> EMPLOYMENT & INDUSTRIAL RELATIONS

FOCUS

> AIRC confirms expanded exemption to unfair dismissal

A. CRUICKSHANK V PRICELINE PTY LTD [2007] AIRC 292

The Australian Industrial Relations Commission (AIRC) has held that a employee who was made redundant and then found his job readvertised for a lower wage should not be able to bring an unfair dismissal application because his redundancy was a 'genuine operational reason' for his dismissal.

FACTS

Following an approximately $17.2 million discrepancy in its accounts and 2 hostile takeover bids, Priceline conducted a review of its structure and operations. As a result, Cruickshank, along with 31 other employees, were made redundant. Cruickshank, was employed as a space planner with a salary package of $101,000. He subsequently found his job readvertised with a salary package of up to $75,000.

Cruickshank made an unfair dismissal claim on the grounds that his redundancy was a 'sham' because he had been replaced by another employee carrying out exactly the same duties. Priceline claimed that two of the four space planners, including Cruickshank, had been made redundant because they earned considerably more than the other two, and this restructure would result in significant cost savings.

DECISION

The AIRC held that Cruickshank's termination resulted from Priceline's financial difficulties. The subsequent decision to restructure was at least part of the decision to terminate and therefore the dismissal was for a genuine operational reason. Commissioner Eames found that the termination would not have occurred had Priceline's financial position been better. The Commissioner did not believe the redundancy was a 'sham', and confirmed that the 'the question of a 'valid reason' need not be considered, when an argument is advanced regarding the termination being for operational reasons'.

The Commissioner considered that this reasoning 'falls within' and does not 'extend' the recent decision of *Village Cinemas Australia Pty Ltd v Carter* [2007] AIRCFB 35 (15 January 2007), where it was held that an employee's termination does not need to be an 'unavoidable' consequence of operational requirements for the exemption to apply.

SIGNIFICANCE

Prior to Work Choices, this case would not have been rejected at the preliminary stage and it is likely that the termination would have been considered unfair. It confirms that the concept of an operational 'reason' under the Act is much broader than the pre-Work Choices idea of an operational 'requirement'.

However, employers should be wary of acting on this decision. At the time of writing, no appeal has been lodged and an inquiry has been launched by the Office of the Victorian Workplace Rights Advocate into the parameters of the 'operational reason' exemption for unfair dismissal cases.

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> existing employee in new position not subject to qualifying period

DENISE SHEPHERD V JANRULE PTY LTD [2007] AIRC 236

Under Work Choices, employees are unable to bring unfair dismissal claims until completion of a six month qualifying period. Many employers believe that a new 'qualifying period' can be imposed on existing employees who are transferred to a new position with the same employer.

The AIRC has recently confirmed that this view is incorrect by ruling that an employee of six years service who was placed in a new position with the same employer and then dismissed within six months was not barred from bringing an unfair dismissal claim.

FACTS

Ms Denise Shepherd was employed by Janrule Pty Ltd (Janrule) as an Internal Mail Driver from November 2000 until she accepted a position as a full-time Assistant Registration Clerk in November 2006. Janrule terminated Ms Shepherd's employment approximately two months later. Janrule argued that Ms Shepherd was excluded from bringing an unfair dismissal claim because, in their view, the new contract of employment constituted a new period of employment. Arguably Ms Shepard would have to complete a six month qualifying period before a claim could be made.

DECISION

The AIRC concluded that Janrule could not impose a new qualifying period upon Ms Shepherd. The Act states that it is the period of an 'employee's employment with the employer' that is relevant for the purposes of the qualifying period. Commissioner Deegan held 'the words of the legislation should be given their ordinary, literal meaning so that any employee who has completed six months employment with an employer is capable of making an application [for unfair dismissal]'.

The Commissioner rejected Janrule's reliance on pre-Work Choices case law where it was held that a change in duties or employment status (for example, from casual to full time) begins a new period of employment. The Commissioner also held that the Act clearly recognises the concepts of qualifying period and a period of probation as being 'quite separate and distinct'.

DISTINGUISH TRANSMISSION OF BUSINESS

The Janrule decision will not apply in the case of a transmission of business involving a change in the employing entity. In the recent case of *William Rogers v Reflections Group Pty Ltd* [2007] AIRC 2, the AIRC held that unless specifically agreed otherwise, a new qualifying period can be imposed on an employee who is transferred in a transmission of business. In Rogers the employment was subject to a qualifying period because the terms and conditions on offer with the new employer did not set aside the role of any qualifying period.

> AIRC refuses employer's objections to employee's dismissal claim

J M PRICE V MABUNJI ABORIGINAL RESOURCE ASSOCIATION INCORPORATED [2007] AIRC 227

Under the *Workplace Relations Act 1996* (Cth) (Act), an employee engaged under a contract of employment for a specified period of time or an employee serving a probationary period is excluded from claiming that their termination was harsh, unjust or unreasonable.

The AIRC has rejected an employer's argument that an employee was barred from bringing an unfair dismissal claim because they were employed under a contract of employment for a specified period of time and were serving a period of probation.

FACTS

The employee was employed under a contract which commenced on 22 May 2006, and was to expire on 30 June 2007. The employer, Mabunji Aboriginal Resource Association Incorporated (Mubunji) claimed that the employee was excluded under the Act from bringing an unfair dismissal claim when his employment was terminated on 29 September 2006, as he was employed under a contract for a specified period of time and was still serving a period of probation. The contract allowed either party to terminate the contract on notice at any time and for any reason, and provided an option for the employer to extend the employee's three month probationary period to six months at the employer's discretion.

DECISION

The AIRC rejected both submissions put forward by Mubunji. Commissioner Lawson confirmed that fixed term contracts which allow parties to give notice of termination before the end of the term were not contracts for a specified period of time. Furthermore, the Commissioner found that the employee was not serving a period of probation at the time of his dismissal. The Act requires an probationary period to be determined in advance of employment commencing, and limits a probationary period to three months unless a longer period is reasonable. As the employee had been employed by the employer since 2003 under two earlier contracts, and had completed a probationary period at this time, the employer's unilateral decision to extend the employee's probationary period was not reasonable.

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