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As an employer, it is often useful to see things from the "other side" and understand how decisions regarding employee terminations might be viewed by Fair Work Australia if there is an unfair dismissal claim.

This Employment Law Update provides a summary of some recent decisions regarding "unfair dismissal" that will shed some light on the application of the relevant legislation in this area. Remember though, the best option is to discuss each situation with an expert in the field before you make a decision to terminate employment! It also covers the first decision under the "unfair contracts" provisions of the new legislation applying to independent contractors.

Independent Contractors: First "damages" decision under the Federal Independent Contractors Act

The Federal Independent Contractors Act was introduced by the Howard Government in 2006 as a step consistent with the WorkChoices regime to promote independent contracting as a legitimate form of economic activity.

This Act also had the effect of removing another slice from the powers of the NSW Industrial Relations Commission, in the form of most of its very broad "unfair contract" jurisdiction. The IC Act provides a more limited mechanism for contractors who allege that their contracts are unfair to seek redress in the Federal Court system.

The first case to produce judgments on a range of issues affecting this jurisdiction, Keldote v Riteway Transport has been running for quite some time and after several hearings and appeals has finally come to a conclusion (although further appeal may be possible).

The three contractors who made claims in this case were owner-drivers contracted to Riteway. Riteway required them to upgrade their trucks, and terminated their contracts when they refused to do so. Riteway alleged that the contractors had terminated their contracts themselves by failing to do as required.

The Court held that, in fact, it was Riteway's refusal to provide further work which repudiated the contracts, and termination of the contracts gave rise to a question of the contractors being given reasonable notice of termination.

The owner-drivers claimed that their contracts were unfair because they allowed Riteway to unilaterally demand changes to their trucks, without reward, and to terminate the contracts if the drivers refused. The Federal Magistrates Court held that the contracts were indeed unfair.

The Act is unclear as to whether the Court has the power to award damages, or only to amend the contract, leaving the consequences of that amendment to another court on another claim and another hearing. In Keldote v Riteway, the Federal Magistrate decided that the Court did have jurisdiction to award damages as well as amending the terms of the contracts.

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Independent Contractors: First "damages" decision under the Federal Independent Contractors Act cont.

However, he assessed damages as limited to the income that the contractors would have earnt during a period of reasonable notice (assessed as 3 months) together with the loss of a $20,000 goodwill payment to which they would otherwise have been entitled under the contract. The contractors therefore received compensation varying between $29,000 and $38,000.

Although the old "unfair contracts" jurisdiction in NSW has been substantially removed, businesses engaging contractors need to be aware that a contractor may claim to have been, "really", an employee – so that employment law rights may apply, or may make claims of unfairness under the Independent Contractors Act.

If you need advice about whether a "contractor" is truly a contractor or really an employee, or about claims by contractors under the IC Act, contact Stephen Booth on ph: 02 9635 6422 or email sbooth@colemangreig.com.au.

Unfair Dismissals: What constitutes "unfair"?

The cases below outline a number of reasons for which employees have been terminated, and the outcome of their unfair dismissal cases before the AIRC. The short reviews provide a useful indication of the thinking behind unfair dismissal outcomes!

Porn saved to a computer drive:

In a case under the old system (not materially different now for these purposes), in which an employee had saved pornographic images onto their computer, the AIRC found that termination of employment was unfair.

The circumstances that applied in this case which the Commissioner took into consideration included:

- the employer had strong policies regarding inappropriate conduct, including accessing pornography through the employer's computer system;
- a reminder at start up of the computer every day drew the employee's attention to the policy;
- the employee was found to have 115 pornographic images on their computer drive which had been deliberately saved by the employee (not just automatically recorded through the operation of the computer system when others sent them to the employee);
- the employee was not fully frank with the investigator, although some of his answers may have arisen more from naivety about how the computer system worked rather than dishonesty;
- the employee had 25 years unblemished service;
- the employee said the material had been forwarded to him by a more senior employee, who had since left, and that others accessing similar material had not had their employment terminated;
- computer records verified the employee's statement that he had not accessed, forwarded or dealt with the images after initially receiving and saving them
- the conduct had occurred some years before it came to light and was not continuing;
- the employee was genuinely contrite and remorseful;
- the Commissioner found that length of service may be of less relevance in misconduct than it is in other cases, but such a long period of unspoilt service should still be taken into account, particularly where the misconduct was relatively isolated;

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Unfair Dismissals: What constitutes "unfair"? cont.

- the Commissioner also took into account the employee's personal situation, including his need for costly medical treatment, and other financial commitments;
- the Commissioner found that the dismissal was harsh because it was disproportionate to the gravity of the misconduct, and termination had disproportionate consequences;
- The Commissioner ordered reinstatement since the relationship of trust and confidence had not been irretrievably broken, but did not order any compensation for six months loss of pay between termination and reinstatement, because some penalty was reasonable in the circumstances.

Tardiness and low level insubordination:

In another case before the AIRC, an employer terminated a retail cashier's employment because:

- the employee started late, or with only a minute to spare, on 16 occasions during six months (when cashiers were required to be ready for work in advance of the 9am store opening time in order to immediately be able to receive customers, and received a paid lunch break as compensation for the extra time required);
- on two occasions his register was short of cash, raising concerns about his handling of cash;
- he sometimes put up the "Next Cashier" sign to engage in lengthy personal mobile phone calls;
- he refused to answer an incoming phone call as directed because it was "not yet 9am".

The employee's unfair dismissal claim succeeded because:

- while his conduct would have been frustrating, the issues were small niggling issues, and did not provide a valid reason for dismissal;
- there was no evidence that the cashier was responsible for a pattern of cash drawer shortages and two instances over six months did not prove inability to perform the necessary duties;
- as the deteriorating relationship meant that it was unlikely that the employment would have continued longer than another three months, the employer was ordered to pay three months' pay as compensation, but it was discounted by 10% in recognition of the cashier's low end misconduct.

Termination for accessing the Internet at work:

An employee who had been clearly directed not to access the internet during work time failed in his unjust dismissal claim.

He argued that he had not infringed the direction because he had not gone beyond the first page of sites he had accessed (because the computer system did not allow him to go further). FWA rejected this argument: the direction was clear, and accessing the first page of websites infringed that direction, even if the infringement was not prolonged by accessing further pages. The claim therefore failed.

Termination for deliberate car damage harsh:

To save money, an airline directed pilots to travel from airport to accommodation by company car, rather than by taxi (which the pilots preferred).

One pilot vented his frustration at this direction by deliberately driving the company car at high revs in low gear for long periods, and by driving the car with the handbrake on (despite a beeping alarm). He was summarily dismissed.

The low gear and handbrake allegations were proved, but the employer could not prove allegations that the pilot had also scratched the car, shifted the gears down while someone else was driving and had thrown away a key tag.

FWA criticised the employee's actions as petulant, childish and inappropriate, and foolish and silly from a person in a responsible position, so there was a valid reason for termination.

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Unfair Dismissals: What constitutes "unfair"? cont.

Nevertheless, taking account of his 14 years of service, seniority, and the financial effects of termination (he was forced to sell his house and to spend $32,000 to qualify to fly other aircraft), and prior good record, it was harsh to terminate his employment, and he was therefore reinstated.

The Commissioner commented that the pilot's conduct was not to be condoned in any way, but as another pilot who engaged in similar conduct was not dismissed, and in view of the consequences for this pilot, reinstatement was appropriate, with some, but not all, entitlements to be paid for the period of the dismissal, and with the pilot to be placed on a formal warning about his conduct.

Lessons to be learned from these decisions...

The situations leading to unfair dismissal claims are many and various. Even what appear to be strong cases can have issues when a broader view is taken, particularly for employees with long and good service. As an employer, it is worth getting advice before moving to serious disciplinary steps or dismissal as a "reality check" on the issues that are likely to arise, and how to manage and minimise the risks of claims.

Coleman Greig's employment lawyers are available to provide speedy, practical advice in difficult situations. If you need help, or just the confidence to be gained from talking over a situation and getting advice based from an expert in this area, contact Stephen Booth, Anna Ford or Enza Ianella, details below.

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