



PRIVACY CONCERNS TO BE CONSIDERED WHEN COLLECTING BIOMETRIC DATA

The Fair Work Commission Full Bench has allowed an employee to appeal his dismissal for repeatedly refusing to use his employer's biometric fingerprint scanner, which monitored site attendance and tracked shifts.

It was found that an appeal would be in the public interest and raise "important, novel and emerging issues, not previously the subject of Full Bench consideration or guidance."

Deputy presidents Sams and Gostencnik and Commissioner McKinnon ruled that the appeal will be the first time the Full Bench has considered whether the refusal of an employee to provide their biometric data through a fingerprint scanner, for the purposes of recording their presence at the workplace, constitutes a valid reason for dismissal.

Background

In the first instance decision, Commissioner Hunt held that the dismissal was fair on the basis that the employee had refused to follow a lawful and reasonable site attendance policy, requiring him to use the fingerprint scanner as a safety measure to record attendance on site at Superior Wood's sawmill in Imbil, near Gympie in Queensland. The employee, a casual factory hand, was the only member of Superior Wood's 400-strong workforce at the Imbil site who had refused to use the fingerprint scanners.

Commissioner Hunt said the factory hand had objected to using the biometric scanners because of his concerns about the collection and storage of his personal information by the scanners and Superior Wood.

The factory hand also claimed that the site attendance policy (and Superior Wood) had breached the *Privacy Act 1988* (Cth), including Australian Privacy Principle 3.3, which prohibits the collection of a person's sensitive information without consent.

To address the factory hand's concerns regarding the collection of his biometric data, Superior Wood met with him numerous times between November 2017 and February 2018, however, he steadfastly maintained his refusal to use the scanners, and proposed to continue using the "paper sign-in" process, or a swipe card system.

Conclusion

The Full Bench said Superior Wood had insisted that all employees use the fingerprint scanners because "it would be impractical to allow one employee to be exempt from an improved safety measure, when all other employees had agreed to do so".

However, leave to appeal was granted to the factory hand for a number of reasons, including that there was an arguable case of appealable error about whether Superior Wood's request to comply with its attendance policy was lawful and reasonable in the context of the factory hand's refusal to provide consent to the disclosure of his personal biometric data.

What will the appeal mean for employers?

The appeal is likely to examine the operation of the employee record exemption under the *Privacy Act 1988* (Cth) to the collection of an employee's biometric information. It will also look at whether a direction to an employee to allow the collection of their biometric information would be reasonable and lawful in circumstances where the employee does not consent to the collection.

Until the final determination of these issues by an appeal, employers should be cautious about compelling employees to provide their biometric data through devices such as fingerprint scanners, facial recognition tools or wearable devices (a trend which is gaining momentum overseas). This is because the operation of the employee record exemption on the collection of biometric data remains unclear, and dismissal for refusing to provide such data may create unfair dismissal risk for employers.

For further information please contact:



MARK SANT

Partner, Sydney
T +61 (0)2 9320 4601
E mark.sant@hfw.com



BRENDAN MILNE

Partner, Melbourne
T +61 (0)3 8601 4505
E brendan.milne@hfw.com



ROBBIE STEPHENSON

Associate, Melbourne
T +61 (0)3 8601 4507
E robbie.stephenson@hfw.com

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our capabilities, please visit www.hfw.com

hfw.com

© 2019 Holman Fenwick Willan LLP. All rights reserved. Ref: 001092

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific