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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

*Workplace Relations Act 1996*

s.45 appeal against decision and order Print S2632

issued by Commissioner Merriman on 24 January 2000

**K. Dahlstrom and others**

(C Nos. 30794, 30869, 30870, 30871, 30872 and 30873 of 2000)

s.170CE Application for relief re termination of employment

K Dahlstrom and others

and

Wagstaff Cranbourne Pty Ltd

(U Nos. 30700, 31178, 31181, 31460, 31464 and 31466 of 1999)

JUSTICE BOULTON MELBOURNE, 25 SEPTEMBER 2000

SENIOR DEPUTY PRESIDENT ACTON

COMMISSIONER SIMMONDS

*Termination of employment.*

**DECISION**

**[1]** This is an application for leave to appeal and an appeal by Ken Dahlstrom and others against a decision made by Commissioner Merriman on 24 January 2000 [Print S2632].

**[2]** The matter before the Commissioner arose out of applications under **s.170CE** of the *Workplace Relations Act 1996* (the Act) made by six former employees of Wagstaff Cranbourne Pty Ltd (the Company) alleging that the termination of their employment was harsh, unjust or unreasonable. The Company operates an abattoir at Cranbourne, Victoria and the six applicant employees were employed on the beef and mutton floors at the plant. In the proceedings before the Commissioner, the Company submitted that the terminations were necessary because of a significant downturn in the meat industry and the reduction in stock processed by the Company and that the process of selecting employees for redundancy was reasonable and fair. The Australasian Meat Industry Employees' Union (the Union), on behalf of the applicant employees, submitted that the redundancies were not genuine, that the selection process was not in accordance with the seniority provisions in the relevant enterprise agreement and that the employees were dismissed in order to remove union activists from the site so that the Company could introduce Australian Workplace Agreements (AWAs).

**[3]** In his decision, the Commissioner made a number of findings including the following:

· the termination of five of the applicant employees on 10 and 31 March 1999 was as a result of a significant reduction in work available at the Company's abattoir and was therefore for a valid reason based on the operational requirements of the employer;

· there was not a valid reason for the termination of Mr Dahlstrom on 19 February 1999 based on the operational requirements of the employer - he was terminated because of a poor attendance record and the evidence was that his absences had for the most part been condoned by the Company and that the problem had not been taken up with him;

· the selection process adopted by the Company in relation to the redundancy dismissals had regard to each employee's capacity and was fair, just and reasonable;

· there was no enforceable agreement between the Company and the Union in operation at the plant which required the application of seniority in the selection process;

· the action by the Company in seeking to cease dealing with the Union and to introduce AWAs was "not inconsistent with the Act and therefore cannot be described as an act which creates grounds for unfair, unjust or unreasonable terminations";

· although the Company treated the slow down in work in March 1999 differently than the way slow downs had been dealt with at the plant in previous years (that is, by terminating the employment of some workers for redundancy reasons rather than taking measures such as asking employees to take accrued leave or to work a shorter week), this did not lead to the conclusion that, as submitted by the Union, "the whole exercise was about removing active unionists from the site"; and

· as a result of Mr Dahlstrom's attendance record and work skills, he would have been terminated on redundancy grounds on 31 March 1999 along with other employees on the mutton floor.

**[4]** On the basis of these findings, the Commissioner rejected the applications by the employees for reinstatement. In relation to Mr Dahlstrom, the Commissioner

made an order for the payment of compensation being an amount equivalent to his wages for the period 19 February to 31 March 1999 but decided that it would not be appropriate to reinstate him in employment because he would in any event have been terminated on redundancy grounds along with other employees on the mutton floor.

**Submissions**

**[5]** In the appeal proceedings, the applicant employees challenged various findings and conclusions made by the Commissioner. It was submitted by counsel for the employees that no reasonable decision-maker could have reached the conclusions of the Commissioner on the evidence and material in the case. It was also said that the Commissioner erred in various respects in his determination of the applications before him and, in particular, that the Commissioner failed to take into account relevant considerations in reaching his decision. Further it was submitted that the decision of the Commissioner is so unclear that its proper basis cannot be established and that the decision does not set out the steps involved which lead to the conclusion. In this regard it was also submitted that the Commissioner failed to give adequate consideration and make findings in relation to each of the matters in s.170CG(3) of the Act.

**[6]** In relation to the Commissioner's finding that there was a *valid reason* for the terminations, it was submitted by the employees that the Commissioner failed to take into account all the circumstances surrounding the dismissals. In particular, it was said that there was a range of factors other than a downturn in work which led to the decision by the Company to dismiss the employees. These included the negotiations between the Company and the Union regarding the renewal of the 1995 agreement; the Company's intention no longer to abide by that agreement and its wish to enter into individual agreements with employees; the Company ceasing to recognise the Union and the abusive behaviour of the Company's directors towards the Union and its representatives; and the efforts of the Company to introduce a new set of employment and working conditions at the plant which are inferior to those under the agreement.

**[7]** It was further submitted by counsel for the employees that the Commissioner failed to take into account or give adequate reasons for his decision in relation to the evidence before him which suggested that the terminations were for reasons other than a periodic downturn and were therefore not made for a bona fide valid reason. These included: the fact that production was continued more or less at the same level immediately after the dismissals; the Company introduced reduced conditions of employment at the plant after the dismissals; the dismissals on the mutton floor occurred the day after a meeting of Union members passed a resolution of confidence in the Union and advised the Company that negotiations should take place with the Union and not with individual employees; a Company officer suggested that the dismissals were as a result of the vote at the meeting; the abusive and derogatory language used by Company directors/officers towards Union delegates, members and organisers; and the fact that the slow down in production did not require the dismissal of workers and could have been handled in a similar way to other slow downs but for the Company's objective of entering into individual agreements with its workers and avoiding the terms and conditions of the 1995 agreement.

**[8]** In relation to the Commissioner's finding concerning the fairness of the *selection process for the dismissals* , it was said that adequate reasons were not given for the finding and that the Commissioner failed to give consideration to the fact that the employees were not afforded any opportunity to respond to the alleged criteria relating to their selection for dismissal. In regard to Mr Dahlstrom, it was submitted that the Commissioner erred in that there was no evidence relating to his performance or skills as to support a finding that he would have been made redundant at the same time as other employees on the mutton floor.

**[9]** Counsel for the Company submitted that leave to appeal should not be granted in the circumstances of the present matter. It was submitted that the acknowledged principle is that the Commission "will not grant leave merely to substitute its decision for the decision under appeal" (see *Public Service Association (S.A.)* v. *Federated Clerks' Union* (1991) 173 CLR 132 at 162). Reference was also made to the Full Bench decision in *Australia Meat Holdings Pty. Ltd.* v. *McLauchlan* (1998) 84 IR 1 at 15 where it is said that:

> *"Having regard to the terms of s.170JF(2) leave to appeal should generally not be granted unless the appellant satisfies the Commission that there is an arguable case that the member at first instance had either made a legal error or had acted upon a wrong principle, given weight to irrelevant matters, failed to give sufficient weight to relevant matters or made a mistake as to the facts or that the decision was plainly unreasonable or unjust."*

**[10]** The Company submitted that the applicant employees are on appeal merely seeking the Full Bench to make a choice between competing versions of the events and circumstances surrounding the terminations of employment and to substitute its view for that of the Commissioner as to those events and circumstances. It was put that this was not the proper use of the appeal process and was not appropriate given that much depends in a case such as the present upon an assessment of the credibility of the evidence given.

**Consideration**

**[11]** The appeal against the decision of the Commissioner regarding the applications under **s.170CE** of the Act is brought under **s.45** . Subsection 170JF(2) provides that such an appeal "may be made only on the grounds that the Commission was in error in deciding to make the order".

**[12]** Under **s.45** (2), a Full Bench must grant leave to appeal "if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted ." This provides a further obligatory basis for the granting of leave and does not replace the conventional considerations: (see *Construction, Forestry, Mining and Energy Union v. Giudice* (1998) 159 ALR 1 at 20). In relation to an appeal against the exercise of a discretionary power, the principles to be applied in the determination of the appeal are broadly those which were enunciated by the High Court in *House v. The King* (1936) 55 CLR 499 at 504-505 (see also *Norbis v. Norbis* (1986) 161 CLR 513 at 518).

**[13]** In *House* v. *The King* , Dixon, Evatt and McTiernan JJ. said:

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."* (at pp.504-505)

**[14]** In *Norbis* v. *Norbis* , Mason and Deane JJ. said:

> *"The principles enunciated in House v. The King(24) were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled*

*decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."* (at p.518)

**[15]** In relation to the obligation to give reasons for decision, we note that *Edwards* v. *Giudice* (1999) 169 ALR 89 is authority for the proposition that:

*"...the Commission is, when determining an application under **s.170CE** by arbitration, obliged to give reasons for its decision which deal with the material legal and factual issues presented for determination and which deal with the matters the Commission must consider because of s.170CG (3) and the relevant provisions of s.170CH."*

(at p.93 per Moore J., see also at pp.98-100 per Marshall J.)

**[16]** In the present matter, the appeal bench is being asked in effect to review the evidence and material before the Commissioner and to reach the conclusion that the findings made by the Commissioner were not reasonably open to him. However the limits within which an exercise of discretionary power at first instance should be preserved from review on appeal must be respected (see e.g. *Formby* v. *University of Wollongong* , Print S1974, 20 December 1999). On the authorities cited, it is not the function of an appeal bench under s.170JF to conduct a review based on what the Full Bench or a party might think should be a preferred finding or approach to a particular set of circumstances. It is necessary in such appeals that some error of the kind mentioned in s.170JF(2) be shown.

**[17]** In the light of the principles applicable to an appeal from a discretionary order, we turn to consider whether there was an error made by the Commissioner in the exercise of his discretion in the present matter.

**[18]** The Commissioner found that there was a valid reason for the dismissals connected with the operational requirements of the undertaking. This was the general downturn in the meat industry at that time and the significant reduction in the work available at the Company's plant. These developments were the subject of evidence before the Commissioner which was summarised in written submissions tendered by the Company (see Exhibit R7 at paras 6 and 7). The following production figures were provided by the Company:

*(i) Production numbers on the beef floor are as follows:*

| **Month** | **1997/1998** | **1998/1999** | **% Drop** |
|---|---|---|---|
| November | 4468 | 5710 | |
| December | 5307 | 6043 | |
| January | 6151 | 4152 | 32.5 |
| February | 5963 | 4910 | 18.7 |
| March | 6061 | 3013 | 50.3 |
| April | 4972 | 2533 | 49.1 |
| May | 4624 | 4069 | |

| | | |
|---|---|---|
| **TOTAL** | **37546** | **30430** |

*(ii) Production numbers on the mutton floor are as follows:*

| **Month** | **1997/1998** | **1998/1999** | **% Drop** |
|---|---|---|---|
| November | 26885 | 24678 | |
| December | 26994 | 17752 | 34.2 |
| January | 19541 | 12441 | 36.3 |
| February | 19239 | 13297 | 30.9 |
| March | 19847 | 15478 | 22.0 |
| April | 21346 | 7278 | 65.9 |
| May | 26189 | 11681 | 55.4 |
| **TOTAL** | **160041** | **102605** | |

(Exhibit R7, Appeal Book p.560)

**[19]** In paragraphs 9 and 10 of its submissions to the Commissioner, the Company put the following:

> *"9 The downturn in the meat industry was severe, and directors and managers of Wagstaff considered that the downturn would continue for some time: transcript page 121 lines 17-21, transcript page 124, lines 26-33, transcript page 125, lines 24-38, transcript page 126, lines 5-7 and 15-18. Wagstaff was also putting more production through than it wanted to in order to maintain its employee numbers and to achieve the guarantee of a minimum weekly payment and as a result (given the scarcity of stock), was forced to pay a premium for livestock it was purchasing: transcript page 157, lines 9-16.*
>
> *10 Given the bleak outlook ahead, Wagstaff management made the decision to terminate the employment of a number of employees. In December 1998 a deliberate attempt was made by Wagstaff management to offer employees the option of winding down their entitlements, but by February and March 1999, the downturn was so bad, that this option was no longer considered fair to employees as it was not going to see the company through the downturn and employees would then be terminated with no accrued entitlements: transcript page 125, lines 1-4 and 10-14, transcript page 165, lines 8-30, transcript page 166, lines 1-3. As Jamie Ralph said in evidence `If the inevitable is going to happen you don't terminate a fellow with no weeks pay': transcript page 165, lines 18- 19."* (Exhibit R7, Appeal Book p.561)

**[20]** The finding that there was a valid reason for the terminations connected with the Company's operational requirements was in our view reasonably open to the Commissioner on the evidence and submissions before him. It is clear that there was a downturn in the industry and in the number of stock being processed at the

plant and that in these circumstances the Company might need to make decisions regarding its workforce. Although there were various options available to the Company to deal with the situation, the downturn in work at the plant and the Company's assessment as to the extent of the downturn and its implications provided a valid reason for the Company deciding upon a reduction in its workforce.

**[21]** The making of a finding as to whether there was a valid reason for the termination of employment is required under s.170CG(3)(a) of the Act. However such finding is only one of the matters to be considered by the Commission in determining whether a termination of employment was harsh, unjust or unreasonable. In particular, the consideration of whether a termination of employment is harsh, unjust or unreasonable involves a consideration of all of the relevant facts and circumstances surrounding the termination. This is evident from s.170CG(3)(e) and from s.170CA(2) which enjoins the Commission to apply basic notions of fairness in carrying out its functions under Division 3 of Part VIA of the Act (see *National Jet Systems* v. *Mollinger* , Print R3130, 18 March 1999).

**[22]** On our reading of the Commissioner's decision, consideration was given to the circumstances which surrounded the dismissals. In this regard we note that the Commissioner refers in his decision to the production levels at the plant following the dismissals; the issues and disputation regarding the application of the 1995 agreement; the allegations that the employees were dismissed because of their union activities or involvement or because of problems such as Workcover injuries; and the opposition of the Union and employees to the negotiation of individual employment agreements with changes to conditions of employment. However the findings made by the Commissioner were to the effect that the Company had a valid reason for the terminations and that other relevant considerations did not lead him to the conclusion that the selection process applied by the Company in terminating the employees' employment was other than fair, just and reasonable.

**[23]** There is no doubt that the dismissals at the plant on 10 and 31 March 1999 took place in the context of a continuing industrial dispute between the Company and the Union regarding conditions of employment. The issues in the dispute included whether work at the abattoir should be regulated by the 1995 agreement or a replacement collective agreement or by AWAs entered into with individual employees. These circumstances are, in part, the basis of the submissions put by the Union and the applicant employees in the proceedings before the Commissioner and on appeal that there was no genuine redundancy situation at the plant and that the dismissals were motivated by improper purposes on the part of the Company. Accordingly it was argued that there was no bona fide and valid reason for the terminations. We have considered the evidence and material before the Commissioner and the submissions on appeal and we are not persuaded that any error of this kind has been demonstrated in relation to the decision of the Commissioner. It is evident that the Commissioner did not accept that there was an improper motivation for the terminations as suggested by the Union's evidence and submissions. The Commissioner refers in his decision to the Company's submissions to the effect that a number of union delegates were retained in employment, that the Company directors who were alleged to have an anti-union bias were not involved in the selection process and that it was denied that the company sought to dismiss employees who were troublesome because of their union activities or other problems. It would seem that the Commissioner preferred the evidence of the Company to that of the Union in his assessment of the merits of the matter before him. Further the Commissioner took the view that merely because the Company wished to cease dealing with the Union or to introduce AWAs did not necessarily lead to the conclusion that the terminations of employment were harsh, unjust or unreasonable.

**[24]** It was submitted by the applicant employees that the Commissioner erred in not making findings in relation to each of the matters referred to in s. 170CG(3) (b), (c) and (d) of the Act (see *Chubb Security Australia* v. *John Thomas* , Print S2679, 2 February 2000). In particular it was argued that the Commissioner failed to give consideration to the fact that the employees were not afforded any opportunity to respond to the alleged criteria relating to their selection for dismissal.

**[25]** In determining whether a termination of employment was harsh, unjust or unreasonable, s.170CG(3) of the Act requires the Commission to have regard each of the matters in paragraphs (a), (b), (c) and (d) as well as any other relevant matters within the scope of paragraph (e). Subsection 170CG(3) of the Act provides as follows:

*" (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*

*(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*

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

**[26]** It is clear that the scheme under s.170CG(3) of the Act involves the making of findings in relation to the matters referred to in paragraphs (a) to (e) and then a consideration of whether a termination was harsh, unjust or unreasonable having regard to those matters. If an erroneous finding is made in relation to one of the matters in paragraphs (a) to (e), this may compromise the findings on other matters or the overall conclusion reached and the determination made in a case (see *Container Terminals Australia Limited* v. *Toby* , Print S8434, 24 July 2000). Similar reasoning may be applied in a case such as the present where no findings have been made on the matters referred to in some of the paragraphs.

**[27]** Although the terminations concerned were found to be for reasons relating to the operational requirements of the employer's business, it is clear that the selection process whereby certain employees were chosen for dismissal before other employees had regard to considerations relating to the "capacity or conduct" of the employees selected and perhaps to the "unsatisfactory performance" of some of the employees in question. These are matters referred to in paragraphs 170CG(3) (c) and (d). In the context of applications for relief under **s.170CE** (1)(a) regarding redundancy dismissals, it is appropriate to examine the matters referred to in s.170CG(3) having regard to the reasons and process followed in the selection of the individual employees for termination.

**[28]** There was evidence presented to the Commissioner regarding the selection process applied by the Company in choosing the employees from the beef and mutton floors who were to be dismissed. This evidence is referred to in the Commissioner's decision as follows:

*"The Commission now turns to consider whether the selection of the five employees was harsh, unjust or unreasonable. The selection was made by Mr Sandow, the Manager at the Cranbourne site. On 10 March 1999 six out of thirteen employees on the beef line were terminated. Mr Sandow's evidence going to each employee's capacity, the tasks they could perform and the tasks that were going to be performed given the reduction in numbers proved to the Commission that the selection criteria was fair, just and reasonable. On 31 March 1999 the Employer retrenched twelve out of sixteen employees on the mutton floor and again Mr Sandow's evidence satisfied the Commission that the process followed as to each employee's capacity given their skills and the work to be performed was a fair, just and reasonable approach as to selection. The Commission notes that on examining the criteria used on 10 March 1999, two employees had the same skill level and the employee with the greater service was retained. Although the Union tried to strongly challenge this evidence, in the Commission's view Mr Sandow's evidence on this particular aspect of the selection process was not shaken despite the heavy attack."* (Print S2632 at para 8)

**[29]** It is not evident from the decision or from the witness statement of Mr Sandow tendered in the proceedings before the Commissioner (see Exhibit R5, Appeal Book pp.551-556), that the employees concerned were advised of the reason for their selection or were given an opportunity to respond to any reason for their selection related to capacity or conduct. The selection process went beyond the application of objective criteria, such as seniority. Indeed the application of the seniority principle was a matter in dispute between the Company and the Union regarding the applicability of the 1995 agreement at the plant. The statement of Mr Sandow suggests that employees were selected for redundancy on the basis of their skills and competencies to work in a small team.

**[30]** We accept that the manner in which the case was conducted by the parties before the Commissioner did not suggest that there were issues relating to the matters referred to in s.170CG(3)(b), (c) and (d) which required consideration by the Commissioner. Indeed it would seem that these issues have only been raised in the appeal proceedings. Nevertheless we consider that they go to a fundamental aspect of the decision-making process in unfair dismissal applications under the Act and that the absence of findings on these matters warrants a review of the decision made.

**[31]** In these circumstances we have considered the evidence and material before the Commissioner and the submissions on appeal and we have reached our own conclusion as to whether the terminations in question were harsh, unjust or unreasonable.

**[32]** In relation to the matters in s.170CG(3), we make the following findings:

(a) There was a valid reason for the terminations based on the operational requirements of the Company's undertaking (s.170CG(3)( a)). In so finding, we adopt the reasons given by the Commissioner and refer to our consideration of the circumstances of the terminations and the contentions of the parties earlier in this decision.

(b) We are not satisfied that the employees were notified that their employment was being terminated for reasons of redundancy related to the operational requirements of the business, namely the downturn in the meat industry and the lower productive levels at the plant, before they were terminated (s.170CG(3)(b)) (see *P Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* , Print S5897, 11 May 2000). It is clear that the applicant employees did not accept that redundancy due to the downturn was the real reason for their dismissal.

(c) We are not satisfied that the employees were given an opportunity to respond to any reason for their selection before other employees for termination on redundancy grounds (s.170CG(3)(c)). The selection was on the basis of an assessment by management personnel (Mr Sandow and Mr Ralph) as to the skill and competency of the employees concerned. Whilst there is evidence that various matters had been raised with some of the employees about their work performance or attendance record during the course of their employment, it would seem that the employees were not, when the decision was being made to dismiss them on redundancy grounds, given an opportunity to respond to the reasons for their selection for dismissal. Further we consider that there were other deficiencies in the selection process in that it depended mainly on the assessment by management personnel, the criteria to be applied was determined solely by the Company and not through agreement or consultation with the workforce and there was no review process for challenging the assessments and determinations made by management.

(d) The evidence suggests that at least one of the employees (Mr Dahlstrom) had received previous warnings regarding his poor attendance record (s.170CG (3)(d)). The evidence of the Company's manager was that Mr Dahlstrom was made redundant on 19 February 1999 because his attendance was poor.

(e) There are a range of other matters which are relevant to the determination of whether the terminations were harsh, unjust or unreasonable (s.170CG(3) (e)). These relate to the circumstances in which the terminations took place and the impact of the terminations upon the employees concerned. Generally these matters are identified by the Commissioner in his decision. They include: the industrial context in which the terminations occurred, namely a

prolonged industrial dispute regarding employment conditions at the plant and the shift to individual employment contracts; the deteriorating relations between the Company and the Union; the suggestions that the motivation for the dismissals was more related to the industrial disputation than to the downturn in production; the other approaches adopted at the plant in the past for dealing with downturns; the selection process applied by the Company in deciding which employees were to be dismissed; and the number of employees who have been employed again at the plant since being made redundant (see Exhibit R5).

**[33]** Having regard to all these matters, we have reached the conclusion that the terminations of employment were not harsh, unjust or unreasonable. The significant downturn in the industry and lower production levels at the plant provided a basis for the Company's decision to reduce its workforce. Although the terminations due to redundancy took place in the context of a long running industry dispute, we are not persuaded on the evidence presented that the applicant employees were targeted for dismissal for reasons other than on the basis of an assessment by management of their work skills and performance. Furthermore, although there were deficiencies in the selection process applied at the plant in that there was inadequate consultation and discussions with the employees concerned, we do not conclude on that basis that in all the circumstances the terminations were harsh, unjust or unreasonable. Given the decision to make terminations on redundancy grounds, it has not been shown that it was more appropriate on skill or performance grounds to dismiss other employees on the beef or mutton floors in preference to those selected by the Company.

**[34]** It is difficult in circumstances where there is industrial disputation between parties to make an assessment of whether or to what extent the fact of that disputation occurring has influenced a decision to dismiss employees involved. The present matter is not an easy one to determine because of the circumstances in which the terminations took place and the conflicting evidence and submissions presented regarding the reasons for the terminations. If the conclusion had been reached that the primary motivation for the dismissals or for the selection of particular employees was for purposes related to the industrial disputation rather than for genuine redundancy reasons and based on an assessment of comparative skills and/or work performance, this would have supported a finding that the terminations were harsh, unjust or unreasonable. However, on our consideration of the evidence, we have not been able to reach such a conclusion.

**[35]** In determining the matter, we have considered the totality of the circumstances in which the terminations took place. We have therefore examined the evidence and submissions presented by the applicants and their Union relating to the failed negotiations between the Company and the Union, the introduction of AWAs and changed conditions of employment at the plant, the disputation between the Company and the Union, the changes in the production and employment levels at the plant and the harsh effects of the dismissals on the employees concerned. The evidence and submissions of the Company regarding the reasons for the dismissals and the selection of employees contradicts or challenges much of what was put by the applicants. Our consideration of the evidence presented and the circumstances of the dismissals leads us to the conclusion that the dismissals were the result of a significant downtown in work and were an understandable and reasonable response to the downturn, even though they were decided upon by the Company and effected in the course of a bitter industrial dispute.

**[36]** We have also considered the submissions of the applicants in relation to the Company's failure to consult with employees prior to deciding on the redundancy dismissals and its failure to consider alternatives for dealing with the downturn other than dismissals. In this regard, we note that in his decision the Commissioner "notes that no point was made by the applicants or the Union as to any complaint regarding the issue of consultation and again relying upon practices within this industry the Commission understands and accepts why it was not an issue in this case." (Print S2632 at para 12)

**[37]** It is clearly desirable for consultation to take place in redundancy situations between employers and affected employees and/or their representatives. Such consultation in the present matter could have extended to the consideration of measures other than dismissals to deal with the problems facing the Company. In some respects, given the tensions between the Company and the Union, it is understandable that consultation did not take place. Despite the overall desirability of consultation, the Company's failure to consult in the present matter has not, when viewed in the totality of the circumstances, lead us to conclude that the terminations of employment were harsh, unjust or unreasonable.

**[38]** For all the reasons given, we have decided that the termination of the applicant employees' employment was not harsh, unjust or unreasonable.

**[39]** We now turn to consider the matters raised in the appeal regarding the order made by the Commissioner in relation to Mr Dahlstrom. It was submitted by the applicant employees that the Commissioner erred in relation to his findings regarding Mr Dahlstrom. The Commissioner found that there was no valid reason for the termination of Mr Dahlstrom's employment on 19 February 1999 and then considered the appropriate remedy to be awarded. The Commissioner was satisfied having regard to the evidence before him as to Mr Dahlstrom's attendance record and work skills that he would have been terminated on 31 March 1999 along with other employees on the mutton line. It is noted that 12 out of the 16 employees on the mutton floor had their employment terminated by the Company on 31 March 1999. In these circumstances the Commissioner rejected the claim by Mr Dahlstrom for reinstatement but ordered that he be paid wages for the period 19 February to 31 March 1999. In considering the remedy to be awarded, it was open to the Commissioner to make an assessment as to how long the employee would have remained in employment and to take this into account in the assessment of compensation (see e.g. *Slifka* v. *J.W. Sanders Pty Ltd* (1995) IR 316). It has not been shown that there was any error in relation to the Commissioner's decision or that the conclusions reached in regard to the order for compensation were not reasonably open to the Commissioner. Accordingly we do not consider that there is any basis for overturning the decision and order made in relation to Mr Dahlstrom.

**Conclusion**

**[40]** For the reasons given, and in particular the absence of findings regarding some of the matters referred to in s.170CG(3), we have decided to grant leave to appeal. In relation to the decision of the Commissioner regarding the terminations which took place on 10 and 31 March 1999, we have decided to allow the appeal. However we have decided, for similar reasons to those given by the Commissioner, that these terminations were not harsh, unjust or

unreasonable. In relation to the decision and order of the Commissioner regarding Mr Dahlstrom, we dismiss the appeal.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

*Appearances:*

*E. White* of Counsel for the applicant employees.

*S.* ***Wood*** of Counsel for Wagstaff Cranbourne Pty Ltd.

*Hearing details* :

2000.

Melbourne:

June 5.

**Decision Summary**

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| | | Termination of employment - unfair dismissal - appeal - full bench - six appellants meatworkers terminated from abattoir - Dahlstrom had succeeded in obtaining compensation others unsuccessful - challenged findings and conclusion of Commissioners' decision - argued failed to take into account relevant considerations - failed to make findings in relation to each matter in s.170CG(3)(a) to (e) - employer argued not proper use of appeal process - necessary in such appeal process to show error - original proceedings found dismissals valid due to downturn in meat industry - noted industrial dispute between Company and Union - dismissals - not evident employees advised of reason or given opportunity to respond to their selection for dismissal based on capacity or conduct - certain s. 170CG(3)(b), (c) and (d) issues raised only in appeal proceedings but nonetheless fundamental to decision making process - absence of findings warrants review of decision - appeal allowed but concluded valid reason and terminations not harsh, unjust or unreasonable - reason downturn in work not industrial disputation - compensation order - error not shown in Commissioner's decision re Dahlstrom or on amount of compensation - leave granted - appeal dismissed. |
| Appeals by K. Dahlstrom and others against decision of Merriman C of 24 January 2000 [Print S2632] | | |
| C No 30794 of 2000 and ors | | Print T1001 |
| Boulton J<br><br>Acton SDP<br><br>Simmonds C | Melbourne | 25 September 2000 |

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