

FWA upholds sackings for email policy breaches

Fair Work Australia has upheld Dairy Farmers' dismissal of seven employees who "blissfully ignored" the risks involved in sending, receiving and storing inappropriate emails.

The company dismissed 15 employees and six contractors at its Wetherill Park (NSW) site in January last year for receiving and/or sending and/or storing inappropriate material, including pornography, in the workplace.

Seven employees - including two with 20 years or more service - challenged their dismissals.

Three denied they had sent any inappropriate material, while the remaining four admitted sending some, including some pornography.

The company claimed each dismissed employee had breached three or four of its policies covering email use, "good working relations" (which prohibited some conduct, including downloading or displaying sexually explicit material), conduct, diversity/EEO and performance counselling and discipline.

Deputy President Peter Sams noted that in 2006, after the company dismissed three employees for similar offences, it emailed all workers to inform them of the development, told them about a series of training sessions, and advised them that they would be required to sign an agreement indicating they understood and would adhere to Dairy Farmers' email and internet policy.

Six of the seven employees received that email and were trained in key policies, while five of the six received training in workplace conduct standards, including email use, in October 2009.

The company identified the inappropriate emails in a report by McGrath Nicol computer examiner Mark Garnett (a former detective), who it engaged after it found two employees viewing inappropriate material on a PC in December 2009.

Commonsense rather than training needed on appropriate use of employer's email system

Deputy President Sams rejected the employees' arguments that they hadn't been properly trained in using the company's email system and in its code of business conduct.

"For any employee to argue that they require training not to send or access email pornography at the workplace is disingenuous nonsense.

"It is akin to arguing that having no knowledge of drink driving laws is a defence for doing so.

"It is patently obvious that one should not engage in such behaviour as distributing pornography at the workplace.

"It is not only inappropriate and a theft of the employer's time, but raises the real risk of employer liability for ensuring its employees occupational health and safety, due to the potential harassment by other employees.

"The fact that no one seemingly complained is not the point and was probably more a case of fortuitous good luck. It would only have been a matter of time before someone would have complained of being offended or harassed. In any event, in my opinion, it is not necessary to prove anyone was offended or harassed by the inappropriate emails; it is only sufficient that the respondent considered, on a reasonable basis, that the material was inappropriate. There can be no room to doubt that it was."

Employer within rights to make hard core/soft core distinction

The company identified four categories of email (see paragraph 28 of the decision) - hard-core pornography, soft pornography, racist jokes or pictures and other offensive jokes or pictures.

The employees challenged the distinction the employer made between hard and soft core pornography.

But Deputy President Sams, while conceding the tribunal "is not an arbiter of bad taste or what is, or is not, pornographic and therefore inappropriate", said there was nothing wrong with the employer adopting the Commonwealth Censor's definitions of hard and soft core, saying this approach was "entirely appropriate, lawful, clear and unambiguous".

"It was necessary to draw some distinctions to ensure that not all employees, with varying degrees of culpability and seriousness of conduct were treated the same (the company's HR manager, people and culture for the site, Pearl Thompson, told FWA that she recommended dismissal of employees who forwarded hard-core material, while she recommended a final warning for those who forwarded soft-core material).

"I can well imagine the criticism which would have been levelled at [Dairy Farmers] if it had not drawn such distinctions and dismissed employees regardless of the seriousness of the inappropriate material distributed and other factors."

Deputy President Sams said that "on any objective analysis", the distinctions drawn by Dairy Farmers were "entirely sensible, fair and rational".

"Displaying email images in the workplace of male or female genitalia and obvious sexual acts, would obviously be offensive to many people in the community, maybe the large majority."

Culture no excuse

Deputy President Sams rejected the employees' arguments that the sending, storing and receiving such emails was excused by the workplace culture at Wetherill Park. He indicated that it would be hard for the employer to have done more to explain "in clear and unequivocal terms" that such conduct wasn't tolerated and might lead to dismissal.

"That so many employees chose to ignore the warnings and disregard [Dairy Farmers'] policies is hugely disappointing, but fault can hardly be laid at the respondent's door for that.

"These seven [employees] and many others, blissfully ignored the risk they were taking by doing so and have paid the penalty."

He also rebuffed the employees' argument that they had been sacked as a cheap alternative to making them redundant and paying out \$300,000 in severance pay (the company was planning to shut the facility).