

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Department of Employment and Workplace Relations v Oakley

Acton and Duncan SDPP, Grainger C

1, 15 December 2004

Termination of Employment — Appeal — Misconduct — Fraudulent behaviour — Investigation delayed until completion of criminal proceedings — Appellant meanwhile placed on restrictive duties — Appellant dismissed — Valid reason — Whether termination harsh — Commissioner's decision that delay in dismissal rendered dismissal harsh — Workplace Relations Act 1996 (Cth), s 170CG(3).

The employee admitted to improperly using a corporate credit card. He pleaded guilty to a fraud charge in the ACT Magistrates Court. Investigations into the incident were delayed by the employer until after the fraud investigation and the bringing of criminal charges.

After an investigation by the employer the employee was dismissed. The Commissioner found that although there had been a valid reason for dismissal, the dismissal had been harsh as it was not proportionate to the gravity of the conduct, considering the time between the conduct and the dismissal.

Held: (1) The dismissal of the employee was not harsh.

(2) The delay in the investigation by the employer was not relevant to assessing whether the dismissal was unfair.

(3) It was appropriate for the employer to delay the investigation of the employee's conduct pending the commencement of other proceedings.

(4) Employment on restricted duties during the investigation was preferable to suspension.

Cases Cited

House v The King (1936) 55 CLR 499.

Oakley v Department of Employment and Workplace Relations (unreported, AIRC, Raffaelli C, PR952504, 15 October 2004).

Oakley v Department of Employment and Workplace Relations (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004).

Appeal

C Ward, for the appellant.

I Latham, for the respondent.

Cur adv vult

The Commission.

Introduction

1 This decision concerns a notice of appeal lodged by the Federal Department of Employment and Workplace Relations (DEWR) against a decision¹ and order² of Commissioner Raffaelli (the Commissioner) dated 15 October 2004 in which the Commissioner found the termination of the employment of Mr Jason Oakley from DEWR was harsh, determined to make an order requiring DEWR to reinstate Mr Oakley and maintain the continuity of his employment between the date of his termination and the date of his reinstatement and made an order to that effect.

2 The background to the Commissioner's decision and order and the Commissioner's findings are set out below.

Background and findings

3 Mr Oakley lodged an application in the Commission under s 170CE(1) of the *Workplace Relations Act 1996* (Cth) (the Act) on 28 April 2004 alleging the summary termination of his employment by DEWR on 8 April 2004 was harsh, unjust or unreasonable.

4 Following the failure of conciliation in the matter, it went to the Commissioner for arbitration. The Commissioner conducted hearings in the matter and issued his decision and order shortly thereafter.

5 Mr Oakley commenced employment as an APS Level 4 in the Indigenous Community Volunteers Section (ICV) of DEWR in March 2002. ICV operated to provide targeted volunteer services in partnership with indigenous communities. A substantial part of Mr Oakley's duties with ICV involved travelling to indigenous groups and other organisations in various parts of Australia to make presentations in relation to the role of ICV and its potential to assist in targeted ways and to facilitate the management of existing projects.³

6 It is not contested that in mid-2003, Mr Oakley misused the AMEX credit card DEWR had provided to him. The incidents of misuse were described by the Commissioner as follows:

3.1 While on a work-related trip to Brisbane (the applicant is Canberra based) he had used his Amex card to withdraw \$260 in cash from an Automatic Teller Machine (ATM) at 2.24 am on 22 May 2003.

3.2 Later that same morning, at 3.21 am he used his Amex card to withdraw a further \$240 from an ATM.

3.3 While on a work-related trip to Darwin he had used his Amex card to withdraw \$300 from an ATM at 7.32 am on 4 June 2003.

3.4 Later, at 12.37 am on 5 June 2003 he had used his Amex card to withdraw \$160 from an ATM.

3.5 On 6 June 2003 the applicant used his Amex card to pay \$150 for

1 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004).

2 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952504, 15 October 2004).

3 Exhibit DEWR 7 at paras 2-4.

accommodation at his hotel for the night of 5 June 2003, an overnight stay which was not appropriately authorised and to which he had no entitlement.⁴

7 In his decision, in respect of Mr Oakley's s 170CE(1) application, the Commissioner found there was a valid reason for the termination of Mr Oakley's employment by DEWR being his conduct in using the AMEX credit card provided to him by DEWR in breach of relevant DEWR policies.⁵

8 The Commissioner also found Mr Oakley was informed of the reason why he was being dismissed and given an opportunity to respond.⁶

9 The Commissioner further considered that other matters of relevance to his determination of whether the termination was harsh, unjust or unreasonable were:

- Mr Oakley's admissions as to his actions;
- His contrition;
- His punishment by the ACT Magistrates' Court;
- His good work performance both before and since the incidents constituting the valid reason;
- DEWR's delay in pursuing the Australian Public Service Code of Conduct process in respect of Mr Oakley until some seven months after the incidents and its continuing employment of Mr Oakley over that period by re-assigning him to other duties in DEWR;
- The importance of Mr Oakley having stable employment while he pursues his recovery from his alcohol and gambling addictions; and
- DEWR's decision around the time of the incidents not to terminate Mr Oakley's employment for his breaches of the APS Code of Conduct but rather to maintain his employment.⁷

10 The Commissioner concluded in respect of whether the termination was harsh, unjust or unreasonable as follows:

I have considered all the matters referred to above, including, that the misconduct was proven and provided a valid reason for dismissal. However, I consider that the decision to impose the sanction of termination was harsh in that it was disproportionate to the gravity of the misconduct. In coming to that conclusion, *I rely on DEWR's own decision that the gravity of the misconduct did not justify termination in July 2003*. Indeed, as an alternative to suspension (much less termination) the applicant was reassigned to other duties. If his conduct did not call for immediate action against him in July 2003 (when he made formal admissions to Mr Harries) then DEWR's actions in April 2004 must be seen as harsh. After all, nothing had changed except of course that a penalty had been imposed by the court and the applicant had provided satisfactory service over about nine months at the IEB section.⁸

(Emphasis added.)

4 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004) at [3].

5 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004) at [35].

6 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004) at [36]-[40].

7 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004) at [42].

8 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004) at [44].

Grounds of appeal

11 In its grounds of appeal, DEWR submits, amongst other things, that the Commissioner erred in finding that DEWR decided that the gravity of the misconduct did not justify termination in July 2003. DEWR maintains that because that finding was central to the Commissioner's determination that the termination was harsh, the Commissioner's decision is attended with appellable error of the type set out in *House v The King*⁹

12 Mr Oakley opposes the grant of leave to appeal. In respect of the Commissioner's conclusion that the termination was harsh, Mr Oakley submits the conclusion was based on the Commissioner's view that the sanction of termination was disproportionate to the gravity of the misconduct.

13 Mr Oakley says that, in coming to that view, the Commissioner not only has regard to DEWR's decision that the gravity of the misconduct did not justify the termination in July 2003 but also to the other matters he says in his decision are of relevance to his determination, including:

- admissions by Mr Oakley even when the employer was not able to provide accurate records;
- contrition;
- alternative punishment;
- good performance in the interim;
- good office work with ICV;
- the lack of further adverse conduct; and
- the need for stable employment.

14 Further, Mr Oakley says, the Commissioner's reference to "DEWR's own decision that the gravity of the misconduct did not justify termination in July 2003"¹⁰ needs to be read in the context of his other statements in the decision that:

[38] One issue that did emerge was the delay in DEWR's Code of Conduct process because of actions taken by the FIT and the DPP ...

[39] ... it is difficult to understand why HR decided to halt their process ...

[44] ... if his conduct did not call for immediate action against him in July 2003.

Appeal conclusion

15 We think it is apparent from a fair reading of the Commissioner's decision that in concluding the termination of Mr Oakley's employment by DEWR was harsh, the Commissioner was heavily influenced by "DEWR's own decision that the gravity of the misconduct did not justify termination in July 2003."¹¹ On the evidence before the Commissioner, however, we do not think DEWR did decide the gravity of Mr Oakley's misconduct did not justify termination in July 2003 or that it was open to the Commissioner to find that DEWR so decided.

16 The evidence before the Commissioner from witnesses for DEWR was that, following Mr Oakley's failure to attend work on 5 June 2003 and a number of

⁹ *House v The King* (1936) 55 CLR 499.

¹⁰ *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004) at [44].

¹¹ *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004).

irregular dealings around that time in respect of the AMEX credit card DEWR had provided to him, Mr Paul Tyrrell, who was Mr Oakley's supervisor in ICV, met with Mr Oakley on 10 June 2003. Mr Oakley told Mr Tyrrell he was sorry for what had happened and he had no excuse other than he had been drinking and gambling all night and that was why he did not turn up for work. Mr Tyrrell told Mr Oakley that because of his conduct he could not come back to work at ICV, he was discussing options with the Human Resources area of DEWR and Mr Oakley would be informed of the outcome. Mr Oakley subsequently went on recreation leave from Tuesday, 10 June to Friday, 13 June 2003. On Monday, 16 June 2003, Mr Tyrrell again had a discussion with Mr Oakley regarding his future, including the possibility that his conduct may be investigated by the DEWR Fraud Investigation Team (FIT) and subject to APS Code of Conduct procedures. Mr Tyrrell also discussed Mr Oakley's possible transfer to another area of DEWR pending the outcome of the FIT and APS Code of Conduct investigations and he agreed to place Mr Oakley on leave until Friday, 27 June 2003 pending a position for Mr Oakley being found.¹²

17 On 16 June 2003, Mr Garry Brewer, a Senior Advisor in the Human Resources Branch of DEWR, recommended to Mr Tyrrell that as the FIT and APS Code of Conduct investigations were not likely to take place within a short time frame, then provided any problems in allowing Mr Oakley to stay at work could be properly addressed, it was more appropriate to find Mr Oakley alternative work within DEWR than to suspend him pending the outcome of the investigations.¹³

18 Mr Oakley was transferred to the Indigenous Employment Program Branch (IEP) of DEWR on or about 27 June 2003.

19 When Mr Oakley started working in IEP, Ms Kylie Emery, Assistant Secretary of IEP, informed him he was being temporarily placed in IEP pending the finalisation and outcome of the investigations into his conduct. Two restrictions were placed on Mr Oakley whilst engaged on the temporary placement. He was not allowed to travel and he was not to have access to a corporate credit card.¹⁴

20 On 10 September 2003, Mr Oakley sent an email to Mr Craig Farrell, Acting Assistant Secretary in the Human Resources area of DEWR, asking whether Mr Farrell had received any news about his position or the investigation. Mr Farrell responded to Mr Oakley by email on 11 September 2003 to the effect that he had heard no more about the investigation, Ms Emery and Mr Peter Frankis were discussing Mr Oakley's position and Ms Emery had advised that Ms Michelle Cullen was perhaps the best person to speak to.¹⁵

21 From July to September 2003, DEWR experienced on-going delays in obtaining relevant transaction documentation from AMEX.¹⁶

22 On 30 September 2003, there was a meeting between officers of the Commonwealth Director of Public Prosecutions (DPP) and officers of DEWR as to whether DEWR should run the APS Code of Conduct proceedings on Mr Oakley concurrently with the FIT investigation into Mr Oakley. The DPP's

12 Exhibit DEWR 7 at paras 13-21.

13 Exhibit DEWR 8 at para 3 and DEWR 7 at para 23.

14 Exhibit DEWR 15 at paras 3 and 4 and Transcript at PN 1287.

15 Exhibit DEWR 13.

16 Exhibit DEWR 10 at para 6.

office advised it was a matter for DEWR to decide when and if to bring the APS Code of Conduct proceedings. However, the DPP's office said the criminal investigation must be given precedence over the administrative proceedings, such that DEWR must ensure whatever APS Code of Conduct action is taken does not prejudice the fraud investigation.¹⁷

23 On 28 October 2003, FIT referred its brief of evidence in relation to Mr Oakley's misuse of the AMEX credit card to the DPP's office and asked them to consider it with a view to pursuing charges against Mr Oakley.¹⁸

24 Mr Oakley took leave from DEWR from 1 December 2003 to 16 January 2004.¹⁹

25 On 18 December 2003, the DPP's office finalised drafting the Information and Summons against Mr Oakley. On 21 January 2004, Mr Oakley pleaded guilty in the ACT Magistrates' Court to offences arising from his misuse of the AMEX credit card and the matter was set down for sentencing on 9 March 2004.²⁰

26 On 3 February 2004, FIT advised Ms Anya Moore, Assistant Secretary in the Human Resources area of DEWR, that the DPP's office agreed there was now very little risk of prejudicing the outcome of the criminal prosecution if DEWR commenced the APS Code of Conduct proceedings against Mr Oakley.²¹

27 Mr Oakley's evidence was that following the discussion with Mr Tyrrell on or about 10 June 2003 concerning his improper use of the AMEX credit card, he was put on leave and then transferred to IEP. He was advised the matter of his conduct would go to FIT. He was not told how long he would be with IEP nor was he advised, until early 2004, that an APS Code of Conduct investigation was pending. On 3 July 2004, he participated in a tape recorded interview with Mr Christopher Harries in relation to his use of the AMEX credit card. He was aware Mr Harries was conducting an investigation on behalf of FIT, although he was unaware what the outcome would be in relation to his employment. As 2003 progressed, he believed the likelihood of him losing his job had greatly diminished. He had received no further information from DEWR in relation to the FIT investigation. By the end of 2003, given the substantial delay, he was of the view DEWR had decided to take no further action.²²

28 We consider Mr Oakley's own evidence reveals that even he did not think DEWR had decided in July 2003 that the gravity of his conduct did not justify termination. In this regard, in his evidence Mr Oakley refers to participating in a tape recorded interview with Mr Harries on 3 July 2003 relating to his use of the AMEX credit card. Mr Oakley then says:

24. As the year progressed I believed that the likelihood of losing my job had greatly diminished. I had received no further information from the Department in relation to the FIT investigation or whether the matter would be referred to the DPP.

17 Exhibit DEWR 10 at para 8.

18 Exhibit DEWR 10 at para 9.

19 Exhibit DEWR 10 at para 10.

20 Exhibit DEWR 10 at paras 12 and 14.

21 Exhibit DEWR 10 at para 16.

22 Exhibit Oakley 2 at paras 19-25.

25. By the end of the year, given the substantial delay, I was of the view that the Department had decided to take no further action.²³

29 Mr Oakley's only real challenge to the evidence of the witnesses for DEWR, that we have set out above, was whether he was told early on that an APS Code of Conduct investigation was pending. Even if the evidence given by the witnesses for DEWR in that regard is excluded, their remaining evidence confirms that DEWR had not decided in July 2003 that the gravity of Mr Oakley's conduct did not justify termination and why it had not so decided by then.

30 In the circumstances it is apparent the Commissioner made an error of the type set out in *House v The King*²⁴ That is, the Commissioner made an error in exercising his discretion as to whether the termination was harsh in that he mistook the facts.

31 Accordingly, we grant leave to appeal and uphold the appeal. We will determine Mr Oakley's s 170CE(1) application ourselves.

Section 170CG(3)

32 Section 170CG(3) of the Act provides as follows:

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.

33 We will deal with each of these matters in turn.

Valid reason — s 170CG(3)(a)

34 We are satisfied there was a valid reason for the termination of Mr Oakley's employment by DEWR related to his conduct being his misuse in late May and early June 2003 of the AMEX credit card provided to him by DEWR.

Notified of reason and opportunity to respond — s 170CG(3)(b) and (c)

35 We are also satisfied Mr Oakley was notified of the valid reason for his termination and given an opportunity to respond. We set out the basis for that conclusion in the following material.

²³ Exhibit Oakley 2.

²⁴ *House v The King* (1936) 55 CLR 499.

- 36 Mr Oakley's evidence was that in March 2004 he received a notification from
Ms Anya Moore, Assistant Secretary in the Human Resources area of DEWR.²⁵
37 Ms Moore's notification was as follows:

Minute

To: Jason Oakley	Contact Officer:
From: Anya Moore	Telephone: [number inserted]
Date: 16 March 2004	Fax:
File:	Location:
Copy:	

Subject: Possible Termination of Employment Following Breaches of the APS Code of Conduct

You will be aware that I selected Mr Garry Brewer to determine whether you had breached the APS Code of Conduct. Mr Brewer has completed his report and has found that you did breach the Code. A copy of Mr Brewer's report is attached. You are entitled to apply to the Merit Protection Commissioner for a review of that determination. More information on the review mechanism is available through the Department's Guidelines on Review of Actions, s 33 of the *Public Service Act 1999* and Regulation 5.24(2) of the Public Service Regulations, as well as the Australian Public Service Commission's web site.

It is my function to decide on an appropriate sanction. My preliminary view is that your breaches of the Code warrant your dismissal from the APS. However, before I make a final decision, I am offering you the opportunity to provide any comments that you think I should take into account. I am enclosing a draft of my reasons for the imposition of the sanction for your information and to assist you in preparing any comments.

If you have comments you wish me to take into account you should have them to me within 7 days of your receipt of this minute. If I do not hear from you I will be making my decision on the information I have at that date.

[Signed]

Anya Moore
Assistant Secretary
Human Resources Branch
Corporate²⁶

- 38 Mr Brewer's report contained, amongst other things, the following:

Background

1. Section 13 of the *Public Service Act 1999* ("the Act") establishes the APS Code of Conduct which sets out the standards of conduct required of APS employees.
2. Section 15(1) of the Act allows an Agency Head to impose sanctions on an APS employee in the Agency who is found to have breached the Code of Conduct.
3. Section 15(3) of the Act requires Agency Heads to establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. Those procedures are to comply with the requirements of Chapter 5 of the Public Service Commissioner's Directions 1999.

²⁵ Exhibit Oakley 2 at para 8.

²⁶ Exhibit Oakley 1 at A11.

4. A delegate of the Secretary of the Department of Employment and Workplace Relations (“the Department”) has established procedures for determining breaches of the Code of Conduct by APS employees in the Department. Clause 2 of that instrument provides for the selection of a person to determine whether an APS employee has breached the Code of Conduct.
5. By instrument dated 10 February 2004 ... the Assistant Secretary, Human Resources Branch, Corporate, selected me as the decision-maker to determine whether there had been a breach of the Code of Conduct by Mr Jason Oakley, an ongoing APS 4 employee employed in the National Projects and Co-ordination Unit, Indigenous Employment Programmes Branch, Intensive Support Group.

Allegations

6. It is alleged that during the period 22 May 2003 to 6 June 2003, on five occasions, Mr Oakley used a departmental Amex credit card (“Corporate Card”) which had been issued to him for official use to obtain cash or a service for his own personal use. Particulars of the allegations are as follows:
 - It is alleged that at 2.24 am on 22 May 2003, Mr Oakley used his Corporate Card to withdraw \$260.00 in cash at an Automatic Teller Machine situated in Brisbane, Queensland without authorisation and contrary to departmental requirements.
 - It is alleged that at 3.21 am on 22 May 2003 Mr Oakley used his Corporate Card to withdraw a further \$240.00 in cash at an Automatic Teller Machine situated in Brisbane, Queensland without authorisation and contrary to departmental requirements.
 - It is alleged that at 7.32 am on 4 June 2003 Mr Oakley used his Corporate Card to withdraw \$300.00 in cash at an Automatic Teller Machine situated in Darwin, Northern Territory without authorisation and contrary to departmental requirements.
 - It is alleged that at 12.37 am on 5 June 2003 Mr Oakley used his Corporate Card to withdraw \$160.00 in cash at an Automatic Teller Machine situated in Darwin, Northern Territory without authorisation and contrary to departmental requirements.
 - It is alleged that on 6 June 2003 Mr Oakley used his Corporate Card to pay \$150 for accommodation at the Novotel Atrium, Darwin, on the night of Thursday 5 June 2003 which was not appropriately authorised and to which he had no entitlement.
 - In addition, it is alleged that Mr Oakley incurred unauthorised Cash Withdrawal Fees amounting to \$28.80 and a Late Payment Fee of \$61.66 resulting from his unauthorised use of his Corporate Card.
7. It is alleged that these actions may have breached subsections 13(1), 13(5), 13(8) and 13(11) of the PS Act ...

Evidence

11. I have relied on:
 - the brief of evidence provided by the Fraud and Investigations Team, particularly the credit card statements and record of interview of Mr Oakley by Mr Harries on 3 July 2003,
 - my interview with Mr Oakley on 24 February 2004,
 - the Department’s documents “Practical Guide — Credit Cards” and “Travel Policy and Guide”.

Findings on material questions of fact

12. In his interview with me, Mr Oakley made full admissions as to his Corporate Card use. Those admissions confirmed the admissions he had made to the Fraud and Investigations Team (see pages 11ff of transcript of 3 July 2003). I therefore find that Mr Oakley used a Corporate Card which had been issued to him for official use to obtain cash and a service for his own personal use as specified in the allegations at paragraph 6.
13. On 29 November 2002, Mr Oakley signed a receipt for the issue of a Corporate Card. In doing so, he certified that he would use the card for official Departmental business only and in accordance with the Department's Chief Executive Instructions and appropriate Practical Guides.
14. The Department's "Practical Guide — Credit Cards" provides that cards can only be used for legitimate departmental business purposes. Expenditure of a private nature must not be charged to cards.
15. The Department's "Travel Policy and Guide" provides "cards must not be used for personal expenditure under any circumstances".
16. In misusing his Corporate Card, Mr Oakley has failed to comply with his undertaking and with the various departmental instructions regarding his use of the credit card, and has used Commonwealth resources in an improper manner.

Determination of breaches of the APS Code of Conduct

17. I determine that through his misuse of his Corporate Card Mr Oakley has breached the Code of Conduct in that he:
 - failed to behave honestly and with integrity, thereby breaching section 13(1) of the PS Act,
 - failed to comply with a lawful and reasonable direction, thereby breaching section 13(5) of the PS Act,
 - failed to use Commonwealth resources in a proper manner, thereby breaching section 13(8) of the PS Act, and
 - failed to uphold APS Value 10(1)(d) of the PS Act which requires the APS to have the highest ethical standards, thereby breaching section 13(11) of the PS Act²⁷

39 Ms Moore's draft of her reasons for the imposition of the sanction of termination of employment included the following:

Findings on material questions of fact

I make the following findings of fact:

- (1) In accordance with procedures established under subsection 15(3) of the Act, Mr Brewer determined that Mr Oakley breached the APS Code of Conduct in that he breached the following subsections of the Act:
 - subsection 13(1) of the Act which requires an APS employee to behave honestly and with integrity in the course of APS employment;
 - subsection 13(5) of the Act which provides that an APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction;
 - subsection 13(8) of the Act which requires an APS employee to use Commonwealth resources in a proper manner;

²⁷ Exhibit DEWR 8 at GB4.

- subsection 13(11) of the Act which requires an APS employee to at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
- (2) Mr Oakley has knowingly and deliberately engaged in serious misconduct involving unauthorised use of his departmental credit card to withdraw substantial sums of cash for his own use on two separate trips away from Canberra and, on one occasion, to pay for an additional night's accommodation.
 - (3) Mr Oakley was aware of the Department's instructions on the use of departmental credit cards and of his responsibilities.
 - (4) Mr Oakley is receiving counseling [sic] for addiction to alcohol and gambling. He has repaid a substantial proportion of the money he misused. He has provided various references and is supported by his supervisors.

Reasons for decision

I have determined that termination of employment is the appropriate sanction to impose on Mr Oakley under sub-clause 15(1) for the following reasons:

- Mr Oakley has knowingly and deliberately engaged in serious misconduct which has breached the APS Code of Conduct;
- Mr Oakley's actions are incompatible with his duty as an employee and seriously damage the relationship of confidence and trust necessary between employer and employee for the employment relationship to continue.
- Mr Oakley's apparent addiction to alcohol and gambling do not excuse his actions. While the initiatives he has taken to obtain treatment for these difficulties are commendable, they do not overcome the effects of his wrongdoing on his employment relationship.
- Mr Oakley's misconduct is so serious that it is no longer appropriate, from the perspective of efficient administration and public confidence in the integrity of that administration, for Mr Oakley to remain employed in the Australian Public Service.²⁸

40 Mr Oakley responded to Ms Moore's notification in a letter dated 24 March 2004.²⁹

41 Mr Oakley's employment, as we indicated earlier, was terminated by DEWR on 8 April 2004.

Unsatisfactory performance, size of employer's undertaking and human resource management — s 170CG(3)(d), (da) and (db)

42 The valid reason for the termination of Mr Oakley's employment did not relate to unsatisfactory performance by him. Accordingly, we do not think the matter of whether Mr Oakley was warned about unsatisfactory performance is relevant to whether the termination of his employment was harsh, unjust or unreasonable.

43 Further, DEWR is a Federal Government department of considerable size. In that circumstance, the size of DEWR's undertaking, establishment or service should have had a significant, positive impact on the procedures it followed in effecting the termination. We think the procedures DEWR followed were quite satisfactory.

44 DEWR also has dedicated human resource management specialists or expertise. As a result, we do not think the matter of the degree to which the

²⁸ Exhibit Oakley 1 at A12.

²⁹ Exhibits Oakley 1 at A13 and Oakley 2 at paras 29-30.

absence of dedicated resource management specialists or expertise in the employer would be likely to impact on the procedures followed in effecting the termination is relevant.

Other matters — s 170CG(3)(e)

45 The other matters we consider are relevant and support a conclusion that the termination of the employment of Mr Oakley by DEWR was harsh, unjust or unreasonable are:

- The fact the termination was a summary dismissal;
- Mr Oakley's admissions, co-operation with DEWR throughout the investigations, restitution and remorse;
- Mr Oakley's punishment by the ACT Magistrates' Court for his misuse of the AMEX credit card;
- The fact Mr Oakley's misuse of the AMEX credit card was associated with his alcohol and gambling addictions, for which he is undertaking treatment and counselling;
- The fact that Mr Oakley's rehabilitation would be facilitated by continuing employment;
- Mr Oakley's sound performance in the work to which he was transferred from mid-2003;
- The absence of formal written warnings about Mr Oakley's capacity or conduct prior to the AMEX credit card misuse; and
- The more lenient treatment given by DEWR to some other employees who have engaged in similar misconduct.

46 We do not regard DEWR's delay in undertaking the APS Code of Conduct investigation as a relevant matter. We consider DEWR acted appropriately and reasonably in delaying the APS Code of Conduct investigation given the possible prejudice to the FIT investigation and resultant proceedings in conducting the APS Code of Conduct investigation any earlier.

47 Nor do we consider DEWR's continuing employment of Mr Oakley for some 10 months after he misused the AMEX credit card is a relevant matter. Over that period Mr Oakley was on relevantly restricted, alternative work pending the outcome of the FIT and APS Code of Conduct investigations. We have already indicated we consider the delay in the APS Code of Conduct investigation was appropriate and reasonable. We also consider it was preferable to give him such continuing employment rather than suspend him pending the outcome of the investigations.

Harsh, unjust or unreasonable conclusion

48 Bearing in mind our conclusions regarding the matters in s 170CG(3)(a) to (e) of the Act, we have decided the termination of the employment of Mr Oakley by DEWR was not harsh, unjust or unreasonable.

49 In our view, Mr Oakley's misuse of the AMEX credit card provided to him by DEWR and the procedural fairness afforded to him by DEWR on the issue outweigh the matters supporting a conclusion that the termination was harsh, unjust or unreasonable.

50 In so deciding, we have been conscious of the objects of the relevant Division of the Act and, in particular, our decision has been made in the context of the need to ensure a "fair go all round" is accorded both to Mr Oakley and DEWR.

- 51 In the circumstances, we quash the decision³⁰ and order³¹ of Commissioner Raffaelli of 15 October 2004 and dismiss Mr Oakley's unfair dismissal application. A copy of our order³² quashing the decision and order of Commissioner Raffaelli is attached.
(PR954267)

Appeal upheld
FABIAN FLINTOFF

30 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952429, 15 October 2004).

31 *Oakley v Department of Employment and Workplace Relations* (unreported, AIRC, Raffaelli C, PR952504, 15 October 2004).

32 PR954268.