[INDUSTRIAL RELATIONS COURT OF AUSTRALIA]

JONES v DEPARTMENT OF ENERGY AND MINERALS

Ryan J

18 June 1995

Termination of Employment — Unlawful dismissal — Application for review of decision dismissing application for relief — Abolition of applicant's position — Whether a lack of any suitable position at his existing or lower levels constitutes a valid reason for dismissal — Whether position is ''genuinely redundant'' where the employer still requires duties to be performed — Held, applicant's former position genuinely redundant and as applicant could not be redeployed, there was a valid reason for his dismissal — Whether dismissal ''harsh, unjust or unreasonable'' — Whether notification of termination at a difficult time, ''harsh, unjust or unreasonable'' — Procedural fairness — Lack of consultation — Opportunities afforded to applicant to make representations sufficient to prevent dismissal from being procedurally unfair — Application dismissed — Industrial Relations Act 1988 (Cth), ss 170EA, 170DE(1)(2), 377(1)(2).

RYAN J. This is an application made under s 377 of the *Industrial Relations Act* 1988 (Cth) (the Act). The applicant seeks review of the decision of Tomlinson JR of 20 September 1994 dismissing his original application under s 170EA of the Act for relief in respect of the termination of his employment. The applicant seeks an order that the decision of Tomlinson JR be set aside and the respondent be ordered to pay compensation of $476,000.

In his original application filed on 22 May 1994, Mr Jones sought an order under s 170EA declaring that the termination of his employment by the respondent was unlawful, in that it contravened Div 3 of Pt VIA of the Act. He also sought an order for compensation in respect of that termination, and a further order extending the time for commencement of review proceedings, to accommodate his application.

On 20 September 1994, Tomlinson JR granted the extension of time, but dismissed the applicant's substantive application for relief.

Ten days before the date fixed for hearing of this application for review, the applicant wrote to the Registrar of this Court to notify him that the applicant would not appear at this hearing by representative or in person. He also wrote that he would be ''hesitant'' to seek an adjournment, or to request a transfer of the proceedings to Brisbane, where by then he was living and working. It was implied that he hesitated to make such a request because he could not be certain that he would be available to attend, even if the hearing were adjourned or moved to Queensland. The applicant asked that his notice of motion and accompanying affidavit ''be reviewed in (his) absence'' and that questions arising should be answered, if possible, by correspondence or in sworn statements.

Mr Turner for the respondent appeared on the date fixed for the hearing of

the review. At the hearing, I indicated that I would consider the judicial registrar's decision and the documents filed by the parties up to the date of the hearing, together with other submissions from the parties if required, and make a decision on the basis of those materials.

Background and evidence

The applicant, Mr Francis Owen Jones (Mr Jones), was appointed on 6 November 1981 to the position of Director of Mining, Mining Inspectorate Branch, in the Victorian Department of Energy and Minerals (the respondent). He was originally appointed under the *Public Service Act* 1974 (Vic), which was later superseded by the *Public Sector Management Act* 1992 (Vic). It was common ground that Mr Jones was not an employee covered by any relevant award. He commenced duties on 4 January 1982 and was employed continuously by the respondent for 12 years until 31 March 1994. At the time of his termination, he was 49 years old.

The applicant deposed on affidavit that on 4 February 1994, two hours before proceeding on four weeks' annual leave, he was told to clear his desk and vacate the premises of the respondent. He was told that upon his return from leave, he was to report to Mr David Downie, the Secretary of the respondent (Mr Downie), and that he would no longer be working in his former position. Upon being told this, Mr Jones immediately asked to meet with Mr Downie, who explained that Mr Jones' position was being abolished as part of the management restructuring process being carried on within the Department. That process had apparently been going on since late in 1993. Mr Downie discussed voluntary departure packages and redeployment and suggested that Mr Jones postpone his impending leave to ''sort it out''. Mr Jones was reluctant to do so, because pressing family matters arising from the terminal illness of an aunt who had been caring for his invalid mother required his presence in Brisbane. Mr Jones did not explain those compassionate reasons for taking leave to Mr Downie at that time or subsequently.

Mr Downie responded to these matters in affidavits and in oral evidence before the judicial registrar, asserting that he had been ''most concerned'' to learn that Mr Jones was going on leave on 4 February. He claimed that he had decided to notify Mr Jones before he went on leave of the outcome of the restructure and that no position was presently available for him. That decision, he said, had been taken because he thought that a further delay would hold up the restructuring process and adversely affect other employees. He confirmed that Mr Jones did not tell him during that meeting of the compassionate circumstances underlying his need to take leave.

On 9 February 1994, Mr Downie wrote to Mr Jones stating that there was ''not a suitable position for [Mr Jones] in the new structure of the Resources Development Division nor the Department'' and that there would be ''limited prospect'' of redeploying him elsewhere in the Department. In the letter, Mr Downie stated that Mr Jones might be ''given a Targeted Separation Package''. He also offered him the option of taking a voluntary departure package and the use of outplacement support and personal counselling services.

After returning early from his leave on 22 February 1994, Mr Jones attended the Victorian Public Service's Workforce Management Unit, where attempts were made to redeploy him elsewhere in the Victorian Public Service. After three weeks the Workforce Management Unit remitted the matter to

Mr Downie. On 31 March 1995, Mr Downie wrote to Mr Jones, notifying him of his decision to terminate his employment ''on the basis that there are no suitable positions for [Mr Jones] at [his] existing or lower level''.

In affidavit material filed on the respondent's behalf, Mr Downie gave evidence that Mr Jones received a targeted separation package totalling $33,063.50, which consisted of four weeks' pay in lieu of notice ($5,500.58) and the equivalent of two weeks' pay per year of service for a maximum period of 10 years ($27,502.92). Mr Jones also received pay in lieu of his accrued recreation and long-service leave entitlements which, together with the separation package just described above, amounted to a total payment on termination of $61,282.35. In addition, Mr Jones was given superannuation benefits and access to outplacement and personal counselling with professional consultants. The respondent's evidence indicated that Mr Jones used these services on a number of occasions between March and May 1994.

The evidence showed that after his termination, Mr Jones applied for sick leave for the period from 26 April to 26 May 1994. The sick leave claimed was for three weeks required for a substantial ear operation. Mr Jones stated in oral evidence that he had asked for that period of sick leave before his position was terminated on 31 March and had originally planned to take it before his termination. Mr Jones' evidence was that, at the date of termination, he had 14 weeks of accrued sick leave entitlements. Mr Downie stated that the sick leave application was refused on the grounds that Mr Jones' employment had been terminated before the claim was made.

It was also shown that Mr Jones sought to be re-credited with recreation leave for the period of four weeks from 7 February to 4 March 1994 inclusive. Mr Jones contended that he would not have taken any recreation leave in February 1994 had he known in advance that his employment was to be terminated. He told the Court that, had he known at an earlier stage that termination was possible, he would have taken leave in November or December 1993 or January 1994 to attend to his family's affairs.

Mr Jones' recreation leave entitlements were re-credited for the period 28 February to 4 March 1995 inclusive, when he had returned from Queensland and was attending the Workforce Management Unit. However Mr Downie refused to re-credit leave for the days from 7 to 25 February 1994, during which Mr Jones had been absent from the Department.

On 29 May 1994, the respondent advertised a position of ''General Manager, Mineral Operations'' in the restructured Resources Development Division of the Department. In his affidavit of 9 September 1994, Mr Jones argued that the duties, selection criteria and responsibilities attaching to the new position were identical to those of his previous position. By contrast, Mr Downie claimed in his witness statement of 8 September 1994 that the holder of the new position would be expected to ''lead a major review of the regulatory framework with the intent of moving from a highly prescriptive approach to an objective approach to regulation''. In his evidence-in-chief, Mr Downie expressed his view that there are ''substantial differences in what is required in the former position and the new position'' entailing a ''change in direction'' for the holder of the new job. Mr Downie stated that in his view, Mr Jones ''did not have the full range of skills and experience in developing the new approach to regulation and environmental management that was being demanded'' of the respondent and, it was implied, of its employees.

Mr Downie conceded that there may potentially have been positions available in the respondent department at lower levels but that in his view, there were no positions which were suitable for Mr Jones. He stated that it would have been ''untenable'' to place Mr Jones in such a lower-level position, as it was ''simply not standard'' for senior managers to be deployed to positions where they are supervised by their former subordinates.

The evidence revealed that Mr Jones did not apply for the new position of General Manager, Mineral Operations; nor for any other post with the respondent or the Victorian Public Service. In his oral evidence and on affidavit, Mr Jones stated that he had applied for 49 positions in the private and public sectors interstate and overseas.

Jurisdiction on an application for review

Section 377(1) of the Act permits a party to apply to the Court for review of a judicial registrar's exercise of various powers, including the power to hear a claim for unlawful termination. Under s 377(2), the Court may make whatever order it considers appropriate in relation to the judicial registrar's exercise of that power.

Was the termination unlawful?

Mr Jones' initial application alleged that the termination by the respondent of his employment contravened Div 3 of Pt VI of the Act.

Division 3B of Pt VIA of the Act prescribes, amongst other things, a number of requirements for lawful termination. These include a requirement that the employer give a prescribed period of notice before termination, or a commensurate payment in compensation in lieu of notice. In this case, the applicant does not allege that the respondent has failed to meet this obligation.

The Act also prohibits harsh, unjust or unreasonable termination. Section 170DE states:

> ''(1) An employer must not terminate an employee's employment unless there is a valid reason or valid reasons connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service.
>
> (2) A reason is not valid if, having regard to the employee's capacity and conduct and those operational requirements, the termination is harsh, unjust or unreasonable. This subsection does not limit the cases where a reason may be taken not to be valid.''

In this case, the main reason given for the termination was expressed to Mr Jones in Mr Downie's letter of 31 March 1994. This stated that Mr Jones' employment was being terminated ''on the basis that there are no suitable positions for you in the Department at your existing or lower levels''. In his application to the Court of 23 May 1994, Mr Jones claimed this was invalid as at the time ''a person was acting in my position and also there was a vacancy at a lower level''. He also stated that until termination, he had ''held a statutory appointment of Chief Inspector of Mines and Quarries and these statutory positions still exist in legislation''.

It seems clear on the evidence that the reason given was attributable to or based on the respondent's purported ''operational requirements'' following the restructure. The question for the Court is thus whether that reason was valid in the circumstances.

Section 170DE(1) does not define what will or may constitute a ''valid reason'' for termination. However, the question has been considered in analogous cases under other legislation in several jurisdictions, in which courts and tribunals have interpreted award provisions prohibiting dismissals which are ''harsh, unjust or unreasonable''.

It has generally been accepted that a dismissal is not unfair if it results from genuine redundancy, in the sense that an employee is no longer required to perform his or her job because of changes in operational requirements. In *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Co-operative Ltd* (1977) 44 SAIR 1202, Bray CJ defined redundancy at 1205, where he stated:

> ''a job becomes redundant when an employer no longer desires to have it performed by anyone.''

That definition was endorsed by a Full Bench of the Australian Conciliation and Arbitration Commission in the *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 55-56.

On Mr Jones' evidence, this case would not satisfy that narrow definition of genuine redundancy, as some of his former duties were still being performed. However, it should be noted that Bray CJ's description of what can constitute redundancy is not expressed to be exclusive. His Honour's description was cast in terms of a ''job'' in the sense of a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer's organisation, to a particular employee. However, it is within the employer's prerogative to rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. It is inappropriate now to attempt an exhaustive description of the methods by which a reorganisation of that kind may be achieved. One illustration of it occurs when the duties of a single, full-time, employee are redistributed to several part-time employees. What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant in the sense in which the word was used in the *Adelaide Milk Co-operative* case.

In this case, the respondent led evidence of the major changes which were made to the Department between September 1993 and late 1994. According to Mr Downie, the applicant's former position as Director, Mining Inspectorate, was abolished and the duties attached to it were combined with those of the previous Director, Environmental Management. In addition to a number of other, newly-created functions, those pre-existing duties were to be performed by a newly created General Manager, Mineral Operations. Thus, it is clear that although some of the tasks previously assigned to Mr Jones still had to be carried out, the employer's rearrangement of its operational structure had the consequence that they be combined with other functions and performed by the holder of a new, more generally-oriented position.

On this basis, it appears that Mr Jones' former position was rendered ''genuinely redundant''. When it became apparent that he could not be redeployed, Mr Jones was found to be surplus to the respondent's personnel

needs. This amounted to a reason for dismissal which was clearly based on his employer's operational requirements.

Harsh, unreasonable or unjust termination

Under the current legislation, however, it is not sufficient for an employer to show that it had a good commercial or other reason for terminating a worker's employment. In addition to having a good reason, an employer must refrain from dismissing an employee in circumstances which make it harsh, unreasonable or unjust. Section 170DE(2) of the Act imposes an important qualification on s 170DE(1) by providing:

> ''(2) A reason is not valid if, having regard to the employee's capacity and conduct and those operational requirements, the termination is harsh, unjust or unreasonable. This subsection does not limit the cases where a reason may be taken not to be valid.''

The meaning of the words ''harsh, unreasonable or unjust'' has also been considered extensively in unfair dismissal cases not only under this section, but as well under similar provisions in award provisions and in relation to the common law cause of action for wrongful dismissal.

In *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 36 FCR 20; 41 IR 452, Sheppard and Heerey JJ at 28; 459 said of the expression:

> ''These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge's view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee's misconduct.''

This statement has since been endorsed in a number of cases, including *Byrne v Australian Airlines Ltd* (1994) 47 FCR 300; 52 IR 10, per Beaumont and Heerey JJ at 351; 59 and Gray J at 357-360; 63-67.

Taking the approach suggested by Sheppard and Heerey JJ in *Bostik*, I have concluded, for reasons which I shall develop, that the respondent's decision to dismiss Mr Jones, viewed objectively, was not harsh, unjust or unreasonable.

The circumstances leading to the decision included, principally, a major change of personnel and management structures within the Department. The decision to abolish the position of Director, Mining Inspectorate, was part of that process, which I find was undertaken in good faith. Evidence was led that the respondent took steps to try to redeploy Mr Jones within the Public Service through the Workforce Management Unit before deciding to terminate his employment. The ''effect'' of the termination on the Department, according to the thrust of Mr Downie's evidence, was to enable it to shed an employee for whom no appropriate position existed within the new structure.

Also relevant, according to the *Bostik* formulation, is the harsh effect of the termination on Mr Jones himself. This has been described in his affidavits and evidence given before the judicial registrar. Mr Jones instanced the manner in which the Department told him on 4 February that his position was to be abolished, and the personal impact which that announcement had on him on the

day before he was to take leave in difficult family circumstances. He further referred to the lack of any opportunity given to him to use his accrued sick leave entitlements. In addition, Mr Jones claimed in his affidavit of 9 September 1994 that the respondent's actions appeared to ''have brought [his] career to an end''.

However, these alleged effects, of themselves, are not sufficient to render Mr Jones' termination harsh, unjust or unreasonable. His position contrasted markedly with that of the dismissed employee in *Bostik*, who, having no specialised trade or occupational skills and a relatively poor command of English, faced ''catastrophic'' financial consequences after dismissal (per Sheppard and Heerey JJ at 34). Mr Jones in this case received a substantial separation package upon termination, together with accrued leave, salary in lieu of notice and superannuation benefits. He did not challenge the amount of any of these payments. In addition, he was given extensive counselling and assistance in seeking new work, which was aimed at alleviating to some degree the negative effects of his dismissal. Further, Mr Jones has told the Court that he now has employment in Queensland, suggesting that the dismissal did not have the effect of bringing his working life to an end as he feared.

The emotional impact of being told by Mr Downie on 4 February that he was likely to be dismissed was obviously significant, and, I accept, caused Mr Jones considerable distress. However, the evidence shows that Mr Jones never informed Mr Downie or the Department of his difficult personal circumstances in the days before 4 February 1994, when his mother and aunt were ill. The Department could not be expected to have been aware of those circumstances and their tendency to worsen the impact of notifying him that his position was to be abolished. In that sense, its conduct in raising the matter with him when it did could not be said to be harsh or unreasonable. Further, the legislation does not, in terms, provide any specific remedy for emotional consequences of a notification of redundancy. That is not to say that the manner of an employee's dismissal or defects in the procedural steps leading to it will not attract a remedy. These aspects are examined below under the heading ''Procedural Fairness''. However, a distinction needs to be drawn between those elements in the total matrix surrounding a dismissal which *can* render it unlawful, and those which do not. The nature of the distinction was succinctly indicated by Commissioner Chambers in *Monsanto Chemicals (Australia) Ltd v Amalgamated Engineering Union (Australian Section)* (1958) 90 CAR 27 at 31:

> ''A dismissal, to be 'harsh and unreasonable' must be of a nature very different from the normal case. For the employee dismissed to be concerned, embarrassed financially, disturbed in the normal pattern of life, is not sufficient, unless it can be shown that the employer created all these like difficulties by effecting dismissal without regard for all the reasonable and fair considerations one is entitled to expect in the employer/employee relationship . . .''

Procedural fairness

In addition to the external and continuing effects of his dismissal, Mr Jones complained of the manner in which the respondent terminated his employment. In his application, he alleged that the Department had shown a ''disregard for due process and natural justice''.

A Full Court of the Federal Court recently confirmed that the obligation to

afford procedural fairness, or observe the elements of natural justice, is part of an employer's duty not to dismiss an employee harshly, unjustly or unreasonably. In *Byrne v Australian Airlines Ltd*, Black CJ at 303; 11 endorsed a conclusion by the trial judge that an award prohibiting ''harsh, unjust or unreasonable dismissal'':

> ''. . . imposed on an employer an obligation to give procedural fairness, the content of which would vary according to the circumstances of the case. I agree with this conclusion. In my opinion such an obligation flows inevitably from the prohibition against the termination of employment, with or without notice, that is 'unjust' and also from the prohibition against termination that is 'unreasonable'.''

The learned Chief Justice then went on to agree with the reasons of Gray J who observed, at 303; 11.

> ''The use of the word 'unjust' . . . is intended to import the requirements of natural justice or procedural fairness into the process of terminating employment.''

The authorities in this area support the view that the content of the duty of fairness, in the sense of the procedures to be followed before deciding to dismiss an employee, will vary according to the circumstances of each case. No generally applicable rule can be formulated as stipulating, for example, the required extent of consultation with the employee facing dismissal, or the lengths to which the employer must go in attempting to find other work for that employee. In *Gregory v Philip Morris* (1988) 24 IR 397, Jenkinson J recognised the need for flexibility in determining the appropriate process, saying at 398:

> ''The question whether the termination was unreasonable is, I think, one of fact. This question requires a determination, by reference to moral values and prudential considerations current in the community, of what the tribunal of fact thinks a reasonable employer in the circumstances would have decided to do at the time when the respondent terminated the appellant's employment. The process is similar to that by which the questions whether a personal injury or damage to a chattel has been caused by a person's negligence are resolved: what does the tribunal of fact think that a reasonable person placed in the circumstances in which that person was placed would have done?''

In *Gregory*, the court considered what measures a large corporate employer should have taken before deciding to dismiss a worker because he was not a member of the relevant union. It was found that, before taking that action, the employer should, at least, have established the facts on which it purportedly based its decision, and explored any available alternative to dismissal. That view also found expression in the joint judgment of Wilcox and Ryan JJ (at 415) which again emphasised the need to consider the circumstances of each case before deciding what procedures must be observed to render a termination just and reasonable:

> ''We would not wish to propound any universal rule, but it seems to us that a provision such as that contained in cl 6(d)(vi) of the Metal Industry Award may often necessitate consultation with the employee before a decision to dismiss. The necessity for consultation has been emphasised in the United Kingdom: see *Spencer v Paragon Wallpapers* [1976] IRLR

373; *Williamson v Alcan (UK) Ltd* [1978] ICR 104; *W Weddel & Co Ltd v Tepper* [1980] ICR 286.''

In *Gregory* the dismissed employee's status (as a non-union member following his expulsion from the union) would have made it practically impossible for him to have continued to work without causing significant difficulties for the employer. However there may have been an expedient, like temporary suspension, which Mr Gregory could have suggested to his employer had he been consulted. Alternatives of that kind do not suggest themselves as readily where the proposed dismissal results from redundancy, but that consideration does not absolve the employer from the need to consult in some way with the employee affected by a proposed dismissal.

Recognition has been accorded by decisions of judicial registrars of this Court to the importance of consultation as an element of procedural fairness in dismissals for redundancy (see, for example, *Carydias v Greek Orthodox Community of Melbourne and Victoria* (unreported, Staindl JR, 31 March 1995) and *Papadopolous v Colonial Mutual Life Assurance Society Ltd* (unreported, Ryan JR, 16 August 1994)). Similarly, the Employee Relations Commission of Victoria has also found that a total failure to consult can render unfair a termination resulting from redundancy: see *Shearer v Action Mercantile Pty Ltd* (1993) 5 VIR 149; *Budget Couriers Equity Management v Beshara* (1993) 5 VIR 173.

In the present case, there does not appear to have been a clear process of consultation in the sense envisaged in *Gregory*. The discussion between Mr Downie and Mr Jones on 4 February 1994 did serve to alert Mr Jones to the fact that his future in the Department was being reviewed. However, it seems that Mr Downie confined himself to notifying Mr Jones that his position was to be abolished. He did not consult with Mr Jones in the sense of engaging in a mutual exchange of views as to how the restructure could be brought about with the least adverse consequences for the employee. The evidence suggests that neither at the meeting of 4 February nor at any other time before 31 March did Mr Downie invite Mr Jones to discuss what other positions within the Department he might have been able to fill, or how his former duties could best be carried out after the restructure.

Mr Jones submitted at first instance that there was a vacancy at a lower level to which he could have been appointed. Mr Downie's evidence was that he did not consider placing Mr Jones in a lower position, like that of Inspector of Mines, Gippsland, because it would have been a departure from the Department's ''standard practice''. That practice, it appears, was based on the proposition that it was generally ''untenable'' to demote managerial staff to positions lower in the hierarchy than those of officers whom they had previously supervised.

On the other hand, it is worth noting that Mr Jones had several opportunities to put his case to his employer before he was dismissed. After his position had been abolished, he was not automatically dismissed. Rather, he was referred to a Workforce Management Unit through which he had a chance to apply for other positions in the Public Service. In those applications he was presumably free, before a final decision was made to dismiss him, to advance considerations tending in favour of his redeployment. In addition, he was obviously aware in May 1994 that the newly-created position of General Manager, Mineral Operations, was open for applications. Mr Jones did not

apply for that appointment, despite his submissions to the Court that the duties and criteria were identical to those of his former position. Whilst it is acknowledged that this vacancy was not advertised until after he had been dismissed, it appears that Mr Jones chose not to use the opportunity which it afforded to be heard by the Department on whether his talents and experience could reasonably be used in its new structure.

On balancing these considerations, I am not persuaded that the respondent's failure to engage in a formal process of consultation with Mr Jones amounted to a denial of procedural fairness. I consider that the opportunities outside his actual interview with Mr Downie, which he had to press his claims for alternative employment within the Department were sufficient to prevent his dismissal from being procedurally unfair.

In the joint judgment in *Gregory* it was pointed out at 415:

> ''that a prohibition on harsh, unjust and unreasonable termination could be seen as 'casting some burden on the employer to consider all the available options, even options not suggested by the employee'.''

In this case, I believe that the respondent has gone to reasonable lengths to explore the available options by attempting to redeploy the appellant and by giving detailed consideration to the effect of the changes which the restructure entailed.

Compliance with other, and different, procedural obligations has been required of employers by authorities in the area of unfair dismissal. However, many of these have no application to cases like the present. For example, it will usually be essential for an employer to attempt genuinely to establish the facts in respect of alleged misconduct by an employee before making a decision to dismiss. In the same way, an employer contemplating dismissal for incompetence must thoroughly investigate the circumstances before terminating the employment. In this case, by contrast, it appears that the employer fully informed itself of the facts giving rise to the redundancy. No additional duty to inquire into Mr Jones' attributes or his performance of his duties before the restructure could be said to arise.

In summary, I am not able on the evidence to find that the respondent failed to adopt procedures of the kind which any reasonable employer in similar circumstances would have followed. Its conduct in giving early notification of the possibility of termination, together with the opportunities given to Mr Jones to explore options for deployment, support the conclusion that it discharged its duty to afford procedural fairness in the circumstances.

Accrued sick leave and re-crediting of annual leave

As well as making submissions on the manner and effect of his dismissal, Mr Jones sought relief in relation to the refusal by the respondent to recognise his entitlement to certain sick and annual leave benefits.

It is not apparent from the evidence that either of these refusals could be said to render Mr Jones' dismissal harsh, unreasonable or unjust. I shall deal with each of them in turn.

After Mr Jones' employment had been terminated, he applied for three weeks of sick leave commencing on 26 April 1994. There was no evidence suggesting that his contract of employment provided that any unused entitlement to sick leave could be taken after termination of the employment, or that any compensation would be paid for unused sick leave accrued as at that date. Nor

was it suggested that the respondent intentionally caused his termination to occur when it did in order to deprive him of any benefits of that kind. I am unaware of any authority to support the proposition that termination, not being for some such ulterior purpose can, without more, be harsh, unreasonable or unjust.

Similarly, the failure to recredit annual leave does not, of itself, render unlawful Mr Jones' termination. The evidence shows that Mr Jones was physically absent from the Department and the Workforce Management Unit during the period in question. Mr Jones seems to imply that his enjoyment of the leave which he was then taking was impaired by the news of his possible dismissal, which he had received on the day before starting leave. It has not been shown that there were any express or implied terms of his contract of employment to support this contention. Nor am I able to hold as a matter of principle that a refusal to compensate an employee for leave ''lost'' in similar circumstances is unfair in the relevant sense.

The Department's communication with Industry Association

In further support of his application, Mr Jones also referred to the respondent's conduct in advising the Victorian Chamber of Mines (VCM) in early February 1994 that he was no longer an officer of the Department.

The evidence showed that the VCM then circulated a memo dated 8 February 1994 to its members, stating that Mr Jones and another officer had ''terminated their employment with the Department''. That memo was annexed to Mr Jones' affidavit of 9 September.

It is not entirely clear from the material before the judicial registrar what the VCM was told about the manner of Mr Jones' departure. However, the circular shows the VCM to have been under the impression that Mr Jones had departed voluntarily.

It is accepted that the Department has an obligation to inform bodies like the VCM of changes in its personnel and of re-allocation of responsibilities. However it may not have been reasonable conduct for the Department on 8 February to advise an industry association that Mr Jones' employment was already at an end, at a time when he had not actually been dismissed. On 4 February, Mr Jones had simply been told that his position was to be abolished and it was likely that his employment would be terminated if he were not redeployed in the meantime. In fact, Mr Jones was not dismissed until 31 March.

However, even if it be assumed that the Department had acted incorrectly in this respect, it does not follow that its conduct in anticipating Mr Jones' termination in its communication with the VCM was sufficient to render the termination generally harsh, unreasonable or unjust. I am not satisfied that the premature notification had any significant adverse effect on Mr Jones' prospects for re-employment within the industry. Although the evidence is unclear as to what actually was said, it is not suggested that the respondent made any disparaging or harmful allegations to the VCM about Mr Jones' conduct or performance. In the absence of evidence of any direct or indirect effect of the communications on Mr Jones, this aspect of the dismissal cannot support a conclusion that it was harsh, unjust or unreasonable.

Conclusion

On the evidence before the Court at first instance and on appeal, I am not satisfied that the respondent, in dismissing Mr Jones, contravened Pt VIA, Div 3 of the Act.

The respondent's decision to terminate Mr Jones' employment was made for a ''valid reason'' within the meaning of s 170EA of the Act, namely that his position was genuinely redundant and there were no suitable positions open in the Department or elsewhere. Further, the procedures followed by the respondent in reaching its decision were generally appropriate in the circumstances.

The application for review of the orders and decision of Tomlinson JR of 20 September 1994 is accordingly dismissed.