



Express law fast track information for clients

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The downside of including misconduct procedures in a certified agreement

A poorly-run misconduct process has resulted in the Federal Court of Australia ordering an employer to pay an employee \$20,000 for breaching its certified agreement.

McAleer v The University of Western Australia

Federal Court of Australia [2007] FCA 52 (2 February 2007), Siopsis J

Professor McAleer was the subject of serious allegations involving breaches of the university's sexual harassment policy. The university's misconduct process was annexed to its certified agreement (CA) as part of a termination policy.

Professor McAleer complained that the university had failed to properly apply the termination policy – in particular, that he hadn't been given sufficient detail of the allegations made against him, as the policy required. Professor McAleer also complained that the Misconduct Investigation Committee established under the termination policy had not properly conducted its hearings. Professor McAleer asserted that the university had therefore breached the CA.

Professor McAleer sought, and was granted, an interim injunction to prevent this Committee from progressing its investigation. He sought the following substantial relief:

- a declaration on the proper interpretation of the termination policy
- a declaration that the university had breached the termination policy and therefore breached the CA
- a penalty order against the university, under s 178 (post *Work Choices*, now s 719) of the *Workplace Relations Act 1996*, for breach of the CA
- a permanent injunction restraining the Committee from progressing the misconduct investigation.

The university conceded that it had breached the CA by failing to give Professor McAleer proper details of the allegations against him, but denied the other alleged shortcomings.

Decision

The court considered the terms of the CA, which made it clear that any termination of employment by the university was 'exhaustively governed' by the CA, and that all disciplinary decisions or decisions to terminate employment for misconduct were to be carried out in accordance with the termination policy.

The court declared that the university had breached the CA by failing to provide adequate particulars of the allegations made against Professor McAleer. The court granted an injunction to prevent the Committee from taking the existing misconduct investigation any further.

On the question of penalty, the university argued (among other things) that the failure to properly apply the policy was inadvertent and without malice. Justice Siopsis considered that a more important consideration was deterrence (at paras 66 and 67):

It is a fundamental element of procedural fairness that a party should know the case which has been made against him or her, so that the person may have a fair opportunity to defend himself or herself. The failure by the University to provide the applicant with adequate particulars of the allegations was a serious breach. There are other facts which add to the gravity of the breach. The allegations made against the applicant were allegations of serious misconduct. The applicant holds a senior position in the academic staff at the University and has an international reputation in his field. The allegations are of such a nature they have the potential to damage the reputation of the applicant. The University did not after having initially failed to provide particulars in its letter of 6 January 2006, thereafter provide adequate particulars.

In imposing a penalty of \$20,000 on the university (payable to Professor McAleer), Justice Siopsis noted:

The University employs a large number of academic staff. Reputation is particularly cherished in the academic world. The importance of the need for the University to act in accordance with the agreed disciplinary procedure, so as to minimise the risk of unwarranted damage to the reputation of its academic staff, should, in my view, be reflected by the imposition of, and, in the quantum of, a penalty.

Implications for Australian Government agencies

This decision has valuable lessons for all Australian Government employers:

- Failure to properly apply your misconduct policy can result in misconduct action being overturned.
- If your misconduct policy is embedded in an industrial agreement (a certified agreement, collective agreement or Australian workplace agreement), then failure to comply with your policy can result in a finding that your agency has breached the Workplace Relations Act.
- A breach of the Workplace Relations Act could result in a monetary penalty being imposed on your agency.

Implications for Public Service Act agencies

For *Public Service Act 1999* agencies, misconduct should be dealt with in accordance with procedures established under s 15(3) of that Act. Because of the existence of this statutory arrangement for handling misconduct, there is simply no need to refer in industrial agreements to the way that suspected misconduct will be dealt with.

If you are in the course of preparing a draft collective agreement, or a template AWA, we recommend that you omit any reference to the approach that will be taken to suspected misconduct. If your agreement is silent on the subject, then an employee cannot seek a penalty on the ground that you have not complied with your agreement. Also, there will be no basis for the employee to access grievance or dispute avoidance mechanisms under your agreement in relation to the handling of misconduct matters.

This does not mean that employees will be deprived of a remedy in this situation. They will usually be entitled to bring internal grievance actions about failure to comply with agency

procedures, and will typically have access to the Federal Court if there has been a breach of the rules of natural justice, under the Administrative Decisions (Judicial Review) Act. In these circumstances there is little value for the employer in giving employees an additional remedy, under the Workplace Relations Act, for breach of process.

If your agreement does incorporate misconduct procedures or other procedures, you will need to ensure that they are adhered to, or risk an action for breach of your agreement.

Text of the decision is available at:

http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/52.html

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