

TERMINATION OF EMPLOYMENT BY TEXT MESSAGE: DISMISSAL IN THE DIGITAL AGE

The decision by Hutchison Ports to retrench 97 workers on Thursday 6 August 2015 has generated substantial media interest and publicity. The controversy seems to surround not so much the retrenchment of staff itself, but the manner in which the news was delivered to the employees by Hutchison Ports – in the form of a text message and email.

Labor Senator Doug Cameron, as well as officials from the Maritime Union of Australia, has likened the actions of Hutchison Ports to a return to the “balaclavas and dogs” days of the Patrick Corporation waterfront dispute of 1998.

THE LEGAL REQUIREMENTS

Section 117(1) of the *Fair Work Act 2009* requires employers to give written notice of the date of termination. Additionally, the date of termination cannot predate the date written notice is given.

Traditionally, written notice is “given” in a number of ways, including:

- In person;
- Sending it by pre-paid post to the employee’s last known place of residence; and
- By leaving it at the employee’s last known place of residence.

Section 9 of the *Electronic Transactions Act 1999* (ETA) also allows for written communications being “given” electronically (which can include email and SMS) provided that the intended recipient has given prior consent to receiving communications electronically.

Another question that has been highlighted by the recent Hutchison Ports story is when can employers determine that an email or text message has actually been received and read? Hutchison Ports are reported to have sent text messages a few minutes before midnight to its employees notifying them that they had received a letter from Hutchison Ports by email. The letters of termination were attached to those emails.

Where a written notice has been sent electronically, by operation of the ETA, the communication itself is deemed to have arrived immediately. However, the actual time of receipt of the communication doesn’t occur until the intended recipient has become aware that the electronic communication has been sent. In the Hutchison Ports case, it is unlikely that the employees would have been aware of the notices of termination until at least the following day.

RISKS TO EMPLOYERS

The Fair Work Commission has expressed strong criticism of companies that elect to terminate employees by text message on the basis that it is disrespectful to the employee, and demonstrates a lack of courage and conviction on the part of the employer. Employers that elect to terminate employees by text message therefore run the risk that their conduct will weigh against them in the context of assessing harshness in any subsequent application for unfair dismissal.

In addition, if written notice is not properly given and received, the employer may be liable for payment of wages up to the date that they can prove the employee first became aware of the notice of termination.

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BEST PRACTICE

The key issue around giving notice of termination electronically is consent. Employers that wish to communicate with their staff electronically should include a clause in their employment contracts notifying prospective employees that the company may send correspondence electronically.

In addition to the above, employers should implement a policy that clearly sets out procedure for use of electronic communication in the workplace, including:

- Acceptable forms of communication, such as email and text message;
- Identifying who the appropriate person(s) are within the company to whom employees are to send communications;
- Circumstances where it is and is not appropriate to communicate electronically, such as calling in sick and sending notices; and
- A method of confirming that electronic communications have been received.

Harmers Workplace Lawyers can assist with reviewing and updating template contracts of employment and the development of effective policies tailored to the specific needs of your business covering the use of electronic communication and digital media in the workplace.

Employers need to understand that the law in relation to termination of employment by SMS and email is not entirely settled and so in the absence of consent and a clear policy for electronic communication, for the avoidance of risk, personally handing an employee a notice of termination in a face-to-face meeting is by far the safest option.

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