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Workplace View

September 2012

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C'est la vie - Fair Work Australia says "non" to an employer who dismissed a manager for mistreating an employee

In the case of *Oui v Townsville Aboriginal & Torres Strait Islander Corporation Health Services* [2012] FWA 2713, Fair Work Australia (**FWA**) held in a situation that is common in many Australian workplaces, that a manager was unfairly dismissed after criticism of her dealings with a subordinate employee.

'Proper context'

The manager had allegedly been abrupt and abusive towards the employee and had responded sarcastically to suggestions that the employee would be suitable for a higher position. In holding that the dismissal was harsh, FWA found that, in many instances, the manager had been entitled to feel aggrieved by the way in which the employee had performed her work.

Commissioner Simpson held that *'in the context it would appear that* [the manager] *had some justification for expressing the views that she did and on that basis I am not satisfied* [that the conduct] *was bullying or harassment.'* Indeed, the Commissioner went further, saying that, given the conduct of the subordinate employee (who had a chequered employment history herself, in particular failing to attend work for two weeks because her car had broken down), in some instances the manager had in fact acted with restraint!

In another specific incident, the manager had allegedly used abusive and condescending language towards the employee after being accused of stealing ideas and passing them off as her own. The Commissioner agreed that the manager's conduct was unprofessional but held that, in the context, it was nevertheless appropriate because she was being directly challenged by her subordinate in front of a meeting of other staff members, something that any manager would find embarrassing. According to the Commissioner, this meant that the retaliation needed to be seen in its *'proper context'*.

Investigation

The Commissioner was also highly critical of the employer's investigation into the alleged misconduct. He found that almost all of the evidence relied upon came from a single witness who had a history of grievances with the manager. Further, the investigator who compiled the ultimately determinative investigation report was not called to give evidence at the FWA hearing and therefore could not be cross-examined. Finally, it was apparent that the investigator made important findings that were never put to the manager in the course of the investigation, meaning that she was never given an opportunity to respond.

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The Commissioner concluded by stating: *'I am satisfied that the way the investigation was conducted was unfair and the manner in which the investigation report was compiled and produced was unsatisfactory for the purposes of the findings reached. The fact that* [the manager] *was not given an opportunity to respond to the findings in it before the employer summarily dismissed her compounds the problem.'*

Implications for employers

This case puts employers on notice that FWA will scrutinize a dismissal for alleged abusive behavior by looking not solely at the behaviour of the dismissed employee, but also at the context surrounding the dismissal and behaviour. If the employee's demeanour can be justified in the totality of the circumstances, the employee's dismissal will be found to be harsh, unjust or unreasonable.

The decision also highlights the continued importance of following procedural fairness when carrying out a dismissal and, in particular, the importance of a thorough and fair investigation where an employee's conduct is contentious.

Company policies – employer required to practice what it preached

To what extent are companies obliged to follow their own policies? Does a serious breach of policy amount to a breach of the implied term of mutual trust and confidence? These interesting questions were recently considered by the Federal Court of Australia in *Barker v Commonwealth Bank of Australia* [2012] FCA 942.

The facts

Mr Barker was a senior executive of the Commonwealth Bank of Australia (**the Bank**) who had worked for the Bank for 27 years. On 2 March 2009 Mr Barker was advised that his position had been made redundant. His intranet and email access were cut off that day and he was asked to clear his desk and leave the premises.

For the next month Mr Barker had minimal contact from the Bank, despite being told that it was the Bank's preference to redeploy him. A few emails were sent to his deactivated work email account but the Bank made no meaningful attempts to consult with him about redeployment.

On 9 April 2009 Mr Barker's employment was terminated on the ground of redundancy.

The Bank's Redeployment Policy

The Banks's 'Redeployment Policy' required ' … *an open, well communicated and*

consistently applied process through which all employees affected by redundancy, redeployment and/or retrenchment are treated with fairness and dignity.'

The policy also required employees subject to redundancy to be given the earliest '*practicable*' advice about potential redeployment opportunities, which were to be based on merit.

Importantly one of the '*principles*' said to underpin the policy was that employees should be '*reassigned and retrained where possible*.'

Mutual trust and confidence and breach of the policy

Mr Barker argued that there was an implied term in his employment contract that required the Bank to refrain from doing anything likely to destroy or seriously damage the mutual relationship of trust and confidence. An integral part of his case was that in breaching its own redeployment policy, the bank had breached the implied term of mutual trust and confidence.

Justice Besanko found that while the decision to make Mr Barker's position redundant was not a serious breach of policy, the Banks' inadequate communication with Mr Barker in the period between 2 March and 2 April 2009 amounted to a failure to fulfill the Bank's obligations under its Redeployment Policy.

There was no consultation with Mr Barker, the possibility of retraining was not raised and no redeployment plan was developed.

Justice Besanko held that the Bank's ' … *almost total inactivity'* amounted to a serious breach of its redeployment policy which was sufficient to breach the implied term of mutual trust and confidence.

Judgement was entered against the Bank and Mr Barker was awarded damages.

Implications for Employers

The Bank's breach of its own policies amounted to a breach of the implied term of trust and confidence, despite the fact that the policy manual contained a statement expressly excluding it from incorporation into employees' contracts.

Employers should be aware that a serious breach of their own policies may amount to a breach of an implied term of an employment agreement, even where the policies are expressly excluded from forming part of that agreement.

Employers should review their policies to ensure they are carefully drafted and do not unduly restrict the exercise of the company's discretion. Policies should also be followed in practice, especially when taking actions that will have a significant impact on employees, such as disciplinary investigations, terminations and redundancies.

Advice should be sought where it is unclear what course of action is required under a policy and what steps must be taken prior to making decisions.

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Did you know? … Prospective employees are increasingly demanding access to social media while at work.

We have previously written about the implications of social media use in the termination of an employment relationship (Workplace View, February 2012) – but did you know that social media is also playing an increasingly influential role in the recruitment and retention of employees?

According to a recent survey by recruitment firm Hayes, employers need to embrace social media within the workplace or risk losing out on prospective employees. The survey has found that one of the factors job applicants take into account when deciding on whether to take up a new position is whether or not the employer allows access to its employees to social media sites, such as Twitter and Facebook at work. According to this study up to 20% of prospective employees would not join a company if it did not allow reasonable access to such websites.

So it appears as if, in this digital age, employers need to embrace their staff's use of social media or else risk losing out on the most promising employees. This makes it all the more important to have in place well drafted policies to provide 'guidance' to employees on appropriate use.

Watch this space for future status updates and no doubt more cases involving social media and employment.

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