

# Employment & Industrial Case Note

February 2008

## **TERMINATION OF EMPLOYMENT – RECENT DECISIONS – REINSTATEMENTS & APPEALS**

There have been three recent decisions of the Australian Industrial Relations Commission (AIRC) of interest in respect of terminations of employment and then consequential orders of reinstatement. Below we deal with those three decisions:-

**1. Jean Rowland and National Offshore Petroleum Safety Authority** – Termination found to be harsh, unjust or unreasonable and reinstatement ordered;

**2. EDI Rail Pty Ltd (Rowley and EDI Rail Pty Ltd)** – Termination found to be harsh, unjust or unreasonable and reinstatement ordered and appeal against that decision by the employer and appeal rejected by the Full Bench of the AIRC;

**3. Appeal by Telstra Corporation Limited (Carlie Streeter and Telstra Corporation Limited)** – Termination of employment found to be harsh, unjust or unreasonable and reinstatement ordered and then appeal by employer successful and orders of reinstatement and termination being harsh, unjust or unreasonable overturned.

These three decisions demonstrate to employers that process is very important, as well as preparation for any contest on the termination. The appeals also show the process of the AIRC Full Bench in intervening.

### **JEAN ROWLAND AND NATIONAL OFFSHORE PETROLEUM SAFETY AUTHORITY (U2007/4050) [2007] AIRC 1054**

This is a decision of Deputy President McCarthy delivered on 18 December 2007. Jean Rowland was an Executive Assistant employed by the respondent employer when her employment was terminated on 2 May 2007. The organisation was governed in respect of the performance of employment by the Australian Public Service Code of Conduct. Various allegations were made against Ms Rowland dealing with two instances of handover of positions and two instances of deleting documents from her work computer, respectively the 'H' drive and the 'S' drive. The Deputy President examined in detail the evidence before him relating to the handover on both occasions and the practices and procedures of the respondent authority. Of interest is that the Deputy President found that in respect of the first instance, Ms Rowland did apply due care and diligence in providing the handover and in respect of the second instance, again exercised due care and diligence in that handover, even though the handover was inadequate but its primary cause was related to the start date of the employee and Ms Rowland's leave. These were matters that were outside Ms Rowland's control.

In respect of the deletion of files from the 'H' and 'S' drives, it was found that Ms Rowland did delete such material, but the applicant, Ms Rowland, did so in a genuine belief that the material was not such that should be generally available and in particular that the Authority did not have a document management system nor document audit trail protocol in place to guide the employees. The Deputy President found this to be an important factor in deciding these issues.

Importantly as well, prior to termination there was an internal investigation into Ms Rowland's conduct and the investigator recommended:

*Ms Rowland should receive a formal reprimand concerning her behaviour for not providing a proper handover and for deleting files that had obvious benefit to NOPSA. However, the Delegate can choose to impose a different sanction. When deciding on an appropriate sanction, the Delegate may consider past behaviour ...*

The disciplinary decision-maker then went on to refer to an incident earlier in 2005 which the decision-maker described as the applicant having created havoc in the workplace. Unfortunately for the respondent employer, the discovered records of the employer noted at the time that this incident was *not a significant breach*.

The Deputy President therefore found there was no valid reason to terminate the employment of Ms Rowland.

The Deputy President then went on to discuss remedy and in particular the issue of reinstatement. Importantly, the immediate supervisor of Ms Rowland prior to the termination of her employment was not called to give evidence by the employer and no explanation was provided as to why. The organisational structures also provided evidence that the witnesses who were called in the main case were not part of the organisational structure to which the employee, Ms Rowland, was involved with prior to her termination.

All in all, the Deputy President decided that there was no obstacle to reinstatement and an order was made that reinstatement occur no later than 11 February 2008.

### **Comment**

As an outsider looking in, it appears that the employer should have followed the advice it received from its internal investigator and seemed keen to terminate the employment when there was no good reason for doing so. An employer must look ahead to a termination case and decide that the process and the material and evidence that will be called if the matter went to a hearing could justify an appropriate termination of employment. In this particular case the employer then has to deal also with a reinstatement which was clearly open to the Deputy President to order. The evidence not led gave no insight into the impact of reinstatement.

### **EDI RAIL PTY LTD (C2007/3740)[2008] AIRCFB 64**

This is a decision of a Full Bench delivered in Sydney on 21 January 2008. The decision at first instance was that of Senior Deputy President Hamberger of 22 October 2007. That decision found the termination of employment was harsh, unjust or unreasonable and ordered the employee, Mr Rowley, should be reinstated to the employment of the employer. Importantly, in assessing this decision, it was not ordered that the reinstatement should be to the previous position the employee held. This took into account findings of the Senior Deputy President on the employee. The employee held a position as Warehouse Supervisor at the time of the termination of his employment on 31 May 2007. The employee had been employed from July 2006. The reasons given to the employee for his termination were in respect of his conduct in respect of a number of his work colleagues. The Senior Deputy President examined this conduct in detail in reaching his decision.

Importantly, on appeal the employer did not contest the Senior Deputy President's finding that the employment was terminated harshly, unjustly and unreasonably. The appeal therefore centred upon the question of the reinstatement order. The employer in the main attacked the process the Senior Deputy President took to considering whether reinstatement should be ordered. The Full Bench referred to decisions of *Wark v Melbourne City Toyota*, and *Newtronics Pty Ltd v Salenga and Henderson v Department of Defence*. The argument raised by the appellant was that it appeared the Senior Deputy President had applied a test that led to a presumption in favour of reinstatement. The Full Bench in rejecting that argument stated:

*When His Honour's reasoning is so understood, it is apparent that His Honour considered reinstatement as a remedy that was "first to be considered" and also considered whether reinstatement was "appropriate" rather than not "inappropriate".*

The appellant then went on to argue about the appropriateness in reappointing the employee. The Full Bench discussed the decision of *Henderson v Department of Defence* and found that the Senior Deputy President had correctly considered the matters in s.654(2) and found that the approach was consistent with the requirements of s.654(3) of the Act.

The appellant then dealt with grounds involving the actual alleged interactions between terminated employee and another employee of the employer. In this regard it was relevant that at first instance the Senior Deputy President had found that the respondent may have *occasionally resorted to a poorly chosen expression or gesture*. Correctly the Senior Deputy President did not order that the employer reinstate the employee to the former position he held and left it to the employer to decide whether the employee was to exercise any supervisory roles in the future. The Full Bench commented that there had been some concession to the employer even though it was found that the employee had done nothing wrong but perhaps the employee was not well suited to a staff supervisory role. Such an approach the Full Bench found was open to *His Honour within the exercise of his discretion on remedy*.

#### **Comment**

It is fair to say that reinstatement is not often ordered. Clearly the members of the Commission are aware of the difficulties that reinstatement pose and it appears the law is settled as to considerations that must be made in assessing what factors are necessary for reinstatement and the consequences of such reinstatement. Clearly in this case the Senior Deputy President applied the law correctly. Then understanding the position of the employer has ordered reinstatement but not specifically to a supervisory role that the employee held previously. This would give the employer some latitude in dealing with the reinstatement. However employers should be aware it was quite open to the Senior Deputy President to order the employee to his previous supervisory position. It is essential therefore that if termination of employment is carried out then it must be through proper process and assessment of all factors and risks.

#### **Appeal by Telstra Corporation Limited (C2007/3458)[2008] AIRCFB 15**

This is a decision of the Full Bench on appeal from a decision made by the Senior Deputy President Hamburger on 29 August 2007. That decision was that the termination of employment was harsh, unjust or unreasonable and Ms Streeter should be reinstated to a similar position to that which she held

immediately prior to the termination of her employment and on no less favourable terms. Lost remuneration was also ordered. The appeal decision is of interest given the factual circumstances of sexual misconduct at an office Christmas party – or more correctly after the office Christmas party. This would have been a very difficult and needless to say embarrassing matter for all parties to have dealt with both prior to the termination being carried out by the employer and then during the conference and arbitration proceedings and the decision of the Senior Deputy President. It would have been a very difficult matter for the decision makers at all Commission levels to deal with given the moral questions the factual circumstances raised.

Clearly sexual conduct was carried out both in the presence of and vicinity of workmates sharing accommodation after the Christmas function had ended. The difficulty presented by the case for the employee was that she initially denied the conduct – explained as an embarrassment as to what had occurred. The employee had been provided with the opportunity to confess to the conduct. At first instance the Senior Deputy President had found as follows:

*Ms Streeter's dishonesty with Telstra during its investigation into her activities on 24 – 25 February 2007 in the room at Hotel B did not constitute a valid reason for the termination of Ms Streeter's employment because the dishonesty was about activities of an inherently personal nature and he had no reason to believe Ms Streeter was dishonest when it came to stock or cash.*

The Full Bench found that Ms Streeter had an obligation to answer Telstra's reasonable enquiries honestly. Therefore the Senior Deputy President had compartmentalised the question of honesty and that her honesty was necessary for the relationship of trust and confidence in the employment relationship.

The majority found:

*We think it was reasonable for Telstra to conduct the investigation given it appeared her activities had caused difficulties at her work and were likely to cause difficulties at her work in the future. In the circumstances, we also think the questions Telstra asked Ms Streeter were reasonable. We think Ms Streeter needed to be honest with Telstra during the investigation, notwithstanding the inherently personal nature of her activities, so that Telstra could determine and take appropriate action to deal with the difficulties. Ms Streeter's dishonesty during the investigation meant Telstra could not be confident Ms Streeter would be honest with it in the future. Her relationship of trust and confidence between Telstra and Ms Streeter was, thereby, destroyed.*

The majority found the termination of employment was not harsh, unjust or unreasonable. The investigation carried out by Telstra was reasonable and the steps it had taken to deal with the situation were reasonable.

#### **Comment**

The majority therefore found that termination was justifiable by the employer. Interestingly there was a dissenting decision on the Full Bench. The dissenting decision agreed with the assessment and decision of the Senior Deputy President at first instance. Without doubt matters of a sexual nature constitute a very difficult scenario for the employer to deal with. It is therefore important that the process dealing with any investigation and

termination is absolutely correct. It must be reasonable and it must provide an open and fair go all around. It is very much open to see that the question of honesty for Telstra was important and it is a fundamental factor in the question of trust and confidence in the employment relationship between the employer and the employee.

### **Overall Summary**

Employers must be aware and ensure their investigation and process for termination is correct and that termination should not be undertaken lightly. Employees do have their rights subject to the terms of the Act to contest terminations and can be reinstated to their former positions or to the employment. It is a very difficult situation for an employer to deal with if there is a reinstatement. It is a fair comment employers do not want that embarrassment of having to reinstate an employee.

For all your questions and enquiries regarding employment law and termination of employment please do not hesitate to contact our Employment & Industrial Team.

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