

the fact that Wesoky was employed for a specific and substantial project and a unique post was created for him to enable the project to reach fruition, Justice Merkel concluded that the nature of Wesoky's employment was such that maintenance of his skills required continuing work in the 'cinema exhibition market'.

Justice Merkel further indicated that where a significant part of the promised remuneration depended on the employer providing the opportunity to earn it, this would imply an obligation to allow the other contracting party an opportunity of doing so.

His honour ultimately concluded that by instructing ICFC that Wesoky was no longer to participate in Village Cinema's European activities, Village Cinema breached its obligations to Wesoky and repudiated the agreement.

Implications for employers

The decision of Justice Merkel makes it clear that where remuneration of an employee depends on that employee's performance, a court will be ready to infer that an implicit obligation

of an employer under the employment contract is to provide work.

While situations where an employee's performance is linked to their remuneration may be obvious, such as in the case of a sales person working on the basis of a commission, the position may be less clear in relation to employees with potential entitlements under share schemes.

Editor's note

A garden leave (paid suspension) clause should make it clear that the employer:

- is not obliged to provide any work;
- may suspend the employee from his or her duties; and
- may direct the employee not to attend the work place and report for work.

In addition, such a provision should specify that during any period of paid suspension, the employee:

Although an appeal by Village Cinemas is currently being heard by the Federal Court, in the meantime where any doubt arises as to the whether an employee's remuneration may potentially be linked to performance, the employment contract should include an express provision that permits the employer to send the employee home for garden leave.

- must observe all obligations imposed under the relevant employment contract and common law (eg, duties of good faith and fidelity and confidentiality) (subject to future directions of the employer); and
- should not seek or perform work from any other source (including a competitor) without the employer's prior consent.

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industrial relations

When is summary dismissal justified?

By Leigh Johns, Mallesons Stephen Jaques

The Victorian Supreme Court ("the Court") recently awarded \$157,000 to a dismissed senior executive because his poor performance did not justify summary dismissal. The decision of *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 (21 May 2001) considers the circumstances justifying summary dismissal of employees.

Major cost overruns

Geoffrey Rankin ("the Employee"), the former general manager of a Victorian-headquartered division of Mercury Marine ("the Company"), was managing a major construction project in China on behalf of the Company.

The project suffered from substantial cost overruns that were not adequately brought to the attention of the Company's senior management. The Employee had been employed by the company for 18 years.

Dismissal

When the Company discovered that costs on the US\$10.3m project would blow out by US\$2.7m, it gave the Employee three months' notice that his contract would be terminated, and that he would be paid for a further three months after the termination. However, the Company later dismissed the Employee without notice for disobeying an instruction that he wasn't to bring his wife to

the opening of the facility.

The Company argued that the Employee had failed to comply with clear instructions in the Company's manual on expenditure approval for the project and that he had failed to inform senior management that the cost of the project would exceed the last approved figure. This conduct was said to amount to a breach of the employment contract of such a nature as to justify the summary dismissal of the Employee. The Employee claimed damages for wrongful dismissal.

Instant dismissal or dismissal with notice

The Court decided that the Company

was entitled to bring the Employee's contract to an end if it provided proper notice. However, if the Company wanted to end the contract without proper notice it had to establish reasons that would justify instant or summary dismissal.

Notice inadequate

Justice Gillard said that it was an implied term of the contract that either party could terminate the contract by giving reasonable notice to the other party. The 3½ months' notice given to the Employee was inadequate. It would have been reasonable to give him 12 months' notice.

Implied terms of the contract

The contract of employment contained implied terms that the Employee would comply with the lawful and reasonable directions of his superiors, exhibit loyalty and good faith in carrying out his duties, and exercise due skill and care in the performance of his duties.

The Employee breached his contract of employment

The Court said that the Employee breached his contract of employment by failing to carefully and diligently perform his duties with the cost of the project and in his non-compliance with the Company's rules for seeking approval of extra funding. He also negligently performed his duties relating to the project. These breaches arose because he failed to closely monitor the expenditure, failed to do an analysis of the total costs and failed to alert his superiors to the likely overrun.

When can an employer summarily dismiss an employee?

A breach of an employment contract may sometimes entitle an employer to terminate the agreement without notice. The acts of the employee which constitute the breach may amount to misconduct, disobedience, incompetence or negligence. There is no rule of law that defines

the degree of misconduct that would justify dismissal without notice – it is a question of fact in each case.

The Court said that before an employer may terminate the contract summarily, the employee's conduct must amount to a breach of a serious nature, involving either:

- a repudiation by the employee of the essential obligations under the contract showing an intention not to perform the contractual obligations in the future; or
- actual conduct which is repugnant to the relationship of employer-employee.

Isolated conduct by an employee usually would not suffice to justify summary dismissal; however there may be an example of a one-off serious act of misconduct that would justify dismissal.

The Court stated that an employee may be dismissed summarily if he wilfully disobeys any lawful order of his employer, if he is incompetent in carrying out his duties, or for negligently performing those duties. It was stated that such acts would normally have to constitute a very grave case of negligence, causing substantial damage, to justify dismissal for a single act of negligence. As a general proposition, the neglect would have to be habitual.

Was the company justified in summarily dismissing the Employee?

Having established that the Employee breached his contract of employment, was the breach sufficiently serious in nature to justify summary dismissal?

The burden is on the employer to justify its summary dismissal of an employee. Here, the Company argued that the Employee failed to provide truthful information to senior management in that he failed to inform his superiors that the cost of construction would exceed what was approved. The Company said that the Employee's misconduct was serious, and that his acts and omissions

were wilful, deliberate, dishonest and misleading, or grossly negligent. The Company did not allege that the misconduct was the overrun in project costs.

Justice Gillard rejected these claims. While the Employee was "clearly derelict in his duties", he did not breach his contract "knowingly, wilfully and with any intention to deceive or mislead his superiors." He had no motive to conceal, mislead or deceive. His conduct did not amount to wilful disobedience or a refusal to perform his duties. However, neglect of a serious nature may nevertheless justify instant dismissal.

The Employee was found to be negligent to the extent that he failed to carry out an analysis of costs earlier than he did and failed to alert senior management of the substantial costs overrun.

The Court decided that he wasn't guilty of habitual negligence, gross negligence, or recklessness in his responsibilities as a project manager. Accordingly, the Employee was not so negligent as to justify summary dismissal.

Wrongful dismissal

The Court concluded that the Company had failed to prove that its dismissal of the Employee without giving him 12 months' notice was justified in the circumstances. The Employee was entitled to \$157,000 for failure to give proper notice and \$13,000 in long service leave entitlements.

Implications for Employers

Employers must give reasonable notice of termination or be able to prove that the employee's actions justified summary dismissal.

In certain circumstances, wilful disobedience, incompetence or gross negligence will amount to a breach of the employment contract serious enough to justify instant dismissal. However, the seriousness of the act of termination and the effect of summary dismissal are factors which place a heavy burden on the employer to justify dismissal without notice.