

Employer Update



Drunken argument and hotel damage 'not serious misconduct' and warranted discipline, not dismissal – FWC

Despite finding a valid reason for an employee's summary dismissal, an employer's decision to terminate has been overturned and the employee reinstated and awarded damages for lost wages.

The Bechtel employee, who worked as a rigger on the Wheatstone LNG construction project, was terminated following an out-of-hours argument with his girlfriend at a motel in a nearby town.

The Fair Work Commission (FWC) found the applicant's behaviour, involving drunken behaviours and being a nuisance, constituted 'misconduct', but not 'serious misconduct' and found the employee's summary dismissal disproportionate to the gravity of the misconduct.

• Background – argument leads to motel damage:

Both the employee and his girlfriend (also a Bechtel employee) were readily identifiable as Bechtel employees having arrived at the motel in their Bechtel work uniforms and signing in as employees of Bechtel.

They went out drinking at a hotel nearby to celebrate a friend's birthday and argued loudly upon returning to their motel room just prior to midnight. The long, loud and aggressive argument woke motel guests who had become concerned for the well-being of the woman, involved banging on the door of an adjacent room and resulted in damage to a shower screen and curtain.

Following a complaint from the hotel's management the employee was stood down pending further investigation into the incident and was subsequently advised of his termination in writing.

The employee's girlfriend, for her part in the disturbance, received a final written warning. Bechtel's explanation for this difference in disciplinary approach was the conclusion that she was "...more of a victim, than the instigator of the disturbance..." and that she did not damage the shower screen nor was she doing most of the yelling or shouting.

• 'Not unreasonable' to enforce out-of-hours code of conduct:

Bechtel submitted that termination was valid as the misconduct was manifestly serious and in clear breach of the worker's contract of employment and various policies he had expressly acknowledged. The FWC accepted that employees should be expected to comply with all of the employer's policies for conduct and behaviour and it was not unreasonable for Bechtel to impose its community code of conduct on employees outside of work hours in order to maintain a positive relationship with the community. The fact that the employee was offsite and the incident occurred outside of working hours was 'largely irrelevant'.

The FWC noted the importance of Bechtel maintaining a strong reputation in a regional town with only 500 residents in circumstances where many of the Wheatstone project's 10,500 employees visit the town during time off.

The requirement of employees to behave acceptably outside working hours and the regulation of access to the town was necessary to ensure the town is not flooded with Wheatstone project employees and that the residents are free to go about their normal lives without the presence of large number of employees.

The FWC found the employee was obliged to comply with the requirements of Bechtel's Code of Conduct, but did not do so and this provided a valid reason for his dismissal.

• Misconduct or serious misconduct?

The Commissioner then turned his attention to whether the employee's behaviour constituted 'misconduct' or 'serious misconduct', as distinct in Bechtel's employee code of conduct.

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The examples of what behaviour constituted 'misconduct' included:

"Drunken or noisy behaviour" and
"Causing a nuisance to others, or causing a disturbance" and
"Breaches of this Employee Code of Conduct".

The examples of what behaviour constitute 'serious misconduct' that may result in termination of employment without notice included:

"Fighting, and/or offensive, intimidating or violent behaviour in any form (either initiating and/or in response to actions of another)"
and
"Vandalism, wilful damage, misuse/abuse or interference to company and/or personal property".

The code's examples of serious misconduct involve a wilful element and the FWC did not consider the employee intentionally caused damage to the shower screen. Consequently the FWC found the employee's behaviour constituted 'misconduct', but not 'serious misconduct'. As such, the summary dismissal was inconsistent with the terms of Bechtel's code of conduct and disproportionate to the gravity of the misconduct.

The FWC ultimately found the decision to terminate employment was both harsh and unjust and ordered reinstatement. The FWC also ordered Bechtel pay the employee the remuneration lost since the dismissal, less eight weeks deducted for his 'not blameless' role in the matter.

Of note the FWC also found there was no basis in Bechtel's conclusion that the employee's girlfriend was *"more of a victim and not the instigator"*. "The only difference between the two during their argument was that (the employee's) voice was louder and he was shouting more".

Implications for employers:

The immediate dismissal of an employee is a strong measure. Employers need to proceed carefully when considering allegations against their employees, particularly where there are questions about whether the allegations occurred within the workplace

To discipline or dismiss an employee for out of hours misconduct, you must be sure of two things:

1. The employee's misconduct is connected with their employment in a clear and relevant way.
2. The misconduct has caused damage (or a risk of damage) to your business.

Conduct that risks an employer's interests, even if there is no actual damage, may be conduct that constitutes a 'valid reason' for termination of employment. Whether such a termination is harsh, unjust or unreasonable, notwithstanding the existence of a valid reason, will be determined by the circumstances.

In this instance, it is concerning that the FWC ordered the employee's reinstatement based on splitting hairs on a narrow definition of 'misconduct' and 'serious misconduct'.



If you are considering conducting a review of your workplace or project employment practices, contact Savvy Human Resources Associates:

Sydney Ballina Brisbane

info@savvyhr.com.au

Phone +61 (0) 428 874 186

www.savvyhr.com.au



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