AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Cunningham v Australian Bureau of Statistics

Giudice J, President, Watson SDP, Simmonds C

16 August, 10 October 2005

Termination of Employment — Harsh, unjust or unreasonable — Appeal — Whether employer had valid reason for termination — Conduct of employee — Extent of harm to employer — Objective test — Appeal allowed — Workplace Relations Act 1996 (Cth), s 170CG(3) — Public Service Act 1999 (Cth), ss 29(3)(g), 15(1).

The respondent was responsible for the development and maintenance of the appellant's footy tipping database. The appellant terminated the respondent's employment pursuant to ss 29(3)(g) and 15(1) of the *Public Service Act 1999* (Cth), after allegations arose concerning cheating in footy tipping. At first instance, the respondent's application for relief was granted on the grounds that there was no valid reason for the respondent's dismissal and that the termination was harsh, unjust or unreasonable pursuant to s 170CG(3) of the *Workplace Relations Act 1996* (Cth).

Held: (1) The primary decision-maker erred in finding that the termination was harsh, unjust or unreasonable. The appellant had a valid reason for the termination of the respondent's employment as the appellant was harmed by the incident.

(2) The test determining the validity of the termination is an objective one. The respondent was employed at a senior level and had system administrator privileges, which carried a high degree of trust. Anything that erodes the trust and honesty between work colleagues is destructive and has the potential to affect the work environment significantly. Viewed objectively, there was a legitimate basis for the appellant to conclude that the requisite level of trust no longer existed.

Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371, referred.

Cases Cited

Cunningham v Australian Bureau of Statistics (unreported, AIRC, Eames C, PR958391, 27 May 2005).

Cunningham v Australian Bureau of Statistics (unreported, AIRC, Eames C, PR958390, 27 May 2005).

Cunningham v Australian Bureau of Statistics (unreported, AIRC, Eames C, PR958363, 27 May 2005).

Cunningham v Australian Bureau of Statistics (unreported, AIRC, Eames C, PR958166, 27 May 2005).

Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371.

Appeal

B Dube and *R Shelley*, for the appellant.

R Gruber and *R Grech*, for the respondent.

Cur adv vult

The Commission

1 The respondent commenced employment with the Australian Bureau of Statistics (the appellant) on 21 January, 1991. In recent years he had been engaged as an Assistant Director, an Executive Level 1 position, in the appellant's Hobart office. On 14 December 2004 the appellant terminated the respondent's employment for breach of the Australian Public Service Code of Conduct (the Code). The respondent lodged an application for relief pursuant to s 170CE of the *Workplace Relations Act 1996* (Cth) on the basis that the termination was harsh, unjust and unreasonable.

2 In due course the application was dealt with by arbitration before Commissioner Eames. On 27 May 2005 the Commissioner issued a decision in which he found that there was no valid reason for the appellant's dismissal of the respondent and, it is to be inferred, that the termination was either harsh, unjust or unreasonable.[1] On the same day he ordered that the appellant reinstate the respondent and pay him an amount of five months salary.[2] A supplementary decision and order were issued on the same day.[3] The reasons for the supplementary decision and order are immaterial. This is an appeal, for which leave is required, against the Commissioner's decision and orders of 27 May 2005.

3 The appellant terminated the respondent's employment pursuant to ss 29(3)(g) and 15(1) of the *Public Service Act 1999* (Cth) (the PS Act) for breach of the Code. It is not necessary to set those provisions out. They permit the appellant to impose a range of sanctions up to and including termination of employment upon employees who breach the Code. The relevant allegations against the respondent concerned footy tipping. The respondent was responsible for the development and maintenance of the respondent's footy tipping database. The database is used for the conduct of a number of competitions in which participants attempt to predict the results of Australian Rules football matches in the Australian Football League (AFL). The database commenced in 1998. Footy tipping competitions have been conducted annually since then with the appellant's support. It was alleged in particular that the respondent had gone into the appellant's Hobart premises at the weekend, logged on to the system and used his administrator access to change his tips, and in some cases his margins, to improve his results.

4 The evidence concerning changes in tips related to round 19 and round 21 of the 2004 AFL season. Before going to that evidence it should be explained that there were three different tipping competitions known respectively as the Victorian Rules competition, the Tasmanian Tipping competition and Syd and Stella's competition. The geographic focus of the first two competitions is

1 *Cunningham v Australian Bureau of Statistics* (unreported, AIRC, Eames C, PR958166, 27 May 2005).

2 *Cunningham v Australian Bureau of Statistics* (unreported, AIRC, Eames C, PR958363, 27 May 2005).

3 *Cunningham v Australian Bureau of Statistics* (unreported, AIRC, Eames C, PR958390, 27 May 2005), *Cunningham v Australian Bureau of Statistics* (unreported, AIRC, Eames C, PR958391, 27 May 2005).

obvious. The third, Syd and Stella's, was based in the appellant's Sydney operations. The respondent was a participant in all three competitions. In the Victorian competition tipsters selected the winning team and the margin for each match. In the other two competitions only the winning team was selected.

5 Tips are required to be lodged electronically before the start of the first game of each round. The appellant called evidence of the following changes in the respondent's selections after the tips had closed.

6 These were the changes in round 19.

(a) Hawthorn played Western Bulldogs on Saturday 7 August 2004 at 7.10 pm and won by 11 points. The respondent's tip in the Victorian Rules competition was changed from Western Bulldogs to Hawthorn at 6.09 pm on Sunday 8 August 2004.

(b) Port Adelaide played Melbourne on Sunday 8 August 2004 in a game which commenced at 2.10 pm at AAMI Stadium. Port Adelaide won by 73 points. The respondent's margin in the Victorian Rules competition was changed from Port Adelaide by three goals to Port Adelaide by 10 goals at 6.09 pm on Sunday 8 August 2004.

(c) Geelong played Richmond on Sunday 8 August 2004 at 2.10 pm and won by 31 points. The respondent's tip in the Tasmanian Tipping competition was changed from Richmond to Geelong at 6.08.33 pm on Sunday 8 August 2004.

7 These were the changes in round 21.

(a) Carlton defeated Melbourne by 31 points in a game played on Saturday 21 August 2004 at 2.10 pm. The respondent's tip in the Victorian Rules competition was changed from Melbourne by two goals to Carlton by three goals at 5.32 pm on the day of the game. The respondent's original tip in Syd and Stella's competition was also Melbourne. Carlton was entered as the tip in Syd and Stella's at 5.30 pm on the day of the match. The computer records showed that an attempt had been made to change the tip from Melbourne to Carlton in that competition on the preceding Friday afternoon but the change did not reach the tipper file.

(b) Western Bulldogs played Kangaroos on Saturday 21 August 2004 at 7.10 pm and won by 30 points. The respondent's tip in the Victorian Rules competition was changed from Kangaroos by two goals to Western Bulldogs by two goals at 5.17 pm on Sunday 22 August 2004. The respondent's tip in Syd and Stella's competition was changed from Kangaroos to Western Bulldogs either at 5.33 pm on the Saturday (before the game) or at 5.13 pm on the Sunday.

(c) Adelaide played Sydney at 2.10 pm on Saturday 21 August 2004 and won by 22 points. The respondent's tip in the Victorian Rules competition was changed from Adelaide by one goal to Adelaide by two goals at 5.32 pm on the same day.

(d) Port Adelaide played Collingwood on Friday evening 20 August 2004 and won. The respondent's tip in the Tasmanian Tipping competition was changed from Collingwood to Port Adelaide at 5.32 pm on Saturday 21 August.

8 The changes made to the ABS footy tipping database are recorded in the database itself. No attempt was made to prove that the database log was incorrect except for the change in the result of the Western Bulldogs/Kangaroos

round 21 game played on the Saturday evening. It was suggested by the respondent that the change from Kangaroos by two goals to Western Bulldogs by two goals in the Victorian competition logged at 5.17 pm on Sunday 22 August 2004 may have been a "replication error". In other words that the back up of the database only took affect when the respondent logged on. This suggestion was disposed of by the evidence of the appellant's systems expert.[4] Another explanation, tentatively put forward by the respondent, was that the alterations might have resulted from the respondent inadvertently clicking his computer mouse was rejected by the Commissioner as "unconvincing". It is beyond doubt that the changes alleged were made by the respondent. It is also beyond doubt that the respondent gained access to the footy tipping database by using his network administrator permission. It was common ground that the respondent stood to gain financially from the changes.

9 This information about alteration of the respondent's tips was the subject of a report from the appellant's Security Section at the end of August 2004. On 2 September 2004 the respondent was informed of the security report and told that the appellant had decided to institute a formal investigation of possible breaches of the Code. The respondent was given an opportunity to indicate why he should not be suspended from duty pending the result of the investigation. On 3 September 2004 a Mr Roarty, a senior officer from the appellant's Western Australian operation, was appointed to conduct an inquiry into possible breaches of the Code.

10 On 6 September 2005 Mr Roarty sought the respondent's comments. The respondent's response is in a letter dated 8 September 2004. Although in some respects the account in the letter was added to in evidence in this case, it provides the respondent's considered explanation for his conduct. Several aspects of it are important.

11 The first thing is that in the letter of 8 September the respondent did not mention the changes to tips in round 19. It is common ground that the respondent maintained throughout that he had no recollection of changing any tips in round 19.

12 The respondent indicated that he normally entered his tips on Friday morning, sometimes revising them later in the day after studying the newspaper at lunchtime. He also normally entered the Tattersall's Footy Tips competition at a nearby newsagency. In relation to his round 21 tips, the respondent said that late on the Friday afternoon of 20 August 2004, having studied the newspapers, he took his Tattersall's entry to the newsagency, returned to work and left for the weekend. According to his statement he would normally check, and if necessary adjust, his entries in the appellant's competitions before going home to ensure they were the same. On this evening he did not.

13 Again according to his statement, on Saturday afternoon the respondent decided to do his tax return and, on realising his payment summary was in his office at work, he went in to work to get it. While at work he logged on to the network to check his emails. He also checked his football tips. Upon realising that his tips were not the same as his Tattersall's entry he changed the tips in each of the three competitions. He visited the office again on Sunday afternoon, to pick up receipts for some donations which he wished to claim and again checked his tips. He did not suggest he had altered any tips at that time.

4 Transcript 17 May 2005 at p. 148.

14 On the following Monday morning the respondent told the employee who ran the Tasmanian Tipping competition that he had altered his tips after close-off time but only to make them consistent with the tips he had made in the Tattersall's competition. At the other employee's suggestion he changed all of his tips back to those originally entered on the preceding Friday. Later the employee who ran the Syd and Stella's competition asked the respondent if he had altered his tips after close-off. The respondent said he had altered his tips but that his decision was made before the games commenced. At this employee's suggestion he re-entered his original tips in Syd and Stella's as well. He did not contact the employee who ran the Victorian competition but testified that he assumed the employee knew of the late changes and had no objection because the winnings had been paid out based on the altered tips.

15 The respondent concluded his letter by indicating he had not intended to cheat, and had acted honestly in admitting the changes on the Monday morning. He said he was upset and embarrassed and intimated that he might be under stress due to workload.

16 At a subsequent interview with Mr Roarty the respondent further indicated that he had no memory of altering any tips in round 19 or on the Sunday of round 21.[5] The respondent suggested the changes might have been caused by a system problem. On checking with IT security and other system experts Mr Roarty was advised that there was no likelihood of system problems causing the changes. Mr Roarty concluded that the respondent had deliberately cheated by making late changes and had breached the Code in a number of respects. He found that the respondent:

- failed to act honestly and with integrity in the course of APS employment, contrary to s 13(1) of the Code;
- did not at all times behave in a way that upheld the APS Values and the integrity and good reputation of the APS contrary to s 13(11) of the Code; and
- made improper use of
  - (a) inside information, or
  - (b) his duties, status, power or authority

  in order to gain, or seek to gain, a benefit or advantage for himself, contrary to s 13(10) of the Code.

17 In considering the respondent's claim the Commission must have regard to the matters in s 170CG(3) of the Act. Under that section one of the relevant issues is whether there was a valid reason for the termination of employment. Section 170CG(3)(a) reads:

> (3) In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:
>
> (a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and
>
> …

18 Commissioner Eames found that there was no valid reason for the termination of employment. He did not make a specific finding about the respondent's conduct in changing the footy tips but said he was satisfied that in

5 Exhibit G12 paras 12 and 23.

that respect the respondent's behaviour "left a lot to be desired". He noted the respondent's eventual acknowledgement that he had breached the Code. He found, however, that changing footy tips is "not work related, in the terms of the Code of Conduct". He further found that the manipulation of the footy tips had not been demonstrated to have impacted at all on either the community or the Government. He found in addition that the respondent was not in a position to get access to highly confidential data from the appellant's main database and there was no evidence of any manipulation of other data. Finally, the Commissioner took into account the sanctions short of termination of employment available to the appellant and concluded that there was no valid reason for the termination.

19 We are unable to accept the Commissioner's conclusion that there was no valid reason for the termination of the respondent's employment. There are a number of reasons for this. The first is that although the Commissioner did not make a specific finding as to the conduct upon which the appellant relied, by implication he rejected the respondent's evidence in critical respects. The appellant's case was that the respondent had deliberately cheated by changing his tips after he knew the results of games. The appellant was entitled to such a finding at least in relation to round 19, the Victorian tips in round 21 and the tips for the Saturday night game for both the Tasmanian and the Syd and Stella's competitions in round 21. The evidence provided by the system logs was unshaken either before the Commissioner or before us. We think we should give the respondent the benefit of the doubt in relation to the other changes in round 21 — which he admitted to on the Monday morning.

20 Evidence given on the respondent's behalf by another ABS employee that the alteration of footy tips is trivial in the scheme of things cannot be determinative. The test is an objective one. The respondent was employed at a senior level and had system administrator privileges which carried a high degree of trust. We do not accept that the appellant was not harmed by the incident. Anything which erodes the trust and honesty between work colleagues is destructive of harmony and cohesion and has the potential to effect the work environment significantly. The respondent was a senior manager who abused his authority to gain access to the appellant's system and then failed to reveal the full extent of his actions. Having regard to the nature of the appellant's functions and the importance of confidentiality in relation to the data the appellant collects and deals with, trust was a critical element in the employment relationship, particularly at the management level. Viewed objectively there was a legitimate basis for the appellant to conclude that the requisite level of trust no longer existed. To use the often quoted words of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*, the reason for the termination was "sound, defensible and well-founded".[6] In our view there was a valid reason for the termination. We grant leave to appeal. In the circumstances the appropriate course is that we consider the matter afresh for ourselves, pursuant to s 170CG(3).

21 Section 170CG(3) reads in full:

> (3) In determining, for the purposes of the arbitration, whether a termination was harsh, unjust or unreasonable, the Commission must have regard to:
>
> (a) whether there was a valid reason for the termination related to the

6 *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373.

capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and

(b) whether the employee was notified of that reason; and

(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

(d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and

(da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and

(db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and

(e) any other matters that the Commission considers relevant.

22 As indicated above, in our view there was a valid reason related to the respondent's conduct for the termination of his employment. There is no need to refer to the standards of conduct which are particularised in the Code. On any view the respondent's conduct involved multiple breaches of the rules of the tipping competition, resulted in gain for the respondent at the expense of other tippers and involved a breach of the trust reposed in those given system administration privileges.

23 We have no doubt that there was a proper investigation by Mr Roarty during which the respondent was apprised of the relevant information and given an opportunity to respond. The Commissioner so found. In relation to s 170CG(3)(da), in this case the appellant is a Government authority of some size and significance of which we would expect high standards in termination procedures. We can find no serious flaw in the procedures adopted. The factor in s 170CG(3)(db) is not relevant.

24 The final consideration concerns other relevant matters. We have approached the matter on the basis that the reasons for the termination are those relating to the respondent's manipulation of footy tipping entries in rounds 19 and 21. We think it is significant that the respondent did not admit that he had altered his tips in round 19 or on the Sunday of round 21. He persisted in claiming he had no recollection of making those changes, even in evidence before the Commission. The changes which were made in round 19 were made at two separate times over the weekend. At around 6 pm on the Saturday the result of the Western Bulldogs/Hawthorn game was changed in the Victorian competition to reflect the result. At around 6.10 pm on Sunday the result of the Port Adelaide/Collingwood game in the Victorian Rules competition was altered by changing the margin from three goals to seven goals. At about the same time the result of the Richmond/Geelong game in the Tasmanian competition was also altered. In all cases the game had concluded when the results were changed and all of the changes improved the respondent's tips. It is also significant that he took no action to reverse the changes he made in round 21 in the Victorian Rules competition but accepted his winnings. In the circumstances his expressions of remorse and his apologies do not weigh heavily in his favour. The totality of this conduct, viewed objectively, justifies the appellant's loss of confidence in the respondent.

25 On the respondent's behalf it was pointed out that he had 14 years of unblemished service. That was accepted by the Commissioner and we also accept it. Our attention was drawn to the consequences for the respondent if the termination was to stand. It was said that his skills would not be easily transferred to the private sector and that the impact on him from a social and family point of view would be severe.

26 The Commissioner of course had the opportunity to see the respondent give his evidence. On the critical issues of the changes to the round 19 tips and on the Sunday of round 21 the Commissioner by necessary implication rejected the respondent's evidence. In the circumstances we do not think we are at a disadvantage in not having observed the respondent in the witness box.

27 The Commissioner seems to have been influenced by the view that football tipping was not part of the appellant's work requirements and that there was no evidence that he had been less than diligent and trustworthy in carrying out the responsibilities of his employment. We do not take the same view. We are influenced by two things in particular. The first is that the other participants in the tipping competitions for the most part were, it is to be inferred, the respondent's co-workers. The second is that the respondent was an assistant director of the appellant and used his system administrator privileges for personal gain. These matters give the conduct a relationship to work which is direct and significant.

28 Taking all of these matters into account, as well as the need for a fair go all round, we do not think that the termination was harsh, unjust or unreasonable. If the respondent had made an early and frank disclosure of all of the alterations our view might have been different. The Commissioner's orders should be quashed and the respondent's application for relief dismissed. We shall make orders to that effect.

PR963720

Appeal allowed and the respondent's application for relief dismissed

AZADEH KHALILIZADEH