Industrial Relations Court of Australia

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Stroszynski v Strasburger Enterprises Pty Ltd (970162)

DECISION NO:162/97

CATCHWORDS

INDUSTRIAL LAW - UNLAWFUL TERMINATION - TERMINATION OF EMPLOYMENT - VALID REASON - SERIOUS MISCONDUCT - ONUS OF PROOF - circumstantial and direct EVIDENCE of theft - SUMMARY DISMISSAL - AWARD - WAGES - DAMAGES - whether any claim for wages or damages after suspension.

Workplace Relations Act 1996 (Cwth) ss170DB, 170DC, 170DE, 170EA

Evidence Act 1995 (Cwth) s140

The Vehicle Industry - Repair, Services and Retail Award 1983

Thompson v Boyne Smelters Ltd (unreported, IRCA, Madgwick J, 3 April 1997);

Luxton v Vines (1952) 85 CLR 352.

STROSZYNSKI v STRASBURGER ENTERPRISES PTY LTD

VI96/2669

Before: MURPHY JR
Place: MELBOURNE
Date: 12 MAY 1997

IN THE INDUSTRIAL RELATIONS COURT
OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

VI96/2669

BETWEEN:

SHARLYN STROSZYNSKI
Applicant

AND

STRASBURGER ENTERPRISES PTY LTD (T/A QUIX FOOD)
Respondent

BEFORE: MURPHY JR
PLACE: MELBOURNE
DATE: 12 MAY 1997

MINUTES OF ORDERS

THE COURT ORDERS THAT:

[1] The application is dismissed.

Note: Settlement and entry of orders is dealt with by Order 36 of the Industrial Relations Court Rules

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REASONS FOR DECISION
Delivered ex tempore

These proceedings are about shrinkage, surveillance, integrity testing and suspension. The applicant seeks a remedy under s170EA of the Workplace Relations Act 1996 (Cwth).

A handbag full of cigarettes.

On 4 May 1996 the applicant's handbag was observed on the floor of the storeroom of the convenience store where she worked as a console operator. The bag was open and Ms Marinucci, the fellow employee who made the observation, saw an open packet of cigarettes in it. About half an hour later Ms Marinucci, who in the meantime had been working in the body of the store, returned to the storeroom and observed the handbag on the sink. In addition to the other packet there previously, there were three differently branded packets of cigarettes in the handbag.

Some time later Ms Marinucci noted that the applicant appeared to spend an excessive amount of time in the storeroom before she left at the end of her shift. After the applicant left the store Ms Marinucci inspected the storeroom and noticed that a tin of coffee was missing from a shelf where she had neatly arranged the stock shortly before. Later that night Ms Marinucci contacted Mr George Fotopolous, the store manager, about her observations regarding the cigarettes.

The next day Mr Fotopolous attended at the store and, using the computer stock records of the store, conducted a check against the physical stock actually held. He found that an item of stock corresponding to the four items of stock identified by Ms Marinucci was missing. Stock shrinkage had been a significant problem for this store for some time and Mr Fotopolous had been appointed manager a couple of months earlier, with a brief to address the problem. After consultation with his area manager, Mr Flood, he decided to test the honesty of the applicant.

The applicant is integrity tested.

The store operates in conjunction with a service station. It has three surveillance cameras, including two over the main counter and console area. Customers cannot access behind the console area where the cigarettes are kept. They also cannot access the storeroom. Store procedures required that cash in the till be kept to a minimum. All $50 and $100 notes are not placed in the till but are recorded in the cash register, placed in a numbered safe-drop envelope, its number is recorded and the envelope is dropped into the safe below the counter.

The empty numbered safe-drop envelopes in order are placed on the top of the cash register ready for use. The envelopes are re-used after retrieval from the safe. At 4.00 pm on 6 May 1996 Mr Fotopolous, in the presence of the assistant store manager Ms Hodges, recorded the serial number of a $20 note and placed it in an envelope numbered 72. This envelope was in a pile of such envelopes on the register that the applicant was expected to use in her shift. Mr Fotopolous left the store between 5.00 and 5.30 pm.

The applicant arrived for her shift around 6.00 pm. Ms Hodges completed her shift soon after and left. The applicant worked until midnight that evening. The following morning Ms Hodges checked the safe and retrieved envelope number 72. It contained a $50 note that the cash register roll recorded had been safe dropped at 7.11 pm the previous evening. There was no sign of the $20 note placed there by Mr Fotopolous, or in the safe, nor was there any $20 surplus in the cash balance for the applicant's shift.

The surveillance videos.

On Tuesday 7 May Mr Fotopolous viewed the video of the previous evening. Ms Hodges also viewed the video. It showed the applicant receiving money from a customer at about 7.11 pm. The applicant places the money from the customer in a safe-drop envelope, then records it on a sheet near the console. It is then dropped into the safe. The applicant is then observed placing both hands in the vicinity of the safe-drop envelopes and appears to pick something up. The applicant then either folds her arms at her waist and puts her right arm inside her jacket, or places something up her sleeve. She then looks out of the window for some seconds. Ms Hodges said the video shows the applicant acting suspiciously. She could not see what the applicant took from the top of the register. The video is black and white and its resolution is such that no actual note can be seen.

Mr Fotopolous and Mr Flood also viewed the video of when the applicant and Ms Marinucci were working together on 3 May. This shows the applicant in the console area taking packets of cigarettes from cartons and stacking them in racks behind the console. The applicant can be observed to take a bin of rubbish to the storeroom. A short time later she takes another quarter-full bin into the storeroom. The cameras do not operate in the storeroom.

The interview.

On 10 May the applicant was interviewed by Mr Flood and Mr Fotopolous. Mr Fotopolous made handwritten notes (Exhibit R7) of her responses to the questioning by Mr Flood. When the applicant was asked whether she knew anything about a $20 note, she said she had not done anything and did not find any $20 note. She was shown the video. She advised that if she had found the note she would have noted it. She did not put it up her sleeves and could not remember why she reached for the safe-drop envelopes a second time.

She denied taking the $20 note and said she folded her arms while watching the pumps. She was asked about the cigarettes and said she did not smoke the missing brands and bought her brand at Franklins. She said she did not take the coffee and said it too was not her brand. Mr Flood gave evidence that he told the applicant that he would be calling the police in. The applicant advised him to call the CIB down. She was not worried. The conversation became heated. At one stage the applicant said that she had to have "hours" at the respondent. She said her husband was not working and she needed her job. She told the respondent that: "I'll admit to the $20 to keep my job." She then denied that she had taken the $20. She went on: "Just say I'll admit it to shut it." She also asked: "If I say yes, what are the consequences?" She also said: "Maybe the fairies have taken the money." Mr Fotopolous said in his evidence that the admissions made by the applicant could be seen as forced admissions. Mr Flood maintained that they were voluntarily given admissions.

He maintained in his evidence that the applicant had made it clear in the interview that she would admit to the $20 as long as the respondent would not call in the police. Towards the end of the interview the applicant actually telephoned the local police. At the end of what was a lengthy interview the applicant was suspended.

The lengthy suspension before termination.

Matters proceeded at a very leisurely pace after this. Mr Flood reported the matter to the local police. The applicant retained solicitors. A letter asserting that the applicant was wrongly suspended was sent on 30 May (Exhibit R13). On 5 June Mr Flood gave a statement to police (Exhibit R20). On 7 June Mr Fotopolous and Ms Marinucci gave statements (Exhibits R8 and R9) . On 18 July the newly appointed human resources manager of the respondent, Ms Yiannacou, finally replied to the applicant's solicitor's letter, and stated that the respondent regarded "this as a lawful termination" (Exhibit R12).

Subsequently Ms Yiannacou ascertained that the applicant had only been suspended. She arranged a meeting with the applicant, her solicitor and Mr Flood, at which, as part of the respondent's "internal investigation process" the applicant was asked a number of questions. The answers were short. The applicant, in her answers, denied she had reached over to the register after the safe-drop of envelope number 72. She explained that she folded her arms and was watching customers or children on skateboards in the forecourt.

She denied seeing the $20 note and making any admissions in the interview that she would admit to

the money, but not the cigarettes, if the police were not called. She denied taking the cigarettes and said she always kept her handbag on the bench in the storeroom. The missing tin of coffee was not raised in the interview. After the interview, arrangements were made for the applicant's solicitors to view the video. This did not occur. Subsequently Mr Flood, after consultation with Ms Yiannacou, formed the view that the applicant's responses in the interview were unsatisfactory. On 27 September she was advised that her services were terminated (Exhibit R19).

The course of evidence.

The respondent's witnesses gave evidence generally in accordance with the statements they had made to police. Ms Hodges had not made a statement. Both Ms Hodges and Mr Flood gave unsatisfactory and contradictory accounts as to whether they had discussed their evidence before the trial. Mr Fotopolous made a number of amendments to his police statement a week before the trial. Both Ms Hodges and Mr Fotopolous denied taking the $20. The solicitor for the applicant was unable in his cross-examination to damage the account of Ms Marinucci.

Except in two respects, the account of the interview given by Mr Fotopolous and Mr Flood was not the subject of real challenge. It was put that it was the applicant that first suggested that the police be brought in, while Mr Flood maintained that he brought up the fact that unless the matter was resolved that day, the police would be brought in. Another minor matter was whether it was Mr Flood or the applicant who first referred to the money having been taken by the fairies. In evidence put to Mr Flood, the applicant said to him that he said that, if she would admit to it, the police would not be brought in and she would keep her job.

In his evidence, Mr Flood denied saying this or holding out any inducement to the applicant. Mr Fotopolous' account of the statements made by the applicant was not challenged. Further, his recalling that the applicant had stated that she had needed her job because her husband was not working was also not challenged. These matters were the subject of contrary evidence by the applicant. The applicant in her evidence also said Mr Fotopolous said at first it was the applicant's brand of cigarettes that had gone missing. This was not put to him in cross-examination. It was also asserted by the applicant that Mr Flood suspended her at the beginning of the interview. This was not put to him, and was contrary to his evidence.

The applicant also raised in her evidence difficulties with the integrity of the store inventory system that were not put to Mr Fotopolous. In her evidence, the applicant denied that she took any of the cigarettes, the tin of coffee or the $20. She said she had no reason to buy those three brands. She explained that she went to the rubbish bin twice in a short space of time because it needed emptying.

She further denied that she had made any admissions in the interview, or admissions to the effect that she would admit to the cigarettes and money if the police were not called in. In the trial, when the applicant was first questioned about the video and the number 72 safe-drop envelope, she said she did not reach over to the register for a second time. Later she admitted that she may have done so to flick

back envelopes. The applicant stated that she had suggested in the interview on 10 May that she may have been watching kids playing on the forecourt. This had not been put to Mr Fotopolous or Mr Flood, although it is recorded as a response in the interview of 30 August.

Was there a valid reason?

The respondent carried the onus of proof that the misconduct on which it relies is made out. The allegations here are misconduct amounting to a criminal offence, so the shifting onus of proof referred to in s140(2) of the Evidence Act 1995 (Cwth) applies. In a recent decision Thompson v Boyne Smelters Ltd (unreported, IRCA, Madgwick J, 3 April 1997), Madgwick J noted that in cases involving criminality the court is required to exercise caution. He noted however:

"It is not the case that the Court need or must shy away from resolving a question decisively when there is only a single witness on either side of a controversy."

Here, the solicitor for the applicant submitted that the respondent's evidence was contaminated. He referred to the reversals in the evidence of Mr Flood and Mr Fotopolous as to whether they had discussed their statements together prior to the trial. He noted that Mr Flood had been present throughout the trial and gave evidence last in the respondent's case. He referred to the fact that both videos had not been produced. The evidence was that the $20 note video had been damaged when there was an attempt to retrieve some stills from it. No explanation was given as to the whereabouts of the other video.

The solicitor submitted that the respondent had launched upon a flawed investigation without adequate evidence and had sought to shore up its account by collaboration. He further submitted that Ms Hodge had the opportunity to turn off the video and had a key to the safe. Counsel for the respondent invited the Court to prefer the respondent's version, to reject the applicant's account as false, and find that she had lied in the interviews and at the trial.

Conclusion: the respondent's account inherently more probable.

The cigarettes.

There was a clear conflict between the account of Ms Marinucci and the applicant on the cigarettes. Rejection of Ms Marinucci's account requires the Court to accept that either she is mistaken or she has falsified her account. Both scenarios are improbable. Her account of her observations is detailed enough not to have been the result of a mistake. She was familiar with the three brands she noticed, because she sold them. In any event, her account is to some extent corroborated by Mr Fotopolous with his evidence of the stock counts and his note of the missing brands. Either he has falsified this aspect of his account, or Ms Marinucci has stolen the cigarettes herself. Either scenario is unlikely, particularly given that Ms Marinucci does not smoke. If the stock records are wrong, there was a strange and unlikely coincidence that they coincided with Ms Marinucci's account. Further, nothing

was raised by the applicant which would suggest that Ms Marinucci had such animus against the applicant that she would fabricate such a serious allegation against a fellow employee, or that Mr Fotopolous would join in such a fabrication.

The applicant had the opportunity to steal the cigarettes. She was observed on the video making what appeared to be an unnecessary trip with the rubbish bin to the store room shortly before the cigarettes were observed by Ms Marinucci. This is of some assistance to the respondent. The applicant also had some motive to steal the cigarettes. Although she did not smoke those particular brands she said that both she and her husband did smoke. The respondent's account of the cigarette matter is inherently more probable and convincing than that of the applicant. I reject her denial. I am satisfied that the applicant did take the three packets of cigarettes as observed by Ms Marinucci.

The $20 note.

Here the inadequacies of the video surveillance were such that direct evidence of the applicant actually taking the $20 note is not available. The Court is invited to infer from the evidence that the applicant did so. Here again I prefer the respondent's evidence over the applicant's denial. In reaching this conclusion the following comments about circumstantial evidence in civil cases should be borne in mind. In Luxton v Vines (1952) 85 CLR 352 at 358, Dixon, Fullagar, and Kitto JJ referred to an unreported decision of the High Court in Bradshaw v McEwan Pty Ltd where it was said:

"Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture..... But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjunction or surmise....."

Here, the respondent invites the Court to conclude that it is more probable then not that the applicant failed the integrity test set by the respondent. The video was not available but the Court heard accounts from Mr Fotopolous, Mr Flood and Ms Hodge as to what it revealed. Their accounts were generally consistent as to what they observed the applicant doing. The applicant did not really dispute the respondent's account of what the video revealed. The absence of the physical video does not damage this aspect of the respondent's case as submitted by the solicitor for the applicant. The applicant is recorded in Mr Fotopolous' notes as saying she "pushed the envelopes back". She is also

recorded as saying she folds her arms to watch the petrol pumps.

The question is whether it is more probable than not that the applicant, when she engaged in the actions recorded on the video, took the $20 that Mr Fotopolous had placed in the envelope earlier. In cross-examination the solicitor for the applicant pressed the witnesses that the note could not be seen. In his final address he noted that Ms Hodge could have turned off the video and removed the note. The respondent submits that such a possibility should be given no weight, and is to be weighed against the ambiguous nature of the applicant's movement as observed on the video, the fact that the $20 was not retrieved from the envelope or the safe the next day, the admissions by the applicant in the interviews, and the lies the applicant told in the interview and on 30 August.

Here it is a reasonable and definite inference that the applicant did steal the $20. It is unaccounted for after being placed there by Mr Fotopolous. It is unlikely that Ms Hodge would betray her duty to remove the $20 before the applicant's shift. No motive was put to her to do that. Next, if the $20 remained in the envelope, the applicant had the opportunity to remove it even though it is not recorded with precision on the video. Perhaps more damning are the unexplained and coincidental actions of the applicant after the safe drop. If the envelope was empty, why did she place her hands back there in the vicinity of the safe-drop envelopes? Why did she change her account as to what she was doing looking out the window when it was put to her that there could not have been anyone at the pumps? While no one can ever be certain what happened to the $20 it is mere conjecture to say that it was taken by the fairies or by a person other than the applicant.

On the other hand I am comfortably satisfied that the account of the respondent, that it placed a $20 note in the envelope and that the applicant stole it, is more probable than the applicant's denial that she never saw such a note. I reject the submission that the respondent's account was so contaminated as to be unreliable. The account of the respondent's witnesses is supported by the contemporaneous documents recording the interview (Exhibit R7), the police statements (Exhibits R8, R9 and R20), and the notes made by Mr Fotopolous (Exhibits R2 and R5).

The coffee.

The respondent, in its final meeting with the applicant on 30 August, did not question her about the coffee. Mr Flood gave evidence that it would be too difficult to prove. In these circumstances it is unnecessary for the Court to now make a finding in relation to the coffee.

Conclusion: no breach of the Act.

The respondent has made out two acts of serious misconduct that provide the basis for the decision to dismiss the applicant without notice. I accept the submission that the delay of the respondent in acting does not deprive it of the opportunity to rely on the acts of misconduct as constituting a valid reason. The respondent has discharged its onus of proof on s170DE.

It has also not breached s170DB(1) as this was serious misconduct.

The respondent has also discharged its obligations under s170DC. The applicant had an opportunity to respond to the allegations in the two interviews.

Claim for payment of wages between suspension and dismissal.

In opening, the solicitor for the applicant sought to claim the wages that he said the applicant was entitled to receive from the date of her suspension until she fully mitigated her losses in November 1996.

The solicitor sought to rely on clause 6(vii) of the disputes settlement provision of the Vehicle Industry - Repair, Services and Retail Award 1983 ("the Award"). The evidence led on this aspect of the claim was unsatisfactory and incomplete at its highest. A reproduced copy of the Award was handed up, but there was no evidence that the respondent was bound by the Award, nor that the applicant was a member of any union that was also bound. The relevant provision on which the solicitor seeks to rely does not assist, as it is predicated upon reference of any dispute by the relevant union to the Australian Industrial Relations Commission.

Other provisions of the Award, if it applies, do not assist the applicant. Under clause 6A employees can be employed on a weekly or casual basis. The applicant admitted that she was a casual employee. Clause 6D(7) of the Award provides that the notice of termination of employment provisions of the Award do not apply to casual employees. The applicant was suspended. This was tantamount to termination of her employment without notice. As the respondent was entitled to do this under the Award, I am unable to see any basis for the applicant to have any entitlement to wages.

Alternatively, under her contract of employment, she cannot claim damages for the period prior to the actual written notice of termination. This is because, given the casual basis of the applicant's employment, the respondent always retained the right to do what it did. The suspension of the applicant was effectively a termination of contract by the respondent. Because the applicant was a casual, the respondent was entitled to do this without notice.

The applicant's claim for lost wages is substantially a claim for damages for wrongful dismissal. The respondent is entitled to defend that claim by raising the applicant's misconduct that entitled it to end the contract without notice. The applicant cannot succeed on this aspect of her claim.

The application must be dismissed.

I certify that this and the preceding twelve (12) pages are a true copy of the reasons for decision of Murphy JR as recorded on transcript and revised by the Judicial Registrar.

Associate: KAREN HALSE
Dated: 12 May 1997

APPEARANCES

Appearing for the applicant:	MR CHESTER METCALFE
Solicitors for the applicant:	TOOP HARRIS & METCALFE
Counsel appearing for the respondent:	MR STUART WOOD
Solicitors for the respondent:	CORRS CHAMBERS WESTGARTH
Dates of Hearing:	2, 5, 7, 9 MAY 1997
Date of Judgment:	12 May 1997.