FAIR WORK AUSTRALIA

Royal Melbourne Institute of Technology v Asher

[2010] FWAFB 1200

Watson VP, Acton SDP, Williams C

21 July 2009, 3 March 2010

Appeal — Leave to appeal granted — Appeal upheld — Leave to appeal under Workplace Relations Act 1996 (Cth), s 120 — Error in exercise of discretion under Workplace Relations Act 1996 (Cth), s 652 — Proper approach to appeal concerning factors in Workplace Relations Act 1996 (Cth), s 652(3) — Parties to make submissions as to remedy.

Termination of Employment — Unfair dismissal — Termination harsh, unjust or unreasonable — Termination for alleged misconduct — Whether conduct amounted to serious misconduct within meaning of enterprise agreement — Whether misconduct amounted to serious dereliction of duties — Valid reason for termination — Relevance of compliance with disciplinary procedure in enterprise agreement — Workplace Relations Act 1996 (Cth), ss 120, 643, 652.

Words and Phrases — "Serious misconduct".

Words and Phrases — "Serious dereliction of duties".

Words and Phrases — "Valid reason".

The appellant employed the respondent as a lecturer in 1986. Between 1996 and about 2003, the respondent had responsibilities in relation to joint programs and activities with the Chinese Police Academy, including functions in relation to the finances for relevant projects. Between 2005 and 2008 certain allegations concerning financial irregularities were investigated and found to be proven. The respondent's employment was terminated on 16 May 2008 for serious misconduct. At first instance, Commissioner Cribb found there was no serious misconduct and no valid reason for the termination, and the dismissal was harsh, unjust and unreasonable.

Held: (1) The Commissioner, because she found the conduct was misconduct falling short of serious misconduct, erroneously concluded that there was no valid reason for the termination of employment. The discretion vested in the Commissioner miscarried and the appeal should be upheld.

(2) A valid reason existed for the termination of employment because the reasons relied on by the employer were sound, defensible and well-founded.

Annetta v Ansett Australia (2000) 98 IR 233, applied.

(3) Failure to counsel and warn the respondent of the standards expected of him was a relevant factor. The termination of the respondent's employment was harsh, unjust and unreasonable.

(4) Whether termination of the employment of the employee is consistent with an applicable enterprise agreement is a relevant matter within the meaning of s 652(3)(g) of the Act.

Cases Cited

Adami v Maison de Luxe Ltd (1924) 35 CLR 143.

Annetta v Ansett Australia (2000) 98 IR 233.

Atfield v Jupiters Ltd (t/as Conrad Jupiters Gold Coast) (2003) 124 IR 217.

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

Gibson v Bosmac Pty Ltd (1995) 60 IR 1.

House v The King (1936) 55 CLR 499.

Osman v Toyota Motor Corporation Australia [2001] AIRC 1081.

Potter v WorkCover Corporation (2004) 133 IR 458.

Robin v Worley ABB (2002) 51 AILR 4-560.

Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371.

Shanahan v Australian Industrial Relations Commission (No 2) (2006) 160 IR 386.

Application for leave to appeal and appeal

M McDonald SC and *R Millar*, for the appellant.

S Zeitz and *S Gauci*, for the respondent.

Cur adv vult

Fair Work Australia

Introduction

1 This is an application for leave to appeal and an appeal under s 120(1)(a) of the *Workplace Relations Act 1996* (Cth) (the Act) against the order of Commissioner Cribb made on 30 April 2009 reinstating Dr Geoffrey Asher in his position as Associate Professor of Royal Melbourne Institute of Technology (RMIT) (the University). The order arose from proceedings instituted by Dr Asher under s 643 of the Act alleging that the termination of his employment by the University was harsh, unjust or unreasonable.

2 On 14 May 2009 Senior Deputy President Watson issued an order by consent of the parties staying the operation of the orders in certain respects and varying the orders in another respect. At the hearing of the appeal in this matter Mr M McDonald SC and Mr R Millar of counsel represented the University. Ms S Zeitz, of counsel represented Dr Asher.

Background

3 The Commissioner conveniently summarised the relevant chronology of Dr Asher's employment and the events leading to his termination in the following terms:[1]

1 [2009] AIRC 439 at [6]

- Dr Asher was appointed as a Lecturer in criminal justice in the School of Community Studies, Phillip Institute of Technology, in May 1986.
- On 1 January 1997, Dr Asher was appointed Acting Head of Department, Justice and Youth Studies.
- In 1996, Dr Asher visited the Chinese Police Academy at Shenyang, Liaoning Province, China to establish a link between the Academy and RMIT University.
- In September 1997, Dr Asher visited China again and, following further negotiations, an Intention Agreement was signed with the Police Training Academy.
- In June, 1998, Dr Asher and Mr Shuey (Assistant Commissioner, Victoria Police) were invited to the 50th anniversary of the Police University in Shenyang, China.
- In June 1998, a Memorandum of Understanding (MOU) was signed between RMIT University and the Institute of Liaoning Public Security and Judicial Management Cadre College (Chinese Police Academy). The MOU facilitated, amongst other things, an exchange program. Once implemented, this became known as the Chinese Police Project between RMIT University and Victoria Police on the one hand, and the Chinese Police Academy on the other hand.
- In late 1998, a senior delegation came from China to assess the training and educational opportunities offered by RMIT University and Victoria Police.
- An MOU was developed between RMIT University and Victoria Police with respect to the Chinese Police Project.
- Dr Asher became Project Leader then later Director of the Chinese Police Project.
- There were four training visits by Chinese Police delegations — July 2000, 22 June - 7 July, 2001, 1 - 16 March, 2002 and 12 - 26 January, 2003 (fourth Chinese Police visit).
- On 1 October 2001, Dr Asher received a formal censure following allegations of misconduct/serious misconduct.
- Dr Asher was unable to work due to illness from 19 July 2004.
- On 21 April 2005, Dr Ziguras advised Mr Branov and Mr Stagoll that he had concerns about financial irregularities in the Chinese Police Projects and that he had requested the relevant documents from Victoria Police.
- On 6 May 2005, Dr Ziguras wrote to the applicant regarding information he had received from Victoria police about payment to RMIT University of half of the surplus from the fourth Chinese Police visit. The applicant was requested to provide all records and documents relating to the project, including the laptops.
- Dr Asher responded on 12 May 2005 indicating, amongst other things, that a bank cheque for the residual funds would be forwarded to RMIT.
- On 1 August 2005, Dr Asher returned two laptops and "a parcel".
- On 31 January 2007, Professor Bruce Wilson, Head of School, GSSSP, wrote to the applicant requesting financial statements and all other documentation relating to the China Project.
- On 2 February 2007, the "parcel" which had been sent by Dr Asher on 1 August 2005 was found in an office. It contained documentation relating to the China Project including a "complete" set of account statements, receipts and invoices etc.
- On 30 July 2007, Dr Asher was advised of allegations of misconduct/ serious misconduct by Professor Gardner and asked to provide a written response.

- The applicant responded on 12 August 2007.
- The allegations were referred by Professor Gardner to a formal disciplinary proceeding, conducted by a misconduct investigation committee, which sat on 6 March 2008.
- On 16 May 2008, the applicant was advised of the report of the Misconduct Investigation Committee MIC). The Committee had found proven three serious allegations and a further one, in part. Dr Asher was advised that the proven allegations amounted to serious misconduct and his employment was terminated effective 16 May 2008.

(references omitted)

4 Dr Asher was dismissed for serious misconduct. His termination letter recorded the reasons for termination as:

- Establishing and operating an account for the RMIT Chinese Police Project as a "working account" with the Police Credit Co-operative rather than establishing an RMIT account under the RMIT ledger system.
- Failing to properly account for RMIT funds in relation to income and expenditure in the account, and/or otherwise related to the Chinese Police Training Project.
- Failing to declare and repatriate any monies from the Account to RMIT from, on or around, 25 June 2001 until 27 May 2005.
- A partly proven allegation that Dr Asher had misappropriated certain monies in the account.

5 The Commissioner made a number of findings of fact after noting that the facts were largely undisputed. Her findings were expressed as follows:[2]

(a) Established and operated a working account

[100] There was no dispute between the parties about whether the applicant had established and operated a working account with the Police Credit Co-operative rather than establishing an RMIT account under the RMIT ledger system. The applicant gave evidence to this effect. Therefore, I find that the applicant established and operated a working account for the Chinese Police Project which was not an RMIT account and which was not under the RMIT ledger system.

(b) Failure to properly account for RMIT funds

[101] The parties were not in agreement on this issue. Having considered what is before me, I have not been convinced that this was the exact situation. It was the applicant's unchallenged evidence that, after each Chinese Police visit, he forwarded to the Head of Department, Associate Professor Philips, a detailed and itemised account of all that had transpired during that visit. This included all of the details regarding the income and expenditure for the visit. I have no reason to not accept that that is what Dr Asher did.

[102] Secondly, it was the applicant's evidence, which was also not challenged by the respondent, that the financial statements of each of the visits were audited by Victoria Police at the end of each of the visits. With respect to this aspect of the matter, the statement and evidence of Mr Shuey, to the MIC, corroborates the applicant's evidence. It is noted that the MIC's report referred to Mr Shuey's confirmation of Victoria Police's audit of the financial statements.

---

2 [2009] AIRC 439 at [100]-[109]

[103] As well, the applicant, albeit eight years on, was able to reconstruct the income and expenditure for this account. In this regard, the MIC noted that "there do not appear to be any funds not accounted for."

[104] Therefore, it is not possible, on the evidence, to find that the applicant failed to account for RMIT's funds in the working account. It is acknowledged that the "accounting" for the funds did not occur in the orthodox manner. I accept, as the MIC did, that the account was properly audited and signed off by the Victoria Police after each Chinese Police visit.

(c) Failure to declare and repatriate monies to RMIT

[105] There was no dispute between the parties that the money in the working account was not declared and repatriated to RMIT until 27 May 2005. It was the applicant's evidence that this is what had occurred. Therefore, I find that the applicant failed to declare and repatriate monies in the working account to RMIT between 25 June 2001 and 27 May 2005 when he was requested to do so.

(d) Misappropriated certain monies (found in part)

[106] The monies in question appear to be a receipt from Safeway for $75.00 and a receipt from Shell Templestowe, for $14.75. In addition, there was also a concern by the respondent regarding the purchase of textbooks by the applicant which were not related to the Chinese Police Project. The MIC found that the amounts were small; there was no evidence of fraud and that it was clear that the money was not used for the appropriate purpose.

[107] With respect to the purchase of the textbooks, the applicant's position was that the purchase was approved by Associate Professor Philips and that a similar practice had prevailed in the department at Phillip Institute (which was corroborated by Associate Professor Bondy in his evidence). The respondent's view was that the purchases were not in accordance with the appropriate approval and accountability procedures.

[108] Having carefully considered this aspect of the matter, I accept the applicant's evidence that Associate Professor Philips had authorised the purchase of the textbooks and that the applicant's actions are likely to have been a continuation of the Phillip Institute practice.

[109] With respect to the monies relating to the two receipts, it is not possible to definitively say that the funds were misappropriated. Some (at least one) of the monies was expended outside of the timeframe of the Chinese Police Project. The applicant provided the receipts, and, as part of the reconstruction of the accounts, gave the best but not definitive explanation he could. Given the evidence before me, it is not possible to make a definite finding about the receipts. Given that one of the expenditures appears to have been outside the Police Project timeframe, it would seem that it, and quite possibly the other expenditure, was not used for the appropriate purpose, namely the Chinese Police Project.

(references omitted)

6 The Commissioner then proceeded to decide the matter by reference to each of the factors set out in s 652(3) of the Act. As her conclusions are important to the disposition to this appeal, we set out that part of her decision regarding these conclusions in full:[3]

3 [2009] AIRC 439 at [110]-[141]

Was the applicant's conduct serious misconduct?

[110] Having made these findings of fact regarding the applicant's conduct, I now turn to the central question in this matter, which is whether the applicant's conduct amounted to serious misconduct which thereby warranted the termination of his employment.

[111] It was admitted by the respondent that, whether the definition of serious misconduct in the 2005 enterprise agreement was applied or that contained in the case law, the applicant's behaviour constituted serious misconduct on either basis. The respondent contended that it was unacceptable for an employee to set up an account in his own name and home address and to deposit the employer's money into it and to retain those funds for a lengthy period. Further, to run a project without the usual accountabilities eg. issuing of receipts, obtaining of approvals of etc, was said to be a breach of the employee's duty of good faith and fiduciary obligations.

[112] On the other hand, in the applicant argued that there was no valid reason for the termination of his employment and that the respondent had engaged in conduct designed to affect the termination of the applicant's employment. It was contended that the applicant was dismissed on the basis of the MIC's findings and that the MIC process was fundamentally flawed. In addition, two out of the four allegations were denied by the applicant.

[113] Having considered carefully all of the material, I find that the actions of the applicant are serious and inappropriate conduct but are not so serious as to constitute serious misconduct, as defined by the 2005 enterprise agreement or in the various authorities. Rather, they amount to misconduct. The reasons for this finding are:

- I accept the reasons given by the applicant for how the account came to be established at the Police Union Co-operative and why it was in his name with the statements forwarded to his home address. It was clear from the applicant's evidence that he had not set out to create the account in his name and it was his evidence, which was unchallenged, that there were joint signatories to the account (Victoria Police and himself).
- It was also the applicant's evidence that he had realised after the first Chinese Police visit that he needed to regularise the financial aspects of the project. Given the context within which the Chinese Police Project was being conducted, it is perhaps understandable (but not wise and not condoned) that the applicant accepted the advice of Mr Shuey to set up a joint account at the Police Credit Co-operative. The decision by the applicant to accept Mr Shuey's advice could well be described as an exhibition of poor judgement. However, an aspect of this context was the applicant's description of the Project as a joint project between RMIT University and the Victoria Police. As the prime architect of the Project, weight should to be given to the applicant's evidence when he describes it as a joint project. It is clear that the applicant's decision to accept Mr Shuey's advice, was made in this context.
- It was the applicant's unchallenged evidence that he had provided the Head of School, Associate Professor Philips, with a full and detailed account of each visit, including itemised income and expenditure. Associate Professor Bondy gave evidence that he was responsible for signing off on the applicant's annual work plans which contained specific mention of the Chinese Police Project. Professor Kalantzis was involved in the re-establishment of the project in 1999. A number of senior RMIT personnel were also

involved in various functions to host the Chinese Police. From the evidence before me, there were a number of people within the department, including the Head of Department and the applicant's supervisor who were fully aware of the Chinese Police Project. In addition, Associate Professor Philips, Head of School, was personally aware of the financial arrangements pertaining to the first Chinese Police visit when he was one of the two people who was given the surplus from the first police visit in July 2000, in cash in a Safeway bag. The Departmental Finance Manager, Mr Benincasa, was the other person who was given the surplus cash funds in the Safeway bag.

- There is no evidence before me that steps were taken by the Finance Department or the Head of the School or any of the other people in the Department who were fully aware of the Chinese Police Project, or enquiries made of the applicant, to put processes in place so that the Safeway bag of cash was not repeated for the second police visit or to ascertain what financial arrangements had been put in place for the Chinese Police Project. Further, Associate Professor Bondy named Mr Benincasa, as the person who told him of his concerns about the project in 2005.
- Eight years after the event, the applicant was able to reconstruct the income and expenditure for the working account. From the evidence, it would appear that all funds were accounted for.
- When requested, the applicant promptly repatriated all of the money to RMIT University.
- There was no evidence of fraud.

[114] In summary, the main reasons for the finding that the applicant's behaviour constituted misconduct, rather than serious misconduct are firstly, that the Department's financial personnel together with the applicant's departmental superiors including Associate Professor Philips, Head of Department and Associate Professor Bondy, the applicant's supervisor, also bear responsibility for the unorthodox financial arrangements that the applicant put in place for the Chinese Police Project. As set out in the MIC's report "proper department of management would have ensured that the failure to follow RMIT operating procedures was discovered after the second Chinese visit and that the correct procedures were followed for subsequent visits."

[115] Secondly, although unorthodox, the applicant did put in place, accountable and audited financial arrangements for the Project and, at eight years on, was able to reconstruct those arrangements, such that the MIC found no evidence of fraud and that all of the monies appeared to be accounted for.

[116] In characterising the applicant's actions as misconduct, it is also describing Dr Asher's conduct as ill considered, lacking in judgement and inappropriate, without due regard being paid to administrative and financial systems. Dr Asher's actions are a serious matter for concern but not so serious as to be characterised as serious misconduct, in all of the circumstances of this matter.

[117] With respect to whether there was a valid reason for the termination of the applicant's employment, on the basis of the evidence before me I find that there was not a valid reason for Dr Asher's dismissal.

Was the applicant notified of the reason — s 652(3)(b)

[118] The applicant was advised by a letter dated 30 July 2007, from

Professor Gardner, of allegations of serious misconduct or misconduct. The letter provided details of four allegations, together with other documentation.

[119] On 16 May 2008, Professor Gardner wrote to the applicant again, attaching a copy of the report of the MIC. The letter went on to discuss the findings of the MIC. The letter concluded on the basis that the applicant's actions, as set out in the MIC's report, amounted to serious misconduct, and that therefore, his employment was terminated.

[120] On this basis, I am satisfied that the applicant was notified of the reasons for the termination of his employment.

Was the applicant given an opportunity to respond? — s 652(3)(c)

[121] Once the applicant had been advised of the allegations on 30 July 2007, at the applicant was given an opportunity to respond. Dr Asher responded on 12 August 2007.

[122] Once Professor Gardner made the decision that a MIC should be convened, the applicant provided a Preliminary Statement to the MIC on 29 November 2007. The MIC met on the 6 March 2008 for which the applicant provided an amount of written material. He was also interviewed by the MIC. On behalf of the applicant, written final submissions were also forwarded to the MIC by the NTEU.

[123] It was the applicant's submission that the MIC process was flawed in that it operated as a trial and not as a proper investigation. By doing this, it was said that the MIC had failed to properly discharge their role, which, under the 2005 enterprise agreement, was to conduct an investigation not a hearing. It was further argued that the Vice-Chancellor actively participated and also sought findings against the applicant, contrary to the enterprise agreement.

[124] For the respondent's part, it was contended that the criticisms of the MIC were ill founded and that it had conducted its investigation in accordance with the requirements of the 2005 enterprise agreement. It was submitted that the MIC had undertaken an exhaustive investigation with the applicant able to present any relevant evidence. It had been conducted, also, in accordance with the requirements of procedural fairness.

[125] With respect to procedural fairness, there are a number of events which, in my view, have impeded the applicant's opportunity to respond to the allegations/reasons for the termination of his employment. The last Chinese Police visit took place in January 2003. Some time before April 2005, Mr Benincasa raised with Associate Professor Bondy, his concerns about the Chinese Police Project. Associate Professor Bondy then spoke to Dr Ziguras about these concerns, who, in turn, made the decision to raise them with Mr Stagoll, Internal Audit, rather than with the applicant. In around April 2005, both Mr Stagoll and Dr Ziguras began investigating the alleged irregularities with the Chinese Police Project.

[126] The first time the applicant was advised of anything regarding the Chinese Police Project was on 6 May 2005 when Dr Ziguras wrote to him, requesting remittance to the University of the money in the Police Credit Co-operative and the return of his laptops and all records and documentation relating to the Chinese Police Project. In a subsequent letter, on 24 May 2005, Dr Ziguras referred to the applicant's breach of the operating procedures and required the remittance of RMIT's funds. It was also indicated in the letter that disciplinary action may follow.

[127] The laptops, a cheque for the funds and a box of documents were returned by the applicant to RMIT University in *August 2005*. The box of

documents appears to have been mislaid and were not "found" until *February 2007* by Mr Stagoll, in the applicant's office at RMIT University.

[128] Two years after Dr Zigura's letters, in April 2007, the applicant received, unsolicited, a file of Professor Wilson's which had been inadvertently left behind by him in a shop. From the file, it appears that Dr Asher became aware of allegations of fraud and an internal audit since 2004.

[129] It was not until *30 July 2007* however, that the applicant was notified that there were allegations against him regarding the Chinese Police Project. This is more than two years after Dr Ziguras' mention that disciplinary action may follow.

[130] Between April 2005 and 30 July 2007, Mr Stagoll had been conducting an investigation and audit of the Chinese Police Project, unbeknown to the applicant. Dr Asher was only advised of the allegations against him on 30 July 2007. The allegations related to his conduct regarding the Chinese Police Project between 2001 and 2003.

[131] Mr Stagoll's investigation culminated in a report to Professor Wilson which was a critical document regarding the further progression of the department's concerns. The investigation carried out by Mr Stagoll was described by him as a search for relevant documentation and records relating to the Chinese Police Project. He did indicate that several people in the faculty were spoken to but he would have to review the files before he could specify the individuals. Contact with Victoria Police was handled, initially, by Dr Ziguras who had passed on to Mr Stagoll, the documentation he had received from the Victoria Police. Mr Stagoll had wanted to speak to the applicant but, despite several requests, this was not possible. However, in his report to Professor Wilson, it was not made apparent that the conclusions reached were in the absence of a discussion with the applicant. Mr Stagoll's findings were, however, that he was unable to conclude that the funds collected by the applicant had been used legitimately and secondly, that the applicant had repeatedly breached the University's policies and procedures.

[132] It is acknowledged that, from July 2004, the applicant was absent for lengthy periods on a range of different types of leave until his return to work in early 2008. The fact that the applicant was absent from work does not provide a reasonable explanation for the lack of a fair process as set out above. When it chose to, the University was able to communicate with the applicant.

[133] From the events set out above, it is apparent that procedural fairness was not accorded to the applicant. The applicant's comments regarding the MIC's role and process are noted but it is unnecessary, given my view regarding the lack of procedural fairness, to deal with that issue. Therefore, I am not satisfied that the applicant was given an opportunity to respond.

Had the applicant been warned of unsatisfactory performance? — s 652(3)(d)

[134] As the applicant's employment was terminated for serious misconduct, this section is not relevant.

Size of the employer's undertaking — s 652 (3)(e)

[135] There was no specific material before the Commission regarding this aspect of the matter.

Absence of dedicated human resource management specialists — s 652(3)(f)

[136] On the basis of the material before me, it is apparent that the respondent has dedicated human resource management specialists.

Any other matters? — s 652(3)

[137] On behalf of the applicant, it was submitted that the Commission should take into account the following matters:

- the applicant's length of service (22 years)
- the applicant's relatively unblemished record, save for a couple of minor disputes.
- the damage to his reputation.
- his age and the likelihood that he would not obtain alternative employment in his field.
- the genuineness with which he conducted the Project.
- at its highest, the applicant's conduct was authorised and if not authorised a genuine mistake facilitated by systemic failure.

[138] I have considered all of the matters submitted by the applicant and am inclined to consider relevant the applicant's length of service and the genuineness with which he conducted the Project.

Was the termination harsh unjust or unreasonable?

[139] I have considered all of the factors set out in s 652(a) to (e) of the act and have balanced all of the factors in the context of a "fair go all round" to both the employer and employee concerned (s 652 (2)).

[140] I find, overall, that the termination of the applicant's employment was harsh, unjust and unreasonable, in all of the circumstances.

[141] In reaching this conclusion, I have relied on my finding that the applicant's conduct amounted to misconduct rather than serious misconduct. The applicant's conduct was ill judged and inappropriate and not condoned but it was not of such a serious nature to warrant the termination of his employment.

(references omitted)

7 After considering the factors in s 654(2) of the Act, the Commissioner decided to order the reinstatement of Dr Asher and made consequential orders regarding continuity of employment and back pay.

Grounds of appeal and leave to appeal

8 There were eight grounds of appeal advanced. Six related to the findings of the Commissioner on the allegations of serious misconduct and the findings and conclusions of the Commissioner in relation thereto. One ground related to the conclusion in relation to the consideration of an opportunity to respond to the reason for termination. The final ground of appeal seeks to challenge the conclusion of the Commissioner in relation to remedy. The detail of the grounds and the positions of the parties in relation thereto are discussed by reference to the specific matters below.

9 The application for leave to appeal under s 120(1) was made on the grounds in s 120(2) on the basis that the appeal raises matters of importance and public interest.

The nature of the appeal and the decision subject to the appeal

10 The parties were generally agreed that the principles outlined in *House v The King*[4] and *Coal and Allied Operations Pty Ltd v Australian Industrial Relations*

4 *House v The King* (1936) 55 CLR 499

Commission[5] apply to this appeal. Essentially, the University must establish error in the exercise of the Commissioner's discretion in order to succeed in the appeal.[6]

11 However a significant issue arose between the parties in the appeal as to the proper approach to the factors in s 652(3) of the Act and s 652(3)(a) in particular. The University contends that the Commissioner erred in not finding that Dr Asher had engaged in serious misconduct. Counsel for Dr Asher submits that this approach is flawed. She submits that the decision should properly be seen as a discretion on the question of whether the termination of employment was harsh, unjust or unreasonable. This contest has implications for the disposition of the appeal.

12 The ultimate question in an arbitration under s 652(3) of the Act is whether the termination of employment was harsh, unjust or unreasonable. The Act requires the Commission to have regard to the factors in s 652(3) in considering this question including any other relevant factor. The considerations require the Commission to have regard to whether a circumstance existed, take the conclusion into account and consider it with due weight as a fundamental element in determining whether the termination is harsh, unjust or unreasonable.[7]

13 We have considerable difficulty with the approach of the University that the central question in relation to s 652(3)(a) is whether Dr Asher engaged in serious misconduct. That question was also expressed as the central question in [110] of the Commissioner's decision and in the analysis which followed. The approach to s 652(3)(a) and its predecessors in the context of summary dismissal has been well established in decisions of Full Benches of the Commission. In *Annetta v Ansett Australia*[8] (*Annetta*) a Full Bench said:[9]

> [9] It was submitted on behalf of the appellant that in cases of summary dismissal there can be no valid reason for the termination within the terms of s 170CG(3)(a) unless the employee is guilty of conduct justifying summary dismissal at common law. In this respect it was further submitted that the common law requirement goes beyond wilful disobedience in that the conduct must amount to a refusal to be bound by the terms of the contract: *Adami v Maison de Luxe Limited* (1924) 35 CLR 143. Mr Langmead submitted that the appellant's conduct on 17 February, 1998 could not be so regarded because there was no instruction given to the appellant, only a request, and the appellant provided an adequate explanation for not doing the work he was asked to do.
>
> [10] We think there are a number of answers to this submission. It is generally accepted that the term "valid reason" should be construed to mean "sound, defensible or well-founded": *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373. Although that case concerned legislation which has now been repealed it is still regarded as authoritative. To limit the meaning of the term "valid reason" by importing a test amounting to repudiation of the contract at common law is unwarranted and impermissible. Secondly 170CG(3)(a) focuses on the reason for

5 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309

6 s 685(2) of the *Workplace Relations Act 1996* (Cth)

7 *Chubb Security Australia Pty Ltd v John Thomas* S2679

8 *Annetta v Ansett Australia* (2000) 98 IR 233

9 *Annetta v Ansett Australia* (2000) 98 IR 233 at [9]-[10]

> termination. The appellant's construction would result in an arbitrary application of the section in some circumstances. Take a case where an employee is guilty of conduct which does not amount to misconduct justifying summary termination. If the employer terminates the employment on notice there would be a valid reason for doing so. If the employer terminates the employment summarily there would not be a valid reason for doing so. The validity of the reason cannot be made to depend on whether or not the termination was on notice. Thirdly, however, we are not convinced that if the common law test were applied it would make any difference in this case. The Senior Deputy President found that the appellant had refused to do the duties he was requested to do and that the explanation he gave for the refusals was unreasonable. We think these findings were clearly open to her. The appellant did not say during the enquiry into his conduct that he was not given a direction. Furthermore he continued to maintain his right to refuse to do work which was not his and to refuse to rectify work which somebody else had performed unsatisfactorily. The appellant took this position in an interview more than a week after the day of the refusals. This amounts to the unilateral inclusion of a new term in the employment contract and by necessity amounts to a refusal to observe the fundamental requirement of any contract of service - to be ready, willing and available to carry out the lawful directions of the employer. In the circumstances we reject the submission that the Senior Deputy President should have found that there was no valid reason for the termination of the appellant's employment.

14 The decision in *Annetta* was approved by another Full Bench in *Jupiters Ltd (t/as Conrad Jupiters Gold Coast) v Atfield*[10] where the Full Bench expressed the matter in the following terms:[11]

> [19] Secondly, on one reading of the decision, the reasoning of the Commissioner appears to have imposed an obligation on the employer to prove "serious misconduct" sufficient to justify summary dismissal at common law as a prerequisite to establishing a valid reason within the meaning of s 170CG(3)(a). Such an approach, if adopted, would be incorrect. Proof of misconduct justifying summary dismissal at common law is a sufficient but not a necessary condition to establishing a valid reason within the meaning of s 170CG(3)(a). Nevertheless, since for the reasons we have given we have concluded that the termination of Mr Atfield's employment was harsh, it is not necessary to take that matter further.

(references omitted)

15 The proposition was adopted and applied in other Full Bench decisions in *Robin v Worley ABB*,[12] *Osman v Toyota Motor Corporation Australia Ltd*[13] (*Osman*) and *Potter v WorkCover Corporation*.[14] Those authorities are not inconsistent with the decision of Justice Jessup in *Shanahan v Australian Industrial Relations Commission (No 2)*[15] where His Honour said:[16]

---

10 PR928970

11 PR928970 at [19]

12 PR913493

13 PR910409

14 PR948009

15 *Shanahan v Australian Industrial Relations Commission (No 2)* (2006) 160 IR 386

16 *Shanahan v Australian Industrial Relations Commission (No 2)* (2006) 160 IR 386 at [75]-[76]

> [75] There is no doubt but that, if wilfulness in the *Laws* sense was an essential ingredient of the university's "valid reason" for terminating the employment of the applicant, the Full Bench would have constructively failed to exercise jurisdiction if, assuming that the matter had been properly put to it, it omitted to address that question. There is also no doubt but that, on the facts of this case, the majority of the Full Bench made no reference to *Laws* or to the principle for which it stands. I consider, however, that there is no substance in the submissions made on behalf of the applicant in this regard, for reasons which follow.
>
> [76] First, neither the Commission at first instance nor the Full Bench on appeal was concerned with the question whether, as a matter of contract, the university was entitled lawfully to dismiss the applicant summarily. I accept, of course, that an answer to that question would often be (and in the present case might well have been) an ingredient in the series of propositions which together provide an answer to the question with which the Full Bench was concerned, namely, whether the university had a "valid reason" for the termination. But the question whether the applicant's conduct was repudiatory was not, as such, the question which the Full Bench was required to address. It was not an essential statutory or legal ingredient, such that failure to take it into account would constitute a constructive failure to exercise jurisdiction.

16 In the circumstances of this matter the University purported to terminate Dr Asher's employment for serious misconduct within the meaning of that term in the University's enterprise agreement. If it successfully established that Dr Asher had engaged in serious misconduct it would necessarily follow that there was a valid reason for the dismissal. However, the converse is not true. As established by *Annetta*, the question that needed to be considered was whether there was a "valid reason" in the *Selvachandran*[17] sense — whether the reason was sound, defensible or well founded. Whether it also amounted to serious misconduct may well be a factor relating to the overall characterisation of the termination but it was not an essential requirement in the determination of whether a valid reason exists.

17 In our view, the question of whether a summary dismissal complies with an applicable enterprise agreement is a relevant consideration to the overall question of whether the termination is harsh, unjust or unreasonable and is best considered in this case in the catch all category of other relevant matters.

18 We are concerned that the conclusions of the Commissioner in this matter equate the concepts of "serious misconduct" with a "valid reason". Because she found that the conduct was misconduct falling short of the description of serious misconduct, the Commissioner concluded that there was no valid reason for the termination.

19 This is an erroneous approach inconsistent with Full Bench authority. It was not argued before us that the Full Bench authority should not be followed. In our view it must be followed and applied in this case. This error alone is sufficient to find that the discretion vested in the Commissioner miscarried and the appeal should be upheld. It is not necessary to consider the other grounds of appeal in upholding the appeal. We grant leave to appeal and allow the appeal. However it remains to consider the disposition of the matter in accordance with the correct approach to determining such matters. We propose to consider the

17 *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371

disposition of the matter based on the findings of fact made by the Commissioner and the material advanced by the parties both in the proceedings before the Commissioner and in the appeal.

20 The task of determining whether the termination of employment was harsh, unjust or unreasonable is required to be exercised by reference to the factors set out in s 652(3) of the Act.

Was there a valid reason for the termination? s 652(3)(a)

21 Commissioner Cribb made detailed findings about the conduct of Dr Asher based on contested and uncontested evidence. We have reviewed the evidence and those findings. We accept that the evidence establishes that Dr Asher operated a working account for the Chinese Police Project which was not an RMIT account and was not under the RMIT ledger system.

22 We accept that the evidence establishes that the money in the working account was not declared and repatriated to RMIT between June 2001 and May 2005. A sum of approximately $45,000 representing RMIT's share of the 2001, 2002 and 2003 profits of the Project remained in the account until mid 2005 when Dr Asher was queried about the whereabouts of the proceeds. When the enquiry was made he forwarded a cheque for the amount to RMIT.

23 We find that the evidence establishes that as certain of the expenditures were outside the Project time frame, they were likely to have been used for an inappropriate purpose. The items included expenditure at Safeway, Shell Templestowe, Gold Coast accommodation and computer repairs.

24 It follows in our view that the partly established charge of misappropriation is made out on the evidence. The Commissioner characterised the conduct in a qualitative sense as ill considered, lacking in judgement, inappropriate, a serious matter, carried out without regard to administrative and financial systems and amounting to misconduct. We agree with those descriptions. On that basis, we are of the view that a valid reason existed for termination of employment because the reasons relied on by the employer were sound, defensible and well founded.

Was Dr Asher notified of the reason for his termination? s 652(3)(b)

25 It is generally accepted that Dr Asher was notified of the reasons for his dismissal. In our view he clearly was.

Was Dr Asher given an opportunity to respond? s 652(3)(c)

26 The Full Bench in *Osman* described this obligation as requiring the employer to take reasonable steps to investigate the allegations and give the employee a fair chance of answering them. It adopted comments of Chief Justice Wilcox in *Gibson v Bosmac Pty Ltd*,[18] approved by Justice Northrop in *Selvachandran*, where Chief Justice Wilcox said:[19]

> 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 particularly 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

18 *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1

19 *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at 7

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.

27 The University advised Dr Asher of allegations of misconduct in July 2007. It had apparently been looking into the matter for some time before that. The notification was in a letter from the University and contained references to the four alleged items of misconduct that ultimately formed the reasons for termination. Dr Asher provided a six page written response. Professor Gardner, the Vice Chancellor of the University, determined to refer the matter for further investigation under the process contained in the University's enterprise agreement. Dr Asher was asked to elect for the investigation to be conducted before a Misconduct Investigation Committee or an independent investigator. Dr Asher opted for a Misconduct Investigation Committee. A preliminary meeting was held on 20 November 2007. Dr Asher was represented by the National Tertiary Education Industry Union. The University was represented by the Australian Higher Education Industrial Association.

28 Proceedings were adjourned twice due to the unavailability of Dr Asher and his representative. A formal meeting was conducted on 6 March 2008. The Committee interviewed Dr Asher, Associate Professor Ziguras, Associate Professor Bondy and Mr Ray Shuey. The interviews were recorded and transcripted. A further opportunity was provided to Dr Asher to respond in writing to questions he could not answer at the meeting. Various other documents including witness statements and written submissions were submitted to the Committee on behalf of Dr Asher and the University.

29 Counsel for Dr Asher was critical of several aspects of the conduct of the investigation conducted by the University. It was submitted that the process was more like a trial than an investigation. Various natural justice factors were raised, including matters arising from the time which elapsed between the relevant events and the investigation and Dr Asher's absence from work for various reasons from July 2004 to early 2008.

30 We conclude that Dr Asher was given an opportunity to respond to the allegations against him both before and during the Misconduct Investigation Committee process. The opportunities were availed of. The opportunities were well in excess of those commonly provided in the community for misconduct investigations.

Had the employee been warned of unsatisfactory performance? s 652(3)(d)

31 Dr Asher was dismissed for serious misconduct. The grounds for termination are contained in the letter of termination set out above. The definition of misconduct in the 2005 Agreement is conduct or behaviour which is not serious misconduct, but which is nevertheless unsatisfactory. In general terms unsatisfactory or inappropriate behaviour in the manner work is performed is unsatisfactory performance. Inappropriate conduct which is extraneous to the performance of work would normally be classified as misconduct.

32 In this case the reasons for termination involve a combination of performance and conduct issues. Insofar as the factors involve performance they related to one off events. There was no counselling or warning of the inappropriate manner in which Dr Asher conducted the financial affairs. The evidence

establishes that others within the University had knowledge of the behaviour in question. Their failure to counsel and warn Dr Asher of the standards expected of him is a factor which we consider is relevant.

Size of the employer's undertaking s 652(3)(e)

33 The University is not a small employer. There is nothing about the size of the undertaking which bears on the fairness of the termination.

Absence of human resources managements specialists s 652(3)(f)

34 The University employed human resources management specialists and also utilised the specialist services of its employer association prior to the decision to terminate employment.

Other relevant matters s 652(3)(g)

35 Dr Asher raised various other factors and submitted that they are relevant to the ultimate conclusion. The factors identified in the opening submissions included:

- an allegation that the termination was the result of a contrived process to terminate Dr Asher's employment,
- the Misconduct Committee Investigation was in breach of the first enterprise agreement which operated until 26 November 2005.
- the conduct of the University was intended and did cause Dr Asher's illness to recur and aggravate,
- the conduct of the University was intended to exploit the weakened position of Dr Asher through his illness.

36 In closing submissions, Dr Asher relied on the following additional factors:

- he had always been clear and unambiguous about his understanding of his obligations,
- his length of service (22 years),
- his relatively unblemished record save for a couple of minor disputes,
- the damage to his reputation,
- his age and the likelihood that he would not obtain alternative employment in the field,
- the genuineness with which he conducted the Project,
- the conduct was either authorised or a genuine mistake facilitated by systemic failure.

37 In addition, the considerations of whether the termination was consistent with the enterprise agreement and amounted to serious misconduct under the agreement and whether the sanction of termination was proportionate to the misconduct involved are relevant considerations.

38 To some extent these matters are not contested as matters of fact but the parties made conflicting submissions about their significance. In other respects they are matters of dispute and they involve a consideration of the evidence before the Commissioner. For the purposes of determining this matter, we have considered the evidence before the Commissioner and the submissions of the parties on these matters. We consider that all factors have some relevance to the determination of the matter.

39 It is clear from the evidence that there was limited management guidance and scrutiny of financial aspects of the Chinese Police Project. Although the financial accounts from the Victoria Police were audited and regular, there was no such clear system or requirement imposed and followed through by the

University. RMIT Operating Procedures stated that all monies due to RMIT are to be banked to official RMIT bank accounts. Dr Asher's actions did not comply with this requirement. The Head of School and Finance Manager were found to be aware of the financial practices but did not expressly make Dr Asher aware of any different requirements.

40 It is clear that the failure to declare and repatriate the amounts to the University was at least careless. A reasonable delay in finalising the accounts and forwarding the proceeds is understandable. A belief that the funds would be utilised for future visits justifies a further delay. Dr Asher's extended absence from work is an additional factor which could also justify further delay. Nevertheless the delay from 2003 to 2005 is excessive. The failure to forward the amounts deprived RMIT of its funds. Dr Asher's conduct was clearly inappropriate.

41 Payments for Dr Asher's private purposes were clearly made from the Project account. It appears that this occurred on four occasions. Dr Asher contended that these expenditures occurred by mistake because he had the account's credit card in his wallet. We are satisfied that these payments were unauthorised and inappropriate. They involved expenditure for personal purposes. The Misconduct Investigation Committee found that the amounts were small and there is no evidence of fraud. Nevertheless some of the mistakes were clear, such as an amount with respect to Billy's Beach House in Surfer's Paradise in November 2003. This clearly inappropriate entry was not detected and remedied when the statements were received by Dr Asher - but only when he was asked to provide the accounts to the University in May 2005.

42 In order to constitute serious misconduct under the RMIT Academic and General Staff Enterprise Agreement 2005[20] conduct must be serious misbehaviour of a kind which constitutes a serious impediment to the carrying out of duties of the employee or others, or serious dereliction of duties required of the position. The concepts of "serious misconduct" and "misconduct" are both dealt with in the disciplinary procedures of the 2005 Agreement. Disciplinary action may be taken by the Vice Chancellor with respect to both categories of conduct but the certified agreement provides that termination of employment will not occur where the conduct falls short of the description of "serious misconduct".

43 It is therefore relevant to consider whether the conduct amounted to serious misconduct under the 2005 Agreement. We do not believe that any of the matters constitute a serious impediment to carrying out work. It is a more difficult question of whether the conduct can be described as a serious dereliction of duties.

44 In our view, having regard to all of the circumstances, we are unable to describe it as such. The four Chinese Police delegation training visits occurred in each of the years 2000-2003. There was a prospect of further visits in 2004. In July 2004 Dr Asher commenced an extended period of absence due to illness. The failure to account over this period was inappropriate but in the circumstances it falls short of the description of a serious dereliction of duties. The impermissible expenditure is said to be the result of a mistake. We are unable to conclude that this is not true. The isolated nature of the impermissible transactions and the small amounts involved support Dr Asher's contention. The

20 AG844350

fact that it happened approximately four times might suggest otherwise, but the fact that the last transaction was in late 2003 and the account remained untouched until closed in May 2005 suggests that something less sinister was involved. In our view, Dr Asher's conduct was not a serious dereliction of duties. These conclusions have a bearing on the related consideration of whether the disciplinary action was proportionate to the misconduct involved.

Was the termination harsh, unjust or unreasonable?

45 We have considered all of the above matters. There are several matters of significance. The existence of a valid reason and an adequate opportunity to respond to the allegations are important considerations. The critical consideration however is whether termination of Dr Asher's employment was a fair and proportionate response to his misconduct. In the light of the terms of the University's enterprise agreement we have concluded above that Dr Asher's conduct and behaviour did not amount to serious misconduct as defined in that agreement. The consequence of this finding is that termination of employment was inconsistent with the terms of the agreement. Insofar as the grounds for termination amounted to unsatisfactory performance they were not subject to fair processes such as counselling and warnings.

46 Both of these matters bear upon the question of whether the sanction of termination was a reasonable response to the conduct and behaviour in which Dr Asher engaged. We do not believe that the termination was a fair and reasonable form of disciplinary action in the circumstances of this case. Some disciplinary action was no doubt warranted. However in our view termination of Dr Asher's employment was harsh, unjust and unreasonable.

Remedy

47 We have decided to provide the parties with a further opportunity to address the question of remedy in this matter given the time which has elapsed since the termination and the conclusions we have reached. We will issue directions for the filing of an outline of submissions on remedy and list the matter for further oral submissions.

Appeal granted, final orders pending. Directions for further submissions from the parties on the question of remedy.

KATHRYN PETERSON