COLEMAN GREIG
LAWYERS

Employment Law Update

October 2019

Can an employee be sacked via text message?

Terminating an employee is a confronting experience. Surely, in the digital age where text, email and instant messaging is commonplace, reducing the personal element of terminating an employee via any one of these less confronting methods is appropriate – right?

The Fair Work Commission says no!

Avoiding face-to-face contact is a "gutless abrogation" of the employer's obligations unless unusual circumstances apply.

Text Message – "…we no longer require your services…"

In *Wallace v AFS Security* [2019], Mr Wallace was a casual Security Guard at AFS. In late-January 2019, Mr Wallace sent two text messages to Ms Everett (who was a Director and worked in payroll) – one, raising concerns about his roster; the second, about not receiving payment for a shift he worked a few days before. The first text was answered confirming that it would be discussed the next day. Mr Wallace received a response to the second text a couple of days later when Ms Everett indicated that it would be "fixed up".

The following week, Ms Everett sent Mr Wallace a text *"Effective immediately we no longer require your services as a casual patrol guard with AFS Security."* Mr Wallace texted back *"Please explain?"* After unanswered texts and phone calls, Mr Wallace drove to the company office to get an answer from Ms Everett but was told he was a casual and no explanation was needed.

Mr Wallace filed an unfair dismissal application.

The Outcome

Mr Wallace was awarded $12,465 in compensation. The Commission found that AFS did not have any reasonable grounds to terminate Mr Wallace's employment without warning or any notice. The Commission was scathing about the way AFS terminated Mr Wallace's employment:

> *"Notification of dismissal should not be made by text message or other electronic communication. Unless there is some genuine apprehension of physical violence or geographical impediment, the message of dismissal should be conveyed face to face. To do otherwise is unnecessarily callous…the advice of termination of employment is a matter of such significance that basic human dignity requires that dismissal be conveyed personally with arrangements for the presence of a support person and documentary confirmation."*

Text message – You're Off the Roster

In *Rahim v Murdoch University Childcare Centre* [2016], Ms Rahim was a Childcare Assistant who had worked at the Centre since 10 June 2011 as a casual and then as a part-time employee. In 2015, Ms Rahim sent the Centre Manager, Ms Cannon, a text asking if she could complete a half day the next day, because she had a hospital appointment.

Can an employee be sacked via text message? cont.

Ms Cannon replied:

"That's fine. Don't worry about coming in tomorrow. I have taken you off the roster as you have become too unreliable. All the best."

Deputy President Sams commented:

"I am appalled that Ms Rahim was dismissed by text message. It was at best, inappropriate and, at worst, a gutless abrogation of an employer's obligation to act reasonably and decently when ending an employee's employment."

Where Exceptions May Apply

The Commission has said, time and time again, that it is not appropriate to terminate an employee via text message, email or any other electronic means unless there is some "genuine apprehension or physical violence or geographical impediment." These situations are rare and would be an exception to the rule and would be considered on a case-by-case basis.

Another exception may be where the employee is no longer attending work, and the discussion about their future of employment has been conducted by letter or electronic communication, but again this needs to be considered on a case-by-case basis.

Although termination conversations or meetings are awkward and unpleasant for all those involved, it is integral that the decision to terminate an employee's employment be done face-to-face after observing principles of natural justice. The employer should be clear about the allegations to the employee, providing him/her with the option of having a support person, listening to their version of events, and considering all of the information before coming to a decision.

If you are looking for advice in relation to managing an employee, please contact:

Shanni Zoeller, Lawyer
Phone: +61 2 9895 9202
Email: szoeller@colemangreig.com.au

Are employee claims always crystal clear? If not…what do you do?

When an employee makes a claim against their employer, you should know exactly what the claim is, the evidence they intend to rely on and the remedy or outcome they seek. However, what happens if all these things aren't clear? How are you supposed to put your best case forward?

These issues were considered in the case of *Haque v Jabella Group* [2016].

Mr Haque was a self-represented litigant who made an application to the Federal Circuit Court alleging that his former employer, Jabella, and its director, Mr Baker, had contravened the *Fair Work Act*, the *Industrial Relations Act* and the *Independent Contractors Act*. The application did not specify what sections of the Acts were breached, or how.

Mr Haque's claims against his former employer included the below:

- the company *"confiscated his websites and SEO development without any contractual agreement;"*
- the company *"has not paid a single dollar for any of the web development works that he undertook online research for SEO development"* which was *"generated"* from his knowledge and was not connected to his employment as a "*finance broker;"*
- he wanted the Court to confirm a "*fair industrial wage and other entitlements"* so he was able to calculate the sum *"stolen"* from him *"with their unfair decision/unfair manner of contract;"*
- he wanted *"repossession of the intellectual property he created whilst he was an independent contractor;"*
- he felt *"discriminated against, tortured, robbed blindly by his employer for a 4-year period of time;"* and,
- because *"his job was done as an independent contractor that implies the right [of his] ownership."*

The Respondents applied to have Mr Haque's claim summarily dismissed, on the basis that it was "frivolous or vexatious, or an abuse of process." It argued that:

> *"the applicant's claims are "clearly vexatious" as they do not identify or clarify, in a fair and meaningful manner, the claim brought against the respondents; do not identify the basis of a cause of action or provide necessary particulars; "dumps" a story on the Court and expects the parties to "guess" the claim; contains "irrelevant matter[s]; does not seek "relief" that the Court is capable of granting and "has no reasonable prospects of success"… the proceedings "appear to be futile" and are a waste of "Court time and resources and that the proceedings should be dismissed."*

The Outcome

The Court dismissed Mr Haque's application on the basis that the material he provided was "for the most part, impenetrable, and in part, incoherent." Further, "Mr Haque's approach to the substantive proceedings had been to seek to shift the burden of articulating a coherent case both as to facts, and the law, to the Court."

Although the Court noted that Mr Haque was a self-represented litigant and not legally trained, it was still not its role to "make sense" of the "large volumes of narrative written questions" put in front of it and identify what he sought when the he had not put his material in some sort of order to express an understandable case.

Are employee claims always crystal clear? If not…what do you do? cont.

Key Lessons

An applicant needs to identify his or her case with sufficient particularity, so that the other party understands the case it needs to answer. It is not the Court's role or responsibility to construct a case for the applicant. Rather, its purpose is to decide the appropriate remedy on the available facts and evidence provided in support of an identifiable case.

If faced with an incoherent claim, an employer can ask the court to strike the claim out or order that the claimant to amend it so that the claim can be understood.If you are looking for advice in relation to managing an employee, please contact:

Shanni Zoeller, Lawyer
Phone: +61 2 9895 9202
Email: szoeller@colemangreig.com.au

Can employers legally collect and store employees' sensitive data?

Ever wondered if your employer is storing your personal data and information? A recent decision by the Fair Work Commission Full Bench has analysed closely whether employers can legally collect and store their employees' data.

There are many reasons why an employer may find it useful to collect and store employee data, such as personal contact details, emergency contacts, health information or records. And where companies implement and encourage a 'Bring Your Own Device' (BYOD) policy that allows employees to use their personal phones, laptops and tablets to engage in work activities. Employees are usually required to download software onto their devices to allow them to log into and access company data, and for privacy and cyber security purposes, this software may also allow the employer to access data on employees' personal devices.

Previously, guidance provided by the Office of the Australian Information Commissioner suggested that employers could legally store employee data without breaching the Privacy Act if the data related to the employee's employment.

However, the recent Fair Work Commission Full Bench decision in *Jeremy Lee v Superior Wood* [2019] has held that this exception only applies to data already held by the employer. Furthermore, employees are entitled to refuse to allow their employer to collect and store 'sensitive information' about them, including biometric data obtained from BYOD personal devices, or in this case, fingerprints.

Facts of the Case

Jeremy Lee was employed by Superior Wood, a company that operates Sawmills in Queensland. Previously, employees of Superior Wood were required to use a 'sign in and sign out' book to log their shift times. However, Superior Wood discovered that employees were signing in for their colleagues when they were not actually at work. Superior Wood decided to implement a fingerprint scanning system to replace the sign-in book and amended their 'Site Attendance Policy' accordingly.

Mr Lee refused to register his fingerprint in the system and continued to use the manual sign-in book. After directions, discussions and warnings, Mr Lee's employment was terminated.

Mr Lee made an unfair dismissal claim in the Fair Work Commission. The Commission held that the dismissal was not unfair. However, on appeal to the Full Bench, this decision was overturned. The Full Bench held that:

- the 'Site Attendance Policy' did not apply to Mr Lee, as his employment contract specified that he was only bound by company policies in place at the commencement of his employment (a drafting point worth noting);
- as to whether Superior Wood's direction to use the fingerprint scanner was a 'reasonable and lawful' direction, under the *Privacy Act,* records held by an organisation in connection to a person's employment are exempt from *Privacy Act* requirements, but this exemption only applied to records *already* held by the employer, not the *collection* of data, and even more so sensitive personal information;
- therefore Superior Wood did have to comply with the provisions of the *Privacy Act*, including the prohibition on collecting 'sensitive information', including biometric data, without the person's consent;

Can employers legally collect and store employees' sensitive data? cont.

- and therefore, Superior Wood's direction to Mr Lee to submit to mandatory fingerprint scans was not a 'reasonable and lawful' direction, and not a sound basis for termination; and,
- while it was acknowledged that the implementation of the fingerprint scanner may have offered some safety benefits by providing a record of which employees were on site in the case of an emergency, these safety benefits did not outweigh the requirement for Superior Wood to comply with the provisions of the *Privacy Act*.

What does this mean for Employers?

Employers should ensure that they have an up-to-date privacy policy, that specifies what information will be collected, and when, how, and why. If employers need to collect sensitive data from employees, they will need to obtain explicit consent from the employees and deal with what happens if consent is refused.

Further, if an employer wants to implement a new workplace practice for the purposes of improving safety, and that safety feature somehow collects and stores sensitive data from employees, employers first need to obtain explicit consent from employees before implementing the new workplace practice.

It is important that employment contracts clearly state that employees consent to the employer collecting and storing sensitive data, including biometric data, in accordance with the privacy policy, and other policies and procedures that may already be in place.

Finally, employers should ensure that employment contracts refer to policies as amended from time to time, not just the policies that are in place at the date of the contract.

If you think that your employment contracts or privacy policies need to be updated, please contact:

Stephen Booth, Principal Lawyer
Phone: +61 2 9895 9222
Email: sbooth@colemangreig.com.au

Article preparation by Tom Dearden.

Are employers required to pay redundancy if the job is no longer required as a result of the "Ordinary and Customary Turnover of Labour"?

When an employer terminates an employee's contract of employment, they are required to pay an amount for redundancy based on the employee's years of continuous service. If an employer terminates an employee's employment, how much redundancy are they obligated to pay and what exceptions might there be to paying redundancy?

When is an Employer Required to Pay Redundancy to an Employee?

Section 119 of the Fair Work Act (FW Act) sets out when an employer is liable to pay redundancy. The amount of redundancy pay under the FW Act ranges from four to 12 weeks, depending on the employee's length of service (zero weeks for small businesses (fewer than 15 employees), or employees who have worked less than 12 months).

Section 119(1) contains an exception to the obligation to pay redundancy pay. An employer is not required to pay redundancy where the termination of employment is due to the *"ordinary and customary turnover of labour."*

What does "Ordinary and Customary Turnover of Labour" mean?

The recent case of *Fair Work Ombudsman v Spotless Services Australia Ltd* [2019] FCA 9 discussed the meaning of the phrase *"ordinary and customary turnover of labour."*

Spotless Services engaged employees to provide cleaning services to business customers. The service contract between Spotless Services and their customers were often for a fixed term and obtained through a tender process.

Spotless Services was not able to renew a contract with a customer, and it terminated the employment of three employees and relied upon the "ordinary and customary turnover of labour" exception as a basis for not paying redundancy.

Spotless Services argued that because its service contracts with its client were often not renewed at the end of an unsuccessful tender, losing a customer contract because of an unsuccessful tender, was a normal, and therefore an "ordinary and customary" part of their business, so they fell within the exception to redundancy obligations.

Justice Colvin in the Federal Court disagreed and held that whether *"the ordinary and customary turnover of labour"* exception applied required an analysis of the nature of the work which the employee was doing (in this case cleaning), and not the nature of the contractual relationship between the employer and its customers. Justice Colvin said that if Spotless Services' interpretation of the exception was correct, *"an employer could simply announce to its employees "when your job is no longer required to be performed for the business your employment will be terminated without redundancy pay, that is our common and usual practice so you should expect that to occur and thereby bring about their own exemption."*

Justice Colvin also observed that employers are always faced with the risk that employment of some employees may come to an end, either through "*insolvency of the business, technological change, a reduction in customers of the employer's business and the restructure that may follow a takeover or amalgamation."* Therefore, simply having a client contract not renewed at the end of a tender process, is insufficient to take the situation outside usual redundancy obligations.

Are employers required to pay redundancy if the job is no longer required as a result of the "Ordinary and Customary Turnover of Labour"? cont.

So, when does the Exception Apply?

The Court held that whether the exception applies, will depend on many factors, in particular:

- Whether it was evident to the employee at the time of employment, that their employment would cease at the end of the customer contract (that is, there was no reasonable expectation of ongoing employment if that occurred); and
- Whether it was ordinary and customary, with regard to the nature of the work (not the nature of the contract between employer and customer) for the employment to cease at the end of the contract between employer and customer.

Key Takeaways for Employers

The Spotless Services decision has confirmed that the "ordinary and customary turnover of labour" exception only applies in a narrow set of circumstances. An employer wanting to rely on this exception should:

- ensure that at the time of offering the employment, the employee is aware that their employment is likely to cease at the end of a certain engagement, and this is particularly relevant where the employee is employed by the employer to work closely with the customer, and where there is not much scope for the employment to continue at the end of that engagement;
- make sure this expectation is clearly set out in the employment contract or other communications at the time of engagement or allocation to the particular subject of work;
- if the employment is to be fixed term, consider providing a "fixed term" contract, which more clearly allows for an exemption to redundancy obligations; and,
- take a consistent approach: make sure all employees in the same situation are treated in the same manner, rather than adopting an ad hoc approach to who is paid redundancy, and who is not; and be aware that applying this apparent exception to redundancy obligations may be difficult!

If you have a question in relation to your redundancy obligations or entitlements, please contact:

Lisa Qiu, Associate & Registered Migration Agent
Phone +61 2 9895 9207
Email: lqiu@colemangreig.com.au

Article preparation by Manuela Palucci.