



Summary of Decision

11 November 2013

Colson, Mark v Barwon Health

U2012/10440

1. This decision concerns only the question of remedy. Previous decisions of Commissioner Roe and the Full Bench on appeal have dealt with the question of whether the dismissal of Dr Mark Colson by Barwon Health, was harsh, unjust or unreasonable.
2. The Commission has determined that reinstatement of Dr Colson is inappropriate and that in all of the circumstances an order of compensation to be paid to Dr Colson in the amount of \$59,050.00 is appropriate. This is the maximum compensation available at the time of Dr Colson's dismissal.
3. The Commission determined that reinstatement is not appropriate for several significant reasons, including a clear breakdown of trust and confidence between Barwon Health management, in particular with Dr Colson's immediate supervisors in the Department of Anaesthesia.
4. This matter has a long and public history. On 30 May 2012 Dr Colson was dismissed from his employment with Barwon Health where he had worked as an anaesthetist since 1998. Barwon Health summarily dismissed Dr Colson from his employment because of serious misconduct.
5. The matter had previously been heard and determined by Commissioner Roe in February 2013. In his decision Commissioner Roe found that Dr Colson's dismissal had been unfair and ordered his subsequent reinstatement. However given his contributory misconduct, did not order back-pay to be paid.
6. Following an appeal by Barwon Health to the Full Bench, it was determined that Commissioner Roe had made a number of significant errors of fact in his consideration of whether there was a valid reason for the termination of Dr Colson's employment and that there were a number of erroneous findings in the Commissioner's consideration of the allegations against Dr Colson.
7. The Full Bench concluded that there were valid reasons for the termination of Dr Colson's employment, however these reasons could not be regarded as serious misconduct justifying summary dismissal. The Full Bench therefore concluded that the termination of Dr Colson's employment was harsh, particularly having regard to his lengthy period of service and the significant impact of the termination on his reputation and his ability to find future employment in the region where he lives.
8. In determining the question of remedy, in particular whether reinstatement was appropriate, the Commission considered several important elements including:
 - whether there had been a loss of trust and confidence between Dr Colson and his immediate managers and Barwon Health management
 - whether Dr Colson's own behaviour and continued 'obstinacy' would have a significant impact on his ability to return to a constructive and productive working

relationship with his immediate managers and Barwon Health management generally

- Dr Colson’s conduct and behaviour during his three-month return to work in.
9. The Commission also considered the widespread regard with which Dr Colson was held by his colleagues and co-workers for his clinical expertise and competence.
 10. It also considered the likely impact on Dr Colson and his family, should he not be reinstated, particularly in relation to his ability to find suitable ongoing employment in the region or establishing a successful private practice in the area.
 11. Following these considerations Deputy President Gostencnik concluded:

“Although this matter is finely balanced and the consequences for Dr Colson in not being reinstated are significant and have weighed heavily on me, I am satisfied based on the totality of the evidence, that reinstatement in this case is inappropriate.

“... Taking into account the findings of the Full Bench and all of the circumstances of this case, I am satisfied that an order for compensation is appropriate.”
 12. In determining compensation the Commission considered Dr Colson’s likely earnings should his employment not have been terminated, his earnings during his brief period of reinstatement, Dr Colson’s contributory misconduct, and his other earnings since his dismissal.
 13. The total compensation after deductions for remuneration earned and misconduct contribution was \$431,173.32.
 14. By reason of s392 (5) the Commission was unable to order the amount of compensation calculated above. It was only able to order the lesser of the amounts referred to in s392 (5) that being half the amount of the high income threshold that applied immediately before the dismissal. That amount is \$59,050.00.

Dr Mark Colson v Barwon Health [\[2013\] FWC 8734](#)

This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.

- ENDS -

For further information please contact:

Di Lloyd
Manager Media and Communications
Phone: (03) 8661 7680
Email: communications@fwc.gov.au