

## Article Information

Authors: David Ey, Gemma Twemlow

Service: Employment & Labour

---

### “Smoko” break, going up in smoke

**The Fair Work Commission’s recent decision of *Bajada v Trend Windows and Doors Pty Limited* [2018] FWC 5937 takes on whether smoking at work can constitute a valid reason for dismissing an employee.**

---

Whether employers like it or not, a significant number of the workforce today smoke. The smoke break continues to remain a controversial topic amongst employees who do not smoke given they miss out on additional breaks and the lost productivity and expense it causes employers and businesses.

Whilst the *Fair Work Act 2009* (Cth) (**the Act**) does not contain any entitlement for employees to take smoke breaks, modern awards and enterprise agreements may set out an employee’s right to take ‘rest’ breaks, however not smoke breaks. Whether and how an employee is permitted to take a smoke break is entirely up to the employer, generally governed by specific policies and procedures relevant to each workplace.

Whether an employer can terminate an employee for smoking is dependent upon the facts and circumstances surrounding each case. In the recent decision of *Bajada v Trend Windows and Doors Pty Limited* [2018] FWC 5937, the Commission has held that an employee’s constant wilful disregard of a workplace smoking policy constituted a valid reason for his dismissal. The case is discussed below.

Mr Bajada was employed by Trend Windows and Doors (**Trend Windows**) as a labourer. Trend Windows’ smoking policy allowed smoke breaks during scheduled meal breaks and rest breaks only.

On a number of occasions Mr Bajada was given warnings after having breached the smoking policy by taking smoke breaks outside of scheduled meal and rest breaks. Whilst disciplinary documents were prepared by Trend Windows in relation to those breaches, Mr Bajada refused to sign them. Instead, Mr Bajada asserted he was entitled to smoke at any time and wherever he pleased on the basis that it “relaxed him” as he found dealing with management stressful.

Trend Windows offered Mr Bajada time off work to seek help to deal with his smoking addiction.

Following that leave and upon Mr Bajada returning to work, Mr Bajada, in what the Commission described as a “*breathhtaking act of disobedience*”, breached the smoking policy again. As a result, and unsurprisingly, Trend Windows terminated Mr Bajada’s employment. Mr Bajada challenged his termination.

The Commission upheld the termination of Mr Bajada’s employment stating that, despite Mr Bajada’s long period of service (approximately 14 years) and otherwise sound work record, the employer’s policy was clear and reasonable and that it had been more than patient in dealing with Mr Bajada’s breaches of the policy. Mr Bajada’s unfair dismissal claim was dismissed with the Commission stating:

*[32] It is often said that “smoking kills”, well on this occasion it killed Mr Bajada’s employment. And just as smoking is one of the largest causes of preventable death and illness in Australia, the devastating outcome for Mr Bajada was also preventable. All he had to do was comply with the policy. He could continue to smoke so long as he did it during identifiable breaks and in designated areas. He chose not to do so.*

An employer can rely upon a smoking policy which places restrictions on when employees may take smoking breaks during work hours. If a workplace has a smoking policy, the right of an employee to take a smoke break is not unrestricted and employees must comply with the limitations placed on them by the relevant policy.

If you would like advice on your organisation’s smoking policy or with responding to employee misconduct, please contact

