

FOCUS

WORKPLACE RELATIONS



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WHEN IS A REASON NOT AN OPERATIONAL REASON?

Senior Associate John Naughton and Lawyer Simon Eiggins report on two cases in which employers relied upon the 'operational reasons' exclusion, but with different results.

We report on four court decisions relating to two different unfair dismissal exclusions

HOW DOES IT AFFECT YOU?

- Since the Australian Industrial Relations Commission full bench decision in *Carter v Village Cinemas Australia*,¹ an employer need only provide evidence that there was a genuine operational reason for a termination, and then refute any claim by the employee that this given reason is a sham.
- In asserting that a given reason is a sham, an employee cannot rely on allegations of mistreatment, or evidence that:
 - an employer did not follow its own certified agreement, or
 - the employee had been promised or was eligible for another position.
- If the evidence does not make clear the discrete operational reason on which the employer relies, there is a risk that the Commission may accept that the termination was for another reason that does not attract the exclusion.

SPERAC V GLOBAL TELEVISION SERVICES

Ms Sperac was employed by Global Television Services Pty Ltd (**Global**) as an account manager, reporting to the 'General Manager Victoria'. In November 2005, Global reviewed its branch structure, abolishing the position of General Manager Victoria and making Ms Sperac's position redundant.

Ms Sperac claimed the restructure, which led to her redundancy, was a sham, and that Global had actually dismissed her because she was 'generally agitating for her rights'. Ms Sperac accepted that her role had changed and that she was made redundant as a consequence, but said she had been promised a new position as project services supervisor.

1. *Carter v Village Cinemas Australia Pty Ltd*, Full Bench of the Australian Industrial Relations Commission, 15 January 2007 (IR975821), see AAR Focus: Workplace Relations – January 2007.

Section 643(8) of the *Workplace Relations Act 1996* (Cth) provides that an employee cannot bring an unfair dismissal claim if the



termination was for genuine operational reasons, or for reasons that include genuine operational reasons.

The Australian Industrial Relations Commission (**AIRC**) was bound to follow the decision in *Carter v Village Cinemas Australia Ltd*, accepting that the operational reason need only be one of the reasons for the termination. The *Village Cinemas* case also accepted that it was irrelevant whether the termination or the restructure prompting it was appropriate or sound, or whether there were other options open to the employer, such as redeployment.

Applying that reasoning, the AIRC ignored whether there was another position to which Ms Sperac could have been reassigned and how she was treated during the process.² The AIRC confirmed that Global had failed to follow its certified agreement in relation to the termination, and that Global's comment that 'things could have been done better' was 'a bland understatement'. Nonetheless, because the AIRC was satisfied that the restructure was intended to address economic and operational issues, it dismissed the claim.

ACWORTH V BOEING AUSTRALIA

A different result was reached in *Acworth v Boeing Australia Limited (Boeing)*.³

Mr Acworth was employed by Boeing as a software engineer, and undertook assignments on a project basis. His employment contract included a provision entitling the employer to direct Mr Acworth to undertake alternative roles, as long as they were commensurate with his skills and knowledge and comparable in nature with his previous roles.

When Mr Acworth refused to undertake a new role, Boeing dismissed him (having no other comparable work available). Mr Acworth filed an unfair-dismissal claim, opposed by Boeing on the basis that Mr Acworth's employment had

been terminated for genuine operational reasons – namely that Mr Acworth had refused a new role or assignment as proposed, and this meant there was no work he could perform for Boeing.

The AIRC determined that for this to constitute a genuine operational reason it did not have to be the only motivation for the dismissal, but it did have to be a 'discrete' reason. It held, therefore, that because the reason for the termination was the employee's refusal to accept reassignment, it was not a genuine operational reason under the Workplace Relations Act. The proper characterisation of the reason for the termination, according to the AIRC, was the employee's refusal to carry out a reasonable and lawful direction (ie his refusal to accept the new position). This led to the curious result that, by trying to redeploy fairly, the employer cost itself use of an operational reasons argument.

FEDERAL COURT CONSIDERS MEANING OF ACCESSORIAL LIABILITY

The Federal Court has found that the Construction, Forestry, Mining and Energy Union and its organisers were not a party to, or concerned in, strike action, despite their attendance at a meeting when the employees decided to go on strike. Special Counsel Rowan Kelly and Lawyer Jessica Choong report.

HOW DOES IT AFFECT YOU?

Proceedings against unions and their organisers based on unlawful industrial action can be difficult to establish without direct evidence of their involvement.

2. *Sperac v Global Television Services Pty Ltd*, Australian Industrial Relations Commission, Commission Smith, Melbourne, 1 June 2007, PR977237.

3. *Mr Brent Acworth v Boeing Australia Limited*, Australian Industrial Relations Commission, Senior Deputy President Richards, Brisbane, 25 May 2007, PR977142.



BACKGROUND

Employees of Barclay Mowlem Construction Ltd (the *company*) were employed under a certified agreement with a 'no extra claims' clause and a dispute-resolution procedure. After a meeting of the employees and organisers of the Construction, Forestry, Mining and Energy Union (the *union*), the company's employees withdrew their labour and went on strike to support and advance claims against the company.

At the meeting, union organisers advised the employees against going on strike. The union organisers also urged the employees to comply with the dispute-resolution procedure and the certified agreement generally. Nevertheless, the employees decided to strike.

After the meeting, the employees' job representative and the union organisers consulted with the company's representative and conveyed the reason for the strike.

Proceedings were then commenced against the union and two of its organisers for:

- failing to comply with the dispute-resolution procedure of a certified agreement; and
- contravening section 170MN of the *Workplace Relations Act 1996* (Cth) (pre-WorkChoices amendments) by engaging in industrial action for the purpose of supporting or advancing claims against the company, in respect of the employment of its employees who were covered by the certified agreement.

The WA Industrial Magistrates' Court found that a breach of s170MN had occurred, and fined the union and the organisers. This decision was upheld on appeal to a single judge in the Federal Court. The union and the organisers then appealed to the Full Court of the Federal Court.⁴

The union also changed their rules to provide that industrial action was not authorised by the union without the consent of a committee of management of the union.

DECISION

The Full Court of the Federal Court set aside the orders made against the union and the organisers.

4. *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87 (per Tamberlin, Gyles and Gilmour JJ).

The Full Court found that the evidence did not establish that the union, through its organisers, played a significant part in the activities leading to the strike, and it was not reasonable to find that the organisers' actions had made the union or the organisers a party to, or concerned in, the strike.

To be liable, the union and the organisers needed to be linked in purpose with the employees, and be implicated or involved in the contravention. In other words, they needed to participate in, or assent to, the contravention.

The Full Court found that 'there was no proper basis for the finding by the Industrial Magistrate that on the evidence there was "an irresistible inference" that the Union by its officers ... played a significant part in the activities which led to the withdrawal of labour'.

The Full Court also found that the job representative's actions in calling, arranging and attending the meetings was not attributable to, and did not bind, the union.

PROTECTION FROM DISCRIMINATION ON THE BASIS OF EMPLOYMENT ACTIVITY

The recently enacted *Equal Opportunity Amendment Act 2007* (Vic) will introduce a new basis for unlawful discrimination complaints for Victorian employees. Senior Associate Luke Gattuso and Lawyer Erin Hawthorne report.

HOW DOES IT AFFECT YOU?

- Amendments to the *Equal Opportunity Act 1995* (Vic) will mean that discrimination claims can be brought if Victorian employees perceive that they have been discriminated against on the basis of an 'employment activity'.

- Any request by an employee for information regarding their employment entitlements must be reasonable for that request to form the basis of a successful discrimination complaint.
- Employers should take steps to ensure adequate record-keeping of written and oral requests or concerns raised by Victorian employees in relation to their employment entitlements.

THE LEGISLATION

The *Equal Opportunity Amendment Act 2007* (Vic) will amend the *Equal Opportunity Act 1995* (Vic) to establish a new protected attribute under Victorian discrimination law. The new 'employment activity' attribute will cover situations where an employee, in their individual capacity, has:

- made a reasonable request to an employer, orally or in writing, for information regarding their employment entitlements; or
- communicated to an employer, orally or in writing, a concern that he or she has not been, is not being, or will not be, given some or all of their employment entitlements.

The employee's request about entitlements must be **reasonable**, and would not include:⁵

- requests for confidential or unduly complicated information not readily accessible;
- requests made outside of normal work hours or in a violent or threatening manner; or
- requests for information not related to the employee's employment entitlements.

Discrimination claims made on the grounds of 'employment activity' must be made to the Victorian Equal Opportunity and Human Rights Commission, which has the power to dismiss vexatious or misconceived claims.

EFFECT OF THE LEGISLATION

It will be against the law in Victoria for an employer to treat an employee less favourably (including termination of employment or a denial of employment benefits) because the employee has made a reasonable request for information about their entitlements or expressed concern as to whether they are being given their entitlements.

The prohibited conduct will only relate to an employee's **existing** employment entitlements, and the Explanatory Memorandum states that it is not intended to provide a mechanism for enforcing employment entitlements or for negotiating a pay rise or other terms and conditions of employment more generous or different from those to which an employee is currently entitled.

UNFAIR DISMISSAL EXCLUSIONS

Working out whether an employee is entitled to pursue an unfair-dismissal claim is not always straightforward. Senior Associate John Naughton considers two recent cases dealing with unfair dismissal exclusions.

HOW DOES IT AFFECT YOU?

- Unfair-dismissal applications cannot be made by employees who are not covered by an award or workplace agreement and earning more than the specified rate of remuneration (currently \$98,200 per year).
- Employers need to be aware of:
 - whether their employees are covered by 'award-derived conditions' or not; and
 - what components of an employee's remuneration may be counted in assessing whether the specified rate of remuneration has been exceeded.

LAYTON V NORTH GOONYELLA – 'AWARD-DERIVED CONDITIONS' EXCLUSION

In this case, Mr Layton claimed that he had been unfairly dismissed by his employer, North Goonyella Coal Mines Pty Ltd (**North Goonyella**).

Section 638(1)(f) of the *Workplace Relations Act 1996* (Cth) (the **Act**) prevents employees

5. Explanatory Memorandum to Equal Opportunity Amendment Bill 2007.

from pursuing unfair dismissal applications, on the grounds that:

- they are not employed under 'award-derived conditions'; and
- they receive remuneration exceeding the 'specified rate' (currently \$98,200 per year).

Mr Layton acknowledged that his remuneration exceeded the specified rate, but claimed he was entitled to pursue his claim because he was employed under award-derived conditions, namely the *Clerical Employees Award – State 2002* (which became a Notional Agreement Preserving a State Award (**NAPSA**) when WorkChoices commenced in March 2006).

At the initial hearing of the matter, the Australian Industrial Relations Commission (**AIRC**) decided that even if Mr Layton's employment was covered by a NAPSA, this did not mean that he was employed under 'award-derived conditions'.⁶ Section 642(6) of the Act provides that an employee is taken to be employed under 'award-derived conditions' if the employer is bound by an award or workplace agreement. Applying the definitions of 'award' and 'workplace agreement' in the Act, the AIRC concluded that a NAPSA was neither, and rejected Mr Layton's claim on jurisdictional grounds.

A few days later, the AIRC reconsidered its decision, accepting that the transitional provisions anticipated that an 'award' within s642(6) of the Act included a NAPSA.⁷

PHILIPPA V STARGAMES – 'SPECIFIED RATE' EXCLUSION

In this case⁸, Mr Philippa filed an unfair-dismissal application, although his employer, Stargames Corporation Inc (**Stargames**), claimed that his remuneration exceeded the specified rate. The parties agreed that Mr Philippa was not employed under 'award-derived conditions'.

Mr Philippa claimed he was entitled to make his claim because his remuneration was limited to annual salary (\$90,000) plus 9 per cent superannuation (\$8100 per year), which, at \$98,100, was \$100 less than the cap.

Fortunately for Stargames, it was also in the practice of paying Mr Philippa annual-leave loading on four weeks holiday per year, an additional \$1,211.53 per year. Stargames asserted that when this amount was taken into account, Mr Philippa's annual remuneration was \$99,311.53 and exceeded the cap.

The AIRC agreed, accepting that:

- payment of annual-leave loading will usually be regarded as part of an employee's remuneration; and
- in this case, payment of leave loading was a standard component of Mr Philippa's remuneration (rather than a discretionary one that might not be included).

6. *S.Layton v North Goonyella Coal Mines Pty Ltd*, Australian Industrial Relations Commission, Commissioner Bacon, Brisbane, 17 May 2007, PR977110.

7. *S.Layton v North Goonyella Coal Mines Pty Ltd*, Australian Industrial Relations Commission, Commissioner Bacon, Brisbane, 21 May 2007, PR977140.

8. *Peter Philippa v Stargames Corporation Inc.*, Australian Industrial Relations Commission, Senior Deputy President Hamberger, Sydney, 22 May 2007, PR977070.

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CONTACTS

Jamie Wells

Partner, Brisbane
Ph: +61 7 3334 3268
Jamie.Wells@aar.com.au

Tim Frost

Partner, Melbourne
Ph: +61 3 9613 8835
Tim.Frost@aar.com.au

Peter Arthur

Partner, Sydney
Ph: +61 2 9230 4728
Peter.Arthur@aar.com.au

Gavin MacLaren

Partner, Singapore
Ph: +65 6535 6622
Gavin.MacLaren@aar.com.au

Rowan Kelly

Special Counsel, Perth
Ph: +61 8 9488 3804
Rowan.Kelly@aar.com.au

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