

# Workplace Relations Update

## Unfair Dismissal: What you need to know

As most of you know, **unfair Dismissal is back** for the majority of employees in Australian Workforce.

While large employers have been covered by unfair dismissal legislation for many years now and continue to be so regulated, employers employing 100 or fewer employees were exempt from unfair dismissal regime under *WorkChoices*. The Rudd government's Fair Work Act reinstated *unfair dismissal for these employees as from 1 July 2009*, subject to them working a qualifying period of 6 months. For **small business employers** (less than 15 full time equivalent employees) that qualifying period is extended to 12 months. Apart from the 100 employees issue and despite rhetoric to the contrary, the unfair dismissal regime set up under the Fair Work Act is not markedly different from former regimes.

So, if you think you might need to dismiss someone, how do you minimise your chances of the facing an unfair dismissal action down the track (or worse, a discrimination, adverse actions or unlawful termination suit)?

Ultimately, the Act requires that 'a fair go all round' be given in terminations. There is no definitive 'how to' list in the Act or elsewhere to guide your actions, but here's some basic – though often overlooked – criteria to tick off before dismissing anyone:

Is there a valid reason for the termination that relates to performance of the job?

\* Beware of irrelevant or dis-



John Wilson, Partner, WLN Employment and Industrial Law Group

## Employer Alert:

### Work health and safety reform

The harmonisation of work health and safety laws is a major step in Australia's reform of safety legislation, and a hot topic for discussion. The Model Work Health and Safety Act will have a great impact on businesses across Australia—we will outline how it can affect you. More in our next newsletter.



criminary motives for determination;

Have the allegations of a valid reason for termination been substantiated?

\* For misconduct allegations, did you just rely on rumour or third party discussions, or was a proper and unbiased investigation undertaken?

\*If the reason is poor performance, what evidence do you have of this? Beware of glowing performance appraisals that are inconsistent with later allegations of poor performance;

\*If the reason is redundancy, can you ensure that no other person is engaged to perform the dismissed employee's job role (see case alert)?

For misconduct allegations,

\*Has the employee been told of the proposed reason for termination and of the consequences if the allegations are substantiated, and given proper opportunity to respond to these allegations?

\*Was the employee made aware that the conduct or reason allegedly justifying termination was unacceptable in the workplace?

If the reason is poor performance, was the employee warned appropriately and specifically about his/her standard of performance and given reasonably opportunity to improve?

See over the page for a discussion of the decision in *Joshua Paul Craft v Glennies Creek Coal Management Pty Ltd* [2010] FWA 5147 which is a good example of how to get a dismissal right.

## ACT Human Rights Commission Education

The ACT Human Rights Commission offers a wide range of courses in relation to the *Human Rights Act 2004* and the *Discrimination Act 1991* which are useful educative tools. These courses familiarise participants with their legal obligations and are an excellent way for businesses to ensure compliance with Human Rights legislation. See [www.hrc.act.gov.au](http://www.hrc.act.gov.au) for more details.

## Case alert:

FWA full bench clarifies meaning of 'genuine redundancy' exemption to unfair dismissal provisions: see *Howarth & Ors v Ulan Coal Mines Limtied* [2010] FWA 167.

# Meet the Team



*John Wilson*

John is the premier industrial relations and employment lawyer in the ACT and region and is the only lawyer practicing in this area who is accredited as a specialist industrial relations and employment lawyer under the NSW Law Society's specialist accreditation scheme. John has handled several major cases affecting the ACT as a whole, and combines expertise, professionalism and effectiveness to achieve the best outcomes for his clients.

## Unfair dismissal: Mitigate your risk!

The recent decision of *Joshua Paul Craft v Glennies Creek Coal Management Pty Ltd* [2010] FWA 5147 provides a good illustration of a company that took the right steps prior to terminating an employee for serious misconduct. The case illustrates some steps that management can take prior to terminating an employee for serious misconduct to mitigate the chances that an employee will be successful in claiming unfair dismissal.

### Details of the case

Mr Craft, an underground production employee, was summarily

dismissed for writing racially discriminatory graffiti on a crib room wall directed towards another employee. Glennies commissioned an investigation into the incident, and the handwriting examiner's report concluded it was 'highly probable' that the graffiti had been written by Mr Craft. Glennies had a zero tolerance policy towards discrimination which was outlined to staff in formal training and reinforced in subsequent toolbox talks. Mr Craft alleged his termination was harsh, unjust and unreasonable.

Commissioner Stanton found Mr Craft's dismissal was not unfair, unjust or unreasonable. The Commissioner stated it was open to Glennies to dismiss Mr Craft as the conduct was in breach of Glennies' established workplace discrimination and equal opportunity policy, an investigation had found on the balance of probabilities that Mr Craft had written the graffiti and Mr Craft had received training with respect to the policy. Mr Craft was informed of the reason for his termination (and these reasons were also made clear to Mr Clark prior to the decision being made), he was given an opportunity to respond to the allegations and to have a support person during the meetings. The

Commissioner further stated that Mr Craft's consistent denial of the allegation did not provide Glennies with any grounds to mitigate the penalty of dismissal.

### What does this mean for you?

Firstly, all employers should have policies and procedures prohibiting discrimination and harassment. Secondly, so an employer can rely on such a policy, the employer should formally train employees in their policies and procedures, and the content of such policies should be reinforced regularly in the workplace. In the event of an incident, an employer should commission an investigation into the alleged misconduct and not act upon any findings unless the investigation concludes that (at a minimum) on the balance of probabilities the allegation is substantiated. Notifying the employee, giving the employee an opportunity to respond and allowing the employee a support person are also pertinent precursors to the dismissal.

### Introducing: Paul Hynes

Paul has a broad-based commercial practice specialising in technology and communications law. Prior to joining Williams Love & Nicol, Paul was Special Counsel at Moray & Agnew Lawyers and had previously worked as Principal Solicitor in the Commonwealth Attorney-General's Department and as Legal Counsel to TransACT Communications.

Paul's commercial and government clients have included telecommunications carriers and carriage service providers, public sector corporations, ISPs and software developers. Paul has expertise in commercial law, with particular emphasis on trade practices law, electronic law, privacy law, commercialisation of IP and government procurement and contracting. Paul is also Adjunct Professor of Technology Law at the University of Canberra.

