[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

SABETO v WATERLOO CAR CENTRE PTY LTD

Acton and O'Callaghan SDPP, Foggo C

20 May 2003

Termination of Employment — Unlawful termination — Notification — Finding required on each of the circumstances specified in Workplace Relations Act 1996 (Cth), s 170CG(3) that are relevant to factual circumstances — Notification required prior to decision to terminate — Commissioner failing to make finding as to notification — Employee not notified of valid reason for termination before employer decided to terminate — Termination was harsh, unjust or unreasonable — Commissioner's decision set aside and payment to be made in lieu of reinstatement — Workplace Relations Act 1996 (Cth), s 170CG(3).

THE COMMISSION.

Introduction

1 This is an appeal by Mr Ben Sabeto against a decision by Spencer C dated 20 December 2002 in which the Commissioner found the termination of the employment of Mr Sabeto by Waterloo Car Centre Pty Ltd trading as Red Spot Rentals (Red Spot) was not harsh, unjust or unreasonable and dismissed his application under s 170CE of the *Workplace Relations Act 1996* (Cth) (the Act).

2 Mr Sabeto's grounds of appeal were essentially that the Commissioner:

(1) failed to consider or adequately consider the termination was a summary dismissal;
(2) erred in concluding Mr Sabeto was notified of the valid reason for his termination (s 170CG(3)(b));
(3) erred in concluding Mr Sabeto was given an opportunity to respond to the valid reason (s 170CG(3)(c));
(4) erred in concluding Mr Sabeto was warned about his unsatisfactory performance (s 170CG(3)(d));
(5) erred in concluding a prior robbery at Red Spot was contextually relevant.

3 Red Spot runs a car rental business and small ''pay-as-you-park'' operation from an office in Melbourne. Mr Sabeto was employed to manage the office in Melbourne. The nature of Mr Sabeto's work was described by the Commissioner in her decision as follows:

> ''[10] The Applicant's role in managing the Melbourne office was quite autonomous given the location of this office, and the fact that Mr Benn, to whom he reported, was located at the Sydney head office.
>
> [11] The nature of the Applicant's job was outlined by Mr Benn as follows:
>
> 'Insofar as Mr Sabeto returned to Melbourne to run the office, what

level of autonomy did he have in that office? — Complete control of the organisation, including hiring and firing of staff, basically as well office administration, daily banking duties such as American Express, such as credit card entries, also barter card reconciliation, security of the branch; just all facets that basically a manager would have I guess under the circumstances.

And who oversaw him in his management? — I did.

And how regularly did you travel to Melbourne? — Depending, normally what I used to normally do is I would visit our Brisbane office. That was normally on a five to six week basis. In return I guess basically down to Melbourne. Initially I guess the visitation frequency was probably I guess four to five weeks. Then as Mr Sabeto settled in, obviously it was five to six weeks where I would appear down at the offices.

And who ultimately was responsible for the running of the Melbourne office in Melbourne? — In Melbourne itself, Ben Sabeto was.'

[12] Mr Benn and the Applicant were in contact via telephone and electronic mail on a regular basis. The company's computer system allowed the General Manager to access the Melbourne branch's financial data when it had been inputted into the system.''

4 The Commissioner pointed out the termination of Mr Sabeto's employment by Red Spot significantly related to events on 9-10 April 2002 when Mr Sabeto visited the Melbourne office to undertake a spot audit.

5 The Commissioner's decision in respect of this audit is as follows:

''[17] In evidence, Mr Benn stated that:

'On 9 April 2002 I travelled from Sydney to Melbourne in order to conduct a random audit at the Melbourne office. I arrived at the premises at approximately 9 am. The office was at that time unattended with a note on the door stating ''Back in 15 minutes''. The office was in a particularly dishevelled state. There was smashed glass on the floor. It was generally untidy. That day's newspaper was open on the counter. Furthermore, and of greater concern to me, the cash drawer was unlocked. The cash drawer and safe were wide open and there was an amount of money lying in the safe. I then conducted an audit and discovered that there was a cash discrepancy. The discrepancy, on the documents I looked at, was in the sum of $834.90. I then conducted a reconciliation of the DRWBAL and EFTPOS vouchers. DRWBAL is a reference to ''Draw Balance'', a program in the computer concerned with balancing daily takings.'

[18] The parties accused one another of using abusive language when the Applicant returned to the workplace, and Mr Benn raised the findings of the random audit with the Applicant. It is agreed that after the initial exchange, the Applicant walked out to get a drink. When he returned, there was a short discussion on alleged breaches of policy and procedure in relation to the issue of cash handling and branch security. The exchange again became heated and the Applicant walked out of the premises, went home and turned his mobile phone off for the afternoon.

[19] Mr Benn states that he endeavoured unsuccessfully to contact the Applicant:

'... Thereafter, I rang Sydney and spoke to a director of the company, Dan Mekler. After some discussion, I recommended to Mr Mekler that Red Spot should terminate the applicant's employment having regard to:

- the state of the premises in Melbourne;
- the safe and cash drawer being left open whilst the premises were unattended;
- the fact that so much of the cash and banking had not been done;
- the applicant's language and threatening conduct in dealing with me on that day.

Mr Mekler accepted my recommendation. I then drafted a letter advising the applicant he was terminated.

... I thereafter notified the police in relation to the $834.90 that was missing from the premises. The Victoria Police attended and asked me a number of questions. I continued to operate the business out of the Melbourne office for the entire day. The Melbourne office made the daily cash target in relation to the casual parking. I tried to call the applicant on many occasions on his mobile phone but it was switched off for the whole of the day.

... At about 10.30 am on 10 April 2002 I contacted the applicant on his mobile phone. He had not appeared for work at 8.30 am that morning. The applicant said to me over the phone words to the effect:

> ''I will be in soon and I am sick and I have a doctor's certificate.
>
> I have some cash for you.''

Some time later, the applicant attended at the Melbourne offices. At that time, the applicant handed to me $630 in cash. He presented me with crisp, fresh notes in the following denominations:

- 12 × $50 notes = $600
- 1 × $20 notes = $20
- 1 × $10 note = $10

At the time the applicant handed over this cash to me I typed up and printed out a receipt formally recognising that he had provided $630 of company funds to me on 10 April 2002. I provided a copy of this receipt to the applicant. Now produced and shown to me and marked with the letters ''JB-8'' is a copy of the receipt I provided upon provision of the $630 dated 10 April 2002.

I took the money from the applicant. He explained to me that this money belonged to the company. He did not explain to me why he had this money in his possession. He did not explain to me why this money had not been banked nor why it was not in the safe at the Melbourne offices when I conducted the audit the day before.

I then issued to the applicant his letter of termination which was dated 9 April 2002. Now produced and shown to me and marked with the letters ''JB-9'' is a copy of the letter of termination to the applicant dates Tuesday 9 April 2002.

The Victoria Police then attended the Melbourne offices. I provided a formal statement to them in relation to the money that

was missing as a result of the audit I had conducted the day before. At that time, there was still $204.90 which had not been accounted for . . .'

[25] The Applicant opposes the contentions of the Respondent in relation to the events of 9 and 10 April 2002. He states as follows:

'. . . On 8 April 2002 I attended the office at 7.00 am as usual and took the cash float out of the safe and placed it in the cash drawer which I then padlocked. I also took the banking out of the safe and placed it in my briefcase for security as I had been advised to do so by the Respondent at staff meetings on previous occasions. I then left the office to deliver a vehicle to a client at a nearby hotel. When I left the office the safe door was closed but there was no need for same to be locked because it was completely empty. Before I left the office a light bulb smashed and glass spread onto the floor. I swept the glass into the corner and planned to attend to it on my return. As I left the office I locked the front door. On returning to the office I was met by Mr Benn who informed me that he wished to go through the bookwork for the office. Mr Benn pointed out slight discrepancies in the daily bookwork of between one and five cents. Mr Benn spoke to me in an abusive and demeaning manner and accused me of a variety of offences. He swore at me and called me stupid and lazy. I told Mr Benn that I was not prepared to be spoken to in this way and that I was feeling extremely ill and that I was going to go home for the afternoon. He said, ''Fine, piss off''. I left the office.

On 9 April 2002 Mr Benn rang me early in the morning and asked me if I was coming to work. I stated that I was ill and that I was going to the doctor's that morning. Mr Benn then said ''Where is my fucking money''. I asked him if he was accusing me of theft. He replied that he was. I explained to him that the banking was in my briefcase as I had gone home sick and had not banked it and that I would bring the banking into the office with me when I attended work at lunch time.

When I attended the office at approximately midday on the same day, Mr Benn approached me in an aggressive manner. He was rude and abusive and I felt upset and disgusted by the way he was speaking to me. I handed the banking to him and greeted him as politely as possible. Mr Benn then handed me a letter terminating my employment with the Respondent . . . Mr Benn said that the Respondent was investigating moneys missing which they believed were unaccounted for and that the police had been contacted. I told Mr Benn that I would not leave the office without a letter acknowledging that I had returned the banking. Mr Benn gave me the letter. Annexed hereto and marked ''D'' is a true copy of this letter. Mr Benn requested that I give him my work keys and I complied. I asked him about my pay entitlements and he replied that I would not get any money until an internal investigation had been conducted. I told Mr Benn that I thought that contacting the police might help sort the problems out and I again asked about my pay

entitlements. Mr Benn repeated that he would not be paying anything. At this point I gathered my belongings and left the office.

On the same day I attended the Melbourne Central Police Station as I was concerned that allegations of theft had be made against me [sic]. I was interviewed by the police and I produced the letter of receipt from Mr Benn in relation to the banking. I was advised by the interviewing officer that I should not be too concerned about the matter and that no charges had been laid against me. I was never and have never been contacted by the police in relation to the Respondent's claims and to my knowledge no charges have ever been laid.'''

6 The letter of termination from Mr Benn to Mr Sabeto dated 9 April 2002 was as follows:

''Mr Ben Sabeto
[Address]

LETTER OF TERMINATION

On Tuesday 9 April 2002 a random audit was conducted at the branch located at 58 La Trobe Street Melbourne Victoria. Upon commencing the audit there where [sic] a number of operational concerns that surfaced, which include:

- Numerous daily takings not balanced correctly.
- Failure to bank cash as instructed.
- Unaccounted cash takings.
- Banking of American Express, Barter Cash and Cheques not banked for a period of 24 days.
- Petty cash payouts have not been processed daily.
- Back log of mailing and general correspondence that is urgently required in Sydney for administrative processing.
- Fuel receipts not reconciled daily.
- Concierge commissions not paid for over 2 months.
- Office appearance was filthy including smashed glass on the floor and rubbish everywhere.

This has highlighted your failure to follow company policy and procedure. As a result of these matters being raised for discussion with you, the manner in which you responded was totally unacceptable and will not be tolerated. Your conduct and actions included:

- Poor attitude towards your responsibilities and duties as a Manager.
- The manner in addressing senior staff was abusive, rude, involved the use vulgar [sic] language and was delivered in a threatening manner.
- Abandonment of duties and responsibilities.

Furthermore there still remains a large amount of cash takings that are unaccounted for and numerous areas of administration to be investigated. Subsequently, the matter will be investigated internally and had also been referred to the police. Subject to the findings of the investigation there may be further action taken against you.

As a result, effective immediately your employment with our company will terminate with our Company.

Yours faithfully
Jason M Benn

General Manager''

7 The Commissioner found there was a valid reason for Red Spot terminating Mr Sabeto's employment. The Commissioner then said in relation to whether Mr Sabeto was notified of that reason (s 170CG(3)(b)) and given an opportunity to respond (s 170CG(3)(c)) that:

> ''SECTION 170CG(3)(b) — NOTIFICATION OF REASON
>
> [40] The notification of the reason for the termination by Mr Benn to the Applicant was, I consider, thwarted by the Applicant absenting himself from the workplace on the afternoon of 9 April 2002, turning off his mobile phone and not being willing to discuss the issues found by Mr Benn on 9 April 2002. As a consequence, the company prepared the letter of termination in the knowledge that a significant amount of money was missing from the workplace without any notification from the Applicant that he had these funds.
>
> SECTION 170GC(3)(c) — OPPORTUNITY TO RESPOND
>
> [41] I acknowledge that the sequence of events whereby the Applicant left the workplace and made himself uncontactable, and the then unaccounted for $800, initiated the letter of termination. The Applicant was not provided with a clear opportunity to respond. However, he compromised any opportunity which he may have had by virtue of the abusive exchanges between himself and Mr Benn when the issues were raised, and by his leaving the workplace. I am also cognisant that the evidence of the Applicant does not provide a justifiable explanation as to why the money was removed from the workplace on 9 April 2002, rather than banked in accordance with the arranged procedure. There is also no appropriate reasoning from the Applicant as to why he did not meet his managerial obligations to process the expenses which he maintains account for the outstanding $204.
>
> [42] I concur with the following submissions of the Respondent:
>
> > 'Mr Benn attempted to give the applicant an opportunity to respond to the problems with security and the DRWBAL on 9 April 2002 but he left the premises to ''get a drink''. Upon returning and being further confronted in relation to further irregularities, he commented:
> >
> > > ''You can get fucked and so can the company. You're a cunt, and I'm not putting up with this shit.''
> >
> > This conduct, if proved, is arguably repudiatory of the contract of employment. Notwithstanding that legal characterisation, the applicant was given his opportunity and chose not to communicate any comment of substance.
> >
> > This is not a case of the class implicitly addressed by the Full Bench in *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137. In that application, the Full Bench commented:
> >
> > > ''As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employed and give them an opportunity to respond after a

> decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.''
>
> The applicant was not notified of the valid reason after the fact of termination. Mr Benn sought to discuss the various matters with the applicant on 9 April. The applicant chose not to communicate with Mr Benn on that occasion. He admitted as much in evidence in chief at PN899:
>
> > ''Did you attempt to raise any of the matters in document JB9 with him? — With Mr Benn? There is no reconciling with Mr Benn. Trust me.''
>
> Rather, the applicant chose to absent himself from the workplace. He did not explain the irregularities to Mr Benn notwithstanding that Mr Benn was gravely concerned by this issue. He did not inform Mr Benn at that time or (by phone) during that day that he in fact had an amount of the respondent's revenue in his briefcase. These were not the actions of a diligent manager . . .'
>
> [47] Having regard to all of the material before me, my findings are: . . .
>
> - In relation to s 170CG(3)(b), the reasons for termination were set out in full in the letter of termination. The Applicant provided no justifiable explanation to properly explain his breach of procedure;
> - In relation to s 170CG(3)(c), the Applicant obfuscated his opportunity to respond by absenting himself from the workplace and becoming enraged when the issues were raised with him.''

8 In *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, a Full Bench of the Commission said:

> ''[26] Section 170CG(3) states:
>
> > '(3) In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:
> >
> > (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and
> >
> > (b) whether the employee was notified of that reason; and
> >
> > (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
> >
> > (d) if the termination related to unsatisfactory performance by the employee — whether the employee had been warned about that unsatisfactory performance before the termination; and
> >
> > (e) any other matters that the Commission considers relevant.'
>
> [27] In determining whether a termination of employment was 'harsh, unjust or reasonable', s 170CG(3) requires the Commission to consider each of the matters in s 170CG(3)(a), (b), (c) and (d), as well as any relevant matter within the scope of s 170CG(3)(e). Not only must the matters be considered but the words 'must have regard to' signify that each must be treated as a matter of significance in the decision making process. A consequence of this construction of s 170CG(3) is that the Commission is obliged to make a finding in respect of each of the

circumstances specified in s 170CG(3)(a), (b), (c), (d) and (e) insofar as each of these paragraphs is relevant to the factual circumstances of a particular case . . .

[64] Section 170CG(3)(b) requires the Commission to have regard to 'whether the employee was notified of that reason'. The reference to 'that reason' is a reference to the 'valid reason' for the employee's termination. This is clear from the juxtaposition of s 170CG(3)(a) and (b).

[65] An issue arises as to what is meant by the word 'notified' in the context of s 170CG(3)(b).

[66] In the circumstances of the matter before us it is uncontested that Mr Crozier was not notified of the reason for his termination before a decision was taken to terminate his employment. Does s 170CG(3)(b) refer to the giving of notice prior to a decision to terminate? Or is it sufficient if the employee is told of the reason for termination after the employer has made the decision to terminate their employment?

[67] Looked at in isolation the word 'notified' in s 170CG(3)(b) is somewhat ambiguous and may support either of the two interpretations advanced. We think the first interpretation is to be preferred, for three reasons.

[68] First, the interpretation we favour is consistent with one of the meanings attributed to the word 'notified'. The *Oxford Dictionary* states that one of the meanings of the word 'notify' is 'to intimate, give notice of, announce'.

[69] Second, the Explanatory Memorandum relating to s 170CG(3) says:

> '7.43. Subsection 170CG(3) sets out the matters that the Commission must have regard to in determining whether a termination was harsh, unjust or unreasonable. These matters are:
>
> - whether there was a valid reason for the termination related to:
> - — the capacity or conduct of the employee; or
> - — the operational requirements of the employer's undertaking, establishment or service;
> - whether the employee was notified of that reason;
> - whether the employee was given the opportunity of responding to a reason which related to the employee's capacity or conduct;
> - whether the employee had been warned about unsatisfactory performance if the termination was based on unsatisfactory performance; and
> - any other matters the Commission considers relevant.
>
> 7.44. Affording employees procedural fairness in relation to a termination will be relevant in establishing whether or not a termination is harsh, unjust or unreasonable.
>
> However, as procedural fairness is to be only one factor to be considered along with other relevant factors, the intention is that undue weight will not be given to procedural defects in a termination.'

[70] Section 170CG(3)(b) and (c) are clearly related to the concept of 'procedural fairness'. The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a

> reason personal to him or her, without first affording the affected person an opportunity to present a case. This principle is a well established incident of public administrative law. It is apparent from the Explanatory Memorandum that s 170CG(3)(b) and (c) are intended to import the principle into Australian labour law.
>
> [71] Having regard to whether the employee was notified of the valid reason for his or her termination before rather than after the decision to terminate his or her employment is more consistent with the reference to procedural fairness set out in the Explanatory Memorandum.
>
> [72] Third, the interpretation we propose to adopt is consistent with the context in which the provision appears, in particular its relationship with s 170CG(3)(c).
>
> [73] As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted.''

9 *Crozier's* case, and other decisions of the Commission (eg *Chubb Security Australia Pty Ltd v Thomas* (unreported, AIRC, Print S2679, McIntyre VP, Marsh SDP and Larkin C, 2 February 2000), refer to the obligation on the Commission to make a finding in respect of each of the circumstances specified in s 170CG(3) insofar as each is relevant to the factual circumstances of the case.

10 Further, *Crozier's* case indicates that in order to make a finding that an employee was notified of the valid reason for their termination in accordance with s 170CG(3)(b), the employee must have been notified of the valid reason ''prior to a decision to terminate'' them.

11 In this case, while the Commissioner found Mr Sabeto thwarted Red Spot's notification to him of the reason for his termination by ''absenting himself from the workplace on the afternoon of 9 April 2002, turning off his mobile phone and not being willing to discuss the issues found by Mr Benn on 9 April 2002'' and also found the ''reasons for termination were set out in full in the letter of termination'', we think the Commissioner failed to go on to make a finding as to whether Mr Sabeto was notified of the valid reason for the termination of his employment in accordance with s 170CG(3)(b) of the Act.

12 The Commissioner's conclusions that Mr Sabeto thwarted Red Spot's notification and that the reasons for Mr Sabeto's termination were set out in the letter of termination cannot constitute a finding by the Commissioner that Red Spot notified Mr Sabeto of the valid reason for the termination of his employment in accordance with s 170CG(3)(b). Such a finding based on those conclusions would be inconsistent with the facts or *Crozier's* case or both.

13 The Commissioner's failure to make a finding in respect of s 170CG(3)(b) of the Act in the factual circumstances of this case or the making of a finding in respect of s 170CG(3)(b) which is inconsistent with the facts or the law or both the facts and the law is an error within the principles in *House v The King* (1935) 56 CLR 499 at 505. Accordingly, we grant leave to appeal against the

Commissioner's decision and will deal with Mr Sabeto's s 170CE application ourselves.

Valid reason — s 170CG(3)(a)

14 We are satisfied there was a valid reason for the termination of Mr Sabeto's employment by Red Spot related to his capacity.

15 It is clear that in early February 2002, some money belonging to Red Spot was stolen from its Melbourne office. As a result of that, on 19 February 2002, Mr Benn asked all Red Spot office managers, including Mr Sabeto, to bank moneys received every Monday, Wednesday and Friday or on any day in which over $300 is received and to advise him if the money is not so banked.

16 Notwithstanding that request, Mr Sabeto failed, without reasonable excuse, to bank the moneys he received in accordance with the request or to advise Mr Benn as to why he had not so banked the moneys. However, we make no suggestion that Mr Sabeto's failure was associated with dishonesty.

17 Such a failure, in our view, constitutes a valid reason for the termination of Mr Sabeto's employment by Red Spot.

Notified of reason and opportunity to respond — s 170CG(3)(b) and (c)

18 We are not satisfied, however, that Mr Sabeto was notified of the valid reason for his termination or given an opportunity to respond consistent with s 170CG(3)(b) and (c) of the Act. It is apparent that Mr Sabeto was not notified of the valid reason for his termination until he received a letter of termination from Red Spot.

19 As *Crozier's* case indicates, s 170CG(3)(b) requires that an employee be notified of the valid reason before any decision is taken by an employer to terminate their employment.

20 As Mr Sabeto was not notified of the valid reason before Red Spot decided to terminate his employment, he also cannot have been given the opportunity to respond intended by s 170CG(3)(c).

Warning — s 170CG(3)(d)

21 Red Spot conceded Mr Sabeto was not warned about his unsatisfactory performance before his termination.

Size of undertaking and human resource management — s 170CG(3)(da) and (db)

22 In Red Spot's written closing submissions to Commissioner Spencer, Red Spot said in regard to s 170CG(3)(da) and (db):

> ''Section 170CG(3)(da) — size of employer/impact on the procedures followed
>
> 14. The respondent does not operate a large undertaking in Melbourne. It is at best two or three employees. The procedures adopted in the process leading to the termination of the applicant's employment were informal and somewhat ad hoc. Those procedures befitted the nature and size of the respondent's operations generally and its Melbourne offices particularly. In principle, the procedure adopted by Mr Benn was instinctive and developed in a fluid fashion as the financial irregularities became apparent.
>
> 15. The Commission also must consider the applicant's conduct at the

time of the termination. The applicant was abusive and difficult. He left the workplace rather than assist Mr Benn in making sense of the accounts.

Sections 170CG(3)(db) — absence of dedicated human resource management in the undertaking

16. The respondent refers to and repeats the preceding paragraphs. The respondent does not employ a dedicated human resource manager. Mr Benn of the respondent is responsible for human resources. He is not trained in this discipline. Notwithstanding this fact, it is submitted that Mr Benn acted in a fair and appropriate manner on 9 and 10 April 2002.''

23 The witness statement of Mr Benn also pointed out:

''2. I have been employed by the respondent in the position of general manager since 1997. My duties may be generally described as follows:

- human resources management
- operations
- compliance

3. The respondent is engaged in the business of operating a budget car rental operation throughout Australia. Its head office is in Sydney. It operates a car rental fleet in Sydney, Melbourne and Brisbane. The respondent employs about 35 employees nationally. It does not employ a dedicated human resources manager/officer.''

24 We are not satisfied the size of Red Spot's undertaking, establishment or service was such that it would be likely to impact on the procedures it followed in effecting the termination.

25 However, we are satisfied the absence of dedicated human resource management specialists or expertise in Red Spot's undertaking, establishment or service had a significant detrimental impact on the procedures it followed in effecting the termination.

Other matters — s 170CG(3)(e)

26 Other matters that we consider are relevant are the fact the termination was a summary dismissal and Mr Sabeto's negative attitude and reaction on being challenged by Mr Benn on 9 and 10 April 2002.

27 While Red Spot raised Mr Sabeto's inability to manage his workplace in a sound and accountable fashion and some outstanding unaccounted for funds as other relevant matters under s 170CG(3)(e), we think those factors are relevant to the valid reason we have found for his termination.

Conclusion on harsh, unjust or unreasonable

28 Bearing in mind our conclusions regarding the matters in s 170CG(3)(a) to (e) of the Act, we have decided the termination of Mr Sabeto's employment by Red Spot was harsh, unjust or unreasonable.

29 In so deciding, we have been conscious of the objects of the relevant Division of the Act and, in particular, our decision has been made in the context of the need to ensure a ''fair go all round'' is accorded both to Mr Sabeto and Red Spot.

Remedy

30 Section 170CH(1) of the Act provides that the Commission may make an order providing for a remedy if it has determined that the termination was harsh, unjust or unreasonable.

31 Section 170CH(3) provides that if the Commission considers it appropriate, it may make an order requiring the employer to reinstate the employee by:

> ''(a) reappointing the employee to the position in which the employee was employed immediately before the termination.
>
> (b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.''

32 Section 170CH(4) provides that if the Commission makes a s 170CH(3) order and considers it appropriate, it may also make:

> ''(a) any order that the Commission thinks appropriate to maintain the continuity of the employee's employment; and
>
> (b) subject to subsection (5) — any order that the Commission thinks appropriate to cause the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination.''

33 Section 170CH(5) is not relevant to this matter.

34 Section 170CH(6) provides that if the Commission thinks reinstatement is inappropriate, it may if it considers it appropriate in all the circumstances of the case, order the employer to pay the employee an amount in lieu of reinstatement.

35 Section 170CH(7) states that in determining a s 170CH(6) amount, the Commission must have regard to all the circumstances of the case including:

> ''(a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
>
> (b) the length of the employee's service with the employer; and
>
> (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
>
> (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
>
> (e) any other matter that the Commission considers relevant.''

36 Section 170CH(8) and (9) limit the s 170CH(6) amount.

37 Section 170CH(2) provides that the Commission must not order a remedy unless satisfied the remedy ordered is appropriate, having regard to all the circumstances of the case including:

> ''(a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
>
> (b) the length of the employee's service with the employer; and
>
> (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
>
> (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
>
> (e) any other matter that the Commission considers relevant''.

38 In *Henderson v Department of Defence* (unreported, AIRC, Full Bench,

Print S8591, 28 July 2000), a Full Bench of the Commission said with respect to these provisions:

''[16] It appears to us that s 170CH provides for four classes of remedy:

- an order for reinstatement by reappointment to the same position: s 170CH(3)(a);
- an order for reinstatement by reappointment to a position 'on terms and conditions no less favourable': s 170CH(3)(b);
- in conjunction with either of these, an order for continuity of employment and an order for an amount in respect of lost remuneration: s 170CH(4); and
- an order for payment in lieu of reinstatement: s 170CH(6).

[17] It is clear from the terms of s 170CH(6) that, in determining the question of remedy, the Commission must first consider reinstatement.

[18] It is equally clear that, in making a decision as to remedy, the Commission is obliged to consider each of the matters listed in s 170CH(2) and to treat them as matters of significance in determining whether any and, if so, what remedy is appropriate. Section 170CH(2) is expressed in mandatory terms. The Commission cannot make an order for a remedy unless it is satisfied that the remedy is appropriate and, in determining whether or not a remedy is appropriate, the Commission is required to have regard to the matters prescribed in paragraphs (a) to (e) of that sub-section. However, as is the case with determining under s 170CG(3) whether or not a termination of employment is 'harsh, unjust or unreasonable', the Commission, in determining under s 170CH, whether or not a remedy is appropriate, is only required to have regard to these matters in so far as they are applicable or are relevant to the particular circumstances of the case.

[19] This does not mean that, in every case in which the Commission decides to order an amount in lieu of reinstatement, the matters referred to in s 170CH(2) would require examination at least three times — once in deciding that reinstatement was not appropriate, once in deciding an order in lieu of reinstatement was appropriate and once, because of the repetition of those matters in s 170CH(7), in determining the amount to be ordered. In determining a remedy, reference would only need to be made to those matters once. All that s 170CH(2) requires is that the Commission must not make an order unless it is satisfied that the remedy is appropriate having regard to the matters specified in that sub-section. To adopt the words of Moore J in *Edwards v Giudice* [(1999) 169 ALR 89 at 92 (per Moore J)], each of the matters 'must be treated as a matter of significance' in the decision as to which remedy (or combination of remedies) is appropriate. Having regard to those factors, the Commission would determine whether reinstatement was the appropriate remedy and, if not, whether a payment in lieu of reinstatement should be ordered.

[20] It is correct that, if the Commission decides to order an amount in lieu of reinstatement, regard would have to be had to the same matters for the purpose of determining the amount to be ordered. But that involves having regard to these matters for a different purpose. In s 170CH(2) the purpose of the inquiry is to ascertain which remedy or remedies, if any, are appropriate. In s 170CH(7) the purpose of the inquiry is to ascertain the

amount to be awarded in lieu of reinstatement. If it were otherwise s 170CH(7) would be redundant.''

39 As earlier indicated, at the date of his termination, Mr Sabeto was managing the Melbourne office of Red Spot and had been employed as such for some four months.

40 Mr Sabeto does not seek an order for reinstatement, rather he seeks an order requiring Red Spot to pay him the maximum possible monetary amount in lieu thereof. Accordingly, we consider an order for the reinstatement of Mr Sabeto would be inappropriate.

41 In this matter, with respect to s 170CH(2)(a), there was no basis on which to conclude the ordering of the maximum possible amount in lieu of reinstatement would affect the viability of the undertaking, establishment or service of Red Spot. We therefore find the effect of such an order on the viability of Red Spot is a factor that neither favours nor goes against such an order.

42 With respect to s 170CH(2)(b), we find Mr Sabeto's short service with Red Spot is a factor neither favouring nor going against the ordering of an amount in lieu of reinstatement.

43 With respect to s 170CH(2)(c), we are satisfied that if Mr Sabeto's employment had not been terminated he would have remained in employment at Red Spot for only another four weeks. This is because Mr Sabeto was unable to provide a reasonable excuse for his failure to bank the moneys he had received even at the hearing of his s 170CE application.

44 The evidence is that Mr Sabeto's gross annual remuneration at Red Spot was $54,252 or $1,039 gross per week.

45 Mr Sabeto earned no relevant remuneration in the four week period following his termination.

46 Accordingly, the remuneration Mr Sabeto would have received, or would have been likely to receive, if his employment had not been terminated is $4,156 gross.

47 This amount of $4,156 gross, concerning remuneration Mr Sabeto would have received or would have been likely to receive, we find favours the ordering of an amount in lieu of reinstatement.

48 With respect to s 170CH(2)(d), there was a paucity of evidence as to the efforts made by Mr Sabeto to mitigate the loss suffered by him as a result of the termination. However, we accept Mr Sabeto's evidence to the effect that the circumstances surrounding the termination of his employment by Red Spot were such that it was difficult for him to gain other employment. We therefore find his efforts in this regard neither favour nor go against the ordering of an amount in lieu.

49 With respect to s 170CH(2)(e), there are no other matters that we consider are relevant.

50 Having regard to all the circumstances of the case, including our findings above in respect of the matters in s 170CH(2), we are satisfied that an order requiring Red Spot to pay Mr Sabeto an amount in lieu of reinstatement is an appropriate remedy.

51 We now turn to the determination of the amount in lieu of reinstatement.

52 With respect to s 170CH(7)(c), as we earlier indicated, we are satisfied the remuneration Mr Sabeto would have received, or would have been likely to receive, if he had not been terminated is $4,156 gross. We find it favours the ordering of such an amount.

53 With respect to s 170CH(7)(a), there was no basis on which to conclude an order for an amount of $4,156 gross in lieu of reinstatement would affect the viability of the undertaking, establishment or service of Red Spot. We therefore find such a factor neither favours nor goes against the ordering of such an amount.

54 We find, with respect to s 170CH(7)(b), that Mr Sabeto's length of service with Red Spot neither favours nor goes against the ordering of such an amount.

55 Further, we find with respect to s 170CH(7)(d) that Mr Sabeto's efforts to mitigate his loss, as outlined above, neither favour nor go against the ordering of such an amount.

56 With respect to s 170CH(7)(e), there are no other matters that we consider are relevant.

57 In all the circumstances of the case therefore, including our findings above in respect of the matters in s 170CH(7), we are satisfied that $4,156 gross is an appropriate amount to order in lieu of reinstatement.

58 Accordingly, we quash the Commissioner's decision and, as $4,156 gross is no more than the limit imposed by s 170CH(8) and (9) of the Act, we will order pursuant to s 170CH(6) that Red Spot pay Mr Sabeto the sum of $4,156 gross in lieu of reinstatement, with such sum being subject to the deduction of taxation as required by law, within 21 days of the date of this decision. A copy of the order is attached to this decision as PR930817.

(PR930816.)