DV and job termination

When will it be justified?

Dismissing an employee for reasons connected with domestic violence – either a perpetrator or victim – will require careful consideration of the circumstances, including their relation to the workplace. Report by **Andrew Ross.**

Employers have responsibilities to employees who are victims or perpetrators of domestic violence.

Employers should become familiar with their obligations to employees who are affected by domestic violence, particularly when the issue of termination arises.

Obligations in the public sector

The *Public Service Act 2008* (Qld) (the Act) imposes obligations on public sector employees for both work performance and personal conduct. Specifically, s26(1)(k) of the Act requires that the conduct of public service employees "does not reflect adversely on the reputation of the public service". This means that an employer is permitted to consider an employee's involvement in domestic violence when assessing their fitness for work and, by extension, termination.

The decision in *Public Employment Office Department of Attorney General and Justice (Corrective Services New South Wales) v Silling* looks at the way in which an employer can exercise their termination rights when considering whether an employee who is a domestic violence perpetrator should face disciplinary action.

Perpetrators

Mr Silling was employed by Corrective Services NSW (CSNSW) for 15 years. Between 1998 and, Mr Silling committed two assaults on his wife and one on his daughter.

After being charged for the first assault, Mr Silling was issued a letter of warning. After being charged for the third assault, he was issued with a letter to show cause. Mr Silling responded to this request, albeit about two weeks late, and also provided CSNSW with a medical certificate outlining that he was suffering from anxiety and depression.

On 10 June 2011, following a meeting with his employer, Mr Silling was issued with a letter of dismissal and dismissed from the role of senior correctional officer on 17 June 2011. He subsequently filed an application for unfair dismissal.

Both at first instance and on appeal, the Fair Work Commission found that Mr Silling's dismissal was harsh, unjust and unreasonable. The reasons for this include that:

- He was being treated for his anxiety and depression.
- He had an untarnished record as a correctional officer.
- There was no evidence that his conduct outside of work would compromise his ability to perform his duties at work.
- There was no acceptable justification given for why the harshest industrial penalty was warranted when the local court dealt with the conduct so leniently.
- He had actually only been convicted of one criminal offence.

This case highlights that employers do have a responsibility to consider an employee's involvement in domestic violence. However, to terminate on that basis, a connection needs to be established between that conduct and the employee's conduct in the workplace. The connection may be made if the offending conduct takes place during work hours, for example abusive Facebook posts, or if the employer has a policy requiring its workers and management to present a professional image of the employer.

Victims

Similarly, while employers have the right to assess the fitness of work of an employee who has suffered domestic violence, they should exercise these rights with caution and note their obligations to make accommodations for these employees before progressing to an assessment.

In *Moghimi v Eliana Construction and Developing Group Pty* Ltd, Ms Moghimi was employed as a full-time architectural draftsperson at Eliana Construction for about six months between 2014 and 2015. Her partner also worked for Eliana Construction, although their work did not require them to interact with each other.

After an incident that left Ms Moghimi "in fear for her life", she obtained an intervention order preventing Mr Moghimi from taking certain actions against her. On 22 January, Ms Moghimi had a meeting with her superior about the situation, which resulted in her being dismissed. Accordingly, Ms Moghimi filed an application for unfair dismissal.

The New South Wales Industrial Relations Commission found that the reason for Ms Moghimi's dismissal, namely that the intervention order meant she could no longer work in the office, was not valid and that her termination was "particularly harsh" because of her vulnerable state. The commission also found that Eliana Construction did not explore all available options and discuss these matters over a reasonable period of time with those affected.

This case highlights that employers need to make accommodations for employees who are the subject of intervention orders before the commission considers finding the dismissal valid.

The Queensland Government has developed a domestic and family violence (DFV) directive outlining the types of accommodations and support options for workers affected by domestic violence. Some of these include:

- flexible working arrangements
- counselling
- reasonable workplace adjustments
- a minimum of 10 days of paid special leave.

Government agencies need to ensure they put policies in place to implement the DFV directive.

Summary of responsibilities

Employers need to be careful not to dismiss employees for reasons concerning their conduct outside of work if it does not affect their ability to fulfil their duties at work.

Employees, in turn, are obliged to conduct themselves in their personal lives in a way that does not have a detrimental effect on the reputation of their employer. To do otherwise can constitute a reason for dismissal of the employee.

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