Article Information

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"Exemplary" investigation process still results in successful workers compensation claim

An employer has failed to rely on reasonable management action to defend against a workers compensation claim as the investigation process was considered unfair despite the Member presiding over the hearing calling it "exemplary".

The decision is sure to be concerning for employers as an employer's direction to an employee under investigation, to keep the contents of an investigation confidential and not speak to other employees, was held to have been unfair and therefore unreasonable management action. The Member found that this prevented the employee from obtaining factual information that may have assisted him in mitigating the allegations of racist language against him. Effectively, the employee was denied the ability to conduct his own investigation or call other witnesses in support of his defence.

Background

We have set out below a brief background of the facts:

- On 24 May 2017, the employee engaged in a discussion with several work colleagues about the Manchester Arena bombing.
- It was alleged that during the conversation, the employee made a number of disparaging comments in reference to Islam, including:
  - "You cannot have fleas without a dog";
  - "If you get rid of Islam you get rid of terrorists"; and
  - In response to another employee saying that Muslims were good people, the employee stated that it was "not genocide if it is Muslims".
- Upon being informed of the allegations, the employer undertook a formal investigation. The employee was directed to keep the investigation confidential and not to speak to other employees (**Confidentiality Direction**).
- During the hearing, the Member described the investigation process undertaken by the employer as "exemplary". Despite this, the Member concluded that the investigation was not fair, and did not constitute reasonable management action, as the Confidentiality Direction deprived the employee of an opportunity to put forward his case "at its highest".

Key Takeaways

This decision is significant as it is common practice for employers to direct employees who are party to an investigation to keep the contents of the investigation confidential. This is usually designed to avoid evidence contamination and witness intimidation.

The key takeaways from this decision are:

- a 'one size fits all' approach to investigations can result in unintended risks to employers; and
- there only needs to be one deficiency in the investigation process for an employee to successfully argue that the investigation process was not 'reasonable management action' and thus be entitled to workers compensation.

If your company would like advice in relation to employee misconduct or how to conduct a best practice investigation, please contact Joe Murphy or Jarrad McAuliffe from the employment team at Piper Alderman.

This month marks the return of Piper Alderman's Masterclass Workplace Training Series hosted by the

National Employment Relations team.

The first session covers the topical issue of Workplace Investigations facilitated by Partner, Ben Motro. To register for the half day virtual workshop on Wednesday 25 August please register below.

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