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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

[s.170CE](#) application for relief in respect of termination of employment

C Kovacs

and

Wilson's Group Services

(U No. 31326 of 2000)

COMMISSIONER LEWIN

MELBOURNE, 19 MARCH 2001

Alleged unlawful termination

DECISION

[1] Constance Kovacs was an employee of Wilson's Group Services (the company). She commenced her employment in April 1996. The employment was terminated at the initiative of the company on 7 April 2000. Ms Kovacs seeks relief in respect of the termination of her employment pursuant to [section 170CE](#) of the *Workplace Relations Act 1996* (the Act). The matter has a long history. Conciliation pursuant to section 170CF(1) of the Act has been unsuccessful and a certificate issued pursuant to section 170CF(2). The applicant elected to proceed to arbitration pursuant to section 170 CFA. The matter was heard by me accordingly in the second half of 2000. Final submissions were received on 29 December 2000.

[2] A significant volume of evidence was called in the matter. In broad terms the evidence dealt with two significant subjects. The first concerned events at the workplace on 7 April 2000 concerning Ms Kovacs' performance of her duties, the second concerned Ms Kovacs' discovery of an item of lost property on 9 March 2000 and its ultimate disposition.

[3] To set the issues in the matter in context, in what must be a very minimal sense, it is useful to describe the relevant activities of the company and Ms Kovacs.

[4] The company is a contract service provider to the Melbourne Airport at Tullamarine. The relevant service in this matter is management of the taxi traffic at the arrivals area. It was as a part of a team of employees engaged in the provision of this service that Ms Kovacs worked. Having regard to the evidence in this matter it would be a euphemism to describe the workplace culture as distinct. All of the witnesses employed by the company portrayed, either directly or indirectly, a set of individual characteristics and interpersonal relationships of a Byzantine flavour which, in my view, established a unique and heightened atmosphere of drama, no doubt sensitised by the hustle and bustle of the general atmosphere of the airport itself.

[5] Until the second half of the twentieth century the romance, mystery and shadowy ambiguity of maritime ports occupied a specific place in the cultures of the world. Aviation and its rapid development has led to the focus of human movement shifting from maritime ports to airport passenger terminals. The mythical status of ports such as Venice, Genoa and Marseille has been replaced by the great air terminals LAX, JFK and Heathrow. Since the Peter Styvesant advertisements of the 1960s airports have figured as sites of excitement and escape in popular perception. No doubt work in the economy of aviation has a post modern flavour of the life without boundaries.

[6] This digression into popular culture is appropriate because it is necessary to say, I think, that much of the evidence and indeed some of the witnesses, affected a certain detachment from reality and a tendency to formulate fragmented and fictional narratives of the central events in this matter, which were extraordinarily fantastic, implausible and complex.

[7] This situation presents something of a Gordian knot which I think I must cut through for reasons of expedition. I consider, given the nature of the evidence of several of the key witnesses, that a forensic description of each witnesses' evidence and a discussion of those parts of it I found credible and those which I consider incredible would be monstrously time consuming and of little utility. Nevertheless, there should be no misunderstanding I have given the evidence in the matter careful consideration and I have reached conclusions which I think are available to me on the evidence for reasons which I state where appropriate.

[8] I turn first to the events of 7 April 2000.

[9] In essence these were the events which gave rise to the termination of Ms Kovacs' employment. It is submitted on her behalf that a proper construction of those events should lead to a conclusion that they did not, in context, constitute a valid reason for the termination of the employment.

[10] The events themselves were closely related to conflict between Ms Kovacs and Mr Lakkis. Both gave evidence. There is no doubt on this evidence that the relationship between the two was highly dysfunctional and poorly managed by the company.

[11] The conflict between Ms Kovacs and Mr Lakkis seems to have its origin in the complex social network which exists between employees of the company and probably employees of other companies at the airport.

[12] Apparently there had been parties, at one of which insults were made by Mr Lakkis towards some members of a social group described as either the "Maltese Falcons" or the "Maltese Connection", with whom Ms Kovacs has an ambiguously defined social relationship. These insults led to lingering antagonism.

[13] It seems that this conflict was acted out in behaviours by Mr Lakkis and Ms Kovacs at the workplace, in particular in communication over the distribution of taxis from the main feeder rank to the Qantas and Ansett ranks respectively. There were reciprocal and complementary allegations concerning the two employees working against each other and deliberately causing confusion in the allocation of taxis, which resulted in scenes of frustration and indignation among the taxi drivers present, with readily imaginable effects on the general scenario.

[14] On the evidence before me, I am satisfied that this situation had led to an unsatisfactory working relationship between Ms Kovacs and Mr Lakkis which gave rise to conflict over situations of this kind which occurred on 7 April 2000 which was particularly stressful to Ms Kovacs and led to her departure from the workplace for this reason contrary to instructions issued by management.

[15] My conclusion therefore does not support the company's assertion that Ms Kovacs' misconducted herself by simply refusing to comply with a reasonable direction without mitigating circumstances. I think that whilst Ms Kovacs' behaviour was problematic on that day, having regard to all the circumstances, I do not think it constituted serious and wilful misconduct and did not constitute a valid reason for termination of the employment. I think her mental health was the cause of her departure from the workplace. Moreover, if the relevant conduct were to be considered a valid reason to terminate the employment I do not consider that the issue of her departure constituted an abandonment of her employment as contended for by the respondent or was dealt with in a manner which meets the considerations of procedural fairness referred to in [section 170CG](#) G(3)(b) and (c) of the Act in respect of her conduct on that day. In this respect on the facts before me and accepting as I do Ms Kovacs account of the events, or at least the weight of it, in my view, the termination was unfair, there was not "a fair go all round" in the manner in which the situation was dealt with. Not only is it the case, in my judgement, that in the circumstances of 7 April 2000 and their context the reason for the termination was not valid but also the procedures of the company, in the context, were inadequate and summary.

[16] I now turn to the question of the lost property and its disposition previously referred to. On 9 March 2000, in the course of her duties, Ms Kovacs found a watch in a white box. Her duty was to place the watch with the lost property service of the airport. Ms Kovacs claims that while she was walking to the lost property office she was approached by a tall, dark man in a beige suit, who had happened to pull up in a taxi just at the moment when she was about to enter the terminal building to take the watch to the lost property office. She says the man asked her if she had found a watch and told her that it belonged to him. She says she gave the tall, dark man the watch. There is no evidence of the identity of this man. Ms Kovacs did not seek to obtain the man's identity or establish the validity of his claim in any way. She says she simply gave the watch to him on request. I found this evidence unconvincing.

[17] Mr Carmelo De Nino's evidence is that he saw Ms Kovacs put the watch into a bag being carried by Mr Pat Cassar.

[18] Mr Cassar, obviously by coincidence only, is a tall dark man who attended the Commission in a slate blue suit and is a member of the "Maltese Connection". Mr Cassar is a friend of Ms Kovacs.

[19] I found Mr De Nino's evidence in this respect just as inherently unconvincing as that of Ms Kovacs, denied as it was by Mr Cassar and Ms Kovacs. I should observe that I found the demeanour of Mr De Nino troubling, he was an extremely furtive witness. I was surprised by the extent of delays between questions and answers during his evidence and his reticence. His body language in the witness box was unsettling. Be that as it may, in the final analysis of this matter, I doubt that much turns on it, for reasons I hope will become apparent.

[20] On Mr De Nino's account Mr Cassar and Ms Kovacs casually walked to meet one another in the middle of a pedestrian crossing, on the Melbourne Airport roadway leading to the arrivals area. A more exposed situation is hard to imagine in the context of this matter. In broad daylight the two of them

stood opposite one another. Mr Cassar is said to have smiled and opened a sports bag with both hands so that Ms Kovacs could place the watch, in its white box, into this bag for all the world to see.

[21] In any event the conclusive effect of this evidence is undermined by the witness statement of Mr McCarthy who I will refer to shortly. Paragraph 108 of Mr McCarthy's statement includes evidence of a conversation about this subject; the following reference to Mr De Nino as *Charlie* :

"Charlie further stated that Pat Cassar had apparently taken the empty white box in which the watch was found , placed it in his work bag and removed it from the airport separately when he ceased his duties." (Emphasis added)

This description of the facts does not fit neatly with that which I have described above.

[22] Ms Kovacs' evidence is that she found the watch. She accepts that she did not deposit the watch in the lost property service. What very limited references I have made so far to the evidence about the lost watch are merely a tiny illustration of what I consider to be a maze of absurdity in the evidence concerning the loss, discovery and disappearance of this piece of property.

[23] The evidence of Mr McCarthy the manager of the taxi allocation service is equally bizarre and implausible. Mr McCarthy is a former police detective. His evidence would have me believe that he was contacted by a mysterious person named "Mary", a person he failed to identify, who called in search of the lost watch. The effect of this evidence is obviously to undermine Ms Kovacs' suggestion that she had returned the watch. I assume in order to establish that the watch had not been recovered or abandoned but was subject to action for its recovery by the rightful owner who, in this fanciful account, I can be satisfied was not a tall, dark man in a beige suit. Given that this mysterious and unidentifiable individual goes by the name of "Mary".

[24] That a former police detective would not take the full name and address of a member of the public who informed him that she had been told by a taxi driver to telephone him because she had reason to believe that an employee under his management had recovered a valuable piece of her personal effects beggars belief.

[25] Furthermore, one may pause to reflect on the level of coincidence of the mysterious "Mary" encountering a taxi driver, who had been at the airport when the white box was left on a baggage trolley and had been attentive enough to note what became of it, during "Mary's" travels around Melbourne subsequently. This is yet another illustration of the burden that much of the evidence in this matter places upon detailed description, comprehension and construction for decision making purposes.

[26] The unbelievable proposition that a mysterious individual named "Mary" spoke to taxi drivers of Melbourne, generally, during several days after leaving her watch at the airport and happened across a driver who saw and remembered exactly what had happened at the airport that day, which led to "Mary" identifying and ringing Mr McCarthy about a week after the loss of the watch and then failing to contact him subsequently or to leave any accurate contact information casts a pall over the credibility of Mr McCarthy's evidence. This damage to his credibility applies to my evaluation of it concerning the events of 7 April 2000. However, again for reasons which I hope will become apparent, in the final analysis, these observations are not crucial to the ultimate outcome of this case.

[27] In the course of the evidence it was also revealed that on the day that Mr McCarthy informed Mr Cassar of his concerns that Ms Kovacs may have been involved in the lost watch saga he was subsequently contacted in quick time by a Mr Mifsud, another employee of the company, who told Mr

McCarthy that he was on duty on the day of the lost watch. Mr Mifsud said he had been approached by a man with an accent "*possibly French*" who claimed to have lost a watch. Mr Mifsud says he directed this man to the lost property office. Suddenly the identity of the tall dark man in the beige suit is given, in this fantasy, a more substantive construction as some one from a former French colonial society, such as Algeria or the Seychelle Islands. This further mysterious, fragment of information I think is too coincidentally timed to be taken as more than a part of the cat and mouse game being played by the "Maltese Connection", its enemies and "Tamany Hall".

[28] There was a suggestion made on behalf of Ms Kovacs that if Mr McCarthy had been contacted at all by a "Mary" it was most likely to have been Mary Lakkis the wife of Andre. This suggestion bears no proof and for obvious reasons I prefer to leave the invited speculation alone.

[29] I return to the ultimate disposition of the watch. I reject Mr McCarthy's evidence about the contact from the mysterious and miraculous "Mary". Indeed it is a dishonourable thing that the name of a Saint should be so sorely used in this shoddy and unnecessary fantasy about the lost watch.

[30] The evidence of Ms Kovacs I think is the crucial aspect of this matter. Tragically for her it is, in my view, conclusive of itself for the purposes of a civil proceeding. Such that it is more likely than not, on her evidence, that she maintained possession of the watch contrary to her responsibility to deposit this item of property with the lost property service. However, I should note that I think to reach a conclusion concerning the misappropriation of lost property a higher standard of conviction or "proof" than simply the balance of probabilities is required. Nevertheless, on the higher standard, which I consider falls short of the criminal onus, having regard to the circumstances, I am still satisfied on the evidence that Ms Kovacs did not carry out her duty to take the watch to the lost property office and did not give it to a tall, dark stranger.

[31] Ms Kovacs testified that subsequent to the day that the watch was lost and, according to her, was given to the tall, dark stranger she informed other airport staff that she had a watch for sale. Her evidence is that she said this only as a joke. I do not accept this explanation it is no more convincing than parts of the evidence of Mr De Nino, Mr Cassar and Mr McCarthy.

In these circumstances what should I find?

[32] The requirements of the legislation in this respect are set out below:

170CG(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.'

[33] My findings are that Ms Kovacs' conduct in respect of the events of 7 April 2000 concerning the allocation of taxis to the ranks, the conflict with Mr Lakkis and her departure from the workplace in the overall context of the evidence and the employment, particularly Ms Kovacs' health and well being, did not constitute a valid reason for the termination of the employment nor was Ms Kovacs afforded a reasonable and substantial opportunity in the circumstances to deal with the allegation that she was guilty of misconduct, pursuant to section [s 170CE](#) (3)(b) and (c) hence the termination was harsh, unjust and unreasonable.

[34] In respect of the failure to deposit lost property found by Ms Kovacs on 9 March 2000 this, on the evidence before me, constituted a valid reason for the termination of the employment. However, Ms Kovacs was not afforded procedural fairness in relation to this matter in the manner identified for consideration by [section 170CG](#) (3)(b) and (c) of the Act. Whilst the misappropriation of the lost property is a matter to be taken seriously so is an employee's entitlement to an opportunity to deal with allegations of misconduct and to make out a case for lenient disciplinary action if they are considered proven. The lack of procedural fairness in relation to this incident, which was pre-empted by the termination of Ms Kovacs' employment, in my view, problematises what utility the validity of this reason for the termination has. Submissions on behalf of the company referred to the situation as follows:

"The Respondent further submits that the theft of the watch by the Applicant on 9 March 2000 constitutes an additional valid reason for the termination of the Applicant's employment. It should be noted in this regard that the investigation which was being conducted by Graham McCarthy would, had the Applicant not abandoned her employment on 7 April 2000 lead to the circumstances surrounding the watch being put to the Applicant in a formal sense and, depending upon the outcome of the Respondent's investigation, may have lead to the termination of the Applicant's employment."

[35] However, there can be no doubt that if the incomplete investigation had anything to do with the termination, the termination was unfair because Ms Kovacs was also denied adequate procedural fairness, as identified in [section 170CG](#) (3)(b) and (c) of the Act in respect of this matter.

[36] The subject of the lost property was under investigation at the time of the termination of the employment. How long that investigation would have continued is a matter of judgement. In my judgement, to complete the process fairly and arrive at an appropriate conclusion would not have taken a great deal of time under normal circumstances. However, the uncertainty of Ms Kovacs' health, the likely exacerbation of the stressful condition she found herself in arising from the prosecution of the investigation and possible challenges to the findings of the investigation, given some of the incredible aspects of the efforts to make the charges stick by Mr McCarthy, add up, in my view, to more than the period of a week, which counsel for the company estimates. In all of the circumstances I will assume a period of four weeks having particular regard to Ms Kovacs state of health and well being at the time.

[37] In addition there is the prospect that Ms Kovacs may have been successful in persuading the company either that proof of the allegation was insufficient to warrant termination or to take disciplinary action which fell short of termination. Other possible developments and courses of disciplinary action less prejudicial to Ms Kovacs cannot be ruled out. If Ms Kovacs had the watch in her possession she may have returned it with an apology.

[38] This discussion essentially concerns the fairness of the course of the company's procedure and the impact on Ms Kovacs' chance to minimise the effects of her conduct. This type of consideration is akin to that which is given by courts dealing with common law proceedings in relation to breaches of contract and claims for damages. Whilst the jurisdiction of the Commission is distinct and different, some of the conceptual aspects of the jurisprudence involved is amenable to the peculiar facts of this case, for the purpose of considering any remedy which might be appropriate.

[39] In *Mallet v McMonagle* [1970] AC 166 at 176 Lord Diplock said:

"The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past the court decides upon a balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, even in the amount of damages which it awards."

And referring to *Davies v Taylor* [1974] AC207 at 213:

"The guide to answering this question must be in the rationale for adopting the loss of the chance principle. The starting point must be the statement of principle by Lord Reid in Davies v Taylor...."

'You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is evaluate the chance. Sometimes it is virtually 100 per cent: sometimes virtually nil. But often it is somewhere in between.'

[40] This approach was adopted by both the majority and minority decision of a Full Bench of the Federal Court of Australia in *Gregory v Phillip Morris Ltd* 80 ALR 455.

[41] In all of the circumstances I think that a remedy is appropriate for reasons which follow, including my view that the effect of the remedy will have no or little effect on the viability of the company's business. Ms Kovacs' length of service, in my view, is sufficient to warrant a remedy. In the circumstances however, I do not think that reinstatement is appropriate or practical.

[42] I return to the period I have allowed for the completion of the investigation of the circumstances of the lost watch. Ms Kovacs did not seek other work in the four weeks after her dismissal or indeed for the longer period between the termination and the hearing. On the evidence before me, I think her state of health and well being mitigates this situation for a period subsequent to termination sufficient for the purposes of the appropriateness of the remedy I will soon set out.

[43] There is however, some possibility that the incidence of paid sick leave entitlements may have impacted on the remuneration Ms Kovacs might have earned in the four weeks I have allowed for the period taken to complete the investigation of the lost property incident and deliberation on the appropriate response. I will exercise my discretion to disregard contrary possibilities, such as there being insufficient paid sick leave available to cover possible illness during that time or the company choosing to stand Ms Kovacs down without pay during the period of the investigation and apply a contingency deduction of 25% to this period instead. There is a roughness to the treatment of these contingencies. However, I think, having fixed the four week period, more specific speculation on the possible eventualities in that time, in relation to the remuneration Ms Kovacs would have earned but for the termination, would only elaborate the uncertainty of what by necessity must be an estimate. I will therefore award an amount equal to three weeks pay in this respect.

[44] The amount of remedy I will order will not provide for deductions in respect of social security payments or WorkCover entitlements which may have been received by Ms Kovacs. The relationships of any award by the Commission to such entitlements are, in my view, a matter for the agencies concerned.

[45] In reaching my conclusion as to the specific nature of the remedy I intend to award, I have come to the conclusion that on the evidence before me there is nothing to suggest that the remedy will affect the viability of the company's undertaking. I think that Ms Kovacs' period of service is sufficient to warrant a remedy of the amount provided. I have dealt with the remuneration Ms Kovacs would have received but for the termination and the issue of mitigation generally.

[46] In respect of the loss of a chance I have identified, in my judgement, the prospects of Ms Kovacs achieving a less prejudicial outcome than termination as a result of the investigation concerning the watch were poor. I have also taken into account the viability of continuing employment in light of the conflict in the workplace, what I consider to be the inadequacy of its management and Ms Kovacs' state of health. I have also taken into account the issue of mitigation. The amount I will award is therefore small. I will award an amount equivalent to four weeks pay in respect of the "loss of a chance" arising from the coincidence of the events concerning 7 April, the investigation arising from the discovery of the watch on 9 March and the failure to provide procedural fairness in relation to this issue.

[47] It was submitted on behalf of Ms Kovacs that I should award an amount on account of shock, humiliation and stress due to the termination and the manner of its execution. I am not persuaded to do so. On the evidence before me, I am unable to discern the degree to which this originated from the work itself or the termination. No doubt there was aggravation. However, I do not feel confident enough on this point to make such an award.

[48] I will order a total payment of an amount equivalent to 7 weeks pay, comprised of the two aspects identified in the assessment of the appropriateness and amount of remedy, namely the period I have estimated for completion of the investigation of the circumstances of the lost watch and the "loss of a chance" that Ms Kovacs may have been able to secure more lenient

treatment in the event that at the conclusion the company had found the allegations proven and proceeded to consideration of what disciplinary action was appropriate.

BY THE COMMISSION:

COMMISSIONER

Appearances :

I Fehring, of counsel, for the applicant.

S  Wood , of counsel, for the respondent.

Hearing details:

Melbourne, 23, 24 and 25 August 2000.

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