

# EMPLOYMENT UPDATE

JANUARY 12

## TERMINATION OF EMPLOYMENT BASED ON CONFLICT OF INTEREST

In this Employment Update, we provide an overview of a recent case dealing with termination of employment based on conflict of interest.

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In *Villani v Holcim (Australia) Pty Ltd* [2011] FCAFC 155, the Federal Court has upheld a decision of Fair Work Australia (FWA), terminating an employee, Giuseppe Villani, for refusing to answer questions about a potential conflict of interest.

During his employment with Holcim (Australia) Pty Ltd (**Holcim**), Mr Villani conducted a trucking business carting concrete for Holcim's business rival. Upon discovering Mr Villani's activities, Holcim made several requests for information about the possible conflict of interest, without success.

### Breach of common law obligation

In determining the matter, FWA found there had been no breach of Mr Villani's common law obligation to avoid conflicts of interest between his personal interests and those of his employer. The case of *Farquharson v Qantas Airways Limited* [2006] AIRC 488, summarises the common law approach to out of hours conduct by employees:

*"It may be put in questions: 1. Is the second activity incompatible with the*

*fulfilment of the employee's duty to his other employer? 2. Does it involve an opposition or conflict between his interest and his duty to his employer? 3. Does it impede the faithful performance of his obligations to his other employer? 4. Is it destructive of the necessary confidence between employer and employee? In all cases an actual repugnance between the employee's acts and his relationship with his employer must be found."*

Holcim's complaint was that, given Mr Villani's position as Man in Charge, he had access to information which would be useful for a competitor and that by providing services to a competitor, there was a potential conflict of interest.

FWA rejected Holcim's submission, determining that, *"[this] is not a case where Mr Villani had set up a business which was a potential business rival to Holcim or where Mr Villani's work with [the competitor] assisted [the competitor] make*



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*inroads into Holcim's industry. Mr Villani as a truck driver for [the competitor]... could not in any way impact on Holcim's business."*

FWA found that Holcim required evidence that Mr Villani actually provided confidential information to the competitor, before he would have been in breach of his common law obligations to his employer. "A mere apprehension that Mr Villani will act in a manner incompatible with his duty to his employer" would not be sufficient. It was accepted that Mr Villani had not provided confidential information to Hanson.

#### Employer could not rely upon policy

FWA also found that Holcim could not rely on a breach of their Code of Ethics in circumstances where a complex policy document was distributed "by email without any steps being taken...to ensure that employees actually understand the Code..."

On that basis, FWA found that Holcim was not able to rely upon non-compliance with the policy as a basis for arguing that there was a valid reason for the termination of Mr Villani's employment.

Further, FWA said that "...an employer who relies upon email as the sole method of informing its employees of its policy runs the risk that employees do not understand the material provided and, as a consequence, will not comply with the policy."

FWA also found that there were drivers who delivered for both Holcim and the competitor and that Mr Villani knew this was permitted. In the circumstances, Holcim could not rely on strict compliance with the Code.

#### Failure to answer questions

However, FWA did find that Holcim was entitled to ask Mr Villani the questions it did and to require him to respond. FWA also found that Mr Villani was "wrong in concluding that his business dealings were none of Holcim's business".

FWA found that, in circumstances where Holcim had a genuine "albeit arguably misguided" concern about a potential conflict of interest and Mr Villani refused to respond to those concerns, there was a valid reason for the termination of Mr Villani's employment.

#### Implications

Whilst there is a common law duty on all employees to avoid conflicts of interest between their personal interests and those of their employer, employers must not act upon suspicion or rumour alone that an employee will act in a way inconsistent with that duty.

This case also reinforces the necessity for adequate induction and training on workplace policies in order to ensure that they can be enforced. And, to ensure the policies are strictly

adhered to by the employer and employee.

#### Fair Work Act Review

On 20 December 2011, the Federal Government announced the details of an independent review of the Fair Work Act (Act) and its terms of reference.

The Review will look at whether the Act is being implemented as it was intended, including the effectiveness of procedures at resolving grievances and disputes and protecting against unfair dismissal. It will also look at how different regions, industries, genders, young workers and people from non-English speaking backgrounds are being affected.

The Review will also identify areas where the operation of the legislation could be improved, including whether the Act and its workplace bargaining framework have improved workplace productivity and whether employers have pursued productivity improvements through workplace bargaining.

Written submissions are due by 17 February 2012 and supplementary submissions on 2 March 2012, with the report to the Government due by 31 May 2012.

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