

Dismissal unfair despite previous Christmas party head-butting

Dismissal held to be unfair but application for reinstatement denied: The Fair Work Australia decision *Dewson v Boom Logistics* [2012] FWA 9027 reinforces the importance of following process and providing natural justice when managing employee behaviour and determining a penalty for such behaviour.

Workplace Relations Update

Fair Work Australia has held that an employee was unfairly dismissed on the basis that there was insufficient evidence to establish the allegations that he assaulted another employee, and that his employer could not rely on past behaviour to justify the dismissal.

Mr Dewson was employed by Boom Logistics for approximately six and a half years, initially as a Dogman and later as a Crane Operator. Boom Logistics Limited (Boom) terminated his employment on 11 May 2012 for serious misconduct for assaulting a co-worker (Mr Zuniga) on 2 separate occasions.

Background – external investigation

Prior to the decision to dismiss Mr Dewson, in 2011 Boom had engaged an external consultant to investigate a formal complaint from an employee alleging serious workplace harassment and associated matters such as verbal and physical assault. The external consultant concluded that “a *toxic work environment exists which poses an unacceptable risk to injury to employees, [which] should not be allowed to continue*”¹.

The external consultant’s report also noted that in December 2010, Mr Dewson had been involved in an incident where he head-butted another employee during a work Christmas party. No investigation of the incident was conducted at the time.

In the external consultant’s recommendations Mr Dewson was named as one of the 5 employees involved in the systemic conduct and whom the external consultant recommended should be considered for transfer to another work location.

Reading through the decision of Commissioner Cambridge it appears that the findings and recommendations contained in this report prejudiced the process that was followed and the findings that were made regarding Mr Dewson.

¹*Dewson v Boom Logistics* [2012] FWA 9027 [8]

Who does this affect?

All employers of staff.

Article Highlights

- An employer will be expected to satisfactorily prove the misconduct to rely on it to justify a dismissal.
- All employers are expected to provide employees under investigation with natural justice and procedural fairness.
- Past conduct can be relied on to validate a dismissal as long as the incident was properly considered and dealt with by the employer at the time of the incident.



Assault allegations

Subsequent to the external investigation, Mr Zuniga (another Boom employee) lodged a formal complaint against Mr Dewson alleging that Mr Dewson had assaulted him on 2 separate occasions in April 2011, alleging that he had thrown him into the tray of a dump truck on one occasion and grabbed his arms from behind and forced him to the ground on another occasion.

After putting the assault allegations to Mr Dewson, Boom formed the opinion that the 2 assaults did occur and that these assaults, together with the Christmas head-butting incident, established a pattern of unacceptable misconduct warranting Mr Dewson's termination.

No steps were taken by Boom to investigate the alleged incidents of assault and Boom rejected Mr Dewson's request for a CFMEU official to attend discussions regarding these incidents as his support person. Part of Boom's reasons for not investigating the assault allegations was that it believed, in light of the external consultant's findings, that any potential witnesses were likely to be untruthful.

Unfair dismissal claim

Mr Dewson lodged an unfair dismissal claim with Fair Work Australia challenging his termination on the grounds that:

- the alleged assaults did not in fact occur; and
- he had been denied procedural fairness.

Commissioner Cambridge after hearing evidence from both parties found that the evidence of Mr Zuniga was unreliable and consequently found that neither of the alleged assaults occurred, observing that "*the evidence in this case has established that the employer failed to satisfy even a basic level of proof upon which to find that the applicant committed the particular acts of physical assault as alleged by Mr Zuniga*".

Consequently there was no valid basis on which Boom could dismiss Mr Dewson. Interestingly, the Commissioner linked the flawed procedure undertaken by Boom to the incorrect findings it made noting that "[t]he erroneous findings made by the employer in respect to the two primary reasons for dismissal is unsurprising when the procedure that was adopted by [the employer] is examined."

Flawed process

Not only had Boom failed to establish a valid reason for Mr Dewson's termination but it had also failed, completely and utterly, to afford Mr Dewson any sense of natural justice. In fact, Commission Cambridge made the potent observation that the approach Boom had taken in investigating the assault allegations "*represented something of a case study in how not to conduct an investigation and determination of disciplinary matters leading to termination of employment*".

For further information or assistance in dealing with performance management, investigations of alleged misconduct or claims of unfair dismissal;

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The flaws in the process adopted by Boom included that:

- a) there was no proper investigation,
- b) there was no testing of detail of the alleged assault,
- c) no scrutiny was applied to the sequence of events as asserted by Mr Zuniga,
- d) the relevant manager displayed manifest bias and he predetermined his views before even hearing from Mr Dewson – the willingness to adopt Mr Zuniga’s version of events as factually correct “*provided a convenient mechanism to make the personnel changes that were mentioned in the consultants supplementary report*”, Boom’s attempt to provide Mr Dewson with an opportunity to respond to the allegations represented “*nothing more than an ambush*”; and
- e) Boom unreasonably refused to allow Mr Dewson to have a CFMEU representative present as his support person.

In reaching his decision Commissioner Cambridge did note that while Mr Dewson did not have a clean slate, all employees, even those considered to be of “bad character” are entitled to natural justice.

The festive head-butt

Commissioner Cambridge went on to consider whether the incident where Mr Dewson had head-butted another employee at the 2010 Christmas party weighed against a finding that the dismissal was harsh.

In relation to this incident the Commissioner found that the action of head-butting another employee was an “indefensible act”. However, Boom took no disciplinary action against Mr Dewson at the time of the head-butt, the Commissioner observed that:

“If the matter had been properly considered and dealt with by the employer at the time it may have provided sound basis for dismissal. Ultimately, and largely because of the failure of the employer to deal with the matter at the time, the head-butting incident cannot now become a justification for the applicant’s dismissal.”

Consequently, Commissioner Cambridge went on to find that the dismissal was harsh, unjust and unfair.

Nonetheless, the head-butt was undeniably misconduct and the Commissioner rejected the applicant’s request for reinstatement partly because of this misconduct.

Lessons to be learnt

This case highlights the importance of:

- conducting full and proper investigations; and
- acting on employee misconduct in a timely manner.



Set out below is a quick checklist for you to complete prior to deciding to terminate an employee.

Considerations for HR practitioners / Employers	Answers
Does your organisation have a policy to guide you through dealing with inappropriate behaviour of employees in the workplace?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Where allegations are made, are there sufficient grounds to suspend the employee?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Has an internal investigation been conducted into the allegations?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Have the allegations been put to the employee?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Was the employee granted a reasonable opportunity to respond to the allegations?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Is there evidence to support the allegations?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Has all the evidence been examined, free from bias?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Is there a need to engage an external investigator?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Is there a valid reason for dismissal?	Yes <input type="checkbox"/> / No <input type="checkbox"/>
Was the employee denied a support person?	Yes <input type="checkbox"/> / No <input type="checkbox"/>

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