

# FOCUS

## WORKPLACE RELATIONS



September 2006

## TERMINATING EMPLOYMENT FOR GENUINE OPERATIONAL REASONS – AND OTHER ARTICLES

We report on what is required to show a termination was for a genuine operational reason, the incentives to self-insure for multi-state employers and a case highlighting differences in upstream OHS obligations.

Terminating employment for genuine operational reasons – and other articles

### TERMINATING EMPLOYMENT FOR GENUINE OPERATIONAL REASONS

In *Focus: Workplace Relations* – July 2006, we reported on the ‘operational reasons’ exemption in two decisions made by the Australian Industrial Relations Commission. More recent cases provide further guidance for employers. Senior Associate Della Stanley and Lawyer John Naughton report.

### THE EXEMPTION

The *Workplace Relations Act 1996* (Cth) now excludes employees from making unfair dismissal claims if they are terminated for genuine operational reasons.<sup>1</sup> Operational reasons include reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business.

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1. *Workplace Relations Act 1996* (Cth), section 643(8).



## PROCIV V BILFINGER BERGER SERVICES (AUSTRALIA) PTY LTD

In this case,<sup>2</sup> Mr Prociv, Mr Allen and Mr Lockwood filed unfair dismissal applications when their employment by Bilfinger Berger Services (Australia) Pty Ltd (**Bilfinger**) was terminated. Bilfinger applied to the Australian Industrial Relations Commission (the **Commission**) to have each of the applications dismissed on the basis that there were genuine operational reasons for the terminations.

The dismissals occurred when Bilfinger decided to restructure its unprofitable roads division. In all, 59 employees were made redundant, including the complainants.

The Commission held that before applying the exemption, it had to be satisfied that the operational reasons relied upon by Bilfinger were *bona fide*. The Commission noted that:

- a mere assertion by an employer that a termination was for operational reasons will not be sufficient to exclude an unfair dismissal claim; and
- when organisational restructuring precedes a termination, the Commission will consider the reasons for this, and whether termination was a necessary consequence.

The Commission accepted there were valid economic and structural reasons for closing the business unit and dismissed the applications.

## SPRINGER V THE NORTHCOTT SOCIETY

In this case,<sup>3</sup> the Commission considered whether unfair dismissal applications by Ms Springer and Ms Cunningham were excluded because they occurred as a result of genuine operational reasons.

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2. *Alexander Prociv and Bilfinger Berger Services (Australia) Pty Ltd* (U2006/4538); *Colin Allen v Bilfinger Berger Services (Australia) Pty Ltd* (U2006/4539); *Kevin Lockwood v Bilfinger Berger Services (Australia) Pty Ltd* (U2006/4540), Commissioner Cargill, Sydney, 14 August 2006, PR973542.

As in *Prociv*, the Commission embarked on a detailed enquiry into the reasons for termination. Evidence was given on behalf of The Northcott Society by its human resources manager who was involved in meetings about the level of funding for the organisation, and who was directly involved in effecting the terminations.

However, the human resources manager was not the ultimate decision-maker and could not provide comprehensive evidence to the Commission about the decision-making process which led to the restructure and subsequent terminations.

The Commission was therefore not satisfied that it had sufficient evidence to determine that the dismissals were for genuine operational reasons, and therefore allowed Ms Springer and Ms Cunningham to pursue their unfair dismissal applications.

The case shows that the Commission will only exclude claims at a threshold level if there is evidence to demonstrate operational reasons. While the Commission noted that it does not require 'an endless parade of witnesses', it expects those who give evidence to have been directly involved in the decision-making process.

## ORGAN V CLIMATE TECHNOLOGIES

Climate Technologies operated two manufacturing facilities at Leeton, New South Wales and Salisbury in Adelaide, South Australia. The Leeton plant comprised two distinct manufacturing areas – the 'cool line' (which manufactured air-conditioning units) and the 'Mallet area' (which manufactured hospital products).

In July 2006, the company decided to close the cool line and retrench several employees. Some employees previously employed on the cool line were transferred to the hospital products area to replace employees in that area consequently made redundant. Mr Organ was one of the hospital products area employees made redundant.

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3. *Georgina Springer v The Northcott Society* (U2006/4728); *Dianne Cunningham v The Northcott Society* (U2006/4729), Commissioner Cargill, Sydney, 1 September 2006, PR973840.



The company argued that there was an overall need to reduce staff numbers in Leeton, and that the company's decision to make Mr Organ redundant was for a genuine operational reason, based on retaining the most skilled employees.

The Commission accepted that there were genuine economic reasons to close the cool line in Leeton and that redundancies were required.<sup>4</sup> It distinguished the *Perry* case<sup>5</sup> on the basis that the 'operational reasons' relied upon by the employer in that case were a sham, whereas Climate Technologies' reasons were *bona fide*.

The Commission confirmed the observation in *Prociv* that the company is ultimately entitled to utilise its labour force in the most economic way possible. While Mr Organ believed that the company still required his services, this did not override the company's discretion to decide that matter.

As a consequence, the exemption applied and Mr Organ could not pursue his unfair dismissal claim.

## LESSONS FOR EMPLOYERS

These cases confirm that an employer can defeat an unfair dismissal claim on the grounds of genuine operational reasons. However:

- the Commission will not allow the exclusion to operate if the reasons are not genuine or are not supported by evidence;
- the Commission will conduct a detailed enquiry to assess the reasons for the termination before preventing a dismissed employee from proceeding with their claim. For this reason it may assist if the employer has carefully documented the decision making process which led to termination;
- employers must identify the decision-makers and be prepared for them to be witnesses; and
- employers making justifiable decisions to terminate on the basis of genuine operational reasons will be able to resist unfair dismissal claims even if they could have taken an alternative approach which might not have resulted in dismissal.

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4. *Terry Organ v Climate Technologies Pty Ltd* (U2006/5005), Commissioner Roberts, Sydney, 1 September 2006, PR973801.

5. *Perry v Savills (Vic) Pty Ltd*, Senior Deputy President Watson, 20 June 2006, PR973103 and see *Focus: Workplace Relations* - July 2006.

# COMCARE LICENSEES EXEMPT FROM COVERAGE OF STATE AND TERRITORY OHS LAWS

Recent amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) and *Safety, Rehabilitation and Compensation Act 1988* (Cth) are likely to make self-insurance under Comcare an attractive option for multi-state employers. Senior Associate Ric Morgan and Articled Clerk Jacqueline Goodall report.

## CHANGES TO LEGISLATION

The Commonwealth passed the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) (the **OHS Act**) and *SRC Legislation Amendment Act 2006* (Cth) (the **Act**) on 6 September 2006, exempting all Comcare licensees from state and territory OHS laws.

The eligibility requirements for self-insurance (competing with a current or former government business enterprise) are broad and cover a wide range of industries, including banking and finance, insurance, communications, printing and distribution, retail, transport, building and construction, waste removal, and drug production and sales.

The duties imposed on employers, and on persons supplying or otherwise interacting with employers, under Commonwealth OHS laws are similar to those under state and territory OHS Acts. However, the consequences for breach differ significantly.

Breach of Commonwealth OHS laws is an offence only if the person negligently or recklessly causes serious injury or death. State and territory OHS laws generally provide for penalties regardless of the outcome, and aggravated penalties if the result is serious injury or death. Furthermore, state and territory OHS laws generally provide much higher penalties.

## CONCERNS

While Comcare's recent recruitment of investigators has seen levels rise to a ratio of inspectors-to-employees similar to comparable jurisdictions, concerns have been raised that Comcare is not adequately resourced to cope with the extra OHS regulation should a large number of employers move to self-insure.

Some also claim that the Commonwealth OHS laws, which operate only in the event of adverse and traumatic outcomes resulting in serious injury and death, may limit the role of OHS laws in promoting proactive approaches to the prevention of risks to health and safety.

## FURTHER CHANGES PLANNED

Two other Bills that propose further amendments to the Commonwealth OHS Act are currently before Parliament. One seeks to remove the role of unions in OHS consultation, and the other exempts employers covered by the OHS Act from industrial manslaughter laws.

The OHS Act is also under review with the aim to strengthen prevention, reduce prescription, and facilitate measures which suit the needs of individual enterprises.

## ADVANTAGES FOR MULTI-STATE EMPLOYERS

The amended Commonwealth OHS scheme may be attractive to eligible employers. The scheme offers advantages including administrative savings for businesses operating across several jurisdictions, lower penalties and an enforcement approach that does not aim to punish except in exceptional circumstances.

# OHS RESPONSIBILITIES OF ENGINEERS AND ARCHITECTS IN CONSTRUCTION WORK

A recent decision of the New South Wales Industrial Relations Commission highlights an engineer's obligations under OHS laws. Senior Associate Ric Morgan and Articled Clerk Jacqueline Goodall report.

## BACKGROUND

An engineer engaged to prepare structural drawings for a proposed renovation was convicted under the *Occupational Health and Safety Act 1983* (NSW) (the **NSW Act**) after a wall at the construction site collapsed, killing one worker and injuring another.<sup>6</sup> He was fined \$24,300.<sup>7</sup> The engineer successfully appealed against the conviction and fine, arguing that the construction site for which he had prepared drawings was not his place of work – an issue peculiar to the NSW Act.<sup>8</sup>

## THE APPEAL DECISION

The Appeal bench held that 'control' must be present when the operative act or omission constituting the offence occurred. In this case, the engineer:

- was not present at the premises when the accident occurred on 3 September 1998;
- had not been at the premises since 27 July 1998;
- had not spoken to the builders since 31 July 1998; and
- had not been asked to provide, nor had provided, any advice since the work on the premises had commenced.

The Commission found the appellant did not have the necessary control of the workplace.

6. *WorkCover Authority of New South Wales (Inspector Carmody) v Luke Tsougranis (No 2)* [2003] 123 1R 419.

7. *Inspector Carmody v Luke Tsougranis (No 3)* [2003] NSWIRComm 281.

8. *Tsougranis v Inspector Carmody (No 2)* [2006] NSWIRComm 133.



# THE IMPLICATIONS

All Australian states have upstream OHS duties imposed on:

- persons in control of a workplace; and
- (with the exception of NSW and the ACT) persons designing buildings and structures to be used at a workplace.

Designers (except in NSW and the ACT) have a duty to ensure that buildings or structures are designed to be safe and without risk to the health of persons using them as a workplace, regardless of any control over the worksite.

Engineers and architects owe these upstream duties in relation to advice, directions or drawings for construction works – for example, builders using drawings at a construction site. In NSW and the ACT, designers will have duties only if they are found to be a person in control of the workplace.

The effect is that designers are subject to different obligations depending on the state in which they work. The difference in approach suggests that a truly uniform scheme of OHS regulation is still some way off.



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