

Today FM saga raises numerous employment issues

The recent abrupt closure of Today FM attracted a lot of media attention, with the shutdown playing out on air. The scandal raises questions about what employment obligations are owing when a business winds up – by both employer and employee.

It seemed like a regular Thursday morning show on Today FM until presenter Tova O'Brien suddenly informed the audience that the station was going 'off air' and that she and her colleagues were going to lose their jobs. O'Brien went on to say the station hadn't been given a chance and "*they*" had "*f***ed us*". O'Brien then told listeners they had been instructed to stop programming and to play music. O'Brien's colleague, Duncan Garner, told the audience "*this is betrayal*" and "*this is it folks*".

Later that day, producer Tom Day tweeted that the Mediaworks Board had approved a proposal to shut down the station and that staff had until the end of the day to make submissions. Garner, O'Brien and other staff were then pulled into a meeting with acting CEO Wendy Palmer. It appeared someone recorded that meeting and the audio was leaked to Stuff. The audio reveals that financial pressure was the reason behind the proposal to shut down the station. Mediaworks subsequently released a statement confirming the decision had been made to take Today FM off air.

Redundancy

The scenario that played out is awash with employment issues. A number of people at Today FM lost their jobs. This amounts to dismissal by redundancy. An employer must adhere to the same legal requirements as any other kind of dismissal, in particular, it must meet the

test of justification and the good faith requirements under the Employment Relations Act. Any termination requires employees to be consulted before a final decision is made. Even a decision to close the business should not be made until employees have had an opportunity to provide input. This requirement often comes as a surprise to employers. As owners, they may believe they have the right to manage their business as they see fit.

Consultation also underpins the duty of good faith – which requires both parties *to be communicative, responsive and active and constructive in establishing and maintaining a productive employment relationship*. Employers should not underestimate the value that employees might be able to provide and the ideas they might contribute.

To stand up in Court, what should a redundancy process look like? In a nutshell, a fair and reasonable employer would outline a redundancy proposal (including the rationale for that proposal) and provide any relevant supporting information. The employer would also allow the affected employees an opportunity to consider the proposal, seek legal advice and respond, and then genuinely consider any feedback before confirming a final decision.

So, what is a reasonable opportunity? It needn't be a long, drawn-out process. It will be fact-dependent, but a week or two is generally sufficient. In times of urgency or crisis, the duty to consult is often forgotten. This was common during the height of the COVID-19 pandemic when businesses were forced to abruptly close as lockdowns took place. Litigation ensued and the Employment Court made it clear the law did not pause over this time. It is difficult to see what the urgency was with the Today FM closure, where employees were given mere hours to consider and respond to what was being proposed. It is likely such a timeframe would be considered unreasonable.

Any proposal to cut jobs must be a genuine proposal and not a fait accompli, otherwise consultation is a

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farce. It is difficult to say for sure whether the decision to shut down Today FM was predetermined, although the extremely short consultation period suggests a decision had effectively already been made and the request for submissions may have been a 'tick-box' exercise.

Duty of fidelity

It is clear the employer has an obligation to treat employees fairly during a redundancy process. But what are the obligations of employees?

Employees also owe various obligations to their employer. Employees have a duty of fidelity, which essentially means acting in the employer's best interests. It applies even when faced with possible job loss. O'Brien and Garner's various on-air comments were highly critical of Mediaworks (in particular O'Brien's colourful "*they've f***ed us*"). Although understandable, given the circumstances, publicly disparaging your employer is not consistent with the duty of fidelity.

The duty of fidelity is implied – it is required regardless of whether it is expressly outlined in the employment agreement. However, many agreements will explicitly refer to an obligation to not disparage or bring the employer into disrepute, and some would list this as an example of serious misconduct.

Secret recordings

Stuff reported that the audio of the staff meeting was "leaked". It's not clear whether a person present at the meeting covertly recorded the meeting or sought permission. A secret recording (provided the person making the recording is part of the communication) is not illegal, in the sense that it does not breach the Crimes Act, and it is unlikely to be a Privacy Act breach. It is probably a breach of good faith and an employee making a covert recording could be liable to a penalty. However, if a case makes its way to the Employment Relations Authority (**Authority**), the recording is not automatically disregarded. The Authority is not strictly bound by the rules of evidence and has discretion

whether or not to listen to a secret recording and/or use it as part of its investigation.

Confidentiality

O'Brien and Garner's comments were not only disparaging, they publicly imparted to their listeners highly confidential information about the state of affairs at Today FM. Employees are bound by the duty of confidentiality. Like the duty of fidelity, the confidentiality obligation is an implied term of employment, although it is also a very standard clause in the majority of employment agreements. Unlike the duty of fidelity, confidentiality survives termination of employment.

A number of former employees are reportedly considering legal action against Mediaworks as a result of their termination. O'Brien has already been involved in employment litigation – she took (and lost) a case in the Authority attempting to strike out a restraint of trade in her previous employment agreement with her former employer Newshub. As a result of the case O'Brien had to wait until the restraint expired before starting at Today FM. Time will tell if she decides to pursue another employment case.

Want to know more?

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