

How "trust & confidence" affect whether an unfairly dismissed employee must be reinstated

In two different unfair dismissal cases before Commissioner Booth of the Fair Work Commission, the concept of 'trust and confidence' of an employer in an employee was examined.

These decisions highlight that while an employee's dismissal may be considered "*harsh, unjust and unreasonable*" by the Commission, whether there is sufficient trust and confidence to reinstate the employment relationship is another story.

Harrington v Coates Hire Operations Pty Limited

In the recent decision of *Harrington v Coates Hire Operations Pty Limited*, an employee was dismissed for serious misconduct for a safety breach.

The incident occurred when the employee, who was a portable toilet delivery driver, went to pick up a vandalised portable toilet that was adjacent to the newly constructed Gold Coast light rail line. When picking up the toilet, the employee parked over the rail tracks. Then when using a crane to lift the toilet onto the truck, he went within the three metre safety limit of overhead wires. The employee was of the mistaken belief that the rail tracks and the overhead wires were not 'live'. Coates' management had been informed that the area had gone 'live' but had not yet notified the employee. Consequently, he did not realise that the area was a hazard zone.

The employee gave evidence, which the Commissioner accepted, that "*there were no warning signs, lanyards or tape*" which he was informed in his training would be present at a 'live' site. In addition, there was "*no indication on his work order that the site was a hazard zone*". Following the incident, Coates put a safety warning on its work orders.

Prior to the incident, the employee had worked for Coates for 11 and a half years and had an unblemished record with Coates. The Commissioner found the employee to be honest and a willing worker who admitted his error. She found that he had not engaged in the conduct wilfully or deliberately, as he had genuinely thought the site was 'dead' and thus was undertaking his duties in a safe manner. The Commissioner said the employee's "*conduct was not a deliberate, wilful, reckless or even negligent breach of safety requirements. On that basis I conclude it cannot be characterised as serious misconduct*".

Due to these reasons, the Commissioner found the employee's dismissal to be disproportionate to his misconduct and there was no valid reason to dismiss. When considering the appropriate remedy the Commissioner looked at whether reinstatement was appropriate in the circumstances.

Trust and Confidence

In contemplating reinstatement, the Commissioner examined whether trust and confidence had been lost by Coates in the employee's ability to perform his role.

When considering "*whether there is sufficient trust to allow the employment relationship to be viable and productive*", the Commissioner noted from previous case law authority that it may be embarrassing or inconvenient for an employer to reinstate an employee, but that it is the

employer's own doing for not having a valid reason for dismissing the employee or affording the employee procedural fairness.

The Commissioner was of the view that *"there was no evidence of any difficulties between [the employee] and any other Coates' officer.... There is no reason to suspect that, if [the employee] were reinstated, he would not perform his duties in a satisfactory manner and in the best interests of Coates"*.

Accordingly, the Commissioner found that Coates ought to have the necessary trust and confidence in the employee to perform his role and granted reinstatement.

Schmidt v BHP Coal Pty Ltd

Conversely, in the decision of *Schmidt v BHP Coal Pty Ltd* the employee's conduct was such that the Commissioner found that BHP would have lost trust and confidence in the employee to perform his role. Due to this, reinstatement was not appropriate.

The employee had failed to notify his supervisors of damage to a fuel tank in the mine pit when it had been brought to his attention. The employee attempted to communicate with a supervisor, but his method of sending a text message to the incorrect number of that supervisor was found not to be sufficient. In addition, despite speaking to supervisors later on the day of the incident, he failed to mention what had occurred. This meant the supervisors were not able to undertake the appropriate action to secure and assess the site.

Prior to this, the employee had received a Step 2 Written Warning due to the employee failing to notify BHP that he would not be returning to work when he had gone home to change his clothes. BHP had expected him back at work. Only when BHP contacted him to see as to his whereabouts, did the employee inform them he would not be returning to work that day.

At the time of the incident, the employee was on a Step 3 Final Written Warning. The Step 3 Final Written Warning was in relation to his lateness to work. He received a warning for this as he had been late on a number of occasions previously.

Defective Warning

The Commissioner took issue with this warning, as BHP also used this warning as evidence of the employee's 'failure to notify'. The Commissioner said that BHP's rewording of the warning was not correct. The warning detailed only about lateness to work, not about failing to notify BHP that he would be late for work. While the Commissioner found that BHP could rely on this conduct by the employee, BHP's action of stating that the Step 3 Warning in their correspondence was in relation to the failure to notify BHP, rather than the actual lateness to work (which was the wording of the warning), was frowned upon by the Commissioner.

She said *"I consider this notice to be defective. It is a significant overreach by BHP Coal to reword the basis of the previous warning and then to base its dismissal of [the employee] in part on the alignment of the earlier warnings and the failure to notify in the fuel tank incident"*.

In addition, the Commissioner was of the view that BHP did not afford procedural fairness to the employee. BHP did not permit the employee to have a support person at the relevant meetings and BHP did not give the employee a genuine opportunity to respond to the allegations.

The Commissioner found that the employee's dismissal was *"harsh and unjust"* when taking into consideration the above and also his service, the limited opportunity to be employed in the local

area and the employee's family responsibilities.

Trust and Confidence

However, the Commissioner found that in this circumstance it would not be right to reinstate the employee as *“on the evidence before me, including his repeated late attendance and serial failures to notify, [the employee] has lost the trust and confidence of BHP Coal, and that the loss asserted by BHP Coal has a rational and factual basis.”*

The Commissioner said that *“it is well established that ‘trust and confidence’ is a necessary ingredient in any employment relationship”*.

LESSONS FOR EMPLOYERS

- Ensure that there is a valid reason to dismiss an employee. Consider whether the punishment fits the crime?
- If you are going to rely on prior conduct of an employee, make sure that the conduct the employee has been warned about relates to the current conduct in question. Do not try to ‘re-craft’ any warnings given to the employee to suit the circumstance.

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