Employers – consistency is key when disciplining employees

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In the context of an unfair dismissal application, many findings in favour of the employee stem from the fact that, although there was a valid reason for the dismissal, there was also a procedural shortcoming in respect of the termination.

This can be galling for employers who are then faced with either an order for reinstatement or an order for the payment of compensation to the employee, despite the existence of a valid reason for the dismissal.

One issue that commonly arises is inconsistent or unequal treatment.

The Fair Work Commission decision of *Treen v Adelaide Services Alliance T/A Allwater JV* [1] highlights how important this issue can be.

Facts

In the context of protected industrial action, Mr Treen sent a derogatory text message to a co-worker who he thought had not participated in the industrial action. The text message said "*Hi mate, just wondering if you are working. If you are, you're a fucking scab*."

Allwater investigated after receiving a complaint. Mr Treen was then summarily dismissed for misconduct.

Evidence

In support of its decision to terminate Mr Treen's employment, Allwater provided the Commission with evidence of two earlier disciplinary matters involving other employees that it said were relevant to this employment law matter.

Each of the two earlier disciplinary matters involved employees who were threatening and aggressive towards others in the workplace.

Allwater's response in these two matters was to issue written warnings to the employees concerned (one warning was a final).

Decision

Commissioner Platt ultimately found that Mr Treen's conduct was a valid reason for Allwater to terminate his employment.

Although as a singular incident it could not be characterised as bullying or harassment, the

Commissioner said the conduct was "*grossly inappropriate*" and was in defiance of the choice that all employees have to participate in protected industrial action.

The word "*scab*" is a particularly robust insult in Australia in the context of industrial action. Commissioner Platt acknowledged this.

However, when other relevant matters were considered the Commissioner found that the dismissal was "*a disproportionate response to Mr Treen's conduct*" which was acknowledged by Allwater to be "*out of character*".

Commissioner Platt noted that Allwater did not appear to consider Mr Treen's prior "*good service and work performance*".

Importantly, the Commissioner found that the outcome, namely the summary termination of Mr Treen's employment, was "*inconsistent with other similar matters*". This was a reference to the earlier two disciplinary matters where employees investigated for similar misconduct were only given written warnings.

Accordingly, the Commissioner that the dismissal was harsh, unjust or unreasonable under workplace law and he ordered Mr Treen be reinstated with continuity of service.

Implications

The decision discussed in this article is just one of many cases that highlight the importance for employers, in defending unfair dismissal claims, being able to:

1. demonstrate that they have not treated the dismissed employee any differently to employees who have engaged in similar behaviour in the past; and
2. establish that the decision to terminate is proportionate to the level of misconduct involved.

Employers need to be mindful of workplace law and the need to consistently discipline employees for similar types of behaviour in the workplace.

Questions/Assistance

If you have any questions in relation to this article or if you would like any assistance in other employment law matters including employment contracts or you require an immigration law Sydney, please feel free to speak with or email one of our specialist employment lawyers on (02) 9635 7966 or info@matthewsfolbigg.com.au

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[1] [2016] FWC 2737.