

EMPLOYMENT LAW

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**JOHN WILSON - PARTNER,
EMPLOYMENT AND INDUSTRIAL**

If the boss says do it, must you?

Must employees be blindly obedient to their 'bosses' and do everything they ask? The short answer is no.

The position with respect to *unlawful* orders is relatively clear. There is an implied term in employment contracts that an employer may not make an employee perform an unlawful act, e.g. instructing an employee to drive an unregistered or

uninsured vehicle or to falsify account records is a no-no.

Orders which endanger, or which an employee reasonably believes will endanger, their life or health are not lawful orders. There is no obligation to follow them, unless the danger or risk in the work is something the employee has actually contracted for, e.g. it is reasonably foreseeable that a fire-fighter might be burnt at work and a police officer or soldier shot in the course of duty. This is because contracts of

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employment for people working in inherently risky occupations could be said to contain implied (if not express) terms that such workers are sometimes required, and expected, to place themselves in harm's way.

However, generally employees must obey all *lawful* and *reasonable* instructions – if they refuse, they will be in breach of their employment contract and at risk of losing their job.

What is a 'lawful and reasonable' direction depends on the facts and circumstances of each case – and such directions are *not restricted to work or the workplace*. In *McManus v Scott-Charlton* for example, it was held that a direction to a Commonwealth employee that he not contact a co-worker outside the requirements of official duties was lawful and reasonable direction.

Employees are not usually obliged to obey lawful



instructions which go *beyond the scope of the work* they are actually contracted to perform, e.g. a cook might not be bound by a direction to work in a dairy, and a sub-editor may not be required to perform the work of a lower grade journalist. However employees are generally expected to follow instructions to do things which are incidental to their work, such as working reasonable amounts of overtime.

In *Van Tran v Calum Textiles Pty Ltd* it was held that the mere fact that an employee did not follow the direction of an employer did not mean there was a valid reason for the termination of the employee's employment. As Beazley J, said in *Izdes v LG Bennett & Co Pty Limited*, in deciding '*whether a refusal to carry out the lawful and reasonable directions of an employer constitutes a valid reason for termination, it is necessary to have regard to all the circumstances, including the nature and degree of the employee's conduct*".

Similarly in *Lupoi v Phillips Fox*, Ritter JR held that in the context of a dismissal based on disobedience, insubordination, or failure to comply with a lawful and reasonable command, determining the validity of the termination requires examination of at least:

- the *extent of the disobedience*

(i.e. the length of time over which the employee has been disobedient);

- the *nature of the disobedience* in relation to the contract of employment;
- any *warnings* given for failing to carry out the instruction;
- the *reasonableness* of the request,
- whether there has been a *calculated and persistent course of disobedience*; and
- whether the *disobedience strikes at the essence of the contract of employment* in the sense that it is inconsistent with the continuing relationship of employer and employee.

In *Lupoi*, a person mainly employed as the receptionist for a law firm could not be terminated for saying she wouldn't wash dishes because that task was only a minor part of her duties. As such, her stated intention to not carry out such an instruction did *not strike at the heart of the contract of*

employment between her and the firm, but was, rather, only a minor incidental matter.

Andrew Stewart states in *Stewart's Guide to Employment Law* that courts and employment tribunals have generally accepted that it is lawful and reasonable for employers to impose dress or appearance standards on customer-service employees, to require employees to clock on and off a shift, to direct employees against using a work computer to view pornography using their personal internet connection on their own time, to order employees not to make public comments about the employer, and, sometimes, to require an employee to undertake a medical examination to determine their fitness for work - although not to insist that they undertake a psychiatric examination simply because another employee has complained about them.

In summary, the courts and employment tribunals may consider a range of facts and circumstances in considering whether an employer's instruction to an employee is 'lawful and reasonable' and therefore employers need to be seen to exercise their authority in a fair, consistent and rational manner; not arbitrarily or capriciously.



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