

Employer Update

FWC awards \$28,471 to employee unfairly sacked for Facebook post.

A recent Fair Work Commission (FWC) decision highlights how procedural fairness obligations can be easily and unwittingly breached during the investigation process.

Summary

A maintenance fitter who made belittling *Facebook* comments about a Colleague was unfairly dismissed, the Fair Work Commission has ruled. The decision shows how procedural fairness obligations can be easily and unwittingly breached during the investigation process.

The Commissioner found the comments constituted misconduct but held dismissal was unfair because the Employer failed to disclose that it had partly relied on a report that found the Fitter's behaviour was having a negative effect across the workplace. Since the report was never put to the Fitter for a response, the Commissioner found there was significant procedural unfairness and he awarded more than \$28,000 as compensation.

The Commission found it was wrong of the Employer to mention two very relevant issues in its workplace investigation, then fail to give the Fitter a chance to respond to them.



Background

The Fitter was at his home when he was among several other employees involved in a series of *Facebook* posts. The post consisted of a photo of a Colleague at work and a number of derogatory comments.

The posts, and the derogatory comments about the Colleague, were brought to the attention of the Colleagues' supervisor, who in turn, showed his managers.

The Commissioner considered that the Colleague who was the focus of the posts, had also been subjected to a pattern of behaviour by a group of employees that would readily fall within the category of bullying.

The behaviour concerned included the Colleague having:

- his tools disappear from the workplace and then appear in his locker or elsewhere;
- the lock for his locker covered in superglue;
- holes drilled into water tanks that were marked for him to take home, rendering them useless;
- his drink bottle vandalised with the words "f<><wit c<><>" written on it and later having lens cleaner cloths and grasshoppers pushed into another drink bottle;
- some personal items stolen; and
- offensive graffiti aimed at him drawn on the inside of the toilet door.

The Commissioner considered the *Facebook* posts were inappropriate and there was a relevant and sufficient connection with the out of working hours conduct and the employment relationship since many of the Fitter's *Facebook* friends were also employees and the posts were of a photo taken at the workplace.

The Commissioner found that the Employer's response was inadequate and that it took insufficient steps to protect and support the Colleague. This included conducting inadequate investigations into the conduct.



A 'HR Summary' of the workplace investigation was produced for senior management which outlined the findings of the investigation and recommended that the seriousness of the incident warranted dismissal.

The Fitter was notified of the reasons for his dismissal in general terms through a letter standing him down and an investigation meeting. The principal reasons were also confirmed in the dismissal letter, however, the Commissioner considered there were other factors that influenced the recommendations of the investigation panel and by implication, the decision maker, and these matters were not notified to the Fitter at any relevant time for a response.

The Commissioner found that a valid reason for dismissal existed, however termination was unfair since there was significant procedural unfairness in the Employer's decision making process.

Lessons for Employers

The decision shows how procedural fairness obligations can be easily and unwittingly breached during the investigation process and is an important reminder that procedural fairness is a practical obligation requiring that the employee be given 'a fair go'.

It is important that the employee is notified about the allegations in as much detail as possible so that they can adequately and fully respond to the allegations.

If additional adverse material comes to light during the investigation, which is credible, relevant and significant, it should be put to the employee under investigation. Otherwise there is a real risk that the investigator will be prejudiced, albeit subconsciously and the decision-making process will be tainted with unfairness.

Notification of the valid reason to terminate must be given to the employee before the decision to terminate the employee is made and the notification needs to be in explicit and clear terms.

Out of hours conduct?

In this instance the conduct of the Fitter took place outside of working hours, however it is only in exceptional circumstances that an employer has a right to extend any supervision over the private activities of employees.

Care should be taken when accessing employees' social media (whether the profile is public or private) and always think carefully about whether it is necessary at all.

Seriously consider whether an employee's *Facebook* posts are actually relevant to your investigation and ensure that the methods used to access this information are appropriate and not unreasonably intrusive.

The FWC has summarised its approach to out of hours conduct in the following terms:

The out of hours conduct must have a relevant connection to the employment relationship in order to be a valid reason for dismissal. In ascertaining whether a relevant connection is established, the following matters should be considered:

- (a) Whether the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employee and employer;
- (b) Whether the conduct damages the employer's interests; or
- (c) Whether the conduct is incompatible with the employee's duty as an employee."

Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine (U2016/2151) per Commissioner Hampton ADELAIDE, 10 OCTOBER 2016

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

Sydney Ballina Brisbane

info@savvyhr.com.au
Phone +61 (0) 428 874 186
www.savvyhr.com.au



This publication is provided by way of general guidance only and is not to be construed by the reader as legal advice or as a recommendation to take a particular course of action in the conduct of their business or personal affairs. You should not rely upon the material as a basis for action that may expose you to a legal liability, injury, loss or damage and it is recommended that you obtain your own advice relevant to your particular circumstances.