

Common Sense Prevails at Fair Work Australia

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In a decision which will bring comfort to employers, Fair Work Australia (**FWA**) has found that employees should not have to be taught 'common sense' in finding that the dismissal of an employee was not unfair.

What happened?

The employee was a production worker at a carpet tile manufacturing plant. The employee claimed that shortly after starting work, a colleague told him that he could climb into a compactor used to push down carpet off-cuts. The employee stated that he had received no formal training on the use of the compactor and it was common practice for employees to climb into the compactor. Further, the compactor had no signage prohibiting employees from climbing into the compactor.

In November 2010, the employee spoke to an OHS training group who were observing operations at the plant. The employee asked the trainer whether the group was doing an OHS course. When the trainer replied that they were, the employee climbed into the compactor and started to jump up and down. The employee told the group that he was on the OHS Committee and laughed and giggled while waving his arms about without hanging on to the edges of the compactor.

The trainer, who was an independent bystander, later reported the incident. Following a meeting with the employee attended by his union representative, the employee was summarily dismissed for, amongst other matters, a breach of his safety obligations.

The employee subsequently applied to FWA for an unfair dismissal remedy. While the employee did not dispute that he climbed into the compactor, he disputed that he jumped up and down in it, engaged in horseplay or deliberately disparaged his employer to a group of visitors. The employee also claimed that climbing into the compactor was not prohibited and that he was doing no more than he had been shown to do and, like other employees, had done many times before.

What did FWA decide?

FWA found that the employee's evidence was contrary to that of his manager, who had observed part of the incident, and the independent OHS trainer. FWA was satisfied with the employer's version of events and found that the employee's actions, including climbing into the compactor, jumping up and down and waving his arms around, were

'inherently unsafe'. FWA also found that by his actions, the employee had placed himself at risk of falling onto the concrete floor or hitting himself on the compactor. As such, FWA found that the employee's conduct presented a serious and imminent risk to his safety.

FWA's concerns were further compounded by the employee's lack of concern about the possible risks and dangers associated with his actions and his cavalier approach to the disciplinary meeting and the FWA proceedings, particularly given that he was an OHS representative.

FWA accepted that the employee had climbed into the compactor on previous occasions, as had other employees, and that the employer had not directly told its employees to not climb into the compactor. Despite this, FWA found that 'it is a matter of common sense not to climb into machinery in such circumstances. In my view, the applicant should not have required training on this.' Accordingly, FWA dismissed the employee's application.

Key lessons for employers

While this decision will provide some level of comfort to employers that common sense can prevail, it is important to keep in mind that the outcome may have been different if the employer had not provided induction training, had a safety policy which was provided to the employee, twice assessed the employee's skills and, in his capacity as an OHS representative, trained the employee in risk assessment. As outlined in our previous update (click [here](#)), the outcome may also have been different if there were any significant mitigating factors, as these have the ability to render harsh a dismissal that was otherwise procedurally fair and for a valid reason. As such, employers should take into account subjective, mitigating factors when deciding whether to terminate an employee's employment.