

Employment & Industrial Relations Client Alert

6 July 2010

Terminating employees: an obligation to offer a support person?

A recent decision of Fair Work Australia suggests that there may now be a positive obligation on the employer to offer a support person to employees at any meetings prior to a termination.

When determining whether the termination of an employee is harsh, unjust or unreasonable, section 387(d) of the *Fair Work Act 2009* requires Fair Work Australia to consider “any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.” According to the Explanatory Memorandum to the *Fair Work Act 2009*, this factor “will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present.” However, the recent decision of *Mr N v The Bakery* [2010] FWA 3096 throws doubt on this proposition.

In this case, Mr N was employed at a bakery with fewer than 15 employees. He was Hungarian, and his understanding of English was limited. Mr N had been warned previously about making incorrect time sheet entries. The issue of incorrect time entries arose again on 17 October 2009 while Mr N worked on a Saturday afternoon. The following Monday one of the managers, Mrs O, engaged in discussions with Mr N regarding the issue. Mrs O then called Fair Work Australia and was advised to download the Small Business Fair Dismissal Code (“**the Code**”). The next day Mr N was requested to meet with Mrs O. Ms P, another employee, was asked to attend as a witness. At the meeting, Mr N was advised that he was being summarily dismissed. At some point during this discussion Mr N phoned his sister and had a conversation in Hungarian.

At the hearing, Senior Deputy President O’Callaghan decided that there was a valid reason to dismiss Mr N. However, an issue arose when considering the element of the Code that states “in discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist.” SDP O’Callaghan considered that while Mr N was allowed the opportunity to telephone his sister during the meeting, this did not equate to the opportunity to have a support person present, and Ms P was present as a witness for the employer, not to assist Mr N. SDP O’Callaghan decided that Mr N had a right to have another person present to assist, and the employer had an obligation to inform him of that right. He therefore concluded that the Code had not been complied with.

SDP O’Callaghan went on to consider whether the dismissal was harsh, unjust or unreasonable. In considering whether there had been an “unreasonable refusal” to allow a support person as required in section 387(d), SDP O’Callaghan held that notwithstanding the lack of evidence that Mr N sought access to a support person or was refused any such request, Mr N’s English limitations meant that the failure on the part of the employer to propose a support person indicated that the process was unfair.

Mr N’s dismissal was found to be harsh because it occurred without notice and without access to a support person. Mr N was awarded payment for two week’s notice, comprising his three week entitlement, minus one week reflecting that his behaviour caused the dismissal.

This decision considerably expands the obligation to not unreasonably refuse an employee access to a support person by suggesting that an employer has a positive obligation to offer an employee that is inhibited by some disadvantage access to a support person when engaging in discussions where dismissal is a possible outcome. While it may be argued that this finding went beyond the scope of section 387(d), it is also arguable that it would alternatively fall under section 387(h) – “any other matter that Fair Work Australia considers relevant.”

This decision will have significant consequences on the procedure employers must use when considering the dismissal of an employee. Employers will now need to turn their mind towards whether they should actively offer the employee access to a support person during the performance management process, or they risk a finding that the dismissal was unfair.

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

DISCLAIMER

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.

Liability limited by a scheme approved under Professional Standards Legislation