AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Tempo Services Ltd v Klooger

Williams P, Cartwright SDP, Larkin C

25 October, 19 November 2004

Termination of Employment — Remedy — Appeal — Amount in lieu of reinstatement — Proper regard to matters for determining that payment in lieu of reinstatement was appropriate remedy — Relevant matters for considering amount — Workplace Relations Act 1996 (Cth), s 170CH(2), (7).

The appellant appealled against the decision of a Commissioner of the Australian Industrial Relations Commission. The decision related to the termination of the respondents' employment by the appellant. The Commissioner found that the terminations were harsh, unjust or unreasonable and that each of the respondents should be awarded an amount in lieu of reinstatement.

The appellant had a cleaning contract at a particular site. When it decided to terminate the cleaning contract it informed the respondents that their services would no longer be required and that their employment was to be terminated. The respondents were not paid any redundancy payments. The respondents were subsequently employed by an incoming contractor on the same terms and conditions and without any break in employment. The terms and conditions of the respondents' employment were governed by the *Cleaning (Building and Property Services)(ACT) Award 1998*.

Held: (1) The Commissioner's reasons for decision that the terminations were harsh, unjust or unfair was based upon his conclusion that the terminations were not due to the ordinary and customary turnover of labour and that the respondents were therefore entitled to redundancy payments under the Award. The Commissioner was entitled to form a view as to whether or not the respondents were entitled under the Award to redundancy payments for the purpose of determining whether or not the failure to pay them rendered the terminations at least harsh, if not unjust.

(2) The Commissioner rejected reinstatement as an appropriate remedy and determined that payment of an amount in lieu of reinstatement was an appropriate remedy. He gave reasons for doing so. The Commissioner had proper and adequate regard to each of the matters listed in each of the paragraphs of s 170CH(2) of the *Workplace Relations Act 1996* (Cth) for the purpose of determining that the payment of an amount in lieu of reinstatement was an appropriate remedy in each case. There was no error in the Commissioner's approach.

(3) The Commissioner had regard to the matters referred to in s 170CH(7) by reference to the regard he had for the same matters in respect to the application of

s 170CH(2). In doing so, without further explanation as to the weight to be given to such matters for the purpose of s 170CH(7), the Commissioner fell into error.

Cases Cited

Australian Federation of Air Pilots, Re (unreported, AIRC, Ludeke J, Polites DP and Nolan C, J4022, 27 August 1990).

Australian Meat Holdings Pty Ltd v McLauchlan (1998) 84 IR 1.

Carling v Tempo Services Ltd (unreported, AIRC, Redmond C, PR951458, 31 August 2004).

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

Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission (1998) 89 FCR 200; 84 IR 314.

Cram, Re; Ex parte Newcastle Wallsend Coal Co Pty Ltd (1987) 163 CLR 140; 21 IR 177.

Dingjan, Re; Ex parte Wagner (1995) 183 CLR 323; 58 IR 138.

Ellawala v Australian Postal Corp (unreported, AIRC, Ross VP, Williams SDP and Gay C, S5109, 17 April 2000).

Henderson v Department of Defence (unreported, AIRC, Giudice P, Williams SDP and Huxter C, S8591, 28 July 2000).

House v The King (1936) 55 CLR 499.

Hutchison v Tempo Services Ltd (unreported, AIRC, Redmond C, PR951456, 31 August 2004).

Klooger v Tempo Services Ltd (unreported, AIRC, Redmond C, PR951455, 31 August 2004).

Klooger v Tempo Services Ltd (unreported, AIRC, Redmond C, PR951454, 31 August 2004).

Klooger v Tempo Services Ltd (unreported, AIRC, Redmond C, PR950776, 12 August 2004).

Newtronics Pty Ltd v Salenga (unreported, AIRC, Polites SDP, Acton DP and Smith C, R4305, 29 April 1999).

P & O Catering Services Pty Ltd v Kezich (unreported, AIRC, Giudice P, Ross VP, Gregor C, S5158, 27 April 2000).

Precision Data Holdings Ltd v Wills (1991) 173 CLR 167.

Ranger Uranium Mines Pty Ltd, Re; Ex parte Federated Miscellaneous Workers Union of Australia (1987) 163 CLR 656; 22 IR 338.

Smith v Moore Paragon Australia Ltd (2004) 130 IR 446.

Sprigg v Paul's Licensed Festival Supermarket (1998) 88 IR 21.

Velis v Tempo Services Ltd (unreported, AIRC, Redmond C, PR951459, 31 August 2004).

Wark v Melbourne City Toyota (1999) 89 IR 132.

Appeal

J Murphy, for the appellant.

J Nolan, for the respondents.

Cur adv vult

The Commission.

1 This is an appeal, for which leave is required, by Tempo Services Limited (the appellant) against the decision [1] of Commissioner Redmond issued on 12 August 2004. The decision concerned applications by T. M. Klooger, R. L. Klooger, B. C. Hutchinson, L. G. Carling and J. Velis (the respondents) for relief under s 170CE of the *Workplace Relations Act 1996* (the Act) in relation to the termination of their employment by the appellant on 31 March 2004. In that decision, the Commissioner found that the terminations were harsh, unjust or unreasonable, that reinstatement was not an appropriate remedy and that each of the respondents should be awarded an amount in lieu of reinstatement. He then directed the respondents' union to prepare and submit draft orders to give effect to his decision. On 31 August 2004, the Commissioner issued an order in respect of each of the applications in which he awarded specified amounts to each of the respondents. [2]

2 Pursuant to the Commission's directions, the parties filed and exchanged written submissions and the matter came on for hearing before the Full Bench on 25 October 2004 for the purposes of short oral argument and allowing the parties to answer any questions from the Commission.

3 The notice of appeal as lodged by the appellant was expressed to be against the Commissioner's decision of 12 August 2004. The notice of appeal contained no reference to the Commissioner's orders. Indeed, as it was lodged before the date upon which the orders were issued, it could not have done so. It is clear, however, that, in reality, the appellant is seeking to challenge those orders. At the commencement of the hearing, when the apparent defect in the notice of appeal was brought to the attention of the parties, Mr Murphy, who appeared on behalf of the appellant, sought leave to amend the notice of appeal by including reference to the Commissioner's orders. Mr Nolan, who appeared on behalf of the respondents did not object to this course.

4 The Commission may exercise its general powers under s 111 of the Act, or pursuant to Rule 6 of the Commission's Rules, to correct a defect in a notice of appeal. In circumstances where an appellant has erroneously appealed against a decision rather than the resulting orders, the Commission has considered the appeal as having been brought against the relevant orders. [3] We also note that s 98A of the Act requires the Commission to "*perform its functions in a way that avoids unnecessary technicalities and facilitates the fair and practical conduct of any proceedings under* [the] *Act*". We, therefore, allowed the appellant to amend its notice of appeal so that the appeal was made against the Commissioner's orders of 12 August 2004.

5 The appellant, in its notice of appeal, sought a stay order. As Mr Nolan

1 *Klooger v Tempo Services Ltd* (unreported, AIRC, Redmond C, PR950776, 12 August 2004).

2 *Klooger v Tempo Services Ltd* (unreported, AIRC, Redmond C, PR951454, 31 August 2004), *Klooger v Tempo Services Ltd* (unreported, AIRC, Redmond C, PR951455, 31 August 2004), *Hutchison v Tempo Services Ltd* (unreported, AIRC, Redmond C, PR951456, 31 August 2004), *Carling v Tempo Services Ltd* (unreported, AIRC, Redmond C, PR951458, 31 August 2004) and *Velis v Tempo Services Ltd* (unreported, AIRC, Redmond C, PR951459, 31 August 2004).

3 *Re Australian Federation of Air Pilots* (unreported, AIRC, Ludeke J, Polites DP and Nolan C, J4022, 27 August 1990).

informed us that the respondents were prepared to await a decision in respect of the appeals before seeking enforcement of the Commissioner's orders, it was not necessary for us to deal with the stay order application.

6 The appeal is, in effect, against orders granting relief in respect to applications brought pursuant to s 170CE(1)(a) of the Act. That sub-section provides, in so far as is relevant, that "an employee whose employment has been terminated by the employer may apply to the Commission for relief in respect of the termination of that employment … on the ground that the termination was harsh, unjust or unreasonable". The appeal, subject to the grant of leave, is brought pursuant to s 45 of the Act. By virtue of s 170JF(2), an appeal of this kind may be made "only on the grounds that the Commission was in error in deciding to make the" orders. The powers that may be exercised by a Full Bench on the hearing of an appeal are set out in s 45(7). Those powers are exercisable only if there is error on the part of the primary decision-maker. [4]

7 The Commissioner's decision to make the relevant orders in this case may be appropriately described as a discretionary decision. The errors that might be made in exercising such a discretion were described in *House v The King*[5] in the following terms:

> If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

8 In the circumstances, it is both convenient and appropriate that we consider the question of leave in conjunction with the merits. We would, however, reiterate the proper approach to the granting of leave to appeal. Section 45(1) of the Act makes it clear that an appeal lies to a Full Bench only with leave of the Full Bench. Section 45(2) requires a Full Bench to grant leave if it forms the opinion that the matter is of such importance that, in the public interest, leave to appeal should be granted. If such an opinion is formed, the Full Bench is obliged to grant leave. However, that obligatory basis for granting leave is additional to and does not replace the conventional grounds for granting leave. Such conventional grounds include "whether, in all the circumstances, the decision is attended with sufficient doubt to warrant its being reconsidered by the Full Bench, or whether substantial injustice would result if leave were refused". [6]

9 Leave to appeal should not be granted unless the appellant demonstrates to the satisfaction of the Commission that there is an arguable case of the type that has a reasonable prospect of success that the Commission at first instance has made a legal error or, where the decision which is the subject of the appeal is a discretionary one, there has been some miscarriage in the exercise of the Commission's discretion.

10 The factual circumstances leading up to the terminations are essentially not in

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

5 *House v The King* (1936) 55 CLR 499, at 505. This passage was cited with approval by the majority in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309.

6 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200; 84 IR 314.

dispute. For some 18 years up to March 2004, the appellant had a cleaning contract at the Westfield Belconnen site. In late February 2004, the respondents were informed at meetings with the appellant that it had decided to turn that contract in, that the services of the respondents would no longer be required and that their employment was to be terminated on 31 March 2004. At the time of the terminations, the terms and conditions of the respondent's employment were governed by the *Cleaning (Building and Property Services) (ACT) Award 1998* (the Award). [7] The respondents were not paid any redundancy payments, as the appellant considered that it was under no legal obligation to do so. Each of the respondents was subsequently employed by the incoming contractor on the same terms and conditions and, effectively, without any break in employment. What role, if any, the appellant played in that subsequent engagement or whether that subsequent engagement was wholly the result of the efforts of the respondents was a matter in dispute, one that does not appear to have been the subject of any finding at first instance.

11 Against that background, the Commissioner found that there was a valid reason for the terminations and that the respondents were notified of that reason and were given an opportunity to respond. After stating that s 170CG(3)(d) was not relevant in the circumstances, he went on to consider, pursuant to s 170CG(3)(e) as a matter he clearly did consider relevant, the entitlements of the respondents to severance pay under the Award. He concluded that the terminations in question were not due to the "ordinary and customary turnover of labour". It is evident, from a reading of his decision as a whole, that he considered that the respondents were, in the circumstances, entitled to redundancy pay upon termination.

12 Turning to the issue of remedy, the Commissioner rejected reinstatement as an appropriate remedy. He went on to consider "alternative remedies" and made findings that the factors referred to in paragraphs (a), (b), (c), (d) and (e) of s 170CH(2), including, for the purposes of paragraph (e), the respondents' entitlements to redundancy payments, favoured the making of an order for payment of an amount in lieu of reinstatement. He then went on to state —

> [29] In determining an amount in lieu of reinstatement having regard to s 170CH(7) and the matters referred to above, the starting point is the monetary value of the unpaid severance entitlement should be that he/she was entitled to under that clause of the Award for their service with the respondent.
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> [30] After having regard to all of the evidence, the materials supplied, the submissions of the parties, I consider on balance that the termination of the applicants' employment was harsh, unjust or unreasonable. In coming to this conclusion, I consider that I have afforded both the employees and the employer a "fair go all round".
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> [31] The Union will, on behalf of each of the applicants, prepare a draft order to give effect to this decision and submit respective draft orders within 21 days of this decision.

13 The Commissioner's decision was issued on 12 August 2004. On 20 August 2004, the respondents' union, the Liquor, Hospitality and Miscellaneous Union (the LHMU), sent the Commissioner (with a copy to the appellant's representative) by facsimile draft orders in each application. The amounts specified in the draft orders reflected the LHMU's views as to the

7 *Cleaning (Building and Property Services) (ACT) Award 1998* AW773639CRA [Print N7078].

amounts of redundancy pay due to each of the respondents. The appellant did not raise any issue directly with the Commissioner in relation to the draft orders. It did, however, lodge its notice of appeal on 27 August 2004 and the Commissioner issued orders in the terms of the drafts supplied by the LHMU on, as we have already stated, 31 August 2004.

14 The appellant challenges the finding that the terminations were harsh, unjust or unreasonable. On a proper reading of the Commissioner's reasons for decision we consider that his finding in this respect was based upon his conclusion that the terminations were not due to the ordinary and customary turnover of labour and that the respondents were therefore entitled to redundancy payments under the Award. It was the appellant's failure to make these payments, i.e. the appellant's non-compliance with an award obligation, that, in the Commissioner's view, rendered the terminations unfair.

15 We are of the view that non-compliance with an award obligation that arises in respect to a termination is a matter that the Commission may, pursuant to s 170CG(3)(e) of the Act, take into account when determining whether or not a termination is harsh, unjust or unreasonable. The mere fact that whether or not a breach of an award has occurred may be determined in another jurisdiction for another purpose does not preclude the Commission from making a finding as to the question of non-compliance for the purpose of determining the fairness or otherwise of a termination. It is now well recognised that a tribunal such as this Commission may determine disputed facts or form an opinion as to existing rights and obligations as a step in arriving at its ultimate determination. [8] The Commissioner, in this case, was entitled to form a view as to whether or not the respondents were entitled under the Award to redundancy payments for the purpose of determining whether or not the failure to pay them rendered the terminations at least harsh, if not unjust.

16 For the purposes of this matter, it is neither necessary nor appropriate that we determine in any definitive way the meaning and effect of the expression "ordinary and customary turnover of labour". Each case depends upon its own circumstances. It is sufficient that, in the particular circumstances of these applications, this was not the cause of the terminations. The terminations were due to the fact that the appellant handed in its cleaning contract. Bearing in mind the length of time that it had held that contract and the length of service of each of the respondents, we cannot agree that the Commissioner's conclusion was not one that was open to him. It follows that we are not able to discern any error in this respect that should be reviewed upon appeal.

17 The appellant also challenges the Commissioner's determination as to remedy, both as to payment of amounts in lieu of reinstatement being an appropriate remedy and the assessment of those amounts.

18 It is now well established that, in determining the question of remedy, the

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8 *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149; 21 IR 177; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666; 22 IR 338; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360-361; 58 IR 138 (Gaudron J).

Commission must first consider reinstatement. [9] So much is clear from the terms of s 170CH(6) of the Act. 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. However, it 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. [10] As we have already stated, the Commissioner rejected reinstatement as an appropriate remedy and determined that payment of an amount in lieu of reinstatement was an appropriate remedy. He gave reasons for doing so. In our view, the Commissioner had proper and adequate regard to each of the matters listed in each of the paragraphs of s 170CH(2) for the purpose of determining that payment of an amount in lieu of reinstatement was an appropriate remedy in each case. We can find no error in the Commissioner's approach.

19 Once a determination is made that payment of an amount in lieu of reinstatement is an appropriate remedy, s 170CH(7) requires that regard be had to the same matters for the purpose of determining the amount of that payment. However, that does involve having regard to these matters for a different purpose. [11] Section 170CH(2) is concerned with ascertaining the appropriate remedy. Section 170CH(7) is concerned with ascertaining the amount to be awarded in lieu of reinstatement.

20 As is apparent from paragraph [29] of his decision (cited above), the Commissioner had regard to the matters referred to in s 170CH(7) by reference to the regard he had for the same matters in respect to the application of s 170CH(2). In doing so, without further explanation as to the weight to be given to such matters for the purpose of s 170CH(7), the Commissioner has, in our view, fallen into error. The nature of the enquiry under s 170CH(7) being different, the obligation to have regard to the matters referred to in that sub-section could not be satisfied by having regard to those same matters for the purpose of s 170CH(2). In particular, in relation to the matter referred to in paragraph (c) of s 170CH(7), no regard appears to have been had to the fact that each applicant obtained gainful employment shortly after the terminations were effected. Such a matter was relevant to the determination of the amount to be ordered.

21 The Commissioner's failure to properly address the matter referred to in s 170CH(7)(c) constitutes an error within s 170JF(2) that warrants correction on appeal. We grant leave to appeal and uphold the appeal. Although we have reached the same conclusion as the Commissioner in respect to appropriate remedy, it is not clear from his decision that, in determining the amounts ordered in lieu of reinstatement, he has had proper regard to the matters referred to in s 170CH(7). We refer the original applications back to Commissioner

9 *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1 at 16; *Newtronics Pty Ltd v Salenga* (unreported, AIRC, Polites SDP, Acton DP and Smith C, R4305, 29 April 1999); *Wark v Melbourne City Toyota* (1999) 89 IR 132 at 135; *Henderson v Department of Defence* (unreported, AIRC, Giudice P, Williams SDP and Huxter C, S8591, 28 July 2000).

10 *Ellawala v Australian Postal Corp* (unreported, AIRC, Ross VP, Williams SDP and Gay C, S5109, 17 April 2000), [25]; *P & O Catering Services Pty Ltd v Kezich* (unreported, AIRC, Giudice P, Ross VP, Gregor C, S5158, 27 April 2000), at [13]-[15]; *Henderson v Department of Defence* (unreported, AIRC, Giudice P, Williams SDP and Huxter C, S8591, 28 July 2000).

11 *Henderson v Department of Defence* (unreported, AIRC, Giudice P, Williams SDP and Huxter C, S8591, 28 July 2000).

Redmond and direct him to determine the amounts to be paid in lieu of reinstatement by having regard to and addressing each of the matters referred to in s 170CH(7) for that purpose.

22 We would wish to make it abundantly clear that we are not expressing a view that the amounts actually ordered by the Commissioner are necessarily incorrect. It may well be that, after taking into account all the circumstances and the particular matters referred to in s 170CH(7), the Commissioner concludes that the same or similar amounts are appropriate. We note and endorse the observations of the Full Bench in *Smith v Moore Paragon Australia Ltd*[12] as to the application of the guidelines laid down in *Sprigg v Paul's Licensed Festival Supermarket*[13] and refined in *Ellawala v Australian Postal Commission*. [14] We also would emphasise that s 170CH(6) confers a general discretion "if the Commission considers it appropriate in all the circumstances of the case" to "make an order requiring the employer to pay the employee an amount ordered by Commission in lieu of reinstatement" subject to the Commission having regard "to all the circumstances of the case including" the matters listed in s 170CH(7). No one matter referred to in s 170CH(7) is to be regarded as paramount but regard must still be had to each of them. In the end result, it is for the Commission to arrive at an assessment of an appropriate amount in the circumstances of each particular case.

(PR953337)

Appeal upheld

ANDREW EDGAR

12 *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446.

13 *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21.

14 *Ellawala v Australian Postal Corp* (unreported, AIRC, Ross VP, Williams SDP and Gay C, S5109, 17 April 2000).