

# Swearing at work: Where are we now?

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**Many employers regard swearing and inappropriate language at work as misconduct, and often grounds for dismissal. Unfair dismissal claims and other cases which consider swearing in the workplace recognise that abusive language can be misconduct, although it is another question again whether the “misconduct” justifies termination of employment.**

On 23 February 2018, the full bench of the Fair Work Commission handed down its decision in *Illawarra Coal Holdings Pty Ltd T/A South 32 v Matthew Gosek* [2018] FWCFB 749, another case considering inappropriate language in a workplace context.

Illawarra Coal had employed Mr Gosek for more than 11 years, and he was the Lodge President for the Construction, Forestry, Mining and Energy Union (CFMEU).

A member of the CFMEU had made a complaint about a manager at Illawarra Coal, and Mr Gosek had represented the member in relation to this complaint.

The allegations in the complaint were not proven.

## Summary of the Gosek case

On 4 October 2016, Mr Gosek, who was not rostered for work, went to the pub and was drinking. During the afternoon Mr Gosek sent a text message to seven of his colleagues and his supervisor. The text message said “dogs”. The employees rang Mr Gosek to discuss the text. Mr Gosek could not remember what he said in these conversations, but it was not contested:

- The phone calls involved tense and heated discussions;
- Mr Gosek used inappropriate language and called his colleagues a variety of names including “f\*\*king dog” and “dog c\*\*\*”; and
- Mr Gosek was under the influence of alcohol at the time.

This outburst was related to the worker’s participation in the incident investigation, or as the Commissioner described it:

*Mr Gosek intended to convey to his colleagues his disappointment as Lodge President about their role in the investigation and his view that they had not upheld union principles and they had lied to the investigator.*

**“A single isolated incident of swearing... is unlikely to justify dismissal”**

When the case was first heard, the Commissioner found that Illawarra Coal had a valid reason to end Mr Gosek’s employment, but the termination was harsh, unjust, or unreasonable and ordered Mr Gosek be reinstated. One of the factors influencing the decision was a finding by the Commissioner that the type of language used was “*commonly used in the mine*”.

Illawarra Coal successfully appealed the decision. While there were multiple grounds of appeal canvassed in detail by the Full Bench, regarding the specific conduct, two Commissioners found:

*...by focusing on the language and not the totality of the conduct the Commissioner downplayed the character of the conduct. The problem was not that Mr Gosek swore at his work mates. The conduct involved an expletive filled tirade which included threats directed at employees because they participated in an investigation.*

In part the case is indicative of the difficulties faced by employers when assessing this type of conduct, because Commissioner Booth rejected the appeal, noting:

*Although the conduct of the Mr Gosek on the day in question was clearly inappropriate, for the reasons detailed in this decision, the Commissioner took into account the conduct of the applicant and a range of other matters and concluded that the termination of Mr Gosek’s employment was also unfair. That is, the decision reached by the*

*Commissioner was that Mr Gosek's behaviour was unacceptable but explainable. Therefore a finding the dismissal was unfair was available to the Commissioner. No error is revealed.*

In my view, the case reinforces, rather than gives any new direction, about inappropriate language in the workplace. The principles we can take away from decided cases, including this one are:

- Prior warnings and repeat offences of swearing or inappropriate language in the workplace will support an employer's decision to dismiss an employee;
- Even if swearing is common in the workplace, it must be considered in context. It is one thing to swear in a general sense, it is another thing to swear aggressively and maliciously at another person, which is more likely to support a decision to dismiss an employee;
- A single isolated incident of swearing, even directed at a person, is unlikely to justify dismissal;
- While swearing, inappropriate language, or inappropriate behaviour, can be a valid reason for dismissing an employee, the dismissal must still be "fair". Generally, this means that an employer must:
  - Give the employee an opportunity to explain their conduct;
  - Consider the circumstances of the employee and any factors relevant to them, such as length of employment or prior performance; and
  - Consider the conduct in context: why did it occur and were there any mitigating factors?

Whilst misconduct cases often present difficulties for an employer, setting up clear processes to investigate and address misconduct while avoiding the temptation to "*rush to judgement*" will give you the best chance to successfully manage the situation.

*Disclaimer: This article provides a general summary of subject matter and does not constitute legal advice. The law may change and circumstances may differ. Therefore, you should seek legal advice for your specific circumstances.*

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