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) hasawarded 2 employees over $50,000 compensation for being unfairly dismissed.

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

Bennett and Bergin maintained the company had been set up asa means of security as both had concerns about their employer’s financialviability resulting from the Queensland floods.

Bennett and Bergin were both terminated at a weekly salesmeeting 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 themeeting, it appears the employer had already decided to terminate Bennett andBergin prior to the meeting.

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

The two major factors which made the termination unfair resultedfrom the meeting which took place. The first is that Bennett and Bergin weren’tadvised that the meeting would involve a discussion regarding their company orthat it would result in their termination. Both were under the impression thatthe meeting was just an ordinary weekly sales meeting. As a result, neitherBennett nor Bergin were ready to respond to the employer’s questions, nor dideither of them arrange for a support person to attend with them.

The second factor is that during the meeting Bennett andBergin were terminated in front of all staff present at the meeting. Thisincluded administrative staff as well as operational staff.

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

1.the individual who questioned Bennett and Berginat the meeting, and who made the decision to terminate Bennett and Bergin didnot give evidence at the hearing; and

2.an investigation report that was preparedapparently showing that Bennett andBergin had downloaded information from the company database regarding theemployer’s customers, was not available at hearing, nor was it provided to FWAor the applicants.

This case highlights the importance for employer’s to ensurethey have proper procedures in place when terminating (or deciding toterminate) employees. It also indicates the need for employer’s to fully committo FWA proceedings if an unfair dismissal claim is made and the employerchooses to defend it. Employers should ensure they seek legal advice prior toterminating employeesand ensure theirexisting termination, staff disciplinary and performance management proceduresare 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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