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Emailing pornographic material to or from a work address: misconduct justifying dismissal?

By Stephen Hughes, Special Counsel and Lara Radik, Associate

***B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191**

Introduction

In a decision handed down on 28 August 2013, the Full Bench of the Fair Work Commission (**FWC**) confirmed that:

- Accessing, sending, receiving or storing pornographic material on a work computer is not a special type of employee misconduct. The same general principles apply as in all cases of employee misconduct;
- FWC is not "a court of morals but one of law".[1] Accordingly, cases of this nature are not to be determined according to how sexually explicit the material was, or the level of violence portrayed; and
- An employee's inappropriate use of work IT resources, even if in breach of a policy clearly articulated by the employer, will not always justify termination of employment.

Background

The three employees in this case, Mr B, Mr C and Mr D had worked for Australia Post at the Dandenong Letter Centre (**Dandenong**) for periods of time ranging from 11 years – 17 years.

Australia Post had an 'IT Systems Security Policy' (**IT Policy**), which was readily accessible by all employees. In addition, all employees who logged onto the Australia Post computer network were required to make a daily declaration acknowledging that disciplinary action may be taken against them

for misusing email including the use, access or transmission of pornographic or sexually explicit material.

In 2010, Australia Post installed a new email filter, which enabled management to more easily identify pornographic emails. As a result, Australia Post became aware of a number of offensive emails sent by Mr B, Mr C and Mr D, and ultimately terminated their employment.

The employees admitted sending emails as follows:

- Mr B sent six offensive emails from his work address to his home address. In addition, he sent numerous offensive emails from his home address to colleagues at their Australia Post email addresses;
- Mr C sent 11 offensive emails from his work address to numerous friends; and
- Mr D sent a number of offensive emails from his home address to numerous friends, including colleagues at their Australia Post email addresses.

At first instance, Commissioner Lewin found that the dismissals of Mr C and Mr D were not harsh, unjust or unreasonable, but that the dismissal of Mr B was harsh in all the circumstances. Commissioner Lewin dismissed Mr C and Mr D's applications and ordered that Australia Post pay compensation to Mr B.

Mr C and Mr D appealed against the dismissal of their applications, and Mr B appealed against Commissioner Lewin's refusal to grant the remedy of reinstatement. Australia Post cross-appealed in relation to the granting of Mr B's application.

The Full Bench granted leave for all of the appeals and held that all three dismissals were unfair. The Full Bench's reasoning is summarised below.

Valid reason for dismissal

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWC must take into account whether there was a valid reason for the dismissal related to the person's capacity or conduct.

The Full Bench confirmed that a prohibition on using work resources to access, send, receive or store pornographic material is a lawful, rational and reasonable policy. The Full Bench further confirmed that a substantial and wilful breach of such a policy will usually constitute a valid reason for dismissal.

Based on the facts of this case, the Full Bench held that Australia Post had a valid reason for dismissing the three employees. The following other relevant considerations however meant that the dismissals were unfair.

No evidence of harm or damage

The Full Bench held that the level of harm or damage to Australia Post was a relevant matter bearing upon the seriousness of the misconduct of the three employees.

In this particular case, the three employees emailed offensive material to friends and colleagues who were apparently willing recipients of the material. There was no evidence of any complaints about the employees' behaviour, nor was there any evidence of reputational damage to Australia Post. In the circumstances, the Full Bench determined that the level of harm was at the lower end of the scale.

Culture and absence of enforcement and warnings

At first instance, Commissioner Lewin made a factual finding that a large volume of offensive material had been circulating amongst employees at Dandenong over an extended period of time. Employees holding managerial and supervisory positions had been recipients of the offensive material and had not taken any action.

The Full Bench accepted that finding and additionally held that there was a culture of tolerating breaches of the IT Policy at Dandenong.

In those circumstances, the Full Bench held that it would be reasonable to expect Australia Post to take active steps to notify employees of the new email filter, to warn employees that Australia Post would be enforcing the IT Policy, and that breach of the IT Policy may lead to termination of employment.

Disparate treatment of other employees

Following installation of the new email filter, Australia Post conducted disciplinary processes against around 40 employees. A number of employees were terminated, with other employees receiving lesser sanctions.

Australia Post seemed to determine the sanction based on whether an employee merely received emails as opposed to sending them, the number of emails involved, and the explicitness of the material.

The Full Bench held that the nature of the misconduct by other employees was the same, regardless of the number of emails sent and the explicitness of the material involved. The lenient approach shown to other employees contrasted sharply with the treatment of Mr B, Mr C and Mr D. As a result, their dismissal was harsh and unfair.

Remedy

The Full Bench observed that the employees were

unlikely to engage in misconduct of this sort again, and there was nothing about their behaviour which would undermine fundamental trust and confidence in the employment relationship. In those circumstances, the Full Bench noted that reinstatement with continuity of employment would be appropriate, but any back-pay in the intervening period should be significantly discounted to reflect the employees' misconduct.

Comment

In deciding whether to terminate an employee for misuse of work IT resources, employers must ask the following questions:

1. Does the business have a comprehensive IT policy which clearly articulates the standard of conduct expected, and the consequences for breach of the policy?
2. Have employees been made aware of the IT policy? (Note: Logon reminders alone are insufficient. As the Full Bench noted in this case, such reminders become "*part of the wallpaper*").
3. Have employees been made aware that incoming and outgoing emails are being monitored?
4. Have employees received regular reminders that breach of the IT policy may result in disciplinary action, including dismissal?
5. Has the IT policy been applied consistently? (Note: Employers must avoid moral judgments about the nature of the material involved. All breaches of the IT policy should be treated consistently. In addition, all levels within the business, including management, should be subject to consistent sanctions in the event of a breach of policy).

If the above questions cannot be answered in the affirmative, it would be prudent to consider options other than terminating the employee and take steps to otherwise address the training, awareness, consistent application and enforcement of the IT policy.

Genuine redundancy: reasonableness of redeployment to overseas position

***Roy v SNC-Lavalin Australia Pty Ltd* [2013] FWC 7309**

Introduction

In a decision handed down on 30 September 2013, the Fair Work Commission (**FWC**) confirmed that, in considering whether a person's dismissal is a genuine redundancy, FWC generally does not consider it reasonable for an employer to redeploy an otherwise redundant employee to an overseas location.

Background

Mr Brian Roy (**Mr Roy**) had worked for SNC-Lavalin Australia Pty Ltd (**SNC**) in the position of Senior Designer – Mechanical since February 2011. In March 2013, his position was made redundant.

Mr Roy filed an application for unfair dismissal remedy, arguing that his dismissal was not a case of genuine redundancy.

Section 389(2) of the *Fair Work Act 2009* provides that a person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

a. the employer's enterprise; or
b. the enterprise of an associated entity of the employer.

Mr Roy argued that there were numerous positions for which he was qualified within SNC's associated international entities, and that SNC ought to have redeployed him to one of those international positions.

Decision

The FWC found that the dismissal was a case of genuine redundancy and dismissed the application for unfair dismissal remedy. In finding that the dismissal was a case of genuine redundancy, the FWC gave weight to the following considerations:

- An employer cannot be expected to redeploy an otherwise redundant employee to a more junior position at the expense of its incumbent. If the relevant position is not vacant, then it is not a position to which an otherwise redundant employee could reasonably be redeployed;

- If there are no vacant positions available locally, then it would be appropriate for an employer to explore options for redeployment outside the local area. However, where an interstate redeployment is under consideration, the financial burden of funding relocation expenses would inform the reasonableness of the redeployment; and
- Generally, it will not be reasonable for an employer to redeploy an otherwise redundant employee to an overseas location. This is particularly so where there is no overriding central managerial control over a corporate group's human resource functions, and the employer does not have a facility to redeploy redundant employees to international locations.

Comment

The FWC applies an objective test in deciding whether it would have been reasonable in all the circumstances to redeploy an otherwise redundant employee. An individual employee's subjective expectations regarding redeployment within a corporate group will bear little, if any, weight in the FWC's considerations. Factors which will generally be considered by the FWC include:

1. Does the alternate position offer like terms and conditions?
2. Will service entitlements be preserved?
3. What is the distance between the alternate position and the employee's home?
4. What impact will the alternate position have on the employee's family responsibilities?

When considering redundancies, employers must also ensure that they comply with any consultation requirements imposed by a Modern Award or enterprise agreement.

[1] Per the full Bench of the NSWIRC in Budlong v NCR Australia Pty Ltd [2006] NSWIRComm 288 at 68.
[2] Per the full Bench of the PWC in BC and D v Australian Postal Corporation T/A Australia Post [2013] FWCFB 6191 at 63.

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