

Employment, Workplace Relations & Safety

Update: DISMISSAL AND SAFETY LAWS – PARTNERS OR ADVERSARIES?

Employers have onerous obligations under occupational, health and safety laws and, as recently proven in a decision from Fair Work Australia, terminating an employee on the grounds that they have not complied with the company's safety standards can be a 'valid reason' for a termination but care should be exercised when making such a decision.

DISMISSAL AND SAFETY LAWS – PARTNERS OR ADVERSARIES?

In our March Update we described the difficulty faced by an employer looking to fairly terminate an employee for a breach of a company's safety standards with the employer's obligation to provide a safe workplace under occupational, health and safety laws. This year has seen a number of applicants challenge their termination with unfair dismissal claims following a termination on safety grounds. The cases demonstrate that terminating an employee for failing to comply with the company's safety standards or policies can be a valid reason leading to a fair termination provided that the company's policies are clearly expressed and that other factors such as the personal circumstances of the employee are also considered first.

In the recent decision of *Clint Griffiths v Boral Australian Gypsum Ltd* on 27 September 2010, Herbert Geer successfully defended the employer against an unfair dismissal claim arising out of a safety breach.

FACTS

Mr Griffiths was employed by Boral as a licensed forklift driver. He had in excess of 28 years' experience in the operation of a forklift. In previous employment, he held supervisory roles and was a workplace Health and Safety Representative. At Boral Mr Griffiths received regular training in the safety of forklift operation and the company's health and safety policies and procedures.

During one of his shifts, Mr Griffiths was found to be operating the forklift without wearing a seatbelt. The seatbelt was looped around the back of the forklift and fastened. The forklift had a safety system which prevented operation unless the seatbelt was fastened. Upon being approached by the Team Leader about his failure to fasten the seatbelt in an acceptable way approximately three hours into Mr Griffiths' shift, Mr Griffiths immediately apologised and fastened the seatbelt correctly.

Mr Griffiths and the employee on the previous shift both denied looping the seatbelt around and fastening it so as to bypass the safety system. In those first three hours of the shift whilst not wearing the seatbelt, Mr Griffiths estimated that he mounted and dismounted the forklift approximately 20 times. Mr Griffiths was sent home on pay pending an investigation. After several meetings, Mr Griffiths was dismissed for reasons which included his serious breaches of Company policies and procedures, including site safety requirements.

DECISION

Valid reason

FWA concluded that the safety breach constituted a valid reason for terminating Mr Griffiths' employment.

"There was a valid reason for the termination of the Applicant's employment, being a serious and wilful breach of an important safety policy. The Applicant knew that the forklift had a safety system designed to prevent it being operated without the seatbelt properly fastened around

the operator. He continued to operate over an extended period with that system knowingly bypassed. This is not the case of the Applicant having a momentary and absent minded lapse of judgement."

Notification of reason and opportunity to respond

FWA determined that Mr Griffiths was adequately notified of the reason for termination and was afforded adequate opportunity to respond. FWA also took into consideration statements made by Mr Griffiths in a disciplinary interview which occurred a few months prior to his termination.

Boral's safety policies

Importance was placed upon the existence of extensive Company safety policies and procedures required to comply with onerous statutory obligations. In this regard FWA noted:

"Additionally, I have had regard to the significant amount of material handed up or filed by the Respondent emphasising the importance of adhering to policies requiring the wearing of seatbelts whilst operating forklifts and the consequences, including fatalities, that potentially flow from failure to wear them. In this latter respect I have had particular regard to the documented attitude of the relevant statutory authority with responsibility to health and safety.

I consider that a rational balancing of all of these factors does not render the termination of the Applicant's employment harsh, unjust or unreasonable."

Although Mr Griffiths had a considerable period of service it was determined that it was reasonable for the employer to terminate the employment due to the seriousness of the breach and the training Mr Griffiths had received.

IMPLICATIONS - IS THE RELATIONSHIP BETWEEN OHS AND DISMISSAL LAWS BECOMING CLEARER?

We have summarised below some of the recent decisions from FWA, and the relevant considerations which arise, when an employer seeks to terminate an employee for a failure to comply with OH&S policies.

- **Safety breach is a valid reason for termination**

FWA recognises the importance of safety and often concludes that safety breaches constitute a valid reason for dismissal. However dismissal laws require that termination of employment for valid reasons be executed fairly. It is in this latter area where employers sometimes encounter difficulties.

- **Policies, procedures and adequate training**

Employers can only seek to rely on a breach of a safety procedure to justify dismissal if there is a safety procedure in existence which is widely known to employees. Accordingly, employers must ensure that employees have been provided with adequate practical training to ensure that they understand how safety procedures work in practice.

The benefit of comprehensive policies was illustrated in Boral as well as in another recent decision concerning the breach of an alcohol policy. In *MH v The Respondent* (14 October 2010) a mineworker was dismissed for breaching the company's zero tolerance alcohol policy by attending work after a night of heavy drinking. The employee argued that he simply miscalculated how long it would take for the alcohol to pass through his body and that whilst he was aware of the policy, he was unaware of the details of the policy and the penalties for contravening it. FWA found that the policy was unambiguous and that the employer had taken sufficient steps to ensure that employees were aware of the policy through training, prominent display and random and blanket testing.

However, good written policies will not provide employers with a defence if they cannot demonstrate that employees have been adequately trained. In *Colin Makin v GlaxoSmithKline Australia Pty Ltd* (29 March 2010) FWA reinstated an employee who failed to abide by company procedure to access a high-rise warehouse. FWA determined that the breach of the safety policy constituted a valid reason for dismissal however found that deficiencies with respect to the training provided rendered (in part) the dismissal harsh.

FWA concluded that the training was inadequate, impractical and failed to identify and address employee misconceptions about their obligations. FWA noted that the purpose of training is not to deliver it for its own sake but rather to improve the skills, knowledge and understanding of those being trained.

Similarly in *Paul L Quinlivan v Norske Skog Paper Mills Australia* (8 February 2010) it was determined that although a failure to wear safety glasses was a valid reason for termination, the employer repeatedly failed to explicitly spell out the consequences of not complying with the safety policy of not wearing safety glasses (see March Update).

- **Length of service, employment record and attitude to safety breaches**

An employee's record on safety and attitude when confronted with a breach will be considered when determining whether dismissal is the appropriate course of action. In *Peter Graham Butson v BHP Iron Pty Ltd* (1 February 2010) the employee's indifference and poor attitude to safety outweighed other flaws in the employer's conduct to justify dismissal (see March Update).

This case can be contrasted with several cases where serious safety breaches could not justify dismissal largely because the employee concerned had an unblemished record on safety and appreciation of the importance of safety in the workplace. For example, in *Mr Mohamed Ahmed v Webforge NSW Pty Ltd* (2 June 2010) an employee of 15 years in a metal fabrication plant, was employed as a machine operator with supervisory responsibilities. His employment was terminated following a serious safety breach in which he injured his back after attempting to use a steel bar to fix a misalignment in a machine.

FWA found that the employee had been unfairly dismissed and awarded him 9 weeks' pay in lieu of reinstatement. FWA concluded that in light of the employee's extensive length of service and employment record, options other than dismissal should have been fully explored by the employer, even if alternatives to dismissal for a supervisor who engaged in this conduct would have been 'both few and unpalatable'.

Similarly, in *Jones v BHP* (23 September 2010) a track maintenance technician was dismissed following an accident where an expert investigation concluded he was speeding and not driving appropriately for the road conditions and therefore breaching BHP's safety procedures. FWA concluded that the expert evidence was not reliable. FWA took into account the employee's strong safety record, including safety procedures initiated by the employee. Whilst FWA commended BHP's record on safety, it nevertheless found there was

no justification for dismissal and therefore reinstated the employee with back pay.

- **Consistency**

The consistency with which safety policies are enforced and the consequences of enforcement will, in many cases, be examined by FWA when determining whether the dismissal was fair.

In *Mr Wayne Darvell v Australian Postal Corporation [2010] FWAFB 4082* (1 June 2010) an employee of 20 years successfully challenged his termination. The applicant refused to follow directions and was summarily dismissed for a number of safety breaches. One of the arguments raised by the applicant was that the dismissal was a disproportionate response to his actions and was inconsistent with action in respect of other employees who engaged in similar conduct.

The Full Bench endorsed the finding at first instance and noted that when comparing apparently similar misconduct, account should be taken of the particular employee's work histories, the individual responses to concerns raised and the nature of the breach.

However, the Full Bench advised caution, noting that in claims of differential treatment or inconsistency, the cases must be truly comparable to be relied upon. It relied on the decision of Lawler VP in *Sexton v Pacific National (ACT) Pty Ltd* who stated that the Commission must "ensure that it is comparing 'apples with apples'".

This point was adopted by FWA in *Boral* when Mr Griffiths sought to rely on alleged inconsistent treatment between previous disciplinary situations at Boral concerning seatbelt use and safety. FWA held that the examples provided were not sufficiently similar to give rise to a valid comparison in Mr Griffiths' claim of inconsistent treatment.

- **Deficient investigation will undermine a dismissal**

In *Francis v Kalgoorlie Consolidated Mines* (28 July 2010) the dismissal of a mine worker for conduct which endangered the lives of other workers was deemed unfair due to a "fatally deficient" investigation in which the worker was not given the opportunity to respond to the allegations against him. This procedural flaw was compounded by the fact that the employee

had an unblemished record and long duration of employment.

CONCLUSION

Employers will be assisted when defending a termination on safety grounds if they have:

- implemented comprehensive written OH&S policies with safety in the workplace being identified as a top priority;
- overseen practical, regular and proactive training on these OH&S policies across the organisation to ensure they are well understood by existing and new employees (as well as contractors and anyone else who attends the work site);
- consistently and diligently enforced the written OH&S policies; and
- prior to termination, considered the employee's safety and disciplinary record, his or her attitude to safety, his or her length of service with the company and options available other than termination of employment.

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