

GETTING PROCEDURAL FAIRNESS RIGHT

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Would you believe that a worker who was dismissed for making racist, crude, lewd and sexist remarks recently won his job back? Or that an employee who was dismissed for repeatedly accessing pornographic websites on his work computer was recently awarded \$25,000 compensation? Or that an employee who was sacked for calling his CEO an “old c—t” during a telephone conversation was also awarded compensation? These are just some recent examples of decisions by the Fair Work Commission where ex-employees have had their unfair dismissal claims upheld due to a finding by the Commission that their employer had not afforded the employees procedural fairness in the termination process.

What is procedural fairness in the termination process?

In summary, the unfair dismissal provisions of the *Fair Work Act 2009* (Cth) require employers to only dismiss eligible employees if it has a valid reason for the dismissal and affords the employees procedural fairness in the termination process. The primary remedy for a successful unfair dismissal claim is reinstatement of employment or, where that is not practical, compensation of an amount equivalent to up to 6 months remuneration.

It has been established that a valid reason for dismissal is one that is “sound, defensible or well founded” and one that is not “capricious, fanciful, spiteful or prejudiced” (*Rode’s Case*, AIRCFB, 11 May 1999). Valid reasons include poor performance or misconduct, such as theft, dishonesty, or causing a risk to health and safety.

The concept of procedural fairness is less straightforward and depends on the circumstances of each case. However, it generally requires an employer to take the following key steps when proposing to dismiss an employee:

- notify the employee of the reason for the proposed dismissal and give the employee an opportunity to respond before making a final decision;
- if the dismissal relates to unsatisfactory performance, give the employee prior written warnings about the performance issues and the opportunity to improve;
- treat employees who engage in similar behaviour consistently;
- follow any applicable workplace policies or procedures with respect to the dismissal;
- take into account the nature of the particular industry and working environment when assessing the employee’s conduct and behaviour; and
- do not unreasonably refuse to allow the employee to have a support person present during discussions relating to dismissal.

Recent example

In the recent case of *Hain v Ace Recycling Pty Ltd* [2016] FWC 1690, a labourer had a telephone discussion with the Company’s CEO seeking alleged unpaid overtime. The phone call became heated and during the discussion the CEO said words to the effect of “I cannot afford to put food on the f-cking table for my family”. The labourer replied with words to the effect of “that’s not my f-cking problem, you owe me money”. The labourer also called the CEO an “old c—t”. Later that day the CEO dismissed the worker via text message, simply stating: “Do not come back tomorrow thanks”.

The Fair Work Commission held that the Company had a valid reason for dismissing the labourer, but that the manner of the dismissal was unfair. In particular, the communication of the dismissal via text message, the failure to inform the employee of the reason for the dismissal, and the failure to give the employee an opportunity to respond to that reason were all unfair.

What should employers do?

In our experience, employers generally have a valid reason for proposing to terminate the employment of a particular employee. However, employers need to be careful to ensure that they afford procedural fairness to the employee in the termination process in order to avoid being subject to a successful unfair dismissal claim. The Fair Work Commission has shown that it expects employers to strictly adhere to the procedural fairness obligation, no matter how compelling the reason for the dismissal. The steps that need to be taken to discharge this obligation will vary depending on the particular circumstances of each case.

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