



Employer Update

Swearing in the Workplace – a matter of context.

Dismissing an employee for swearing in the workplace is not always straightforward. Recent Fair Work Commission (FWC) decisions demonstrate that the grounds upon which an employer can summarily terminate an employee may depend upon the circumstances in which the use of the language arose, and the type of industry in which the business operates.

In *Smith v Aussie Waste Management*, the FWC ruled that a truck driver's swearing at a managing director in an expletive laden and vulgar way during a heated phone call was not sufficient cause for summary dismissal.

Background case 1

The employee was a truck driver with 2 years' service and had previously received a written warning relating to his involvement in a number of motor vehicle accidents. When the managing director noticed through a GPS tracker that the employee was driving the truck slower than usual, the managing director contacted the employee. During a heated exchange the employee swore at the managing director before hanging up. The managing director phoned the employee, indicating that he would not be spoken to in such a manner and that the employee could not hang up on him. Subsequently the managing director summarily terminated the employee's employment.

The FWC observed that the employee's conduct should not be tolerated in the workplace and warranted a warning or counselling. However the FWC ruled that the conduct was not sufficiently insubordinate for the employee to be dismissed because the conversation was not overheard by other employees, meaning it had not undermined the managing

director's authority in the workplace

The FWC noted:

- the employee said the things he did in anger, and a single outbreak of bad temper, accompanied with regrettable language, is usually an insufficient ground for dismissal, and;
- the managing director did not meet with the employee to discuss his conduct before dismissing him and therefore the employee did not have the opportunity to explain his conduct.

The FWC also noted that bad language in the workplace is not uncommon in the transport and other similar industries.

In an earlier case *Symes v Linfox Armaguard Pty Ltd*, Armaguard was ordered to reinstate one of its employees, after he swore at his boss. FWA found that although the employee's swearing was totally inappropriate and his behaviour did amount to misconduct, his dismissal was harsh, unjust and unreasonable and ordered that the employee be reinstated. FWA found that although Armaguard had a policy which stated that swearing in the workplace was not tolerated, it still happened regularly and was accepted. FWA also found that the employee had been dismissed without being given a reasonable opportunity to respond to the allegations against him.

Background case 2

At an Armaguard staff meeting, a long-term employee was informed that he had been allocated a vehicle with a faulty

indicator. Frustrated and angry that this would cause delay in his work duties, the employee told his supervisor to “get f****ed” and stormed out of the room. This was in spite of requests for him to come back and sit down. The employee approached his supervisor later in the lunchroom and a heated exchange occurred during which the employee caused damage to a notice board after hitting it with force. Despite the employee later apologising, including writing a formal letter of apology, the employee was dismissed without notice the following day.

The Commissioner ruled that although employee’s behaviour did amount to misconduct, his dismissal was harsh and excessive in the circumstances, and some other form of disciplinary action would have been sufficient.

The Commissioner found that:

1. Although the employee’s swearing was completely inappropriate and unwarranted, Armaguard’s workplace was an environment in which bad language was regularly used and accepted.
2. Although Armaguard had a policy in place that swearing in the workplace was not tolerated, it conceded that employees may have received “mixed messages” about the use of foul language.
3. Hitting an inanimate object such as the notice board is in a different category of behaviour to violence towards a person.
4. The employee was not given a reasonable opportunity to respond to the reasons for his dismissal.

Swearing in the workplace can amount to misconduct, however whether or not an employee’s dismissal is warranted will depend on all the circumstances of the case and will turn on its unique facts, such as:

1. whether or not the work environment is one in which swearing is condoned;
2. the context of the swearing i.e whether it was said aggressively; and

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3. who or what the swearing was directed at (e.g. swearing at a manager can amount to insubordination and consequently be serious misconduct in some circumstances, particularly when combined with a refusal to perform duties).

While it is commonly accepted that swearing at your boss is not acceptable, summary dismissal may be considered equally inappropriate in circumstances where an employer has allowed the development of a workplace culture in which its employees swear regularly.

Employers should ensure that employees are informed as to whether offensive swearing will amount to misconduct and should warn employees who tend to swear that it is not acceptable workplace behaviour. If the swearing is serious enough to warrant summary dismissal the employer should provide the employee with an opportunity to respond to the allegations and consider their response in the context of the nature of the workplace and the circumstances in which the use of the language arose.

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