Pornography in the Workplace – Does It Justify Summary Dismissal?

Both under the common law and under the Fair Work Act 2009 an employee may be summarily dismissed without notice if he or she engages in "serious misconduct".

Regulation 1.07 of the Fair Work Regulations 2009 requires "serious misconduct" to be given its "ordinary meaning", and includes:

• Willful or deliberate behaviour that is inconsistent with the continuation of the contract of employment;

• Conduct that causes serious or imminent risk to the:
  - Health or safety of a person; or
  - Reputation, viability of or profitability of the employer’s business;

• The employee, in the course of his or her employment engaging in theft, fraud or assault;

• The employee being intoxicated at work; and

• The employee refusing to carry out a lawful or reasonable instruction that is consistent with the employee's contract of employment.

The employer bears the onus of proving that the employee engaged in serious misconduct justifying summary dismissal. If the conduct relied upon to summarily dismiss an employee is found by the Fair Work Commission not to justify summary dismissal, it most likely follows that the employee's dismissal will be found to be harsh, unjust or unreasonable.

QR Case

QR dismissed an employee with 27 years' service and a good service record for storing and emailing pornographic material on his work computer. The employee brought an unfair dismissal claim against QR claiming that the dismissal was harsh, unjust or unreasonable.

QR had gone to great lengths to notify its employees of its policies in relation to pornography in the workplace, including:

• The CEO sending email updates to all employees advising of QR’s IT policy and what was considered appropriate use of workplace emails, including advising of consequences of any misconduct.

• The Union sending correspondence to its members about QR’s IT policy and consequences of breaching the policy.

• Employees having been notified of an amnesty period whereby employees were encouraged to remove any inappropriate content from their work computers and emails.

• Weekly article having been published on QR’s intranet about inappropriate use of work computers.

• A reminder about QR’s IT policy been printed on each employee’s payslip.

As QR went to great lengths to inform employees of its IT Policy, it was found that the dismissal of the employee was not unfair, unjust or unreasonable.

Australia Post Case

Recently the Full Bench of the Fair Work Commission considered the same type of issues in B, C & D v Australian Postal Corporation T/A Australia Post3. B, C & D were all long term employees at Australia Post’s Dandenong Letter Centre. B sent 6 unacceptable emails to his private email address and sent emails from a private email address to friends at Australia Post at their work email addresses. C sent 11 unacceptable emails and D sent multiple emails from his private computer to friends at Australia Post via their work email addresses.

The conduct was identified after Australia Post installed a software filter on its email system and the employees were immediately dismissed.
At first instance, the trial judge found that the dismissal of C and D was not harsh, unjust or unreasonable, however considered that the dismissal of B was harsh. B, C and D all appealed the decision with B appealing only against the trial judge's refusal to order his reinstatement.

The Full Bench considered, amongst others, the following factors:

- The age of employee;
- The length of service;
- The employee's service record;
- Whether there was any evidence of actual harm or damage resulting from the conduct of the employee;
- Culture of the workplace (it was noted that supervisors and managers were aware of the misconduct and were also involved);
- Whether the employee was warned that conduct in breach of the policy would result in dismissal; and
- Inconsistent treatment of different employees.

The Full Bench came to a different decision than in the QR Case and found that the dismissal of the 3 employees was harsh and ordered their reinstatement.

The distinguishing factor to the QR case was that the employees were not given prior warning that Australia Post's policy would be enforced and the consequence of a breach of the policy. Further, the employees were not notified that a new screening system was implemented and the policy was not applied consistently to all employees found to be infringing the policy.

Employers Take Care

Even if there is misconduct in a workplace which is objectively regarded as serious misconduct, but which falls outside the definition of serious misconduct in the Fair Work Regulations, it does not necessarily entitle the employer to summarily dismiss the employees engaging in the misconduct. An employer must first have in place a policy which covers the behaviour and regularly advise its employees of the policy and that its breach will result in summary dismissal.

Another consequence for employers who fail to have in place a policy which prohibits the viewing and distribution of pornography, is that it may make it difficult for the employer to defend a claim for sexual harassment made by another employee who is sent a pornographic email or who inadvertently may view pornographic material in the workplace. Such a claim may be brought under the Sex Discrimination Act 1984 or an adverse action under the Fair Work Act.

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1 Section 123(1)(b) and Section 789(1)(b).
2 (2006) 156 IR 393
3 [2013] FWCFB 6991.