

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Wodonga Rural City Council v Lewis

Watson and Lloyd SDPP, Gay C

16 February, 4 March 2005

Costs — Appeal — Unfair dismissal application — Application discontinued following pleas of guilty in relation to criminal charges arising out of the misconduct which led to the dismissal — Pleas of guilty constitute admission of serious misconduct — Objective test to be applied for purpose of s 170CJ of Workplace Relations Act 1996 (Cth) — Should have been reasonably apparent to former employee that she had no reasonable prospects of success — Appeal allowed in part — Costs of application awarded to former employer — Costs of costs application not awarded — Workplace Relations Act 1996 (Cth), s 170CJ.

Termination of Employment — Costs application — Appeal — Dismissal for misconduct — Pleas of guilty in relation to criminal charges arising out of the misconduct which led to the dismissal constitute admission of serious misconduct — Should have been reasonably apparent to former employee that she had no reasonable prospects of success — Appeal allowed in part.

A former employee who had been dismissed for misconduct brought an unfair dismissal application under s 170CE of the *Workplace Relations Act 1996* (Cth) (the Act). The application was subsequently discontinued after the former employee had pleaded guilty to three claims of obtaining financial advantage by deception. Those charges arose out of the conduct which had provided the basis for the dismissal.

The former employer applied under s 170CJ of the Act for its costs incurred in relation to the application. That section provided that the Commission could make an order for costs if a party which brought such an application (subs (1)),

did so in circumstances where it should have been reasonably apparent to the first party that he or she had no reasonable prospect of success in relation to the application,

or if either party (subs (2)),

acted unreasonably in failing ... to agree to terms of settlement that could lead to the discontinuance of the application.

The former employer also applied for its costs of the costs application. The former employer's solicitors had written to the former employee's solicitors shortly before the hearing of the costs application setting out the costs sought and inviting the former employee to consent to those costs.

At first instance a commissioner dismissed both parts of the former employer's costs application. The former employer appealed.

Held: (1) The commissioner appears to have approached the application on the basis of whether he was satisfied that the former employee believed she had a case, rather than whether he was satisfied that it should have been reasonably apparent to the former employee that she had no reasonable prospect of success. In doing so he applied a subjective test, rather than an objective test required by s 170CJ(1) of the Act. Accordingly, the commissioner erred in exercising his jurisdiction under s 170CJ(1).

(2) The former employee's guilty plea constituted an admission as to the conduct associated with the three charges. The admitted misconduct constituted a fundamental breach of her duty of fidelity as an employee. An admission of misconduct, involving obtaining financial advantage by deception, even in respect of some of the allegations brought against the former employee, would compel a finding, in arbitration, that there was a valid reason for summary termination of her employment, and would warrant a finding that the termination was not harsh, unjust or unreasonable, unless there were substantial considerations militating against such a finding. There were no such considerations in the current matter. Accordingly, it should have been reasonably apparent to the former employee that she had no reasonable prospects of success.

Deane v Paper Australia Pty Ltd (unreported, AIRC, Giudice J, Williams SDP and Simmonds C, PR932454, 6 June 2003), considered.

(3) It was not appropriate to grant the former employer its costs of the costs application. It was reasonable for the former employee to believe that she had a reasonable prospect of resisting the costs application and, in that circumstance, she did not act unreasonably in failing to agree to the terms of settlement proposed by the former employer.

Cases Cited

Carpenter v Corona Manufacturing Pty Ltd (unreported, AIRC, Lacy SDP, PR935864, 8 August 2003).

Deane v Paper Australia Pty Ltd (unreported, AIRC, Giudice J, Williams SDP and Simmonds C, PR932454, 6 June 2003).

Lewis v Wodonga Rural City Council (unreported, AIRC, Redmond C, PR954769, 5 January 2005).

Wright v Australian Customs Service (2002) 120 IR 346.

Application for leave to appeal, and appeal, regarding costs

M Murphy and *G Katz*, for the former employer.

C Serpell, for the former employee.

Cur adv vult

The Commission

1 This is an appeal, pursuant to s 45 of the *Workplace Relations Act 1996* (Cth) (the Act), by the Wodonga Rural City Council (the Council) against a decision of Commissioner Redmond (the Commissioner) on 5 January 2005.¹ In his decision, the Commissioner dismissed the Council's application (s 170CJ(1) or (2)), for an order for costs against Katie Lewis (Ms Lewis) in respect of costs

¹ *Lewis v Wodonga Rural City Council* (unreported, AIRC, Redmond C, PR954769, 5 January 2005).

arising from her s 170CE(1) application as to the termination of her employment by the Council and from the Council's application for costs.

Leave to appeal and appellable error

2 The Council advanced a number of grounds in support of the grant of leave to appeal. Amongst them was a ground that the Commissioner erred in adopting and applying a subjective rather than an objective test in considering the application before him and had by applying the wrong test thereby failed to exercise his jurisdiction in accordance with the Act.

3 The statutory requirements of ss 170CJ(1) and (2) of the Act are as follows:

(1) If the Commission is satisfied:

(a) that a person (*first party*):

(i) made an application under section 170CE; or

(ii) began proceedings relating to an application; and

(b) the first party did so in circumstances where it should have been reasonably apparent to the first party that he or she had no reasonable prospect of success in relation to the application or proceeding;

the Commission may, on application under this section by the other party to the application or proceeding, make an order for costs against the first party.

(2) If the Commission is satisfied that a party (*first party*) to a proceeding relating to an application under section 170CE has acted unreasonably in failing:

(a) to discontinue the proceeding; or

(b) to agree to terms of settlement that could lead to the discontinuance of the application;

the Commission may, on an application under this section by the other party to the proceeding, make an order for costs against the first party.

4 The statutory test in s 170CJ(1) is that the party against whom costs are sought, the applicant in a s 170CE(1) proceeding or the applicant in related proceedings, initiated an application or the related proceedings "in circumstances where it should have been *reasonably apparent* to the first party that he or she had *no reasonable prospect of success* in relation to the application or proceeding" (emphasis added).

5 A fair reading of the decision of Commissioner Redmond suggests that he has not properly applied the statutory requirements in reaching his decision. This is evident in his conclusions that:

The applicant in my opinion, and from the documents that I have read, clearly believed that she had a case for unfair dismissal notwithstanding the allegations that were made against her.²

and

It would appear from the facts that the applicant lodged her notice of termination of employment fully believing that she had a case to run.³

6 With respect, the Commissioner appears to have approached the application on the basis of whether he was satisfied that Ms Lewis believed she had a case,

² *Lewis v Wodonga Rural City Council* (unreported, AIRC, Redmond C, PR954769, 5 January 2005) at [22].

³ *Lewis v Wodonga Rural City Council* (unreported, AIRC, Redmond C, PR954769, 5 January 2005) at [27].

rather than whether he was satisfied that it should have been reasonably apparent to Ms Lewis that she had no reasonable prospect of success. In doing so he applied a subjective test, rather than an objective test, addressing himself to the belief of Ms Lewis, rather than a belief formed on the objective basis dealt with in s 170CJ of the Act. We find that the Commissioner erred in exercising his jurisdiction under s 170CJ(1) of the Act. Accordingly, we grant leave to appeal, uphold the appeal and quash the Commissioner's decision. We will ourselves hear and determine the Council's application for costs.

Evidence

7 No witness evidence was called in the hearing before Commissioner Redmond or in the appeal. The parties did, however, tender significant documentary evidence. That evidence is considered below.

8 Ms Lewis commenced her employment with the Council, as an administrative officer, working at the Wodonga Sports and Leisure Centre (the Centre) in February 2001.

9 A meeting of management representatives and Ms Lewis was held on 20 December 2002. A record of the meeting⁴ shows:

- Manager Carl Clever indicated that the Centre had received a phone call alleging free memberships;⁵
- Mr Clever showed Ms Lewis two membership forms, which appeared to have been paid for and then reversed. Ms Lewis explained that EFTPOS had been put through too fast and was rejected;
- Mr Clever showed Ms Lewis two further forms, of which Ms Lewis denied knowledge;
- Ms Lewis raised problems with the computer system for membership processing;
- Mr Clever asked about membership cards. Ms Lewis responded that reversals were done in the system, she had recorded a message the previous day and was doing invoices in respect of them and "something has happened to the membership screen";
- Mr Clever raised another membership. Ms Lewis explained that she would have done 30-40 memberships and raised issues with EFTPOS transactions;
- Mr Clever asked Ms Lewis if she knew two particular persons. Ms Lewis indicated she did not know them;
- Ms Lewis indicated that she reversed one cash payment because she had hit the wrong button;
- Ms Lewis complained of a "bad short term memory" and "too many things at once";
- Ms Lewis responded that she was familiar with another person raised with her; and
- Ms Lewis described the reversal of entries in relation to two other persons as "a bit of bad luck".

10 The Council wrote to Ms Lewis on 20 December 2002, advising her of a decision by management to suspend her employment, referencing the meeting held on that day. It stated:

4 Appeal Book, document 10.

5 It was agreed in submissions that it was an anonymous telephone call.

Management have determined that the issues raised are considered serious and are being dealt with in accordance with Council's Guidelines on Stealing, Theft and Fraud. The issues relate to:

- Your actions in regard to the issue of full memberships in the absence of payments. ⁶

11 A further meeting of management representatives and Ms Lewis was held on 9 January 2003. A table and notes arising out of that meeting disclose that Ms Lewis was asked if she knew persons who had benefited from a membership without payment and was asked about recording of transactions in relation to such persons. ⁷ She denied knowledge of the persons in most instances and "check" is recorded as her response in relation to a number of transactions.

12 A meeting of management representatives and Ms Lewis and her father was held on 10 January 2003. A record of that meeting ⁸ shows:

- Ms Lewis responded to an audit trail, which showed she had entered the system after several transactions and altered the membership code to validate memberships, by stating that she was not aware why this would have happened, that she did not do this and that it was a shared computer;
- Ms Lewis asked Manager David Roff exactly what was the Council accusing her of? He responded that a series of transactions, under Ms Lewis' user ID, had been reversed or processed for zero dollars, where a membership had been issued;
- Mr Roff advised that there was sufficient evidence to terminate Ms Lewis' employment and that the matter would be referred to the police for investigation;
- Ms Lewis' father, on several occasions, protested her innocence;
- Mr Lewis stated that the penalty was too strong;
- Mr Lewis asked if roster times had been checked against the transactions. Manager, Matt Burke, said they had and Ms Lewis was rostered for work at the time of relevant transactions; and
- Manager, Anne Pett explained "that this has not been an easy process for all concerned and that this matter has not been taken lightly ... If this was a matter of a few instances then it would be a different matter but up to 15 instances were discovered, all with Katie's user id, and this was deemed a very serious matter. KL has been a good and loyal worker with the Centre and this came as a shock to all of us."

13 On 10 January 2003, the Council wrote to Ms Lewis terminating her employment. The letter referred to the meetings of 20 December 2002 and 9 and 10 January 2003 and stated:

Management have determined that the issues raised were deemed serious enough to constitute gross misconduct in relation to:

- Inconsistencies between membership records and associated financial transactions.

These inconsistencies constitute grounds for dismissal as you have failed to

⁶ Appeal Book, document 10.

⁷ Appeal Book, document 10.

⁸ Appeal Book, document 10.

provide satisfactory explanation for any of the issues raised. Accordingly, your employment with the City of Wodonga is hereby terminated, effective Friday, 10th January 2003.⁹

14 On 23 January 2003,¹⁰ Ms Lewis' firm of solicitors (who represented Ms Lewis throughout these matters) wrote to the Council, advising that they were in the process of filing an application in the Commission in respect of the termination of Ms Lewis' employment. Noting the allegations against her, they sought prompt provision of:

- Ms Lewis' weekly time records for all relevant periods;
- the till rolls for each day when it was alleged that free memberships were given;
- the EFTPOS records in relation to each such matter; and
- the membership application for each free membership.

15 On 29 January 2003, Ms Lewis' solicitors filed a s 170CE application, which was received in the Commission on that day. The brief summary of reasons given for termination was:

It was alleged that I had either failed to collect membership fees, or had given "free" memberships, when not authorised to do so. Whilst I denied these allegations, I was dismissed summarily.

16 On 30 January 2003,¹¹ the Council's legal representatives responded to the 23 January 2003 letter from Ms Lewis' solicitors, advising that their request for documentation was refused on the basis that since Ms Lewis' conduct was subject to a police investigation, the matter was sub judice.

17 On 31 January 2003, the registrar issued a notice of listing in respect of Ms Lewis' application, listing the matter for conciliation in Wodonga on 21 February 2003.

18 On 4 February 2003, the Council's legal representatives filed a notice of employer's appearance.

19 On 6 February 2003, Ms Lewis' solicitors wrote to the Council's legal representatives in response to its letter of 30 January 2003. It disputed the application of the sub judice principle as a basis for refusing to provide documents requested. It stated:

Our client maintains her innocence of the matters alleged and believes that a thorough examination of the documents may assist her in understanding how the matters alleged came about.¹²

20 On 17 February 2003, the Council's legal representatives wrote to Ms Lewis' solicitors in relation to the conciliation conference. The letter enclosed "for your perusal and for the purpose of taking instructions from your client" the Centre's membership analysis, two folios incorporating notes on Ms Lewis which preceded the 20 December 2002 interview and notes of that meeting, the meeting of 9 January 2003 and a record of the 10 January 2003 meeting. The letter referred to an audit train, which could be shown to Ms Lewis' solicitors at

9 Appeal Book, document 15.

10 Appeal Book, document 15.

11 Appeal Book, document 15.

12 Appeal Book, document 15.

a mutually convenient time. The 17 February 2003 letter also put Ms Lewis' solicitors on notice of a s 170CJ application and an application under s 170HE of the Act. In relation to s 170CJ, it stated:

In the light of the overwhelming evidence against your client, we call upon her to discontinue this claim forthwith before further unnecessary legal costs are incurred. Should your client fail to discontinue this claim, then our client will rely on this letter in support of an application for costs pursuant to sections 170CJ(1) and/or 170CJ(2) of the Workplace Relations Act 1996 (Cth).¹³

21 The conciliation conference was adjourned on 21 February 2003, at the request of the parties. The conciliator reported that the parties had requested an adjournment to allow further discussions and to review the outcome of police investigations.

22 On 27 February 2003, Ms Lewis' solicitors wrote to the Council's legal representatives seeking the provision of "a substantial number of documents which you claimed (*at the conciliation conference*) verified your client's case against our client".¹⁴

23 On 4 March 2003, a s 170CF(4) certificate was issued, in error, under the signature of Senior Deputy President Watson, providing an assessment that "It is not possible to make an assessment due to a conflict in the factual position and the necessity to hear evidence". In a letter of 11 March 2003 to the registry¹⁵ seeking that the matter be further adjourned until the resolution of police matters, Ms Lewis' solicitors noted that although the conciliation had been adjourned to 27 March 2003, they had received no notice in respect of the adjourned date for the conciliation and that a s 170CF certificate had issued.

24 On 14 March 2003, the registry received a s 170CFA notice of election to proceed to arbitration, filed on behalf of Ms Lewis.

25 On 5 June 2003, Ms Lewis was interviewed by Wodonga Police and told that they expected to charge her by summons shortly.¹⁶

26 Police laid 65 charges against Ms Lewis on 3 September 2003.

27 A consent mention of 65 police charges was listed for 29 January 2004.¹⁷ The 65 police charges were adjourned to 27 May 2004.¹⁸ Following submissions by Ms Lewis' solicitors to the police,¹⁹ dated 28 January 2004, 62 of the 65 charges were withdrawn. On 4 August 2004, Ms Lewis pleaded guilty to three counts of obtaining financial advantage by deception and she was placed on a good behaviour bond without conviction, ordered to pay court costs of \$500 and compensation to the respondent of \$300, the agreed value of the

13 Appeal Book, document 10.

14 Appeal Book, document 15.

15 Appeal Book, document 15.

16 Appeal Book; document 10; 16 June 2003 letter from Ms Lewis' solicitors to a registry officer.

17 28 January 2004 letter from Ms Lewis' solicitors to the Wodonga Police, contesting the charges: Appeal Book, document 15.

18 8 April 2004 letter from Ms Lewis' solicitors to the Wodonga Police, contesting the charges: Appeal Book, document 15.

19 Appeal Book, document 15.

memberships involved. ²⁰ Ms Lewis' solicitors argued, without challenge, that she did not receive any financial benefit in respect of the memberships. ²¹

28 Ms Lewis' application was discontinued by her solicitors by notice of discontinuance dated 21 September 2004 and received in the Commission on 24 September 2004. A copy was forwarded to the legal representatives of the Council on 21 September 2004. ²²

29 The Council's application for costs was made and received in the Commission on 5 October 2004.

30 On 11 November 2004, the Council's legal representatives wrote to Ms Lewis' solicitors, ²³ setting out a schedule of costs sought. It concluded:

The total of the items of costs listed above is \$3,933.00. Should your client decide to change her mind about opposing our costs application and should she wish to avoid costs of the hearing on 16 November 2004, then please let us know by no later than close of business on Friday, 12 November 2004.

31 The Council's costs application proceeded on 16 November 2004.

Submissions

The Council's submissions

32 The Council submitted that Ms Lewis' employment was terminated on the grounds of gross misconduct, related to her involvement in irregularities concerning membership records and associated financial transactions of the centre. ²⁴ The termination followed an exhaustive investigation and a series of meetings at which Ms Lewis was left in no doubt as to the allegations and evidence against her, namely gross misconduct involving dishonesty, which also constituted criminal behaviour.

33 The Council submitted that the Commission had to determine whether Ms Lewis had no reasonable prospect of success, having regard to the material before it. It submitted that the material included the material put to Ms Lewis in interviews, the statement by the Council that the evidence was overwhelming and the guilty plea of Ms Lewis in respect of three police charges. ²⁵ The Council submitted that in the circumstances it would be found that there was a valid reason for termination on the basis of misconduct reflecting breaches of Ms Lewis' duty of fidelity to her employer. This occurred by her obtaining financial advantage by deception and having failed to meet her duty to honestly advance information sought of her by the Council relevant to her employment. It submitted that for these reasons it was or should have been apparent to Ms Lewis that she had no reasonable prospect of success in relation to her application.

34 The Council submitted that it was common ground that Ms Lewis had pleaded guilty to the three police charges and no evidence was lead by Ms Lewis to refute her guilt. The Council submitted that Ms Lewis knew that

20 Submissions on behalf of the Council to Commissioner Redmond, transcript at PN20 and on behalf of Ms Lewis, transcript PN117.

21 Submissions on behalf of Ms Lewis to Commissioner Redmond, transcript PN117 and written submissions on behalf of Ms Lewis to Commissioner Redmond, at p 4.

22 Appeal Book, document 10.

23 Exhibit R2.

24 Submissions in support before Redmond C, at [1].

25 Of obtaining financial benefit by deception.

she had committed the acts, which provided the basis of her subsequent plea of guilty to the criminal offences. It submitted that in the circumstances, any procedural argument mounted on behalf of Ms Lewis, denied in any case by the Council, could not have outweighed the breach of fidelity admitted by Ms Lewis arising from her lack of candor in the interviews with the Council and her obtaining of a financial benefit from her employer.

Ms Lewis' submissions

35 Ms Lewis submitted, through her solicitors, that she had sought to be provided with documents in relation to the allegations made against her, prior to the making of her application and the Council refused the provision of such documents. The Council's case against Ms Lewis, and the basis upon which it foreshadowed a costs application on 17 February 2003, rested on the entire body of allegation, said by the Council to be "overwhelming evidence". Even at that time, the Council had been selective in the provision of documents, so that she was not fully aware of the allegations against her. Ms Lewis was not in a position to fully respond to all of the allegations against her until all relevant material had been provided. When Ms Lewis was eventually in possession of further material, provided by the police, she was in a position to respond, with the effect that 62 of the 65 police charges against her were withdrawn.

36 Ms Lewis further submitted that the allegations put to her in the meetings prior to her interview were not put with any specific detail and there was a strong case that the procedures adopted by the Council in terminating her employment denied her any meaningful opportunity to respond.

37 Ms Lewis submitted that her application never reached a point where witness statements had been filed, evidence tested and mitigation argued. In those circumstances, it could not be said that it was reasonably apparent to her that she had no reasonable prospect of success in relation to the application or that she had acted unreasonably in failing to discontinue the application at an earlier time.

38 Ms Lewis relied on the following passage from the decision of Lacy SDP in *Carpenter v Corona Manufacturing Pty Ltd*:

In determining whether a circumstance or situation fitting the statutory criteria "should have been reasonably apparent" to a person, it is appropriate, in my view, to consider whether the person:

- has been properly advised in relation to the matter; and
- has continued in the face of the advice with some ulterior motive or because of some wilful disregard of the facts or the clearly established law.²⁶

39 Ms Lewis submitted that she did not continue in the face of advice, some ulterior motive or because of a wilful disregard of the facts or established law. In fact, Ms Lewis in following advice to discontinue in September 2004, did so in circumstances where she had an entirely reasonable prospect of success.

40 Ms Lewis submitted that even if her guilty plea to three police charges meant that she was in breach of her duty of fidelity, it does not follow that she had no reasonable prospect of success in respect of her application. There are no automatic exclusions in the termination of employment jurisdiction, with each case requiring the balancing of a range of statutory considerations to which the

²⁶ *Carpenter v Corona Manufacturing Pty Ltd* (unreported, AIRC, Lacy SDP, PR935864, 8 August 2003) at [34].

Commission is required to have regard in the circumstances of each case. It cannot be said that a breach of fidelity, even if it occurred, led automatically to a conclusion that an application had no reasonable prospect of success.

41 Whilst Ms Lewis conceded that she pleaded guilty to three police charges, she submitted that the conduct pleaded to was not that of which the Council accused her. It represented a small fraction of the allegations against her.

42 Ms Lewis submitted that it was wrong to submit that there were no competing versions of the facts before the Commission. In her solicitor's letter to the police, dated 28 January 2004, the allegations against her are contested. Ms Lewis submitted that she was not required to run her entire case to resist a costs application. Such a requirement would impose costs upon each party and unnecessarily waste the time of the Commission. There is no basis within s 170CJ of the Act for such a proposition.

43 Ms Lewis submitted that her guilty plea to three police charges did not equate to a concession that she was guilty of the 15 instances of misconduct alleged of her by the Council. In light of the position of the Council put by Ms Pett on 10 January 2003, there was a reasonable prospect that Ms Lewis' application for relief would have been determined in her favour. She had a reasonable prospect of success at all times.

Consideration

The application for costs in respect of Ms Lewis' s 170CE application

The s 170CJ(1) application

44 As already noted, the statutory test in s 170CJ(1) of the Act is that the party against whom costs are sought, the applicant in a s 170CE(1) proceeding or the applicant in related proceedings, initiated an application or the related proceedings "in circumstances where it should have been *reasonably apparent* to the first party that he or she had *no reasonable prospect of success* in relation to the application or proceeding" (emphasis added).

45 In respect of the expression "no reasonable prospect of success", a Full Bench in *Wright v Australian Customs Service*²⁷, an appeal concerning the operation of s 170CF of the Act, in which that expression appears, held that a conclusion that an application had no reasonable prospect of success should only be reached with extreme caution and where the application is manifestly untenable or groundless. That conclusion was made in the context of summary dismissal of an application in s 170CF.

46 In *Deane v Paper Australia Pty Ltd*,²⁸ a Full Bench considered the meaning of the phrase "no reasonable prospect of success", as it appears in the context of s 170CJ(1)(b) of the Act, arising from an application within the terms of s 170CJ(1)(a)(ii) of the Act. It considered the decision in *Wright* and concluded:

Making due allowance for the caution which must attend the exercise of a discretion to summarily dismiss an application, it appears to us that the approach in *Wright* is one we should follow. In other words, unless, upon the facts apparent to the applicant at the time of instituting the appeal, the proceeding in question

²⁷ *Wright v Australian Customs Service* (2002) 120 IR 346.

²⁸ *Deane v Paper Australia Pty Ltd* (unreported, AIRC, Giudice J, Williams SDP and Simmonds C, PR932454, 6 June 2003).

was manifestly untenable or groundless, the relevant requirement in s 170CJ(1) is not fulfilled and the discretion to make an order for costs is not available.²⁹

47 The issue, as we apprehend it, is whether we ought be satisfied that it was or should have been “reasonably apparent” to Ms Lewis that her application had “no reasonable prospect of success”, in that it was “manifestly untenable or groundless” on the facts apparent to her.

48 Ms Lewis maintains her innocence in relation to the allegations of misconduct against her. It was asserted on her behalf that the guilty plea to three police charges was directed to avoiding the risk of a conviction being recorded against her. The Council, who asserted that the plea reflected recognition of the fact of her misconduct, contested this assertion. Absent any evidence as to the basis of the plea, we are satisfied that the plea does constitute an admission as to the conduct associated with the three police charges.

49 The admitted misconduct constituted a fundamental breach of Ms Lewis’ duty of fidelity as an employee to the Council as her employer. An admission of misconduct, involving obtaining financial advantage by deception, even in respect of some of the allegations brought against Ms Lewis by the Council, would compel a finding, in arbitration, that Ms Lewis was guilty of misconduct and that there was a valid reason for summary termination of her employment, and would warrant a finding that the termination was not harsh, unjust or unreasonable, unless there were substantial considerations militating against such a finding.

50 We are not satisfied that any such considerations exist, in the circumstances of this matter, which could reasonably be thought to provide some reasonable prospect of success in respect of Ms Lewis’ s 170CE application.

51 We are not satisfied that such circumstances arise from the procedural deficiencies alleged by Ms Lewis against the Council. From the record of meetings before the termination, we are satisfied that the allegations which formed the basis for termination, including those in respect of which the guilty plea by Ms Lewis to the three police charges was made, were squarely put to her. We are not satisfied that there existed procedural deficiencies which created any realistic prospect that Ms Lewis could reasonably hope to succeed in her s 170CE application.

52 Nor, having regard to Ms Lewis’ guilty plea in respect of the three police charges, are we satisfied that any reasonable prospect for success by Ms Lewis in relation to her application arose from the proposition put to her by the Council, through Ms Pett, in the meeting of 10 January 2003, that:

this has not been an easy process for all concerned and that this matter has not been taken lightly ... If this was a matter of a few instances then it would be a different matter but up to 15 instances were discovered, all with Katie’s user id, and this was deemed a very serious matter. KL has been a good and loyal worker with the Centre and this came as a shock to all of us.³⁰

53 Ms Lewis relied on this statement by Ms Pett, submitting that it supported a reasonable apprehension on her part that she had a reasonable prospect of success in respect of her application on the basis that the penalty of summary termination was disproportionate to her misconduct. We see no reasonable basis

29 *Deane v Paper Australia Pty Ltd* (unreported, AIRC, Giudice J, Williams SDP and Simmonds C, PR932454, 6 June 2003) at [8].

30 Appeal Book, document 10.

for interpreting this proposition, as Ms Lewis invites us to, as suggesting that limited instances of misconduct in the form of a fundamental breach of fidelity (the obtaining of financial advantage by deception) would not warrant summary termination. Read in context, Ms Pett's statement was addressed to the defence offered on behalf of Ms Lewis that others could have misused Ms Lewis' user ID on the computer. This is a proposition Ms Pett rejected in light of the frequency of instances of free memberships associated with Ms Lewis' user ID and after the Council correlated the events in question and Ms Lewis' periods of duty. Ms Pett's statement was not informed by the admissions of misconduct by Ms Lewis in respect of the three police charges.

54 In our view, the statement by Ms Pett could not create a basis for Ms Lewis to reasonably apprehend that she had a reasonable prospect of success in relation to her application, at least in respect of the argument that the penalty was disproportionate to the misconduct. We are not satisfied that there was some reasonable prospect of Ms Lewis succeeding in her claim.

55 In light of the admission by Ms Lewis, in respect of the three police charges, to misconduct which constituted a fundamental breach of Ms Lewis' duty of fidelity, by obtaining financial advantage by deception, and in the absence of reasonably based countervailing considerations, we are satisfied that it should have been reasonably apparent to Ms Lewis that she had no reasonable prospect of success in relation to the application and that her application was manifestly untenable or groundless. Further, in light of the allegations put to Ms Lewis in the interviews, we are not satisfied that the documentary information sought by Ms Lewis' solicitors on 23 January 2003 and the refusal of the Council to provide such information provided a basis to reach a different conclusion as between the time of lodgement of Ms Lewis' application and some later time.

56 We find that an order for costs against Ms Lewis in respect of bringing of her s 170CE application is warranted.

57 We have decided to make a costs order against Ms Lewis, pursuant to s 170CJ(1) of the Act, in respect of legal and professional costs and disbursements incurred by the Council in relation to Ms Lewis' s 170CE(1) application up until the discontinuance of her application on 21 September 2004. We direct the parties to confer with a view to settling the order for costs. In the event that we are advised that the parties are unable to settle the order for costs, we will, pursuant to s 45(7)(c) of the Act, direct Senior Deputy President Lacy to tax the costs and settle the order.

58 Given our decision in respect of the Council's application for costs pursuant to s 170CJ(1) of the Act, it is unnecessary to deal with the alternate s 170CJ(2) application by the Council in respect of Ms Lewis' s 170CE application.

Costs in respect of the Council's costs application

59 The Council also made application under s 170CJ(1) and (2) of the Act for orders for costs, both in respect of Ms Lewis' s 170CE application and its own application for costs.

60 Section 170CJ(1) of the Act permits the making of a costs order only in respect of either a person (the first party) who made application under s 170CE in relation to the s 170CE application or a person (the first party) who began proceedings relating to an application (in this case the Council in respect of its costs application). An application for costs against Ms Lewis in respect of the Council's application for costs in relation to its cost application is not available to the Council under s 170CJ(1) of the Act. In any case we are not satisfied that

it would have been reasonably apparent to Ms Lewis that she had no reasonable prospect of resisting the Council's application for costs or that her prospect of defending the costs application was manifestly untenable or groundless.

61 Section 170CJ(2) of the Act provides that where a party to an application relating to a s 170CE proceeding has "acted unreasonably" in failing to "discontinue the proceeding" or "agree to terms of settlement that could lead to the discontinuance of the application", the Commission may make an order for costs against that party. Ms Lewis was not able to discontinue the Council's costs application. We are not satisfied that Ms Lewis acted unreasonably in failing to agree to terms of settlement that could lead to the discontinuance of the application. The only "offer" put to her was that in the letter on behalf of the Council, exhibit R2, seeking that she pay the costs as claimed by the Council of \$3,993. In our view, it was reasonable for Ms Lewis to believe that she had a reasonable prospect of resisting the cost application and, in that circumstance, we are not satisfied that she acted unreasonably in failing to agree to the terms of settlement proposed by the Council.

62 Section 170CJ(3) of the Act was not relied upon by the Council in support of its cost application before Commissioner Redmond nor on appeal. No case has been put or made out to persuade us that an unreasonable act or omission on the part of Ms Lewis in connection with the conduct of the costs proceeding caused costs to be incurred by the Council.

Conclusion

63 We grant leave to appeal, uphold the appeal and quash the decision of Commissioner Redmond.

64 Upon rehearing the matter for ourselves, we have decided to make an order (PR956244) against Ms Lewis, pursuant to s 170CJ(1) of the Act, in respect of legal and professional costs and disbursements incurred by the Council in relation to Ms Lewis' s 170CE(1) application up until the discontinuance of her application on 21 September 2004. We dismiss the application by the Council for the making of an order for costs against Ms Lewis in respect of its application for costs.

65 We direct the parties to confer with a view to settling the order for costs. In the event that we are advised that the parties are unable to settle the order for costs, we will, pursuant to s 45(7)(c) of the Act, direct Senior Deputy President Lacy to tax the costs in order to settle the order.

PR9562430.

*Grant leave to appeal
Quash decision of Commissioner
Parties to confer in relation to the order for costs of the
substantive application
Application for costs of the costs application dismissed*

PAUL C MOORHOUSE