GIBSON v BOSMAC PTY LIMITED

Wilcox CJ

5 May 1995

Termination of Employment — Unlawful dismissal — Application for review of decision by Judicial Registrar dismissing claim of unlawful terminaton — Nature of review — Hearing de novo — Parties entitled to have case reviewed by the judge without any limitation imposed by the conduct of the case before the Judicial Registrar or the Judicial Registrar's findings — Employment terminated because of employee's refusal to work Saturday overtime as directed by employer — Warning to employee — Whether procedural fairness — Whether employee denied opportunity to defend himself — Whether termination was harsh, unjust or unreasonable — Substantive fairness — Lack of notice — Applicant entitled to notice — Damages awarded in lieu of notice — Industrial Relations Act 1988 (Cth), ss 170DB, 170DC, 170DE, 170EDA, 170EE, 376, 377.

WILCOX CJ. This is an application for review of a decision of a Judicial Registrar dismissing a claim of unlawful termination of employment. The applicant for review is the dismissed employee, Allan Craig Gibson. The respondent is the former employer, Bosmac Pty Limited.

The nature of the review

Before going to the facts of the case, it is desirable that I deal with some submissions put to me by counsel for the respondent concerning the nature of review by a judge of a decision of a Judicial Registrar in an unlawful termination case. I can do this briefly because the subject was comprehensively addressed by Moore J in *Association of Professional Engineers, Scientists and Managers Australia v Deniliquin Council* (1995) 58 IR 275. In a judgment with which I agree, his Honour referred to the relevant legislation and the authorities that bear on the matter.

First, counsel submits that such a review ''is not a hearing de novo in the sense that such a hearing requires a rehearing of all the evidence, by reference to which fresh findings of fact are made''. If it was, he says, the ''charter of this Court to deal with terminations would be frustrated by a caseload of full

rehearings of matters heard and determined before Judicial Registrars''. He points out that the legislation concerning review of decisions made by Judicial Registrars in this Court does not expressly provide for a rehearing de novo. He contrasts this with the rule of the Family Court of Australia considered in *Harris v Caladine* (1990) 172 CLR 84.

Counsel's second submission is that a decision of a Judicial Registrar is a discretionary one, so that a judge conducting a review must bear in mind the principles concerning review of a discretionary decision that have been applied in cases like *Mace v Murray* (1955) 92 CLR 370 at 378.

It seems to me that both these submissions are erroneous. In determining an unlawful termination claim, a Judicial Registrar exercises the powers of the Court: see s 376(1)(b) and (4) of the *Industrial Relations Act* 1988 (Cth) and O 74, r 2 of the Court's rules. But s 377(1) of the Act permits any party to the proceeding to apply to the Court to review a Judicial Registrar's exercise of power. Subsection (2) provides that, on such an application, ''the Court may review'' the exercise of power and ''make whatever order it considers appropriate in relation to the matter in relation to which the power was exercised''. It is correct, as counsel observed, that there is no reference in s 377 to the review being a hearing de novo; but the section imposes no restriction on the extent of review. The reason for this is clear; a right of full review is a constitutional precondition to the vesting of the Court's powers in a non-judicial officer. This was pointed out by Mason CJ and Deane J in *Harris v Caladine* at 95:

> ''It seems to us that, so long as two conditions are observed, the delegation of some part of the jurisdiction, powers and functions of the Family Court as a federal court to its officers is permissible and consistent with the control and supervision of the Family Court's jurisdiction by its judges. The first condition is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters. The second condition is that the delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court. For present purposes it is sufficient for us to say that, if the exercise of delegated jurisdiction, powers and functions by a court officer is subject to review or appeal by a judge or judges of the court on questions of both fact and law, we consider that the delegation will be valid. Certainly, if the review is by way of hearing de novo, the delegation will be valid. The importance of insisting on the existence of review by a judge or an appeal to a judge is that this procedure guarantees that a litigant may have recourse to a hearing and a determination by a judge. In other words, a litigant can avail him or herself of the judicial independence which is the hallmark of the class of court presently under consideration.''

See also Dawson J at 121-122, Gaudron J at 151 and McHugh J at 164, noting that McHugh J went so far as to state that the power *must* be ''subject to review by way of a de novo hearing'' by a judge.

The term ''hearing de novo'' is perhaps ambiguous. It may be understood to mean a hearing conducted as if there never had been a hearing before the Judicial Registrar; everything concerning that hearing being completely ignored. Alternatively, it may be understood to mean no more than a hearing at which the parties are not bound by the course they took before the Judicial Registrar, where they have the right to adduce such further evidence as they wish, perhaps to adopt positions and put contentions different from those adopted before, and put to, the Judicial Registrar; and, of course, where the judge is not bound by the Judicial Registrar's findings of fact. Like Moore J, I think a review hearing is a ''hearing de novo'' in the latter sense. A hearing conducted in that way answers the constitutional requirement described by Mason CJ and Deane J, ''a hearing and a determination by a judge'', without forcing on the parties, as a matter of necessity in all cases, the burden of relitigating all issues.

There may be occasions when it will be appropriate to conduct the review hearing as if there had never been an earlier hearing; perhaps because the earlier hearing so miscarried that the evidence became confused and the findings irrelevant or there is so much new evidence that it swamps the earlier. But ordinarily this will not be so. Where parties make a conscientious effort to adduce the relevant evidence at a properly conducted first hearing, by the end of that hearing they will ordinarily have found considerable common ground. It will have become apparent that some issues, on which they initially had inconsistent positions, are irrelevant or peripheral. They will have dropped out of the case. Differences of evidence on other issues will have been reconciled or explained; it may have become apparent to everyone that one particular version of events is more likely to be correct than its competitor. It would be unfortunate indeed if constitutional necessity compelled the Court to ignore this narrowing of the dispute. I do not think it does. The relevant constitutional principle means no more than that, on review, the parties are entitled to have the case reviewed by the judge, without any limitation imposed by the conduct of the case before the Judicial Registrar or the Judicial Registrar's findings. The parties have the right to call such additional evidence as they wish, subject to relevance and other usual canons of admissibility. The judge must decide the relevant facts for himself or herself, and not simply adopt the findings of the Judicial Registrar. But the principle does not require the parties to ignore the evidence tendered to the Judicial Registrar; on the contrary it will ordinarily be sensible for that evidence to be tendered to the judge conducting the review.

In most cases, by the review stage, the critical factual issues will be few and well-defined. The course most conducive to the proper conduct of the review will be for the judge, in conjunction with the parties, to identify and concentrate upon those issues. Although nobody is not bound by the Judicial Registrar's findings of fact, and it is important that everybody concerned with the case understands that, the Judicial Registrars' reasons for decision will usually assist to identify the issues to be determined on the review. In the review cases that have so far come before me for pre-trial directions, including this present case, after discussion with the representatives of the parties, I have required the applicant for review to file and serve, within a specified time, a document identifying the findings of fact of the Judicial Registrar that will be challenged by the applicant at the hearing of the review and to state any findings of fact, not made by the Judicial Registrar, that the applicant will say ought to have

been made. So far, nobody has reported any difficulty in complying with this direction. In every case a brief document has been filed identifying the controversial findings and indicating the findings sought on review. The document has had the effect of concentrating everybody's attention on the matters truly in issue.

In the present case, this procedure had the result that, when the matter came on for hearing, counsel for the applicant was able to announce that there was only one finding of the Judicial Registrar that his client did not accept (her finding about the content of a particular conversation), but, even in relation to this issue, it was not necessary to call oral evidence because he was prepared to argue the case on the basis that the finding was correct. In other words his client waived his right to have me decide for myself what was the truth about the conversation and asked me to determine the case on the assumption that the substance of the conversation was as found. The applicant's decision to adopt this course obviated the necessity for the parties to the conversation to travel from Parkes, in the Central West of New South Wales, to Sydney to give oral evidence before me.

I do not suggest that it will always be appropriate for a judge conducting a directions hearing to give a direction along the lines I have mentioned. The overriding concern of the judge must be to make the directions that are most conducive to the just determination of the matter. If a different course seems more appropriate, having regard to the nature of the case and the issues, that is the course that ought to be taken. However, efficiency and expedition are important components of justice, especially in this area of law. If experience to date is any guide, these factors will often commend the type of direction I have described; thereby, at the one time, upholding the parties' constitutional right to a judge's determination of the issues in the case whilst relieving them from retreading now non-controversial ground.

It follows from what I have said that counsel's second submission must be erroneous. Not only does a Judicial Registrar's decision not attract the sanctity commonly accorded a discretionary decision; it is not binding on the judge in any way. I add that a Judicial Registrar's decision on the question whether the relevant termination was unlawful is not a discretionary decision at all. It is a decision based on findings of fact. If relevant facts are proved, the termination is unlawful. If they are not proved, it is not. The only possible discretionary element in the decision is in relation to remedies: see s 170EE.

The facts of this case

The applicant was born on 2 July 1962. He is a married man with two young children, resident at Parkes. He was employed by the respondent for a period exceeding six years, from 21 March 1988 until 27 May 1994. His employment was terminated by his employer on that day, a Monday, because of his failure to report for overtime work on the preceding Saturday.

The respondent operates an engineering workshop serving the local farming, mining and manufacturing industries. Although he is not a qualified tradesman, Mr Gibson was employed by the respondent to do welding work. He was able to do this work satisfactorily. The case was conducted on the basis that the applicant was a competent, efficient and hard-working employee and that, but for difficulties arising out of his unwillingness to work Saturday overtime, there would have been no reason for the respondent to terminate his employment.

The applicant, and the other 10 people employed in the respondent's workshop, were employed under a State award, the Metal and Engineering Industry (New South Wales) Award. That award provided for a standard 38-hour working week. However, it was the practice of the respondent to require all workshop employees to work five eight-hour days, taking the standard working week to 40 hours. As a matter of routine, two hours overtime were paid.

There were occasions when the respondent requested employees to work on Saturdays, this work being paid as additional overtime hours. It seems that, until April 1994, the applicant usually acceded to these requests, although with some reluctance. Sometimes he successfully asked to be excused the Saturday work. As I have mentioned, the applicant has a young family. He apparently valued being at home at weekends, particularly after March 1992. In that month Mr Gibson and his wife purchased the house in which they reside. They have since been involved in its renovation. In addition, Mr Gibson is a keen aviculturist. He has a collection of about 100 birds that need regular care and feeding.

The Office Manager of the respondent, Robert Ehsman, gave affidavit evidence that, prior to April 1994, the system at Bosmac concerning Saturday overtime was that, where this was required as a result of customer requirements, a foreman would give the necessary instructions to relevant employees. He said that, by April 1994, the frequency of Saturday overtime was increasing and the system was proving unsatisfactory because of the short notice given to employees. In his affidavit he also said it was unsatisfactory because ''Mr Gibson was not doing his fair share of overtime work, which resulted in other employees having to complete additional overtime hours''. However, there is no evidence that Mr Gibson, not being excused, refused, or failed, to work Saturday overtime before April 1994. Mr Ehsman based the statement in his affidavit on an analysis of the respondent's records that showed Mr Gibson had worked less overtime than most of the other workshop employees; but this is consistent, of course, with him more often seeking to be excused.

In April 1994, Mr Ehsman decided to take the direction of employees concerning overtime out of the hands of the foremen and to attend to this himself, endeavouring to give them longer notice.

Mr Ehsman said that on Thursday, 14 April, it became apparent that it would be necessary to have employees work on the following Saturday. After discussion with the two foremen in the shop he spoke to the individuals they needed, including Mr Gibson. He told Mr Gibson that he was required to work for three to four hours on the Saturday. Mr Gibson did not indicate, one way or the other, whether he would attend. Mr Ehsman spoke to him again on the following day, the Friday, but Mr Gibson only replied ''You'll be lucky''. He did not in fact attend for work on the Saturday with the result, according to Mr Ehsman, that the seven employees who did attend had to work about 30 minutes longer than otherwise.

On the following Monday, 15 April, Mr Ehsman drafted a memorandum. He pinned it to the staff noticeboard. The memo read:

> ''The following extract is from the Metal and Engineering Industry (New South Wales) Award, Clause 11, Section L.
>
> 'An employer may require any employee to work reasonable

overtime at overtime rates and such employee shall work overtime in accordance with such requirement.

The assignment of overtime by an employer to an employee shall be based on specific work requirements and the practices of ''one in, all in'' overtime shall not apply.'

The purpose of this memo is to remind all employees that in the current situation, we must work overtime to ensure that customer's timing needs are satisfied.

Notwithstanding the second part of the clause, under the current work-load, we need every available hour of overtime to be worked in accordance with customers' requirements — the alternative is to employ someone who will work when needed.''

Mr Ehsman prepared a note addressed to Mr Gibson individually and handed it to him. The note read:

''There is a memo attached to the notice board reminding employees of the overtime award requirements.

As you have on several occasions in the past, refused to work overtime or have just not turned up, we must advise that this is an official warning that you must work overtime when customers' timing dictates. Failure to comply with this notice, will result in termination.

We will endeavour to advise you when overtime is required with as much lead time as possible.''

During the following few weeks there were occasions when Mr Gibson worked more than the standard two hours overtime. There was no problem about this overtime. But it was on weekdays. He was not asked to work Saturday overtime again until Friday, 27 May. Early that day, Bosmac received an urgent order from a customer. According to Mr Ehsman (and this is the conversation the subject of my earlier comment), Mr Ehsman went into the morning tea room at about 10 am, when the employees were having tea, and told them he wanted ''everyone to work tomorrow, if possible''. Mr Ehsman said that Mr Gibson replied ''I won't'', he asked him why and Mr Gibson said ''Too much to do''. Mr Ehsman said he responded ''Like what?'', but Mr Gibson made no reply. After morning tea, according to Mr Ehsman, he approached Mr Gibson privately and said to him: ''Gibbo, you need to turn up tomorrow. If you don't, don't bother coming in on Monday.'' He said Mr Gibson made no reply.

Mr Ehsman said Mr Gibson left work at about 4 pm that day; as he passed Mr Ehsman's desk, Mr Ehsman said ''See you tomorrow''; Mr Gibson said ''Not tomorrow'' and he replied ''If you don't come in, you can pick up your tools on Monday''. Mr Gibson made no reply.

Mr Gibson did not attend work on the Saturday. The evidence does not disclose his reason. Eight of the workshop employees attended, the other two having been excused by Mr Ehsman for reasons he considered adequate. On the Monday morning, 27 May, Mr Gibson arrived at work at his usual time, about 7.30 am. He approached Mr Ehsman saying ''What do I do? Do I pick up my tools or what?'' Mr Ehsman replied: ''Pick up your tools.'' Mr Gibson then collected his tools and left the premises. Later that day he returned to the premises and sought an Employment Separation Certificate in order to obtain social security. This was provided to him. He was paid off that day. No payment in lieu of notice was made. In an affidavit read before the Judicial

Registrar, and therefore treated as read before me, Mr Ehsman said the reason for the respondent's decision to terminate Mr Gibson's employment was that ''he failed to obey the reasonable and lawful direction of the respondent, that being a direction to work overtime''.

Procedural fairness

Counsel for the applicant puts his client's case of unlawful termination on two bases. First, he argues that the termination was unlawful because his client was denied an opportunity to defend himself; secondly, that the termination was harsh, unjust or unreasonable.

The first submission depends on s 170DC of the *Industrial Relations Act*. That section provides that ''(a)n employer must not terminate an employee's employment for reasons related to the employee's conduct or performance unless ... the employee has been given an opportunity to defend himself or herself against the allegations made'' or the employer could not reasonably be expected to give the employee that opportunity. There is no doubt that Mr Gibson's employment was terminated for reasons related to his conduct; namely, his non-attendance on the Saturday. There was no difficulty about Mr Ehsman giving him an opportunity to defend himself. But counsel for the respondent submits that the respondent gave Mr Gibson an adequate opportunity to defend himself. I think this submission is correct. In *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 1 IRCR 199 at 209; 57 IR 50 at 59 I discussed the significance of s 170DC. I observed that the section imposed an important limitation on an employer's power of dismissal. Ordinarily, before being dismissed for reasons related to conduct or performance, an employee must be made aware of the particular matters that are putting his or her job at risk and given an adequate opportunity of defence. However, I also pointed out that the section does not require any particular formality. It is intended to be applied in a practical, commonsense way so as to ensure that the affected employee is treated fairly. Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of the section. That was the situation in the present case. In April Mr Ehsman had made clear to Mr Gibson that he must work on Saturdays when required. On the Friday morning before the termination, he had two conversations that included Mr Gibson about work on the following day. As Mr Gibson left work on the Friday, Mr Ehsman told him that, if he did not come in on the Saturday, he could pick up his tools. Mr Gibson understood this to be a threat of dismissal. Mr Gibson had the opportunity, then and there, to say anything he wished about that threat. He had another opportunity on the Monday morning. His opening words to Mr Ehsman that day continued Friday's conversation. The question, ''Do I pick up my tools or what?'', shows that Mr Gibson went to work expecting to be dismissed, and knowing that the reason would be his failure to attend on the Saturday; the link between failure to attend and dismissal having been spelled out by Mr Ehsman on the Friday. I do not think that the respondent failed to comply with s 170DC.

Substantive fairness

The more significant issue in the case is whether Mr Gibson's dismissal was substantively unfair; that is, whether it was harsh, unjust or unreasonable.

Section 170DE(1) of the Act prohibits an employer from terminating an employee's employment ''unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service''. Subsection (2) says a ''reason is not valid if, having regard to the employee's capacity and conduct and those operational requirements, the termination is harsh, unjust or unreasonable''. Section 170EDA(1) of the Act deals with the onus of proof in respect of a claim under s 170DE(1):

> ''If an application under section 170EA alleges that a termination of employment of an employee contravened subsection 170DE(1):
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> (a) the termination is taken to have contravened subsection 170DE(1) unless the employer proves that, apart from subsection 170DE(2), there was a valid reason, or valid reasons, of a kind referred to in subsection 170DE(1); and
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> (b) if the employer so proves, the termination is nevertheless taken to have contravened subsection 170DE(1) if the applicant proves that, because of subsection 170DE(2), the reason or reasons proved by the employer were not valid.''

In this case nothing turns on the onus of proof. Mr Ehsman gave evidence that Mr Gibson's employment was terminated because of his refusal to obey a direction to work overtime and this was not contested. It is clear that, if Mr Gibson had attended on the Saturday, he would not have been dismissed. The only reason for the termination was his absence that day.

In support of his contention that the termination was harsh, unjust or unreasonable, counsel for the applicant made the point that this is not a case of a general refusal to work overtime, in defiance of the award obligation ''to work reasonable overtime at overtime rates''. In the week ended 25 May 1994, his last week with Bosmac, Mr Gibson worked a total of 48 hours; that is, 38 standard hours, two hours regular overtime and eight hours additional overtime. Counsel submitted this amount of overtime was more than a reasonable contribution by Mr Gibson to his employer's needs and he was not under an obligation to do more. He further submitted that, in considering the extent of an employee's duty to work ''reasonable'' overtime, it is not sufficient to consider only the employer's needs; it is necessary also to take into account any obligations and personal interests of the employee.

I agree with these submissions, but I do not think they are sufficient to make good the claim that the termination was harsh, unjust or unreasonable. In considering reasonableness, it is necessary to take into account the position of both parties. Employees are people, not robots. Most have obligations to their families and others. Most have private interests and commitments, to which they are entitled to have regard in deciding whether to work particular overtime. If Mr Gibson's personal obligations or private interests or commitments dictated his decision not to work on the Saturday, in my view it could not be said that the decision was unreasonable. Having already provided 10 hours overtime that week, he was entitled to consider his own wishes in connection with the Saturday morning. But he did not approach the matter in this way, explaining to Mr Ehsman his reasons for being unwilling to work on Saturday and pointing out the extent of the overtime he had already worked that week. When Mr Ehsman made his general request during the morning-tea break, Mr Gibson said he would not work. When asked his reason, he said he

had too much to do but failed to respond to Mr Ehsman's request for further information. Had he done so, and given a reason for refusing to work, Mr Ehsman would probably have excused him from attendance; as he did for the two employees who indicated a difficulty in working that day. Mr Ehsman said in evidence that, if an employee could not work overtime and advised him of the problem, he would seek an alternative solution. He said: ''As long as I was advised, there was never any problem with overtime.'' On some earlier occasions, Mr Gibson had given a reason; for example, that he ''had to do something with the birds''. That had been accepted. It is apparent that the factor that made Mr Gibson's conduct unacceptable to Mr Ehsman on 24 and 27 May was his refusal to give any reason for his unwillingness to attend.

I do not suggest that employees are accountable to their employers for the way they spend their off-duty hours, or obliged to submit to questions regarding their private plans. Mr Gibson was entitled to decide that he would not work on the Saturday and not reveal his reason. However, equally I think, Bosmac was entitled to decide that, if Mr Gibson adopted that attitude, it would dispense with his services. The nature of the company's business was such that, from time to time, it would inevitably be asked to provide immediate service. A delay in the provision or repair of equipment urgently required for an agricultural, mining or manufacturing operation could cause a customer significant loss. Refusal of immediate service might seriously damage the company's reputation and goodwill. The company maintained a relatively small workshop, with only 11 workshop employees. It was inherent in the nature of its business that, in times of urgency, the company would need to call on employees to work overtime and to press those who had no particular reason for refusal. If Mr Ehsman had conceded Mr Gibson the right to absent himself from overtime without explanation, even though the company had an urgent job that required a maximum attendance, he could not reasonably have refused the same concession to others. The result would have been intolerable, from the company's point of view. It would have been unable to indicate to a customer when an urgent job would be completed. In this situation, it seems to me that Mr Ehsman, and anyone else who was involved in the decision to terminate Mr Gibson's employment, was entitled to reason that, if Mr Gibson was not prepared to explain any difficulty he had in working on a Saturday, in the circumstances it was better to dispense with his services. That decision was based on a valid reason based on the operational requirements of the respondent's business. The limitation imposed by subs(1) of s 170DE was satisfied. And, having regard to the size and nature of the respondent's business, it seems to me the decision was not harsh, unjust or unreasonable. I appreciate that the applicant was an employee of eight years' standing, a competent worker whose conduct and performance was satisfactory in all respects save in relation to Saturday overtime. But that exception was an important one, justifying the decision that was made. I do not think the termination was substantively unfair.

The lack of notice

Prior to the hearing of the review the applicant filed a document setting out the orders he was seeking. By way of an alternative to his principal claim, he sought an order for payment of ''damages in the amount of $1,260 pursuant to s 170EE(5) following a finding by the Court that the respondent . . . contravened

s 170DB of the Act''. At the hearing, his counsel contended that, even if the respondent was entitled to terminate the applicant's employment, it ought to have given him the notice required by s 170DB of the Act, or paid him wages in lieu of notice. This matter was not raised at the hearing before the Judicial Registrar. The case was there conducted on an ''all or nothing'' basis, it being contended that the termination was either unlawful pursuant to s 170DC or 170DE — with the consequence that the applicant was entitled to substantial compensation (reinstatement being agreed to be impracticable) — or it was not, with the consequence that the proceeding ought to be dismissed.

Section 170DB provides that an:

> ''employer must not terminate an employee's employment unless:
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> (a) the employee has been given either the period of notice required by subsection (2), or compensation instead of notice; or
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> (b) the employee is guilty of serious misconduct, that is misconduct of a kind such that it would be unreasonable to require the employer to continue the employment during the notice period.''

The notice required by subs (2), in the case of an employee less than 45 years of age who has served the employer for a continuous period exceeding five years, is at least four weeks. The parties agreed that, in the present case, four weeks wages amount to $1,260. Section 170EE(5) of the Act empowers the Court to make an order in respect of a contravention of s 170DB:

> ''. . . requiring the employer to pay to the employee an amount of damages equal to the amount of the compensation which, if it had been given by the employer to the employee when the employment was terminated, would have resulted in the employer not contravening that section.''

Counsel for the applicant argues that Mr Gibson was not guilty of serious misconduct within the meaning of subs (2); although Mr Gibson was unwilling to work Saturday overtime, or explain his refusal for his unwillingness, he was in every other respect a satisfactory employee. He had not been guilty of conduct making it unreasonable to require the employee to continue the employment during the notice period. Despite the respondent's submission to the contrary, I think this argument should be accepted. Although Mr Gibson was unwilling to accommodate Mr Ehsman's wishes, he did not create a situation of open embarrassment. Mr Ehsman could have made his point, and upheld his authority, by giving Mr Gibson four weeks' notice. There was no reason for him to fear action prejudicial to the company's interests during the notice period. Certainly, if the need had arisen within that period, Mr Gibson would have been unlikely to work any Saturday overtime. But Mr Ehsman could have accommodated his absence, in the same way he said he could have accommodated a reasonable request for exception from Saturday attendance.

I think Mr Gibson was entitled to notice under s 170DB. That notice not having been given, he is entitled to an order requiring Bosmac to pay damages equal to the compensation he should have received at the time of termination; that is, $1,260. I set aside the Judicial Registrar's order dismissing the proceeding and in lieu thereof order that the respondent pay this amount to the applicant within 14 days.