

Employment & Workplace Relations

Update: When Dismissal for Unsafe Work Practices is Unsafe for your Business: Balancing Dismissal Laws and OHS

Under model work health and safety (WHS) laws due to take effect in December 2011, those who operate a business or undertaking will have a non-delegable duty to keep safe the individuals who are affected by the business or undertaking. Fulfilling that duty means managing proactively, the behaviour of the individuals affected. When their behaviour falls short of the standard expected, can the employer end the employment?

Two recent Fair Work Australia (FWA) decisions highlight the need for clear standards and diligent monitoring and review of performance against, and enforcement of, those standards, to meet a business' WHS duty.

Not unfair to dismiss employee over allowing a near miss - attitude, behaviour and due diligence revisited

In *Peter Graham Butson v BHP Billiton Iron Ore Pty Ltd*, [2010] FWA 640 (1 February 2010), FWA found it was not unfair to dismiss a team leader who failed to enforce a BHP safety procedure, even though it was a widespread and common practice to ignore the procedure, and supervisors and other team leaders were just as lax at enforcing it.

Facts

Mr Butson was a team leader at a BHP locomotive repair workshop. In the course of performing their work, he and his team were required to step across a 40-60cm gap above a 3-4 metre drop, between the platform and the locomotive they were working on. BHP procedure required the use of a mobile platform to bridge the gap, but the mobile platforms were unwieldy and typically kept some distance away, and the widespread, site level practice was not to use it. Concerned at reports of the practice, BHP investigated.

In its evidence, BHP said that despite an extensive employee safety awareness campaign including refresher training in the policy and what was required, Mr Butson displayed insufficient understanding or concern about the safety procedure and, of greater concern, no acceptance of his obligation to enforce it.

Mr Butson said that only he and his supervisor were dismissed, and that singling him out for such harsh treatment made the dismissal unfair.

Attitude and Behaviour

Addressing the reason for dismissal, FWA said:

"In my view it was the [employee's] response to the approaches to him regarding the practice that was the catalyst for and led to the termination. The practice of stepping across the gap may have been, and by my findings above, were occurring regularly but the reason for the termination was the indifference of the [employee] to the practice and the lack of any recognition by him of any responsibilities he had with regard to it".

FWA concluded that the dismissal of Mr Butson was not unfair, because based on his attitude to safety, displayed throughout the investigation, the employer could not reasonably have any trust or confidence that Mr Butson would fulfil his responsibilities. FWA observed that Mr Butson had difficulty accepting that he had any responsibility to do anything about a breach unless he actually saw it himself. Critically for employers, FWA relied on Mr Butson's past conduct and current attitude towards his safety obligations, as a good indicator of his future behaviour - in following and enforcing its safety standards and keeping himself and others safe.

Singled out?

FWA found that it was indeed common practice for the procedure in the policy to be ignored, and accepted that Mr Butson was not the only managerial employee who was aware of the relatively regular breach but allowed it to continue. Critically, there was no evidence that any other team leader or supervisor had shown indifference to the safety of persons and their obligations to enforce the standards that keep people safe.

FWA rejected Mr Butson's arguments that he was singled out. It acknowledged that there may be some criticism of the fact that other supervisors had not been investigated over the practice but nevertheless found that there was no reason to find that the employer would have *"dealt with the matter in any different way had the individual concerned been someone other than the [employee]"*. FWA found that it was not reasonable to expect that BHP had cause or an obligation to investigate every supervisor and any failure to do so does not render the termination of employment unfair.

Reinforcing policies and procedures before there is a problem - effective due diligence

Three critical factors underlie BHP's success in this case.

- In the months before the incident, BHP had gone to great lengths to communicate, to all affected personnel, including Mr Butson, its safety procedures and expectations for the relevant work practices and the importance of safety issues and compliance with safety rules and standards.
- In the course of its investigation, BHP became concerned by Mr Butson's responses and attitude towards safety obligations that he *"may not be prepared to embrace and actively participate in development of a culture and attitude in [the locomotive service shop] that was intolerant of any conduct or behaviours involving the taking of risks that had safety implications"*.
- FWA agreed, finding that Mr Butson *"refused to recognise that there had been, or was, any fault on his part. He had difficulty accepting that there was any responsibility on his part to take any initiative such as informing his supervisor or other management of the practice unless he actually witnessed the occurrence"*.

- BHP *"genuinely endeavoured to provide [Mr Butson] with sufficient opportunity to provide information and responses to questions that could provide them with confidence that his approach was consistent with what they were trying to achieve"*.

Against this background, the reason for dismissal was found to be valid, and the procedure adopted fair.

Prudent employers will review and monitor how well their safety policies are being put into practice and take steps promptly to address any gaps they find.

Safety is paramount provided its enforcement is not surprisingly "disastrous" for the individual

In *Paul L Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883 (8 February 2010), one of the more controversial and highly publicised decisions this year, FWA reinstated an employee dismissed for repeatedly breaching safety policies. While it found that the employer did have a valid reason for termination, FWA nevertheless found the dismissal was harsh due to a procedural flaw and that the employee's personal circumstances would make losing his job "disastrous" for him and his family.

Facts

Mr Quinlivan was employed by Norske Skog Paper Mills (Australia) Ltd for nearly 20 years. Whilst performing his duties of cleaning out a tank in a paper recycling warehouse, Mr Quinlivan was repeatedly told to wear his safety glasses. He repeatedly refused to wear the glasses and responded abusively. In addition he allegedly refused to refrain from modifying tools he was using to perform the task. Perhaps unsurprisingly, his employer lost patience with Mr Quinlivan's repeated refusals to keep himself safe, and brought his employment to an end.

Failure to spell out the potential consequences against a background of failing to exercise due diligence in the past

FWA accepted that Mr Quinlivan had repeatedly refused to wear his safety glasses and acknowledged that his behaviour amounted to "relatively serious misconduct". It concluded that most of the legislative requirements pertaining to a dismissal were in fact complied with.

However, and critically in this case, FWA noted that although there was evidence that Mr Quinlivan was

repeatedly told to put on his safety glasses, the Company put no evidence before FWA that it had warned Mr Quinlivan of the potential consequences of failing to do as he was directed, and specifically, that it could result in the termination of his employment.

In this regard, FWA noted the many minor incidents regarding safety matters including safety glasses in Mr Quinlivan's disciplinary history. Vice President Lawler stated that:

"it should have been brought home to an employee in the position of the applicant that a further breach could have serious consequences....In this case that is particularly so when the applicant had the experience of being repeatedly told to wear safety glasses on earlier occasions without any repercussions whatever".

Vice President Lawler recognised that the Company had onerous OHS responsibilities under the applicable State legislation and therefore was entitled to take safety breaches seriously. Nevertheless he determined that the dismissal was harsh in light of Mr Quinlivan's long service and the disastrous effect such a dismissal would have on his personal life.

FWA ordered the Company to reinstate Mr Quinlivan but, in what it described as a "sanction of significance", it denied him any award of back pay, in recognition of the seriousness of his misconduct and to encourage Mr Quinlivan to take more seriously his obligations relating to safety. FWA explicitly cautioned employees of the Company from interpreting *"this decision as in any way endorsing a disdainful or careless approach to safety or the [Company's] safety policies"*.

Prudent employers will not only revisit their practices, policies and procedures, but also update their policies to spell out the potential consequences of a refusal to comply with safety obligations. More importantly still, employers should also speak with their employees, before there is a problem or incident, and take steps to assess the employees' understanding of the "right" way to perform their duties and to ensure that employees understand their obligations and what is expected of them.

How well do your business' OHS management AND performance management systems align?

These two decisions serve to highlight the complexities and inconsistencies through which employers need to navigate in order to comply with

both OHS and dismissal laws. The challenge for employers is exacerbated by decisions which arguably deliver conflicting messages.

In *Butson* the dismissal of the team leader was upheld despite the fact that the relevant safety breach occurred regularly and without consequence under several managers' supervision. Conversely in *Norske*, the very fact that the safety breach occurred repeatedly without repercussions, rendered the dismissal harsh. The critical difference was the communication of the employer's expectations in the months leading up to the incident, and the clarity around potential consequences of a failure to meet those expectations in future.

In *Butson*, FWA determined that safety was paramount and was prepared to overlook the less than ideal situation where other supervisors were aware of the widespread breach. On the other hand in *Norske* workplace safety and an employer's ability to enforce it, took second place to unfair dismissal law procedural considerations and the devastating effect the dismissal would have on the individual employee. Importantly, in *Norske*, the employer's lack of clarity around potential consequences allowed FWA to find the outcome was harsh. No such opportunity was allowed in *Butson*.

IS THERE A SAFETY LIGHT AT THE END OF THE TUNNEL?

It is incumbent upon employers to provide safe workplaces. Accordingly employers have the right and moreover, are obliged to implement and enforce safe work practices. As these decisions show, the manner and regularity of how employers do so may have a critical difference to their business and commercial risks. Only when performance management and risk management/due diligence processes align can an employer dismiss safely over safety issues.

Employers can increase the likelihood of establishing a workplace in which these two spheres of law coincide harmoniously through comprehensive policies and consistent implementation and diligent enforcement of those policies, clear communication of how they are expected to operate in practice, and diligent monitoring and review of how effectively that is occurring. In such circumstances employers are better placed to successfully defend litigation and possibly prevent the claims from arising at all, as well as keep their workforce safe.

This article was produced by Herbert Geer.
It is intended to provide general information in summary form on legal issues.
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