Employers should review their workplace policies and procedures to ensure they clearly articulate the consequences of non-compliance. If appropriate, policies should clearly state that a breach may result in termination.
- Employers should also take active steps to ensure policies are applied in the workplace and educate employees on their terms and effect. Ensure all breaches are dealt with in a consistent manner, with consideration given to the nature and circumstances of the breach.
- Do not assume that promulgating a "zero tolerance" policy will, of itself, justify dismissal in the event of a breach. Even in the gravest cases of misconduct, consider all the circumstances and disciplinary options before making a decision to terminate employment. This includes affording an employee due process and taking into account any mitigating circumstances.

A recent decision by the Full Bench of the Fair Work Commission provides a useful reminder of the approach the Commission must take in an unfair dismissal application to determine whether a dismissal is "harsh, unjust or unreasonable". The criteria the Commission must consider in determining whether a dismissal was "harsh, unjust or unreasonable" are contained in s387 of the *Fair Work Act 2009* (the Act). This list is broad and includes in s387(h): "*any other matter that FWC considers relevant*".

The majority confirmed that whilst a wilful breach of reasonable policy will often provide a "valid reason" for dismissal, other factors including a failure by the employer to adequately communicate and enforce the policy, may lead to a finding that the dismissal was harsh, unjust or unreasonable when all the other factors in s387 are taken into account.

Background

Employees B, C and D were employed by Australia Post. Their employment was terminated for conduct which included distributing multiple emails containing pornographic material to work colleagues and/or using work facilities. Some of the material was described as "hardcore".

In November 2011, Commissioner Lewin at first instance rejected Mr C and Mr D's applications. It found that the dismissal of Mr B was harsh, but awarded compensation instead of reinstatement. Each of the employees appealed, with Australia Post cross-appealing in relation to Mr B.

On appeal, the Full Bench (Lawler VP and Cribb C, Hamberger SDP dissenting) overturned the findings and held that each of the dismissals was harsh,

referring the matter to VP Lawler for determination of remedy. In dissent, SDP Hamberger refused permission to appeal.

Clarification of the role of "valid reason"

The majority conducted a historical analysis of the legislative predecessors to s387, pointing out that the concept of a "valid reason" has narrowed over time, and is now only one of a number of factors the Commission is required to consider in determining an unfair dismissal application.

The majority found that a "valid reason" is assessed from the perspective of the employer by reference to the acts constituting the misconduct, considered in isolation from the context in which they occurred.

On finding that there is a "valid reason", the Commission must then turn to consider the other factors in s387, thereby introducing a consideration of the personal circumstances of the employee and the broader context in which the misconduct took place. This involves weighing the gravity of the misconduct against the various mitigating factors.

The application of the other factors in s387 (in addition to "valid reason") mean that even serious misconduct in clear breach of a policy may still lead to a dismissal being held to be harsh in all the circumstances.

No "one size fits all" approach

The majority applied principles used in previous cases involving dismissal of employees for sending emails containing pornographic content, including *Queensland Rail v Wake* (2006) 156 IR 393 and *Budlong v NCR Australia Pty Limited* [2006] NSWIRComm 288. The majority accepted that it is reasonable and necessary for employers to take steps to eradicate the trafficking of pornography on company communications systems, in light of the employer's fiduciary and occupational health and safety obligations to employees.

It confirmed that a substantial and wilful breach of a company policy prohibiting the accessing, distribution or storage of pornographic material will often, "if not usually", constitute a valid reason for dismissal.

However, it also noted the "bedrock principle" that the particular circumstances of a case might render a dismissal for breach of the policy, harsh unjust or unreasonable, notwithstanding the existence of a valid reason.

In this case, the majority accepted that the employer had in place a policy which unambiguously prohibited most of the conduct in question, and that the installation of a new software system by the employer had led to a substantial investigation which revealed a large number of breaches by a range of employees, including supervisors and managers. A disciplinary process was then conducted in relation to some 40 employees, some of whom were sacked whilst others received a lesser sanction or warning.

The majority appeared to take a different view to Commissioner Lewin regarding the weight and significance of a number of matters relevant to s387(h), holding that "scant" regard had been paid at first instance to:

- the absence of any evidence of harm or damage being caused by the appellant's conduct;
- a culture within the workplace of tacit acceptance or condoning of the distribution of pornographic material;
- the absence of any proximate prior warning to employees that breaches would warrant dismissal;
- inconsistent treatment, particularly of managers who had participated in the distribution of emails but had not been dismissed.

It noted that consideration of these matters at first instance had occurred in the part of the decision dealing with "valid reason", which was an error.

The majority also noted other factors relevant to s387(h) including the employees' long service, good disciplinary records, and the harsh economic consequences of the dismissal.

In considering whether the employer's conduct in respect of its IT policy justified the approach it took in relation to its breach, the majority appeared to be particularly influenced by the apparent lack of "active steps" taken by the employer to notify employees that breaches would be taken seriously, noting that the policy did not specify termination as "the likely disciplinary sanction for breach". It also found a workplace culture of tolerance of pornographic material, commenting that had the employer taken steps to monitor policy compliance and manage risk, it would have discovered the existence of the culture at an earlier time.

The majority also appeared critical of the criteria used to differentiate Mr B, Mr C and Mr D from other employees who had engaged in similar conduct on a lesser scale, and the failure to treat the conduct of managers involved more seriously.

When compared with the "exceptional facts" in *Queensland Rail*, in which repeated breaches of policy in the face of substantial steps by the employer over a period of time ultimately justified the dismissal of an employee with 27 years' service, the facts in this case led the majority to conclude that dismissal of each of the employees was harsh in all the circumstances.

In addition to clarifying the approach that the Commission will take in determining unfair dismissal applications, this case is a caution against applying principles from previous cases involving similar misconduct without considering carefully the particular circumstances in which the misconduct occurred.

MAKING THE CASE: Insights from Geoff Giudice

This decision raises some interesting questions about reliance on breach of company policy in unfair dismissal cases.

The employer had a policy against pornographic email traffic. Employees were required to acknowledge the policy in order to gain access to the intranet. Despite this there had been a large volume of pornographic email traffic in the relevant part of the employer's operations for some time.

Some supervisors and junior managers were involved, as well as a large number of employees. The employer dismissed three of the employees for breach of the policy. There was no doubt that the employees had been involved in serious breaches. According to the majority, the employer took no "active steps" prior to the dismissal to warn employees that the "culture of tolerance" was to end and that further breaches might result in dismissal. Many employees, not just the three who were dismissed, had previously breached the policy without sanction.

The effect of the majority decision is that an employer which does not enforce a policy against pornographic email traffic, and so permits such traffic to occur, may be unable to rely on the breach of the policy in subsequent unfair dismissal proceedings.

Although the case is about pornography, the majority's approach has implications for situations in which an employer seeks to rely on breach of other policies when terminating an employee's employment. Failure to actively enforce policies against sexual harassment, pilfering or personal use of the employer's property, for example, might result in an inability to rely on breach of the policy in unfair dismissal proceedings. Would the Commission apply similar reasoning in relation to those policies? The answer will probably depend on the Commission's assessment of two factors:

- the nature of the conduct which the relevant policy is intended to prevent; and
- the seriousness of the breach or breaches of the policy.

Of course other circumstances will always be relevant, but there is no doubt that in this case the employer's apparent failure to enforce the policy prior to the dismissals was a very significant factor.

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