

# **Dowling v Cardcall Pty Ltd [2006] NSWIRComm 1013 (30 March 2006)**

Last Updated: 30 March 2006

NEW SOUTH WALES INDUSTRIAL RELATIONS COMMISSION

CITATION : Dowling v Cardcall Pty Ltd [\[2006\] NSWIRComm 1013](#)

FILE NUMBER(S): 2586

HEARING DATE(S): 18/08/2005

06/09/2005

01/02/2006

EX TEMPORE DATE: 01/02/2006

**PARTIES:**

**APPLICANT**

Shane Francis Dowling

**RESPONDENT**

Cardcall Pty Ltd

JUDGMENT OF: Cambridge C

**LEGAL REPRESENTATIVES**

**APPLICANT**

Self represented

**RESPONDENT**

Mr T Bors barrister

Solicitors for respondent

Hassett Dixon

**CASES CITED:**

LEGISLATION CITED: Industrial Relations Act 1996 [NSW]

JUDGMENT:

- 1 -

## **INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES**

**COMMISSIONER CAMBRIDGE 1 February 2006**

**Matter No IRC 2586 of 2005**

**Shane Francis Dowling -v- Cardcall Pty Ltd**

Application by S Dowling regarding a claim for unfair dismissal made pursuant to [section 84](#) of the [Industrial Relations Act 1996](#).

### **EXTEMPORE DECISION**

**[2006] NSWIRComm 1013**

1 This matter involves a claim for unfair dismissal. The claim was made pursuant to [section 84](#) of the [Industrial Relations Act 1996](#) [NSW], (the Act). The claim was filed on 19 May 2005, by  **Shane Dowling**  (the applicant), and named the respondent employer as CardCall Pty Ltd, (CardCall). CardCall is apparently a Queensland based division of Telecorp Limited (ABN 84 091 707 970), (the employer).

2 Following unsuccessful conciliation the matter has proceeded to arbitration. The arbitration proceedings have become convoluted and extended such that the proceedings today, 1 February 2006, have initially involved the applicant's notice of motion which essentially sought to reopen the Hearing to permit the taking of further evidence including re-calling some witnesses who provided evidence during the earlier days of Hearing, 18 August and 6 September 2005.

3 The Commission now issues this extempore Decision in accordance with internal protocols established in conjunction with Practice Direction number 17. The Commission reserves determination in respect to any subsequent issue and publication of considered reasons for judgement which may be made at a later date.

### **THE NOTICE OF MOTION**

4 This Decision firstly confirms that the applicant's notice of motion has been refused. The Commission is not persuaded that the interests of justice would be served by permitting the re-opening of the matter so as to allow the taking of

further evidence. The substantial documentary material accompanying the notice of motion does not impact upon the issues for determination of the applicant's unfair dismissal claim. Although some of this material may reflect poorly upon some aspects of the employer's business practices, it is irrelevant to any determination of the unfair dismissal claim.

## **THE UNFAIR DISMISSAL CLAIM**

5 The applicant was dismissed on 16 May 2005 because, contrary to clear instruction from the employer, he sent an e-mail to a large number of the employer's customers, the effect of which was unequivocally harmful to the employer's business interests. Although the applicant had some reasonable basis for complaint about an occupational health and safety issue, this complaint did not entitle the applicant to deliberately damage the employer's business by circulation of the offending e-mail.

6 The applicant had knowledge of and access to other proper channels for raising occupational health and safety concerns. Indeed the employer invited the applicant to pursue his occupational health and safety complaint with the relevant government authorities. The Statement and Interim Orders of this Commission as issued in this matter on 25 August 2005, would have been unnecessary had the applicant devoted his energies to constructing a documentary report to, inter alia, Workcover New South Wales, rather than the e-mail that he understood would precipitate his dismissal.

7 The actions of the applicant in sending the e-mail to customers, represented an act of gross misconduct which, in the circumstances of this case, can not be justified by any associated, legitimate, occupational health and safety complaint.

8 Rather than protect the health and safety of others, the applicant's actions only served to deflect attention away from the elevated concentrations of solvents in the promotional flags and focus upon his misconduct instead. The simple, logical alternative would have been to make a documentary report to the appropriate agencies so as to hasten a comprehensive analysis of the solvent in flag issue.

9 Consequently the Commission finds that the applicant deliberately engaged in serious misconduct aimed at damaging the employer's business. Therefore the dismissal of the applicant was not harsh, unjust or unreasonable. The dismissal of the applicant was for proper, substantive reasons, and without significant procedural defect that would provide any basis for the Commission to disturb the employer's decision to dismiss the applicant.

10 Therefore the applicant's claim has not been made out. Consequently the matter is dismissed and proceedings are accordingly adjourned.

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LAST UPDATED: 01/02/2006