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Employee Relations Newsletter

Edition 64 **14 May 2017**

An employer's worst nightmare: reinstatement of a sacked worker

Allan West v Holcim (Australia) Pty Ltd. [2017] FWC 2346. (U2016/14182). Lawrence, DP. 2 May 2017.

This matter covers the areas of relevant previous warnings, safety in the workplace, adequate supervision and who is responsible for ensuring that employees are adequately trained.

Holcim is very big company employing almost 2,400 workers.

The applicant in this matter, Allan West, had worked for the Holcim at its cement and concrete products factory in Tamworth, New South Wales for about 6 ½ years. At the time of his dismissal he was a leading hand. As leading hand West (according to Holcim) was responsible for ensuring that all employees under his control were adequately supervised.

Further, West being 58 years old in a regional area, would have significant difficulty in finding another comparable job. He also had a satisfactory work history, having been promoted to Leading Hand.

The incident that led to West's dismissal was that the casual labour hire employee, who had been on site for 16 months, used an overhead crane to lift a rack of steel. The employee had performed the operation by himself on many occasions previously with no objection. West says that he did not see the incident but heard the noise and then saw the steel on the ground. West then helped with the clean-up. He told the casual employee to file a safety report which occurred some 49 minutes later.

West had a previous final warning for what I describe as a "Basil Faulty" moment where he, in a fit of pique, attacked a machine with a steel rod in apparent revenge for the machine's misbehaviour. Importantly the DP found this previous final warning had no relevance to this matter.

The labour-hire employee was unable to give evidence, as he was busy looking for work (which is a euphemism for he also lost his job).

Holcim's process was to:

- Provide a "show cause" letter on 22 November and a termination letter on 24 November (which it issued on the ground that West had not responded to the show cause letter).
- West contacted his union, which in turn requested an extension for West to respond to the show cause letter. Which was not granted.
- The reason given for the termination was that he had allowed another employee to perform a task which was unsafe, did not provide adequate supervision and did not properly report the safety incident. It also relied on the previous final warning.

For the uninitiated, the FWC is required to determine whether a dismissal is "unfair", by satisfying itself that:

- The person has been dismissed; and
- The dismissal was harsh, unjust or unreasonable (there is further criteria for this); and
- The dismissal was not consistent with the Small Business Fair Dismissal Code (ie less than 15 employees); and
- The dismissal was not a case of genuine redundancy.

The DP noted before providing his findings considered a number of previous cases:

> *"A failure to comply with a lawful and reasonable policy is a breach of the fundamental term of the contract of employment that obliges employees to comply with the lawful and reasonable directions of the employer. In this way, a substantial and wilful breach of a policy will often, if not usually, constitute a "valid reason" for dismissal".*

And

> *"I also accept the Respondent's submission that a serious breach of a workplace health and safety policy or an incident where an employee places health and safety at risk may constitute a valid reason for dismissal",*

And

> *"Reaching an overall determination of whether a given dismissal was "harsh, unjust or unreasonable" notwithstanding the existence of a "valid reason" involves a weighing process. The Commission is required to consider all of the circumstances of the case, having particular regard to the matters specified in s.387, and then weigh:*
> *"(i) the gravity of the misconduct and other circumstances weighing in favour of the dismissal not being harsh, unjust or unreasonable;*
> *Against*
> *(ii) the mitigating circumstances and other relevant matters that may properly be brought to account as weighing against a finding that dismissal was a fair and proportionate response to the particular misconduct."*

The DP then summarised:

> *"The Applicant agreed that incidents must be reported at once. He did not do this. Rather, he told the casual employee to do it. This was done 49 minutes after the incident. It is not clear from the Respondent's policy…that the Applicant had to report the incident. He had a responsibility to make sure that it was reported and he did. Whether 49 minutes is too long is a question of judgement. It partly depends on one's view of the severity of the incident. My view is that the Respondent's witnesses embellished the possible danger to the casual employee of the incident. There was no suggestion of danger to other employees.*
>
> *"The Applicant also says that the urgent job he had to complete justified his approach. I do not think that, taking all the circumstances into account, there was a valid reason for dismissal arising from the 16 November incident.*
>
> *"Respondent sought to rely on the Applicant's previous warning. I do not think that this assists to provide a valid reason. It was a spur of the moment reaction which was different to the 16 November incident.*
>
> *"Overall, I am not satisfied that there was a valid reason for the dismissal of the Applicant".*

There are number of case precedents, which the DP relied upon to determine whether procedural fairness was provided:

> *"As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified [the Act] would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."*

The DP was not satisfied that the Respondent carried out an appropriate investigation process which gave the Applicant and the AWU a fair opportunity to be heard, and he was denied the right of a support person. Also, Holcim had not considered West's age, the difficulty of finding comparable work in a regional area, and his previous satisfactory work record, evidenced by the fact that he had been promoted to a leading hand. Critically, the DP stated that:

> *"Even if there was a lack of training of the casual employee, the Applicant was not responsible for that. That would be the role of more senior management. I do not think that this accusation is substantiated".*

The DP finding:

> *"Reinstatement is the primary remedy and I can see no reason why it is inappropriate in this case. "The Applicant presented as a responsible person. There was no issue raised as to his work attendance or attitude. I am confident he will be able to resume his role as a Leading Hand. I am sure that this episode will have made him more conscious of health and safety requirements. I see no evidence of any real breakdown in the work relationship".*

Take home message

- It is management's reasonability to ensure that all employees have the appropriate training/competencies to safety (and productively) undertake the duties to which they have been allocated.
- Only rely upon warning that are pertinent to the matter at hand.
- ALWAYS follow "procedural fairness". Be patient. If the employee can't make a certain time/date because his or her support person is unavailable (which must be offered), then be as accommodating as possible. It is always a good to have the "moral" high ground anyway.
- Overall, what is the company to do with an employee it had sacked, and now has to reinstate? Not suggesting that this will happened in this case, but I have heard of companies paying substantial amounts of money to the applicant to "buy a resignation". This is additionally to the time, Legal costs, and loss of productivity – big incentives to get it right first time.

Until next time....

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