

EMPLOYMENT UPDATE

MARCH 11

THE IMPORTANCE OF HAVING A VALID REASON TO DISMISS AN EMPLOYEE

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The importance of a Valid reason when determining the fairness of a dismissal.

The Full Bench of Fair Work Australia has emphasised the importance to be placed on having a valid reason when determining the fairness of a dismissal.

In *Wililo v Parmalat Food Products*, Commissioner Cargill at first instance found that, whilst Parmalat had a valid reason to dismiss the employee, other procedural fairness factors required to be taken into account under section 387 of the *Fair Work Act 2009* (Cth) meant that the dismissal was harsh on balance.

The employee, a forklift driver, was dismissed for placing part of his body under an unsecured load in breach of safety regulations. Parmalat had security footage of the incident which it did not show to the employee when investigating the incident. Instead, Parmalat asked the employee about the incident and found his recount of events to be false based on its observations of the footage. It then dismissed the employee for serious misconduct.

Commissioner Cargill found the dismissal was harsh because the

driver had not been shown the security footage and given a chance to respond to it. She also found that the employee's actions were 'not wilful or negligent but rather the result of carelessness and a failure to properly appreciate the consequences'.

Parmalat appealed. In granting permission to appeal, the Full Bench stated that:

"Clearly, disciplinary action was necessary and appropriate because a failure to do so sends a message to the workforce that safety breaches can occur with impunity."

On the issue of whether or not the dismissal of the employee was harsh taking into account the employer's failure to show the CCTV footage to the employee and the nature of the employee's actions, the Full Bench concluded that such a failure 'was not significant, while the fact that the employee's conduct was negligent rather than deliberate did not render it less serious.'


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The Full Bench confirmed that where there is a valid reason and it can be shown that the employee has been afforded procedural fairness, it was *"inconceivable that a conclusion could be reached that termination of employment is harsh"* subject only to where there were significant mitigating factors. Having concluded that such factors were not present in the case before them, the Full Bench held that the dismissal of the employee was not harsh, unjust or unreasonable.

What is a "valid reason"?

Fair Work Australia will consider numerous factors in determining whether there is a valid reason for dismissing an employee, including:

- whether the employer had a valid reason for the termination connected with the employee's capacity, conduct or operational requirement of the business;
- whether the valid reason was *"sound, defensible or well founded"* and not *"capricious, fanciful, spiteful or prejudiced"*;
- whether the reason for the termination is defensible or justifiable on an objective analysis of the relevant facts; and
- an assessment of the factual circumstances in terms of what

the employee is capable of doing or has done.

In the *Willio* case, the Full Bench found that the workplace health and safety breach amounted to serious misconduct and was so serious that there was a valid reason for terminating the worker's employment.

However, not all breaches of workplace health and safety, or breaches of company policies, will give rise to a "valid reason" for termination.

- whether the reason is sufficiently serious to warrant dismissal;
- whether the reason could amount to serious misconduct;
- whether a company policy exists to regulate the relevant conduct and, if so, whether the worker was aware, or should have been aware, that they were breaching the policy;
- the employment history of the worker and whether there are any previous issues with the worker related to relevant conduct; and
- whether the worker has been given previous warnings and/or put on notice that the worker could be dismissed if there were additional issues with performance or behaviour related to the reason for considering dismissal.

Generally speaking, the more serious the reason for dismissal is, the greater the likelihood that it will be considered a valid reason. For example, cases of serious misconduct such as assault, theft, fraud and serious workplace health and safety breaches are all valid reasons for termination.

In less serious circumstances, if the worker has received prior warning of behaviour that could lead to

dismissal and that behaviour continues, this can also amount to a valid reason. However, if the worker has not had any prior issues in the workplace and the reason does not amount to serious misconduct, a valid reason for termination may not be found and the dismissal may be considered to be unfair in all the circumstances.

What is "procedural fairness"?

Even if there is a valid reason for termination, the dismissal must still comply with procedural fairness. The focus of procedural fairness is on:

- whether the worker was notified of the reason/s for their termination;
- whether the worker was given an opportunity to respond to the reason/s for their termination;
- whether the worker was given the opportunity to have a support person present; and
- if the reason for dismissal is related to performance issues, whether the worker was given prior warning about that unsatisfactory performance before the dismissal.

Although procedural fairness does not need to be afforded in cases of serious misconduct warranting a summary dismissal, this approach is not without risk in circumstances where there might be some question mark over whether the reason for dismissal could be considered serious misconduct.

Some cases may be straightforward, such as assault. However, in most other cases, further investigation or communication with the employee is required in order for the employer to reach a reasonable conclusion regarding the conduct. Failure to do so may result in a successful unfair dismissal claim.

In the *Willio* case, even though the action of the worker was a serious breach of workplace health and safety amounting to serious misconduct, the employer erred on the side of caution and complied with principles of procedural fairness. In that case, the employer met with the worker and notified him of the alleged breach, gave him an opportunity to respond to the allegation and allowed a support person at all times. Only after a consideration of the employee's response (which the employer in that case concluded was false and inadequate) did the employer determine to terminate the employee's employment.

Key points: Whether a dismissal is considered to be unfair will be determined having regard to whether there is a valid reason that is "*sound, defensible or well-founded*"; that procedural fairness has been followed; and whether additional mitigating factors have been considered.

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