Article Information

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Lessons for Employers– How failure to consult on workplace policy led to reinstatement of intoxicated worker

The Fair Work Commission (Commission) has reinstated an employee after he was found to have breached a workplace Drug and Alcohol Policy (D&A Policy) in the recent decision Craig Hancock v Sydney International Container Terminals Pty Limited [2025] FWC 516. This case highlights the importance of consulting appropriately with your workforce around policy changes and choosing appropriate methods of communication.

Background

Mr Hancock commenced employment with Sydney International Container Terminals Pty Ltd trading as Hutchison Ports Sydney (**Hutchison**) in 2013 as a Stevedore at Port Botany in New South Wales. Mr Hancock's employment conditions were governed by *Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021*.

Drug and Alcohol Policy

On 7 March 2023, Hutchison made changes to a decade old D&A Policy which moved the acceptable Blood Alcohol Content (**BAC**) level from 0.02% to a strict alcohol-free requirement for all employees, visitors and contractors while on site.

On request by its Work Health and Safety (**WHS)** Committee, Hutchison notified the workforce of the policy change in the following ways:

1. A text message was sent to employees' personal phone numbers. It stated that a copy of the D&A Policy had been emailed to them.
2. An email was sent to the personal email addresses of employees. The subject heading was 'HSEQ3.19 Drug & Alcohol Policy' and it attached the D&A Policy. In the body of the email the key policy changes were outlined.
3. Employees were explained the changes in policy in a tool box meeting.
4. Copies of the updated policy were displayed in multiple areas on site, including the Safety Noticeboard in the amenities room, and copies were also openly available on the table inside that office.

Incident

On 31 March 2024, Mr Hancock was involved in a workplace accident while he was operating a crane which resulted in a collision with another crane. In line with Company protocol, Mr Hancock was required to submit to a drug and alcohol test.

Mr Hancock submitted to two tests, with the final test confirming a positive result recording of 0.017% BAC. Mr Hancock made a comment to the test administrators that he believed he was below the 'cut off' level set by Hutchison's D&A Policy. As he had recorded a positive test, he was informed that he could not continue his shift and was sent home. Mr Hancock was suspended, and following an investigation Mr Hancock's employment was terminated for serious misconduct.

Mr Hancock commenced unfair dismissal proceedings against Hutchison on the basis that there was no valid reason for termination because Hutchison failed to notify him that the D&A Policy had been amended, and he believed his BAC was in accordance with the existing policy.

FWC finds dismissal was for a valid reason but was harsh and unreasonable

Deputy President Wright found that Mr Hancock breached the D&A Policy and that this was a *valid* reason for dismissal

after testing positive and being issued warnings for the two previous breaches. However, Deputy President Wright ordered Mr Hancock to be reinstated, and awarded compensation for lost renumeration on the basis that the termination was harsh and unreasonable due to the following factors:

- *Text messages and emails not appropriate:* Text messages and emails to employee's personal addresses was not an appropriate way to communicate such a significant change. The text message and email sent by Hutchison did not give any indication that the D&A Policy had changed. The Commission found these methods of communication were only appropriate in ensuring that each employee was able to *access* the D&A Policy.
- *No requirement for employees to check work emails from personal email account:* The Commission highlighted that if a person receives a work related email on a personal email account, the possibility is that the employee will not open the email and leave it "unread". The Commission noted this may only be appropriate for employees who have a work email address and usually work at a computer.
- *Tool box meetings not effective:* The Commission found that the routine of a daily toolbox meeting before every shift meant that it was not reasonable to expect employee's to remember every issue discussed. The Commission stated that employees would be more likely to retain information about policy changes where there is a dedicated training session.
- *Posters and flyers not effective:* While posters and flyers may be a useful source of information, Hutchison was unable to prove the extent to which employees read these materials. The Commission highlighted inconsistencies and that not all notices were up to date. For example, a poster on the human resources board was outdated and displayed the old cut off level of 0.02%.
- *Lack of consultation with WHS Committee:* There was no evidence that the WHS Committee had a direct conversation with anyone at Hutchison about the changes and the date that they were to take effect.
- *Conduct of management:* The Commission found previous procedural failures involving prior breaches to the D&A Policy.

Key Takeaways for Employers

The decision comes shortly after the High Court case of *Elisha v Vision Australia*[1] and again highlights the importance of implementing policy changes in a lawful and meaningful manner to the workforce. The key takeaways for employers are as follows:

1. Ensure communication of policy changes are tailored and specific to the workforce and job requirements. The use of personal email and phone numbers are not always appropriate methods to notify and consult workplace changes, unless stipulated in an employment contract or policy.
2. Ensure that employees are not only notified of a policy change, but that the changes and how they will affect workers are explained in simple terms through training and consultation.
3. Keep up to date records of the consultation process, including training attendances and evidence that employees have read and understood the policy changes which are pivotal in defending such matters.

[1] *[2024] HCA 50.*