

Opinion Piece | Steve Knott AM

CEO AMMA

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The danger of FWC members redefining safety protocol

Fair Work Commission (FWC) members are awarding compensation or reinstatement following dismissals for serious safety breaches. While they may have the discretion to do so under the Fair Work Act, this is both wrong and dangerous.

Even though a valid reason for termination exists, and despite extensive and correct procedural processes being followed, FWC members can - and some do - exercise the discretion to determine a dismissal for a serious safety breach was 'harsh'. In essence, they not only substitute their decision for that of experienced managers, but a certain cohort of FWC members are taking up the role of social justice warriors.

When it comes to safety there can be no compromise. That's why AMMA is calling for the removal of this discretionary power where a serious safety breach has occurred and is proven.

Let's make it simple; adherence to safety policies save lives.

From personal experience I can attest there is no worse job in the world than going to a colleague's house and advising their family members that their loved one is never coming home. I don't know if any FWC members have been tasked with that, but if they have, I empathise.

A person's age, length of service, whether they have invested wisely or not to have a nest egg and so forth must bear no relevance to whether an employer can strictly enforce the terms of their safety policies. Sadly, sometimes you don't get a second chance when it comes to safety.

It is commonplace for companies to have zero tolerance towards key safety breaches. They are strictly enforced because the alternative is people get seriously injured, or still worse, die.

I've travelled the world rubbing shoulders with leaders from business, unions and government. The one thing that globally unites us is the need for safe workplaces. It is not a 'nice to have', it is a 'must have'.

Employers must be vigilant in protecting their employees and their businesses.

Generally, employers make serious investments in their people and don't make a decision to terminate an employee lightly. Once that decision is taken, consistent with their policies and procedures that ought to be the end of the matter.

For an administrative body (they are not a court) such as the FWC to insert their own perception of what is 'harsh' has a whiff of arrogance. They are essentially saying they are better placed than the employer to make decisions on how businesses manage their employees.

With due respect, and I know or have met most of the 41 FWC members over the past 30 years, this is piffle. Who are these people?

The majority have been appointed by the ALP (24 out of 41), with most being ex-union bosses or employment lawyers. Next to none have ever been charged with running a real business of any size in their professional lives.

Let's recap on some absurd key safety breach decisions; and there are many.

Last month a petrol tank driver in SA was sacked for driving 28kms over the limit on a road, with a steep decline, in an area flagged as a death-trap as many deaths, including trucks have occurred in this area.

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No surprises there you'd think. You're hired for your ability to drive safely and obey the road rules and that particular driver couldn't manage it. The surprise was that the employer concerned was ordered by the FWC to re-employ the driver. Whether this decision withstands appeal, only time will tell.

In the offshore oil and gas industry many will be acutely aware that there is zero tolerance for breaching company drug and alcohol policies. When sailing the high seas, the first priority is for the safety of the people on-board. Further to this, with significant environmental and safety consequences if things go wrong, this seems sensible.

Recently, when someone employed as a Master presented themselves on the morning of their swing well over the company mandated alcohol limit, a clear breach of policy was found.

The FWC member found that the employee should be entitled to a compensation remedy, notwithstanding having never worked in the offshore oil and gas industry themselves, the termination was 'harsh'.

In keeping with the nautical theme, the captain of a commuter ferry on Sydney Harbour was involved in an incident where the ferry crashed and some passengers required medical assistance. When subject to 'for cause' testing it was discovered he had elevated THC (cannabis) levels in his system beyond well established and well understood company policy levels.

After a thorough investigation, the company terminated his employment. This again seemed to be a no-brainer as the public safety issue is extreme.

Understandably the employer appealed this decision to a Full Bench of the FWC. While the employer's decision on appeal was vindicated, the company was again required to defend its decision before a Full Bench of the Federal Court.

Some may say that the ultimate decision to terminate the ferry captain was vindicated through various appeal processes and the system is working as designed. Unfortunately such cases can give the appearance strict adherence to key safety protocols may be flexible, and defending such cases may cost employers tens, indeed as in this case, hundreds of thousands of dollars in wasted legal fees.

Unfortunately the ALP's Fair Work Act 2009 gives FWC members discretion to consider 'any other matter' that they think is relevant to a termination. This is where the social justice warrior FWC members get their power to exercise their discretion and substitute their decision for that of an employer.

With most FWC members having never run a business themselves, this cannot be right, nor can it be fair. Worse still, it is dangerous.

Whether employees have been employed one minute or 50 years – there are 'no go zones' in safety-critical industries. Simply put, if you run the gauntlet and take the punt on safety, most people employed in such industries would be shocked if the safety transgressor was not sacked.

The consequence of discretion instead of no compromise in key safety policy areas is the risk of something going awry. When this happens work colleagues and family members, not FWC administrators, are left to pick up the pieces.

There's no room for touchy-feely/social justice warrior-type decisions. There is nothing harsh, unjust or unreasonable about having clear safety policies in place, articulating an expectation that these be followed and employers deciding the consequence if they are not.

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Numerous FWC decisions show that there are different views about what is 'harsh' when a termination of employment follows a breach of a safety policy.

If the FWC is not capable of placing the same level of importance on safety as employers must, perhaps the government needs to take that discretion out of their hands.

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