WARING EMPLOYMENT ADVISORS
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# THE POST

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WELCOME TO "THE POST". YOUR E-NEWSLETTER DESIGNED TO KEEP YOU UP TO DATE WITH WHAT'S HAPPENING IN EMPLOYMENT LAW & INDUSTRIAL RELATIONS.

## WHAT'S MAKING NEWS?

**TERMINATION PERIOD FOR INDIVIDUAL FLEXIBILITY AGREEMENTS TO BE EXTENDED**

The Fair Work Commission has this week adopted the Fair Work Act Review Panel's recommendation to extend the notice period for terminating Individual Flexibility Agreements (IFA's), but has refused to expand their subject matter, in the latest modern award review ruling.

Justice Iain Ross, Senior Deputy President Ian Watson and Commissioner David Gregory said it was appropriate to give effect to the review panel's proposal to extend the notice period from 28 days to 90 days, but decided to express the period as 13 weeks as it was "simpler and easier to understand and administer".

The full bench was dealing with 15 applications to vary the standard award flexibility provision in 10 modern awards.

Cinema operators Greater Union and Birch, Carroll & Coyle asked for a 16 week notice period, with general support from other employer organisations and opposition from the ACTU and unions.

**FWC UPHOLDS SACKING FOR REFUSING URINE TEST**

A national logistics company validly dismissed an employee for refusing to provide a urine sample for a random drug and alcohol test, despite his offer to instead produce a saliva sample, the Fair Work Commission has found.

The Company dismissed the stores officer last year after he refused to submit to a random urine test, which it required under its Alcohol and Drug Misuse Policy, conducted by independent qualified testing agency.

The employee had a history of questioning why the Company ascribed to certain cut-off levels under its urine testing policy under Australian Standard 4308, which he maintained created a false impression that they reliably measured impairment or fitness for work.

He instead offered a saliva swab after the pathologist failed to answer the employee's questions about the cut-off levels under the policy that he considered to be contradictory and confusing.

The company dismissed the employee for failing to comply with the direction to provide a urine sample, following a series of meetings with management, during which he consistently maintained the test was unlawful.

The company argued it had a valid reason to dismiss the officer on the basis that he failed to obey a lawful and reasonable management direction on two occasions in breach of its policy, adding that he was given an opportunity to respond.

Commissioner Williams rejected the employee's argument that the D&A policy that favoured urine testing was unreasonable and that his refusal to comply was therefore justified based on his "opinion of 'best practice'".

"In my view a testing policy is not unreasonable simply because an employer could have adopted an alternative approach to testing which an employee would have preferred, and which in some circumstances may have had different consequences or outcomes for tested employees," Commissioner Williams said.

**DISCIPLINARY ACTION IS NOT ADVERSE ACTION**

The Federal Court has found that a warning letter to a coal mineworker who took unauthorised leave to attend a union meeting was not adverse action, saying the Fair Work Act was not intended to restrict employers' authority to take disciplinary action.

The Company had refused a technician unpaid leave to attend a union board of management meeting in August last year, with his supervisor citing the applicable leave policy.

The technician responded that he intended to go to the August meeting anyway, which he did.

Justice Katzmann held that, "In truth, what the union sought was preferential treatment".

She said the Union's "real complaint was not that [the Company] took into account [the employee's] union status and commitments, but that it failed to take them into account".

Justice Katzmann continued that if the Union's argument was correct, then "no employer who took adverse action against an employee knowing the employee to be a member or officer of a union, or knowing that the employee was engaging or intending to engage in industrial activity, could ever discharge its onus of proof".

"On the union's argument, an employer who dismissed an employee for admittedly sexually assaulting a fellow employee or for stealing from the company would contravene the Act and face the prospect of civil penalties merely because it knew that the employee was a union member or officer, or was engaged in an industrial activity.

She said the Union's argument was not materially different from that the High Court rejected in Barclay.

If you require further information on employee issues or termination matters affecting your business, please give one of the team at **Waring Legal** and **Waring Employment Advisors** a call on the numbers below.

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A PICTURE FROM OUR MANAGING DIRECTORS RECENT WEDDING