

[2007] AIRC 710

PR978032

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.643 application for relief in respect of termination of employment

Adam Draganovic

and

Telstra Corporation Limited
(U2007/2244)

COMMISSIONER SIMMONDS

MELBOURNE, 24 AUGUST 2007

*Termination of employment – costs application.***DECISION**

[1] On 22 January 2007, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), on behalf of Mr Draganovic, lodged an application under section 643 of the *Workplace Relations Act 1996* (the Act). The application alleged that the termination of his employment with Telstra Corporation Limited (Telstra) on 19 January 2007 was harsh, unjust or unreasonable. That application was the subject of an unsuccessful conciliation proceeding before Commissioner Lewin on 20 February 2007. Subsequently, an election was made to proceed to arbitration in the Commission.

[2] The matter came on for arbitration before the Commission as presently constituted on 7 May 2007 and it continued on 8 May 2007. Following the luncheon adjournment on 8 May 2007, the Commission was informed that Mr Draganovic was discontinuing proceedings. The matter was adjourned. On 11 May 2007 a notice of discontinuance was filed, wholly discontinuing the application.

[3] On 22 May 2007 Telstra filed and served an application for costs. The application was based on the provisions of s.658(1) and 658(2) of the Act. Those provisions are as follows:

“(1) If the Commission is satisfied:

(a) that a person (first party):

(i) made an application under section 643; or

(ii) began proceedings relating to an application; and

(b) the first party did so in circumstances where it should have been reasonably apparent to the first party that he or she had no reasonable prospect of success in relation to the application or proceeding;

the Commission may, on application under this section by the other party to the application or proceeding, make an order for costs against the first party.

(2) If the Commission is satisfied that a party (first party) to a proceeding relating to an application under section 643 has acted unreasonably in failing:

(a) to discontinue the proceeding; or

(b) to agree to terms of settlement that could lead to the discontinuance of the application;

the Commission may, on an application under this section by the other party to the proceeding, make an order for costs against the first party."

[4] In respect of the part of the application based on s.658(1), Telstra's claim was:

"On the facts apparent to Draganovic at the time he instituted his Application for relief it should have been reasonably apparent to him that his application was manifestly untenable or groundless for reasons including:

- (1) that Telstra had a valid reason for terminating [his] employment related to his conduct;*
- (2) that damage to Telstra property, particularly a security camera, was sufficient to justify the summary termination of [his] employment;*
- (3) that the subsequent removal of the CCTV camera from its original location exacerbated the seriousness of [his] conduct;*
- (4) that the act of theft only further exacerbated the seriousness of [his] misconduct;*
- (5) [he was] afforded procedural fairness both prior to and at the time of the termination of his employment; and*
- (6) [his] behaviour during the PICM [Performance Improvement and Conduct Management] process breached his obligation of trust and confidence that he owed to Telstra."¹*

[5] In respect of the second part of the application based on s.658(2), Telstra relied on what it described as Mr Draganovic's unreasonable failure to discontinue either, on receipt of Telstra's witness statements and documentary material served on 30 April 2007, or prior to the commencement of the hearing on 7 May 2007. Telstra claimed that it made an offer to Mr Draganovic on 1 May 2007. In that offer, it advised it would accept discontinuance of the application in exchange for him contributing \$15,000.00 towards its legal costs. That offer was rejected.

¹ Application for costs, paragraph 1.4.

[6] The “unreasonableness” of his actions in failing to discontinue was evidenced by the matters set out in respect of its s.658(1) claim together with the following matters:

“ ...

- (2) *that the witness statements and documentary material filed on behalf of Telstra only confirmed what should have already been reasonably apparent to Draganovic, namely that his Application ... was manifestly untenable or groundless;*
- (3) *that Telstra was able to provide an overwhelming amount of witness and documentary evidence to demonstrate that the termination of [his] employment had not been harsh, unjust or unreasonable;*
- (4) *that even absent Telstra's witness evidence there was a preponderance of documentary and physical evidence which 'put lie' to [his] witness evidence; and*
- (5) *[Telstra's] offer was reasonable having regard to the costs that Telstra had already been forced to incur as a result of [his] continued pursuit of his Application for relief which was manifestly untenable and groundless.*²

[7] It was Telstra's position that Mr Draganovic had entered the Northcote, Victoria, telephone exchange on 1 December 2006, and while there he damaged, without any excuse, a security camera and had stolen or had attempted to steal that camera. Mr Draganovic knew so much at the time of instituting his application, and, thus, it should have been reasonably apparent that he had no reasonable prospect of success. Telstra invited the Commission to find that the evidence advanced in the hearing, prior to the discontinuance, supported its position. Critically, Telstra referred to Exhibit E5, a diagram of the position of the CCTV camera prepared by Mr Draganovic. It claimed that the diagram lacked credibility, as the camera could not operate in the fashion described in the diagram.

[8] Ms Andleman, appearing for Mr Draganovic, argued that, on the facts apparent to Mr Draganovic at the time he lodged his application, it was not apparent that his application was groundless or untenable. He had eleven years of unblemished service with Telstra; and the investigation leading up to his termination was predicated on the allegation that he had stolen the surveillance camera in circumstances that were highly prejudicial to Mr Draganovic. He admitted, at the first opportunity, that he had removed the camera and that he should have informed his team leader and did not do so. He denied stealing the camera, but placed it on top of a cupboard in a room adjoining the passage where the camera had been installed. The only damage to the camera was to the end of the rod securing the camera to its base. There is no evidence that he stole the camera.

[9] In respect of the claim under s.658(2)(a) of the Act, Ms Andleman submitted that the certificate issued by Commissioner Lewin was a neutral one containing nothing to suggest that he should not proceed to have the matter arbitrated. Subsequently, he received the material supplied by Telstra only four clear days before the proceedings commenced. The material was voluminous and difficult to decipher. Moreover, there were a number of deficiencies in the evidence presented by Telstra.³

² Ibid, paragraph 2.3.

³ Exhibit E6, Section 2(4)(b).

[10] In respect of the claim under s.658(2)(b) of the Act, Ms Andleman contended that there was no offer to settle the proceedings under s.643(1)(a) of the Act, rather it was a written notice that Telstra may make an application for costs. There was no reasonable offer of settlement together with demonstrated acts of negotiation and conciliation. In fact, Mr Draganovic made two offers of settlement on a without prejudice basis, the first seeking reinstatement and the second seeking permission to resign. Both offers were rejected and no attempt was made to enter into negotiations. He also attempted to seek further conciliation in the week before the commencement of arbitration proceedings. However, Telstra refused to participate.

[11] The evidence before the Commission is essentially the information presented by Mr Draganovic in his examination in chief and his responses to cross-examination. This is because the matter was discontinued before any of Telstra's witnesses were called. The Commission and the parties also had the benefit of a view of the Northcote telephone exchange on the morning of the first day of hearing, 7 May 2007.

[12] What is apparent from the evidence is that the camera in question was operating normally at the time he entered the exchange. The vision from the camera was captured in a number of still photographs over almost six months.⁴ The only conclusion available from the photographs is that the position of the camera was identical over that time.

[13] The camera is supported by a rod, approximately 100-mm in length, and sits on top of the rod. When attached to its mounting plate, the camera is located above the mounting plate. Because of the design, if it became disconnected from the mounting plate, it would necessarily fall and be below the rod, while hanging from the connecting wiring. So much is apparent from the description provided by Mr Draganovic in Exhibit E5. Thus, for Mr Draganovic's claim that the camera was hanging down from its mount and held up only by the wiring, as claimed in Exhibit E5, it is necessary to conclude that it had been in that position for some months. In the light of the camera's location and the regular use of the corridor by Telstra employees and contractors, it is inconceivable that it would not have been noticed at some time in the months before and reported. Mr Draganovic conceded as much when he stated:

*"However I did notice that this camera did not appear to be correctly positioned. It was noticeably lower than I had observed before. I had been to the Northcote Exchange a couple of days before and did not notice anything odd with the camera."*⁵

[14] I conclude, therefore, that prior to Mr Draganovic making contact with the camera with a broom, the camera was properly attached to its mount. As a result of his contact, it came free from the mount and, as he admits, he subsequently detached the wiring and removed the camera.

[15] I am, therefore, satisfied that there was no reason connected with occupational health and safety for Mr Draganovic to interfere with the security camera. Absent any other reason, I find the Mr Draganovic's actions in hitting the camera with a broom amounted to the wilful damage of the camera in that he rendered the camera useless for its purpose of providing a security record for the use of Telstra.

[16] Mr Draganovic denied that he stole the camera and security footage from another camera does not support the proposition that he left the building with the camera in his

⁴ Transcript PN547 – 564, referring to attachments to material presented by Telstra, specifically JG5 and JF4.

⁵ Exhibit E1, paragraph 8.

possession. Subsequently, the camera was found in the location he claimed to have put it, although it would have been possible for Mr Draganovic to place it there after Telstra's investigations commenced. Telstra claims that the camera was not in that location when it had the premises searched after the camera went missing. However, no testimony regarding that matter was before the Commission.

[17] The inference that he removed the camera in order to steal it, in the circumstances where it is denied, and the camera was found where he claimed to have put it, gives rise to "conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture".⁶ Bearing in mind the seriousness of the allegation and the need for clear and cogent evidence in such circumstances,⁷ I am not prepared to find that Mr Draganovic stole or intended to steal the camera.

[18] In view of the finding that Mr Draganovic wilfully damaged the camera, it follows that his denial of wrongdoing during the course of the investigation carried out by Telstra, and, in particular, his claim that the camera posed an occupational health and safety risk, amounted to dishonesty and a failure to comply with Telstra's policies.

[19] Mr Draganovic was given opportunities to respond to the allegations and was accompanied by a union official during those opportunities. He was advised of the reason for his termination. On the evidence before me, I am satisfied that the processes followed by Telstra did not provide any basis for Mr Draganovic to consider that his misconduct was in any sense offset.

[20] It is clear that the application was manifestly untenable or groundless⁸ on the facts known to Mr Draganovic at the time he instituted his application on 22 January 2007. Thus, for the purposes of s.658(1), it should have been reasonably apparent that his application had no reasonable prospect of success. It is, therefore, appropriate that an order for costs be made against Mr Draganovic for the reasonable legal and professional costs and disbursements incurred by Telstra from 22 January 2007 until 11 May 2007 inclusive. I do not consider it necessary to make an order to cover the expenses of witnesses (non-Telstra employees) as such witnesses were not called.

[21] In the light of that decision it is not strictly necessary to deal with the claims under s.658(2) of the Act. However, for the sake of completeness I shall do so briefly.

[22] It follows from my conclusion that the application was manifestly untenable or groundless on the facts known to Mr Draganovic at the time he instituted his application, that it was also unreasonable for him to fail to discontinue his application at all times after it was lodged.

[23] I also accept that he acted unreasonably in failing to agree to terms of settlement that would have led to the discontinuance of the application. I cannot accept Ms Andleman's characterisation of the offer as a written notice that Telstra might make an application for costs. The terms of its offer were:

⁶ *A Smith and others* PR915674, 21 March 2002, Ross VP, Lacy SDP and Simmonds C [42].

⁷ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449, 449-450 referred to in *Brinks Australia Pty Ltd*, PR922612, 18 September 2002, Giudice J, Acton SDP and Hingley C.

⁸ *Deane v Paper Australia Pty Ltd*, PR932454, 6 June 2003, Giudice J, Williams SDP, Simmonds C [8].

*"We advise that Telstra would be prepared to accept the discontinuance of this matter on the basis of Mr Draganovic contributing \$15,000 towards its legal costs, which is a small contribution to the costs Telstra has expended to date in defending this matter."*⁹

[24] An order giving effect to this decision is published separately as print PR978050.

BY THE COMMISSIONER:



COMMISSIONER

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⁹ Exhibit W4.

PR978050

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(U2007/2244)

COMMISSIONER SIMMONDS


MELBOURNE, 24 AUGUST 2007

*Termination of employment – costs application.***ORDER**

A. Further to a decision issued by the Commission on 24 August 2007 in the above matter [PR978032], I order that Mr Adam Draganovic pay to Telstra Corporation Limited the reasonable legal and professional costs and disbursements incurred by Telstra Corporation Limited from 22 January 2007 until 11 May 2007 inclusive in respect of matter U2007/2244.

B. This order shall operate on and from 24 August 2007.

BY THE COMMISSION:

The image shows a circular seal of the Australian Industrial Relations Commission. The seal features a central emblem with a shield, a kangaroo, and a emu, surrounded by the text 'THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION' and 'AUSTRALIA'. A signature is written across the seal.COMMISSIONER

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