Termination gets personal

Employee circumstances can make dismissal unfair

Terminating an employee can easily turn into a legal minefield for employers if they don't exercise their power to do so in a lawful, just and reasonable manner.

In exercising this power, employers must consider the employee's personal circumstances and identify whether they are so extraordinary that termination would be considered unfair in line with the *Fair Work Act 2009* (Cth) (the FW Act).

In *Dennis Sipple v Coal & Allied Mining Services Pty Ltd T/A Mount Thorley Warkworth Operations* [2015] FWC 1080 (*Dennis Sipple v Mount Thorley*), the full bench of the Fair Work Commission (FWC) found that the employee's personal circumstances, such as his age, literacy and injury, were not so extraordinary to prove the dismissal was unfair, that is, harsh, unjust or unreasonable.

This decision provides an example for employers on how to exercise reasonable management action in a way that takes into account an employee's personal circumstances.

When is dismissal harsh, unjust or unreasonable?

Section 394 of the FW Act allows employees who believe they have been sacked unfairly to apply to the FWC for an unfair dismissal remedy.

In considering whether the dismissal was harsh, unjust or unreasonable, the FW Act provides a number of relevant factors for consideration in s387, including:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct
- any other matters that the FWC considers relevant.

Dennis Sipple v Mount Thorley

Mr Sipple was employed by Mount Thorley Warkworth Operations (Mount Thorley) for 27 years as a pit service operator and it was an inherent requirement that he be a 'multi-skilled' operator, capable of operating various heavy machinery and equipment.

In 2002, Mr Sipple underwent surgery on his back for a non-work related medical ailment, with complications from the surgery causing ongoing problems. Following medical advice and in anticipation of Mr Sipple's return to work, Mount Thorley made reasonable alterations to Mr Sipple's duties by allowing him to work solely in a service cart on his return, which he continued doing for the next eight years.

Following a restructure of Mount Thorley in 2010, the position of pit service operator garnered additional heavy machinery responsibilities, including the operation of a haul truck, grader and other heavy equipment. While completing mandatory training for these additional duties, Mr Sipple aggravated his existing back injury.

As a result, Mr Sipple underwent an independent medical examination, which concluded that he was only capable of operating a service cart and was otherwise permanently unfit for the role of pit service operator.

Andrew Ross explains why an employer must consider an employee's personal circumstances when considering termination.

Based on this finding, and following a show cause process, Mount Thorley dismissed Mr Sipple. Mr Sipple then applied to the FWC for an unfair dismissal remedy, alleging that the medical evidence demonstrated he was fit for his duties as a service cart operator and that the dismissal was therefore harsh, unjust or unreasonable.

Key issues

The key issues for determination before the FWC were:

- Was it unfair for Mount Thorley to dismiss Mr Sipple for his inability to perform the inherent requirements of a pit service operator?
- Was it unfair for Mount Thorley to dismiss Mr Sipple for this inability, bearing in mind he was fit to perform the inherent requirements of the position, as it was, before the restructure?

First instance

At first instance, the FWC upheld the dismissal as fair. Commissioner Stanton followed the decision of *J Boag and Son Brewing Pty Ltd v Allan John Button* [2010] FWAFB 4022, which states that when an employer is assessing whether an employee suffering from an injury can perform the inherent duties of their role, the employer is not obligated to create a new position that the injured worker is capable of performing. As a result, Commissioner Stanton found that because Mr Sipple was unable to fulfil the essential duties of a pit service operator and was retained on suitable duties for a period of eight years, he had received a "fair go all round".

Dismissal upheld upon appeal

Mr Sipple then appealed to the full bench of the FWC[1] on the basis that Commissioner Stanton did not properly consider all relevant matters, in particular, Mr Sipple's personal circumstances when he was dismissed. Counsel for Mr Sipple submitted the decision should be made in light of the fact:

- he was 57 years old
- he had worked with Mount Thorley for 27 years
- he was fit to drive a service cart and had done so for a number of years
- his injury, age and low level of literacy would make it difficult to find new employment
- he had family commitments.

In a split decision, the majority upheld the dismissal as fair. In considering all other relevant matters, the FWC found that Mr Sipple's personal circumstances were not so extraordinary as to make his dismissal harsh, unjust or unreasonable.

You should be aware in this case that the unfair dismissal provisions of the FW Act will always be applied closely and that a relatively minor factual difference or any other alleged flaws in the employer's decision-making process could have led to the FWC reaching a different conclusion.

What does this mean for employers and employees?

To ensure that any action to be taken against an employee is lawful, just and reasonable, employers should:

- Evaluate the employee's circumstances (such as existing illnesses or injuries, age, family situation and job prospects) and consider whether they are extraordinary to the situation at hand.
- Confirm that all reasonable alterations have been made to accommodate the employee, unless they can no longer perform the inherent requirements of their position.

Both employer and employee should take careful and informed legal advice.

Employers who fail to establish that they have exercised reasonable management action expose themselves to possible claims of bullying, adverse action,[2] discrimination[3] or workers' compensation.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The assistance of Emily Smith in preparing this article is gratefully acknowledged.

Notes

1 [2015] FWCFB 5728.
2 *Fair Work Act 2009* (Cth) ss340-342.
3 *Fair Work Act 2009* (Cth) s351.

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