In late September, the Fair Work Commission delivered judgment in a seemingly remarkable unfair dismissal case. The employer had sought to rely on pornography found on his employee's computer and mobile phone, discovered after termination, to justify the dismissal. While Commissioner Cambridge accepted that such actions constituted misconduct, he nevertheless concluded that a panoply of errors in the termination process meant that they did not constitute a valid reason for dismissal. The termination was therefore harsh, unjust and unreasonable, and an award of compensation was ordered — an eye-catching result given the applicant admitted using employer provided technology to download pornography.

Croft

Mr Allam Croft was an insurance manager at a small insurance brokerage firm. His employment was beset with difficulties from an early stage due to his ‘fractious’ relationship with the Directors of the employer. The employer alleged that Mr Croft was dismissed several verbal warnings about underperformance and misconduct during his employment, but these were never particularised in written form. In January 2016, the employer dismissed Mr Croft. Rather than terminating on the basis of underperformance or misconduct, they sought to rely upon a contractual clause which purportedly permitted termination without cause on four weeks’ notice. Mr Croft subsequently filed unfair dismissal proceedings. In his decision, Commissioner Cambridge firstly dealt with the alleged ‘right to dismiss at will’. He held that a dismissal made without reason but solely reliant on a purported contractual right would plainly subvert the statutory unfair dismissal laws, and also offend the broader common law position. Commissioner Cambridge then considered whether Mr Croft’s accessing, downloading and storing of hardcore pornographic material on employer provided technology — the alleged misconduct discovered only after he had been dismissed — constituted a valid reason for the termination of his employment. On balance he decided — for reasons outlined below — that it did not. Accordingly, Mr Croft’s dismissal was found to be harsh, unjust and unreasonable, and $10,000 in compensation was awarded.

Reliance on information arising post-dismissal

As Commissioner Cambridge found that the reason originally stated for Mr Croft’s termination was ‘manifestly invalid’, he was then required ‘go behind’ the reasons provided and consider whether any conduct of the applicant, including that subsequently discovered, represented a valid reason for dismissal. This approach, and the respondent’s attempted ex post facto reliance on the pornography justification, represents the continuation of a long-accepted common law principle:

‘The dismissal of an employee may be justified upon grounds on which the employer did not act and of which the employer was unaware when the employer was discharged.’

In Australian law, this concept is known as the Shepherd principle and has general application in contractual disputes — it is not restricted to employment law. A British judgment to this effect was quoted approvingly in 1933 by the High Court, and has subsequently become accepted jurisprudence:

‘It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.’

The Shepherd principle has implicitly been incorporated into the Fair Work Act’s unfair dismissal scheme, such that the ‘Commission is bound to determine whether, on the evidence provided, facts existed at the time of termination that justified dismissal’ — regardless of when those facts came to light. From a policy perspective, this approach seems sound: it would be absurd for an employer who seriously misconducted themselves to win compensation or reinstatement simply because their misconduct was only discovered post-termination. However, there are several limitations on the Shepherd principle in the employment context. Firstly, in unfair dismissal disputes, an employer relying on reasons arising posttermination will ‘have to contend with the consequences of not giving the employee an opportunity to respond’ to such reasons. Given the Fair Work Act requires the Commission to consider whether the applicant was notified of the reason for dismissal and provided an opportunity to respond in assessing whether the dismissal was harsh, unjust or unreasonable, this poses a considerable albeit not insurmountable obstacle to relying on a valid reason arising post-termination. Thus in Croft a relevant factor for Commissioner Cambridge was the applicant’s inability to provide a response to the ‘underlying but unstated basis’ for the dismissal.

Moreover, the existence of contractual rights and procedures mechanisms may limit an employer’s ability to rely on a reason ‘not properly dealt with under that procedure’. In Lakshmi v Mid Cheshire Hospitals NHS Trust, for example, the High Court of England and Wales held that ‘an employer is only able to rely upon antecedent misconduct of which it was not aware at the time of dismissal as a reason to justify the original dismissal where there is no disciplinary process in existence’. In all other cases, dismissal could only take place ‘consequent to its disciplinary process.’ Practically, the most relevant in disputes where the Fair Work Act’s unfair dismissal protections are not applicable and another limitation on the employer’s actions must therefore be located.

Finally, the recent case of Melbourne Studium Ltd v Sautner provides one additional — if somewhat self-evident — limitation. There, the employer had initially notified the employee that his position was to be made redundant. The employer subsequently discovered misconduct on the employee’s part, and sought to dismiss him on that basis instead. While on factual grounds the Full Court of the Federal Court held that the redundancy had not yet taken
effect and therefore the subsequent summary dismissal was effective, it rejected the proposition that Shepherd had applied in any event. ‘We do not consider that Shepherd supports [the appellant’s] contention that a lawfully terminated agreement, in effect, may be resuscitated and then re-terminated upon some ground not known at the time of the termination,’ observed Tracey, Gilmore, Jagot and Beach JJ. ‘A contract cannot be terminated twice.’

**Procedural fairness**

As highlighted above, the Fair Work Act introduces into the unfair dismissal matrix a consideration of several pillars of procedural fairness. These include whether the employee was notified of the reason for dismissal, whether they were given an opportunity to respond, whether they had received prior warning and — to permit inquiry into a broad range of issues — ‘any other matters that the [Fair Work Commission] considers relevant.’ While the specifics of procedural fairness in the administrative law sense are not strictly relevant in the employment context, they provide valuable guidance towards achieving the overall standard of fairness required by the Fair Work Act.

From the seminal High Court case of Kou v Westward,14 it has been accepted that procedural fairness generally requires adverse allegations to be put to the affected party, that they be given an opportunity to respond and that the decision-maker brings an open-mind to the decision. In the employment setting, this means that — absent compelling countervailing reasons or obvious serious misconduct — an employee must be told of the allegations of misconduct or underperformance made against them, he permitted a reasonable period to respond (whether in person or in writing) and to have the benefit of an unbiased decision-maker.

Thus in Croft, Commissioner Cambridge held: ‘in the absence of clear, documented warnings about issues [relating to underperformance] … these matters could not represent valid reason for dismissal.’15 As allegations of underperformance had not been put to Mr Croft, and he had not been advised that ‘they were matters that potentially endangered his employment’, it would have been manifestly unfair for these issues to ground a ‘sound and defensible basis for dismissal’.16

Whilst the exact requirements of fairness will be context-dependent, and it should again be stressed that the common law of procedural fairness is not directly applicable in most employment settings, adherence to these basic principles should safeguard employers from unfair dismissal-related litigation. Callinan J once mused: ‘That no man is to be judged unheard was a precept known to the Greeks.’17 Several millennia later, it remains no less important.

**Policies**

One of the simplest ways to ensure a modicum of procedural fairness is the implementation of and adherence to a set of workplace policies. These typically provide clear guidance to employees as to expected standards of behaviour, and set out processes and procedures for dealing with alleged failures to comply. In Croft, Commissioner Cambridge took notice of the fact that ‘there was no evidence that the employer had promulgated any particular policy regarding the use of its equipment being confined to work-related activities.’18 He did accept that ‘[i]t here are obvious differences between using an employer provided laptop computer to conduct, for example, personal internet banking, as opposed to accessing and downloading pornography.’ 19

Nonetheless, the lack of an explicit policy going either to the downloading of pornography at work or more generally to the use of employer provided technology factored in the Commissioner’s ultimate decision that Mr Croft’s misconduct was not a valid reason for his dismissal.

Accordingly, having comprehensive and easily accessible policies covering a range of workplace issues — from bullying and harassment to work health and safety, from workplace surveillance to use of employer provided technology — is a necessary requirement for all employers. That said, care must be taken in the drafting of such policies.

In some cases, workplace policies will take on contractual force — whether by express reference or incorporation — and therefore bind both parties. Whether or not policies should form part of the employment contract is a question of preference for individual employers, and both approaches have their respective advantages and disadvantages. Yet regardless of which is preferred, employers should be explicit: either specify in the contract that workplace policies form part of the contract of employment, or disclaim in the policy any intent for it to be incorporated.20 Where a nebulous middle ground is pursued, policies will usually be construed against the employer. As Wilcox J noted in Nikolich v Goldman Sachs Sachs JBWere Services Pty Ltd, where the employer had sought to reside from a policy, ‘if the document does not bind [the employer] at all, those of its provisions that constitute promises by [the employer], or which purport to confer entitlements, are misleading, a cruel hoax.’21 Courts do not take kindly to such deception.

**Consistency**

Finally, Croft highlights the need for robust and consistent decision-making in the employment context — an extension of the need for fairness highlighted above. In Commissioner Cambridge’s judgment, he identified as a relevant factor in his finding of no valid reason that ‘there was some contested evidence as to whether some of the Directors of the employer may have also participated in accessing, downloading and [disseminating] pornographic material in the workplace.’22 While the Commissioner failed to elaborate on this point, it is in keeping with a broader trend of demanding that employers adopt a consistent approach to workplace misconduct: not only must they treat like cases alike, but employers have to walk the walk if they are going to talk the talk.

While the latter proposition may be obvious — an employer can hardly fairly dismiss an employee for misconduct if the employer has misconducted themselves in exactly the same manner — the former is more complex. Madgwick J once mused that ‘[f]ew things have such a tendency to give rise to a sense of grievance by employees as perceived differential treatment of themselves or their fellow employees without strong justification,’23 and it is now accepted that inconsistent treatment of employees in the disciplinary process can be a relevant matter in
determining whether a dismissal was harsh, unjust or unreasonable. As much was authoritatively confirmed by the Full Court of the Federal Court in 2013, when Dowsett, Flick & Griffiths JJ rejected a judicial review application of a Fair Work Commission decision which had partially relied upon differential treatment. ‘No relevant comparable action was taken against those employees [in a similar position]’, the bench observed. ‘That was a consideration relevant to the decisions to be made by both the Commissioner and the Full Bench.’

While the Commission has shown caution in accepting differential treatment arguments on factual grounds — “the Commission must ensure that it is comparing ‘apples with apples’” — this has not prevented the issue being determinative at times. In Fagan v Department of Human Services, for example, that a colleague of the applicant had escaped disciplinary action for almost identical misconduct was an essential consideration relevant to the applicable regulatory landscape, termination can open a Pandora’s box of potentially litigious grievances.

In extreme cases such as Croft, an employer’s mishandling of a dismissal can even outweigh what might be considered to be obvious employee misconduct when the case comes before the Fair Work Commission. Yet while the termination process is always likely to be emotionally charged, it does not have to be such a minefield. Respecting basic principles of procedural fairness, utilising a robust system of policies and acting consistently when taking disciplinary action can safeguard employers from much post-dismissal litigation. Beyond the eye-catching outcome in Croft, these principles form the judgment’s take-home message. ‘The employer completely failed to deal with the dismissal of the applicant in any fundamentally fair manner,’ Commissioner Cambridge concluded. ‘That, not pornography, proved the ultimate vice.’

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Endnotes
1. [2016] FWC 6859 (28 September 2016) [1].
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4. Ibid [41].
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Conclusion
Terminating an employee’s employment is rarely a pleasant process. Whether due to misconduct, a genuine redundancy or other reasons, ending the employment relationship can be difficult for all involved. When handled insensitively or without due regard to the principles of procedural fairness, such a minefield. Respecting basic principles of procedural fairness, utilising a robust system of policies and acting consistently when taking disciplinary action can safeguard employers from much post-dismissal litigation. Beyond the eye-catching outcome in Croft, these principles form the judgment’s take-home message. ‘The employer completely failed to deal with the dismissal of the applicant in any fundamentally fair manner,’ Commissioner Cambridge concluded. ‘That, not pornography, proved the ultimate vice.’

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