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THE BUSINESS NEWSLETTER FROM AUSWILD & CO
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WFH: EMPLOYER 1 – EMPLOYEE 0

In a win for employers, the Fair Work Commission (FWC) recently dismissed an unfair dismissal case brought by a work-from-home employee, whose employment was terminated after her employer, insurer IAG, found low keystroke activity while monitoring her laptop.

This decision has added new fuel to the ongoing discussions between businesses and their employees about the ability to productively work from home and comes as many large and small employers are seeking to have employees return to the workplace after the popularity of hybrid arrangements following COVID-related lockdowns.

Whilst it is worrying that big brother-like technology is being used by employers, business owners are rightfully concerned about how unions are currently trying to enshrine work-from-home clauses in employees' contracts.

This is what Fair Work Commissioner Thomas Roberts found, so you be the judge:

- The employee received a formal warning in November 2022 about her work output.
- She was put on a performance improvement plan.
- She became uncontactable.
- The employee failed to lodge a Product Disclosure Statement resulting in a fine for IAG.
- After that, her work on the computer was tracked for 49 days and her keystroke activity was embarrassingly low.
- There were significant periods where no or minimal keyboard activity was evident, including 143 hours in a month with zero keystrokes.
- Her average strokes over the tracking period were 54 per hour!

While the employee said she was suffering mental health issues and offered excuses for the low keystroke activity, such as she had used other devices, the Commissioner did not buy into her explanations and concluded that the employee was not performing the inherent requirements of her role and there were serious issues related to conduct.

Commissioner Roberts said that he had "little doubt that the factors underlying the applicant's disconnection from work were serious and real," and was satisfied that the dismissal was not harsh, unjust, or unreasonable.

Monitoring employee output

Keystroke technology has been implemented by some organisations offering hybrid or flexible work arrangements as a management tool to monitor productivity. Among other things, it is used to measure the number of times an individual presses a key on their keyboard during a recorded period.

Legally, there is no inherent difference in an employer's ability to monitor the output of their employees whether they work from home or the office. In both settings, employers generally trust employees to conduct the work required of them and are entitled to monitor whether they are doing so.

Further, employers have a general right to monitor and review output as it relates to an employee's performance.

What the FWC decision means

While this case concerns an employee whose productivity was not satisfactory while working from home, it confirms that employers are able to monitor their employee's performance regardless of the employee's location.

While many employers and industry groups are exploring ways to get employees to return to working at offices, this is often based on a misunderstanding that employees will always be more productive in an office setting or that productivity is easier to measure in an office setting.

The reality is that there is an element of trust in an employment relationship whether an employee is at home or the office, and employers are entitled to monitor output whether an employee is at home or at the office.

Footnote

The Daily Mail Australia reports that the woman in question is now on Centrelink benefits and complains that this public exposure of her plight will mean she'll never get a job. However, she seems destined to use the 'bad' publicity to build up her profile as a micro-influencer on Tik Tok and Instagram!