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The Benefit of Workplace Policies when Communicated Effectively and Applied Consistently

Many employers have written policies that supplement, and may form part of, their employment contracts. Company policies often reinforce and clarify the standards expected of employees and help employers manage staff more effectively by defining acceptable and unacceptable behaviour in the workplace.

Employers often provide their employees with handbooks or manuals containing workplace policies and procedures, which regulate such things as:

- use of company property (eg mobile phones, company vehicles or laptops);
- email and internet use;
- non-smoking at the workplace;
- drug and alcohol use;
- occupational health and safety (**OHS**);
- anti-discrimination and equal employment opportunity (**EEO**); and

- performance management/employee development.

Policies ought to be implemented and applied consistently and fairly throughout the workplace.

What are the benefits of having company policies?

There are many benefits to having well-written company policies.

Aside from often helping an employer to defend itself against an unfair dismissal claim, OHS prosecution or vicarious liability claim, policies can demonstrate that an organisation is being operated in an efficient and businesslike manner. Furthermore, they can foster stability and ensure uniformity and consistency in decision-making and operational procedures.

A good policy

A good workplace policy will be explicit. It will also clearly state to whom the policy applies. Policies should be written in plain English so they are easily understood by employees. Workplaces employing staff with first



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languages other than English must ensure that policies are translated for these employees.

A policy should also give the employer discretion in the policy's implementation and the basis of that discretion should be stated as part of the policy.

A policy should also help employees to understand how they can comply with the policy and what to do if they cannot comply.

Thus, a good policy should:

- set out the aim of the policy;
- explain why the policy was developed;
- identify to whom the policy applies;
- set out what is acceptable and unacceptable behaviour;
- set out the consequences of a failure to comply with the policy; and

- state the date on which the policy was developed or updated.

Communicating policies

Policies cannot be effective unless they are provided, and explained, to all existing and new employees. This includes casual, part-time and full-time employees, employees on maternity leave and any independent contractors. Employers should explain how to comply with the policies and the implications of not complying.

Furthermore, when changes are made to policies, it is important that they are clearly and openly communicated to employees. Changes that are not communicated to employees may be of no effect.

Courts and tribunals are unlikely to uphold dismissals for breach of workplace policies if the policies have not been properly communicated to employees or have not been applied consistently.

Understanding the policy

The case of *Agnew & Ors v Nationwide News Ltd* highlighted the importance of ensuring that employees understand your company policy and that any changes made to a policy are communicated to employees. The former Australian Industrial Relations Commission (**AIRC**) ordered the reinstatement of four employees after finding they had misunderstood their company's drug and alcohol policy and, specifically, the penalties associated with their conduct. The employees had defied their company's policy, which prohibited the drinking of alcohol during lunchbreaks. An earlier version of the policy had stated that employees (who breached the policy) would be subject to "normal" company disciplinary procedures. However, three of the four employees thought that a lesser penalty than dismissal would apply to their conduct. The AIRC found their dismissal was harsh in the circumstances.

Enforcement of policies and appropriate penalties

Disciplinary policies must comply with both the requirements of the relevant legislation and any disciplinary provisions contained in applicable awards or agreements. The grounds justifying discipline should be clear. The use of warnings should be explained. It is also important that the policy describes when summary dismissal is warranted.

It is important that policies are applied consistently throughout the organisation. If the implementation of the policy is inconsistent, there is a greater chance that an employee dismissed for breach of that policy could successfully claim he or she has been unfairly dismissed. Thus, any breaches of policy should be dealt with promptly and according to the procedure set out in the policy.

Consistent application

In *Australian Workers' Union, Tasmania Branch v Pasmenco Hobart Smelter (Administrator Appointed)*, the Tasmanian Industrial Relations Commission (**Commission**) recommended that a final warning issued to a worker who breached an OHS policy on protective clothing be withdrawn because the company had applied the policy inconsistently.

The employee was issued with a final warning the day after being warned three times to button the collar of his protective clothing. The company stated that its reasons for proceeding straight to a final warning were that, as an experienced operator, the employee should have complied with the OHS policy. The employee, however, claimed he was too hot to button up his shirt and other persons had not complied with the policy on several other occasions.



Also, after issuing the warning, the company permitted overseas visitors into the same area without the required protective equipment.

The Commission held that the company's decision to immediately issue a final warning was unfair in light of the fact that other people were permitted into the area without the recommended personal protective clothing. The policy must be seen to be applied consistently.

Zero tolerance policies

Although an employer may have a policy regarding certain matters, for example, the use of email or dress codes, an employee's failure to comply may not warrant summary dismissal.

There is a distinction between a code of conduct policy and a "zero tolerance policy".

For example, in *Selak v Woolworths Ltd*, the full bench of the AIRC held

that Woolworths did not act unfairly when it dismissed an employee for drinking during his lunch break, confirming a previous finding of the AIRC that Woolworths was within its rights to strictly enforce a policy of "zero tolerance" for alcohol in the workplace.

Whereas in *Budlong v NCR Australia Pty Ltd*, the AIRC found that a company did not operate a "zero tolerance policy" with regard to inappropriate use of its information technology. A long-term employee, who was found to have pornographic material on his laptop computer, was dismissed according to the company's email policy. However, another employee was only given a warning after downloading similar images. It was also found that the company allowed a culture which encouraged employees to view pornography by failing to stop managers from setting a bad example to others. Thus, although the company operated a code of conduct policy with respect to pornography at work, this was not a "zero tolerance policy" and the employee should have been given a warning rather than being dismissed. Consequently the employee was reinstated (subject to his undertaking to strictly comply with the company's email and pornography policies).

What about enforcing policies that form part of the employment contract?

In the Federal Court decision in *Riverwood International Pty Ltd v McCormick*, the Full Court stated that employment instruments such as workplace policies will be contractually binding if:

- (a) the relevant policy is directly referred to in a document purporting to be the "contract of employment"; or
- (b) where it appears to the court that it was the intention of the parties that the policy form part of the contract.

More recently, in *Goldman Sachs JB Were Services Pty Ltd v Nikolich*, the Full Federal Court reconsidered the issue of the contractual force of policies. Chief Justice Black stated that the court should examine whether a reasonable person in the promisee's position would think that the promisor's intention was to be bound by the relevant part(s) of the policy in the circumstances.

Employers need to carefully consider whether such policies should form part of the employment agreement as there are both benefits and drawbacks.

For instance, a clear benefit of incorporating policies into contracts is that it enables employers to enforce such things as disciplinary procedures against employees (where those procedures are contemplated by the policy). However, it is also binding on the employer and a company may be in breach of not only its own policy, but the contract of employment, if it does not follow the disciplinary procedure. This could result in a dismissal exercised under the procedure being overturned and compensation for breach of contract being ordered.

In *Carrasco v Boral Window Systems Limited* (2007), the AIRC found that two employees were not given a sufficient opportunity to respond to the reasons for their dismissal and thus their termination of employment was harsh, unjust or unreasonable. In that case, the two employees were accused of fighting at work – however, they had in fact been fooling around when one of the employees fell and injured his back. The company dismissed the employees for gross misconduct on the basis that they were fighting at the time of the incident. The AIRC concluded that the fall was an accident between friends' horse playing and not fighting, and further found that the crowded floor area had contributed to the fall. Although disciplinary action was available to management



– as the site induction manual prohibited “horse play” – the manual stated that the disciplinary procedure consisted of a recorded warning, followed by a written warning for a further breach, leading to instant dismissal for further breaches. The company had failed to follow its own procedure.

Conclusions

Employers must ensure, in drafting their policies, that they do not impose overly onerous obligations on the company that it may not, or cannot, comply with. This is particularly important where a policy is incorporated into an employee’s contract of employment.

Up to date, well drafted policies that have been effectively communicated to employees can be used by employers to defend unfair dismissal applications and also vicarious liability claims of discrimination or sexual harassment.

Authored by: **Virginia Sadler**, Senior Associate

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For further information please contact:

Tracey Davies, Partner
Phone (direct) +61 3 9608 2177
Mobile +61 412 164 030
Email t.davies@cornwalls.com.au

Virginia Sadler, Senior Associate
Phone (direct) +61 3 9608 2106
Mobile +61 488 310 103
Email v.sadler@cornwalls.com.au