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TIME TO CHANGE UNFAIR FORMAT

Consistency is critical to our fair work system

SCOTT BARKLAMB

THE government is currently giving "active consideration" to creating a new specialist appeals tribunal, entirely independent of the Fair Work Commission.

The case for a new approach to Fair Work appeals is strong. There are growing concerns with the quality and consistency of commission decisions and failures to properly apply long-standing precedents. Employers trying to comply with our employment laws are increasingly unable to rely on Fair Work decisions. Consider the problems the commission has created around drug and alcohol testing.

In January, Endeavour Energy was prevented from introducing urine testing for drugs and alcohol. This is despite other recent decisions backing the use of urine testing, and well-documented problems with alternative testing methods.

The real sting is that some of these recent decisions reverse a 1984 precedent that made the employer responsible for managing drug testing and legal liabilities as they saw fit. This 30-year-old precedent was widely understood and accepted until the Fair Work Commission injected complication and inconsistency into this vitally important area of workplace safety.

The impact of the commission ignoring such long-standing precedents is unions now intend to challenge how resource industry employers manage the risks of drug and alcohol impairment. This will cause disputes and create extra costs and work for our tribunal system when the commission should be in the business of minimising friction between employers and unions.

Another worrying development is that some Fair Work commission members are beginning to have far too much regard for the length of service of employees and their re-employment prospects when ruling on unfair dismissal cases. One recent decision concerns a wharf worker who was sacked after violently assaulting his supervisor.

A second example is an Australia Post employee who clearly breached company conduct by distributing pornographic material and was dismissed in a seemingly reasonable response by his employer.

Both employers were eventually vindicated in dismissing the employees concerned, but incredibly at least one commissioner in each case disagreed with the employer's action and considered dismissal too harsh based on the employee's length of service and personal circumstances.

If someone breaches company protocol and community expectations through violence or distributing pornography, their personal circumstances and prospects of future employment should be irrelevant.

They are certainly irrelevant to someone at risk of facial fractures and brain injury.

Employers have to be able to set and enforce zero tolerance on workplace violence, drug use and sexual harassment. If our system is failing to support them, the system needs to change.

The role of the commission should not be to entertain individuals wanting to reverse established precedent. It must send clear and consistent messages to employers about how to comply with Australia's employment laws and treat people correctly in the workplace. If it is incapable of doing so, another body will need to assume its appeals functions.

An independent body of experienced industrial lawyers would deliver clearer and more consistent industrial decision-making, and put the system back on the rails. Better appeal decisions that pay proper regard to the legislation and merits of cases would not excuse assaults or the distribution of pornography, complicate drug and alcohol testing, or send mixed signals on whether OHS rules need to be complied with.

It's time for the government to restore rigour and consistency, restore common sense decision-making, and ensure the Fair Work system operates in line with community expectations.

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