Best Practices for Dismissing or Disciplining Public Sector Employees

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Disciplining and dismissing an employee is a fraught but necessary aspect of the employer/employee relationship, and given the potential legal risks arising from dismissals they must always be carefully considered and managed.

Even where a valid reason for dismissal exists (e.g. for poor work performance or serious misconduct), an employer must still take care to afford an employee appropriate procedural fairness, have regard to their legal and industrial obligations, and ensure that any dismissal is not influenced by any discriminatory or other unlawful factors.

Dismissal unfair where disciplinary procedures not followed

The *Industrial Relations Act 1996* (NSW) (**IR Act**) provides that an employee may seek a legal remedy where the employee's dismissal is *'harsh, unreasonable or unjust'*.

Courts and Commissions will apply this test so as to consider a dismissal:

- *'harsh'* being when the dismissal is disproportionate to the employee's conduct giving rise to the dismissal;
- *'unreasonable'* being when the employee was not afforded procedural fairness or natural justice prior to the dismissal; and
- *'unjust'* being when the employer did not have a valid reason to dismiss the employee.

Unfortunately for employers, there are no comprehensive rules or standards that can be followed to ensure a dismissal is procedurally fair, and the degree of procedural fairness required to render a dismissal 'fair' will depend upon the particular circumstances.

Further, although employers are not required by law to implement policies or procedures relating to performance management or disciplinary action, recent decisions of the Industrial Relation Commission (and other tribunals) illustrate that where such policies or procedures exist any failure by an employer to comply with them will likely cause a dismissal to be *'unreasonable'*.

By way of example, in *Bowen v City of Ryde Council* (No 2) [2020], a Council employee was dismissed shortly after the completion of his probationary period on the basis of his unsatisfactory work performance. Following the dismissal, the employee filed an Application for Relief in Relation to Unfair Dismissal pursuant to section 84 of the IR Act.

During the proceedings, Council produced credible evidence that demonstrated that the

employee's work performance was unsatisfactory. The Commission accepted that the Council had legitimate concerns regarding the employee's unsatisfactory work performance, and that this unsatisfactory performance provided a valid reason to terminate the employee's employment.

However, the Commission noted that clause 36 of the *Local Government (State) Award 2017* (**the Award**) (now clause 37 of the 2020 version of the Award) contains a comprehensive and prescriptive disciplinary procedure, and requires all Local Government employers to follow the procedure prior to taking any disciplinary action (including dismissing) an employee covered by the Award.

The Award's disciplinary procedure provides that:

- Where an employee's work performance or conduct is considered unsatisfactory, the employee shall be informed in the first instance of the nature of the unsatisfactory performance or conduct and of the required standard to be achieved, by the employee's immediate supervisor or other appropriate officer of the employer. The employer and employee will discuss the reason(s) for the unsatisfactory work performance or conduct including matters external to the workplace, and, where appropriate, measures to assist the employee to improve their work performance or conduct. Such measures may include, for example, training, counselling and provision of an Employee Assistance Program (EAP).

- Unsatisfactory work performance or conduct shall include, but not be limited to, neglect of duties, breach of discipline, absenteeism and non-compliance with safety standards. A written record shall be kept on the appropriate file of such initial warning. The employee shall be entitled to sight and sign such written record and add any notations regarding the contents of such record.

- Where there is re-occurrence of unsatisfactory work performance or conduct, the employee shall be warned formally in writing by the appropriate officer of the employer and counselled. Counselling should reinforce the standard of work or conduct expected and, where the employee is failing to meet these required standards, a suitable review period for monitoring the employee's performance; the severity of the situation; and whether disciplinary action will follow should the employee's work performance or conduct not improve. A written record shall be kept of such formal warning and counselling. The employee shall be entitled to sight and sign such written record and add any notations regarding the contents of such record.

- If the employee's unsatisfactory work performance or conduct continues or resumes following the formal warning and counselling, the employee shall be given a final warning in writing giving notice of disciplinary action should the unsatisfactory work performance or conduct not cease immediately.

- If the employee's work performance or conduct does not improve after the final warning further disciplinary action may be taken.

The Commission found that the Council failed to issue the employee with a final warning before terminating his employment, and therefore failed to fully comply with the disciplinary procedure prescribed by the Award. The Commission found that the employee had been unfairly dismissed and ordered the Council to pay the employee compensation in an amount equivalent to 4 weeks' wages.

Dismissal in contravention of victimisation prohibitions

Employers must also take special care when taking disciplinary action against employees so as to ensure that such disciplinary action is not claimed to be discriminatory or unlawful.

Section 210 of the IR Act provides that an employer must not victimise an employee because the employee (amongst other things):

- was a member of an industrial organisation, or does not belong to an industrial organisation
- engages or refuses to engage in industrial action, or participates in proceedings relating to an industrial matter;
- claims a benefit under an industrial legislation or an industrial instrument;
- makes a complaint about an alleged breach of industrial legislation or an industrial instrument, or a workplace matter which poses a risk to health and safety.

The IR Act provides that claims of victimisation are subject to a 'reverse evidentiary onus'. This means that the employer is presumed to have engaged in victimisation because of the prohibited reason(s) alleged and the employer must satisfy the Commission that the action taken (e.g. any disciplinary action including dismissal) was not taken because of the alleged reason(s).

Such a claim was made in the matter of *Vaulin v City of Parramatta Council [2020].* In that case, the employee was a full-time pool duty manager until he was dismissed after being accused of falsifying his timesheets. Relevantly however, prior to his dismissal, the employee made several workplace complaints about his increased workload and ongoing bullying and harassment by other employees.

Following his dismissal, the employee lodged a victimisation claim against the Council in the Industrial Relations Commission where he alleged that the dismissal was in response to or affected by his various workplace complaints.

Unfortunately Council was unable to discharge the reverse evidentiary onus and satisfy the Commission that the employee's workplace complaints were not a factor in the dismissal. The Council was not assisted by the fact that the decision-maker behind the employee's dismissal had subsequently retired, and so it was unable to adduce any direct evidence about the Council's real reasons for the dismissal and which rebutted the unlawful reason alleged by the

employee.

The Commission ultimately found in favour of the employee, and the Council was ordered to pay the employee compensation in an amount equivalent to 12 weeks' wages.

Action Items

These cases clearly illustrate that when disciplining or dismissing employee, employers MUST:

- familiarise themselves with all applicable disciplinary policies, procedures and other industrial obligations (e.g. awards), and ensure that these are strictly followed;
- ensure that the employee is afforded appropriate procedural fairness, having regard to the particular circumstances of the employee and the performance/conduct issue concerned;
- ensure that any decisions to dismiss or discipline an employee is not influenced by any discriminatory, unlawful or other prohibited reason – including any prior complaints about workplace rights and/or work health and safety;
- if possible, keep a paper-trail of the internal reasoning and decision-making process behind any dismissal, and ensure that all decision-makers can be relied upon to give evidence about their decisions in the event of future legal proceedings; and
- consider obtaining professional legal advice before actioning a dismissal.