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# Workplace View

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# The other side of the coin… employee to pay costs

A recent decision by the Federal Magistrates Court of Australia may deter some employees who vexatiously bring general protection claims against employers, because it highlights the risk of adverse cost orders being imposed against them.

## Background

The Applicant was employed as a Safety Officer by a local Council, a role which required him to drive a car to perform his duties. The Applicant made a number of complaints to the Council about the discomfort he experienced while driving, which he attributed to a medical condition. The Applicant also sent an inflammatory email to police officers bemoaning the Council's treatment of him and identifying a member of the public as a 'graffitist'. The Council subsequently terminated his employment for gross misconduct.

The Applicant commenced legal proceedings against the Council, alleging it had taken adverse action against him because of his disability.

Several months prior to the hearing the Council wrote to the Applicant, who was at the time unrepresented, and invited him to withdraw from the proceedings on the basis that it would forgo making an application for costs against him. The Applicant did not respond.

During the hearing the Applicant:

- abandoned a number of issues he initially raised in his submissions;
- insisted upon a laborious cross examination of witnesses in relation to matters outside his amended pleadings; and
- did not challenge crucial evidence about why his employment was terminated.

The Court ultimately dismissed the claim and the Council applied for a costs order against its former employee.

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## Costs Application

The Court confirmed that in relation to proceedings brought under the *Fair Work Act 2009* (Cth) **(FW Act**), costs can only be awarded against a party where the Court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause;
- the party's unreasonable act or omission caused the other party to incur costs; or
- the party unreasonably refused to participate in the matter before Fair Work Australia.

The Council submitted that costs should be awarded against its former employee because he rejected the 'walk away' settlement offer and had caused the Council to incur significant legal expense by insisting upon examining witnesses unrelated to his cause of action.

In considering whether the Applicant had acted unreasonably the Court noted the discretion to award costs is not necessarily enlivened merely because a party does not conduct litigation efficiently, a concession is made late, a party could have acted in a different or timelier fashion, or a party adopted a genuine but misguided approach.

However the Court concluded that the way the Applicant had conducted the trial and his failure to accept the settlement offer warranted the imposition of a costs order against him in an unspecified amount.

## Implications for employers

This decision highlights that, as a matter of strategy, an early offer of settlement can be an extremely useful tool in limiting financial exposure to court costs, even where, as in this case, the offer does not include provision for any payment of compensation. The case may also serve as a deterrent to potential litigants, particularly those acting as individuals, who must now weigh up the very real risk that costs may be awarded against them should they vexatiously pursue their claims.

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# Summary dismissals to be handled with care

In a recent X-rated tale a summary termination was found to constitute unfair dismissal, even where an employee's misuse of electronic communication provided a sufficient reason for termination.

## Background

The Applicant was employed at Australia Post's Melbourne consolidation centre and over a period of 18 days sent a number of pornographic emails, including one enigmatically entitled '*Grandmothers of Brazil',* to colleagues and a contact outside the organisation.

After detecting the correspondence through an electronic filtering system, Australia Post launched an investigation into the Applicant's conduct, and subsequently terminated his employment, without notice or payment in lieu, for multiple breaches of company policy.

The Applicant commenced unfair dismissal proceedings against his former employer, arguing that:

- the organisation's culture tolerated the exchange of inappropriate emails; and
- several other employees had engaged in similar conduct and had not been dismissed.

## Naïve Conduct but not wilful disregard of policy

Fair Work Australia (**FWA**) accepted that the Applicant had breached the relevant Australia Post policies, but characterised his conduct as naïve and falling short of a calculated or wilful disregard of company policy.

The Tribunal confirmed that an employer is only entitled to summarily dismiss an employee for serious and wilful misconduct, and found that in this case, summary dismissal was disproportionate and contravened the unfair dismissal protections in the FW Act.

In reaching this conclusion FWA was influenced by evidence that:

- the Applicant had limited experience with computers and never intended to repudiate his contract of employment;

- Australia Post had applied its policy inconsistently – the Applicant had received the email from other work colleagues and none of these employees had been subject to disciplinary action;
- the Applicant's conduct was unlikely to damage the company's reputation given all external emails were sent to his sister-in-law (at her request…).

In an unusually severe reproach to the employer, in addition to requiring the reinstatement of the employee, FWA determined that Australia Post would be ordered to pay to the Applicant an amount equal to the remuneration lost by the Applicant from the date of dismissal to the date of reinstatement, a period of 13 months.

## Implications for employers

The moral of this racy yarn, is not only that an employer should carefully consider all the circumstances of the case before determining whether the conduct is serious enough to warrant summary dismissal, but also that while company policies are essential in clarifying the boundary between acceptable and unacceptable behaviour in a workplace, in order to be effective tools in the disciplinary process policies should be applied consistently and fairly, as well as explained clearly, to all existing and new employees.

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## Did you know…. employees can temporarily go back to work while on maternity leave?

Parliament has recently passed a number of amendments related to the Federal Government's parental leave scheme, including changes to the FW Act which include the introduction of the concept of a keeping in touch day, which enables employees who are on unpaid parental leave to perform permissible paid work for short periods in order to assist with their return to work. The new provisions make it clear the performance of work does not break the continuity of the period of unpaid parental leave. Keeping in touch days require the consent of the employee and employer and are capped at a maximum of 10 days in any period of leave.


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