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Reinstatement where the employment relationship has irrevocably broken down: *Andrea Walsh v Australian Taxation Office*

Two recent cases of the Australian Industrial Relations Commission establish that the Commission is unlikely to order reinstatement of an APS employee where the employment relationship has irrevocably broken down. The decisions have significant implications for APS employers as they suggest that, even if the Commission finds that the termination of an employee's employment was harsh, unjust or unreasonable, the Commission will refuse to order the employee's reinstatement if it considers that the employee could not return to a harmonious working environment.

Andrea Walsh v Australian Taxation Office

Australian Industrial Relations Commission, Sydney, 4 March 2005, [PR 956205]

Decision at First Instance: PR951810 (Commissioner Eames)

In March 2004 Ms Andrea Walsh sought relief in the Australian Industrial Relations Commission under s.170CE of the *Workplace Relations Act 1996* (the WR Act), following the termination of her employment by the Australian Taxation Office (ATO) for breaching the APS Code of Conduct. Alleging that the termination of her employment was harsh, unjust or unreasonable, Ms Walsh sought reinstatement to the position in which she was employed immediately before the termination and also sought compensation for lost earnings.

Although the Commission found that there was a valid reason for the ATO to terminate Ms Walsh's employment, Commissioner Eames found, that the termination was harsh because, amongst other things, it was disproportionate to the gravity of Ms Walsh's misconduct. This finding was triggered by the fact that in making its decision to terminate Ms Walsh's employment, the ATO had not complied with its own policies and procedures and had taken into account a record of previous misconduct by Ms Walsh that should have been removed from her file. The Commission considered that it had been inappropriate for the ATO to rely on the prior misconduct in concluding that Ms Walsh had engaged in a 'pattern of behaviour', which was a key reason for the ATO's decision to terminate Ms Walsh's employment.

Despite this finding, Commissioner Eames refused to reinstate Ms Walsh to her former position within the ATO. Considering Ms Walsh's proven misconduct, documented unsuitability for her employment and persistent behaviour of making inappropriate 'jokes' and offers of 'inducement' to supervisors, Commissioner Eames found that there was no basis on which Ms Walsh could return to the ATO on harmonious terms. Finding that Ms Walsh's employment relationship with the ATO was incapable of being repaired, the Commissioner refused to order Ms Walsh's reinstatement and instead awarded Ms Walsh compensation equivalent to six months' salary for her unfair dismissal.

Full Bench Decision: PR956205

(Senior Deputy Presidents Duncan and Lloyd, Commissioner Cribb)

On 26 October 2004, Ms Walsh sought leave to appeal to a Full Bench of the Commission against Commissioner Eames' decision, claiming that the Commissioner had erred in the exercise of his discretion concerning reinstatement by making findings of fact which were either not open or which were based on a mistaken view of the relevant facts. Ms Walsh also argued that Commissioner Eames had erred in law by failing to take account of each of the considerations set out in s.170CH of the WR Act and in finding that there was a valid reason for termination.

The Full Bench rejected all of these arguments and refused leave to appeal on the basis that the application disclosed no appellable error and no public interest consideration required that leave be granted.

In upholding Commissioner Eames' refusal to order Ms Walsh's reinstatement under s.170CH of the WR Act, the Full Bench placed considerable emphasis on the breadth of the discretion conferred under subsections (3) and (6) of the WR Act and the fact that Commissioners must exercise their discretion having regard to the evidence and material before them.

The Full Bench expressly endorsed the Commissioner's 'apparently contradictory' findings that a valid reason for termination had existed due to Ms Walsh's breach of the Code of Conduct, but that the termination was harsh due to its disproportionate nature.

The Full Bench noted that in addressing the question of whether or not it was appropriate to reinstate Ms Walsh, Commissioner Eames was required to have regard to all of the factors enumerated in s.170CH(2) of the WR Act. The Full Bench was satisfied that evidence of an irrevocably broken down employment relationship could be a relevant factor arising under the 'any other matters' consideration in s.170CH(2)(e) and was in fact critical in this case. The Full Bench noted that this approach was consistent with the established principle that the restoration of trust is a relevant factor when reinstatement is considered.

Conclusion

The significance of the *Walsh* decisions for APS agencies is that they confirm that even a large agency can resist a reinstatement order when the Commission has determined that the termination of an employee's employment was harsh, unjust or unreasonable, if there is sufficient evidence that the relationship of trust has broken down. In preparing for arbitration of unfair dismissal cases, agencies should ensure that they consider applying this line of argument.

The decision is also a salutary reminder of the importance of APS agencies complying with their own policies and procedures.

Text of the decisions are available at:

<http://www.airc.gov.au/decisionsigned/html/PR956205.htm>

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