

INDUSTRIAL RELATIONS UPDATE

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Written by Nicola Scott

Should have gone to FirstIR

The largest mining company in Australia has been slammed by the Fair Work Commission (FWC) for failing to use its considerable industrial relations/HR expertise to dismiss two drivers, who breached the company's on-site mobile devices policy.

Both drivers were given the boot for using their mobile phones in the cabs of their trucks during their shifts, contrary to the company's policy.

Commissioner Spencer acknowledged that the company had a right to introduce a 'zero-tolerance' policy to the use of mobile phones in vehicles given the nature of the business and danger of distraction on coal mining operations.

However, she was critical of the company's ill-use of dedicated workplace specialists during the disciplinary process. Instead, the company gave local mine managers, who had little relevant expertise, the responsibility of conducting the investigation into the drivers' behaviour and their dismissal.

Commissioner Spencer was also disapproving of the casual manner

in which the company's 'zero-tolerance' was implemented throughout the organisation. She said this simply wasn't good enough for such a large enterprise and expected more from the company, given the resources and professional support that was available to them

The FWC ordered both drivers be reinstated. The only saving grace for the company was the Commissioner did not order it to repay the driver's lost wages for the period off work.

There's a key lesson here for employers – don't shortcut when it comes to disciplining your employees. Follow the proper procedure and implement your policies properly. This means that if you have dedicated HR specialists available, use them! As we see in this decision, the FWC will show no mercy if employers chose not to use the resources available to them when dealing with employment matters.

[Mr Shannon Boal v BHP Coal Pty Ltd \[2014\] FWC 9331 \(22 December 2014\)](#)

[Mr Luke Faulkner v BHP Coal Pty Ltd \[2014\] FWC 9330 \(22 December 2014\)](#)

What does bullying "at work" mean?

In theory, employers should all be able to rest easy now that a five-member FWC bench ruling has defined "at work" for the purpose of anti-bullying orders. We don't know about you, but in a decision that sought to provide clarity on this matter, we're left feeling more perplexed than ever.

In this case, three employees sought anti-bullying orders against their employer and the union. They alleged that both parties engaged in unreasonable behaviour such as insulting Facebook posts and phone calls calling them as 'lagers' and 'scabs.'

Both the employer and union wanted to strike out these allegations on the basis that the conduct did not occur "at work."

The five-member full bench decision found that the meaning of "at work" in s.789FD of the Fair Work Act encompassed "both the performance of work and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work," regardless of time or location.

However, the bench admitted that complexities would arise when applying this definition and that a cautious approach is to be taken when interpreting this definition in the future.

In particular, it advised that the "approach to this issue should develop over time, on a case by case basis." This is because the definition of "at work" is very much dependent on the "context, including custom and practice and the nature of [an employee's] contract."

Ultimately, this decision sets the precedent for the meaning of "at work." This definition is very broad though and leaves so many doors open in relation to what constitutes "at work" when the alleged bullying occurs on social media devices outside usual working hours.

Employers can take small comfort in the fact when they are subject to anti-bullying orders, the FWC may base their decision on the individual merit of the case, taking into account the enterprise's workplace bullying and harassment policies.

[Sharon Bowker, Annette Coombe, Stephen Zwartz v DP World Melbourne Limited, Maritime Union of Australia \(Victorian branch\) and others \[2014\] FWCFB 9227 \(19 December 2014\)](#)

Let's get productive!

Have you ever had a poor or unsatisfactory experience with the current workplace relations system?

Do you think enterprise bargaining is a joke, merely a way to pay higher wages with no trade-offs for your business?

Are you of the view that the complexities in the Australian workplace relations space are unnecessary, unjustified and unfair all round?

If you answered "yes" to any of these questions, read on – here's your chance to do something about it.

The Productivity Commission is currently undertaking an inquiry into the Workplace relations framework. The objective of this inquiry is to examine the current operation of the Fair Work Laws and identify ways to improve workplace legislation/ IR policy.

Recently, the Productivity Commission released a terms of reference document, which outlines a number of matters to be assessed during the inquiry. These range from the impact of the current workplace relations framework on productivity and competitiveness in the labour market to bargaining and industrial conflict at the enterprise level.

We believe a most important issues that have arisen from this document relate to the red tape and compliance burden that the current workplace relations system places on employers. This, paired with the restrictions on employer's ability to flexibly manage and engage with their employees, is a constant battle for our clientele.

As such, First IR is canvassing its diverse clientele to consider participating in the Productivity Commission's inquiry. We believe this inquiry is of pivotal importance to our clients as it gives them the opportunity to raise any issues they have with the current workplace legislation and advocate for major changes to the system.

The Productivity Commission will seek initial submissions by mid-March so if you are interested in participating or have any questions or queries about this matter, please get in touch with us at your earliest opportunity - time is of the essence.

Make 2015 a fresh start

Looking to update your policy manuals, procedural documents and employment contracts?

Want someone else to conduct disciplinary action on your behalf?

Thinking about negotiating or renewing an enterprise agreement?

Need advice on any matter relating to the employment relationship?

Have a question or query about your obligations an employer?

Already in strife with the Fair Work Commission or the Fair Work Ombudsman?

Just give us a call on (02) 9231 2088