

# A VISION IN THE WORKPLACE

## Our November edition of Vision includes:

- A recent cautionary tale for remote work and terminations during Covid-19;
- A case contemplating employer obligations for working from home arrangements; and
- The Fair Work Commission proposal to extend paid pandemic leave in the aged care sector.



## Recent Decision a Cautionary Tale for Covid-time Terminations

In a recent unfair dismissal case, the Fair Work Commission (FWC) highlighted the challenges associated with managing remote workers during the Covid-19 pandemic. Interestingly, the FWC considered the impact of Covid-19 on the employee in this case in deciding whether or not there was a valid reason for the dismissal and whether the dismissal was harsh.

Key to the FWC's finding was the fact that the employee's work expectations and workload had been increased during the pandemic despite a 20% cut to her hours and pay.

"[the employer] failed to recognise [the employee's] natural anxieties about COVID-19 (mixing with clients in public places) and all that COVID-19 could mean for her job security if the business was to be severely impacted."

DP Anderson observed that not all performance failures are a valid reason for dismissal and a consideration of context and circumstances is required to assess seriousness.

### Background

The employee, a Sales Executive for Allpet Products (Allpet), was summarily dismissed in April this year after a series of events over a few weeks, including failing to consistently provide reports, exhibiting (in her director's view) rude behaviour during a teleconference, not disclosing that she carried on a business which may be (in the director's view) in competition with the employer's business, and finally, in what appears to have been the last straw, posting content on Instagram which appeared to show her attending a bridal boutique and driving a friend to the airport during normal work hours.

In the director's subsequent termination letter, the director cited the employee's failure to provide weekly sales reports, customer complaints, poor attitude and "demonstrated lack of respect" for management.

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## Reporting obligations increased, pay and hours cut

In determining whether the dismissal was unfair, the FWC took into consideration the current work environment of Covid-19 with particular reference to:

- The employer had failed to take into account the employee's "natural anxieties about COVID-19 (mixing with clients in public places) and all that COVID-19 could mean for her job security";
- The employee's days and wages had been cut by 20% due to economic effects on the business and she was working remotely covering customers in two states; and
- The employer, in requiring competing and conflicting obligations of their employee, should not have objectively assessed her performance against standard performance criteria at this difficult time.

## "Handful" of errors warranted a warning

The FWC held that a number of errors in the employee's conduct warranted a warning but not summary dismissal.

In relation to the Instagram posts, the FWC found there was no evidence it compromised her employment obligations to the company and thus this was not a valid reason to terminate her employment. Neither was the director's conclusions about the Instagram posts which were tested in evidence and were found by the Deputy President to be factually wrong, or did not meet the standard of proof.

## Judgement

DP Anderson criticised the absence of a formal performance improvement plan despite it being clear that the employee was "a committed but occasionally deficient employee".

"When COVID-19 hit, the combination of reduced hours to do the job, demotivation arising from reduced hours and pay and an additional reporting obligation combined to create a set of circumstances in which an objective assessment of performance was fraught."

Ultimately it was held that Allpet applied an unfair disciplinary approach: a spur of the moment performance meeting, then a week later, a formal warning letter and then a week later, termination.

The impersonal nature of the dismissal by email and letter compounded the procedural unfairness.

"Allpet tried to act fairly but its judgement in the final analysis was rash and impaired. When considered objectively [the salesperson's] dismissal was harsh, unjust or unreasonable."

The Deputy President found that the employee was unfairly dismissed and awarded the worker \$9120 in compensation.

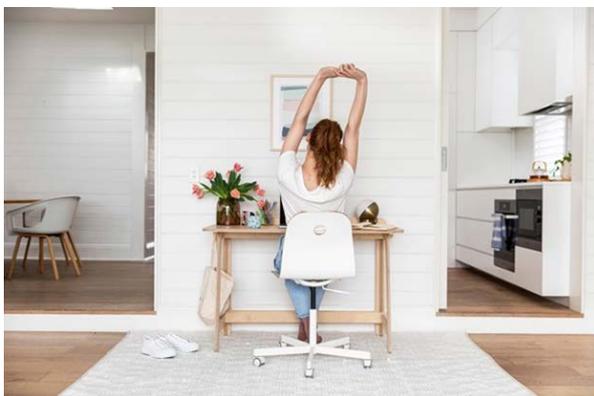
## Takeaway

While glimpses into an employee's personal life on social media can cause a great deal of angst for employers, they should think twice before dismissing an employee because of it. A "big picture" approach, with consideration of the context and circumstances of an

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employee's performance and conduct issues, is recommended. In this case, the FWC demonstrated its willingness to take Covid-19 into account in its decision. Employers must accordingly adapt disciplinary and termination processes to the current climate.

If you need assistance with carrying out disciplinary procedures in these unique Covid times please do not hesitate to contact [Nick Stevens](#), Luke Maroney or [Bernard Cheng](#)



## Employer not obliged to 'pick up the bill' for WFH desk: FWC

In a recent decision, the Fair Work Commission (FWC) has upheld the dismissal of a worker who resigned after Red Energy (the Employer) refused to buy him a desk to facilitate working from home. In fact, the Commission held that under the Covid-19 guidelines it should not be automatically expected that employers provide furniture for working from home arrangements.

### Background

Due to COVID-19, the Employer requested that its employees begin working from home. The Employer provided employees with laptops, headsets, adjustable chairs, ergonomic assessments and access to an occupational therapist.

The worker in question requested that the Employer purchase him a desk to work from home – he stated that he did not have a desk as he was moving house and was under financial strain related to medical expenses. This request was denied by the Employer.

In early July, when the Victorian Government reintroduced Stage 3 restrictions requiring all employees to work from home where possible, the Employer directed the worker that he could no longer work in the office.

Despite the Employer's directions, the worker continued to work from the office for several days. When the Employer confirmed it would not buy him a desk, the specialist resigned, claiming he had been constructively dismissed.

### Worker's argument

The worker argued that s 4.3.2 of the "Guide for Employers: Preparing for a Pandemic" issued by WorkSafe Victoria requires employers to provide adequate resources for employees to support working at home, including "technology and furniture".

He argued that he had been constructively dismissed in that the failure to provide a desk left him with no choice but to resign.

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## The Fair Work Commission Decision

Deputy President Colman, however, found that the Employer offered adequate resources and that the guidelines "do not require the provision of 'furniture' as a matter of course".

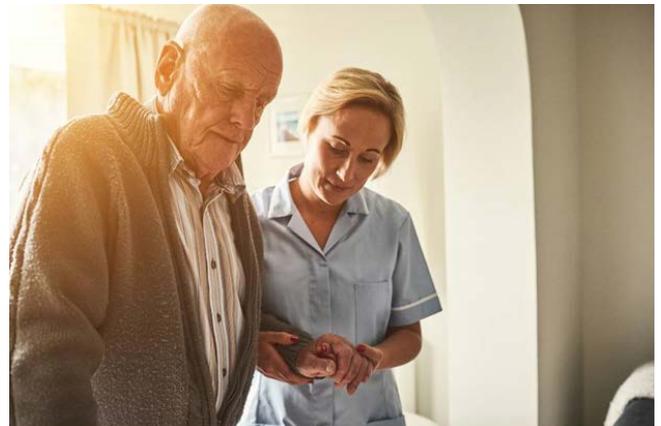
He continued that "[the worker's] argument that he was forced to resign is entirely without merit".

"The simple fact is that instead of resigning, [the worker] could have bought a desk."

The Deputy President added that if the Employer had chosen to dismiss the specialist for his refusal to follow "lawful and reasonable" directions to work from home, this would have provided a valid reason for dismissal.

## Takeaway for Employers

The requirements of what employer's need to/do provide for working from home will likely depend on a variety of factors – role, size of business, totality of their initiatives to facilitate working from home. If you require assistance or advice with respect to the above please do not hesitate to contact [Nick Stevens](#), Luke Mahoney or [Bernard Cheng](#).



## Covid-19 Update: FWC expands paid pandemic leave until late March

The Full Bench of the Fair Work Commission (FWC) announced that the paid pandemic leave provisions within the three awards applying to aged care workers (the Aged Care Award, the Nurses Award and the HPSS Award) will have their operation extended to 29 March 2021.

In its decision the FWC noted the recent Covid-19 improvement recently in its decision:

"The COVID-19 pandemic is returning to a controlled status in Australia. However, these significant improvements have only occurred over approximately the last 6 weeks, and it is too early to say that it will be sustained having regard to the rapidity in which further waves of infection may spread. Further, the statistics above clearly demonstrate the vulnerability of the aged care sector to the COVID-19 pandemic.

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Certainly the risk we identified in the July decision in the aged care sector remains, and it is premature to say that this risk will cease to manifest itself in the future."

The Full Bench noted that this aligned with the position for unpaid pandemic leave in a number of modern awards. Information on unpaid pandemic leave including which awards are covered can be found here.

## **What is paid pandemic leave?**

Throughout the Coronavirus outbreak in Australia there has been the issue of people turning up to work while displaying symptoms.

Paid pandemic leave allows workers to still be paid whilst sick and not to risk turning up to work whilst sick.

## **Will other sectors be included?**

Paid pandemic leave has only been implemented into the aged care sector as the problem is obviously most acute in aged care. Prime Minister Scott Morrison said that separately from the FWC, he had instructed Industrial Relations Minister Christian Porter to discuss extending leave to other workers with employers and unions. However, no immediate implementation of this in other sectors is clear.

[Health Sector Awards - Pandemic Leave \[2020\] FWCFB 5768 \(29 October 2020\)](#)

If you have any questions in relation to the above please do not hesitate to contact [Nick Stevens](#), Luke Mahoney or [Bernard Cheng](#).

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