Previous Document | Next Document | First Hit | Back to Results | New Query | Help

Dec 043/00 M Print S2492

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.170CE application for relief in respect of termination of employment

Bianchi

and

Outboard Marine Corporation t/as Stacer Alloy Craft

(U No. 31311 of 1999)

COMMISSIONER WHELAN MELBOURNE, 27 JANUARY 2000

Termination.

DECISION

[1] In this matter the applicant, Mr Bianchi has lodged an application under section 170CE (1). The matter was not resolved by conciliation and the applicant elected to proceed to arbitration. The respondent disputes the ability of the applicant to bring the claim on the basis that he was not an employee but an independent contractor. Mr Bianchi was represented by Mr Moore and the respondent by Mr Wood, both of counsel.

[2] Evidence was given by the applicant and by Mr Elmer and Mr Saunders on behalf of the company.

Background

[3] Mr Bianchi was employed by the respondent as a spray painter between December 1994 and February 1996 when he resigned his employment. After his resignation the company outsourced the painting of boats for a period of time but then decided that it would make more sense to have someone doing the work on site and using the equipment they had there. Mr Nowak a supervisor with the respondent recommended Mr Bianchi to Mr Saunders, at the time the company's general manager.

[4] On or about 6 May 1996 Mr Saunders and Mr Bianchi had a conversation. Mr Saunders provided Mr Bianchi with a document headed *"Boat Painting - Contract Rate"* . The document listed prices for painting various types of boats. Mr Bianchi's evidence was that Mr Saunders stated that the respondent wanted him to perform the work personally.

[5] Mr Bianchi further gave evidence that they discussed what would happen if he was sick and he was told that the company would get someone to replace him. It was his evidence that on the five or so occasions that he was ill the work was left until his return. He asked what would happen if he was injured and was told that the company was insured for that. He also asked what would happen if there were no boats to paint and was told that he would be given other work to do for which he would be paid an hourly rate of $20 per hour. Mr Bianchi stated that if there was no painting work he would approach Mr Nowak who would allocate him other duties.

[6] If boats had to be reworked it was agreed that Mr Bianchi would be paid $30 per hour for this work. Mr Bianchi asked about the reference in the document to a business name and was told that he needed to create a business name. He was also told that tax at the rate of 35 per cent would be deducted from what was paid to him. He also asked what would occur if there was more work than he could do himself and was told that the respondent would supply any extra labour needed. It was Mr Bianchi's evidence that this happened two or three times and one of the respondent's employees was told to assist him. Mr Bianchi stated that he was told by Mr Saunders that he was expected to work from 7.30 a.m. to 3.30 p.m. Monday to Friday and to clock on and off. He stated that Mr Saunders referred to the *"contract rates"* as *"all-in-one"* rates for each boat in lieu of being paid annual leave and sick leave.

[7] Mr Saunders gave evidence that he assumed that Mr Bianchi would be painting the majority of the boats but he was not engaged on that basis. The rates were established on the basis of what they were paying outside contract companies. He may have referred to the rates as an all-in rate. On the issue of the applicant being sick he stated that Mr Bianchi said he had no one working with him. On that basis the company said that they would have to get someone else in if he was sick, or send the work out. He confirmed that they had an insurance policy covering everyone engaged in the factory for injury.

[8] Mr Saunders agreed that Mr Bianchi was told that if there were no boats for him to paint other work would be offered to him if it was available. He was also told that if re-working of boats was required he would be paid $30 an hour. This mainly covered warranty work. The company was held liable for the warranty.

[9] Mr Saunders stated that the contract rate was offered to Mr Bianchi on the basis that he established himself as a business. In the initial period until he registered his business (until the end of June 1996) PAYE tax deductions of 35 per cent were taken out.

[10] Mr Saunders denied that he told Mr Bianchi he was expected to work 7.30 a.m. to 3.30 p.m. from Monday to Friday. He was advised that those were the factory's working hours. He was expected to work those hours if there was work to be done. It was a legal requirement that everyone working in the factory would clock on and clock off. Mr Saunders agreed that there was no change in the nature of the work performed by Mr Bianchi after 30 June 1996. To Mr Saunders' knowledge Mr Bianchi performed all his work on the respondent's premises and was there Monday to Friday unless he was sick, on leave or there was no work. He never turned up with other workers.

[11] Mr Bianchi claimed that he clocked on and off each day and did all his work at the respondent's premises. It was not denied that all tools and equipment (except a spray mask) needed by the applicant to perform his job were provided by the respondent. Mr Bianchi's evidence was that he was directed by Mr Nowak as to the work he was required to do. He would be told the order in which he should do each job.

[12] Each week Mr Bianchi would submit a statement listing the number and type of boats painted and any other work performed by him. He would receive from the respondent a payment advice being payment for his previous week's work. From July 1996 these were in the name of *"Deep Finish Spray Painting Service"* . The description of the payment was still *"wages"* until September 1998 when it was changed to *"contract services"* . Mr Saunders described this as an *"administrative error by our office girl"* . From June 1998 the applicant was provided with invoice forms printed by the respondent. Until that time he submitted hand written invoices.

[13] Mr Elmer stated that Mr Bianchi was one of five independent contractors on site at the respondent's factory. He described the applicant as an independent contractor because he used an invoice. He came and went as he saw fit and he was not paid annual leave or the sort of things a normal employee would get paid. Mr Elmer stated that Mr Bianchi was offered other duties but he sometimes did not accept them. He agreed that the respondent was buying Mr Bianchi's skill and labour and that there was no equipment, assets or capital that Mr Bianchi provided.

[14] The payments made by the respondent to Mr Bianchi varied. The applicant explained that in weeks that he was paid less it was probably because he was doing general labouring duties or he may have been off sick. He denied that he refused to perform duties given to him but stated that there were occasions when he went home because there was no alternative work to do.

[15] In September 1998 Mr Bianchi was approached by Mr Elmer who stated that the company wanted to formalise its arrangement with him. He was handed a document entitled *"Deed of Agreement"* . Meetings with the applicant, Mr Elmer and Mr Saunders about the document then followed. In early November there was a meeting between Mr Saunders and Mr Bianchi at which Mr Bianchi was told that he had the option of signing an amended version of the Deed of Agreement or becoming a wages employee of the respondent. A handwritten document was given to Mr Bianchi setting out possible rates of pay.

[16] On 12 November 1998 a letter was sent by Mr Saunders to Mr Bianchi offering him employment at an hourly rate of $18 per hour. Mr Bianchi's evidence was that this was considerably less than the first wage offer made to him. He told Mr Saunders that he was prepared to accept employment on an hourly rate but not the $18 contained in the letter of 12 November. This was rejected by Mr Saunders who told him that his options were to enter into the Deed of Agreement or accept the wage offer of $18 per hour.

[17] Further discussions occurred between Mr Bianchi and Mr Saunders between November and March 1999. Mr Bianchi continued to perform work for the respondent on the basis that he had done so since 1996. On 15 March the applicant met with Mr Saunders and Mr Elmer. He was told that he either enter into the contract or accept the wage offer. Both were rejected by the applicant. Mr Bianchi stated that he was then given seven days notice by Mr Saunders but later in the day was told by Mr Elmer that he could finish up.

[18] The applicant gave evidence about his attempts to find other employment after 15 March 1999.

[19] In August 1999 the business of Stacer Alloy Craft was sold by Outboard Marine Corporation.

Submissions

[20] Mr Moore submitted that the approach the Commission should take to determining the jurisdictional point was that of the High Court in Stevens and Gray v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16. That case was recently considered by a Full Bench of the Commission in Treloar Bearings Incorporated Australia Pty Limited [Print R4924]. Mr Moore referred to paragraph 43 of Treloar's case where the Full Bench summarised and analysed the existing authorities.

He further referred to paragraphs 47, 49, 51, 52 and 53 of the decision, and in particular to the way that the Full Bench considered Brodribb's case.

[21] Mr Moore further referred to the Commission's discussion of Re Porter: Re Transport Workers' Union of Australia (1989) 34 IR 179 at paragraph 56 and 66. Finally he referred to the conclusion of paragraph 70 that the test in Brodribb :

> *"Requires us to have regard to a variety of criteria, including the right to control, and matters of economic reality, including the level of economic dependency of one party on another."*

[22] He submitted that at the end of the day it was a question of not relying on any one particular criteria but balancing them and considering them in their totality.

[23] The applicant worked exclusively for the respondent just like an employee does. The level of his economic dependency is demonstrated by the fact that in the 5½ months from the termination until the company ceased to operate the business he earned just $300. He was a proficient worker who worked autonomously. The actual day to day performance of his job was not directly controlled by the respondent but what was controlled was the time and the labour he supplied. Not only did he paint boats but he performed other work as directed. He was paid for all the hours he provided. There was control in terms of the order of the painting.

[24] The applicant provided his labour and his expertise. He was there generally from 7.30 to 3.30 Monday to Friday. He clocked on and off. He did not work when the company had its annual shut down. He did not operate as a partnership or a company. He did not employ anyone. He did all his work on the respondent's premises using the respondent's equipment. He had only a limited level of responsibility for the work being performed. The risk was borne by the respondent on the quality of the work he did. The work was expected to be done by him. If he was sick it waited. If additional labour was needed the respondent directed other employees to assist him. He was treated like other employees except for the terms and conditions of payment and other entitlements.

[25] The work done by the applicant was not an ancillary, severable part of the business. Most clients wanted their boats painted. The respondent had an area on site and equipment necessary to do this.

[26] Mr Moore also referred to the advice given to the applicant by the Australian Taxation Office that for superannuation purposes Mr Bianchi was an employee and that for PAYE purposes he was an employee. Nothing was documented to say that this was indeed a contract for services. There is no question that there was any asset or goodwill which Mr Bianchi had or was able to assign. He further submitted that the intention of the parties was ambiguous. A business name is not a separate legal entity. Even if the applicant had a company which received the payments, that in itself would not be conclusive. He referred to the situation in Treloar's case. The fact that the applicant filled business tax returns is also not determinative.

[27] Mr Moore submitted that the remuneration received by the applicant was partially performance based - in the sense of each boat painted - and partly hourly based. Piece work payments are not inconsistent with the applicant being an employee. The payments were, in fact, called wages by the respondent until September 1998. The payments were an *"all-in"* rate which is consistent with an informal cashing out of benefits such as holidays and sick leave.

[28] Further submissions were made on the issue of compensation and the attempts made by the applicant to mitigate his loss.

[29] Mr Wood submitted that the applicant appeared to rely principally on the right to control, which consistent with Brodribb , is still one of the indicia. There

was no right to control and no actual control. The applicant was not obliged to work on an hourly basis. He was entitled to refuse work. He agreed to perform a range of tasks at a certain rate if and when they were offered, subject to his right not to do them. There was no evidence of a right to control Mr Bianchi's hours or overtime. The clock cards were for security purposes. The fact that the respondent put limits on the applicant's access to the premises does not turn him into an employee. The factory where the equipment was was open at certain hours. Within that framework he was free to come and go when he wanted. The fact that there was no control is indicated by the variation in the work, in the hours and in the pay received by the applicant. The fact that he worked normal business hours does not show that he was required to do so.

[30] Natural persons can be contractors. The fact that the principal specifies the job to be done does not turn the relationship of contractors and principal into one of employee and employer. The fact that what he was paid was referred to as wages in 1998 does not matter. It is the question of what was the relationship at the time of its termination. Clearly what he was paid were not wages as no tax was taken out. The starting point is what the relationship the parties intended to enter into and what was the actual arrangement. One then goes to the issues such as control, mode of payment, perhaps things like tax and related issues.

[31] The intention of the parties in May 1996 was clearly to enter into a different arrangement from what had previously existed. Mr Bianchi had been until February 1996 an employee with the usual benefits of employment, holiday pay, sick leave, long service leave, superannuation, redundancy and pay at a lower rate. This arrangement was to set up a business name, have no tax taken out, not receive the benefits he used to gut but at a much higher rate of pay. It was a new type of relationship. Why did Mr Bianchi set up a business name? Because he intended to enter in to a different relationship. Both parties knew what they were entering into. They had contracted on a different basis previously.

[32] Mr Wood made the further point that a natural person contractor does not have any goodwill in a business. Mr Bianchi contracted with the respondent on the basis of piecework and at a higher rate. Such a contractual basis is recognised by the revenue laws. It is too late three years later to try to characterise it as something else. Mr Wood made further submissions on the issue of compensation and mitigation of loss.

Conclusions

[33] Both counsel in this matter agreed that there were two issues to be determined by the Commission, being the status of the applicant as an employee or independent contractor, and, should he be found to be the former, what compensation should be payable to him.

[34] Both counsel agreed that the starting point in determining the nature of the relationship in the present case is the decision of the High Court in Stevens and Gray v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16. This is consistent with the decision of a Full Bench of this Commission in Bearings Incorporated (Australia) Pty Ltd v Treloar [Print R4924] which, after considering the decisions in that case and criticisms of the approach taken, particularly by other Courts, concluded:

> *"Despite these criticisms we are obliged to follow the most recent leading authority - namely Brodribb . This requires us to have regard to a variety of criteria including the right to control and matters of economic reality including the level of economic dependence of one party upon another."*

[35] In Jackson and Wilson v Monadelphous Engineering Associates Pty Ltd (unreported, IRC No. 281/97, 17 October 1997) Moore J summarised the criteria adopted by the Court in Brodribb as follows:

> *"Apart from control, other indicia to be considered which were identified by Mason J in Stevens, at 24 include the mode of remuneration, provision and*

maintenance of equipment, hours of work and the provisions of holidays, deduction of income tax and the delegation of work. Indicia identified by Wilson and Dawson JJ in Stevens at 36 as suggestive of an employer/employee relationship are: the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged, and the right to dictate the place of work, hours of work and the like. Indicia identified by Wilson and Dawson JJ suggesting a relationship of principal and independent contractor include work involving a trade or profession, the provisions by the contractor of the place of work or his or her own equipment, the creation by the contractor of goodwill or saleable assets in the course of his or her work, the payment by the contractor of business expenses of any significant proportions and the payment to the contractor of remuneration without deduction of income tax. However Wilson and Dawson JJ counsel against these matter being treated as a simple and conclusive checklist."

[36] Both counsel in this matter placed emphasis on the issue of control. It was not contested that the applicant worked autonomously. He was the only spray painter working on the premises and was regarded as a proficient worker. Mr Elmer's description of the process under which the applicant worked is probably the most useful in this regard (at pages 46 and 47 of transcript):

Moore: . . . as Factory Manager you had some role in day-to-day events as they came up on the factory floor obviously? --- Yes.

Yes. And that included telling Mr Bianchi the order in which the boats should be painted? --- Sometimes if there was an urgent boat coming through I might instruct him to do one in preference to something coming through.

You would instruct him to do one in preference to another if there was an urgent need? --- Yes.

And other than in that situation where there was an urgent need, Mr Nowak would be responsible for directing the order in which boats should be painted by Mr Bianchi on a day-to-day basis? --- Generally - well, it was basically a production line as such. So Danny was a cog in that system.

Yes? --- He was fed by the boats coming through, so Danny himself knew basically what was coming through next.

But if there were any particular needs or issues which arose about boats, boats coming off the production line, it would be - the first stop would be Mr Nowak in telling Mr Bianchi? --- It may - it could be either Henry, myself or Vince, the other supervisor.

And that was a fairly general occurrence on a day-to-day basis about which boats needed to be done? --- I wouldn't have thought so.

On a least a weekly basis? --- It could be weekly, yes."

[37] Mr Bianchi was a skilled tradesman. The absence of control over how he actually performed the work he was required to do is not a contraindication of employment (see Brodribb per Wilson and Dawson JJ at page 36). His work was either controlled by the availability of boats to paint - which depended on the respondent's production of them - or the direct instruction of the respondent to give priority to one boat over another. Access by the applicant to the equipment necessary for him to perform his work was also controlled by the respondent. The factory operated between particular hours. He was unable to perform work outside of those hours. According to Mr Saunders if it was necessary for him to stay back to finish a job it was usually within the hours that the factory was open

or the office was open. He had no keys to the premises.

[38] I accept the applicant's evidence that he was expected to be available for work during the factory's hours of operation. The evidence was that he did attend work during those hours unless he was sick, on leave, or there was no work. He appears to have taken leave when the company had its annual shut down and at Easter time.

[39] The applicant was also available for, and offered, alternative work if no spray painting work was available. While there was some suggestion that he did not always accept the work offered to him, this was denied by the applicant. His hours of work were also subject to monitoring by the respondent as he clocked on and off when arriving and leaving the premises. Mr Elmer's evidence was that this was for a dual purpose - in order to know who was on the site for Workcover purposes and in order to assess the invoices at the end of the week.

[40] I do not accept Mr Wood's submission that the access to the premises was analogous to the limits a homeowner might place on when a tradesman might perform work on their home. The respondent's premises during the relevant period was not only the applicant's regular place of work but his only place of work. The respondent totally controlled the availability of work to him and when and where he could perform it. The respondent and not the applicant controlled which boats Mr Bianchi painted and what other work was made available to him if no spray painting was needed. The applicant was not free to choose when and where he worked or what he did when he was at work. The fact that the amount of work and type of work varied was not a matter in the control of the applicant.

[41] The applicant was paid partly on a pro rata basis and partly on an hourly rate. Between May and the end of June 1996 PAYE tax was deducted from payments made to him. Up until September 1998 these payments were described on statements given to him as *"wages"* . Mr Saunders described this as an error on the part of the employee drawing the cheques. I note, however, that the change occurred around the time the respondent company decided to *"formalise its arrangements with its contractors"* as Mr Saunders described it. After this time, the payments were described as being in respect of contract services.

[42] The issue of taxation of payments made to the worker has been considered to be relevant to a proper description of their status. Two views have been taken of this. In Re Porter: Re Transport Workers' Union of Australia (1989) 34 IR 179, Gray J took the view that to place heavy reliance on the method of taxation:

> *"is to assume that the payer has acted in accordance with the requirements of income tax legislation in choosing one type of deduction, rather than another."*

[43] A contrary view was taken by Meagher J A in Vabu Pty Ltd v Commissioner of Taxation (1996) 33 ATR 537 who considered that:

> *"What is significant is not the couriers tell the Commissioner (of Taxation) that they are independent contractors, not employees, but that the Commissioner, presumably after making whatever investigation he deems proper, acquiesces in their description of themselves and taxes them accordingly."*

[44] The view of Gray J was supported by the Commission in Treloar . In this case, while not determinative, it is also notable that the view given to the applicant by the Australian Taxation Office was that he should have been subject to the PAYE system.

[45] The fact that payments were made to *"Deep Finish"* and not to D Bianchi is also a relevant consideration. The acquiring by the applicant of a business name was part of the original arrangement made by him with Mr Saunders. There are certain parallels here with the relationship between Bearings Incorporated

(Australia) Pty Ltd, Mrs Treloar and J A Consolidated in Treloar's case. *"Deep Finish"* was never incorporated and there was no written contract between Deep Finish and the respondent. Deep Finish was merely the business name used by Mr Bianchi. Deep Finish was not an employer of labour and it was clearly understood that the work performed would be done personally by Mr Bianchi. When he was not available the responsibility of performing the work lay with the respondent. The warranty for the quality of the work lay with the respondent and, indeed, Mr Bianchi had no responsibility to make good any defects, rather he was paid extra for any warranty work.

[46] Aside from the control test, in considering the indicia identified by Wilson and Dawson JJ in Brodribb as suggesting a relationship of principal and independent contractor the only factors relevant here are that the work involved skilled labour and payments were made to the applicant without deduction of income tax.

[47] The level of *"independence"* enjoyed by Mr Bianchi, in my view, was no greater than any employee engaged to perform specific tasks. The tasks he performed were clearly integral to the respondent's business and (with the exception of his spray mask) all tools and equipment necessary to perform the job were supplied by the respondent. The applicant was not required to remain at work if there was no work for him to do and his remuneration was related to the tasks performed by him.

[48] I accept that the relationship entered into between the applicant and the respondent in May 1996 was different to his previous employment by the respondent. He was not to be paid a weekly rate and he was to forgo payment for leave and the right to accrue such leave. Performance based pay, payment at piece work rates, payment at an hourly rate based on the work done, and payment of an all-in rate based on incorporation of leave entitlements can also occur in an employment relationship. On balance, I am satisfied that Mr Bianchi's relationship with the respondent is more accurately described as one of employee and employer than as one of independent contractor and principal.

[49] It was conceded by the respondent that if the Commission came to that view there was no valid reason for the termination of his employment, and the termination was, therefore, harsh, unjust or unreasonable.

Remedy

[50] There is no dispute that the respondent continued to operate the business known as *"Stacer Alloy Craft"* for a further 5½ months after the applicant's dismissal. Nor is it disputed that during that period of time the applicant did attempt to find other work and earned a total of $300.

[51] His earnings from 1 July 1998 to 29 January 1999 totalled $27,850. On an annualised basis had he continued to work for the respondent that would have amounted to $47,742.86. The amount he would have earned between 15 March 1999 and 31 August 1999, when the business was sold was agreed by the parties to be $ 21,882.14 (gross).

[52] The respondent argued that the applicant's duty to mitigate his loss extended to acceptance of an offer of employment made to the applicant at a gross rate of $684 per week. Had he accepted this offer he would have earned wages and superannuation totalling $17,443.14 (gross) between 15 March and 31 August 1999, a shortfall of $4,439. The respondent submitted that compensation should be limited to this amount.

[53] The respondent relied on the cases of:

· The Solholt (1983) 1 Lloyd's Rep 605; and

· Brace v Calder (1895) 2 QB 253

to support their submission that the requirement to mitigate included accepting an alternative offer of employment. This requirement would not exist if the relationship of confidence and trust between the employee and the employer had been destroyed by the termination (see Bostik (Aust) Pty Ltd v Gorgevski (No. 1) (1992) 41 IR 452) but that was not the situation in this case. There was evidence that an offer was made to the applicant of employment at what the respondent described as *"conditions comparable to the current industry rates and conditions"* . There was no evidence that the relationship between the parties had collapsed. Indeed, the applicant had originally sought reinstatement.

[54] The applicant submitted that section 170CH(7)(d) required the Commission to have regard to the efforts of an employee to mitigate his loss. The offer of employment made to the applicant provided for inferior terms and conditions as compared to those under which he was working at the time.

[55] The applicant relied on the decision of Madgwick J in Western v Union des Assurances de Paris (unreported, IRCA Dec 9604/96, 28 August 1996). In that case Madgwick J referred to the test as being *"a duty to do what is reasonable to mitigate his damages"* (see TCN Channel 9 v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130; Driver v War Services Homes Commissioner (1923) 44 ALT 130).

[56] He went on to say:

> *"Two criticisms are made of the applicant: that he should have mitigated his loss by acceptance of the new post, the same remuneration being offered, and that he ought in any case to have done more to find another job than he has.*
>
> > *The short and sufficient answer to the first criticism is the observation of Dowsett J in Beck (Beck v Darling Downs Institute of Advanced Education Supreme Court of Queensland, No. 3865 of 1988, Dowsett J, 20 April 1990, unreported)*
> >
> > > *`. . one can imagine that serious questions of waiver and novation may have been raised had he chosen to accept the offer'."*

[57] The applicant submitted that it tested the limits of credulity to conceive that the applicant could have accepted the offer made to him while expressly reserving his rights to proceed with the application.

[58] The action brought by the applicant was brought under the provisions of **section 170CE** (1). The statutory right to bring such an action requires that the employee's employment has been terminated by the employer . The position adopted by the Industrial Relations Court in Brackenridge v Toyota Motor Corporation Australia Ltd (1996-97) 142 ALR 99 that where an ongoing relationship exists, a termination of employment cannot be said to have occurred, has been generally accepted by this Commission. A recent decision of the Full Court of the Supreme Court of South Australia (Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia and Grivell , unreported 23 July 1997) distinguished Brackenridge on the basis that the Court:

> *"was constrained to given the phrase termination of employment a meaning restricted by the proper interpretation of that phrase as used in the Termination of Employment Convention".*

[59] Some support for the view that Brackenridge's case no longer applies is found in the decision of Polites SDP in Boo Hwa Chan v Christmas Island Administration [Print S1443] where His Honour pointed out the significant changes to the legislation since the earlier decision was made. Nevertheless, the practical situation in this case is that had the applicant accepted the terms offered to him in November 1998 and again in March 1999 it is likely this application would never have been brought before this Commission. Had Mr Bianchi accepted employment with the respondent on the terms proposed it is arguable that there would have been no termination of employment by the employer. As Bleby J noted in Grivell's case at page 11:

> *"Not every notice of termination of contract or unilateral action by the employer, even if repudiatory, will necessarily constitute or result in a termination of employment. There may be further negotiations which result in termination of the contract by agreement and the substitution for that contract of a fresh contract, perhaps in a lower paid classification. In that case, the termination of the contract, and hence of the employment, will not have come about by the unilateral action by the employer, but by agreement. There is then no dismissal. Alternatively, the circumstances may suggest not a termination of the original contract but a consensual variation of it to reflect changed terms. In either case there is no dismissal; there is a termination or variation by agreement."*

[60] On balance I am not prepared to accept that the failure of Mr Bianchi to accept an offer that he continue to do the same job at a reduced rate of pay can be considered to be a failure to mitigate the loss arising from the termination of his employment.

[61] Taking into account the provisions of section 170CH(7) I am satisfied that the appropriate compensation in this case is the sum of $21,582.14 (gross). This amount is to be subject to the appropriate taxation and payable within 30 days of the date of this decision.

BY THE COMMISSION:

COMMISSIONER

Appearances:

S. Moore of counsel for D. Bianchi.

S. Wood of counsel for Outboard Marine Corporation t/as Stacer Alloy Craft.

Hearing details:

1999.

Melbourne:

November 17.

Printed by authority of the Commonwealth Government Printer

< Price code D>

** end of text **

Previous Document | **Next Document** | **First Hit** | **Back to Results** | **New Query** | **Help**