[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

CLARKE v FORMFILE INFOSOFT PTY LTD

Watson SDP, Lacy SDP, O'Connor C

13 May 2003

Termination of Employment — Unlawful termination — Appeal — Selection of employees for termination — Commissioner erring in finding that an objective assessment of skills and performance was applied — Evidence not supporting conclusion that selection of employees was justified by reference to their performance — No opportunity provided to employees prior to selection for termination as to criteria to be used and to contest any judgments as to selection — Employees not provided with advice as to reasons for termination or an opportunity to present case prior to decision being made to terminate — Terminations were harsh — Workplace Relations Act 1996 (Cth), s 170CG(3).

Australian Industrial Relations Commission — Appeal to Full Bench of Australian Industrial Relations Commission — Consideration of announcement of ex tempore decisions — Desirable that ex tempore decisions are delivered with sufficient reasons — Reasons provided at later date should be regarded as reflecting reasoning of member unless proper basis for concluding otherwise.

1 THE COMMISSION. This is an appeal, for which leave is required, by Ms Alison Clarke and Ms Louise Abicare (the appellants) against a decision of Cartwright SDP in *Clarke v Formfile Infosoft Pty Ltd* (unreported, AIRC, Cartwright SDP, PR926950, 22 January 2003). In that decision, Cartwright SDP decided applications by the appellants under s 170CE of the *Workplace Relations Act 1996* (the Act) for relief in respect of the termination of employment of the appellants by Formfile Infosoft Pty Ltd (Formfile) on 19 December 2001.

Background

2 The respondent company sells record management products. Each of the applicants was, at the time of the termination of her employment engaged in a sales-based role. Ms Clarke commenced her employment with the respondent on 26 September 1997. Ms Abicare commenced her employment on 24 June 1996.

3 Ms Clarke received a salary of approximately $41,000 per annum, working four days per week, with the potential for additional performance based bonuses. Ms Clarke had changed from a five-day to a four-day working week in February 2001 at her own request. Ms Abicare was remunerated on an annual salary of approximately $28,000 with an additional $10,000 car allowance.

4 In about March 2001, the company restructured its operations reallocating

work on a predominantly geographical basis. The respondent also sought to introduce a commission-based remuneration for the sales staff.

5 Ms Clarke chose to retain her existing salary and bonus arrangement. She notified the respondent of her decision by email in October 2001. The respondent's Victorian Sales Manager, Mr Whittaker, advised in writing that "... if your performance does not improve and budget achieved for October you will be issued with a second warning, a third and final warning will result in termination of your employment".

6 In mid 2001 Ms Abicare was given a standard form agreement for a contractor paid by commission only. She did not agree to the content or sign it and discussed the commission plan with Mr Whittaker, who gave her a new proposed agreement for an employee working as a sales agent, paid by commission only. His evidence is that she told him in September 2001 "... that she would commence commission-only remuneration in October". In October 2001 Ms Abicare queried the non-receipt of her fortnightly salary. She was informed that she was being paid on commission-only. She continued working on a commission-only basis into December. On 17 December Ms Abicare gave Mr Whittaker a draft employment contract, incorporating the changes she proposed. She did not receive a response before her employment was terminated.

7 The company, started by Managing Director, Mr Mensink, in 1988, recorded its first ever loss in the year ended June 2001. In September and October, the respondent's sales were poor and the company was forced to rely on its bank overdraft to fund operations. By mid December Formfile had exceeded the limit on its overdraft, which was its only loan facility.

8 At a meeting on 19 December 2002, Formfile terminated the applicants' employment along with two other sales staff. The employment of an administrative staff member was separately terminated on the same day. The reason given by the company was that the terminations were necessary "due to the current financial position of the company". Mr Mensink invited the employees, whose employment had been terminated to meet with him privately if they wanted to know why they had been selected, or had any ideas how they could be retained.

9 The applicants were each paid for the required notice period and any outstanding salary or commission.

The decision at first instance

10 The applications were initially heard before Blair C on 25 July 2002. He issued a decision (PR920961) and remedial orders (PR920971/PR920972) on 6 August 2002. Formfile appealed the decision (and the accompanying orders). The President of the Commission issued a stay order on 21 August 2002 (PR921658). On appeal (PR922564), the decision and orders were quashed. The matter was then remitted to Cartwright SDP for hearing and determination and were reheard jointly in Melbourne on 30 and 31 October 2002. At the conclusion of the hearing on 31 October 2002, Cartwright SDP announced that:

> "In the view of the circumstances and the nature of the evidence that we have dealt with, I think I can tell you my findings now. Firstly, I raised the question as to whether the Commission had jurisdiction to deal with the applications. I find that it does. Secondly, having considered the submissions and evidence, and having regard to each of the factors in

section 170CG(3) of the *Workplace Relations Act 1996*, I find in accordance with 170CG(3), that the terminations of Ms Clarke and Ms Abicare were not harsh, unjust or unreasonable. I dismiss the applications.

Under rule 46 of the rules of the Commission, you can within seven days request written reasons for decision.''

11 On 1 November 2002, the appellants sought reasons pursuant to r 46. Cartwright SDP published them on 22 January 2002 in PR926950.

12 In his decision, Cartwright SDP:

- found that, in light of substantial losses being encountered by the respondent, an urgent reduction in staff numbers was an operational requirement for the business in December 2001;[24]
- in light of the operational requirement to reduce staffing costs, identified as the central points at issue the selection of the applicants among those whose employment was to be terminated, and questions of procedural fairness;[25]
- found against the appellants' proposition it was the nature and status of their particular remuneration arrangements which resulted in their selection for termination;[26]
- found that whilst there was an unfortunate lack of formal documentation regarding the actual application of the selection criteria identified, the criteria used in the selection of staff for redundancy was that identified in the evidence of the two managers who had been principally involved in managing the sales staff, Mr Whittaker and Mr Mensink;[27]
- found that the selection criteria applied were reasonable and that the respondent's managers were in a position to, and did, make an objective assessment of skills and performance against their selection criteria;[28]
- found no fault in the selection criteria or of the decisions made in applying those criteria, finding the selection of Ms Clarke and Ms Abicare for redundancy related to their capacity or conduct;[29]
- found that each applicant had failed to meet their sales budgets;[30]
- found that there was a valid reason for the termination of the appellants' employment related to the operational requirements of the business and related to their capacity or conduct;[31]
- found that both appellants were aware that the company was experiencing financial difficulties throughout 2001, that the company was concerned about their respective sales performance and that continuing unsatisfactory performance could lead to the termination of employment;[32]
- found that each appellant was notified of the reason for the termination relating to the operational requirements of the business in the meeting of

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24 at [24].
25 at [25].
26 at [29].
27 at [35].
28 at [31]-[34].
29 at [37].
30 at [38] and [45].
31 at [40] and [46].
32 at [53].

19 December 2001, but were not notified of the reason for termination related to capacity or conduct (s 170CG(3)(b));[33]

- neither appellant was given an opportunity to respond to any reason related to her capacity or conduct (s 170CG(3)(c));[34]
- whilst the terminations were not related to unsatisfactory performance as such and it is unlikely that s 170CG(3)(d) was intended to apply in such circumstances, both applicants had been warned about unsatisfactory performance, and, in particular, the need to improve weekly call levels and their sales performance;[35]
- found that the size of the company and absence of dedicated human resource management specialists or expertise in the company did have a significant impact, explaining in large part procedural shortcomings complained of by the appellants (s 170CG(3)(da) and (db));[36] and
- did not find any of a number of factors raised by the appellants under s 170CG(3)(e) to support a finding that the terminations were harsh, unjust or unreasonable.[37]

13 Cartwright SDP concluded at [64]-[65]:

> ''I have found that there was a valid reason in terms of s 170CG(3)(a) for the termination of each applicant. I have had regard to aspects of procedural fairness and other relevant matters as required by s 170CG(3). While one may criticise shortcomings evident in the process of selection I do not find that any deficiencies were such as to invalidate the outcome. The Act does not require the Commission to give procedural fairness conclusive weight. The Commission must decide the appropriate weight to be given to such matters in the light of all aspects of the case before it. This approach was confirmed by the Full Bench of the Federal Court in *Re Crozier* [2001] FCA 1031 (1 August 2001). I have also considered the Act's intent to ensure a 'fair go all round'.
>
> Having considered the submissions and evidence before me, I find in accordance with s 170CG(3) that Formfile's termination of Ms Clarke and Ms Abicare's employment was not harsh, unjust or unreasonable.''[38]

Principles on appeal

14 An appeal from a single member of the Commission lies only with the leave of the Full Bench. In relation to an application for leave to appeal, a Full Bench will need to consider whether it is ''seriously arguable'' that the decision subject to review had been wrong in fact on the point taken as the ground for an alleged error in the decisional process.[39] The error must be of a kind that causes the decision to be attended with sufficient doubt to warrant its being reconsidered. Section 45(2) supplies a distinct and a mandatory test for the

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[33] at [54].
[34] at [56].
[35] at [57].
[36] at [59].
[37] at [60]-[63].
[38] at [64] and [65].
[39] *Miller v Australian Industrial Relations Commission* (2001) 104 IR 415; 183 ALR 419; *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; *Mosey v Australian Customs Service* (unreported, AIRC, Full Bench, PR920611, 29 July 2002) and *Pontil Drilling v Gibson* (2000) 110 IR 122.

Commission to apply when determining whether to grant leave to appeal in a particular case on the ground of importance in the public interest.

15 The appellants in oral submissions grouped the appeal grounds into seven points. They were:

1. Cartwright SDP fell into error, having regard to the question of natural justice and, in fact, denying natural justice to the appellants in the making and particularly the consideration of the closing submissions;
2. Cartwright SDP fell into error in respect of his interpretation and application of s 170CG(3)(a) insofar as there was a finding that there was selection in relation to capacity or conduct;
3. Cartwright SDP failed to give any weight or any significant weight to the failure by the respondent to pay severance pay to the applicants;
4. Cartwright SDP, in his determination that the redundancy process was fair and reasonable and not capricious, was in error and within this ground there will be argument as to the error, so far as a finding of a crucial fact concerning the nature of the redundancy criteria that was applied on 19 December, 2001;
5. Cartwright SDP fell into error in determining that the selection process, itself, was fair and reasonable and not open to criticism;
6. Cartwright SDP failed to give weight to the procedural aspects of termination, put simply, the way in which the applicants were notified and how they were treated on the final day of their employment on 19 December 2001 and
7. Cartwright SDP misconstrued an agglomeration of factors that were proved and erred in his consideration of the fair go all round principle.

Ground 1: Denial of natural justice

16 The appellants submitted that Cartwright SDP failed to properly consider oral and written submissions on behalf of the appellants before announcing his decision on transcript on 31 October 2001. The appellants relied on the circumstances reflected in transcript and supported by an affidavit of Adam Brutovic, solicitor for the appellants, which was admitted in the appeal, in arguing that closing submissions commenced at 4.37 pm, with counsel for the appellants putting oral submissions and handing up and relying upon a 16-page written submission and two authorities. Brutovic's affidavit indicated that Cartwright SDP both looked at counsel and occasionally looked at his desk during the course of oral submissions for the appellants. The respondent's counsel was then heard and counsel for the appellants responded orally. Almost immediately upon the conclusion of the appellant's submissions in reply, Cartwright SDP announced his decision on transcript, recorded above. The appellants argued that Cartwright SDP did not properly consider both the oral and written submissions prior to announcing his decision and thereby denied the appellants natural justice. In support of this contention, reliance was placed on questions asked by Cartwright SDP in relation to remedy in respect of Ms Abicare[40] and the failure of the respondents to pay any severance pay upon termination,[41] which questioning, the appellants contended, demonstrated that his Honour had not considered the written submissions.

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[40] Transcript PN2997.

[41] Transcript PN3050.

17 The respondent submitted that there is no substance to the allegation that Cartwright SDP had denied the appellants procedural fairness. The respondent submitted that the applications fell to be determined substantially upon findings of fact and a discretionary assessment of those facts and that Cartwright SDP was properly placed to make findings at the conclusion of the hearings. It submitted that the questioning highlighted by the appellant was directed to clarification of issues arising in the hearing and demonstrated that the Senior Deputy President was cognisant of the oral and written submissions of the parties.

18 We accept the propositions advanced by the appellants that Cartwright SDP was obliged to afford them an opportunity to put their case and to properly consider that case. In the appeal, it is not contended that the appellants were denied an opportunity to put their case. Rather, it was put that his Honour had not considered the submissions, oral and written, put on behalf of the appellants. We are not satisfied that Cartwright SDP denied the appellants natural justice by failing to properly consider their submissions before making and announcing his decision on transcript. The announcement of ex tempore decisions is not unusual in termination of employment matters, including substantive arbitrations. Whilst it is desirable that ex tempore decisions are attended with sufficient reasoning, at the time, in order to give the parties an indication of the member's reasoning, the provision of later written reasons, following a request under r 46, is permissible and such reasons should be accepted as reflecting the reasoning of the member, unless there exists some proper basis for concluding otherwise. No such basis was established in the circumstances of the present appeal. We see no reason to think that Cartwright SDP did not properly consider the submissions of the appellants, both oral and written, given the benefit enjoyed by him of outlines of argument and witness statements filed in advance of the proceedings, the opportunity to reflect on evidence given over the course of the proceedings, the attention apparently given by him to both oral and written during the course of closing submissions, the questioning identified by the appellants more probably reflecting clarification of submissions and evidence considered by him and the terms of his Honour's published decision.

Ground 2: Cartwright SDP erred in finding that the selection of the appellants related to their capacity or conduct

19 The appellants submitted that Cartwright SDP made a finding that the selection was based on conduct, as well as performance, and was in error in doing so since such a proposition was not advanced by the respondents in the proceedings. They further argued that Cartwright SDP had misapplied s 170CG(3)(a) by collapsing into one the terms ''performance'' and ''conduct''. We are not satisfied that it is seriously arguable that Cartwright SDP erred in this respect. The reasoning of his Honour[42] deals entirely with issues of performance. Whilst Cartwright SDP has reproduced the terminology of s 170CG(3)(a) in recording his findings, there is no suggestion in the reasoning that his Honour found that the selection of either applicant related in any way to conduct. In our view, this appeal point suffers from the

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[42] See [38]-[46].

vice described by Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, in these terms:

> ''The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.''[43]

20 Whilst Cartwright SDP might be criticised for imprecision of language in expressing his finding in relation to the basis of selection of the appellants, when his findings are read in context, there is no basis for finding that his Honour erred.

Ground 3: Cartwright SDP erred in that he failed to take into account a relevant consideration — the failure of the respondent to pay redundancy pay to the appellants

21 We are not satisfied that it is seriously arguable that Cartwright SDP failed to have regard to the failure of the respondent to make redundancy payments to the appellants. It is plain from the questioning of Cartwright SDP[44] that he was aware of the issue, notwithstanding the absence of a specific reference to the issue in his reasoning of Cartwright SDP. The issue was raised in the context of s 170CG(3)(e) which requires the Commission to have regard to any other matters the Commission considers relevant. In any case, even if considered relevant, we do not think the failure to pay redundancy payments would be of great weight in the circumstances of the case, in which there existed no legal obligation to pay redundancy payments and the respondent faced a difficult financial position at the time of the redundancies.

Ground 4: Cartwright SDP erred in determining that Mr Mensink applied three criteria to assess employees for selection for redundancy

22 In his decision, Cartwright SDP extracted evidence of Mr Mensink, Mr Whittaker and Mr Monty, the respondent's accountant, to describe the selection criteria utilised by the respondent. The evidence of Mr Mensink cited by Cartwright SDP went to three criteria — financial performance, including performance against sales budgets, activity, in terms of call volumes, involvement in a movement from manual systems to electronic systems. A fourth factor, commitment to the business on an ongoing basis, was also raised[45] by Mr Mensink, who later confirmed the presence of four considerations in his thinking.[46] Two levels of criticism of the approach of Cartwright SDP were raised by the appellant: an erroneous reference to three considerations in [31] of the decision and, more generally, the failure of Cartwright SDP to find that the evidence of the three company witnesses was inconsistent.

23 On the face of the decision, Cartwright SDP was in error in referring to three, rather than four considerations raised in evidence by Mr Mensink. However, we do not consider this error, in itself, warrants correction on appeal.

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[43] (1996) 185 CLR 259 at 291.

[44] Transcript PN3050.

[45] Transcript PN1686.

[46] Transcript PN2002 and 2007.

The second, broader criticism, does not establish error. In our view the approach of Mr Mensink and Mr Whittaker in relation to the criteria for selection applied was broadly consistent and, as noted by Cartwright SDP, the input of Mr Monty was of a more limited nature, reflecting his role within the respondent's business.

Ground 5: Cartwright SDP erred in finding that the selection criteria were objectively applied

24 In this respect Cartwright SDP found:

> ''[35] I am satisfied that the selection criteria applied by Formfile were reasonable in all the circumstances. I am further satisfied on the 3 managers' evidence that they were in a position to make an objective assessment of skills and performance against their selection criteria, and did so.''

25 We think it is seriously arguable that his Honour erred in making a finding on the evidence that the relevant managers did make an objective assessment of performance and skills. Leave to appeal is warranted in this respect. In considering the evidence ourselves, we have concluded that Cartwright SDP erred in his finding that an objective assessment of skills and performance against the selection criteria were applied. We reach this conclusion on the following basis:

1. The evidence, in our view, supports a conclusion that no systematic or objective application of the criteria nominated was applied by the relevant managers. Whilst Mr Mensink described the process as arduous,[47] the evidence of the respondent's managers is vague and, to a degree contradictory, as to the process of assessing employees against the criteria. Mr Whittaker was certain a whiteboard[48] was used in the process, whilst Mr Monty could not recall the use of a whiteboard[49] and Mr Mensink's evidence is that assessments against the criteria were managed in his head.[50] Some objective data drawn from company systems was utilised in respect of sales performance and sales in the pipeline[51] but there is no evidence as to any objective basis of rating employees in terms of embracing the product range or commitment to the company.[52] Long-term commitment was a matter forming part of the consideration in relation to Abicare[53] but there is no evidence as to any objective assessment of her in that regard. The evidence suggests the weighting on performance was the most important factor,[54] yet the other factors were relied upon in evidence to explain the retention of other employees.[55] Overall the evidence as to the application of the criteria relied upon is vague and does not support a conclusion that an objective assessment was made.

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[47] Transcript PN1685.

[48] Transcript PN2526.

[49] Transcript PN2700.

[50] Transcript PN2003-5.

[51] Evidence of Whittaker in transcript at PN2498 and PN2546.

[52] Other than the evidence of company witnesses, disputed by her, that Clarke, had expressed an intention to leave the company in early 2002.

[53] Evidence of Mensink in transcript at PN1757.

[54] Evidence of Whittaker in transcript at PN2611; Mensink in transcript at PN2091.

[55] Evidence of Whittaker in transcript at PN2638.

2. It is for the Commission to be satisfied itself, on the evidence, that there is a valid reason for the selection of the appellants for termination.[56] We do not think that the evidence supports a conclusion that the selection of the appellants was justified by reference to their performance.[57] Whilst there was evidence concerning sales performance it does not objectively support the selection of the appellants for termination. There is evidence against the appellants in respect of call volumes,[58] there is no comparable evidence in respect of other employees. The criteria involving movement from manual systems to electronic systems and commitment to the business on an ongoing basis involve subjective judgment. The evidence does not disclose any objective basis favouring the selection of the appellants for redundancy.
3. It is clear on the evidence that no opportunity was provided to the appellants, prior to their selection, to be aware of the criteria utilised and to contest any judgments made against them on the basis of the criteria.[59]

Ground 6: Cartwright SDP erred in giving too little weight to the procedural deficiencies in the process and in particular the failure to apprise the appellants of the reason for their selection prior to the termination

26 In his decision, Cartwright SDP found that the appellants were notified of the reason for the termination relating to the operational requirements of the business, but neither was notified of the reason for her selection for redundancy. He found that the applicants were not notified of the reason for termination related to capacity or conduct.

27 We think it is seriously arguable that Cartwright SDP erred in giving too little weight to serious deficiencies in the process and, in particular, the absence of any opportunity to be aware of and have input into the considerations upon which they were selected for redundancy prior to the decision to terminate their employment.

28 In our view it is important that employees are provided with the reasons for the termination of their employment and an opportunity to respond to matters relied upon to their detriment prior to the decision being made. A Full Bench in *Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)*[60] considered whether s 170CG(3)(b) refers to the giving of notice of the reason for termination prior to the decision to terminate or whether it is sufficient if the employee is told of the reason for termination after the employer has made the decision to terminate. The requirement that notice be given prior to the decision to terminate was preferred by the Full Bench for three reasons: firstly, the Oxford Dictionary states that one of the meanings of ‘‘notify’’ is ‘‘to intimate, give notice of, announce’’. Second, the Explanatory Memorandum relating to s 170CG(3) says, in part, that ‘‘affording employees

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[56] See, by analogy in the context of findings as to conduct, *King v Freshmore* (unreported, AIRC, Full Bench, Print S4213, 17 March 2000) at [22]-[29].

[57] See appellant's written submissions to Cartwright SDP, pp 6 and 7 and evidence of Whittaker in Transcript at PN2593.

[58] Transcript at PN1163 in relation to Abicare and PN668 in respect of Clarke.

[59] Evidence of Whittaker in transcript at PN2532, 2534, 2458 and 2460.

[60] Ross VP, Acton SDP and Cribb C (unreported, AIRC, Full Bench, Print S5897, 11 May 2000).

procedural fairness in relation to a termination will be relevant in establishing whether or not a termination was harsh, unjust or unreasonable''. The relevant principle of procedural fairness 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. Thirdly, the context in which the provision appears, and particularly s 170CG(3)(c) regarding being given an opportunity to respond, would require that an employee be notified of a valid reason *before* any decision is taken to terminate their employment. Otherwise, s 170CG(3)(c) would have very little practical effect.

29 Mr Mensink was cross-examined on whether or not the appellants were advised of the four reasons for their selection:

> ''When did you discuss those four matters after 17 December 2001 with Ms Abicare? — I cannot recall having that discussion after 17 December.
>
> And you had made the decision on 17 December, hadn't you? — In principle, in basis, yes.
>
> And that when you turned up to the meeting on 19 December, it was what we would call a fait accompli for the five people who had been selected? — No, I wouldn't call it a fait accompli, because there was discussions afterwards.
>
> But the employment as they knew it, they were being notified it was to be terminated? — Because of the financial position they were notified that they were terminated.
>
> Yes? — Yes. As it says in the letter.
>
> And if Ms Abicare had have said to you, but I really want to keep my job as it is, you would have said that is not possible? — Correct, because of the financial position.
>
> Yes. And when did you speak to Ms Clarke between 17 December and 19 December, saying to Ms Clarke, I have considered these four factors, and I am going to have to make you redundant? — The same would apply.
>
> Well, if you just might tell me? — I didn't.
>
> You didn't. You presented that to Ms Clarke at the meeting on 19 December as a fait accompli? — From 17 December to the 19th. But there were previous discussions, as I alluded to before.
>
> Yes. But the final assessment as to who would be terminated occurred on 17 December 2001, at the meeting of the management team? — The absolute final decision was made on the 19th, but in principle the decisions had been made on the 17th. We were still looking for ways of getting out of this.''[61]

30 In our view, whilst Mr Mensink later equivocated in respect of this evidence, the substantive evidence given by him indicates that the appellants were faced with a fait accompli and were not provided with advice as to the reasons for their termination or an opportunity to present a case prior to the decision being made to terminate their employment. The evidence of Mr Whittaker supports this finding.[62]

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[61] Transcript PN1785-1794.

[62] Transcript PN2536-2540.

Ground 7: Cartwright SDP erred in the application of the ''fair go all round'' principle

31 This ground was argued on appeal as a conglomeration of the errors argued in the other grounds of appeal and does not stand separately as an appeal ground in respect of which a seriously arguable case has been argued.

32 In light of our findings in respect of the appeal grounds in relation to the selection criteria and procedural deficiencies, we grant leave to appeal. Having granted leave it falls to us to determine, for ourselves, whether the terminations were harsh, unjust or unreasonable and if they were what remedy, if any, should apply.

33 The Commission in arbitrating termination of employment matters is required to have regard to the range of matters in s 170CG(3) of the Act. The application of these statutory considerations in respect to terminations of employment arising from the selection of particular employees for termination on redundancy grounds has been canvassed in numerous matters.[63] The Full Bench in *Smith v Moore Paragon Australia Ltd*[64] noted:

> ''In our view *Sulocki* is authority for the following propositions:
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> 1. While operational requirements may provide a valid reason for reducing the size of an employer's workforce, they do not necessarily provide a valid reason for the retrenchment of particular employees.
> 2. The Commission must be satisfied, on the facts as they appear before it, that there was a valid reason for the dismissal of the particular employee in question in that the reason was 'sound, defensible or well founded' and not 'capricious, fanciful, spiteful or prejudiced'.
> 3. The fact that employees are not given an opportunity to respond to allegations of unsatisfactory performance may justify a finding that the termination of their employment was harsh, unjust or unreasonable even though there was a genuine need to reduce the size of the workforce.''

34 Section 170CG(3)(a) requires the Commission to have regard to 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.

35 There is no dispute that the financial difficulties being experienced by the respondent in December 2001 provided a valid reason related to its operational requirements for reducing staff costs by effecting redundancies. However, the authorities considered in *Smith and Moore Paragon* in relation to terminations on redundancy grounds suggest that the Commission must also be satisfied, on the facts as they appear before it, that there was a valid reason for the dismissal of the particular employee in question. The proper approach, consistent with *King v Freshmore*,[65] is not to determine whether the respondent acted reasonably but whether, on the evidence, there was a valid reason for the selection. In our view, for the reasons stated in dealing with ground 5 of the

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[63] *Windsor Smith v Liu* (unreported, AIRC, Full Bench, Print Q3462, 13 July 1998) per Giudice J, Polites SDP and Gay C. *Lockwood Security Products Pty Ltd v Sulocki* (unreported, AIRC, Full Bench, PR908053, 23 August 2001).

[64] (unreported, AIRC, Full Bench, PR915674, 21 March 2002).

[65] (unreported, AIRC, Full Bench, Print S4213, 17 March 2000).

appeal the evidence does not provide a basis for a finding that there was a valid reason for selection of the appellants.

36 In light of our finding that the evidence does not support the selection of the appellants for redundancy and, accordingly, that there was no valid reason for their selection, the considerations in s 170CG(3)(b) and (c) do not arise.[66] However, the failure of the respondent to advise the appellants of the reasons for their selection, discussed in relation to appeal ground 6 or to afford them an opportunity to respond to them and the assessments of their performance relied upon by the respondent is a relevant consideration which can arise under s 170CG(3)(e).

37 We find the appellants were notified of the operational reasons for redundancy but, for the reasons discussed in relation to appeal ground 6, not of the reasons for selection.

38 We also find that the appellants were not given an opportunity to respond to reasons for their selection related to their performance. The failure to afford the appellants this opportunity is compounded, in the circumstances of this matter, by the nature of the application of the criteria employed by the respondent and their application.

39 If the termination related to unsatisfactory performance by the employee s 170CG(3)(d) requires the Commission to have regard to whether the employee had been warned about that unsatisfactory performance before the termination.

40 We agree with Cartwright SDP that the terminations were not related to unsatisfactory performance as such, but to the extent the appellants' performance was considered in selecting staff for redundancy, both had been called upon to improve weekly call levels and their sales performance.

41 Section 170CG(3)(da) requires the Commission to have regard to the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination and s 170CG(3)(db) requires the Commission to have regard to the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination.

42 We find that the absence of dedicated human resource management contributed, in part, to, but does not justify, the procedural deficiencies of the respondent in effecting the terminations.

43 Section 170CG(3)(e) requires the Commission to have regard to any other matters that the Commission considers relevant.

44 We do not find additional matters to be materially relevant. In this respect, we support the finding of Cartwright SDP in relation to internet advertisements raised by the appellants.[67] For the reasons expressed above, we do not consider the failure to pay redundancy payments to be a significant consideration in the circumstances of these matters.

45 Considering all of the matters we are required to have regard to, we find that the termination of each appellant was harsh. Notwithstanding the financial considerations justifying staff reductions by the respondent, we are not satisfied

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[66] *Smith v Moore Paragon Australia Ltd* (unreported, AIRC, Full Bench, PR915674, 21 March 2002) at [92].

[67] at [61].

that a valid reason has been made out for the selection of the appellants and the failure to advise them of the reasons for their selection or afford them an opportunity to put a case in their defence rendered the terminations harsh in all the circumstances.

Remedy

46 In considering whether to provide a remedy and the nature of that remedy, the Commission is required to consider, inter alia:

> ''(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'' [68]

47 In the normal course of events it would be appropriate that we now consider these statutory considerations to determine whether to grant a remedy to the appellants and, if so, what that remedy should be. However, six months have passed since the hearing of this matter before Cartwright SDP concluded. It is reasonable, in that circumstance, that the parties should have an opportunity to address the Full Bench further on the issue of remedy. Further, the factual circumstances relating to the matters to which the Commission is required to have regard (pursuant to s 170CH) may have altered. As the Full Bench said in *ALH Group Pty Ltd (t/as Royal Exchange) v Mulhall*: [69]

> ''... as a general proposition the time between the hearing of an application under s 170CE and decision is usually about six weeks, hence problems associated with a change in the circumstances of an applicant or respondent would not normally arise ... However if the period between the hearing and the decision is considerable ... it would be prudent to provide the parties with a further opportunity to update the Commission on any material change to circumstances.'' [70]

48 Accordingly, pursuant to s 45(6), we will provide the parties with an opportunity to bring, and will admit, further contemporary evidence and direct Watson SDP to take any additional evidence and further submissions, in relation to all relevant evidence, and to report to the Full Bench in relation to it. Watson SDP will issue directions and set a hearing date for this purpose.

49 We do so on the basis that factual circumstances in relation to the matters within s 170CH of the Act, such as mitigation of losses and the effect of any order on the viability of the respondent, may have altered materially. We do so notwithstanding a concern that these matters have had a long and difficult passage and the taking of further evidence will further extend the process for final determination of them.

50 Given the lengthy processes in relation to these matters to date, the parties might give consideration, consistent with s 170CG(2) of the Act, to discussions

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[68] s 170CH(2) and (7).

[69] (2002) 117 IR 357. A similar approach was taken in *Smith v Moore Paragon Australia Ltd*.

[70] (2002) 117 IR 357.

as to remedy which may settle outstanding matters. Watson SDP can facilitate access to another member of the Commission to assist the parties by conciliation if this is thought desirable by them.

(PR931288.)