

Employment & Industrial Case Note

July 2007

Termination of Employment - Genuine Operational Reasons - Getting it Right.

Robert Ian Smith & Georgiou Group Pty Ltd

This is a decision of Commissioner Harrison of the Australian Industrial Relations Commission delivered in Sydney on 13 July 2007.

The decision confirmed that the termination of employment of Robert Smith from Georgiou Group Pty Ltd was for genuine operational reasons. The genuine operational reasons provision is contained within s.643(8) of the *Workplace Relations Act*.

Mr Smith had brought an Application to the Commission that his termination was harsh, unjust or reasonable and the employer countered with an Application under s.643(8) that the employment was terminated for genuine operational reasons and as such the commission lacked jurisdiction to hear any dismissal/termination matter.

The employee led evidence that he had moved from Melbourne to Port Kembla to take up this position, that he had rented his house in Melbourne for a period of 15 months, that there had been representations that the employment would extend for 15 months, that other employees had been employed following his dismissal and that he was the only employee to be terminated at the time he was so terminated.

The employer led evidence that such is the construction industry that the employment had reached a peak work force and then as the project was being completed or winding down there was what was described as a *de-manning* phase.

Importantly the employer produced graphs from its records: *identifying labour resources, man hours and manning levels on the project – showing a peak in man hours at about February and then a steady decline*. Further evidence was led that labourers being unskilled were the first to go on projects as they neared completion. There were also provisions in the industrial instruments regarding redundancy benefits that take into account the nature of the construction industry and such situations. Evidence was led that no employees were employed to replace Mr Smith.

Importantly the Commissioner found that the issues relating to renting of the Melbourne residence were irrelevant to consideration under s.643(8). A quote from The Village Cinemas decision:

The termination of employment of the particular employee does not have to be an avoidable consequence of the operational reason for the limitation in s.643(8) to operate. Consequently, whether the employer could have done something other than terminating the employee's employment would generally be irrelevant in deciding whether the termination was for genuine operational reasons, or reasons that include genuine operational reasons.

Having considered the evidence and drawing upon his own experience with the construction industry the Commissioner accepted the evidence of the employer that the project was nearing completion and there was a demobilisation of the workforce. Consequently he was satisfied that Mr Smith's employment was terminated for genuine operational reasons. The Commission therefore had no jurisdiction to deal with the termination application.

Comment

Importantly for the employer it was able to produce factual and oral evidence supporting its submissions as to a decline in workforce. Further the nature of the construction industry was relied up to show that as projects near a completion there is a decline in man hours available.

It is therefore important when dealing with s.643(8) that a review of the evidence be undertaken so that all arguments can be assessed on the actual genuine operational reason or reasons.

For any further information about terminations of employment, the *Workplace Relations Act* and in particular genuine operational reasons please do not hesitate to contact our employment and industrial team 07 32236400.