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When breaching safety can cost you your job

Queensland Mining Industry Health & Safety Conference

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Overview

- Snapshot of mining safety
- Impact of legal obligations
- Safety v discipline - striking the right balance
- Case examples
- Lessons for the future



Planking...harmless fad or safety breach?



Santos workers planking on a chimney stack (60m high) in Whyalla

Source: Couriermail.com.au

Planking... Fad or safety issue?

- **Santos** - May 2011
 - 2 employees sacked / 2 others stood down for failing to intervene
 - *"behaviour was irresponsible and unsafe and could not be tolerated"* - Santos official
- **BHP Billiton/Conneq** - June 2011
 - 7 workers sacked or suspended - including those who watched/took photos/created a spoof planking safety poster
 - *"All Conneq employees are aware that they are required to comply with safe work practices and to immediately report unsafe behaviour"* - Conneq managing director David Marchant



Trends in 2009/2010

- Queensland mines and quarries safety performance and health report 2009-2010
- General improvement in safety and health performance:
 - lost time injuries down from 301 to 285 injuries
 - disabling injuries down from 417 to 413 injuries
 - medical treatments down from 924 to 403 injuries
 - days lost to lost time injuries down from 17,387 to 10,335 days

Trends in 2009/2010

- However:
 - high potential incidents up from 1,022 to 1,751 incidents
 - lost time injury frequency rate up from 3.4 to 3.5 injuries per million hours worked
 - number of permanent incapacities up from 39 to 47 injuries/illnesses

Safety and employees

The overlay of legal obligations

- Coal Mining Health and Safety Act 1999 (Qld)
- Mining and Quarrying Safety and Health Act 1999 (Qld)
- Workplace Health and Safety Act 1995 (Qld)
- Electrical Safety Act 2002 (Qld)
- Dangerous Goods Safety Management Act 2001 (Qld)
- Workers' Compensation and Rehabilitation Act 2003 (Qld)
- Fair Work Act 2009 (Cth)
- Work Health and Safety Act 2011 (Qld)
 - commencing 1 January 2012
 - harmonisation of mining safety laws released 15 July 2011 for comment
- Regulations
- Codes of Practice
- Policies
- Enterprise Bargaining Agreements
- Contracts of employment

Impact of mining safety legislation

- Applies to:
 - everyone who may affect the safety or health of persons while the persons are at a mine;
 - everyone who may affect the safety or health of persons as a result of operations; and
 - a person whose safety or health may be affected while at a mine or as a result of operations.
- For risk to a person from operations to be at an acceptable level, the operations must be carried out so that the level of risk from the operations is:
 - within acceptable limits; and
 - as low as reasonably achievable.

Safety is everyone's responsibility



A safe system of work

‘The employer’s obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system.’

High Court in McLean v Tedman
(1984) 155 CLR 306

Establish

Maintain

Enforce

Serious Misconduct

- Payment of notice not required where an employee's employment is terminated because of **serious misconduct**
- Under the Fair Work Regulations 2009:
 - ordinary meaning
 - Includes both:
 - wilful or deliberate behaviour that is inconsistent with continuation of the contract of employment
 - conduct that causes imminent and serious risk to the health and safety of a person or the reputation, profitability or viability of the employer's business

Serious Misconduct [cont]

- Can also include:
 - theft
 - fraud
 - assault
 - being intoxicated at work
 - refusing to carry out an employer's lawful and reasonable instruction that is consistent with the contract of employment,
- unless the employee can show that, in the circumstances, the conduct was not conduct that made employment unreasonable.

Case examples - One breach can be one too many

Parmalat Foods Pty Ltd v Mr Kasian Wililo [2011] FWAFB 1166

- Mr Wililo employed as a forklift operator
- Safety breach: placed his arms, head and shoulders underneath an unstable and elevated load while operating a forklift



Parmalat Foods Pty Ltd v Mr Kasian Wililo

[cont]

- Investigation: interviewed, opportunity to respond, benefit of union representation
- Employment terminated Unfair dismissal application
- Employee initially succeeded - reinstated
- Parmalat appealed - arguing it would be in the public interest for the arbitrator's decision to be overturned to confirm the right of the employer to dismiss an employee who is guilty of a significant safety breach

Parmalat Foods Pty Ltd v Mr Kasian Wililo

[cont]

- Appeal bench agreed
- Appeal bench stated:
 - ‘Establishing and enforcing safety rules are an important obligation, a breach of which can lead to serious consequences.’
 - ‘Clearly disciplinary action is necessary and appropriate because a failure to do so sends a message to the workforce that safety breaches can occur with impunity.’

Parmalat Foods Pty Ltd v Mr Kasian Wililo

[cont]

- Appeal bench considered:
 - procedural fairness afforded to Mr Wililo during the investigation
 - Mr Wililo's awareness of safe work practices
 - absence of any mitigating circumstances that would justify a lesser penalty

Failing to enforce safety practices

Peter Graham Butson v BHP Billiton Iron Ore Pty Ltd
[2010] FWA 640

- BHPB team leader and his supervisor sacked when HR managers became aware that Port Hedland locomotive service shop employees were stepping over a 40-60cm gap - leading to a 3 -4 metre drop
- Employer prohibited the practice
- Team leader argued that stepping over the gap was "relatively common" and "spreading over other shifts" and he was dealt with differentially or unfairly

Peter Graham Butson v BHP Billiton Iron Ore Pty Ltd [cont]

- Held: claim of unfair dismissal **rejected**
- BHPB "quite reasonably" expected and required the team leader to actively enforce safety rules and promote safe practices
- However - team leader *"appeared to regard his responsibilities in a much more limited way and did not appear to be able to comprehend that **the employer had a right to expect that he would actively pursue the elimination of unsafe practice regardless of how he became aware of those practices and regardless of where unsafe practices were regular or isolated incidents or whether they also occurred on other shifts**"*.

Peter Graham Butson v BHP Billiton Iron Ore Pty Ltd [cont]

- *The practice of stepping across the gap may have been, and...were occurring regularly but the reason for the termination was the indifference of the [employee] to the practice and the lack of any recognition by him of any responsibilities he had with regard to it.*

Where can it go wrong?

- Enforcing safety v responding to unfair dismissal claims
- Protecting employers against negative comments in court/media
- Protection of company and individual reputations
- Sending clear messages to employees

What is unfair dismissal?

- A dismissal that is either harsh, unjust or unreasonable



FWA/Court considerations

- Was there a valid reason for the dismissal?
 - including the effect of the employee's conduct on the safety and welfare of other employees
- Notification of that reason?
- Opportunity to respond?
- Unreasonable refusal by the employer to allow the person to have a support person present?
- Prior warnings of unsatisfactory performance?
- Employer's size, procedures and absence of HR in the enterprise?
- Any other relevant matters?

Case examples

- Francis v Kalgoorlie Consolidated Gold Mines Pty Ltd
T/A KCGM [2010] FWA 5472
 - Underground supervisor was directing and assisting employees to move an electric cable to a lower level within the mine.
 - Rope being used to lower the cable broke causing one end of the cable to fall down a vertical shaft.
 - The cable uncoiled rapidly and struck one employee, injuring his knee.

Francis v Kalgoorlie Consolidated Gold Mines Pty Ltd T/A KCGM [cont]

- Employer conducted an investigation and found the supervisor had:
 - failed to conduct a job hazard analysis
 - discounted another employee's concerns
 - failed to report the incident
- Following the investigation - supervisor dismissed with pay in lieu of notice
- Supervisor admitted his judgement was poor but that his dismissal was unfair

Francis v Kalgoorlie Consolidated Gold Mines Pty Ltd T/A KCGM [cont]

- Supervisor argued that:
 - JHAs were ‘filtering in to use’ at the mine
 - Had not ignored a colleague’s safety concerns - tested the rope in front of the worker who gave evidence that he was ‘satisfied it was safe’
 - Did not fail to report the incident - superintendant not in the office so left a message with a graduate engineer

Francis v Kalgoorlie Consolidated Gold Mines Pty Ltd T/A KCGM [cont]

- FWA found that:
 - although employer intended that JHAs were mandatory - failed to communicate this change in policy to its workforce beyond a general statement in a meeting;
 - supervisor had not ignored the colleague's concerns;
 - reporting was not sufficient but did not amount to concealing the incident; and
 - investigation flawed - did not take into account length of service and prior good record.
- Therefore - dismissal harsh → awarded 3 months' pay

Coal & Allied Mining Services Pty Ltd t/a Mt Thorley Operations/Warkworth v Lindsay Douglas Lawrence [2011] FWA 352

- Worker removed two isolation locks installed by contractors for repair work they were carrying out on a water pipe - in breach of one of the employer's "Golden Rules".
- Action gave rise to a risk that a person working on the pump line would be injured by an unexpected flow of high pressure water (180L per second).
- Worker's employment was terminated.

Coal & Allied Mining Services Pty Ltd t/a Mt Thorley Operations/Warkworth v Lindsay Douglas Lawrence [cont]

- Worker applied for an unfair dismissal remedy
- Fair Work Australia initially rejected his application, finding that the employer had a valid reason for the termination
- Appealed - majority of Full Bench of Fair Work Australia found that unqualified dismissal in the circumstances was manifestly harsh and ordered:
 - reinstatement; and
 - worker's lost pay to be restored (minus 3 months' salary to "reflect a material sanction" for his misconduct).

Factors considered by the Full Bench

- worker had been employed for 28 years with the vast majority of his years of service being with the respondent;
- the worker was an exemplary employee with an exceptional work ethic;
- the worker has not been subject to any disciplinary allegation or action in his 28 years of service;
- throughout his 28 years of service, the worker had never been guilty of any safety breach;

Factors considered by the Full Bench

- the safety breach was "entirely out of character";
- the worker admitted the breach as soon as he became aware that the matter was being investigated and was remorseful;
- prospect of reoffending - "so vanishingly small as to be non-existent"; and
- the policy he breached contemplated that breaches will not necessarily lead to disciplinary action or dismissal.

Coal & Allied Mining Services Pty Ltd v Lawler [2011] FCAFC 54

- Employer appealed
- Full bench of the Federal Court upheld the worker's reinstatement - found no jurisdictional error by FWA full bench

What can we learn from these cases?

- These cases do NOT suggest that:
 - safety is not important; or
 - breaches of safety policies and procedures are not valid reasons for terminating employment
- However - dismissal can be for a “valid reason” but it may still be harsh, unjust or unreasonable

It is the age old question...

- Does the punishment fit the crime

A few lessons

- Employees must be trained and aware of safety issues and safe practices
- Be proactive in stamping out unsafe work practices - don't let them become a part of entrenched workplace culture

Procedural fairness

- A proper process required:
 - disciplinary policies and procedures are transparent and followed to ensure unsafe practices
 - incidents are properly investigated
 - employees are provided with an opportunity to respond
 - termination decisions are transparent, sound and consistent

Consideration of the safety message...

- A positive safety message will be lost where:
 - More time and money is spent on termination and defending procedures than on safety resources
 - Policies are inconsistently applied
 - The punishment does not fit the crime – lose respect
 - The rules are not clearly communicated – messages get lost
 - A hidden agenda is suspected

Conclusion

- Safety → establish, maintain, enforce
- We all have a part to play
- Employees play a key role
- Balancing safety/discipline obligations is a challenge - strive for a correct balance



Final thought...

Breaching safety can cost you your job.....
but it is better than costing a life!



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