AIR Bulletin

31 January 2008 Volume 03/08 with the Decision Summaries for the week ending Friday, 25 January 2008.

Contents

Decisions of the Australian Industrial Relations Commission........................................2
Websites of Interest........................................................................................................6
Registry Addresses .......................................................................................................7
Decisions of the Australian Industrial Relations Commission

Summaries of decisions signed and filed in the Australian Industrial Registry during the week ending Friday 25 January 2008.

1 ENTERPRISE BARGAINING – protected action ballot – termination of bargaining period – ss430 & 451 Workplace Relations Act 1996 – Full Bench – appeal – metal industry – Union appealed against refusal to grant protected action ballot and order to terminate bargaining period – argued denial of procedural fairness in that union not given reasonable opportunity to make submissions – appeals upheld – decision and order quashed – matters referred to Eames C.


C2008/2169
Acton SDP
Hamilton DP
Eames C
Melbourne 24 January 2008

2 TERMINATION OF EMPLOYMENT – misconduct – off duty conduct – alleged sexual harassment – whether sufficient nexus to employment – dishonesty in giving evidence – appeal principles – public interest – ss120, 652 Workplace Relations Act 1996 – s28A Sexual Discrimination Act (Cth) – Full Bench – appeal – applicant terminated for sexually harassing fellow employee at hotel accommodation after staff party – Commission at first instance found applicant’s conduct not sexual harassment Under Sexual Discrimination Act – applicant’s dishonesty during Telstra investigation not valid reason for termination because conduct about which applicant was dishonest was inherently personal – reinstatement and remuneration ordered – appeal – applicant appealed on number of grounds including 1) that Commission failed to consider whether there was valid reason related to conduct including its effect on safety and welfare of other employees under s652(3)(a), and 2) whether applicant’s dishonesty destroyed employer’s trust and confidence – majority – Telstra’s investigation into incident was reasonable – incident lead to difficulties at work hence applicant needed to be honest when giving evidence to Telstra about incident (regardless of whether the issues were personal) – applicant’s dishonesty during investigation destroyed trust and confidence – valid reason for termination – procedural fairness afforded – leave to appeal granted – appeal upheld – decision and order quashed – Larkin C – appeal process requires existence of error – no appealable error of type identified in House v King – Telstra’s submissions regarding effect of conduct on safety and welfare of other employees not put at first instance hence not appropriate to grant leave on basis of such submissions – findings at first instance regarding applicant’s dishonesty were reasonably open – no public interest in granting leave to appeal – hence leave to appeal should have been refused.
3  TERMINATION OF EMPLOYMENT – misconduct – remedy – reinstatement – whether reinstatement appropriate – whether reinstatement is primary remedy – s 120, 654 Workplace Relations Act 1996 – Full Bench – appeal – Commission at first instance found applicant unfairly dismissed and ordered reinstatement and payment of lost remuneration – appeal against reinstatement on many grounds including that Commission failed to determine whether reinstatement appropriate and failed to give adequate reasons – when considering remedy, reinstatement should be considered first, however this does not mean that there is some overriding presumption in favour of reinstatement [Wark and Newtronics] – Commission correctly considered whether reinstatement was ‘appropriate’ rather than ‘not inappropriate’ – original decision provided adequate reasons – no appealable error – leave to appeal refused – appeal dismissed.

Appeal by EDI Rail P/L against decision [[2007] AIRC 753] and order [PR979559] of Hamberger SDP on 22 October 2007 - re Rowley

4  WORKPLACE AGREEMENTS – dispute over application of agreement – jurisdictional objections – s 170LW Workplace Relations Act 1996 (pre-reform) – postal services – respondent claimed dispute not over application of redundancy/redeployment/retraining (RRR) agreement – union claimed respondent had breached agreement in moves to convert post office branch – enterprise agreement limits operation of RRR agreement to how staff affected by conversion decisions are managed by respondent – dispute over conversion decision cannot therefore be dispute over application of RRR agreement – failure of union to respond to notifications by respondent created timing issues in relation to required consultation – no other agreement gives rise to dispute on basis advanced by union – however satisfied arguable dispute arises over whether RRR agreement applies to employees at post office who may be affected by conversion decision – language of relevant clause suggests RRR agreement concerns management of employees once potential redundancy situation identified and not merely when positions actually redundant – in any case even were union’s arguments accepted, discretion to grant relief pursuant to s 111(1)(g) in relation to timing issues declined because respondent proceeded with conversion decision in good faith – no jurisdiction to deal with dispute in relation to conversion decision but not yet persuaded Commission has no jurisdiction to deal with dispute over whether and when RRR Agreement applies to particular employees in this case – applicant to consider whether to proceed on narrow issue.
5 Termination of employment – 100 employees or less – absence of any contest to the motion to dismiss – satisfied respondent employed fewer than 100 employees – substantive application dismissed.

Reed v Disability Opportunities Victoria Inc


The Australian Workers’ Union

7 TERMINATION OF EMPLOYMENT – extension of time – directions issued – no further information provided by either party – onus on applicant – date of termination not completed in application – 16 days outside limit – insufficient information to determine if delay acceptable – application dismissed.

James v Concrete Precast Systems (SA) P/L

8 TERMINATION OF EMPLOYMENT – extension of time – whether termination at initiative of employer – behaviour of applicant consistent with premeditated decision to resign – satisfied on balance of probabilities that applicant resigned after failing to obtain pay rise – no jurisdiction – not necessary therefore to determine question of extension – order to issue.

Brines v Ray Marshall P/L

9 WORKPLACE AGREEMENTS – dispute over application of agreement – rostered overtime – s170LW Workplace Relations Act 1996 (pre-reform) – private transport industry – whether employer bound to use or can unilaterally stop using agreed
roster procedure – history of clause considered – agreed roster procedure not defined in site agreement – procedure only operative when condition precedent to carrying out work in accordance with procedure present – work must be available – no operational requirement for specified number of persons to be rostered back – although agreed roster procedure is applicable for duration of site agreement, employer has discretion whether overtime will be worked – moreover employer has not sought to unilaterally alter procedure – no evidence that employer used casuals to disadvantage permanent employees – no breach of clause 17 – in all circumstances of case, having regard to ordinary meaning of clauses and predecessor agreements and award, Commission finds against application – matter dismissed.

Transport Workers’ Union of Australia and TNT Australia P/L

C2007/3377 [2008] AIRC 69
Hoffman C Brisbane 22 January 2008

10 ENTERPRISE BARGAINING – protected action ballot – s451 Workplace Relations Act 1996 – order made for secret ballot for protected action to open and close on 7 January 2008 – by agreement order included provision that it would cease operation if employees approved Employee Collective Agreement on 28 December 2007 – satisfied parties genuinely trying to reach agreement – no pattern bargaining – order made in terms required by s463.

The Australasian Meat Industry Employees Union and Lobethal Abattoirs P/L

BP2007/4769 [2008] AIRC 74
Bacon C Brisbane 23 January 2008

11 TERMINATION OF EMPLOYMENT – jurisdiction – 100 employees or fewer – motion to dismiss – respondent’s submission not disputed – motion to dismiss granted – application relating to s643(1)(a) dismissed – application on unlawful grounds referred for conciliation.

Coonan v Q Pastoral Company P/L t/as Mobil South Hay

U2007/450 [2008] AIRC 49
Roberts C Sydney 23 January 2008
Websites of Interest

**Australian Industrial Relations Commission (AIRC)** - [http://www.airc.gov.au/](http://www.airc.gov.au/) – includes hearing lists, rules, forms, major decisions, termination of employment information and student information. Related websites include:


**Australian Fair Pay Commission** – [http://www.fairpay.gov.au](http://www.fairpay.gov.au) – established to set and adjust the federal minimum wage to promote the economic prosperity of the people of Australia;


**ComLaw** - [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/) - legislative repository that has replaced SCALEplus, contains:

- Common wealth primary legislation, as well as other ancillary documents and information, in electronic form; and
- the new Federal Register of Legislative Instruments (FRLI) which was established on 1 January 2005 under the *Legislative Instruments Act 2003* as the authoritative source for legislative instruments and compilations of legislative instruments;

**Department of Employment and Workplace Relations (DEWR)** - [http://www.dewr.gov.au/](http://www.dewr.gov.au/) - provides general information about DEWR and its Ministers, including their media statements;


**South Australian Industrial Relations Court and Commission** - [www.industrialcourt.sa.gov.au](http://www.industrialcourt.sa.gov.au);

**Tasmanian Industrial Commission** - [http://www.tic.tas.gov.au](http://www.tic.tas.gov.au);


**Work Choices** – [https://www.workchoices.gov.au/](https://www.workchoices.gov.au/) – provides pay and conditions information for employees and employers of constitutional corporations and the Commonwealth, those in the ACT, Northern Territory, Christmas and Cocos (Keeling) Islands, and most employees and employers in Victoria;

**Workplace Authority** - [http://www.workplaceauthority.gov.au](http://www.workplaceauthority.gov.au) - primary role is to accept lodgments of workplace agreements; includes information regarding Australian Workplace Agreements (AWAs), development and lodging procedures;

**workplace.gov.au** – [http://www.workplace.gov.au](http://www.workplace.gov.au) - provides access to online employment and workplace relations services and information, including government assistance, jobs, careers, training, working conditions and Indigenous Employment Centres;


Registry Addresses

Principal
Level 4, 11 Exhibition Street
Melbourne
GPO Box 1994
Melbourne Vic 3001
Tel: (03) 8661 7777
Fax: (03) 9655 0401
Out of hrs emergency: 0419 960 157
Email: melbourne@air.gov.au
Industrial Registrar: Doug Williams

Queensland
Level 14, Central Plaza Two
66 Eagle Street
Brisbane
PO Box 5713 Central Plaza
Brisbane QLD 4001
Tel: (07) 3000 0399
Fax: (07) 3000 0388
Out of hrs emergency: 0419 335 202
Email: brisbane@air.gov.au
Deputy Industrial Registrar: Damien Staunton

Tasmania
1st Floor, Commonwealth Law Courts
39-41 Davey Street
Hobart
GPO Box 1232M
Hobart Tas 7001
Tel: (03) 6214 0200
Fax: (03) 6214 0202
Out of hrs emergency: 0418 124 021
Email: hobart@air.gov.au
Deputy Industrial Registrar: Ross McCarroll

New South Wales
Level 8, Terrace Towers
80 William Street
East Sydney NSW 2011
Tel: (02) 8374 6666
Fax: (02) 9380 6990
Out of hrs emergency: 0419 318 011
Email: sydney@air.gov.au
Deputy Industrial Registrar: Barry Jenkins

South Australia
Level 7, Riverside Centre
North Terrace
Adelaide
PO Box 8072
Station Arcade SA 5000
Tel: (08) 8308 9863
Fax: (08) 8308 9864
Out of hrs emergency: 0419 563 601
Email: adelaide@air.gov.au
Deputy Industrial Registrar: Lynne Staplyton

Northern Territory
10th Floor, Northern Territory House
22 Mitchell Street
Darwin
GPO Box 969
Darwin NT 0801
Tel: (08) 8936 2800
Fax: (08) 8936 2820
Out of hrs emergency: 0418 895 495
Email: darwin@air.gov.au
Deputy Industrial Registrar: Neil McHattie

Victoria
Level 4, 11 Exhibition Street
Melbourne
GPO Box 1994
Melbourne Vic 3001
Tel: (03) 8661 7777
Fax: (03) 9655 0401
Out of hrs emergency: 0419 960 157
Email: melbourne@air.gov.au
Deputy Industrial Registrar: Ross McCarroll

Western Australia
Floor 12, 111 St Georges Terrace
Perth
GPO Box X2206
Perth WA 6001
Tel: (08) 9464 5172
Fax: (08) 9464 5171
Out of hrs emergency: 0448 275 936
Email: perth@air.gov.au
Deputy Industrial Registrar: Ross McCarroll

Australian Capital Territory
2nd Floor, CML Building
17-21 University Avenue
Canberra
GPO Box 539
Canberra City ACT 2601
Tel: (02) 6209 2400
Fax: (02) 6247 9774
Out of hrs emergency: 0408 447 112
Email: canberra@air.gov.au
Deputy Industrial Registrar: Christine Hayward

The address of the AIRC Home Page is: http://www.airc.gov.au/

The Australian Industrial Registry Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Commission;
- Practice Directions concerning the practice and procedure of the Commission;
- weekly decisions summaries;
- details of procedural changes and developments within the Registry; and
- advice regarding the rights and obligations of organisations registered under the Workplace Relations Act 1996.

For inquiries regarding publication of the Bulletin please contact the Registry's Information Help Desk - Postal address: GPO Box 1994, Melbourne Vic 3001, Tel: (03) 8661 7807, Fax: (03) 9655 0406.

© Commonwealth of Australia 2008