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WORKERS COMPENSATION & SELF INSURANCE

The "Fairness" Scale

How to measure the reasonableness of your administrative action

By Patrick Walsh

Following on from the High Court's decision in *Comcare v Martin* [2016] HCA 43 I was prompted by a colleague to try and provide some broad principles as to what constitutes "reasonable administrative action taken in a reasonable manner".

The difficulty arises because, to use a classical lawyer phrase, it depends! Every time that an employer decides to take administrative action, the action will need to be evaluated on its own facts for the simple reason that no two sets of circumstances are the same.

In my experience, strong businesses are not dissuaded from taking administrative action because of concerns about any liabilities they might incur. Workplace culture is a difficult concept to get right but, in my view, a good workplace culture requires management to be prepared to exercise their management prerogative. There is a reason that protections exist for employers taking administrative action.

What is considered "administrative action"?

Not every action that an employer takes will be considered administrative action. Identifying when an action will be considered to be administrative action is important, so that an employer can then ensure that they can avail themselves of the legislative protections that are in place for those actions. My view is that the legislature has intended to provide a protection from liability for employers exercising their reasonable managerial prerogative in a reasonable manner, as distinct from injuries that are caused by the inherent requirements of the role a person is employed for.

In *Workcover Corporation of South Australia v Summers* (1995) 65 SASR 243 Doyle CJ (Prior and Williams JJ concurring) held that administrative action is "*probably intended to apply to* ***decisions or action by the employer which are in some way related to the workings or function of the workplace****, rather than to the actual task performed by the worker*".

The view taken by Doyle CJ provides a fairly wide definition of administrative action that goes beyond taking an action in relation to a single employee. In adopting Doyle CJ's reasoning in *Clease v Bridgestone Australia Pty Ltd* [2005] SAWCT 85 the Tribunal found that a decision made by an employer to require workers to work a rotating shift, including a night shift, that pre-dated the worker's employment was administrative action.

Some examples of what may constitute administrative action are:

- A direction to work at a particular location;
- A direction to work particular shifts;
- Lawful decisions relating to industrial action; and
- A direction to perform a role in a particular way.

In South Australia, the *Return to Work Act 2014* (SA) also provides the same protection for:

1. Reasonable action taken in a reasonable manner to transfer, demote, discipline, counsel, retrench or dismiss a worker, or a decision not to renew or extend a contract of service;
2. A decision, based on reasonable grounds, not provide a promotion, transfer or benefit; and
3. Reasonable action taken pursuant to the *Return to Work Act*.

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Taking administrative action in a reasonable manner

Determining whether administrative action is taken in a reasonable manner will largely depend on the nature of the administrative action. Clearly, when there is a greater likelihood of an adverse consequence for employees, there will be a greater obligation on employers to afford the affected employees procedural fairness.

In relation to administrative actions that don't relate to disciplinary action, care should be taken to ensure that any industrial requirements, such as consultation provisions in Modern Awards, are met. Employers should also be able to articulate a clear business reason for the administrative action as well.

In relation to administrative action that is disciplinary action, a useful starting point for employers is section 387 of the *Fair Work Act 2009* (Cth) and the criteria it sets out for considering whether a dismissal is harsh, unjust or unreasonable. Using this as a starting point, I suggest that employers work through the following list:

1. Is there a valid and defensible reason for the contemplated action?

2. Have you notified the employees that are likely to be affected of the proposed action?

3. Have you provided an opportunity for affected employees to provide feedback in relation to the proposed action?

4. Has the process been undertaken in a way that affords affected employees procedural fairness?

5. If the action may result in dismissal, have you advised the affected employees that they are entitled to have a support person at any discussions?

6. If the action relates to unsatisfactory performance and may result in dismissal, has the employee been warned about their performance previously?

Reasonableness of administrative action

In *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 McHugh and Gummow JJ, discussing the dismissal of a person's employment stated that "*Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer,* ***and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted***."

Gilchrist DPJ in his decision in *Whicker v Workcover (SA) Ltd (Signcraft Pty Ltd)* [1999] SAWCT 37 noted that "*The proper and effective management of human resources requires much more than a clinical application of established industrial principles to a particular state of affairs. It also involves a careful reflection of the particular circumstances of each case. A rigid adherence to the principles declared in judgments and decisions of Courts and Tribunals without an appropriate consideration of the particular facts of the matter can lead to inappropriate action being undertaken.*"

His Honour went on to find that the worker "*… was a man who prior to some counselling that he received in mid-1997, had discharged his employment duties with the employer for a period of over twelve years without receiving any formal rebuke about his work performance. After the counselling that he received in 1997, he apparently discharged his employment duties to the satisfaction of his employer (having received no indication to the contrary). Then, on 30 March 1998, he was summonsed to a meeting at which a series of complaints were made, none of which were particularly serious, then another meeting four days later, where further complaints were made that again were about matters that were not very serious, and was then informed that there would be a further review six days later, with an indication that a failure to improve within that time frame might lead to dismissal. Given the tone of the meetings the previous year, and the receipt of the article titled `The Right Attitude', coupled with the fact that he was working under a management team that was a generation on from that which first engaged him, the worker might have been forgiven for thinking that he no longer fitted the employer's image and that Mr. Thorn and Mr. Cameron were deliberately setting him up so as to engineer his dismissal.*"

It was on this basis that Gilchrist DPJ stated "***it was not, in my view, reasonable for it* [the employer] *to attempt to redress the situation by arranging a meeting within days of the earlier meeting and expressing an expectation that there needed to be an outcome within a matter of days of that second meeting, and raising the possibility of dismissal*** *… The misdemeanours that the worker was alleged to have committed, were not particularly serious.* ***To have raised the stakes within such a short period of time after the meeting of 30 March was in my view too heavy handed****. I think that Mr. Thorn's evidence, as set out above, reveals that he was of like mind.*"

As these cases demonstrate, determining whether administrative action is and of itself reasonable is difficult. The case law in the Fair Work Commission contains numerous examples of contentious cases in which employees have engaged in serious misconduct but, because of their personal circumstances, they have been granted an unfair dismissal remedy.

If the administrative action does not

involve the dismissal of, or disciplinary action in relation to, employees, employers should be able to articulate a clear business case as to why the administrative action is necessary. Administrative action that is not supported by a business case can be construed as arbitrary or vindictive.

When the action does involve the dismissal of, or disciplinary action in relation to, employees, employers need to be able to do more than demonstrate that there is a valid reason for the action. Employers need to also take into account the individual circumstances of the employee as part of the decision making process. This usually involves, once a decision has been made, a consideration as to whether there are any extenuating circumstances that need to be taken into account before taking the action (such as the employee's age and length of service to the employer).

It almost goes without saying that the law in this area can be very complicated as an employer tries to wade through industrial requirements, disability discrimination laws, work health and safety laws, and workers compensation obligations. Rather than being dissuaded from exercising an employer's managerial prerogative, if you have any questions or doubts pick up the phone and get some advice from a specialist. It could be the cheapest advice you'll ever get!

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