

# INDUSTRIAL RELATIONS UPDATE

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## “No principles, Scabs, no guts” = no unlawful dismissal

Holding up an offensive and inappropriate sign at a union picket line could cost employees their job. The High Court has held that an employer did not take adverse action against when it dismissed a union delegate when he waved an “anti-scab” sign during protected industrial action.

The court’s majority comprised of a joint judgement from French CJ and Kiefel J and a separate decision from Gageler J, dismissing the appeal made by the CFMEU against a Full Federal Court decision.

This appeal was based on the premise that the termination of employment was an action taken for a reason which contravenes s.346(b) of the Act. That is:

*“A person must not take adverse action against another person because the other person engages, or has at any time engaged or proposed to engage, in industrial activity”*

Hayne J and Crennan J delivered dissenting judgements, which upheld the union’s appeal.

### French CJ and Kiefel J

The judges agreed with the reasons accepted in Jessup J’s primary judgment in the Federal Court.

That is, the employer’s reasons for dismissal related to the *“content of the employees communications with his fellow employees, the way in which he made those communications and what that conveyed about him as an employee.”*

They upheld Jessup J’s view that none of these reasons were prohibited under s.346.

In a joint opinion, they found that s.346 *“does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action.”*

They also cautioned against treating the onus on an employer differently if the adverse action was taken while an employee was engaged in industrial activity, saying this would *“destroy the balance between employers and employees”*.

### Gageler J

Gageler J said that the physical holding and waving of the anti-scab sign while participating in protected industrial relation was not an operative part of the employer’s reasoning for termination.

He makes a narrow distinction between what constitutes protected industrial action; that being on the picket line is protected industrial action whereas the act of holding up a sign and the content of the sign is not.

### Hayne J and Crennan J

In their dissenting decisions, both Hayne J and Crennan J argued that the use of the word scab *“cannot be divorced from the circumstances in which it was used”*

Hayne J stressed that the protest was lawful and that where *“the activity is a protest, no further distinction can be made between those protests which are courteous or polite and those which (lawfully) give offence.”*

Both judges concluded that the employee had been dismissed for engaging in industrial activity and for expressing the union’s views about scabs, and the union’s appeal should be allowed.

This decision confirms that an employee’s misconduct is not protected as part of protected industrial action. Employers can be less cautious about disciplining their employees for serious misconduct during their engagement in protected industrial action. In saying this though, employers must be able to demonstrate that the reasons for such disciplinary action are separate from exercising a workplace right.

[Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd \[2014\] HCA 41 \(16 October 2014\)](#)

**ANY QUESTIONS OR QUERIES?**

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## Employees do not have a 'right' to a support person

Many employers seem to think that they have an obligation to offer their employees an opportunity to have a support person present at a discussion or investigation relating to their conduct or a workplace incident, which may lead to dismissal. On the flip side, employees have conjured up an entitlement to a support person at such times.

A recent decision by the Fair Work Commission Full Bench dismissed any claims of employee's right to a support person. This case was an appeal against a decision where a Commissioner found that the lack of a support person for a dismissed employee was a contributing factor in finding that the termination was unfair with a subsequent reinstatement order.

In considering whether an employee's dismissal was harsh, unjust, or unreasonable, the FWC are required to take into account subsection 387(d) of the Act. This criteria is as follows:

*"any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal"*

It is clear that an employer must not 'unreasonably refuse' a request for a support person. It is not an entitlement of an employee to have a support person present.

Employers need to keep in mind that it is an employee's right to request a support person. Even then, an employer can refuse such a request if in the circumstance, the refusal is reasonable.

The Commissioner at first instance also found that the employee had a right to a support person during the investigation process. The full bench quashed this finding. They stressed that a request for a support person must only be sought if the discussions relate to dismissal. In this case, the employee was asked to explain what had occurred during a workplace incident and there was no mention of dismissal at all.

In short, employers do not have to ensure a support person is present at any time. They must not unreasonably refuse a request for a support person, but only where such a request is for a person to assist at discussions relating to dismissal.

[BlueScope Steel \(AIS\) Pty Ltd v Agas \[2014\] FWCFB 5993 \(18 September 2014\)](#)

## Should have written it down

A failure to comply with an order by the FWC to pay compensation to an unfairly dismissed employee has seen an employer slapped with a fine of nearly \$50,000 by the Federal Circuit Court.

The Federal Circuit Court has penalized an employer for its wilful ignorance in paying \$2,200 compensation to an employee, who was unfairly dismissed for unsatisfactory performance, in particular her excessive use of social media and spending too much time on the phone to customers (and friends) at work.

What's interesting about this case is the lack of warning given by the employer in relation to their employee's unsatisfactory performance. In the original decision, the FWC found that there was no evidence of any actions taken by the employer towards performance managing her behaviour during working hours.

More importantly, the employer could not provide the FWC with any evidence that they had given her warnings, either formal or informal, during the course of her employment. Here, the FWC stressed the importance of clearly advising employee's, either verbally or in writing, of their unsatisfactory performance and the risk of being dismissed if there is no improvement.

There are a couple of take home messages for employers in both these decisions.

Firstly, it sends a strong warning to employers about the seriousness of non-compliance with FWC orders and the need to accept 'the umpire's decision.'

Secondly, it emphasizes the need for employers to properly document any communication with employees on serious matters relating to performance. It is a small investment to produce a small diary note or a written, contemporaneous record; in doing so, the employer may avoid inflated costs like the ones in this case.

Finally, employers must clearly communicate with their employees on the seriousness of misconduct and the implications of their behaviour if it is not remedied.

[Fair Work Ombudsman v World Gym Sunshine Pty Ltd & Anor \[2014\] FCCA 2201 \(19 September 2014\)](#)

## Distress, hurt and humiliation compensable

The poor handling of pay disputes can result in employer's having to pay big bucks in damages for distress, hurt and humiliation. An employer found this out the hard way in a recent decision by the Federal Circuit Court.

The court found that the employer took unlawful adverse action when it removed a bartender from its roster and cancelled all previously rostered shifts after he raised an underpayment query with management.

When the employee noticed he was not receiving a casual loading in his pay despite his irregular hours and work patterns, he raised this issue verbally with senior management but no action was taken to remedy the situation.

The employee then put his complaint in writing to the payroll officer and was greeted with an aggressive response, saying she would "not be dictated to by any staff member and that she "would communicate with the employee as she saw fit."

This was followed by a damning paper trail of "rude, misleading and threatening emails" and the removal of the employee from the roster.

As such, the court found that the behaviour of senior management constituted fair grounds to find the employee had been distressed and humiliated.

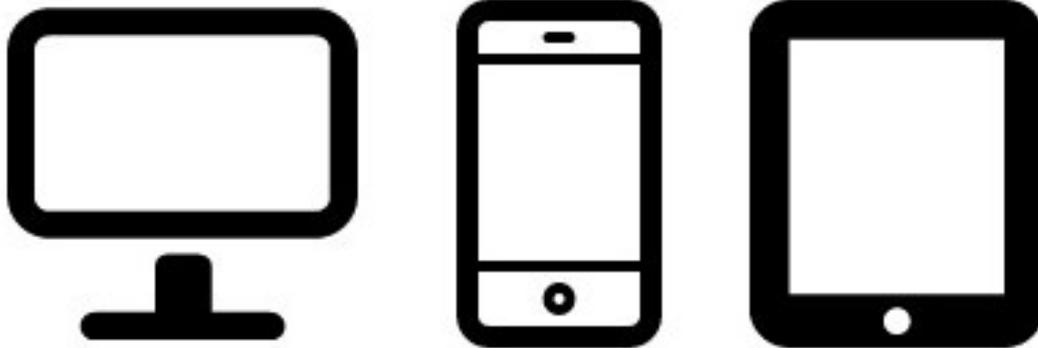
All up, with loss of wages, humiliation, penalties and superannuation, the original underpayment claim of \$2,600 rose drastically to \$11 000.

This figure does not include the potential costs bore by the directors and senior management, if the employee pursues them in a separate claim.

The case demonstrates the importance of dealing with complaints about wages in a serious and timely manner. Employer's and pay roll need to deal with these disputes professionally, otherwise it could seriously cost them if the court finds their behaviour caused shock, distress and humiliation to the employee.

[Hall v City Country Hotel Management Pty Ltd & Ors \(No.2\) \[2014\] FCCA 2317 \(10 October 2014\)](#)

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