[INDUSTRIAL RELATIONS COURT OF AUSTRALIA]

NETTLEFOLD v KYM SMOKER PTY LTD

Lee J

4 October 1996

Termination of Employment — Unlawful termination — Review of decision of judicial registrar — Whether termination at the initiative of the employer — Valid reason — Operational requirements of employer — Onus on employer to prove that at time of dismissal, operational requirements provided proper grounds for termination — Proof that employer acted in belief that the termination was based on the operational requirements of the employer's business not sufficient to satisfy onus on employer to prove valid reason for dismissal — ''Operational requirements'' — Compensation — Industrial Relations Act 1988 (Cth), Pt VIA, Div 3, ss 170CA, 170CC, 170DB, 170DE, 170EA, 170EDA, 170EE, Sch 10.

LEE J. The applicant (Ms Nettlefold) seeks an order under s 170EE(2) of the *Industrial Relations Act* 1988 (Cth) (the Act) declaring the termination of her employment by the respondent (Smoker) to have contravened Div 3 of Pt VIA of the Act and requiring Smoker to pay compensation.

The application was heard by a judicial registrar of the Court who determined that Div 3 had been contravened only to the extent that Smoker had not paid to Ms Nettlefold the compensation specified in s 170DB of the Act to be paid in lieu of notice when her employment was terminated without notice. Pursuant to s 377 of the Act, Ms Nettlefold has applied to review the Registrar's decision.

The application for review was conducted as a complete re-hearing of the principal application. Therefore, the evidence and demeanour of all witnesses was able to be assessed by the Court.

Ms Nettlefold, then aged 16, commenced casual employment with Smoker on or about 17 May 1995 as a ''kitchen-hand''. Smoker carried on business at Devonport as an hotelier. In addition to the sale of liquor the business carried on by Smoker included the provision of counter meals to bar patrons and meals to customers seated in a dining area. The duties carried out by Ms Nettlefold included cleaning kitchen areas and utensils, assisting the chefs by preparing entrees and sweets and by ''cutting up'' and, occasionally, taking meals to tables.

Ms Nettlefold was required to commence work at 5 pm on weekdays, unless required by the chefs to start earlier, and worked during luncheon periods on Saturdays as required. It was agreed that Ms Nettlefold had been engaged by Smoker on ''a regular and systematic basis'' for a period of at least six months, and that pursuant to s 170CC of the Act and reg 30B(1)(d), (3) of the *Industrial Relations Regulations* (Cth) (the Regulations), Ms Nettlefold was an employee to whom Div 3 of Pt VIA of the Act applied at the time her employment ceased.

On 24 November 1995 Ms Nettlefold was called to the office of Mr Smoker, a director of the respondent, and told by him that there were ''not sufficient hours for her job'' and that her position had become ''redundant''. I accept that Ms Nettlefold understood, and confirmed with Mr Smoker, that she had been ''sacked''. Mr Smoker said to Ms Nettlefold that ''if things changed'' in the future and work became available she would be asked to come in again. Subsequently, Ms Nettlefold asked Smoker to provide a reference and to complete a Severance of Employment form issued by the Department of Social Security. Smoker did so.

It was submitted by Smoker that the facts recited above did not describe a termination of employment at the initiative of Smoker to which Div 3 of Pt VIA of the Act applied. Smoker contended that the manner in which Ms Nettlefold's employment was ended was a termination of employment by mutual accord.

I do not accept that submission. As at 24 November 1995 Ms Nettlefold was willing, and anticipated being required by Smoker to continue to be so, to render services to Smoker as a kitchen-hand. Smoker had determined that it no longer required Ms Nettlefold to provide such services. By informing her of that decision Smoker terminated the employment relationship.

It was not in issue that if Smoker had terminated Ms Nettlefold's services such a termination had not been effected with the notice required by s 170DB of the Act. It was agreed that the amount payable in lieu of the required notice would have been a sum of $250. Being satisfied that Smoker terminated Ms Nettlefold's employment it follows that Smoker did not comply with s 170DB of the Act.

The main issue of the case was whether the termination of Ms Nettlefold's employment contravened s 170DE of the Act. Ms Nettlefold made application to the Court for a remedy under s 170EA of the Act in December 1995. Therefore, the terms of s 170DE relevant to the determination of this application are those that applied before the section was amended with effect from 15 January 1996. (See: Item 14(1), Sch 2, *Industrial Relations and Other Legislation Amendment Act* 1995 (Cth).)

At the relevant time s 170DE read as follows:

> ''(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.''

Subsequent to the hearing of this matter the High Court determined in *Victoria v Commonwealth* (1996) 70 ALJR 680; 66 IR 392 that s 170DE(2) is invalid. This application must be determined according to the law so declared. Counsel for the parties were invited to lodge further submissions and did so.

Neither counsel made any submissions on the question whether the phrase ''valid reason'' used in s 170DE(1) of the Act imposed a requirement that in all the circumstances a termination of employment at the initiative of an employer not be unjust or unfair. The terms of the Act suggest that such a construction is arguable. Section 170CA of the Act states that the object of Div 3 of Pt VIA is to give further effect to the Termination of Employment Convention (the

Convention) the text of which is set out in Sch 10 of the Act. Article 8 of the Convention requires a contracting party to the Convention to ensure that a worker who has been dismissed is entitled to challenge that dismissal in an appropriate tribunal if the worker considers that his or her ''employment has been unjustifiably terminated'' and pursuant to Art 9 of the Convention that tribunal is to be empowered ''to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified''.

The following remarks of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd* (1996) 62 IR 371 at 373 on the meaning of the expression ''valid reason'' are pertinent:

> ''Section 170DE(1) refers to a 'valid reason, or valid reasons', but the Act does not give a meaning to those phrases or the adjective 'valid'. A reference to dictionaries shows that the word 'valid' has a number of different meanings depending on the context in which it is used. In the *Shorter Oxford Dictionary*, the relevant meaning given is: '2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.' In the *Macquarie Dictionary* the relevant meaning is 'sound, just or well founded; a valid reason'.
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> In its context in s 170DE(1), the adjective 'valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, commonsense way to ensure that' the employer and employee are each treated fairly, see what was said by Wilcox CJ in *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, when considering the construction and application of s 170DC.''

As Lord Denning stated in *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693 it is an implied term of an employment contract that an employer be ''good and considerate'' to its employees.

By giving effect to the Convention the Act seeks to establish a balance between the right of an employer to duly manage an enterprise in which labour is employed and the right of an employee, and of the community, not to have the asset represented by the capacity of employees who provide such labour, whether skilled or unskilled, depreciated by incompetent or capricious management of labour by an employer.

It was not in issue that in performing her employment Ms Nettlefold did so conscientiously and satisfactorily. The reason for termination of her employment was not a reason connected with her capacity or conduct as an employee. Smoker contended that the reason for termination was based on the operational requirements of its undertaking. Pursuant to s 170EDA of the Act Smoker was required to prove that contention and to justify the termination of

Ms Nettlefold's employment. (See: *Kenefick v Australian Submarine Corporation Pty Ltd (No 2)* (1996) 65 IR 366 at 372-373.)

The ''undertaking'' conducted by Smoker at Devonport was the business of hotel proprietor on premises licensed for that purpose under the *Liquor and Accommodation Act* 1990 (Tas). The business was not large. Although described as a hotel business no evidence was given that any part of the business was directed to the provision of accommodation. The main elements of the business were the sale of liquor for consumption on the premises, the sale of packaged liquor from a drive-through facility, and the sale of meals. The business employed 17 staff of whom only three were permanent. The remainder were casual employees.

As set out above under s 170DE(1) of the Act ''[an] employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, . . . based on the operational requirements of the undertaking . . .''. An employer must prove that at the time of dismissal of an employee the operational requirements of the undertaking provided proper grounds for termination of the employee's employment. Proof that the employer acted in the belief that termination of an employee's services was based on the operational requirements of the employer's business would not satisfy the onus that the employer prove that there is a valid reason for the termination.

The Act does not define the term ''operational requirements''. Obviously it is a broad term that permits consideration of many matters including past and present performance of the undertaking, the state of the market in which it operates, steps that may be taken to improve the efficiency of the undertaking by installing new processes, equipment or skills, or by arranging for labour to be used more productively, and the application of good management to the undertaking. In general terms it may be said that a termination of employment will be shown to be based on the operational requirements of an undertaking if the action of the employer is necessary to advance the undertaking and is consistent with management of the undertaking that meets the employer's obligations to employees.

The business conducted by Smoker relied in substantial measure upon the labour provided by casual employees. Such reliance suggested that flexibility in the engagement of labour was necessary for successful management of the business.

No evidence was presented by Smoker of the financial circumstances of its business or of the capacity of the business to employ labour. No evidence was given of any change in the manner of conduct of the business nor of how the application of good management required Ms Nettlefold's employment to be terminated.

The evidence upon which Smoker relied was to the effect that in October and November 1995 the two chefs who had been employed by Smoker to that date had resigned and were replaced by chefs who were willing to do more of the basic work of food preparation and, unlike their predecessors, did not require the same degree of assistance from a kitchen-hand in that regard. Smoker relied on that change in practice to assert that the ''hours were not there'' and that Ms Nettlefold's casual employment as a kitchen-hand could not be continued.

Examination of the evidence does not support that assertion. Mr Smoker said that the engagement of a replacement for the head chef was arranged about two weeks before the new chef commenced duty on 14 November 1995. He also

stated that in arranging that employment he discussed how she would carry out her work and gave authority to the chef to arrange for a person with whom the chef had worked previously to commence work as a kitchen-hand/waitress on or about 25 November 1995. There was no evidence that the employment of the new employee was a condition to be met by Smoker if the services of the chef were to be obtained nor that it was a requirement of the business that it employ the new employee to maintain, or improve, its position in the market in which it operated. In summary, Smoker authorised the new head chef to engage an employee to take over Ms Nettlefold's duties almost a month before the date on which Ms Nettlefold's services were terminated by Smoker without notice.

It may be accepted that the business conducted by Smoker relied upon the ''flexibility'' in the engagement of staff provided by the use of casual labour. Changes in the employment of such staff could be a regular occurrence. In particular, the employer may be faced with casual staff terminating their employment at short notice, or without notice, causing inconvenience and inefficiency in the conduct of the business. Successful management of such a business may depend upon the control of labour costs and the ability to engage and release labour as and when required, subject, however, to the exercise of proper management.

On the other hand Ms Nettlefold had worked well and diligently in her first regular employment. A good and considerate employer would be aware that a sudden and unexpected termination of Ms Nettlefold's employment would cause her embarrassment and the lowering of her self-esteem.

In this case the regular and systematic nature of Ms Nettlefold's work, the expectation that if she carried out her duties as required the employment would continue, and the adverse impact of dismissal upon a young person for whom re-employment would not be certain, required Smoker in the exercise of good management to assess whether the allocation of Ms Nettlefold's duties to the person engaged by the new head chef justified the termination of Ms Nettlefold's employment.

The evidence showed that the hours in which the services of a kitchen-hand were required had not been eliminated by the efforts of the new chefs. The second chef had only started his employment three days before Ms Nettlefold's services were terminated. Ms Nettlefold had continued to work substantial hours in the period after the new head chef commenced and the core activities of a kitchen-hand remained. It could not be said that the job Ms Nettlefold performed had disappeared. The job was still there but it was to be performed by a new employee engaged by the new head chef. There was no ''operational requirement'' of the undertaking that provided a proper ground for terminating the services of Ms Nettlefold. The reason for ceasing to employ Ms Nettlefold was that the new head chef had been given authority to add another employee to the casual staff. The statement made to Ms Nettlefold that ''the hours are not there'' did not disclose the real reason for the dismissal which was to transfer Ms Nettlefold's duties to the new employee.

In so far as the new employee was able to carry out the additional duty of serving liquor to patrons, that was not an operational requirement of the undertaking according to the evidence presented. Smoker had access to casual staff for that purpose and could have continued to conduct its business efficiently had it retained Ms Nettlefold's services.

Smoker has not proved that there was a valid reason for terminating

Ms Nettlefold's employment based on the operational requirements of the hotel business conducted by Smoker.

I turn now to the question of what amount of compensation is appropriate for the purpose of s 170EE(2) of the Act. In the form in which ss 170EA and 170EE stood before amendment an order for the payment of compensation made under s 170EE may include consideration of the non-compliance with s 170DB.

As set out earlier it was not in issue that Ms Nettlefold was entitled to the sum of $250 in lieu of the notice she should have been given. The question of what amount of additional compensation is reasonable in the circumstances must be a matter of judgment particularly when the amount of remuneration the applicant is likely to have received if she continued to be employed as a casual employee on variable hours is not capable of accurate assessment. I have assumed that if Ms Nettlefold had not been dismissed her future earnings would not have exceeded approximately $150-$170 per week. Ms Nettlefold obtained regular, although lesser, casual work several weeks after her employment with Smoker ceased and was employed for a month in a training programme at remuneration at least equal to that which she had received from Smoker. After approximately six months Ms Nettlefold obtained regular casual work that replaced her former employment in all respects. I consider that having regard to the wages earned after her employment with Smoker ceased a sum of $1,000, which includes the sum of $250 that should have been paid in lieu of notice, would be reasonable compensation pursuant to s 170EE(2) of the Act and there will be an order accordingly.