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John Nemcic v Australian Electoral Commission [2018] FWC 5645

In *John Nemcic v Australian Electoral Commission [2018] FWC 5645* the Fair Work Commission (FWC) acted consistently with its established approach that procedural unfairness does not necessarily render a termination of employment to be unfair. Further, the FWC confirmed that an employee's lack of honesty in responding to alleged breaches of the Australian Public Service (APS) Code of Conduct in the investigation by the employer agency is a breach of the employee's duty of honesty and fidelity to the employer and can itself be a valid reason for termination of employment.

Factual background

Mr Nemcic was employed by the Australian Electoral Commission (AEC) from February 2007 until his dismissal on 13 December 2017. Mr Nemcic was dismissed for conduct in breach of the APS Code of Conduct following preliminary and full investigations conducted by an external investigator. The dismissal arose out of the alleged improper alteration and recording of tally sheet figures for an industrial election so as to make votes allocated to candidates reconcile with the total formal votes cast.

Issue for consideration by Fair Work Commission

The issue for determination was whether Mr Nemcic's dismissal was 'harsh, unjust or unreasonable' having regard to the considerations in section 387 of the *Fair Work Act 2009*.

Reasoning of the Fair Work Commission

The main reason the FWC found that the AEC had a valid reason for dismissing Mr Nemcic was because he improperly interfered with the count of votes in an industrial election: [241]. However, the AEC had further claimed that Mr Nemcic failed in his duty because he was not truthful to the investigators or to the decision-makers in the AEC about his conduct: [223]. The FWC stated that an employee's duty of honesty and fidelity to their employer included a duty to be truthful to investigators about their workplace conduct and events in the workplace. The FWC found that Mr Nemcic compounded his conduct by choosing not to, and had put his employer to the cost and expense of conducting an investigation, as well as allowing suspicion to be cast on other employees: [226]–[227]. It further reasoned that the failure to have been truthful was a serious breach which, in and of itself, was a valid reason for dismissal. However, this conclusion was a consequence of the FWC's primary finding that Mr Nemcic improperly interfered with the count, and would not have arisen if he had simply found and corrected a transposition error in the tally sheets: [248].

In assessing whether the termination of Mr Nemcic's employment was harsh, unjust or unreasonable, the FWC considered whether Mr Nemcic was given an opportunity to respond to any reason related to his conduct: s 387(c) of the *Fair Work Act 2009*. In this context, Mr Nemcic raised a series of procedural fairness issues. The FWC concluded that whilst there

were material failures in the procedure which had been followed, those failures of procedure when considered in the context of the investigation and decision-making processes of the AEC as a whole did not individually or cumulatively deny Mr Nemcic procedural fairness so as to render his dismissal unfair.

The FWC considered a number of allegations of procedural unfairness, including whether:

- the investigators were biased and lacked independence: [270]–[273]
- particular material which an investigator had regard to was prejudicial: [274]–[279]
- it was improper for the investigator who performed the full investigation to have access to the contents of the preliminary investigation report and partially duplicate it in the final investigation report: [282]–[287]
- the interview style used by the investigators resulted in Mr Nemcic being denied procedural fairness or the opportunity to raise issues, facts or opinions which he considered relevant: [288]–[295]
- the AEC gave independent thought and consideration to the investigation reports: [303]–[311]
- the breach decision-maker not giving Mr Nemcic an opportunity to put a response to him was a material failure: [255]–[262]
- Mr Nemcic not being provided with copies of the investigation reports was a material failure: [312]–[325]
- the sanction decision-maker gave weight to Mr Nemcic’s submissions on mitigation: [326]–[331]
- errors in the final investigation report resulted in the AEC taking into account erroneous and irrelevant material: [332]–[350]
- the sanction decision-maker placed undue weight on the reputational impact on the AEC in making his decision that the sanction of termination was appropriate: [351]–[358]
- the AEC acted unfairly in terminating Mr Nemcic’s employment in that it had the consequence of depriving the Merit Protection Commissioner of jurisdiction: [359]–[373].

Significance of decision

The decision is useful because it is an example of a termination of employment that was found to not be harsh, unjust or unreasonable having regard to the nature and seriousness of the misconduct, despite a number of material procedural defects in the investigation and decision-making processes in relation to both the breach and sanction. Further, the decision confirms that an employee’s lack of honesty in responding to alleged breaches of the Code of Conduct can itself be a valid reason for dismissal.

Text of the decision is available at:

<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc5645.htm>

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