

Employment & Industrial Case Note

July 2007

Termination for Genuine Operational Reasons - Priceline Decision to be Reviewed

A full bench of the Australian Industrial Relations Commission (AIRC) on 27 June 2007 ordered that the application relating to termination for operational reasons be returned to another Commissioner and that the original decision be quashed and an appeal by Mr Cruickshank be upheld.

It will be recalled that Commissioner Eames at first instance upheld the employer's argument that Mr Cruickshank had been terminated for genuine operational reasons or for reasons that included genuine operational reasons. *

The Full Bench was not satisfied that Commissioner Eames had fully explained the application of the test in s.643(8) and (9) in a correct way. Further, they were not satisfied that Commissioner Eames had fully explained how what they described as "important evidentiary conflicts were resolved or how he applied the statutory test".

In their decision the Full Bench made some general comments about the genuine operational reasons termination provision. In particular the following are important:-

The employer must produce evidence of the reasons for the termination and persuade the Commissioner hearing the matter that they are or include genuine operational reasons – if this is not done then the jurisdictional objection will fail.

That it is incumbent upon the employer to provide evidence by way of the decision maker or the decision makers and they describe this as "pivotal".

In dealing with the credibility of the decision maker and the evidence of the decision maker the Commission is required to assess and evaluate that evidence against the other evidence produced and the circumstances overall in what was described as "in the usual way". Importantly from later comments from the Full Bench, the Commissioner hearing the matter should explain how that evidentiary assessment has been undertaken and arrived at.

Counsel for the employee directed attention to a number of indications which were argued to conclude that genuine operational reasons played no part in the termination decision. The Full Bench summarised them as follows:

- (a) Despite the termination of the appellant's employment, the position he had occupied, space planner in the health and life style division remained after the restructure;
- (b) The position was advertised internally shortly after the termination;
- (c) The job description in the advertisement, which was alleged by the appellant, matched the description of the job he had been performing;
- (d) When the appellant made an enquiry about the restructured position he was eventually told by a member of the Human Resources Department, Mr Meiliunas, that his skill set was too low;
- (e) Subsequently the same position was advertised on the internet by a recruitment consultant on or around 27 November 2006; indicating that it would be a senior position with an excellent salary; and
- (f) The position was advertised again by the consultant on or about 10 January 2007 and an annual salary up to \$75,000.00 was specified.

In particular the Full Bench made comment about the statement to the employee that his "skill set was too low". Further, in terms of the salary that the figure of

1. See our paper on the first Priceline decision.

\$75,000.00 would give Mr Cruickshank concern given his salary was \$75,000.00 but with other inclusions including a car, mobile phone and superannuation was \$101,150.00.

Further, two employees, one of them a decision maker, had told the employee that he was not sufficiently qualified for the new position.

Therefore the Full Bench has found that the matter must be reheard and the nature of the test properly set out in the decision of Village Cinemas be applied as it should be applied taking into account the facts of the matter and a proper assessment and evaluation of all evidence and an explanation of resolution of that evidence.

It will be interesting to read the final decision of the Commission following a rehearing of the matter. We will report that decision as soon as it is released.

For all information concerning employment and industrial matters and in particular termination situations, please do not hesitate to contact our employment and industrial team.