

[Mrs Karen Jones v Commissioner for Public Employment \[2012\] FWA 7069](#)

A former probation and parole officer employed by Northern Territory Correctional Services ('NTCS') within the Department of Justice ('the Department') has succeeded in her unfair dismissal claim despite Fair Work Australia ('FWA') finding that the Department had a valid reason to dismiss the officer. FWA found there was a lack of procedural fairness, on the basis that the matter involved an extended "dismissal by correspondence".

Background

As part of her recruitment process, Ms Jones completed a "[Criminal History and Integrity Screening](#)" form which required her to declare if she was "associated" with anyone who had a criminal record. Ms Jones failed to declare that her husband had a criminal record and was on parole. Several months later the Department became aware of her husband's criminal record and parole status, and invoked the *Public Sector Employment and Management Act* ('PSEMA') disciplinary provisions. The disciplinary process was conducted solely by way of written communications, carried out between 19 October 2011 and 13 January 2012. During the course of the process:

- the Department asserted that Ms Jones' failure to declare her husband's criminal record impacted on the relationship of trust and confidence and that her employment may be terminated;
- Ms Jones responded that she had interpreted the meaning of the term "associates" as normally applying in a business relationship context and not to her family or spouse, and that she had been "open and transparent" throughout the selection process;
- Ms Jones was advised that the Department was not satisfied with this response and was given a further opportunity to provide any additional information. She was also given the opportunity at a later date to respond to her foreshadowed termination letter, which stated there had been a finding of serious misconduct without an investigation being warranted;
- Ms Jones maintained her initial line of argument throughout the process, and notified the Department in her responses of the increasing toll the allegations were having on her health and wellbeing; and
- Ms Jones was not suspended despite the allegations of misconduct.

Decision

Commissioner Steel accepted that Ms Jones' failure to declare her husband's criminal history was a valid reason for dismissal. However, in finding a lack of procedural fairness Commissioner Steel stated:

"The respondent required the employee to continue working and complete her workload and duties after being advised of allegations of serious misconduct against her. She was never suspended from duties. There were four exchanges of letters between the parties. There was never a meeting of the parties in terms of an investigatory or disciplinary meeting. There was never an investigation by the employer into the allegations of misconduct. The allegation was put to the applicant based on information obtained elsewhere and she was repeatedly given a time limit to respond in writing. In the tribunal's view this was a disciplinary process by correspondence".

Commissioner Steel noted that without any face-to-face meetings with her employer, Ms Jones did not have a viable opportunity to respond to the Department, nor did she have the opportunity to be assisted by a support person. Commissioner Steel also found that the “extended” process conducted by the Department, throughout which Ms Jones was required to continue to fulfill her role even after alerting the Department to occupational health and safety and other implications, had “resulted in unnecessary effects” upon her.

Implications for the broader NTPS

This case demonstrates the importance of conducting disciplinary processes under PSEMA in an efficient and timely manner, and provides insight into the factors that Fair Work Australia may consider when determining what constitutes a “reasonable opportunity” for employee’s to respond to adverse information or decisions. Relevantly, these factors include whether face-to-face meetings and discussions took place, and whether the process provided the employee with the opportunity to have a support person present. The case highlights that in ensuring compliance with mandatory requirements surrounding written communications prescribed under PSEMA disciplinary provisions, NTPS Agencies don’t overlook these additional verbal elements as part of the disciplinary process.

In addition to the above key learnings, a number of other guiding principles can be gleaned from the case. When undertaking a disciplinary process, Agencies should:

- give careful consideration to the possibility of suspension particularly in circumstances where “serious misconduct” is alleged;
- have regard to their duty of care for an employee given the potential impact of the process on the employees health and well-being; and
- avoid express references within correspondence to investigations being unnecessary or unwarranted (It is noted that section 49A(2) provides a number of ways in which a CEO may gather evidence to satisfy, on reasonable grounds that an employee has breached discipline - including consultation, making inquiries or otherwise obtaining relevant information as considered appropriate. All of these methods of obtaining information involve an element of inquiry and analysis, and are designed to achieve flexibility and the exercise of CEO discretion in deciding whether a formal or external investigation is considered necessary or not. It is not necessary, and may be detrimental, to refer in written correspondence to the method of inquiry ultimately relied upon).

Relevant Legislation

- [Fair Work Act 2009 Part 3-2 – Unfair Dismissal](#) and [Fair Work Regulation 1.07](#)
- [Public Sector Employment and Management Act - Part 8 Discipline](#)
- [Natural Justice Employment Instruction Number 3](#) and [Commissioner’s Guideline](#)
- [Discipline Employment Instruction Number 7](#) and [Commissioner’s Guideline](#)
- [Code of Conduct Employment Instruction Number 12](#)

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