

Employment & Industrial Case Note

July 2007

Termination for Genuine Operational Reasons

Judith Ann Bourke and Corporation of the Diocese & Synod of North Queensland Operating St Mark's College as a Charitable Trust

This is a decision of Senior Deputy President Richards delivered in Brisbane on 9 July 2007.

The employee Mrs Bourke filed an Application in the AIRC relating to the termination of her employment. The employer responded with a Notice of Motion to dismiss the Application on jurisdictional grounds based upon s.643(8) that the termination of Mrs Bourke's employment was for genuine operational reasons.

A conciliation conference did take place in the matter prior to the jurisdictional point being decided but the matter was unable to be settled.

The employer successfully argued that the employment was terminated for genuine operational reasons and as such the Commission did not have jurisdiction to deal with the Application for termination of employment.

The period of employment of Mrs Bourke was approximately three years and eight months and she was employed as a purchasing and functions co-ordinator. The employer provided accommodation and other residential services to James Cook University students. Part of those services involved providing meals to the students taken in the College's dining room.

A new Principal of the College was employed on 17 July 2006. In the early part of her employment the new Principal undertook a review of the Purchasing and Functions Co-Ordinator (PFC) position and the duties actually being carried out in that position. The Principal decided from her observations that there were very few functions being carried out outside of normal kitchen catering requirements. Further there was an absence of financial controls and a bookkeeping function was therefore required at the College. A bookkeeper was then approved and employed. The person occupying that position took upon a number of activities across the work structure and some of those that were originally in the PFC position. Other duties performed by the Purchasing Functions Co-Ordinator were then reallocated to the Chef, a kitchen hand and to the Principal.

Importantly then the employee was informed both in November

2006 and February 2007 of the change to her current position and it would *no longer be required and that the new role that would be available would be somewhat different*. The employee then went on period of sick leave.

On 7 February 2007 a memorandum was distributed to staff about the restructure and that a position was available for a full-time kitchen hand from 10 March 2007 and that Application would open on 17 February 2007. Given that the employee was absent the memorandum was forwarded directly to her by post and the employer also telephoned the employee to advise of the restructure and the memorandum.

Clearly it was thought that the employee would apply for the kitchenhand position and that she would in all likelihood obtain that position. The employee remained on sick leave and did not apply for the position. The employer took another step of writing to the employee seeking that she make an appointment to be interviewed for the position. The employee responded referring to her medical certificate and that she thought that she should continue in her employment given the standard of *my work and my length of service* again referred to her whole situation.

The employment of Mrs Bourke was then brought to an end.

The argument of the employer upon receipt of the termination application was that the employment of Mrs Bourke was terminated because of genuine operational reasons as the position of purchasing and functions co-ordinator was no longer required.

The Commission found that the process undertaken by the employer being the review of the position and appointment and restructure was for genuine operational reasons and accepted the evidence of the employer on the reasons for such restructure and then the termination of the employment of the applicant Mrs Bourke.

Of interest the Commission commented on the separation between the process about how the original contract came to an end and the process by which she was to be recruited to a subsequent position. The following from paragraph 72 of the decision is important:

Be this as it may, the process by which the applicant's original contract came to an end and the process by which she was to be recruited to a subsequent position needs to be kept quite separate and distinct for the purposes of the consideration that now faces the Commission. It is only the former process that is the proper focus of s.659 of the Act.

And at paragraph 73:

When the respondent terminated the applicant's employment on 9 March 2007, it did so in the context of

the genuinely motivated restructure as publicly announced on 5 February 2007, and in accordance with the timetable therein articulated. The reason 9 March 2007 was a critical date was that this was the date on which the new structure would commence operation with the start of the new semester. The applicant was paid redundancy in terms that appear consistent with her applicable notionally agreed preserved State Award entitlements (to which she would have been entitled to irrespective of whether she was recruited to the new kitchenhand position or not).

And at paragraph 74:

The failure of the recruitment process to culminate in the re-employment of the applicant under another and a different contract is a different concern, and unrelated to the motivation for the termination itself, which is the subject of this decision.

COMMENT

Our view of the conduct of the employer was that it was not originally motivated by s.643(8) and the provision regarding genuine operational reasons in taking steps against Mrs Bourke. As it turned out the facts fitted s.643(8).

The evidence presented by the employer concerning the reasons for the restructure are relevant and the decision should be read by those wishing an understanding of the genuine operational provision.

For further information concerning terminations in employment and termination for genuine operational reasons please contact our employment and industrial team on 07 32236400