

Dismissal process flawed, but not unfair: **FWA**



In a ruling that addresses some important issues on procedural fairness, Fair Work Australia has upheld a hospitality worker's dismissal for inappropriate conduct despite her employer's failure to provide her with all the information on which its decision was based.

The NSW employer claimed the hospitality attendant - who had received 22 warnings in 20 years of service, including a final written warning just months before her dismissal – had complained loudly and aggressively, within earshot of customers, about a drinks trolley that had been left in the wrong place.

The employer's HR manager conducted an investigation and the worker was given a copy of the findings. A meeting was held to give her an opportunity to respond to the findings, but her explanation was “unconvincing and insufficient”, and she was sacked.

Experienced worker “should have known better”

Before **FWA** Deputy President Peter Sams, the worker agreed she was upset about the trolley and had “expressed annoyance”, but denied being aggressive, irrational and “over the top”.

The worker's union representative claimed she was denied procedural fairness because she was not given *all* of the information on which the decision was based, including witness statements.

The union rep blamed her poor behaviour on a lack of training.

But Deputy President Sams said the worker had 20 years experience in the industry and “should have known better”.

“One does not need training to know that, as an employee, you do not behave as [she] did in the workplace, not once, not twice, but numerous times,” he said.

The “appalling litany of warnings and counselling” she received over the years was “truly breathtaking”, and her employer was “perfectly entitled” to take them into account.

Deputy President Sams also noted that the worker had two representatives at the meeting, and that neither had complained about the process or requested further information.

“While it is preferable, so as to avoid any doubt or criticism, to provide an employee with all of the information upon which the employer relies to justify its decision to dismiss, it will not always be necessary to do so.

“For example, the employee might say that he/she knows the precise nature of the allegations and responds accordingly, or the employee might admit to the allegations,” he said.

“Secondly, to satisfy the requirements of subsection (b) of s387 of the Act, the test is not that the employee is provided with every document or piece of information upon which the employer relied to dismiss the employee.”

The “correct test”

Deputy President Sams said the correct test was whether the employee was given sufficient information to:

- understand the nature and specifics of the allegation/s of which she was accused; and

- Prepare and articulate a response.

Deputy President Sams also said that faults in an employer's process did not necessarily equate to procedural unfairness. In order to be significant, a fault must:

- deny the employee natural justice;
- alter, or have the potential to alter, the outcome for the employee; and/or,
- Outweigh the seriousness of the misconduct proven against the employee.

He said that “on any proper reading” of the witness statements and the HR manager's report, there was “nothing new, inconsistent or unclear about the specifics of the allegations”.

In finding the dismissal fair and appropriate, he said the worker was "fortunate to have lasted as long as she did".