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Employment Law Update

September, 2011

Safety First: Can a dismissal over safety issues be overturned?

In our recent Coleman Greig Employment Law workshops, we have commented on the Norske Skog case, in which an employee who disobeyed safety directions was nevertheless reinstated because the termination was harsh in all the circumstances (particularly because the employee had a good record and would be severely personally disadvantaged by losing his job).

Although the Commission emphasised that safety was a very high priority, employers may feel that this undermines attempts to make safety compliance a high order value in workplaces.

A number of recent cases, however, show Fair Work Australia to be applying a very safety conscious approach in assessing whether the employers had valid reason to terminate an employee's employment. Examples include:

Parmalat v Wililo (2 March 2011)
In this particular case Parmalat dismissed Mr Wililo, a forklift operator, for placing himself under an unsecured load in breach of safety regulations. While the Commissioner at Fair Work Australia found that this was a valid reason for terminating his employment, she found the dismissal to be harsh because of three factors:

i) a defect in the process (not showing the employee the CCTV footage of the incident in question)

ii) his conduct could be seen as negligent instead of intentional; and

iii) the employer, although seriously concerned about safety, did not have a zero tolerance policy.

On appeal, the FWA Full Bench strongly upheld the importance of safety and held that disciplinary action was appropriate because failing to discipline Mr Wililo would send a message to the rest of the workforce about committing safety breaches with impunity.

The three factors mentioned above from the initial hearing were addressed as follows: the importance of safety was such that a minor error in the process (not showing the employee the CCTV footage) was not significant. The conduct being negligent, rather than intentional, did not make it any less serious. There was not a strong basis to find that less drastic responses to other safety breaches invalidated the action in relation to this breach (although it follows that if safety breaches are routinely condoned, then a particular termination may not be supportable).

The Full Bench held that the termination would not be harsh unless there were discernable and significant mitigating factors in Mr Wililo's case (eg very long unblemished service).

Aperio Group v Sulemanovski (4 March 2011)
In another Full Bench decision, the employee, who was also a shop steward, had 14 warnings over four years for a variety of indiscretions, some of which related to safety issues. The incident which led to termination of his employment involved using a mobile phone near flammable solvents, despite signage prohibiting use of mobile phones.

Aperio offered Mr Sulemanovski the option of signing an undertaking acknowledging that his conduct was unacceptable, and pledging compliance with policies in the future. He refused, and was dismissed. The FWA Commissioner found that the reason for termination was the refusal to sign the letter, which the Commissioner characterised as an ultimatum, and therefore he was reinstated.

However, on appeal, the Full Bench found that the true reason for the termination was the employee's poor history of compliance with policies and procedures culminating in a serious safety breach, amounting to a "continued pattern of disregard".

There was no evidence to support his claim that he was treated harshly because he was the union safety representative. Use of the mobile phone in the proximity to solvents was a clear breach of policies that were well known to him and he had been given ample opportunity to respond to the allegation. It was found that reinstatement was plainly inappropriate and his application was dismissed.

Starkey v Coutts Transport (20 January 2011)
Mr Starkey challenged his dismissal for using a mobile phone while driving a fuel tanker through a country town. He had previously been reprimanded for using his mobile while driving, and had promised twice that this would not happen again.

He argued that the mobile phone records failed to verify that he was using the phone at the time that witnesses reported seeing him doing so, and he claimed that he often drove with his hand against the side of his face and this is what the witnesses had observed.

FWA noted that the absence of a record in the mobile phone account was presumably because he had answered a call rather than making a call, but in any event the phone account proved numerous other occasions on which he had used the phone while driving. Mr Starkey's argument that his termination could not be supported because the particular call didn't appear was described as "bold" and "breathtaking", and his application was dismissed.

Noanoa v Linfox (18 January 2011)
In this case, FWA upheld summary dismissal of a long distance truck driver who had falsified a worksheet by understating the time that he had been driving, and then compounding the sin by unloading the truck, further increasing the active time in excess of the limit.

The employee's union, the TWU, argued that it was a momentary lapse of judgement from which he received no benefit and that the dismissal was an excessive response. FWA upheld the termination because he had deliberately falsified the worksheet (which could have had significant detrimental effect on the employer) and he failed to acknowledge the issue when first confronted with it, so that dishonesty seriously detracted from the employer's trust in the employee.

This was held to be so, even though there were some criticisms of the procedure adopted by Linfox (such as preparing a termination letter before meeting with the employee to discuss the issue). FWA also criticised the union for strongly supporting the driver, in a case involving deliberate breach of heavy vehicle driver fatigue management rules, for which the union had, for many years, advocated strongly.

So what is the take-home message from these cases?

Safety is a high order value, and it takes very strong mitigating circumstances to attack termination of employment for a serious safety infringement.

If you need assistance with management of safety issues and resulting disciplinary processes in your workplace, contact Stephen, Anna or Enza on 9635 6422.

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