

WORKPLACE AND
EMPLOYMENT LAW
ALERT

FEBRUARY 2007

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**GENUINE OPERATIONAL REASONS –
CLARIFICATION AT LAST?
VILLAGE CINEMAS AUSTRALIA PTY LTD [2007]
AIRCFB 35**

It has only been 10 months since the commencement of the Workchoices amendments, and there is still confusion amongst workers and employers as to how the provisions actually operate. Once such area of uncertainty surrounds the unfair dismissal laws, notably what would be considered “genuine operational reasons”. On 15 January 2007 a Full Bench of the Australian Industrial Relations Commission provided some guidance on this issue, in the decision of Village Cinemas Australia Pty Ltd. This was an appeal from a decision by Commissioner Hingley to dismiss the employer's motion that the employment was terminated for genuine operational reasons.

The employee, Mr Carter, had been employed by Village Cinemas for 19½ years. He had worked at nine different locations in various positions and had managed the cinema at Doncaster at the time of his termination.

On 15 June 2006 Village received a Notice to Vacate the Doncaster Complex and a decision was taken to close the complex from 1 August 2006. Mr Carter suggested to Village that he be granted his accrued long service leave to enable them time to find a position in which he could be redeployed. The request for long service leave was rejected and on 25 July 2006 the employee was informed his employment would be terminated.

The employee initially brought proceedings under section 643 of the *Workplace Relations Act* citing his termination was harsh, unjust and unreasonable but also alleging his employer had breached section 659 by reason of discrimination or other prohibited reasons. Village filed a Notice of Motion for Dismissal under s643(8), on the grounds the Application was outside the jurisdiction because the employment was terminated for genuine operational reasons.

Commissioner Hingley dismissed this Notice of Motion. In making his decision, the Commissioner reached certain conclusions, which we outline in full:

[18] Jurisdiction is a question of fact. It is not a circumstance where the Commission is entitled to step into the shoes of the employer in the management of its business. However in considering the facts as to whether the termination of the applicant's employment in circumstances of this matter were for genuine operational reasons, the following are relevant

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considerations.

- [19] *The applicant was a long serving multi skilled employee who had worked at numerous different locations. He was therefore eminently redeployable.*
- [20] *Of all the 12 staff working at the Doncaster Complex only the applicant was made redundant.*
- [21] *The applicant had an entitlement to at least six months long service leave which he offered to take knowing ultimately it could still lead to redundancy, but he wished to exercise every opportunity to stay with the company and await a vacancy. It could have been a possibility according to the human resources manager.*
- [22] *The applicant was never asked if he would consider or accept a position of lower status. He gave evidence that he would have accepted redeployment to a lower status position.*
- [23] *The evidence was that in the 12 months prior to the termination of his employment, four to five general managers left the respondent. It was conceded by the human resources manager that on that basis vacancies were likely, and her answer was "That certainly would be a possibility".*
- [24] *The onus rested with the respondent to prove its motion for dismissal on the ground that section 643(8) excluded the applicant from jurisdiction. A case has not been made out that discharges that onus.*

On the appeal the Minister for Employment Workplace Relations intervened and was heard.

The Full Bench (SDP Drake, SDP Kaufman and Commissioner Eames) agreed it was appropriate for the matter to be heard. It considered the exercise of the discretion by the Commissioner at first instance was quite narrow.

Village argued the reason for the termination of Mr Carter's employment was the closure of the cinema. This was a genuine operational reason for the termination of the employment and it fell squarely within the definition of section 643(9) of the Act. It was argued by Village that the irrelevant matters relied on by the Commissioner appeared in paragraphs 18 to 23 of the Commission's Decision (extracted above).

The argument of the employee however was the closure of the

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Doncaster Cinema Complex was not a reason for the termination of the employment but merely created the circumstances that provided a justification for the termination of the employment. It was submitted further that the reason for the termination of the employment was the refusal by Village to allow the employee to take his long service leave. It was submitted the failure by Village to redeploy or attempt to redeploy the employee or offer him a lower classified position was said to be relevant to the assessment of the genuineness of the operational reasons.

The Full Bench agreed with the submissions of the Minister that a reason for the termination of the employment of a particular employee can be genuine in the sense that it is real, true, authentic and not counterfeit. The enquiry as to validity does not arise at the stage of the Commission determining whether a reason for termination was based on genuine operational reasons. The Full Bench was referred to the definitions of “genuine” and “reason” and further agreed the operational reason relied upon by the employer need only be a ground or cause for the termination of the employment of an employee. The Full Bench considered it need not be something that *demands or brings about an obligation to terminate the employment of a particular employee*. *The termination of employment of the particular employee does not have to be an unavoidable consequence of the operational reason for the limitation in section 643(8) to operate.*

The Full Bench further held whether the employer could have done something other than the termination would be generally irrelevant in determining whether the termination was in fact for genuine operational reasons.

It was the opinion of the Full Bench the expression *genuine operational reasons* should be given its natural meaning, taking into account the context in which the words were used. If a termination of employment of a particular employee was for genuine operational reasons, or reasons that include genuine operational reasons, no application can be entertained to the Commission for relief in respect to such termination. The Full Bench rejected any argument that sought to have the Commission determine the *appropriateness* of the termination, rather than ascertaining whether the termination of the employment was for genuine operational reasons. The Full Bench cautioned that care should be taken to not go beyond the plain meaning of the words as they appear in the Act.

The Full Bench found the employer’s position to be clear. The cinema complex was closing and there was no position for a manager. These circumstances led to the termination of the employment, so that the closure of the cinema was at least one of the operational reasons for the termination of the employment. The Commission did not consider this was a case where in the examination of whether or not the operational

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reasons were genuine was required. The Commission considered that in having regard to the matter set out in paragraphs 19 to 23 of the decision at first instance, the Commissioner did err by allowing irrelevant matters to guide him.

The Full Bench did however comment on the onus of proof. Where a respondent employer asserts a particular application for relief is precluded by the operation of section 643(8) then it will be up to the respondent to bear the evidentiary onus of persuading the Commission the termination was for genuine operational reasons. The mere assertion by an employer to that effect will usually not be sufficient to discharge his onus however the evidence will of course vary from case to case. Where it can be clearly established the termination was for operational reasons it was not necessary to have regard to the matter such as the refusal of the request for long service leave to ascertain whether the reasons relied upon for the termination of the employment were in fact genuine.

The application by the employee, Mr Carter, that he be granted relief on the grounds that his employment was terminated for harsh, unjust or unreasonable grounds were dismissed.

EFFECT OF DECISION

While it is up to the respondent employer to discharge the evidentiary onus in showing the Commission there were in fact genuine operational reasons for the termination of the employment, it would appear from this decision there is no set requirement to examine other factors which may have led to the termination.

Previous decisions have required a logical connection between the genuine operational reasons and determination. The Full Bench in this decision has determined that genuine operational reasons only need be one ground for a decision to terminate an individual's employment. Further, the Full Bench specifically rejected an examination of the appropriateness or otherwise of the particular termination, preferring to examine whether the termination was for genuine operational reasons or not.

Care should still be taken when making decisions both to terminate employees based on structural, technical or other changes in the business. While the above decision appears to relax somewhat the examination into the reasons behind the genuine operational requirement the Full Bench was still cognisant of the need to ensure such decisions to restructure are not merely a sham.

Both employers and employees need to be aware of the ability of employers to terminate for genuine operational reasons. A failure by an employer to comply with the legislation will lead to an employee

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being able to claim unfair dismissal in circumstances where the employment has not be terminated for genuine operational reasons.

Whether you are the subject of operational change, or an employer looking to restructure your business, our experienced workplace relations team is able to assist you.:

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