

**Senate Standing Committee on Education Employment and Workplace  
Relations**

**QUESTIONS ON NOTICE  
Supplementary Budget Estimates 2010-2011**

**Outcome 5 - Workplace Relations**

**DEEWR Question No.EW0596\_11**

**Senator Abetz asked on 20/10/2010, Hansard page 95.**

**Question**

**FAIR WORK ACT - UNFAIR DISMISSAL CASE**

wonder if you are aware of the sex offender who won an unfair dismissal case. It was reported on Wednesday, 7 July 2010 in the news. Senator Chris Evans—I am not. Senator ABETZ—It said: A VICTORIAN man convicted of possessing child pornography and allegedly sexually harassing his co-workers has won an unfair dismissal case against food giant Nestle. I wonder if the government thinks that this is exactly how they expected the Fair Work Act to operate. Senator Chris Evans—Clearly I have not seen the article and do not know anything about the case, so I would not comment. Senator ABETZ—Could you take that on notice? Ms Paul—I think we will need to take it on notice.

**Answer**

It is assumed that the case being referred to concerned the dismissal of an employee from Nestle Australia Limited trading as Uncle Tobys. The case citation is *Mr Steve Leigh aka Wilson v Nestle Australia Limited T/A Uncle Tobys* [2010] FWA 4744.

Section 387 of the *Fair Work Act 2009* requires FWA to consider a range of factors in deciding whether a dismissal was unfair. These factors include:

- whether there was a valid reason for the dismissal relating to the person's capacity or conduct;
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason(s) given for dismissal.

FWA found that both the employee's criminal convictions and sexist comments towards female co-workers provided valid reasons for termination. However, FWA was critical of the lack of procedural fairness afforded to the employee – he was not notified of the reasons for his dismissal and was not given an opportunity to respond to the allegations against him. This deficiency was sufficiently significant for FWA to find the dismissal unfair.

FWA indicated that a reasonable process would have allowed the employee an opportunity to respond to the newspaper reports about his offences and to put any mitigating factors to the employer.

FWA held that reinstatement was inappropriate and instead ordered ten days wages as compensation. This was calculated based on the period of time (four weeks) that the employee would have continued to be employed prior to dismissal had the employer implemented a proper disciplinary process.

The concept of procedural fairness is an integral consideration in determining whether a dismissal is unfair. In the circumstances of this case, FWA found the procedural deficiencies to be so significant as to render the dismissal unfair despite there being a valid reason for the termination.

A person who is aggrieved by a decision made by FWA may seek to appeal under section 604 of the *Fair Work Act 2009*. Section 400 of the *Fair Work Act 2009* provides that FWA must not grant permission to appeal an unfair dismissal decision unless FWA considers it is in the public interest to do so and, if the appeal is on a question of fact, if the decision involved a significant error of fact. As far as the Department is aware, the employer did not seek to appeal the decision.