

Employer Update

FWC awards \$25,000 to employee sacked for visiting a swimsuit site.

A recent Fair Work Commission (FWC) decision highlights the importance of procedural fairness in disciplinary matters.

Summary

A BMW dealership has been ordered to pay compensation to a former employee who it sacked for looking at women in swimsuits online during work hours, after the Fair Work Commission found procedural failures could have altered the decision to sack him. At the time of the sacking, the financial controller already had received a first and final warning for accessing pornographic sites during work hours.

While the FWC concluded that the former employee had accessed the swimsuit websites and that doing so was a valid reason to sack him, the company should have given him the specifics of what he had allegedly done and a better chance to respond.

The employee had no practical opportunity to request to have a support person present during the discussions relating to his dismissal because he was unaware of what the subject matter of the meeting was before it began.

Commissioner Williams found that the dismissal was unfair and unjust and ordered the car dealership to pay the former employee \$25,341 in compensation.



Background

A Financial Controller (Employee) at a BMW dealership, was the subject of a complaint by a co-worker that he had been viewing inappropriate material on his computer. In order to obtain evidence, the co-worker accessed the former Employee's computer whilst he was at lunch and took photos of his internet history.

The former Employee subsequently admitted that he accessed inappropriate sites during work time and agreed that he would not do it again.

The former Employee accepted that he had read the Employer's *Policy and Procedures Manual*, signed it when he commenced his employment, was familiar with the policies therein and had agreed to abide by them.

He was issued with a first and final warning and his internet access restricted. He was advised that if there were further breaches of Policy and misuse of the internet, his employment would be terminated.

After a further similar incident the co-worker again complained about the former Employee and claimed she was left feeling vulnerable and uncomfortable working with him and was concerned that he continued to view inappropriate material at work despite the warning.

An investigation found that the former Employee was now looking at life style sites which featured pictures of women in lingerie, bikinis and see-through tops.

In a meeting with the former Employee he was advised that he had breached the policies and procedures manual again and advised that his employment was terminated as a result of his serious misconduct.

The FWC held that the former Employee was aware that any further internet misuse could result in his employment being terminated and that using the internet to access a swimsuit website could constitute a misuse of the internet under the Employer's policy and was therefore a valid reason for terminating his employment.

However, the FWC found that the Employer did not afford the former Employee procedural fairness, specifically:

The former Employer had already made the decision to terminate the Employee before they had spoken to him about the reasons for the termination of his employment.

The former Employee was advised at the termination meeting that a further complaint had been made against him about contravening the internet policy and he was therefore being dismissed.

The former Employee was not notified of the specific reason for his dismissal; in this case the employee was simply told it was "serious misconduct".

"At the time he was dismissed he did not know he was being dismissed because he had apparently accessed the swimsuit website ... Being unaware of the specifics of what he had allegedly done meant he was denied a real opportunity to respond to the actual reason for which he was dismissed," Commissioner Williams said.

The former Employee was not asked whether he had accessed the swimsuit website and was not asked whether he had an explanation for it. In this case, the Employee was not advised about the investigation or required to assist the investigation into the further complaint.

The former Employee told the FWC his computer was attacked by a virus and his computer randomly opened different internet pages, including images of women in swimsuits. The FWC found on balance, there was not sufficient evidence to prove his computer was infected by a computer virus and the former Employee was responsible for accessing the swimsuit website.

There was no practical opportunity for the Employee to obtain a support person if he so wished for one to be present.

The Commissioner also noted that even though the co-worker who complained about the former Employee had accessed his computer without his knowledge, she was not disciplined for her actions.

Commissioner Williams found that the dismissal was unfair and unjust and ordered the car dealership to pay the former Employee \$25,341 in compensation.

Lessons for Employers

Prior to a decision being made to terminate their employment, employees should be provided with full particulars of any allegations and must be given the opportunity to respond to those allegations.

When requesting an employee attend a disciplinary meeting, they should be provided with a reasonable amount of time to arrange a support person if they so require.

The employer must ensure the employee's response can influence the final decision – it's important that the final decision is not pre-determined.

Once an employer has heard the employee's response, the meeting should be adjourned to allow the employer to consider the response.

Once a decision has been made, the meeting can be resumed and the employee advised of the outcome.

Roelofs v Auto Classic (WA) P/L t/a Westcoast BMW
U2015/10082 [2016] FWC 4954

If you are considering conducting an external workplace investigation or disciplinary meeting contact Savvy Human Resources Associates:

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