

EMPLOYMENT UPDATE

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WORKPLACE POLICIES AND UNFAIR DISMISSALS

Relying on a workplace policy to dismiss an employee is not as straightforward as it may seem. Having a policy is one thing but ensuring it remains 'enforceable' and can be relied upon is another.

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The importance of training employees to ensure they understand your workplace policies

Once a policy is in place, it is only effective if adequately communicated to employees. This means that time needs to be taken to explain the policy in full to ensure that employees understand both, how to comply with the policy and the consequences involved if the policy is breached. Finally, making sure employees sign off on a document acknowledging that they are both aware of a policy and understand it completely, goes a long way to being able to rely on a policy for disciplinary or dismissal purposes.

The consequence of failing to have an employee sign off on an existing policy was made evident in the case of *Eng v Goodman Fielder Limited* [2011] FWA 317. In this case, an employee truck driver was dismissed after having been caught urinating in a storm water drain outside of work premises, and only 100 metres away from the toilet. Mr Eng's explanation for his conduct was that he could not wait to enter the

worksite gates due to a medical condition which caused him severe pain at the time of the incident. He explained that he did his best to stay out of sight hiding behind the truck as he knew that if he waited to swipe enter into the work-site gate and walk to the toilet he would not make it in time. It was a fellow truck-driver located on-site who witnessed Mr Eng.

In defending the decision to terminate Mr Eng, the employer argued that his actions breached the company's code of conduct in respect of site quality/hygiene policy and procedure and that he should have known that such actions would not be condoned. Reliance was placed on the argument that the actions of urinating outside of a toilet and failing to wash his hands were breaches of company policy. Unfortunately, the employer was not able to bring evidence that Mr Eng was aware that the policy existed.

The Commissioner held that termination of Mr Eng for the reasons relied upon by the employer was invalid. The Commissioner highlighted a few factors to support her view including:



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- the inability of the employer to prove Mr Eng had acknowledged awareness of the site quality/hygiene company policy; and
- the mitigating circumstance of Mr Eng being in pain at the time of the incident.

The view of the Commissioner was that even if the termination was valid, it was otherwise harsh, unjust and unreasonable because the consequence of dismissal was disproportionate to the gravity of Mr Eng's conduct.

As a result, the Commissioner held that it was appropriate for Mr Eng to be reinstated notwithstanding the argument by the employer that there had been a breach of trust and confidence of the employment relationship.

Key Points: This case highlights the importance of having employees sign workplace policies acknowledging that they have received it and understand its terms. Doing so, ensures that employees are not only aware of their workplace obligations but also provides the employer with added protection should you have to rely on the terms of a workplace policy in dismissing or disciplining an employee in the future.

Whilst it is important to have employees acknowledge that they are aware of and understand the policies, you need to be very careful not to incorporate the terms of the policy into the employee's contract of employment. Therefore, do not expressly state that the policy is part of their contract of employment or include words such as *"you are to ensure that you comply with the company's policies and procedures at all times."* By incorporating the terms of policies into a contract of employment, creates a contractual obligation on both parties to comply with the policies. A failure to do so – for example, failure to comply with a grievance or disciplinary procedure – could lead to a claim for breach of contract. There have been a number of cases in relation to this over the last few years with the most prominent being *Goldman Sachs JB Were Services Pty Ltd v Nikolich* [2007] FCAFC 120. In this case the employee alleged the employer had breached its Grievance Policy, OHS Policy and Discrimination & Harassment Policy when not adequately addressing his complaint of workplace bullying. The employee was successful and awarded 2 years salary, which equated to \$500,000 plus interest. The employer appealed to the Full Bench of the Federal Court which upheld the decision and the compensation awarded but found the employer had only breached the OHS Policy which it considered had been incorporated into the employee's contract of employment. The employer had failed to ensure the employee's health, safety and welfare at work by not acting promptly to resolve the employee's grievance with the delay causing the employee psychological injury.

In this case, the policy was found to be incorporated into the contract due to the use of promissory and obligatory words in the policy and the way it was presented to the

employee i.e. that the employee must comply with it.

Policies are important workplace documents but it is very important that they contain guidelines that the employer is willing and capable of complying with. It is also vital that all employees, including management, are trained in relation to the policies so that everyone understands what is expected of them and management knows how they are to enforce them. Without this, the policies have little to no legal affect.

As workplace situations and incidences are rarely black and white, neither are the rights and entitlements of employers and employees. We always recommend that you obtain legal guidance prior to dismissing or disciplining an employee.

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