

OHS Breach justified dismissal

Food manufacturing multinational Parmalat appealed Commissioner Helen Cargill's decision that it unfairly dismissed a forklift operator who placed part of his body under an unsecured load in breach of safety regulations.

Commissioner Cargill found the employee's breach constituted serious misconduct and that the employer had a valid reason for sacking him.

However, she ruled the dismissal harsh under the [s367\(h\)](#) "other matters" ground, primarily on the basis that the employer had failed to show the employee CCTV footage on which it partially relied and that his conduct was negligent, rather than deliberate.

She also took into account that "although the [employer] has a commendable focus on safety, it does not have anything akin to a zero tolerance policy".

In granting permission to appeal, the full bench – Vice President Graeme Watson, Deputy President Peter Sams and Commissioner Ingrid Asbury – said the case raised "important questions about the respective rights and obligations of employees and employers in relation to safety requirements at the workplace".

Parmalat had established that the employee had engaged in unsafe conduct that amounted to serious misconduct, and the way it was dealt with under the Fair Work Act's unfair dismissal provisions was a matter of public interest.

"Clearly disciplinary action was necessary and appropriate because a failure to do so sends a message to the workforce that safety breaches can occur with impunity," it said.

The bench continued that Commissioner Cargill's decision failed to disclose a "clear line of reasoning" leading to her conclusion, or to properly explain why the "other matters" she raised outweighed her findings that the employer had a valid reason for dismissing the worker and took appropriate procedural steps.

The existence of a valid reason was a "very important consideration" in establishing the fairness of a dismissal, it said.

"Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open."

It was unclear whether Commissioner Cargill had found such mitigating factors existed in this case, but if that was her finding then it should be quashed, the full bench said.

The employer's failure to show the employee the CCTV footage was not significant, while the fact that the employee's conduct was negligent rather than deliberate did not render it less serious.

"Further, we do not believe that there was a sufficient basis to find that the employer could not apply its safety standards because of alleged actions in relation to other safety breaches.

"If it was entitled to take the action in this case the need to enforce its safety rules suggests that the resultant termination is not harsh," it said.

"We consider it somewhat anomalous that an employee found guilty of serious misconduct for breaching safety rules, and hence dismissed for a valid reason, after due process, could be considered to be harshly terminated in the absence of discernable and significant mitigating factors," it said.

The full bench overturned Commissioner Cargill's decision and replaced it with its own finding that the employee had engaged in serious misconduct and that his dismissal by the employer was not harsh, unjust or unreasonable.

[Parmalat Food Products Pty Ltd v Mr Kasian Wililo \[2011\] FWAFB 1166 \(2 March 2011\)](#)