



Express law fast track information for clients

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Footy tipping and breaches of the Code of Conduct

In a recent appeal decision a Full Bench of the AIRC held that the termination of employment of an APS employee who cheated in the workplace football tipping competition was not harsh, unjust or unreasonable.

In overturning the Commission's decision at first instance, the Full Bench considered that because of the employee's actions there was a legitimate basis for the agency to conclude that the requisite relationship of trust no longer existed. The Full Bench also found that the employee's actions had a direct and significant connection to his work.

Cunningham v Australian Bureau of Statistics

Australian Industrial Relations Commission, 10 October 2005, Justice Giudice, President, Senior Deputy President Watson, Commissioner Simmonds, [PR963720](#)

Background

Mr Cunningham worked as an EL1 in the IT area of the Australian Bureau of Statistics (ABS). His employment was terminated for breaches of the APS Code of Conduct (s 13(1), (10) and (11)) arising out of changes he made to his tips in football tipping competitions in rounds 19 and 21 of the 2004 AFL season. The changes were made to tips after the 'close-off' of the round and after the results of the games were known. Mr Cunningham was able to make the changes to his tips because he was the administrator of the football tipping database. The tips changed were from losing to winning tips, and in respect of one competition, also the margins for the results. In making the changes Mr Cunningham made a small financial gain.

In deciding that there had been breaches of the Code of Conduct and that the appropriate sanction was termination, ABS concluded that:

- the underlying conduct by Mr Cunningham involved him improperly exploiting his position to obtain a benefit or advantage, being tipping money contributed by his work colleagues
- when called upon to explain his actions Mr Cunningham offered a series of explanations that were knowingly false and misleading
- at no stage had Mr Cunningham acknowledged any dishonesty on his part (either in relation to his underlying conduct or in relation to the false and misleading explanations proffered by him)
- the dishonesty and self-interest which inhered in Mr Cunningham's underlying conduct, combined with the dishonesty which inhered in the false and misleading explanations

that he proffered, inflicted serious damage upon the relationship of trust and confidence with ABS.

Mr Cunningham applied for relief from the AIRC in respect of the termination of his employment on the ground that the termination was harsh, unjust or unreasonable.

Decision at first instance

Commissioner Eames found that there had not been a valid reason for the termination of Mr Cunningham's employment and ordered reinstatement.

The main reasons leading to the Commissioner's conclusions were:

- footy tipping is not work related
- ABS had not demonstrated that the manipulation of footy tips had any detrimental impact on the community or the government
- no detailed personal or business information was accessed, released or affected in any way
- Mr Cunningham was remorseful
- Mr Cunningham could have been demoted to a lower position within ABS.

Decision of the Full Bench

In allowing the appeal the Full Bench found that Commissioner Eames erred in finding that there was no valid reason for the termination of employment. The Full Bench went on to make findings on the unfair dismissal application itself. The Full Bench did not agree with Commissioner's Eames' finding for the following reasons:

- The Full Bench stated that the evidence was 'unshaken before the Commissioner or before us' that Mr Cunningham had deliberately cheated by changing his tips after the results of games were known.
- Having regard to the nature of ABS's functions and the importance of confidentiality in relation to the data ABS collected and deals with, trust was a critical element in the employment relationship, particularly at the management level. There was a legitimate basis for ABS to conclude that the requisite level of trust no longer existed.
- On any view, Mr Cunningham's conduct involved multiple breaches of the rules of the tipping competition, resulted in gain for him at the expense of other tippers and involved a breach of the trust reposed in those given system administration privileges.

In considering the requirements under s 170CG(3) of the WR Act the Full Bench found, as did Commissioner Eames, that a proper Code of Conduct investigation had been undertaken; that a high standard in termination procedures would be expected given that ABS is a Government authority of some size and significance and that it could find no serious flaw in the procedures adopted.

In looking at other relevant matters the Full Bench rejected Commissioner Eames' reliance upon Mr Cunningham's remorse. The Full Bench took particular note of the failure by Mr Cunningham to, at any time, admit changes to Round 19 or changes made on a Sunday in Round 21 after games had been played, and that Mr Cunningham accepted winnings in the competitions. The Full Bench stated at [24]:

In the circumstances his expressions of remorse and his apologies do not weigh heavily in his favour. The totality of this conduct, viewed objectively, justifies [ABS's] loss of confidence in [Mr Cunningham].

The Full Bench also disagreed with Commissioner Eames that footy tipping had no connection to Mr Cunningham's work. The Full Bench stated that there was a 'direct and significant' relationship to work because:

- other participants in the competition were for the most part, co-workers
- Mr Cunningham was an assistant director within ABS and it was the system administrator privileges he had by virtue of his position that enabled him to access and alter his tips.

In concluding that the termination was not harsh, unjust or unreasonable, the Full Bench made the observation that had Mr Cunningham 'made an early and frank disclosure of all the alterations our view might have been different'.

Implications for clients

- The Full Bench decision reinforces the line of authority that where an employee, in providing explanations for the misconduct, attempts to place a benign face on their actions, the employer can take that subsequent conduct into account in deciding whether to terminate the employment: *McIndoe* (PR901846) and *Post* (PR906776).
- Where an employer wishes to establish a loss of trust and confidence as a significant reason for termination it is important that evidence be adduced which establishes the basis for the particular need for trust and confidence in an employee.
- Where the misconduct is not a part of the employee's duties, the relationship to work can still be established by leading evidence to demonstrate a connection between the nature of the conduct and the employee's duties.

AGS acted as solicitor and counsel for the Australian Bureau of Statistics in the original proceeding and the appeal.

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