



Express law

fast track information for clients



28 JULY 2014

First decision on termination of employment for 'loss of an essential qualification' – Defence defends requirement to maintain a security clearance

AGS continues to contribute to the development of case law in the unfair dismissal jurisdiction confirming the ability of APS employers to use a range of termination powers.

The most recent of these cases, [Applicant v Department of Defence](#) [2014] FWC 4919 published today, confirms that a security clearance can constitute an essential qualification, and that loss of a necessary security clearance is a valid reason for dismissing an employee. The case also confirms that it is not necessary to engage in a misconduct process where the primary concern is security-related.

This decision complements two 2013 APS cases in which AGS also successfully acted. In *Dunkerley v Commonwealth of Australia* [2013] FWC FB 2390, a Full Bench confirmed that a misconduct process is also not necessary where the primary concern is non-performance of duties. In *Hunter v Commonwealth* [2013] FWC 7917, the Fair Work Commission (FWC) upheld a dismissal for the making of false bullying allegations.

[Applicant v Department of Defence](#) [2014] FWC 4919

The applicant was employed by the Australian Signals Directorate (ASD) within Defence until August 2013, when his employment was terminated on the ground that he had lost an essential qualification, being his a Top Secret Positive Vetting security clearance (TSPV clearance).

The applicant's security clearance had been revoked by the Australian Government Security Vetting Agency following a request for a review of the clearance that had been made by the then Director of ASD, Ian McKenzie, who gave evidence at the hearing.

The applicant's employment was terminated by Mr McKenzie under s 29(3)(c) of the *Public Service Act 1999* (PS Act) which provides a ground for termination where 'the employee lacks, or has lost, an essential qualification for performing his or her duties'.

The applicant alleged that the termination of his employment was unfair because his security clearance should not have been revoked. He claimed that any concerns about his conduct should have been addressed through a disciplinary process and that Defence failed to follow its own policies. Despite evidence that Defence requires all employees to hold at least a baseline clearance, the applicant claimed that, even without any level of security clearance, he still could have been employed by Defence, and should be reinstated.

However, Commissioner Deegan accepted the case put by Defence, finding that there was a valid reason for the dismissal because:

- there was no ulterior motive for the request for the review of the applicant's security clearance
- the correctness of the security review was not a matter for the Fair Work Commission

- holding a TSPV clearance was an essential qualification for the applicant's employment
- the applicant was unable to remain employed by Defence without at least a baseline security clearance.

Implications

This is the first decision regarding security clearances as essential qualifications in the context of s 29 of the PS Act. The acceptance that a security clearance can be an 'essential qualification' is an important finding for agencies who require their staff to maintain particular levels of security clearances, and is especially relevant to employers with staff operating in high security environments.

In this case, the FWC was prepared to consider whether there was any evidence that the request for a review of the security clearance had been motivated by an improper purpose. However, the FWC did not review the security clearance process itself.

Importantly, this decision confirms consistent AGS advice that agencies are not required by the PS Act to undertake a misconduct process where the primary concern is security-related. If an employee loses an essential qualification, a final decision regarding any employment consequences can be made as soon as the affected employee has been afforded procedural fairness.

AGS is expert in all aspects of security-related decisions, and in advising on and successfully defending decisions based on a loss of an 'essential qualification', whether for loss of a security clearance, an academic qualification, or a specific agency-imposed qualification.

Text of the decision is available at:

<https://www.fwc.gov.au/documents/decisionssigned/html/2014FWC4919.htm>

AGS represented Defence, with Tim Begbie, AGS Senior General Counsel, appearing as counsel in the proceedings.

For further information please contact:

Tim Begbie

Senior General Counsel, Dispute Resolution

T 02 6253 7521

tim.begbie@ags.gov.au

Sarah Wright

Senior Executive Lawyer

T 02 6253 7630

sarah.wright@ags.gov.au

Julian Ensbey

Senior Lawyer

T 02 6253 7229

julian.ensbey@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:

<mailto:unsubscribe@ags.gov.au>