

FOCUS

WORKPLACE RELATIONS



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COMPANY POLICY AND THE EMPLOYMENT CONTRACT

In this issue: we look at how company policies can form part of an employment contract; the genuine operational reasons exemption to unfair dismissal laws; and the meaning of 'ordinary hours' when determining compensation paid in lieu of notice.

An examination of the latest issues in workplace relations, including termination due to operational reasons and the meaning of 'ordinary hours'

EMPLOYMENT POLICIES: EMPLOYER ASPIRATION OR CONTRACTUAL OBLIGATION?

A Federal Court Full Bench majority has confirmed that company employment policies can form part of an employment contract. Overseas Practitioner Meriel Smith considers the Full Bench's decision on when a policy will form part of an employment contract.

HOW DOES IT AFFECT YOU?

Employers should choose carefully the wording they use when drafting their employment policies. Even if policies are not expressly incorporated into the contract, the content and context may mean that a policy will have contractual effect. If a policy is intended to be merely aspirational, descriptive or advisory, this should be made clear.

If the written contract refers to employment policies, and employees are required to read and sign, this may suggest that the written contract is not in itself a comprehensive statement of the obligations assumed by each party.

An employer's right to vary a policy unilaterally does not mean the employer is not bound by it in the form it was in during an employee's employment.



DECISION

The majority¹ accepted that the employer's policy to 'take every practicable step to provide and maintain a safe and healthy work environment' formed part of the employment contract. Although the language was not clearly contractual, the context reflected a contractual obligation. It was noted that this finding did not greatly extend the employer's common law duty to take reasonable care to provide a safe place and system of work.

The majority disagreed that the harassment and grievance procedures policies formed part of the employment contract, as the language used in them was descriptive and aspirational rather than promissory. In the case of the harassment policy, it was not reasonable to conclude that the employer had made a contractual promise that harassment would not occur.

OPERATIONAL REASONS: WIN FOR EMPLOYEE

Senior Associate Luke Gattuso and Articled Clerk Carly Dunn report on a decision in which the operational reasons relied upon by an employer for dismissal were not genuine.

HOW DOES IT AFFECT YOU?

- Evidence of other motivation for dismissing an employee will be relevant to the Australian Industrial Relations Commission's assessment of whether any operational reason is in fact genuine.
- Employers should not merely rely on recommendations by individual managers if they are not based on genuine operational reasons.

BACKGROUND

Mr Brown was employed by Macedon Ranges Shire Council (the **council**) as a programmer analyst.

The council obtained two independent reports to assist with strategic planning for its information technology department. These reports disclosed deficiencies in the department, including

under-resourcing, and among other things, recommended employing additional staff with specific skills to complement the skills of existing employees.

Subsequently, the IT manager recommended a departmental restructure that included the abolition of Mr Brown's position. This same manager had been the subject of a formal complaint by Mr Brown and there had been a breakdown in their working relationship. The structure adopted by the council and the termination of Mr Brown's employment were based on the IT manager's recommendations.

CLAIM

Mr Brown claimed that he had been unfairly dismissed and that the termination of his employment was unlawful. The council sought to have his application dismissed, based on the operational reasons exemption.

The council claimed that the programmer analyst position was terminated as a result of a restructure, as it wanted to reduce the extent of its development and customisation of IT programs, and there was no suitable position to which Mr Brown could be redeployed. The council sought to rely on the independent reports it had obtained in relation to the restructure.

Mr Brown claimed that the removal of his position was a sham, as his substantive position involved only minor in-house development work in programming, and the work he did still existed.

DECISION

Commissioner Whelan in the Australian Industrial Relations Commission² found that there was nothing in either of the independent reports suggesting that Mr Brown's skills were extraneous to the IT department's needs, and she was not satisfied that the IT manager's recommendations were 'based on an objective assessment of the organisational needs of the council'. The council's restructuring needs were not sufficient to satisfy the test for a 'genuine operational reason'.

Commissioner Whelan found that Mr Brown's termination was motivated by the personal antagonism of his IT manager. She stated:

It is blatantly obvious however that the manager recommending what should occur had a personal antagonism towards Mr Brown and I am not satisfied she acted from organisational rather than personal motivations in proposing a structure that led to his dismissal.

Accordingly, Commissioner Whelan did not accept that the operational reasons relied upon by the council were genuine and referred the matter to conciliation.

MEANING OF 'ORDINARY HOURS' WHEN DETERMINING COMPENSATION TO BE PAID INSTEAD OF NOTICE

Compensation payable for an employee in lieu of notice under the *Workplace Relations Act 1996* does not include overtime. Special Counsel Rowan Kelly and Lawyer Jessica Choong report.

HOW DOES IT AFFECT YOU?

Employers should consider both:

- the terms of employment; and
- the basis on which overtime is worked, including whether it is a mandatory fixed amount or varies from time to time,
- when determining the 'ordinary hours of work' of an employee in order to calculate payments in lieu of notice on termination of employment.

BACKGROUND

Mr Moloney was employed by Beverage Engineering Pty Ltd (the *company*).

While overtime was worked by employees, it:

- was not guaranteed or mandatory;
- varied depending on operational requirements; and
- was in addition to the ordinary hours specified in the site agreement.

About one month after Mr Moloney commenced employment, the company terminated his employment for operational reasons and he was paid in lieu of notice.

Mr Moloney alleged that the company had unlawfully terminated his employment in breach of section 661 of the *Workplace Relations Act 1996* (Cth), because the amount he was paid did not include a component for overtime. Mr Moloney claimed that overtime ought to be included in his ordinary hours because working overtime was 'customary, regular or usual'.

THE LEGISLATION

Section 661 provides that an employer must not terminate an employee's employment unless 'the employee has been given the required period of notice', or 'has been paid the required amount of compensation instead of notice'. The required compensation instead of notice must:

- equal or exceed the total amount the employer would have been liable to pay had the employee remained until the end of the notice period; and
- be worked out on the basis of 'the employee's ordinary hours or work (even if they are not standard hours)'.

DECISION

The Federal Magistrates Court of Australia³ did not accept Mr Moloney's argument, finding that the company was not obliged to include an overtime component in compensation in lieu of notice.

The court found that where there was no requirement or roster to work overtime and overtime varied, 'it was not possible to say what his regular customary or usual hours were'.

In considering the plain meaning of the words as understood in the industrial relations context, the court was also not satisfied that 'ordinary hours' meant the usual or customary time, or the average actual hours worked.

3. *Moloney v Beverage Engineering Pty Ltd* [2007] FMCA 1072 (per Federal Magistrate O'Sullivan)

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