

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Dimovski v Howe & Co Pty Ltd

Ives DP

24 December 2002

Termination of Employment — Company policy — Policy relating to removal of company property from premises — Company considering strict policy necessary due to prior theft of property by staff member — No evidence of wilful breach of company policy by employee — Company did not provide employee with full and fair opportunity to respond to allegations — Application of company policy was strict and unacceptably inflexible — Termination was harsh unjust and unreasonable — Workplace Relations Act 1996 (Cth), s 170CG(3).

Cases Cited

- Black v Ansett Australia Ltd* (unreported, AIRC, Print S3905, Drake SDP, 20 March 2000).
- Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20.
- Briginshaw v Briginshaw* (1938) 60 CLR 336.
- Cosco Holdings Pty Ltd v Thu* (1997) 79 FCR 566; 77 IR 94.
- Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)* (2000) 98 IR 137.
- Edwards v Giudice* (1999) 94 FCR 561.
- Enhance Systems Pty Ltd v Cox* (unreported, AIRC, Williams SDP, Acton SDP and Gay C, 31 October 2001).
- Jobson v Gerrard Strapping Systems* (unreported, AIRC, Whelan C, 24 October 1997).
- Reyn v Qantas Airways Ltd* (unreported, AIRC, Print S4850, Drake SDP, 14 April 2000).
- Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371.
- Seno v Qantas Airways Ltd* (unreported, AIRC, PR904809, Harrison SDP, Duncan SDP and Raffaelli C, 1 June 2001).

*Cur adv vult***Ives DP.****Introduction**

- 1 This matter relates to an application pursuant to s 170CE(1)(a) of the *Workplace Relations Act 1996* (the Act) made by Mr Vangel Dimovski against

his former employer, Howe & Co Pty Ltd (the company). After conciliation was attempted in accordance with the Act, a certificate pursuant to s 170CF of the Act was issued by his Honour Williams SDP on 4 April 2002. The matter is now before me to determine whether the termination of Mr Dimovski's employment was harsh, unjust or unreasonable within the meaning of s 170CE of the Act.

2 I heard this matter on 5 and 6 September 2002 and on 18 October 2002. Mr Dimovski was represented by Mr T Serra of Counsel, the company by Mr J D'Abaco of Counsel. The following people appeared as witnesses before the Commission:

- Mr Dimovski (through an interpreter, Ms Lidia Kumurdian);¹
- Mr Mirolsav Popovski (the company's dispatch supervisor, formerly the company's receiving officer of incoming goods);
- Mr Barry Gadd (a security officer at the company's premises in February 2002);
- Mr Erol "Becko" Fejzuloski (a supervisor at the company);
- Mr Paul Simmons (the company's former Human Resources Manager);
- Mr Tomce Paunkoski (Production Worker and ALHMWU delegate);
- and
- Mr Ioannis (John) Sakulas (the company's Manufacturing Manager).

3 Witness statements on behalf of each of the witnesses were tendered into evidence, as were several other documents, photographs, drawings and two barrels. After the evidence in this matter was heard, counsel for each party made oral closing submissions, referring to outlines of submissions provided to the Commission at an earlier stage in proceedings.

4 While I may not set out in full all of the aforementioned material, I make my decision having given full consideration to the evidence and submissions before the Commission in this matter.

5 For the reasons set out below, I determine that the termination of Mr Dimovski's employment was harsh, unjust or unreasonable. I have decided to order that the company reinstate Mr Dimovski to his former position of employment or a position equivalent and that the company pay Mr Dimovski a sum equivalent to his ordinary time earnings from the date of his termination to the date of his reinstatement, subject to taxation in accordance with the laws of the Commonwealth. I set out my reasons for making such orders below.

Background

6 The company produces leather products including leather car parts. In or about 1998, the company moved its factory from Preston to its current premises in Thomastown.

7 Mr Dimovski is aged 46, is of Macedonian origin and has been a resident of Australia since 1986. English is not his first language. His evidence was, on the whole, provided through an interpreter in the Macedonian language, albeit that

¹ Ms Kumurdian remained present at the hearing after Mr Dimovski completed his evidence, through two days' further hearing. I am uncertain whether Ms Kumurdian had a continuing role as an interpreter or support person, or stayed as a matter of personal interest. No evidence was given to the Commission about Ms Kumurdian's role, save and except for that of an interpreter, nor was Ms Kumurdian asked to give evidence as to her qualifications as an interpreter. I assume in writing this decision that, while interpreting during the examination of Mr Dimovski, Ms Kumurdian complied with her oath to well and truly interpret Mr Dimovski's evidence from Macedonian to English and from English to Macedonian.

from time to time Mr Dimovski saw fit to answer questions in English before they were conveyed through the interpreter.² Throughout his working career (both in Australia and abroad) Mr Dimovski has performed unskilled manual work.

8 Mr Dimovski has been employed with the company since 1990 or 1991. In 1997, Mr Dimovski suffered a serious injury, which restricted him to light duties until the termination of his employment. Mr Dimovski's duties at the time of the termination of his employment consisted of overseeing leather hides being mechanically placed onto a wooden horse (and straightening them up when required), and some cleaning work.

9 Mr Dimovski's employment was terminated on 25 February 2002 following an incident on 21 February 2002 when Mr Dimovski was found to have removed a black plastic 100 l container (referred to variously as "the black barrel" and "the 100 l barrel") from the company's premises without authorisation. The black barrel was removed from the company's premises inside a blue plastic 200 l container (referred to variously as "a blue barrel" and "a 200 l barrel"). Although Mr Dimovski had the company's permission to remove four blue barrels from the company's premises that day, he did not have any authority to remove any black barrels that day.

10 I shall set out the company's policy regarding the removal of property, and the evidence relating to Mr Dimovski's awareness and understanding of that policy, below. I shall also set out the evidence relating to the events of 21 February 2002, and the evidence relating to the investigation into Mr Dimovski's conduct and the subsequent decision to dismiss.

Evidence regarding the company's policy regarding the removal of company property

11 Due to the high value of animal hides (alleged variably to be in excess of \$500 per hide (transcript, PN798), \$50 per square metre or \$250 per hide (transcript, PN2519)) and the prior theft of hides by an employee who removed them from the premises in a plastic barrel (Ex R14, para 3, Ex R16, para 4), the company consider it necessary to have a strict policy relating to the removal of company property from company premises.

12 The Company's policy regarding the removal of property is apparently set out in a one page circular dated 28 February 2000 (Ex R14, attachment PS1) (the security circular), which I set out in full below:

Staff Circular

Security

In accordance with company policies and procedures, the company will be implementing additional security measures to stop theft from the work place.

Therefore in accordance with conditions of employment signed and agreed to by each employee upon commencing employment, *random bag searching and random car searching* will be conducted by the company.

Any employee found in possession of property belonging to the Company without appropriate authorisation/approval could, following investigation, face instant dismissal.

2 Transcript PN121-122, 140-143, 213-214, 216-217, 238-239, 250-251, 307-308, 314-315, 371-372, 376-377, 379-380, 385-386, 406-407, 412-413, 438-439, 459, 466-467, 469-470, 475, 515-516, 522-525, 542-543, 564-565, 595, 597, 605, 607, 610, 637, 639, 698, 748, 778, 888, 1159, 1162, 1268, 1270.

Please note that *all employees (including staff and management)* will be subject to random checks.

[signed]

Paul Simmons

Human Resources Manager

28/2/2000 (Emphasis as per the original.)

13 Notwithstanding the second sentence of the security circular, no evidence was put before the Commission of a written document signed by Mr Dimovski establishing a condition of employment that Mr Dimovski's car or bag could be subject to random search procedures.

14 It was the sworn evidence of Mr Dimovski that he was never made aware that his employment could be terminated if he attempted to remove company property without authorisation. When he was shown the staff circular in the witness box, Mr Dimovski stated through the interpreter that "This is the first time I have seen it in 11 years" (transcript, PN156). When asked if he could read the staff circular, he stated that he could not (transcript, PN157-159). This evidence was contested by various witnesses for the company and subject to cross-examination by Mr D'Abaco. It is worthy of analysis and scrutiny.

15 In his witness statement (Ex A1) Mr Dimovski states that he had, throughout the time of his employment, removed empty barrels from the company's premises with the approval of a manager. Some of those barrels he sold at a local market, some he kept for his own use and some he gave away. Mr Dimovski states (Ex A1, para 5):

In 2001 John Sicoulas the production manager told me that I had to pay \$5 each for the 200 litre drums. The price for 100 litre drums was not discussed since I never took them. Other people continued to take drums free of charge. ...

and continues (Ex A1, para 12):

During all those years [since 1990/91] I have never removed any item of company property without permission as the company well knew. I knew I had to pay for drums and always did so. However, this rule was never put in writing and I was never told that removing any company property without permission would lead to termination. I cannot recall ever seeing a notice stating the company policy was to dismiss anyone removing any item of company property. I cannot recall anyone being dismissed for removing a drum without paying in my 11 years with the employer.

16 It was the company's policy that written authorisation to remove property could be granted by the Manufacturing Manager, Mr Sakulus, a supervisor such as Mr Fejzuloski or the Receiving Officer, Mr Popovski. It is agreed by the company that Mr Dimovski regularly obtained authorisation to remove drums from the site (Ex R11, para 3; Ex R12, paras 7-8; Ex R16, paras 8-11), in accordance with the company's policy.

17 It would appear from a number of written receipts tendered into evidence (Ex R8) that on each occasion the barrels removed by Mr Dimovski were 200 l barrels, although this is not clear (transcript, PN1349). Mr Popovski gave evidence that Mr Dimovski purchased barrels of both the 100 l (black) and 200 l (blue) variety (transcript, PN1330-1343), and that he saw Mr Dimovski selling barrels of both the blue and black variety at Thomastown market (transcript, PN1670-1677). He states that about 40% of all the barrels purchased by Mr Dimovski were black barrels (transcript, PN1447-1450), and that he has seen Mr Dimovski at the Thomastown market selling both blue and black

barrels (transcript, PN1670-1677). Mr Gadd only recalls Mr Dimovski removing blue barrells from the site, not black barrells (transcript, PN1847-1863). I do not consider this issue to be crucial to the determination whether the termination of Mr Dimovski's employment was harsh, unjust or unreasonable. To the extent that it is relevant, notwithstanding Mr Popovski's evidence, I am prepared to accept Mr Dimovski's evidence that 21 February 2002 was the first time that Mr Dimovski had removed a black barrel from the company's premises.

18 Mr Dimovski states that he is aware that the company's policy deems that before any items may be taken off-site, a person must obtain written authorisation from a supervisor or manager, or an invoice/receipt for the purchase of such items. He states that he knows this because every time that he took barrels he would pay for them and obtain an invoice from Mr Popovski (transcript, PN466-469).

19 Mr Gadd is of the view that Mr Dimovski was aware of the company's policy, as his car had been searched for drums by Mr Gadd a number of times when leaving the company's premises (transcript, PN1778-1782). While this demonstrates that Mr Dimovski was aware of the broad policy against unauthorised removal of company property, and of a means of monitoring compliance, it does not demonstrate that he was aware of the dire consequences that might follow from a single failure to comply.

20 Under cross-examination, Mr Dimovski gave evidence that the company originally permitted the removal of Company property without the requirement of written permission. However, after an employee was discovered to have stolen approximately 350 leather hides by hiding them in drums, the requirement was introduced (transcript, PN795-807). Subsequently, due to the quantity of drums removed by Mr Dimovski, he was asked to pay \$5 per drum in conjunction with seeking permission for their removal.

21 Due to the frequency with which Mr Dimovski engaged in this process, and evidence of his understanding of its importance (transcript, PN466-467, 969-970), I find that he was aware of the policy that no employee could remove property from the company premises without either written authorisation or an invoice/receipt. I further find that Mr Dimovski was aware that his car or bag might be searched when leaving the company premises, to monitor compliance with company policy.

22 What is not evident however, is that Mr Dimovski understood the consequences of a breach of the policy. Consequently, I must determine what level of understanding Mr Dimovski had of the security circular.

23 The company submits that Mr Dimovski would regularly have seen the security circular in the course of his duties and that he was able to read and understand it. Further, it was submitted by the company that the message of the security circular was reinforced orally on a number of occasions by company management, and that Mr Dimovski was able to understand those statements made in English. Each of these submissions is denied by Mr Dimovski.

24 Mr Popovski stated that a copy of the security circular was posted on every noticeboard in the company's premises (transcript, PN1572-1577), including a place marked X on Ex R2 (a hand-drawn sketch of the company's premises and surrounding car park). Also at the spot marked X on Ex A2 was, according to Mr Popovski, the time clock used by Mr Dimovski to clock on and off work each day (transcript, PN1572-1577).

- 25 Mr Dimovski was of the view that the time clock he used was on another wall, not near the place marked X on Ex R2. However, Mr Dimovski stated that he could be wrong about the location of the time clock (transcript, PN352-374). Mr Dimovski stated that he did not know whether there was a notice board directly above the time clock at which he clocked on and off each day (transcript, PN758-784).
- 26 Mr Dimovski stated that it was possible the security circular was on a wall or a notice board but that he had never seen it (transcript, PN663-665). Mr Dimovski states that he never had any interest in the notice boards, and therefore could not deny that the security circular might have been posted (transcript, PN666-669).
- 27 On the evidence before the Commission, I find as a matter of fact that a copy of the security circular was posted on the notice board located directly above the time clock which Mr Dimovski used twice a day. However, Mr Dimovski's ability to understand the security circular is a further matter of contention.
- 28 In examination-in-chief Mr Dimovski stated that he was not able to read the security circular (transcript, PN157-159). When the document was handed to him in cross-examination and he was asked whether he had read it, he answered that he had (transcript, PN660-661). However, later in cross-examination, Mr Dimovski gave evidence that he could not read English (transcript, PN784-790, PN1116-1117). In re-examination, Mr Dimovski stated that he tried to read what he could understand in the security circular, that he could not understand much about it and that "all I know is that it is something to do with company policy" (transcript, PN1217-1220).
- 29 On a number of occasions while giving sworn evidence Mr Dimovski stated that he could read various documents (printed in English) which were handed to him (transcript, PN77-87, 96, 100-105, 578-583, 834-837, 971-978). However, he further contended that he had not read material placed on the notice board because "I don't read English. I can't read English and I can't write English" (transcript, PN790). This suggested inability to read and write in English was also raised in Mr Dimovski's evidence pertaining to his letter in response to the allegations made against him. According to Mr Dimovski, this letter was dictated in Macedonian by Mr Dimovski and translated into English by an unidentified source (transcript, PN1232-1235). On the basis of this evidence I find that, while having some ability to read English, the extent of Mr Dimovski's ability is difficult to determine.
- 30 Similarly, it is difficult to determine the extent of Mr Dimovski's ability to communicate orally in English. Mr Popovski states that he spoke Macedonian to Mr Dimovski, and does not recall ever speaking in English to Mr Dimovski (transcript, PN1310-1315). He does, however, recall seeing Mr Dimovski speaking in English with his fellow workmates (transcript, PN1614-1619). Mr Fejzuloski stated that, while he heard Mr Dimovski speak English on occasion, he did not do so "very well" (transcript, PN2162) and always spoke Macedonian with him. While initially saying that he did not have enough communication with Mr Dimovski to determine his ability to speak English, Mr Gadd later gave the opinion that Mr Dimovski "had a very good understanding of English" (transcript, PN2080). According to his own evidence, Mr Dimovski needed assistance when speaking English at his meeting with the company on 22 February 2002 (transcript, PN1273), however, no offer of, or request for, an interpreter was made (transcript, PN1286-1287).

- 31 I find that Mr Dimovski had some ability to communicate orally in English, however, the extent of his ability is difficult to determine. Given this, the potential for misunderstanding and misinterpretation on Mr Dimovski's part would be high.

The events of 21 February 2002

- 32 The following are agreed facts regarding 21 February 2002:
- (a) Mr Dimovski commenced his shift at 2.30 pm, to finish at 7.30 pm;
 - (b) During his shift (or a break) Mr Dimovski purchased four blue barrels from the company, obtaining an invoice from Mr Popovski and paying five dollars for each;
 - (c) Mr Dimovski took the four blue barrels out to his car, which was initially parked in the company's secured car park behind the factory;
 - (d) During Mr Dimovski's dinner break, some time between 6.20 pm and 7 pm, Mr Dimovski moved his car around to the front of the factory, outside of the company's fenced-off premises and on to Northgate Drive, a public road;
 - (e) At approximately 7.30 pm, Mr Fejzuloski asked Mr Dimovski whether he and Mr Gadd could conduct a search of Mr Dimovski's vehicle;
 - (f) Mr Dimovski consented to his car being searched by Mr Fejzuloski and Mr Gadd;
 - (g) With Mr Fejzuloski and Mr Gadd present, Mr Dimovski first removed three blue barrels from the back of his car and removed the lids — the barrels were empty. Mr Dimovski demonstrated little difficulty removing the first three blue barrels;
 - (h) The fourth blue barrel also had a lid and was sealed with a metal rim. It was located on the front seat of Mr Dimovski's car. When Mr Dimovski demonstrated some difficulty removing the fourth blue barrel, Mr Fejzuloski assisted him;
 - (i) As they removed the fourth barrel, Mr Dimovski spoke to Mr Fejzuloski in Macedonian. While the exact phrase is a matter of dispute, it is agreed that Mr Dimovski mentioned that he had a black barrel inside;
 - (j) Mr Gadd opened the fourth blue barrel and removed a small black barrel which he subsequently returned to the premises. Speaking in Macedonian, Mr Fejzuloski asked Mr Dimovski why he had not obtained a receipt for the drum. Mr Dimovski alleged that he had forgotten he had the drum, had intended to pay for it, and on any account, that it was rubbish (transcript, PN2259-2285).
- 33 The search of Mr Dimovski's car was carried out as a result of a suggestion by Mr Gadd. It is Mr Gadd's evidence that his reason for requesting a search was suspicion borne of three factors (transcript, PN1933-1949):
- (a) Mr Gadd had previously told Mr Dimovski to remove the lids from barrels before putting them in his car, which he repeatedly failed to do;
 - (b) Mr Gadd was suspicious because Mr Dimovski had the previous night driven his car off the company's premises during his dinner break, parking it out on Northgate Drive (a public road); and
 - (c) Mr Gadd had a conversation with an employee on 21 February 2002 where the absence of any black barrels around the base-mix area (where one would expect to find empty barrels) was discussed.

34 It is the evidence of Mr Gadd that he suspected Mr Dimovski might have hidden a black barrel inside one of the blue barrels on 21 February 2002 (transcript, PN1935). It is an agreed fact that Mr Dimovski did in fact have a black barrel inside a blue barrel on that day, although it is not agreed that it was intentionally hidden by Mr Dimovski.

35 While I accept that Mr Gadd genuinely suspected that Mr Dimovski was hiding a black barrel, and that his suspicion stemmed from events of 21 February and of previous days, there is no evidence to suggest that Mr Dimovski's conduct on 21 February 2002 (whether dishonest or not) was anything but a once-off event. There is no evidence before the Commission of Mr Dimovski having at any time previous to 21 February 2002 removed Company property from the company's premises without authorisation.

36 As an isolated event, it is necessary to consider whether Mr Dimovski's conduct of 21 February 2002 was dishonest and consciously deceptive (as the company argues) or the result of an oversight, or a mistake (as Mr Dimovski contends).

Dishonest or unintentional conduct?

37 Mr Dimovski states that he only decided to take the black barrel after having already paid Mr Popovski for the four blue barrels. Mr Dimovski describes the decision to take the black barrel and to place it inside one of the blue barrels, and the subsequent decision to move his car off the premises as follows (Ex A1, paras 6-8):

When I was loading the 4 blue drums into my car I noticed a dirty black 100 litre drum nearby and decided to buy this one as well. These black drums are normally thrown into the rubbish because they are not popular with people who take drums home. I thought I could use it to hold pigeon droppings. It was not the sort of drum I could sell or use for other purposes because it was in very poor condition.

The black drum I decided to buy was covered in black paint or something similar so I placed it inside one of the blue drums to avoid making the interior of my car filthy. Micky Popovski was not around at the time so I decided to pay him later. I was sure that he [sic] fact that I paid later would not cause any problems. That shift was very busy one for me as I was working 2 machines. I had also been under a great deal of stress because of the illness of my wife who had been confined to bed for the previous 3 months. I had had trouble sleeping around this time. As a result I completely forgot about the black drum.

At about 7 pm whilst on a break I moved my car from the staff car park to Northgate Drive. Many of the staff did this because it saved time when the shift ended at 8 pm. I did not remember the black drum which I still had to pay for, perhaps partly because I did not see it. If I had noticed it I would have made sure I paid Micky Popovski before the end of the shift.

38 It is Mr Dimovski's evidence that on 21 February 2002 he had an unusually busy day at work. As a result of the cross-examination of Mr Dimovski (particularly transcript, PN536-595) and Mr Popovski's evidence that on 21 February 2002 Mr Dimovski's demeanor appeared normal, relaxed and calm, "like any other day" (transcript, PN1686-1701), I am not satisfied that Mr Dimovski was any busier on 21 February 2002 than any other day. I do not accept this explanation as contributing towards Mr Dimovski's forgetfulness on 21 February 2002.

39 I accept that Mr Dimovski's wife was ill at the time, and that concern for her
may have caused Mr Dimovski to be more forgetful and less diligent than he
otherwise may have been.

40 The black barrel forms part of the evidence in this matter (Ex R10). Based on
the evidence of various witnesses, and my own observations of the black barrel,
I am not of a view that the outside of the barrel either is or was so covered with
pigment or paint on the outside as to be a risk to the interior of Mr Dimovski's
vehicle. The inside of the black barrel is, however, another thing entirely.

41 On the basis of the evidence of various witnesses and my own observations
of Ex R10, I am satisfied that the black barrel contains within it a pigment
which might cause damage to the interior of a vehicle if it were to spill out
while in the vehicle. Mr Dimovski's evidence is that it was this concern, and the
inability to find any metal rims to seal the black barrel shut, which caused him
to place the black barrel inside a larger blue barrel before putting it in his car
(transcript, PN510-520, 845-886, 1204-1207).

42 Mr Popovski agrees that if a black barrel had no rim and was placed on its
side the pigment inside could leak out, and that Mr Dimovski "always made
sure that there was a rim on the drums that he took." (transcript, PN1495-1498)
Mr Gadd also agreed that if a black barrel had no rim and was placed on its side
the pigment inside could leak out (transcript, PN1909).

43 When asked in examination-in-chief whether it was possible that there were
no rims around for black barrels available on 21 February 2002, Mr Popovski
stated that it was not because "lids, caps, everything" were readily available in
the base-mix area of the factory: "You don't have to look far to find it"
(transcript, PN1499-1510; see also PN1702-1709). Mr Gadd agreed that the
rims were stored in the base-mix area. However, he stated that the rings were
kept in bad conditions and that "you could see them getting rusted" (transcript,
PN1867).

44 It was put to Mr Dimovski that rather than being forgetful, he had
deliberately hidden the black barrel inside the blue barrel. Mr Dimovski denied
this (transcript, PN1096-1105).

45 The respondent raised the movement of Mr Dimovski's car as evidence of
such dishonest intent. Mr Gadd's suggestion that the black barrel was
deliberately hidden was based, in part, on his belief that Mr Dimovski had
dishonestly stated that he moved his car to enable his son to pick it up
(transcript, PN1783-1786). Mr Dimovski denied ever having suggested this
(transcript, PN381-384). He states that he moved his car because the car park
was full (transcript, PN278-298) and parking on the public road facilitated a
quicker exit. Mr Popovski agrees that it would be quicker to leave the factory if
an employee's car was on Northgate Drive rather than the factory car park
(transcript, PN1531-1532). Had it been Mr Dimovski's intent to facilitate a
dishonest intent by parking on the public road, it is unlikely that he would have
consented to the search. As he states "If I knew I already made the mistake I
wouldn't allow them to check my car at all" (transcript, PN1071).

46 Giving particular consideration to the fact that Mr Dimovski made no attempt
to prohibit the search of his vehicle, albeit that it was located on a public road
(wherein the company had no right to conduct a search without the employee's
permission), I am unable to concur with the respondent's suggestion that the
movement of Mr Dimovski's car was evidence of any dishonest intention.

47 Given the state of the black barrel it is also difficult to conceive that it would

have been desirable to steal. Mr Dimovski alleges that the black barrel was in fact rubbish, placed on a pallet with the intention that it be thrown out (transcript, PN438-442). The barrel's value to the company was a maximum \$5 (transcript, PN1923). Mr Gadd explains that black barrels were sometimes used as rubbish bins, otherwise the company was required to pay for their removal (transcript, PN1925-1931). Mr Popovski gave evidence that 100-200 such barrels are disposed of each month at the cost of the company. He further states it would not have surprised him that the drum was rubbish given its condition, as bins "like that" were thrown out (transcript, PN1640-1641). Given this, the black barrel is likely to have had minimal, or no value, to the company, other than as a rubbish bin.

48 A further indication of Mr Dimovski's dishonest intent was said by the respondent to be what was characterised as a change in his story. Upon discovery of the black barrel, in discussion with Mr Fejzuloski in Macedonian, Mr Dimovski claimed that he did not have a receipt for the barrel because he had forgotten about it (transcript, PN722, 1081, 2263-2264). Subsequently, he stated that the bin was rubbish, and claimed in cross-examination, that he was not aware that he needed permission to remove something that was rubbish (transcript, PN819). It is suggested, however, that Mr Dimovski *was* aware that he needed a receipt for the bin, as he claimed that he would have paid for the bin and received a receipt had he remembered (transcript, PN1100).

49 I do not necessarily find the statements that: a) Mr Dimovski forgot that he had the black barrel; and b) that the black barrel was rubbish; conflict (as also agreed by the applicant and Mr Fejzuloski (transcript, PN2288-2293)). It is possible that Mr Dimovski removed the bin from the rubbish, placed it in his car and subsequently forgot that it was there. I do however find that Mr Dimovski was aware that he needed to obtain a receipt for the black barrel. Nevertheless, I do not agree with the respondent's proposition that dishonesty was intended.

50 On the basis of the evidence before the Commission and based upon an appropriate assessment of the required standard of proof (*Briginshaw v Briginshaw* (1938) 60 CLR 336 at 363, per Dixon J as he then was; *Black v Ansett Australia Ltd* (unreported, AIRC, Print S3905, Drake SDP, 20 March 2000); *Reyn v Qantas Airways Ltd* (unreported, AIRC, Print S4850, Drake SDP, 14 April 2000) and the Full Bench decision in the same matter *Seno v Qantas Airways Ltd* (unreported, AIRC, PR904809, Harrison SDP, Duncan SDP and Raffaelli C, 1 June 2001)), I do not consider it safe to conclude that Mr Dimovski deliberately set out to hide the black barrel inside a blue barrel on 21 February 2002.

The company's investigation and interview process — the decision to dismiss

51 I now consider the evidence relating to the investigation of Mr Dimovski's conduct and the company's subsequent decision to terminate his employment.

52 Prior to his dismissal, Mr Dimovski met with the company on two occasions — on Friday, 22 February and Monday, 25 February 2002. These meetings were conducted by Mr Sakulas (Manufacturing Manager) and Mr Simmons (HR Manager at the time). Union representative, Mr Paunkoski also attended at the behest of Mr Sakulas (transcript, PN620-627).

53 At the initial meeting on Friday, 22 February 2002, Mr Dimovski was given an opportunity to explain the removal of the black barrel. He states that he

informed Mr Simmons and Mr Sakulas that he had forgotten the drum as he was under a great deal of pressure at the time of the event (transcript, PN634-646). The company requested that he provide a written explanation for his conduct (see Ex R7). This was presented to the company, and spoken to, at the subsequent meeting on Monday, 25 February 2002. After the presentation of this document, Mr Dimovski and Mr Paunkoski were asked to leave the room. Upon their return approximately 15 minutes later, Mr Dimovski was informed that he was being dismissed for knowingly removing property without permission, in breach of company policy (transcript, PN913-920). Options other than termination, such as counselling or a warning were available to the company (transcript, PN2628), however, according to Mr Paunkoski, there was no discussion of such options at either meeting (transcript, PN2885). According to Mr Simmons affidavit (Ex R14), the company considered that Mr Dimovski's employment *could* be terminated, as the company was satisfied that he took the bin without authorisation or a reasonable explanation.

54 It is an agreed fact that these meeting were held in English. Mr Dimovski states that he had difficulty with this, speaking Macedonian to Mr Paunkoski and asking for his assistance to speak English (despite contending that Mr Paunkoski's English skills are also limited (transcript PN1264)). Despite this, no offer or consideration of employing an interpreter was raised by either party (transcript, PN1286-1288), despite the admission by the company that interpreters had been obtained in such situations in the past (transcript, PN2532).

55 The decision to dismiss Mr Dimovski was said to be formulated after receiving reports from, and having discussions with, Mr Gadd and Mr Fejzuloski (transcript, PN2611-2617). However, neither Mr Gadd nor Mr Fejzuloski were asked to attend the meetings. Both were alleged to have submitted reports, however Mr Fejzuloski denied having done so. While said to have been read by Mr Paunkoski (transcript, PN2944-2947) and Mr Simmons (transcript, PN2618-2622) no report from Mr Fejzuloski was presented to the Commission.

56 While consideration was given to the impact of a decision to terminate (transcript, PN2645), Mr Simmons states that in determining to terminate Mr Dimovski's employment, no consideration was given to:

- a) length of service with the company;
- b) Mr Dimovski's previously unblemished record;
- c) the value of the property removed;

as to do so "would make the policy extremely difficult to administer" (transcript, PN2636). In essence it appears that the termination was based upon the reports received which indicated that it was only upon discovery of the black barrel that Mr Dimovski made any mention of it, despite prior opportunities to do so (transcript, PN2734).

The relevant legislation

57 Section 170CE(1)(a) provides:

Subject to subsections (5) and (5A), an employee whose employment has been terminated by the employer may apply to the Commission for relief in respect of the termination of that employment:

- (a) on the ground that the termination was harsh, unjust or unreasonable;

58 Division 3 of Pt VIA of the Act is designed to provide for conciliation and, if

appropriate, arbitration of applications relating to termination of employment. In conducting those procedures, the Commission must ensure that the objectives of Div 3 of Pt VIA are met. These objectives include s 170CA(2):

... to ensure that, in the consideration of an application in respect of a termination of employment, a “fair go all round” is accorded to both the employer and employee concerned.

59 Section 170CG(3) provides:

In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:

- (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer’s undertaking, establishment or service; and
- (b) whether the employee was notified of that reason; and
- (c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
- (d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and
- (da) the degree to which the size of the employer’s undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- (db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- (e) any other matters that the Commission considers relevant.

Submissions on behalf of the respondent

60 The respondent proposed that there were four primary issues to be resolved in determining whether the applicant’s termination was contrary to s 170CE:

1. Did the applicant knowingly remove the black drum from the premises without authorisation or payment?;
2. If so, did that action constitute a breach of the company’s policy?;
3. Was the applicant aware of the consequences of the company’s policy — that employees removing Company property without authorisation could be summarily dismissed?; and finally
4. Did the action justify summary dismissal?

61 In posing a response to these issues, the respondent contends that:

- on 21 February 2002, the applicant knowingly removed the black drum, claiming upon its discovery that he had forgotten to obtain permission for its removal, and later, proposing the black drum was “rubbish” which he intended to dispose of;
- the respondent had a well established procedure regarding the removal of property from its premises — of which the applicant was aware and had previously utilised — which was breached by the removal without authorisation;
- the applicant was aware of the company policy, as notified to all employees through placement of the policy on staff notice boards. He was aware of the consequences of failure to comply as he was conscious of the prior summary dismissal of an employee for unauthorised removal of property;

- after requesting the applicant produce a written statement outlining why his employment should not be terminated, the respondent conducted an investigation of the incident, obtaining statements from the applicant, the applicant's supervisor and the respondent's security officer and determined to terminate his employment;
- the respondent will strictly enforce its policies and procedures, in order to maintain high standards of honesty. Derogation from the procedure will only occur where a reasonable and plausible explanation for removal of property exists. In accordance with s 170CG(3) the applicant was provided an opportunity to respond to the allegations, however, no such explanation was produced. Furthermore, breach of the policy constituted a valid reason for the decision. The respondent consequently submits summary dismissal was justified.

Submissions on behalf of the applicant

62 In support of the proposition that the termination was harsh, unjust and unreasonable, the applicant contended that:

- the respondent's allegation — that the applicant removed one black drum from company premises without permission — had been met with a full oral and written explanation by the applicant;
- the respondent failed to adequately investigate the incident and its surrounding circumstances, neither seeking incident reports from relevant employees and presenting such reports to the applicant, or considering the applicant's contention that he intended to pay for the drum, in light of his long history of purchasing drums;
- the respondent failed to adequately explain the policy in a language understood by the applicant;
- regardless of any adequate explanation, the respondent should not be permitted to act upon the policy as it is harsh, unjust and unreasonable;
- the respondent failed to consider the impact of the termination on the applicant in proportion to the seriousness of the alleged misconduct;

in the absence of any evidence of clear dishonesty, the facts did not justify termination, but a warning.

Was there a valid reason for the termination?

63 The respondent's termination of the applicant's employment must be examined against the provisions of s 170CG(3) of the Act, which provides:

In determining ... whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:

- a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service.

64 The respondent contends that Mr Dimovski's unauthorised removal of property from the company in breach of the security policy constitutes a valid reason for the termination of his employment. On balance, I am not satisfied that there was a valid reason for the termination of the applicant's employment.

65 For a reason to be valid, it must be "sound, defensible or well founded" (*Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373) and "genuinely connected with the employee's capacity or conduct" (*Cosco Holdings Pty Ltd v Thu* (1997) 79 FCR 566; 77 IR 94). It is incumbent upon the

employer to show that there was a valid reason for the termination of employment: *Jobson v Gerrard Strapping Systems* (unreported, AIRC, Whelan C, 24 October 1997). This must be established on the balance of probabilities.

66 There must be a “sound evidentiary basis for such a finding”: *Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)* (2000) 98 IR 137 at [32], [36]). While the Commission ought not place itself in the “managerial chair”, it cannot absolve itself of the responsibility to consider whether such a sound evidentiary basis exists. This involves weighing up what evidence is before the Commission and determining if the onus resting upon the employer has been discharged.

67 The notion of a “fair go all round” means that in determining whether there was a valid reason for the termination, the Commission must have regard to those circumstances in existence at the time when the decision to terminate the employment was made.

68 Giving consideration to such circumstances and the evidence available to the Commission, I am unable to find that there was a “sound, defensible or well founded” reason for termination, particularly given the absence of evidence that there was a wilful breach of company policy. Adopting the reasoning in *Edwards v Giudice* (1999) 94 FCR 561, I (further) find the reason was not valid as “the conduct ... did not justify termination” and the punishment was inappropriate to the circumstances (*Enhance Systems Pty Ltd v Cox* (unreported, AIRC, Williams SDP, Acton SDP and Gay C, 31 October 2001)).

69 In the event that there was a wilful breach of the company policy, this may or may not constitute a valid reason for termination. Regardless of this, if in finding an absence of a valid reason the Commission is incorrect, and a valid reason can be established, I find that the termination was harsh, unjust and unreasonable in accordance with s 170CE(1)(a) on the grounds of s 170CG(3)(c) and (e).

Was Mr Dimovski notified of the reason for termination and given an opportunity to respond?

70 While it is evident that Mr Dimovski was notified of the reason for the termination of his employment, I am of the view that he was not provided with an adequate opportunity to respond to the allegations made against him, particularly in light of his language difficulties.

71 Upon reviewing the means by which answers were sought by the respondent, and provided by the applicant, I find that the investigation procedure adopted by the company did not provide the applicant with the level of procedural fairness required to sustain a termination of employment. At neither of the two meetings held between Mr Dimovski and the company was Mr Dimovski presented with an opportunity to directly address the comments of his accusers. In failing to enable Mr Dimovski to respond directly to the evidence of Mr Fejzuloski and Mr Gadd, the procedure adopted by the company was encumbered by second-hand allegations.

72 The indirect nature of the provision of information continued when the company requested that Mr Dimovski supply them with a written explanation for his conduct without considering his language difficulties. Mr Dimovski’s written response was the result of translation — as were a number of his oral responses in the meetings of the 22 and 25 February 2002. Mr Dimovski clearly exhibited difficulty expressing himself, requiring assistance to both understand what was being said to him, and to provide a full and proper response in

English. Despite such difficulties, and the admission that previous accommodations had been made in similar circumstances, the company made no attempt to ascertain the extent of Mr Dimovski's ability to understand English, nor provide him with a translator. The extent to which the company considered the explanation provided for the removal of the black barrel, and other mitigating circumstances, was consequently inadequate. As such, I find the respondent failed to provide the applicant with a fair and full opportunity to respond to the allegations made against him before a decision to terminate his employment was made.

Application of the company policy

73 As detailed in *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20 at 29:

Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh unjust and unreasonable

In considering the harshness or otherwise of a decision to terminate, "the employer is required to ascertain whether there are any mitigating factors, either associated with the alleged ground for dismissal, or arising from the employee's past record and future prospects" (*Gorgevski* at 35).

The above quotations are particularly apposite in Mr Dimovski's case. In the present circumstances, the respondent clearly failed to consider if such mitigating factors existed. On the contrary, the policy was applied in an inflexible, unthinking and unreasonable manner.

74 In relation to the alleged ground for dismissal, insufficient consideration was given to the applicant's explanation that the removal of the black barrel was a mistake. Such consideration, may, as discussed above, have been hampered by the company's failure to provide Mr Dimovski with a sufficient opportunity to respond to the allegations made against him, bearing in mind his language difficulties. However, it is the view of the Commission that it was the result of the company's strict and unacceptably inflexible imposition of the security policy. While Mr Simmons proposed that the policy would not apply to the innocent removal of a biro (transcript, PN2694), he could not accept that a black barrel of potentially less value than a biro (transcript, PN2708) could similarly be removed due to an individual's failure to remember its existence (transcript, PN2713).

75 The respondent further admits that, while considering the impact of the termination on the applicant, they gave no consideration to Mr Dimovski's length of employment, his previously unblemished record, and the minimal value of the property removed. According to the company, such consideration would "make the policy extremely difficult to administer" (transcript, PN2636). In the light of *Gorgevski*, this is clearly unacceptable.

76 Upon consideration of the mitigating factors regarding the applicant's conduct, past performance and future prospects, the respondent may have been justified in imposing counselling or a warning upon Mr Dimovski. However, the termination of his employment must be characterised as harsh, unjust and unreasonable.

Termination of employment was harsh, unjust or unreasonable

77 In the circumstances, I am satisfied that the termination of Mr Dimovski's employment was harsh, unjust or unreasonable.

Remedy

78 Subsection 170CH(3) empowers the Commission to make an order requiring the employer to reinstate the employee, if the Commission considers reinstatement appropriate. For the reasons set out below, I consider it appropriate to order that the company reinstate Mr Dimovski with no loss of ordinary time earnings for the period from the date of his termination to the date of his reinstatement.

79 I shall now set out my reasons for considering the making of such orders to be appropriate.

80 Section 170CH(1) – (5) of the Act reads as follows:

- (1) Subject to this section, the Commission may, on completion of the arbitration, make an order that provides for a remedy of a kind referred to in subsection (3), (4) or (6) if it has determined that the termination was harsh, unjust or unreasonable.
- (2) The Commission must not make an order under subsection (1) unless the Commission is satisfied, having regard to all the circumstances of the case including:
 - (a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
 - (b) the length of the employee's service with the employer; and
 - (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
 - (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
 - (e) any other matter that the Commission considers relevant;that the remedy ordered is appropriate.
- (3) If the Commission considers it appropriate, the Commission may make an order requiring the employer to reinstate the employee by:
 - (a) reappointing the employee to the position in which the employee was employed immediately before the termination.
 - (b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.
- (4) If the Commission makes an order under subsection (3) and considers it appropriate to do so, the Commission may also make:
 - (a) any order that the Commission thinks appropriate to maintain the continuity of the employee's employment; and
 - (b) subject to subsection (5)—any order that the Commission thinks appropriate to cause the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination.
- (5) If, as a result of an application under section 170CP, a court has awarded an amount of damages for a failure to give notice of a termination as required by section 170CM, any amount ordered to be paid by the Commission under paragraph (4)(b) in respect of the termination is to be reduced accordingly.

- 81 As I have stated above, Mr Dimovski was an employee of long standing with the company. During that time, the company had no issues with Mr Dimovski's performance or conduct, save for the events of 21 February 2002. No evidence was put before the Commission, nor were submissions made, to suggest anything but that if Mr Dimovski's employment were not terminated on 25 February 2002 he would have been employed by the company until his retirement.
- 82 Given Mr Dimovski's difficulties with the English language, low skill-level, age and the workplace injury which he had suffered (transcript, PN1141-1172), it will be difficult, if not impossible, for Mr Dimovski to obtain gainful employment elsewhere before reaching retirement age (transcript, PN160, 1113-1114). In the circumstances (and notwithstanding Mr Dimovski's apparent failure to attempt to mitigate his losses until late August 2002 — transcript, PN1126-1136; Ex R9), I do not believe that effective mitigation of loss is open to Mr Dimovski.
- 83 If I was of the view that reinstatement were not appropriate, I would in the circumstances order that the maximum amount payable under s 170CH ought be paid to Mr Dimovski by the company. Given the statutory cap that applies under s 170CH(8), such an order for payment in lieu of reinstatement would, in my view, be grossly inadequate for the loss suffered by Mr Dimovski consequent upon the termination of his employment.
- 84 In considering the effect that an order of reinstatement would have on the viability of the company, I have considered three factors:
- (a) the cost of re-employing Mr Dimovski in a position that does not currently exist;
 - (b) the propensity of Mr Dimovski to repeat his breach of the security policy; and
 - (c) the effect on the company's ability to enforce the security policy with respect to other employees.
- 85 I have borne in mind Mr Sakula's evidence that the company does not currently have any vacancies, but that it had hired a few new employees some weeks prior to the hearing of this matter (transcript, PN3022). In the circumstances, I do not consider the reinstatement of one further employee to be such a drain on the resources of the company so as to have a deleterious effect on the viability of the company.
- 86 Given the hardship which Mr Dimovski has endured since 21 February 2002, I do not consider it likely that Mr Dimovski would be so foolish or forgetful as to ever again remove company property from company premises without authorisation. The termination of a person's employment, even if that person is ultimately reinstated, is a painful lesson to learn. Given the events that have led to the writing of this decision, it is unlikely that Mr Dimovski does not now understand the dire consequences that could follow from such conduct if it is ever repeated in the future.
- 87 In the circumstances, I would not consider it unreasonable for the company, prior to the reinstatement or within 28 days after the reinstatement, to issue to Mr Dimovski a written warning relating to the unauthorised removal of company property and setting out the consequences which may result in the event that Mr Dimovski removes company property from company premises

without authorisation in the future. If a written warning is given to Mr Dimovski, the terms of it must be reasonable in all the circumstances and it must not be relied upon in a way that is capricious or unfair.

88 I order that the company reinstate Mr Dimovski with no loss of ordinary time earnings for the period from the date of his termination to the date of his reinstatement.

(PR924186.)

ANDREW EDGAR