

INDUSTRIAL RELATIONS UPDATE

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It's not bullying, it's managing

With the dark cloud of a bullying claim looming over them, employers seem to be walking on eggshells when it comes to managing their employees. Some of these hesitations can be put to rest though, as an employee failed to win anti-bullying orders in a recent Fair Work Commission (FWC) decision due to the exercise of "reasonable management action."

In this case, the employee was underperforming in his role and as a result, his manager instigated a structured program aimed at monitoring and improving his work performance. Continual feedback regarding the employee's performance was integral to the success of the program.

Within this context, the employee claimed his manager treated him like a "slave" and used harassment, humiliation and intimidation as tactics to force him to terminate his employment. He believed that the bullying posed imminent risk to his health and safety and sought orders to stop the bullying.

However, the FWC found that there was no evidence of bullying and his performance was managed in an "ordinary fashion." That is, each occasion of alleged bullying demonstrated normal managerial action to address the manager's concerns regarding the employee's work performance.

These concerns included ability to follow through on instructions, communication with customers and proper use of the employer's work systems.

Drake SDP accepted it was the employee's "honestly held belief" that his manager's performance management initiatives were aimed at establishing a reason to terminate his employment. She was not satisfied though that he engaged in those initiatives in a co-operative fashion.

This case demonstrates that employers have a right to carry out reasonable management action relating to issues of poor performance. So long as this action is in line of company policies and procedures and such action was reasonable in the circumstances, employers should be protected from anti-bullying orders.

[Applicant v Respondent \[2014\] FWC 6285 \(31 October 2014\)](#)

Taking the piss

The Fair Work Commission's (FWC) inconsistent approach to the most appropriate method of drug and alcohol testing has left employers being constrained in their ability to manage workplace health and safety. However, there's still hope for employers yet, as a five member Full Bench ruled in favour of managerial discretion when determining a suitable testing method for managing their individual safety risks.

This case involved an employer who sought to introduce a national drug and alcohol policy, which required a urine test if a worker recorded an initial positive oral test. They also had an agreement in place that contained an identical clause acknowledging the incorporation of random drug and alcohol and swab testing into the policy.

In the initial decision, DP Booth ruled in favour of oral testing for both the initial and follow up tests as implementing the proposed urine test was "unjust and unreasonable." She said that urine testing "is more personally intrusive than oral testing" and may "reveal personal choices of individual that do not present a risk to safety in the workplace."

On appeal, the Full bench found that DP Booth fell into "significant error" in determining that it was necessary to consider to merit of using a urine test to follow up a positive oral test. The bench said the Commission should be concerned about whether or not the relevant clause in the employer's agreement "permitted or precluded urine testing for the second or confirmatory test."

In their ruling, the bench considered the surrounding circumstances in which the employer's drug and alcohol policy was implemented. This included the fact that urine testing was an established part of the employer's drug and alcohol testing regime and their employees did not raise any concerns about urine testing upon consultation.

In light of these circumstances, the bench said that relevant clause in the employer's agreement "did not preclude the use of urine testing for the second and confirmatory drug test."

This decision confirms that employers have a right to determine how drug and alcohol testing is carried out. When introducing or amending a drug and alcohol policy, employers should take into account individual business needs and the most effective testing procedure to manage workplace health and safety risks for their enterprise.

[DP World Brisbane Pty Ltd and Others v Maritime Union of Australia \[2014\] FWCFB 7889 \(6 November 2014\)](#)

The great escape

Most employers are unaware that when making a position redundant, they can in fact reduce the amount of redundancy pay an employee is entitled to if they **obtain** acceptable alternative employment” for them. This is easier said than done though, as an employer found out when a decision to vary their redundancy pay obligations was overturned by a Fair Work Commission (FWC) full bench.

After losing its contract to supply security services to a stevedoring company, an employer made 49 of its employees redundant. These employees were then employed by the security company that took over their former employer’s contract. However, their previous service with their former employer was not recognised for the purpose of accrued entitlements.

The former employer then filed an application to the FWC for an exemption from making redundancy payments. This was on the basis that they had ‘obtained’ acceptable alternative employment for these employees.

In an initial decision, the Commissioner found that this was the case and relieved the company of its redundancy pay obligations. However, on appeal, the FWC full bench ruled that merely facilitating an invitation for employees to apply for a position and undertake an interview with the security company was not ‘obtaining’ employment.

The full bench said that the former employer “did no more than to secure the employees an opportunity to enter the recruitment process of [the security company], which may or may not have resulted in an offer of employment”

Additionally, the bench found that the only other actions the former employer took was to unsuccessfully attempt to negotiate an agreement with the security company covering the employee’s accrued entitlements and to provide it with its existing enterprise agreement.

This decision is a reminder to employers that they don’t have to automatically give a big redundancy pay-out to every employee that lines up for it. Although, when making an application to the FWC, employers should be aware that providing former employee’s contact details or facilitating an interview with a potential new employer will not be enough to escape these obligations.

[Maritime Union of Australia v FBIS International Protective Services \(Aust\) Pty Ltd \[2014\] FWCFB 6737 \(21](#)

ANY QUESTIONS OR QUERIES?

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Crying over split milk is a “workplace right”

Employees make complaints and inquiries about their employer’s systems of work, inadequate equipment and the conduct or work performance of their colleagues all the time. It never crossed an employer’s mind though that upon termination of employment, that very same employee was in fact exercising a workplace right and thus could be protected from adverse action.

In a recent case on what constitutes a workplace right, the Federal Circuit Court found that a manager was unlawfully dismissed for challenging his employer’s profession practices.

When the manager asserted that the use of “dry-testing” did not comply with the relevant Australian Standard and that they should use “wet-testing” instead, he was dismissed for questioning his employer’s testing methods.

Judge Lucev said it was evident from the approaches taken by the courts that a complaint or inquiry is characterised by the following:

1. It need “not arise from a statutory, regulatory or contractual provision”; and
2. It only has an “indirect nexus with a person’s terms or conditions of employment”; and
3. It may be a “complaint about the conduct of another person in the workplace or about a work place process which concerns or has implications for an employee’s employment”

Having regard to the manager’s duties under his contact of employment, the judge found that the found that the manager’s questioning of the testing methods was a **“complaint or inquiry in relation to [his] employment.”**

The employer submission that the questioning was not a complaint or inquiry failed to prove that the manager was not unlawfully sacked for exercising a workplace right and the court adjourned the matter.

This decision has massive implications for employers as it broadens the scope of what constitutes a ‘workplace right’ in an adverse action claim. This means that an employee who raises virtually any inquiry or complaint, that has some loose or vague connection to their employment, can argue that any action taken against them was because of the complaint or inquiry they had made.

Even though this is some frightening stuff, employers shouldn’t be deterred from managing employee’s performance and conduct reasonable disciplinary action, when such complaints or inquiries arise. As long as employers have properly investigated the complaint or inquiry and a paper trail to prove it, they should be able to defend themselves in the event of an adverse action claim.

[Evans v Trilab Pty Ltd \[2014\] FCCA 2464 \(30 October 2014\)](#)