Suspect behaviour is not enough to justify termination

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A recent Fair Work Australia (FWA) decision (Bergin & Bennett v Workforce Solutions (Qld) Pty Ltd t/as Workforce Solutions) has awarded 2 employees over $50,000 compensation for being unfairly dismissed.

Mr Bennett and Mr Bergin were both terminated after their employer disc overed they had set up a company and a website which their employer believed was in direct competition with the employer's business.

Bennett and Bergin maintained the company had been set up as a means of security as both had concerns about their employer's financial viability resulting from the Queensland floods.

Bennett and Bergin were both terminated at a weekly sales meeting in front of fellow employees after Bennett denied the company existed. Bergin did not contradict Bennett's response and his employment was also terminated. Although the employer did question Bennett and Bergin about the company at the meeting, it appears the employer had already decided to terminate Bennett and Bergin prior to the meeting.

In ordinary circumstances, one would suppose creating a company to potentially compete with an employer's business could be considered a valid reason for dismissal. (In this case, FWA did not accept that Bennett and Bergin were carrying on a business, and decided that they had merely registered a company). However, terminating Bennett and Bergin nevertheless was deemed to be unfair, largely due to the way in which they were terminated.

The two major factors which made the termination unfair resulted from the meeting which took place. The first is that Bennett and Bergin weren't advised that the meeting would involve a discussion regarding their company or that it would result in their termination. Both were under the impression that the meeting was just an ordinary weekly sales meeting. As a result, neither Bennett nor Bergin were ready to respond to the employer's questions, nor did either of them arrange for a support person to attend with them.

The second factor is that during the meeting Bennett and Bergin were terminated in front of all staff present at the meeting. This included administrative staff as well as operational staff.

In addition to the above factors, it is also obvious that the employer's conduct at the FWA hearing contributed to the success of Bergin and Bennett's claim. Clearly, the following factors did little to persuade FWA to make an order in the employer's favour:

1. the individual who questioned Bennett and Bergin at the meeting, and who made the decision to terminate Bennett and Bergin did not give evidence at the hearing; and
2. an investigation report that was prepared apparently showing that Bennett and Bergin had downloaded information from the company database regarding the employer's customers, was not available at hearing, nor was it provided to FWA or the applicants.

This case highlights the importance for employer's to ensure they have proper procedures in place when terminating (or deciding to terminate) employees. It also indicates the need for employer's to fully commit to FWA proceedings if an unfair dismissal claim is made and the employer chooses to defend it. Employers should ensure they seek legal advice prior to terminating employeesand ensure their existing termination, staff disciplinary and performance management procedures are reviewed by a lawyer with expertise in workplace relations.

Harwood Andrews Lawyers have an expert Workplace Relations team that can assist you with advice and concerns you may have in this area. For further information, please contact:

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