



## *Express law* fast track information for clients

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### **Some recent cases dealing with misconduct by public sector employees**

**Two recent court decisions, both of which relate to suspension from duties, provide useful insights into the handling of alleged misconduct by public sector employees.**

#### ***Hall v State of South Australia***

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In *Hall v State of South Australia* [2010] SCSA 219 (*Hall*), the employee alleged that the employer's decisions to institute a misconduct process against the employee and suspend the employee from duty were invalid. The employee worked in a department of state in South Australia and at the time was employed under the *Public Sector Management Act 1995* (SA) (now repealed).

The South Australian legislation is in many respects quite different from the *Public Service Act 1999* (the PS Act) and other Commonwealth legislation providing for employment by the Commonwealth, so *Hall* is not a legally binding precedent for Commonwealth public sector employment. But the decision includes some persuasive and helpful findings and observations on the following matters:

- the seriousness of the misconduct involved where public servants use work computers to access pornography
- the nature of public sector employment; in particular, the public interest considerations involved in such employment
- the circumstances in which suspension from duties can be justified
- the impact of delay on the conduct of an investigation into alleged misconduct
- the capacity to amend notices advising an employee of the allegations of misconduct.

#### **Accessing pornography on a work computer can justify dismissal**

It was alleged that the employee had accessed pornographic or sexually explicit material on multiple occasions during work hours over a period of more than a year. The court observed that, if such conduct were established, the conduct would be grounds for dismissal. One of the specific factors referred to by the court in this regard was that the public sector holds itself out to be a model employer (at [40]).

#### **Nature of public sector employment**

The court noted that the employment relationship in the public sector is distinct from that outside the public sector. The court emphasised the critical role that legislation regulating public sector employment plays in pursuit of the public interest. The court said that the integrity of the public service and maintenance of public confidence in it are driving forces behind public sector employment legislation (at [43]).

In support of its observations about the nature of public sector employment, the court referred to the decision of Justice Finn of the Federal Court in *McManus v Scott-Charlton* (1996) 70 FCR 16 and the decision of the High Court in *Commissioner of Taxation v Day* (2008) 236 CLR 163 (*Day*). The court quoted the following passage from *Day*:

The public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment, as Finn J observed in *McManus v Scott-Charlton*. Such legislation facilitates government carrying into effect its constitutional obligations to act in the public interest. For reasons of that interest and of government the legislation contains a number of strictures and limitations which go beyond the implied contractual duty that would be owed to an employer by many employees. In securing values proper to a public service, those of integrity and the maintenance of public confidence in that integrity, the legislation provides for the regulation and enforcement of the private conduct of public servants.

### **Suspension from duties**

Under the South Australian public sector legislation, if the relevant decision maker *suspected* on reasonable grounds that an employee was liable to disciplinary action then they could commence an inquiry into misconduct and suspend the employee from duties.

In contrast, under the *Public Service Regulations 1999* (Cth) (PS Regulations), suspension from duties is permitted where (among other things) the relevant decision maker *believes* on reasonable grounds that an employee has, or *may have*, breached the APS Code of Conduct (see s 28 of the PS Act and reg 3.10 of the PS Regulations).

As to the requirement of reasonable suspicion of misconduct, the court held that the statutory requirement of 'reasonable' satisfaction required assessment against what was known, or reasonably capable of being known, at the time of the decision to commence an inquiry or to suspend.

The court held that reasonable suspicion is a relatively low threshold. Actual belief or proof is not required. It is enough that there is an apprehension or slight opinion, without sufficient evidence. (The court referred to legal authority indicating that reasonable suspicion is a lower standard than reasonable belief (at [65]). There is an issue as to whether, for the purposes of reg 3.10 of the PS Regulations, a belief on reasonable grounds that an employee *may have* breached the Code of Conduct is comparable to reasonable suspicion that the employee *did* breach the Code. It may well be that it is comparable.)

The court also noted that the mere fact of suspension of an employee, even with pay, is punitive and that a suspension without pay is a very serious sanction (at [78] and [90]).

### **Impact of delay**

The court held that there was an implied requirement to conduct a misconduct inquiry within a reasonable time (at [79]). In contrast, the governing procedures in agencies under the PS Act should require that the determination process be carried out with as much expedition as a proper consideration of the matter allows (see cl 5.3 of the *Public Service Commissioner's Directions 1999* and s 15 of the PS Act).

The court held that, although the inquiry had been significantly delayed and this was unsatisfactory, it was not in all the circumstances an unreasonable delay even though the employee was suspended without pay and experienced a significant adverse impact. In particular, the court considered that it was not unreasonable to defer the misconduct inquiry pending the outcome of a police investigation (which did not lead to any prosecution) (at [72] to [86]).

## **Amendment of notices of allegations of misconduct**

The South Australian legislation and procedures did not provide for amendment of a notice advising the employee of suspected misconduct. In contrast, APS agencies' misconduct procedures under the PS Act should clearly permit variations of the details of suspected breaches of the Code (see cl 5.2(a)(i) of the *Public Service Commissioner's Directions 1999* and s 15 of the PS Act).

The court held that the provision in the legislation about the conduct of investigations after a notice of alleged breaches has been issued suggested that the legislation contemplated that the allegations might be curtailed, abandoned or expanded. The court held that there was nothing in the legislation to prevent a notice from being amended before the conduct of a hearing, as required under the South Australian legislation (at [87] to [90]).

### ***Quinn v Overland***

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*Quinn v Overland* [2010] FCA 799 concerned a public sector employee in the Victoria Police employed under the *Public Administration Act 2004* (Vic). The employee was suspended from duties with pay pending the outcome of an investigation into alleged misconduct.

The jurisdictional basis of the proceedings is not clear from the judgment and it is not clear on what basis the Federal Court has jurisdiction. The judgment refers to a claim of breach of statutory duty (relating to the *Public Administration Act 2004* (Vic)) and a consequent challenge to the validity of the suspension from duties.

### **Interlocutory injunction to restrain suspension**

The Federal Court of Australia granted an interlocutory injunction to restrain the continued suspension of the employee. The effect of the injunction granted by the court was to permit the employee to return to work pending a decision by the court as to whether or not the suspension was invalid.

In granting the interlocutory injunction, the court did not make a final ruling on whether or not the suspension was invalid. However, the court was satisfied that there was a serious issue as to the validity of the suspension.

The decision demonstrates that, where there is a serious issue about the legal validity of a suspension decision, an interlocutory injunction can be granted to enable the employee to resume duties.

The court emphasised the serious adverse impacts on an employee of a suspension from duties, even where the suspension is with remuneration. Adverse impacts include potential damage to reputation, inability to practise skills and loss of enjoyment of work, none of which can be adequately compensated by an award of damages.

The court was also highly critical of the delay in the misconduct investigation and the length of the suspension.

The decision demonstrates that, to prevent grant of an interlocutory injunction, it will not be enough for the employer to assert matters such as:

- that the suspension gave the employee the opportunity to focus on responding to allegations of misconduct
- the employer's concerns about potential conflict or tensions within the workplace
- the employer's concerns about public confidence in the integrity of the public service.

It will be generally be necessary for the employer to provide evidence of some real risk of prejudice to the effective functioning of the public sector organisation.

### **Serious issue as to validity of suspension**

Grounds on which the court considered that there was a serious issue as to the validity of the suspension included the following:

- It was not clear that there was any alleged misconduct of the kind that justified suspension. (Some initial allegations of misconduct had later been withdrawn. The surviving allegations related to performance and probably were not misconduct of the kind that could lawfully justify suspension. The court considered that the power of suspension here could be exercised only on the basis of misconduct within the common law concept of misconduct.)
- The second suspension decision, made shortly before the court hearing, which was the relevant operative suspension decision, had been made without giving the employee an opportunity to comment. There was a serious issue of breach of procedural fairness.
- The operative suspension decision had been made without regard to the prejudice to the employee caused by the suspension. There was a serious issue as to whether the employer was in breach of an obligation to treat employees fairly and reasonably. This arose from a statutory requirement that agency heads establish procedures that 'will ensure' that employees are treated fairly and reasonably.

The decision demonstrates that, before suspending an employee, generally a public sector employer should ensure that:

- there are clearly established grounds for suspension that can lawfully justify the suspension
- the grounds are recorded in writing
- the affected employee is given an opportunity to comment on a proposed suspension
- the employer has considered any comments of the employee, including in relation to adverse impact on the employee.

When considering suspension from duties, consideration should also be given to whether the employee might be assigned to other duties. Suspension should generally be regarded as a last resort.

### **Right of an employee to perform work**

In support of the grant of the interlocutory injunction requiring the employer to permit the employee to return to duties, the court referred (at [101]) to 'the growing acceptance at common law of the right of an employee to perform work'.

This trend in the law emphasises that, potentially, directions that an employee be on leave—in particular, directions for so-called gardening leave—could be made invalid. Purported de facto suspension by way of gardening leave is not a viable alternative to suspension of an APS employee in accordance with the statutory powers of suspension.

### ***Procedural fairness for suspension in APS***

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In the APS context, to ensure that the administrative law requirement of procedural fairness is met, the affected employee must be given an opportunity to comment on the basis on which a decision maker has formed a preliminary view (subject to consideration of the employee's comments) that the employee may have breached the Code of Conduct. Also, it must be shown that the employee's suspension is in the public interest or the agency's

interest. This would generally require the decision maker to include a reasonably clear statement as to the conduct alleged to be a breach of the Code and a reference to at least one provision of the Code that may be breached by the alleged conduct.

Under reg 3.10(7) of the PS Regulations, a suspension decision maker does not have to have due regard to procedural fairness where the decision maker is satisfied on reasonable grounds that, in the particular circumstances, due regard to procedural fairness is not appropriate. If a suspension decision maker considers that it is appropriate not to accord procedural fairness, this should override any procedural fairness obligations that would otherwise apply. There must be a reasonable basis for deciding that procedural fairness is not appropriate. Such cases will be unusual.

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