

**Employment and Industrial Relations Client Alert**

19 March 2010

**The Importance of Following Correct Procedures for Employment Termination**

Two recent decisions have emphasised the importance of employers following correct procedures when dismissing an employee.

**Gary Bermingham v Kings Transport Transport & Logistics (Aust) Pty Ltd**

The first decision was made by Senior Deputy President O'Callaghan in February 2010. Mr Bermingham, a manager with Kings Transport and Logistics ("**Kings**"), was dismissed after he admitted his participation in fraudulent activities. Mr Bermingham was found to have been involved in overcharging Kings' clients and keeping the difference. The money was used for staff social events. Kings became aware of this practice and, after conducting inquiries with other staff members (which Fair Work Australia deemed to be "cursory") invited Mr Bermingham to a meeting. Mr Bermingham was not advised that he could access a support person or have a representative with him at the meeting. At the start of the meeting Mr Bermingham informed his interviewers that he was aware of the allegations against him and returned an envelope which contained \$100. Mr Bermingham admitted that the money had been wrongly collected from Kings' customers.

Senior Deputy President O'Callaghan found that while Mr Bermingham had engaged in fraud, Kings' investigation into Mr Bermingham's conduct had been "lacking in professionalism" and they had decided to dismiss Mr Bermingham prior to the meeting.

Although Senior Deputy President O'Callaghan conceded that it was inevitable that Mr Bermingham's employment would be terminated because of his conduct, it was still open for Fair Work Australia to assess whether the termination was unfair. Mr Bermingham's dismissal was found to be unreasonable, but not harsh or unjust. Fair Work Australia did not order reinstatement or compensation.

**Paul L Quinlivan v Norske Skog Paper Mills (Australia) Ltd**

The second decision was made by Vice President Lawler in February 2010. Mr Quinlivan commenced an unfair dismissal claim after he was dismissed by his employer for a breach of occupational health and safety procedures. Mr Quinlivan's employer, Norske Skog Paper Mills (Australia) Ltd, had a number of safety policies in place and Mr Quinlivan had been given several warnings regarding his failure to wear safety goggles. Fair Work Australia found that none of the warnings given to Mr Quinlivan advised him that continued failure to follow the safety procedures could result in his dismissal.

Vice President Lawler considered both Mr Quinlivan's long period of employment and limited alternative employment prospects, and determined that the dismissal, although not unreasonable or unjust, was harsh. Vice President Lawler noted that it was entirely proper for the employer to

treat breaches of its OHS policies seriously, however the impact of the dismissal on Mr Quinlivan was harsh, and he was therefore entitled to be reinstated, although there was no order requiring the employer to make back payments to him.

These two decisions show the importance of employers conducting proper investigations prior to considering termination. An employer must ensure that due process is followed by giving an employee an opportunity to respond to allegations, not deciding the outcome of a meeting before a meeting is held with an employee, and ensuring that the penalty imposed is proportionate to the breach. Warnings as to poor performance should include an indication of the possible consequences of continued poor performance. Failure to afford due process, even where the reason for dismissal is valid, may result in reinstatement or compensation being awarded.

If you have any questions in relation to conducting investigations in the workplace, performance management or dismissal procedures, please contact the Employment and Industrial Relations Team at Russell Kennedy on (03) 9609 1555.

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The information contained in this alert is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on this topic, please contact the author directly.