

JUST DROP OFF THE KEY, LEE. . .

THIS MONTH JONATHAN KAPLAN INVESTIGATES THE LEGAL IMPLICATIONS OF AN INCREASINGLY COMMON PHENOMENA – BEING SACKED VIA TEXT MESSAGE.

“THERE must be fifty ways to leave your lover”, Paul Simon sang in his 70’s hit. Presumably there must also be fifty ways to fire your employees, but by text message is not one that sits well with Commissioner Ian Cambridge of Fair Work Australia who was hearing a claim for unfair dismissal. In May the NSW employee was sacked by text message after her boss complained that she had swapped shifts without permission and was late for work.

The text message read: “That shows me you not taking me serious or the work. Which hurts me enough and you can pick up your pay tomorrow and drop the key. You don’t need to call me and I don’t see that we can work together”, which reminded me of the chorus from Simon’s song:

*“Just slip out the back, Jack, make a new plan, Stan
Don’t need to be coy, Roy, just listen to me
Hop on the bus, Gus, don’t need to discuss much
Just drop off the key, Lee, and get yourself free”*

Not quite the way it went but I guess you get the message.

The Commissioner described the

method of termination as “pretty appalling” and found that the employee’s sacking by text message was “harsh, unjust and unreasonable” and awarded her \$9992. Cambridge said it suggested a “lack of courage” to fire an employee by text, adding that if dismissal is implemented by any means other than face-to-face communication, both the legal and ethical basis for the decision to dismiss is likely to face strong and successful challenge.

The Commissioner noted that there was no suggestion of any “serious misconduct” justifying instant dismissal and that the employee had not been afforded an opportunity to respond or explain the circumstances that had led to her termination.

What seems to have got up the nose of the employer was that the employee had swapped shifts with another and that \$5000 worth of clothing was stolen on the other employee’s shift. Presumably an irritation to the employer, who perhaps felt that had the swap not occurred the theft might not have resulted. As noted by Andrew Stewart, John Bray Professor of Law at the University of Adelaide: “We should be careful not to conclude it would be unfair [dismissal] merely because a person is sacked by text. But it’s certainly not a practice that would be recommended from the standpoint of good management.

In a case in Edinburgh some years ago an employee notified his intended absence by text and on returning to work was dismissed for “failure to follow company procedures” since the policy stated that absences should be notified by phone calls. However, the tribunal said that since the company



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had accepted prior notification by text message and hadn’t informed the employee of any problem, they could not dismiss him for using the same method thereafter.

If communication had always been by text (or email) between the employee and the employer, could termination occur by email, if justified? On this basis it seems that an argument could be established to fire a worker via text message.

In my early days in hospitality after text messaging became prevalent I frequently received text messages from employees “calling in sick”. Quite often these were not seen in time to

call in replacement staff, causing absolute havoc to our production. For that reason I quickly ended that practise and implemented a policy requiring employees to either call in the day before or to call the shop at opening time – unless of course critically ill and unable to speak, which was very rare.

As the commissioner in yet another case in NSW in 2003 warned: “E-mails, text messages and answering machines are inappropriate for important official business communication. What happened to the old-fashioned letter or talking to someone in person?”

Having difficult conversations is an art in itself – an art in which few employers and employees are especially skilled. This case should be the cue for some specialist training. ❧