

# Employment & Industrial Case Note

November 2007

## **SABERINO AND ORRCON OPERATIONS PTY LTD**

### ***Termination for Operational Reasons – Employee Contest.***

### ***Onus on Employer – Employer Fails to Make its Case***

This is a decision of the AIRC – Commissioner Raffaelli of 8 November 2007.

The decision deals with the termination for operational reasons provision and in particular makes comments about the onus on an employer to make out its case on operational reasons and in this particular case failure to fulfil that onus.

Mr Saberino's employment was terminated and he sought application in the Commission for harsh, unjust or unreasonable termination and filed an application pursuant to section 643(1)(a) of the *Workplace Relations Act*. The employer then raised by a Notice of Motion an application to dismiss the application for want of jurisdiction based on the fact that it had terminated Mr Saberino for genuine operational reasons or for reasons that included genuine operational reasons. This defence is available pursuant to section 643(8) of the *Workplace Relations Act*. There have been a number of decisions of the Commission that are very helpful in assessing whether there have been genuine operational reasons. Amongst those cases have been Village Cinemas Australia Pty Ltd, which in most respects is the leading decision in this area. That was a decision of the Full Bench and can be found at PR 975821.

When assessing genuine operational reasons, the evidence of the decision-maker is most important. What the employee raised in this case was that there should be doubt thrown upon the position of the employer due to actions and/or statements of various employees of the employer prior to the termination. In respect of the termination, the employer stated that Mr Saberino's position was redundant amongst others. The employer engaged another organisation (ABB) concerning a restructure of its engineering department and several recommendations were made by ABB including a number of redundancies. The employee's position as a Process Improvement Operator was not replaced due to the fact that the employer did not any longer require that job to be performed by any person.

The employer made submissions which included:-

*The Applicant's position as a machine improvement operator was genuinely made redundant; the redundancy arose out of a restructure of the respondent's engineering department based at its Unanderra site to enable that department to operate more efficiently; the applicant's position was one of three positions made redundant in the engineering department. However, there were some 27 other redundancies at the respondent's Unanderra site in other departments; the applicant's position as machine improvement operator was considered redundant in the restructure because the role was unnecessary for the department's implementation of an improved maintenance management system; the engineering department's restructure causing the applicant's redundancy was genuine or "real, true or authentic" as referred to in Village Cinemas.*

What became important to the Commissioner was evidence led on behalf of the employee and in particular the following:-

- That the witness was part of a conversation with the Acting HR and OH&S Co-ordinator when words to the effect of the following were spoken:-

*Don't worry about Rob's stuff too much as he is on his way out as soon as the opportunity is right. He used to be a supervisor, did you know, but he wasn't any good at that so they moved him into maintenance but they are now trying to get rid of him altogether.*

- The witness had overheard another conversation, the words of which he could not recall but the effect of it was that the applicant employee was spoken about in derogative and demeaning language by three management employees.
- Another employer representative had told the witness Rob Saberina had been demoted from Team Leader and was *just biding his time until the company decided what to do about him.*

The employer tried to contest these allegations only on the basis that the witness was not employed by the company at the time of the ABB report, nor was he when the decision was made to make other parties redundant, that he was not in a position to comment on whether the employee's redundancy was a sham or not genuine and tried to make out that he had some grievance against the employer.

IMPORTANTLY, the witnesses about whom the conversations were demonstrated by the witness were not called to give evidence.

Without these conversations, it would undoubtedly have been very open for the Commissioner to find that the termination was for genuine operational reasons or for a reason that included genuine operational reasons.

The Commissioner commented that given the evidence of the witness called on behalf of the employee, it clearly brought *into question* the genuineness of the reason given by the respondent and at the very least it ought to have been answered in some way.

The Commissioner was therefore not satisfied that the employer had discharged the evidentiary onus to establish, on the balance of probabilities, that the termination was for genuine operational reasons or for reasons that included a genuine operational reason.

#### **COMMENT**

Again, employers must be very careful when considering terminating employees and that if an employee has a right to bring a matter in the Industrial Commission, that if operational reasons are to be relied upon, that the decisions taken can be justified upon that basis. In this particular case, the employer, if it had been able to meet the evidence of the employee, would have been able to justify termination on the grounds of operational reasons. However, it did not meet that case and failed to call any evidence to contest the evidence of the employee's witness. Evidence in these cases is most important.

For advice and information about terminations of employment, please do not hesitate to contact our Employment and Industrial Team.