phone (02) 9810 3703 | fax (02) 9810 3685 | mobile 0417 552 801 | johntamplin@iprimus.com.au

INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER – 08-06-11/2

- Some questions we get asked
- Mystery illness led to dismissal
- Failure to follow company policies and procedures
- Employees dismissed for breaching e-mail policies
- Employee who altered medical certificate reinstated

SOME QUESTIONS WE GET ASKED

Question:

I have an employee whose attitude to the performance of their work and their colleagues is not acceptable as it is aggressive and abusive, what can I do?

Answer:

The employee's attitude to their work and their colleagues would appear to be inconsistent with their contract of employment and the interests of the company.

As a result the employee should be warned as to their future employment and the necessary changes that the employee needs to make to continue their employment.

The warning process should be formal and should be documented including notifying the employee prior to the meeting of the issues of concern to the company and that they can have someone attend all represent them.

On issues such as these you should get professional advice as it is establishing the process that you will need to rely upon to defend your actions.

Question:

I have an employee who wants to work through their meal break so that they can leave work early, can I do this?

Answer:

Awards apply to the work the employee performs and not the title of the job of the employee.

Awards prescribe that an employee must take a meal break and failure to take that meal break is a breach or contravention of the award and the employer and employee both can be fined.

If the employer agrees to the provision of an employee working through their lunch time to finish early the employer has contracted out of the award and that is also an additional offence and both issues can result in significant fines and convictions for the employer.

Question:

I have employees who work a 36 hour week and do so every week and I have other employees who work a 37.5 hour week, can I pay them hourly and divide the award rate by the hours that they work and not the total award rate?

Answer:

Unless an employee is specifically employed as a casual or part-time employee they are a weekly employee and must be paid the award rate for the week of work and the employer would be in breach of the award not to do so.

Question:

I have employees leaving their work area and work during paid time to go outside and have a cigarette and it is impacting on production and the other non smoking employees are resentful of the time away from work, what can I do about it.

Answer:

This is not an uncommon problem and it must be seen in the light of not attending at work during paid time.

At the same time the employee can make an allegation that they are being singled out as a result of being a smoker and their addiction.

The process we have used is to advise all employees of the attendance at work during paid time policy and advise that in 8 weeks it will also apply employees who smoke and that smoking will only be accommodated during meal breaks.

MYSTERY ILLNESS LED TO DISMISSAL

The employee went on sick leave in June 2009 and when the paid sick leave period was exhausted his manager contacted him by letter and asked when the employee would be returning to work.

A month later the manager received an e-mail from the employee advising that the employee was "unfit for duty due to an impairment."

Further requests for the employee to establish when he would return to work where not replied to and the Human Resources Director advised the employee in a letter that unless he supplied a medical opinion from his doctor to identify the illness that he was suffering from and the necessary information to facilitate a return to work his employment would be ended.

The worker wrote back stating that he would only consent to an examination when his doctor cleared him to return to work and the employer responded by again sending the preceding letter.

The employment was subsequently ended and the employee filed for unfair dismissal.

The Commissioner hearing the matter found that the request by the employer was reasonable and the employee could have resolved the issue by contact with the employer.

The unfair dismissal application was dismissed.

Petovski v SMS Management and Technology Ltd [2010] FWA 2297 (23 March 2010)

The Issues:

The process used demonstrated the necessity to conform to the requirements of the legislation.

Our View:

This case demonstrates the necessity of the evidentiary trail and the process needed to be followed to make a defence against an unfair dismissal application.

FAILURE TO FOLLOW COMPANY POLICIES AND PROCEDURES

In October 2010 the company arranged a 90 minute training session on workplace bullying and harassment and had it delivered to all staff.

The dismissed employee attended a training session and was advised at the training session that the company was taking a zero tolerance approach to workplace bullying.

The employee was summarily dismissed for serious and wilful misconduct following comments about the weight of another employee in front of other employees and on another occasion stating of another employee in front of other employees that he "was lucky to be able to count to 3".

The applicant was warned as to his performance on both occasions.

On 10 November a contract worker to the company made a written complaint that he had been bullied by the employee. The contractor stated he had a stutter and that when he passed the same employee he would start talking with a stutter and mimick him.

The employee was subsequently interviewed and advised that if he did not substantiate why he should not be dismissed the company because of its zero tolerance view on bullying and harassment said it had no choice but to summarily dismiss the employee.

The matter subsequently went before the Fair Work Australia Tribunal for unfair dismissal and while the Tribunal found that there was a valid reason relating to the conduct for the dismissal and that there was a history of making inappropriate comments.

The Tribunal also stated that because an employer expresses the view that it will have a zero tolerance does not mean that the tribunal would share that view if it is not reasonable in all circumstances.

The Tribunal took the view that while employers can promulgate policies and give directions to employees as they see fit that they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may in the particular circumstances of an individual case be harsh unjust and unreasonable.

The Tribunal took the view that being summary dismissal was harsh and unreasonable and awarded the employee two weeks pay but would not reinstate the employee.

Gray v Automotive Brands Pty Ltd trading as Autobarn [2011] FWA 2113

The Issues:

It is important that employers have policies and procedures on a wide range of issues including bullying and harassment and that those are conveyed to all employees however the fact of this case were that the instant dismissal was seen as too harsh in the circumstances.

Our View:

In this particular case a further warning would have been appropriate and that further warning should been a final warning as to the behaviour of the employee.

Employees dismissed for breaching e-mail policies

The company dismissed 15 employees and six contract workers for receiving and sending and/or storing inappropriate material including pornography in the workplace.

Seven employees challenged the dismissals and 2 of the employees had 20 years or more service with the employer.

In 2006 the company had dismissed three employees for the same issues and conducted a series of training sessions and required that the employees sign an agreement that they understood and would adhere to the company's e-mail and Internet policies.

The employees disputing their dismissal had each received via e-mail a copy of the policy and documentation and had attended the training sessions.

The company engaged a computer executive and examiner after it found 2 employees viewing inappropriate material on a PC and the investigation commenced from December 2009.

After analysing the training sessions the Tribunal took the view that the employee's arguments that they had not been properly trained in using the company's e-mail policy and its code of business conduct was not acceptable.

The Tribunal took the view that while it was not an arbiter of bad taste or what is or not pornographic and therefore inappropriate that it was reasonable and fair that the employer had adopted the definitions used by the Commonwealth Censor.

The Tribunal stated for an employee to argue that they require training not to send or access e-mail pornography at the workplace was nonsense.

The Tribunal also stated that it is not only inappropriate and a theft of the employer's time, it raises the real risk of employer liability for ensuring its employees occupational health and safety, due to the potential harassment by other employees.

Further the Tribunal rejected the employee's submissions that the sending, storing and receiving such e-mails was excused by the workplace culture at the company.

The Tribunal took the view that given the employees were aware of the policies and that the employees and many others ignored the risk they were taking by doing so they should have paid the penalty of being dismissed.

The Tribunal upheld the dismissals and found in favour of the employer.

Batterham and others v Dairy Farmers [2011] FWA 1230 (29 March 2011)

The Issues:

Transmitting or sending pornographic material or other material has the potential to impact on sections of the workforce that may find it offensive and therefore place the company in a position where it can be prosecuted as appearing to condone the pornography or the other offensive material.

Our View:

Every company should have an e-mail and internet policy and should monitor those operations regularly.

Employee who altered medical certificate reinstated

The employee had suffered a back injury at work in 2008 and was on light duties and restricted hours of work.

The employee was advised that their job was under review and was offered a part-time contract that didn't address the light duties and restricted hours.

The employee obtained a Workcover medical certificate from a doctor but after leaving the surgery realised that the doctor had failed to include all the work restrictions such as lifting, sitting and travelling which were discussed during the consultation.

As a result the employee called the surgery and was told by the receptionist that it was okay for her to alter the certificate to include all the restrictions which she then did and her supervisor found out.

The management had a meeting with the employee about the certificate and the employer called the receptionist who confirmed that she had advised that it was okay to add the restrictions on the medical certificate and the employer then asked to speak with the doctor who was unavailable until later.

The employer cited its Fraud and Corruption Control Policy and dismissed the employee for altering the medical certificate to her advantage.

The Tribunal found that it was incumbent on the employer to establish the facts from the doctor before the employer dismissed the applicant without establishing what the true position was.

The Tribunal found that the applicant's explanation was a plausible and an a reasonable explanation and had been in that it had been confirmed to the employer by the receptionist.

The Tribunal found that the employees conduct warranted no more than a warning and most certainly not summary dismissal for fraud and corruption.

The employee was reinstated.

Hammond v Australian Red Cross Blood Service [2011] FWA 1346 (4 April 2011)

The Issues:

There was lack of investigation and the reality of the previous injuries incurred at work should have been taken into consideration as to the veracity of the medical certificate.

Our View:

The investigation by the employer was lacking in this matter and as always the punishment must fit the offence and it would appear that the employer in this matter used its policies in an overreaction to the issue and acted without considering the facts.

If you require any clarification please contact:

John Tamplin
0417 552 801
johntamplin@iprimus.com.au

Maria Loutsopoulos
0416 047 943
tamplin2@gmail.com

If you have been forwarded this email and wish to subscribe, then click *here*.