



Menu



Labour hirer rapped over sacking at client's request

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In a case alerting labour hire companies to the dangers of carrying out dismissals at a client's behest, the FWC has opened the way for a casual labour hire mine worker to seek reinstatement after [WorkPac](#) took a directive to remove her as "a fait accompli".

In finding that [WorkPac](#) Pty Ltd unfairly dismissed a casual labour hire worker after four years' tenure at the BHP Billiton Mitsubishi Alliance (BMA)-operated Goonyella Riverside Mine, Deputy President Ingrid Asbury has this week warned that complying with a client's directions is no defence.

The worker sought reinstatement after [Workpac](#) told the mine worker in November last year that BMA had "demobilised" her from the site, effective immediately.

Although she was not informed of a reason, Deputy President Asbury found it "more probable than not" that it related to her conduct earlier that month in which she refused to comply with an instruction during her night shift to dump a load in an area that she said was too dark.

Finding this not to be a valid reason, the deputy president has criticised [WorkPac](#) for failing to follow its own procedure in carrying out the dismissal, noting that it would otherwise have been difficult to challenge.

"[WorkPac](#) responded to the direction to remove [the worker] from the Goonyella Riverside Mine site by taking immediate action to terminate her employment," she said.

The "BMA directive was accepted by [WorkPac](#) managers as a fait accompli", the deputy president said, adding that there was "no discussion" with her about alternative roles or her views about the possible reasons.

"Had such a discussion occurred, [the worker] may have informed [WorkPac's](#) management of the issues on the night shift on 9 November 2017 so that some attempt could have been made to ascertain whether this was a reason for BMA's directive to remove [her] from the mine site."

This "failure on the part of [WorkPac's](#) managers to seek further information from BMA about the reason" was contrary to its own usual procedure," the deputy president found.

FWC gives worker chance to consider reinstatement

Deputy President Asbury said the procedural failure was also significant given that the contract between [WorkPac](#) and BMA has a specific provision regarding the removal of employees where BMA is dissatisfied with their performance, which gives [WorkPac](#) some rights to debate.

It might also have been better handled if she could have been sent to another site temporarily while the issue was explored, Deputy President Asbury said.

The deputy president expressed "reservations about the appropriateness of reinstatement as a remedy", as she was concerned about a "strong possibility that such an order will be detrimental to [the worker] in the event that WorkPac cannot persuade BMA to reinstate [her] access to the Goonyella Riverside Mine Site".

"If BMA refuses to allow [the worker] to return to the site, subject to WorkPac making reasonable attempts to persuade BMA to the contrary, [she] may well be in the position of the applicant in Pettifer (see Related Article), whereby the refusal of BMA to allow her to access the Goonyella Riverside Mine site results in a dismissal on the ground of incapacity to perform the role or where [she] has no option but to accept an alternative role."

But she concluded that there was "no apparent reason why" the worker could not be reinstated to her previous position, with continuity of service, and gave her a week to consider whether she wanted to press it.

Labour hire companies have "little control"

Meanwhile, Deputy President Asbury said the "contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal".

"Labour hire companies cannot use such contractual relationships to abrogate their responsibilities to treat employees fairly," she continued.

However, Deputy President Asbury also concurred with a full bench observation in Pettifer that labour hire arrangements in which a host employer has the right to exclude a labour hire employee from its workplace are becoming a common part of the employment landscape in Australia.

"The reality for labour hire companies is that they frequently have little if any control over the workplaces at which their employees are placed," she said.

"Notwithstanding that I have found that the cessation of [the worker's] assignment at the Goonyella Riverside Mine constituted a dismissal, and that her assignment at the mine was for a lengthy period during which she worked a regular roster, it remains the case that [she] was a casual employee working in the labour hire industry.

"The basis of [the worker's] employment with WorkPac was that it was constituted by a series of engagements.

"While [the worker] may have a remedy if she is unfairly dismissed, she could also have been dismissed at any time without notice, if for example, BMA chose to restructure or reorganise the manner in which work is performed at the mine and demobilise all or part of its contract workforce as a result."

The deputy president also noted under the contract between WorkPac and BMA, BMA has the right to seek the removal of a WorkPac employee from its site on the grounds of dissatisfaction with performance or for other reasons.

However, she said that if BMA "exercises that right in a manner that is unlawful or unfair, then a remedy may lie against BMA under other provisions of the Act".

Circumstances "common" in industry: Union

Hall Payne principal Joseph Kennedy, who acted in the case for the worker and the CFMMEU, today told *Workplace Express* that casual labour hire employees face "fundamental difficulties related to job security, given they can often be excluded from a site at the behest of the host employer".

"This is so because the host employer does not have to comply with unfair dismissal requirements and is generally not answerable to the Commission in an unfair dismissal proceeding," he said.

"In the decision, the Commission found on the evidence that the exclusion from site did amount to a dismissal, despite the labour hire employers arguments to the contrary."

Of the direction to exclude the mine worker without reason, Kennedy said Hall Payne argued that this "direction alone should not mean that reinstatement was inappropriate".

"There have been some positive developments recently for labour hire employees arising out of the [Skene](#) Federal Court litigation," Kennedy said (see [Related Article](#)).

"We think this case has some broader application that might build on those developments, particularly regarding the availability of reinstatement."

CFMEU Queensland mining and energy division Brisbane district vice president Mitch Hughes said the circumstances involved in the worker's dismissal were "really common" in the mining industry.

"We've been battling it for years," he said.

When long term casual labour hire employees are "alongside permanent employees doing the same work", he said, they "should also be getting the same terms and conditions".

[Ms Kim Star v WorkPac Pty Ltd T/A WorkPac Group \[2018\] FWC 4991 \(28 August 2018\)](#)

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