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## Employment Law e-alert

### Safety breach dismissal approved by FWA

The Full Bench of Fair Work Australia has upheld an employer's right to dismiss an employee for safety breaches of significance in the recent decision handed down on 2 March 2011 (*Parmalat Food Products Pty Ltd v. Mr Kasian Wililo*).

#### Facts

The employee had been engaged as a licensed forklift operator by Parmalat for two years. Following an investigation, the employee was found to have engaged in an unsafe act by raising the tines of his forklift whilst they were not properly engaged with a load and then placing his hand and part of his arm under the elevated load.

Prior to the commencement of his employment, the applicant had signed an acknowledgment in the Safety Booklet supplied to him that working in a safe manner and adhering to safety policies and practices was a condition of his employment.

Parmalat decided that this behaviour was grossly negligent and dangerous, as the employee could have been severely injured or killed. The employee's responses to questioning about what had happened were also inconsistent with evidence presented by witnesses. He was dismissed summarily for serious misconduct.

#### Initial FWA decision

Commissioner Cargill found that the employee's actions amounted to serious misconduct and that the statutory requirements for procedural fairness had been complied with.

Despite this, the Commissioner determined that, on balance, dismissal was harsh and ordered reinstatement.

The reasons for this finding included:

- the employee's length of service and disciplinary history;
- the company's failure to show CCTV footage of the incident to the employee during the investigation process;
- although the employee's actions amounted to serious misconduct, they were not wilful or negligent but rather the result of carelessness; and
- the company does not have anything akin to a zero tolerance health and safety policy.

#### Appeal decision

The Full Bench of Fair Work Australia overturned Commissioner Cargill's decision.

It found that the employee's conduct did involve deliberate acts and that the characterising of his actions as carelessness does not derogate from the seriousness of his actions or the possible consequences.

The Full Bench commented,

*"The finding of a valid reason is a very important consideration in establishing the fairness of a termination. Having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open."*

It found that there were no significant mitigating factors in this case.

## Lessons for employers

The decision recognises the rights of employers to dismiss for safety breaches. These rights were considered by FWA in the context of the important statutory obligations on employers to maintain a safe place of work. Given these obligations, employers can take a hard line on deliberate and serious safety breaches.

The decision also reinforces the importance of employers having appropriate health and safety policies and procedures in place and evidence that the employee is aware of them, ideally via an appropriate signed acknowledgment at the commencement of employment.

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