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LAWYERS

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Editorial – Focus on unfair dismissal provisions

In this edition we concentrate on the unfair dismissal provisions now operative under the *Workplace Relations Act 1996*.

We continue our series of *IR Bulletins* in which we provide some key questions and answers highlighting legislative changes of interest to major employers. We also provide summaries of recent unfair dismissal cases. Since the legislative changes, the decided cases are still at an early stage. There are likely to be more developments about matters such as the operational reasons exception. We will bring these to your attention as they emerge. As always, there is room for a couple of stop press notes about current issues outside our theme.

As the *IR Bulletin* goes to press, amendments to the *Workplace Relations Act 1996*, and a Bill concerning independent contractors, have just been passed by Parliament. We will comment on these in the near future.

Season's greetings and a happy new year to all.

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in this issue

Unfair dismissal provisions

Q. Can employees still challenge their dismissal in a State Industrial Tribunal if they are bound by a preserved State agreement?

No. The *Workplace Relations Act* is stated to operate to the exclusion of State industrial laws, including laws relating to termination of employment (other than discrimination and equal opportunity laws). Therefore, employees who fall within the scope of the federal system are excluded from challenging a termination of employment in a State tribunal. Instead, employees must rely on the protections available under federal laws.

Q. What additional categories of employees are excluded from bringing unfair dismissal claims in the Australian Industrial Relations Commission?

The changes to the *Workplace Relations Act* mean that more employees are now excluded from bringing unfair dismissal claims. In particular, now an employee cannot bring an unfair dismissal claim if:

- the employee's employer employed, at the relevant time, 100 employees or less;
- the employee's employment was terminated for genuine *operational reasons* or for reasons that include genuine operational reasons;
- the employee has not completed the *qualifying period of employment* (the default qualifying period being six months); or
- the employee was engaged on a *seasonal basis*.

Q. How do you calculate whether an employer employs 100 employees or less?

In calculating whether an employer employs 100 employees or less it is necessary to include:

- the employee whose employment was terminated;
- any casual employee who has been engaged by the employer on a regular and systematic basis for at least 12 months, but not other casual employees; and
- the employees of any related bodies corporate (as defined in the *Corporations Act 2001*) of the employer.

Q. What are *operational reasons*? Do they relate solely to redundancy situations?

Operational reasons are defined as reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business.

They are not expressed to relate only to redundancy but will generally do so.

There have been several decisions of the Australian Industrial Relations Commission that have considered the operational reasons exclusion. See pages 8 and 9 of this edition of the *IR Bulletin* for a summary of some of those decisions.

Q. What is the difference between a *qualifying period* and a *probationary period*?

A *qualifying period of employment* is a period which must be completed by an employee prior to the employee becoming eligible to bring an unfair dismissal claim. The default qualifying period is now six months (increased from three months). This period is able to be varied by written agreement between an employer and employee, as long as any longer qualifying period is reasonable

having regard to the nature and circumstances of employment.

A *probationary period of employment* is a period set by the employer to assess suitability for employment. An employee serving a probationary period is excluded from bringing an unfair dismissal claim (as are employees during the qualifying period) as well as other types of claims, such as a claim for failure to provide proper notice. A probationary period must be three months or less, unless it is reasonable for the period to be longer than three months having regard to the circumstances of employment.

An employee may generally bring an action for unlawful termination or for unlawful discrimination even though a probationary period or qualifying period has not expired.

Q. When is an employee engaged on a seasonal basis?

An employee is engaged on a *seasonal basis* if the employee is engaged to perform work for the duration of a specified season. *Season* is a period that:

a) is determined at the commencement of the employee's engagement (the commencement time); and

b) begins at the commencement time; and

c) ends at a time in the future that:

- is uncertain at the commencement time; and
- is related to the nature of the work performed by the employee; and
- is objectively ascertainable when it occurs.

Examples of seasons are:

- the part of a year characterised by particular conditions of weather or temperature;
- the part of a year when a product is best or available; and
- the part of a year marked by certain conditions, festivities or other activities.

Q. What other avenues are available to employees to challenge terminations of employment?

Employees may challenge terminations of employment through the following avenues:

- claims that the employment was terminated for a reason made unlawful under the *Workplace Relations Act*;
- claims that the employer failed to provide the period of notice required by statute;
- claims that the employer failed to notify Centrelink or consult with trade unions where required when terminating the employment of more than 15 employees for reasons of an economic, technological, structural or similar nature;
- claims that the termination of employment was prohibited under federal or State anti-discrimination or equal opportunity legislation; or
- claims under the general law such as an action for damages for breach of the contract of employment or in respect of misleading or deceptive conduct.

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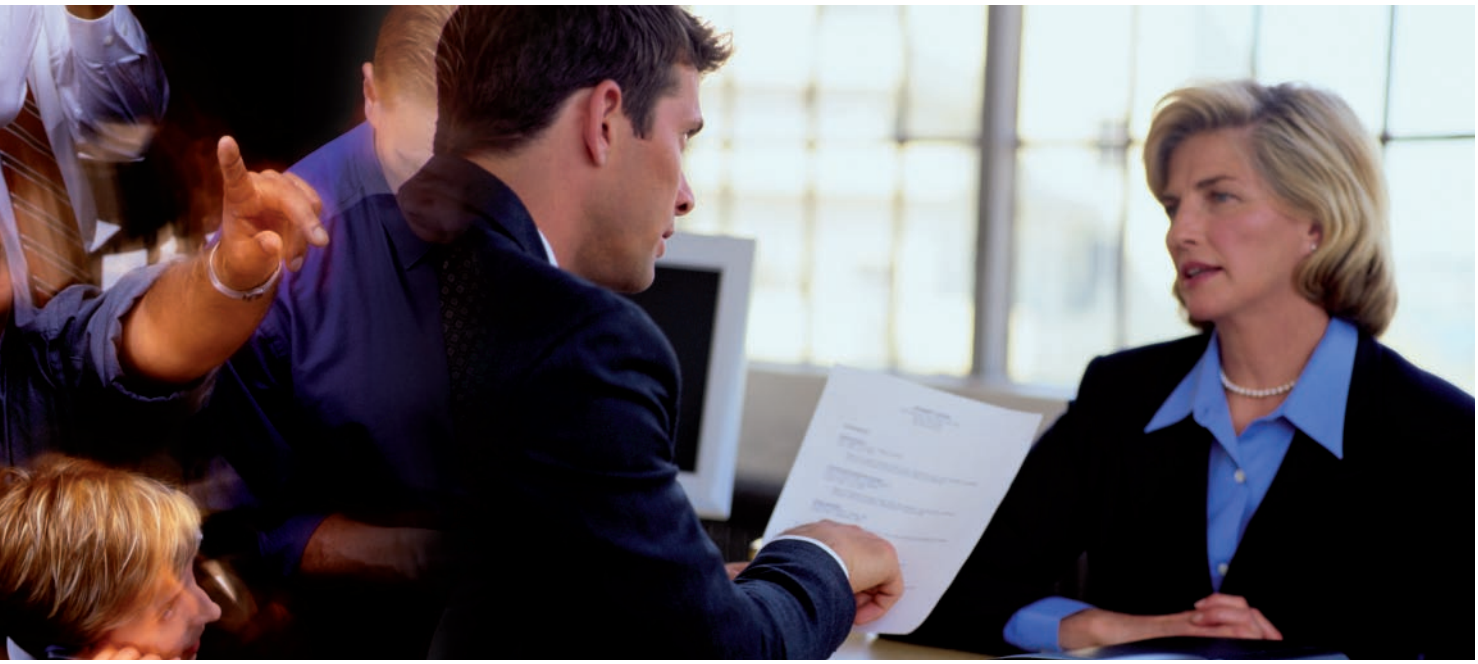

Termination at the initiation of the employer?

Prior to the recent Work Choices amendments to the *Workplace Relations Act* 1996 it was well established that for a termination to be "at the initiative of the employer" there had to be some action on the part of the employer which was either intended to bring the employment relationship to an end or had the probable result of bringing the relationship to an end.

It was not simply a question of whether the action of the employer resulted directly or consequentially in the termination of the employment. Two recent cases consider this issue before and after the commencement of the Work Choices amendments.

Visscher v Teekay Shipping (Australia) Pty Ltd
(9 October, PR974225)

In this case, Mr Visscher was unsuccessful in his unfair dismissal claim because the discussions he had with his employer about a possible change to his role were merely an informal oral indication of his options going forward. The Full Bench of the Australian Industrial Relations Commission considered that the employee's subsequent email complaining of demotion and resignation was pre-emptive in the circumstances and did not constitute termination at the initiative of the employer.

The Full Bench commented that the meaning of "termination at the initiative of the employer" is the subject of greater elaboration in the amended *Workplace Relations Act*.

Megna v No. 1 Riverside Quay (SEQ) Pty Ltd
(24 August 2006, PR973785)

In *Megna,* Senior Deputy President Richards confirmed that the amended *Workplace Relations Act* changed the law in relation to what constituted "termination at the initiative of the employer". In this case, Ms Megna communicated to the employer that she was having transport difficulties getting to work and expected that she would continue having those difficulties for an extended period of time. As a consequence, Ms Megna requested that she be transferred to a location closer to her home. The employer indicated that Ms Megna would first need to resign from her current position and once she had done so, the employer would try to help her find a position closer to home. Ms Megna resigned but the employer did not offer Ms Megna an alternative position. Ms Megna alleged that her employment was terminated at the initiative of the employer because once she had resigned the employer failed to make good on its promise.

Senior Deputy President Richards considered section 642(4) of the *Workplace Relations Act* which provides that the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer. He interpreted "forced" to mean both physical power to achieve a result and actions to persuade or convince another for the same purpose.

In this case, there was no evidence to support a finding that the employer had forced Ms Megna to resign. The employer was simply responding to Ms Megna's suggestion that she would be unable to transport herself to work. The Commission also accepted that there was no undertaking by the employer to redeploy Ms Megna, but simply an offer to try to help her. Importantly, Senior Deputy President Richards noted that any misunderstanding that Ms Megna had in relation to the arrangement was not a relevant consideration in the absence of there being an element of "force" by the employer.

Lessons for employers

- **An employer can be liable for an unfair dismissal action even where the employee resigned if the circumstances amount to a constructive dismissal.**
- **The resignation of an employee will only constitute termination by the employer, for the purposes of unfair and unlawful dismissal claims, if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was "forced" to do so because of conduct (or a course of conduct) engaged in by the employer.**

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Stop Press cases

What powers does the Commission have to vary pre-reform awards?

The Full Bench of the Australian Industrial Relations Commission has handed down a decision clarifying the powers of the Commission to vary pre-reform awards: *Minister for Employment and Workplace Relations, re section 114 applications for review of orders* (27 October 2006, PR974467).

The following key issues were clarified in this decision:

- The Commission's power to vary pre-reform awards is only exercisable in relation to allowable award matters.
- Variations to allowable award matters can only be made by the Commission if they fit within the circumstances exhaustively set out in section 552(1) of the *Workplace Relations Act 1996*.
- Wages are not an allowable award matter. Further, the Australia Fair Pay Commission is the appropriate body vested with the power to fix and adjust minimum wages.

Does the Australian Building and Construction Commissioner have power to direct that a particular solicitor not act for a person in an investigation?

In *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* [2006] FCA 1334, the Federal Court of Australia considered the power of the Australian Building and Construction Commissioner to determine that a particular legal practitioner not represent a client in an investigation under section 52 of the *Building and Construction Industry Improvement Act 2005*. Section 52(3) entitled a person attending before the Australian Building and Construction Commissioner, or an assistant, to be represented by a solicitor or barrister.

In the course of an investigation, the Deputy Commissioner gave a direction to the effect that a particular solicitor could not represent a person in an investigation under examination because the solicitor had been involved in an earlier investigation in which another witness had been asked for information arising out of the same course of events. The Deputy Commissioner was concerned that, given this situation, the solicitor may have unintentionally revealed matters to the person under investigation that would, in effect, forewarn him and prejudice the investigation.

Justice Besanko of the Federal Court ruled that the proper test to be followed by the Australian Building and Construction Commissioner in exercising the power to exclude a particular legal practitioner is whether allowing the representation may prejudice the investigation.

Justice Besanko found that in these circumstances the risk of inadvertent disclosure by the solicitor to the person under investigation was a sufficient basis for the direction made by the Deputy Commissioner and that this direction was properly made.

This decision could be the subject of an appeal.

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Lessons for employers

- **Employers should comprehensively and regularly train employees about policies relating to internet and email usage.**
- **Employers need to ensure that breaches of policy are investigated promptly and acted upon, and that appropriate disciplinary action is taken where warranted.**
- **Where an employer acquiesces in or condones a culture in which inappropriate emails or internet access are tolerated, this may impact an employer's ability to dismiss employees for breach of an email or internet usage policy.**

Email and internet abuse

Two appeals before the New South Wales and Australian Industrial Relations Commissions involving the dismissal of employees for accessing, storing or forwarding pornography via email or the internet highlight the need for employers to actively communicate and enforce a comprehensive workplace policy on internet and email usage.

Budlong v NCR Australia Pty Ltd
[2006] NSW IR Comm 288 (3 November 2006)

Mr Budlong was dismissed by NCR Australia for contravention of its code of conduct after pornographic images were found on his computer. Mr Budlong had received hundreds of emails which he stored in a folder on his computer called "amusements", which he would access. With the exception of one email, he had not forwarded these on to other persons. He was working in an open plan office and was observed by another employee viewing one of the images. This resulted in an investigation and his eventual dismissal.

Mr Budlong brought an unfair dismissal claim and at the hearing argued that he had been "caught up" in a culture where pornographic emails were regularly shared, in particular amongst a group involving managers of which he was part. He argued that it was unfair to single him out for discipline. Nevertheless, Mr Budlong conceded that his actions were a breach of the employer's code of conduct, which he had signed acknowledging the employer's policy in relation to email use in the year prior to his dismissal.

Commissioner Murphy rejected Mr Budlong's defence of being caught up in a workplace culture, described by one witness as an "Aussie bloke culture". Commissioner Murphy noted that the individuals involved in the email group who shared the images had largely been made redundant as a result of a restructure in the previous 14 months providing Mr Budlong with an opportunity to "mend his ways". After these persons had left the organisation, Mr Budlong continued to receive and store emails containing pornography, despite his acknowledgement that this was a breach of policy. The Commissioner also noted that the pornographic material was at the "extreme end".

It was also significant that the employer had warned and then dismissed another employee for similar actions to those of Mr Budlong indicating that the employer did not condone the behaviour. Commissioner Murphy noted that it was difficult to accept that after years of internet use and wide publicity of similar cases that a "reasonable" employee would not recognise a serious risk in accessing such material. On these grounds the Commissioner dismissed Mr Budlong's application.

Appeal

Mr Budlong successfully brought an appeal against this decision. A Full Bench of the New South Wales Commission found that the dismissal was harsh and reinstated him in his employment. The Full Bench accepted that Mr Budlong had been caught up in a culture in which pornographic emails were exchanged at work. The Full Bench noted that "senior managers not only condoned the practice but actively encouraged … participation".

NCR argued that its code of conduct involved a "zero tolerance" policy. However, the Full Bench did not agree. It found that the code of conduct did not extend to pornographic images stored on computers. It also noted that following the earlier dismissal of another employee there had been no communication providing a warning to employees and putting them on notice as to the consequences of accessing or storing pornographic

images. The Full Bench noted "the flow of pornographic emails … continued unabated". In these circumstances the dismissal of Mr Budlong was held to be harsh.

Wake v Queensland Rail (19 October 2006, PR974391)

A different outcome resulted in a recent appeal to the Full Bench of the Australian Industrial Relations Commission in *Wake v Queensland Rail*. In this decision, the Full Bench overturned a decision of Commissioner Bacon who found that the termination of Mr Wake's employment for storage of emails containing pornographic images was harsh. In comparison to the *Budlong* case, the employer had taken comprehensive steps to communicate and train its employees in a policy directed squarely at prohibiting the use of email and internet to store or transmit sexually-related, pornographic or violent material.

At first instance, the Commissioner had reviewed the content of the images stored on Mr Wake's computer. The Commissioner considered that a number of the images and emails were intended to be humorous, despite involving naked people. The Commissioner found that such emails were not "sexual" and, therefore, did not breach the employer's policy.

Criticism was also raised concerning the five months taken to investigate the matter without taking steps to then restrict Mr Wake's access to internet or email. Weighing up these factors, together with the employee's 22 years of otherwise unblemished service, the Commissioner found the dismissal to be harsh, and ordered reinstatement.

Appeal

A Full Bench of the Australian Industrial Relations Commission overturned the Commissioner's decision. It stated that Queensland Rail was entitled to take a "firmer line" due to the numerous comprehensive steps it had taken to implement its policy and the employee's flagrant breach of that policy.

The Full Bench noted that "the Commissioner's approach might well be interpreted to mean that employees with long service ought to be immune from termination unless guilty of breaches…involving large amounts of 'hard core' pornography". The Full Bench stated that it was necessary for employers to take steps to eradicate traffic of such images, as this was a serious and socially important matter.

The Full Bench noted that the employer in this case had made sustained efforts over numerous years to make employees aware of its policy and the consequences of breaching it. In light of these matters, the Full Bench upheld the appeal and overturned the findings and reinstatement order.

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Lessons for employers

- **Before terminating the employment of employees on redundancy grounds, employers should consider redeployment opportunities if they intend to rely on the operational reasons exemption to the unfair dismissal laws. This may include determining whether the employee would be prepared to accept a position of lower status and pay.**
- **In order to rely on the operational reasons exemption to the unfair dismissal laws employers must be able to demonstrate that the restructure was genuine and that the subsequent retrenchment of any employees occurred as a direct result of the restructure.**

Is there a requirement to redeploy redundant employees?

The most recent Work Choices amendments have resulted in various changes to the unfair dismissal laws. One change is that employees are prevented from pursuing a claim for unfair dismissal "if the employee's employment was terminated for genuine operational reasons, or for reasons that include genuine operational reasons": section 643(8) of the *Workplace Relations Act 1996*.

If employers thought any genuine restructuring of their business meant they were safe from an unfair dismissal claim, then they need to think again. Recent decisions suggest employers also have to make genuine efforts to redeploy affected employees before they will be able to rely on the exemption.

Perry v Savills (Vic) Pty Limited
(20 June 2006, PR973103)

Ms Perry and Ms Loriente both worked in the finance department at Savills. A decision was taken in February 2006 to create a single position incorporating their duties and responsibilities. Both employees were given the opportunity to apply for the new position. Ms Perry was unsuccessful. She was subsequently told in vague terms that she could seek to apply for other positions within the company but she elected not to do so. Her employment was subsequently terminated on redundancy grounds. She brought a claim for unfair dismissal which was resisted by Savills on the basis that her employment was terminated for genuine operational reasons.

Senior Deputy President Watson considered the nature of the exemption in section 643(8) of the Act. The Senior Deputy President found that it was not enough for Savills to show that the restructuring was genuine or reflected genuine operational reasons. In order to take advantage of the exemption, Savill's needed to show that Ms Perry's employment was terminated *as a result* of the genuine operational reasons.

Senior Deputy President Watson found that Ms Perry's employment was not terminated for genuine operational reasons. His reasoning was, essentially, that no effort had been made to redeploy Ms Perry. While Ms Perry was told she could apply for other positions, a specific offer of employment was not put to her. Senior Deputy President Watson accepted the evidence of Ms Perry that if a firm proposal of employment with the same remuneration had been put to her, she would have taken up the position.

Carter v Village Cinemas Australia Pty Ltd
(20 September 2006, PR974111)

Mr Carter was the General Manager of the Village Cinema at Doncaster. His employment was terminated on redundancy grounds when Village closed the Doncaster Cinema. Mr Carter's claim for unfair dismissal was resisted by Village on the basis that termination of employment occurred for genuine operational reasons.

At the hearing, Village indicated that it did not have an equivalent position to offer Mr Carter. Mr Carter, however, gave evidence he was prepared to take long service leave and wait to see if another position became available. He also gave evidence that he would have accepted a position of lower status. Commissioner Hingley appears to have had regard to these matters in finding that Mr Carter's employment was not terminated for genuine operational reasons.

This decision highlights two points. First, it seems that an employer will need to consider the employee for

any position, even one of a lower status. A failure to do so will leave an employer exposed to a later claim by the employee that he or she is prepared to accept *any* position.

Secondly, the Commission appears to have taken into account the employee's preparedness to utilise an entitlement to long service leave in order to see whether other positions become available in deciding that the termination did not occur for genuine operational reasons. This has potentially significant implications for employers and the way in which they manage their businesses.

This decision is the subject of an appeal and Ministerial review.

Nicholson v Riviera Marine Pty Ltd
(29 September 2006, PR974198)

Riviera Marine had two business units – the Eastern Business Unit (EBU) and the Western Business Unit (WBU). It terminated the employment of 17 employees, including Mr Nicholson, in the EBU because of a downturn in demand for boats. It subsequently advertised to hire more employees in the WBU, including employees with similar though not identical skills to Mr Nicholson.

Commissioner Spencer found that Mr Nicholson's employment was not terminated for genuine operational reasons. While accepting that the EBU operated separately from the WBU, Commissioner Spencer found a redeployment exercise had not been undertaken prior to termination. The Commission acknowledged that the question of whether redeployment was possible was one that needed to be considered at the substantive hearing of the matter.

Other cases

The importance of offering an alternative position to an employee has been raised in other cases as a factor which the Commission takes into account in determining whether the termination occurred for genuine operational reasons (see, for example, *Trajkovska v Australian Associated Press Pty Ltd* (18 September 2006, PR974086) and *Szekerczes – Boda v. Novadale Enterprises Pty Ltd* (20 November 2006, PR974353)).

Looking forward

It is too early to tell whether the approach taken by the Commission is correct. However, it is doubtful that the legislation imposes a requirement on employers to redeploy employees whose employment ends for redundancy reasons.

Until the matter is decided authoritatively (see the note above about an appeal and review in the *Village Cinema* case), employers should undertake a redeployment exercise before terminating employees on redundancy grounds if they intend to rely on the operational requirements exemption to the unfair dismissal laws. A prudent employer will check to see whether the employee is interested in accepting a position of lower status and pay in order to protect its position later on.

Employers cannot rely on the fact of a restructure in order to assert that the termination occurred for a genuine operational reason. An employer must be able to demonstrate:

- that the restructure was genuine; and
- that termination of the employee occurred as a direct result of the restructure.

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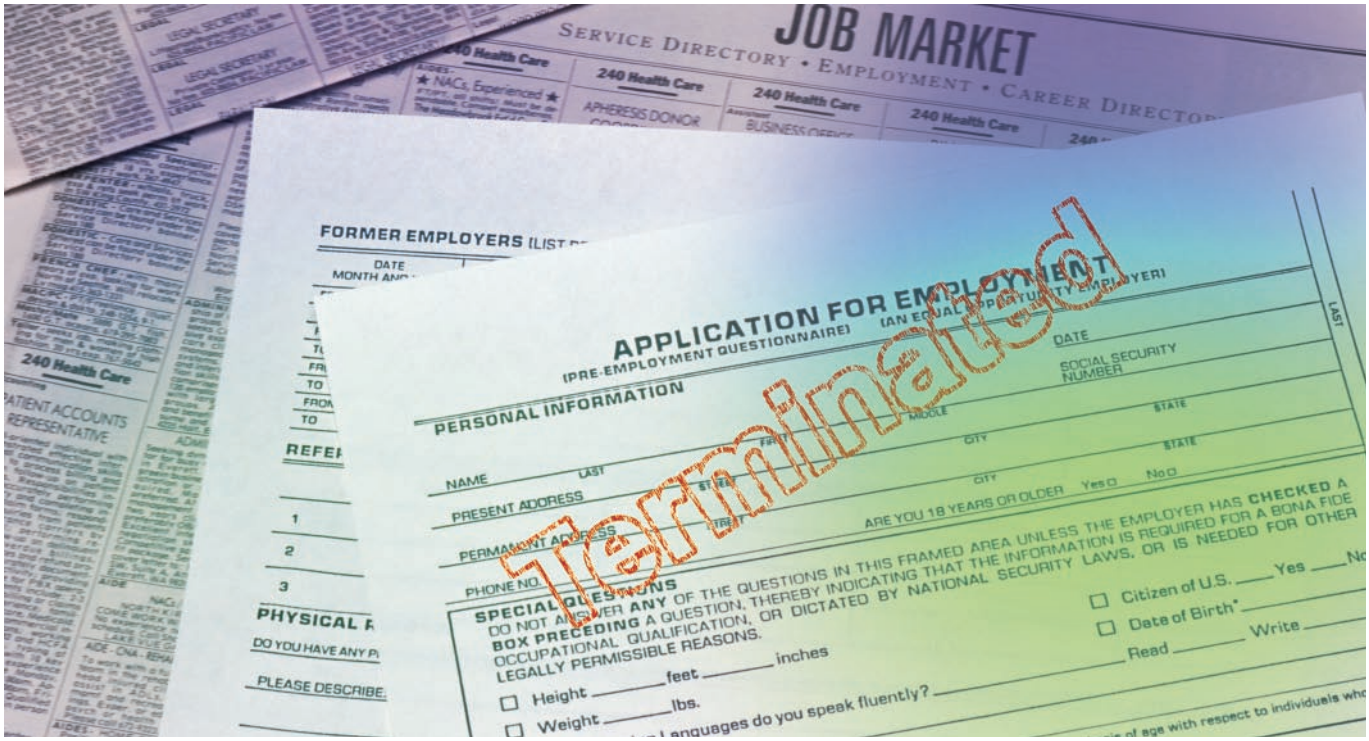

Lessons for employers

- **Lawful directions must be obeyed by employees even if they have lodged a grievance in relation to the issue.**
- **There may be genuine operational reasons for refusing an employee approval to undertake outside employment during a period of leave.**
- **Employers should consider implementing a clear policy about when applications for outside employment may be considered.**

Failure to comply with a lawful direction to resign from outside employment a valid reason for termination of employment

In the recent decision of *Eyre v Department of Human Services* (31 August 2006, PR973720), an employee's failure to comply with his employer's direction to cease unauthorised employment with another organisation was a valid reason for the termination of employment.

Facts

Mr Eyre was employed by the Department of Human Services in a senior management position. He applied for 12 months leave without pay and approval to engage in outside employment with the Deaf Blind Association (DBA). Mr Eyre's application was initially refused.

Mr Eyre lodged a grievance seeking leave with pay for three months and approval to work in outside employment for that period. This was subsequently granted.

Mr Eyre then applied for long service leave for six months and approval to continue to engage in outside employment. The Department granted his application for long service leave but approval to undertake outside employment had ceased. The Department informed Mr Eyre that he was required to resign from his employment with the DBA if he wished to continue employment with the Department.

Mr Eyre did not resign from the DBA and the Department directed him to resign from DBA.

Mr Eyre did not resign but lodged another grievance against the rejection of his application to work

outside the Department while on long service leave. Mr Eyre was again directed to resign from DBA and told by the Department that if he failed to do so the Department would consider terminating his employment. Mr Eyre did not resign and asserted that his reason for disobeying the Department's direction was that he was on authorised long service leave.

Without determining Mr Eyre's second grievance, the Department terminated Mr Eyre's employment on 24 March 2006 because of his persistent failure to comply with a lawful direction to cease unauthorised employment without reasonable excuse. Mr Eyre brought an unfair dismissal claim in the Australian Industrial Relations Commission.

Decision

The Commission (Vice President Watson) considered that Mr Eyre's failure to comply with the Department's direction to cease his outside employment over an extended period was a valid reason for the termination of his employment. All the factual circumstances were relevant to whether there was a valid reason – not just Mr Eyre's entitlement to take long service leave.

The Department was obliged to consider Mr Eyre's application for outside employment against its operational needs, which included important obligations to the community and Mr Eyre's role as a senior employee in managing an important period of change in the Department.

The fact that the Department had not determined Mr Eyre's second grievance before terminating his employment was not relevant to whether there was a valid reason for termination. The Department had made it clear to Mr Eyre that the charges arising from his failure to obey a lawful direction would not be deferred by the lodgement of the grievance. Mr Eyre continued to disobey the direction and this was a valid reason for termination.

The Department's failure to determine Mr Eyre's second grievance was a relevant consideration as to the reasonableness of the Department's processes. The Commission indicated that even if the Department had made a determination in respect of the second grievance it was unlikely to change its position. Given that the Department's position had not been shown to be unreasonable, the failure of the Department to consider the second grievance did not, therefore, impact on the ultimate decision to terminate the employment.

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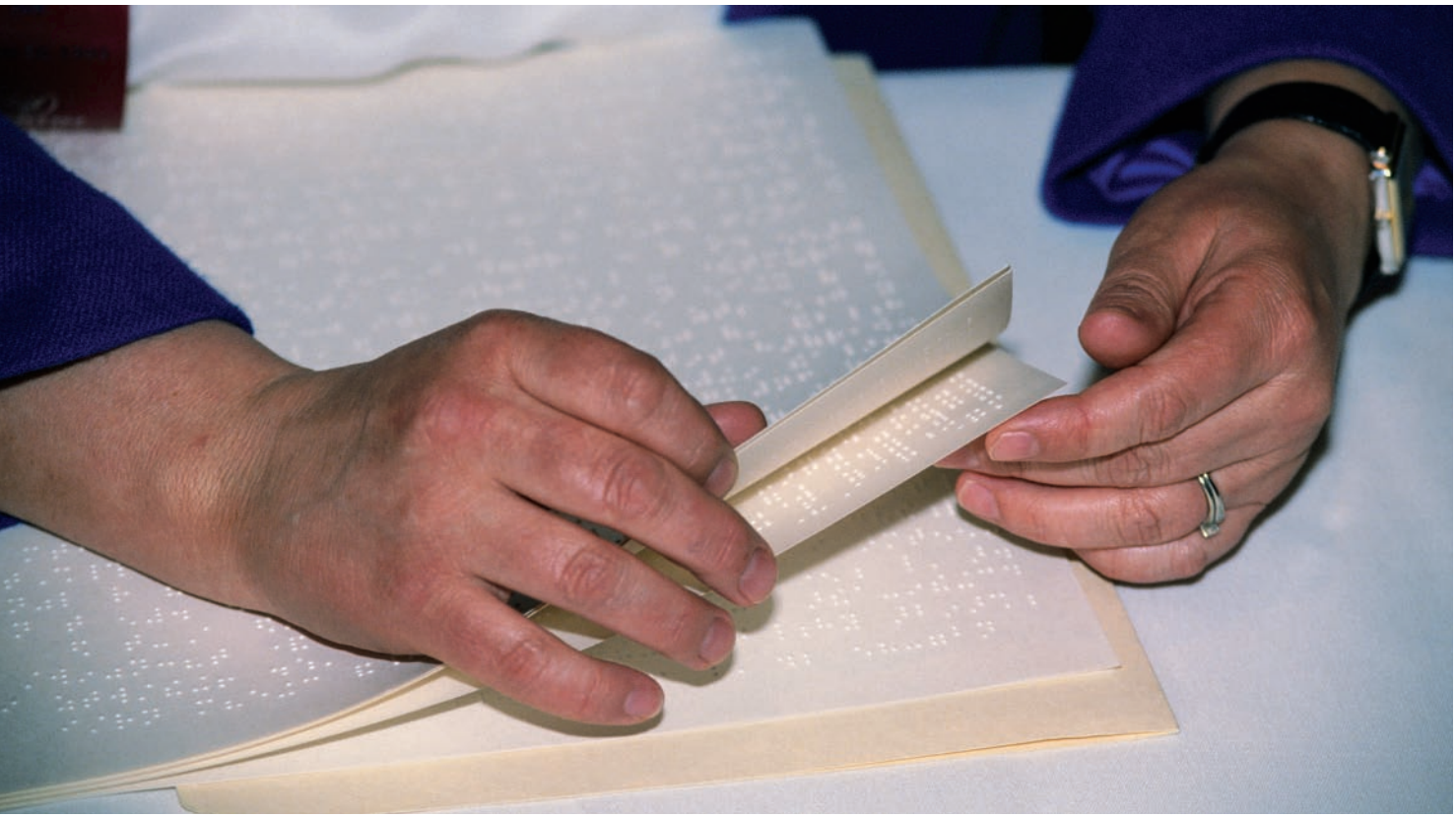

Saint-Gobain unlawfully sacked delegates

The Federal Court of Australia (Justice Buchanan) recently found that Saint-Gobain Abrasives breached the freedom of association provisions of the *Workplace Relations Act 1996*. In this case, the employer failed to rebut the presumption that the selection of two union delegates for redundancy was based on prohibited reasons: *Seymour v Saint-Gobain Abrasives* [2006] FCA 1452 (8 November 2006).

Facts

The applicants, Tony Seymour and Jeff Gearin, were employed by Saint-Gobain Abrasives. They were both delegates of the National Union of Workers. Both applicants had been involved in the organisation of industrial action and in the negotiation of a new certified agreement. At the time the redundancies were announced, the union had initiated a bargaining period and was awaiting an order from the Australian Industrial Relations Commission for a secret ballot to be held to authorise industrial action.

The applicants alleged that Saint-Gobain had contravened the freedom of association provisions of the Act by terminating their employment for a prohibited reason. The relevant reason was that the employees were delegates of an industrial association. They sought reinstatement.

Decision

The freedom of association provisions within the Act establish a statutory presumption against the employer in a final hearing. (Since the advent of the Work Choices legislative amendments, this presumption no longer operates at an *interlocutory* stage in a proceeding.) Saint-Gobain bore the onus of showing, on a balance of probabilities, that the applicants were not dismissed because they were delegates or members of the union.

The following considerations were relevant in determining whether the redundancies had occurred for prohibited reasons:

- There were several inconsistencies between the oral evidence given when compared with the affidavits of the employer's witnesses. In particular this reflected poorly on the credibility of a key employer witness.
- In selecting employees for redundancy, Saint-Gobain gave scant consideration to the quality of the skills possessed by individual employees.
- A report attached to one employer witness's affidavit estimated the cost of the proposed redundancies. Importantly, this had been prepared prior to the development of the skills matrix. However, it accurately identified nine of the 10 employees eventually retrenched.

Justice Buchanan considered that an inference was open to the effect that the skills criteria were deliberately calculated to produce a particular selection outcome.

Saint-Gobain failed to satisfy the Court that the reason for the retrenchments was the selection of the least skilled employees in order to meet the numbers required to be retrenched. Justice Buchanan ordered that the applicants be reinstated.

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Lessons for employers

- **Giving effect to redundancies is a serious matter which requires careful planning.**
- **Selection criteria used in a redundancy process should be clear, justified and genuine.**
- **Whilst the Work Choices amendments have removed the reverse onus of proof at the interlocutory stage, at the final determination employers must still establish what the reasons for dismissal were and that they do not breach the freedom of association provisions.**
- **An otherwise sound case can be undermined by poor preparations or materials which are inconsistent with a version of events later relied upon.**

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