Q. If the University demotes a staff member following a finding of misconduct or poor performance, can the staff member claim they have been unfairly dismissed?

A. If the enterprise agreement allows for demotion as a form of disciplinary action, and the University has complied with its obligations under the agreement, then the demotion will not be a “dismissal” and the staff member will not have access to the unfair dismissal jurisdiction of the Fair Work Commission.

At common law, a demotion will often effectively amount to a termination of employment because the employer is unilaterally changing the contract of employment without the employee’s consent. The Fair Work Act 2009 has gone some way to overriding the common law, by providing that a demotion will not equate to a dismissal if:

- the demotion does not involve a significant reduction in the staff member’s remuneration and duties; and
- the staff member remains employed with the employer.

However, even a demotion that amounts to a significant reduction in remuneration and duties will not be a termination if the employee is covered by an industrial instrument that expressly allows for demotion. The great majority of enterprise agreements at universities allow for demotion as a form of disciplinary action that can be taken following a finding of misconduct or poor performance.

In 2014, the Fair Work Commission dismissed an unfair dismissal application by a university employee who had been demoted following the outcome of a Misconduct Investigation Committee.¹ In doing so, the Commission followed Full Bench authority from a case also involving a university, decided under the previous federal legislation.²

It should also be noted that if the employee is not covered by an enterprise agreement, but their written contract of employment allows for demotion, then demotion will also not amount to termination.³

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¹ Terence Lollback v University of Southern Queensland [2014] FWC 2011
² Elizabeth Gorczyca v RMIT University (PR922414)
³ Hermann v Qantas Airways Ltd (PR903096)