Industrial Relations Court of Australia

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Jordon v Amcor Ltd (970153)

DECISION NO:153/97

CATCHWORDS

INDUSTRIAL LAW - complaint of UNLAWFUL TERMINATION -

whether VALID REASON - whether termination for OPERATIONAL REQUIREMENT - whether objective selection criteria for REDUNDANCY - whether termination for PROHIBITED REASON - whether applicant given OPPORTUNITY TO RESPOND - REMEDY - on-going losses -

Workplace Relations Act 1996 ss170DE(1), 170DC, 170DF(1)(f), 170DF(1)(g),

170EA, 170EE(3)

Workplace Relations Act 1996 Schedule 14

Bechara v Harrison Healey &Co (1996) 65 IR 382

Termination, Change & Redundancy Case [1984] AILR 256

JORDON -V- AMCOR LIMITED

VI 2256 of 1996

Before : PARKINSON JR

Place : MELBOURNE

Date : 2 MAY 1997

IN THE INDUSTRIAL RELATIONS COURT

OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VI 2256 of 1996

B E T W E E N:

Linda JORDON

Applicant

A N D

AMCOR LIMITED

Respondent

MINUTES OF ORDERS

2 MAY 1997 PARKINSON JR

THE COURT ORDERS THAT:

1. The respondent pay to the applicant compensation in the sum of $7174.40 pursuant to Section 170EE (3) of the Workplace Relations Act, 1996.

2. Such payment be made within 21 days of this Order.

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

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REASONS FOR DECISION

2 MAY 1997 PARKINSON JR

This is a decision in an application made pursuant to Section 170EA of the Workplace Relations Act 1996. The applicant commenced employment with the respondent on 28 March, 1989. She was initially employed as a Customer Services Clerk with APM Containers Ltd Scoresby, however in February 1991 she was appointed to the position of Territory Sales Representative with Amcor Fibre Packaging Division. She remained in that position until the termination of her employment effective 19 June, 1996. The termination of her employment occurred during the course of her absence from the workplace on maternity leave.

The respondent manufactures and sells corrugated packaging, including boxes, partitions and displays to industrial users and end users. Product is also sold for the purpose of conversion into boxes and packaging. The respondent operates two relevant sites in Victoria. One site is at Box Hill where the applicant was located and the other site is at Brooklyn. Those sites operated as separately managed and administered sites with both operating separate sales teams and management structures, until mid 1996. As I will discuss later in this judgment, various structural and organisational changes were made to those operations by a decision made in March 1996.

The applicant contends that the termination of her employment was without valid reason and contravened s170DE(1), s170DF(1)(f) and s170DF(1)(g) of the Act. She contends that there was no operational requirement that she be made redundant at the time the termination of her employment occurred and further contends she was selected for redundancy for the reason of, or partly for the reason of, her sex, and pregnancy and/or on account of her absence from work on authorised maternity leave.

The respondent contends that the termination of the employment was for valid reason arising from the operational requirements of the business and that the termination was not for the reason and nor did it include the reason the applicant's sex, marital status or pregnancy. The respondent contends that objective selection criteria was used in the selection of the employees who were to be made redundant.

In 1995 the applicant advised the respondent of her pregnancy and her intention to take maternity leave. As a consequence of this advice the respondent advertised for and hired a short term replacement employee for the applicant's position. The applicant, in the period shortly before leaving on maternity leave, assisted the replacement employee in establishing himself in the area. The replacement employee advised he was resigning shortly before the applicant was due to commence her scheduled maternity leave. The applicant was anxious about this resignation and in particular concerned to ensure that her clients would be adequately serviced during her absence. An alternative replacement employee was obtained, that employee being promoted from her existing employment in the respondent. The respondent's evidence was that the appointment whilst initially designed to cover the applicant's territory during her absence, was always intended to result in a permanent appointment for that employee to a sales position, after the applicant had returned to her position.

The applicant commenced the leave, including some annual leave, in November, 1995 some 2 weeks earlier than originally planned owing to doctors advice. Her evidence was that she intended to return to her employment at the end of the period of maternity leave on 3 January, 1997. The applicant's child was born on 8 January, 1996.

During the applicant's absence on maternity leave a restructure of the operations was announced. This restructure came about as a result of a meeting of managers held on 15 and 16 March, 1996. Further meetings occurred in May and June 1996 wherein the detail of the structures and staffing were considered. In the course of the meetings there had been a decision taken to amalgamate the structural and reporting responsibilities of the Box Hill and Brooklyn facilities and consequently to reorganise all of the sales areas. The Melbourne and Country regions had been previously divided into 40 regions, with those regions being allocated and serviced by Box Hill or Brooklyn. As a result of the reorganisation, the regions were altered, some abolished and some expanded to encompass existing regions. This process resulted in there being 34 regions, six less than had previously existed. The management team then allocated the regions amongst the staff. Included in the staff numbers available for allocation of areas, were all of the existing occupants of permanent positions, including the applicant, the employee who replaced the applicant during her maternity leave and another employee who was transferred from the customer service area into a sales consultant position effective 17 June, 1996. Evidence was called as to the actual effect of these changes. As a consequence of these changes a number of positions for sales consultants were determined to be redundant. The selection criteria for determining who was to be appointed was vague and unclear as to detail or measurement. The evidence is clear that it was not based upon sales figures or sales performance but upon the assessment as to capacity to adapt to change, including, according to Mr. Sykes, changing technology and capacity to be a team player.

The evidence of Mr. Abotomey was that there were 30 redundancies overall in the divisional offices as a consequence of the restructure of the business, however it is clear that as a result there were 6 sales consultants positions in excess of requirements in the Box Hill and Brooklyn regions combined. The majority of alteration to areas was made to those areas previously serviced by sales consultants out of Brooklyn. The majority of redundancies which occurred also occurred in relation to sales consultants

engaged to work out of Brooklyn. The applicant, together with one other sales consultant at Box Hill, was selected for redundancy. The person who upon appointment initially serviced the applicant's region whilst she was absent on maternity leave, was allocated one of the new regions in the Melbourne Metropolitan Area. The person transferred from the Customer Service Area was allocated a region which included substantial portions of regional and country Victoria.

All staff present at the workplace were advised of the restructure and the consequent redundancies on 17 June, 1996. The applicant was advised on that day also, upon attending at the workplace at the request of the respondent. Upon attending the meeting the applicant was informed by the then Sales Manager, Mr. Sykes, that her position was redundant owing to restructuring. He then attempted to continue to read from a prepared document advising what her entitlements were and the various counselling and assistance facilities available, however before he had finished the applicant left the room in distress. The applicant left the workplace after briefly visiting the sales area. The following day she contacted Mr. Sykes and established that the person who had been filling her position during her absence on maternity leave had been retained. The evidence of Ms Chisholm, the current sales manager, is that between October and December, 1996, four sales consultant positions became vacant. Each of those positions was filled by either outside or internal appointment.

The respondent contends that it had valid reason based upon the operational requirements of the business for the termination of the employment. The respondent contends that it did not replace the applicant with the person who serviced her area whilst she was on maternity leave. It contends that the applicant's position disappeared as a consequence of the restructure and not as a consequence of the other employee being appointed to the position. The applicant contends that the operational requirements as a result of the restructure did not necessitate the termination of the applicant's employment, either at all or at the time the employment terminated. It contends that the respondent filled a position which otherwise would have been available to the applicant by appointing to that position the person relieving the applicant whilst on maternity leave, a person new to the sales consultants area.

I do not accept that the respondent had valid reason for the termination of the applicant's employment for the following reasons. The applicant was still on maternity leave when her employment was terminated. Whilst having indicated that she would like to return to work earlier there was no obligation on the respondent's behalf to agree to an early return to work. Further it was unpaid maternity leave, the entitlement to which had accrued some time prior and was continuing. The respondent in terminating the employment, terminated also the maternity leave without agreement from the applicant. It terminated the employment at a point in time when having regard to the ongoing maternity leave, there was no `operational' requirement to do so.

Mr. Abotomey, the General Manager of the Division, conceded that whilst the applicant was on maternity leave, the applicant's position had been "filled" and was allocated a territory under the new restructured system. I do not accept that it was an operational requirement that the applicant's employment be terminated in circumstances where a sales region, which could have been allocated to the applicant, was allocated to an employee whom it had been anticipated would return to her previous duties unless an additional position became available in the sales area.

Mr. Abotomey's evidence was that the respondent selected the applicant for redundancy on the basis that she was alleged "*not to be a team player*" and "*there had been some difficulties between herself and the manager*". I do not accept that there is evidence in these proceedings to support the contention that the applicant was not a "*team player*". Mr. Sykes, the Applicant's supervisor and Sales Manager, was equivocal as to his evidence in relation to this aspect of the applicant's performance. This is particularly so in relation to alleged difficulties between the applicant and another staff member. In this regard the applicant's evidence as to those difficulties and lack of co-operation was not refuted. Further her evidence is that the difficulties became extreme in the last few months of her attendance at work prior to maternity leave and there was a reluctance on the part of management to deal with the issue in view of her impending departure on leave. I accept the applicant's evidence in this regard. Her salary review appraisals confirm that in the most recent review she was assessed at a performance level well in excess of other employees who were retained. As to the allegation of difficulties between the applicant and her manager, I am not satisfied that these were matters which had arisen from the applicant's conduct, nor were they difficulties which had impacted upon the applicant's work performance or the workplace functioning. In particular, it was alleged that the applicant in the last week of work prior to going on maternity leave had refused to service clients in her area. The applicant's evidence in this regard was that she had expressed concern that there be consistency of personnel in servicing her clients and that she was reluctant to pursue new orders when she would not be around to follow through. She saw this as damaging to the reputation of the respondent. The applicant also advised that she was unwell in that latter period and that her doctors advice was to finish work.. This was later confirmed by a Doctors Certificate. This was the only matter relied upon by the respondent as supporting the contention that the applicant was unwilling to perform her duties or that there were difficulties between her and the manager. I accept the applicant's evidence in relation to this incident. The applicant's conduct was directed to the interests of the clients of the respondent and did not constitute conduct which would justify any criticism or fault. Whilst I am satisfied that these matters did constitute the taking into account of performance related matters in selecting the applicant for redundancy, I am not satisfied that these unsubstantiated matters were valid to be taken into account in objectively or fairly applying the `team work' and `adaptability criteria' that the respondent contends was applied.

The applicant, by operation of *Schedule 14 of the Act*, had a Statutory entitlement to Maternity Leave. She also by that Act had an entitlement to return to work at the cessation of that leave in circumstances where the work which she was performing was continuing to be performed or to another position. This is not a situation where the business had closed or ceased entirely to operate in respect of the applicant's functions. The alterations which occurred to the zones or sales regions in the metropolitan area resulted in there still being work performed on a large scale. The restructure of the manner in which that work was performed does not enable the respondent to avoid its obligations in respect of maternity leave and consequent return to work. It is apparent from the scheme of the legislation that a fundamental element of the entitlement to maternity leave is the entitlement to return to work at the expiration of that leave. This is expressed in *Clause 12(2) and (3) of Schedule 14*. No recognition or attempt to accommodate this obligation was made by the respondent and no consideration was given to the particular entitlements and circumstances of the applicant, in that she was absent on maternity leave. According to Mr. Sykes, all employees were treated equally and no regard was had for the applicant being on maternity leave.

This failure to have any regard to the applicant's entitlements under the statute denied her a benefit of protection provided for by the statute and proper to be taken into account in the circumstances.

Further, I am not satisfied that the criteria of selection was either objective or methodically applied. I do not accept the evidence that the applicant was deemed unsuitable for any of the areas available. The applicant was particularly well qualified for any of the metropolitan areas designated. She was one of the respondent's top sales people. Mr. Sykes, save for the examples discussed earlier, was unable to identify any objective basis upon which the applicant had not been selected for a region. It was put to him by Ms. Richards, counsel for the applicant, that the selection was based upon a desire to immediately implement the alterations to the sales areas and that as the applicant would be on leave until January 1997, it was seen as inconvenient to allocate her a sales territory. Mr. Sykes denied that this was so, however he conceded that the respondent was anxious to implement its new arrangements and minimise disruption to clients. In the absence of an explanation as to why the maternity leave period was not allowed to run to its natural conclusion and having regard to the lack of objective criteria applied to the selection of the applicant for redundancy, I am not satisfied that the absence of the applicant on maternity leave was not part of the reason for the termination of her employment. Consequently I am not satisfied that the termination of her employment was not for reasons connected with her sex or parental responsibilities or maternity leave absence, matters prohibited by s170DF(1)(f) and s170DF(1)(g).

Shortly after the applicant's employment had terminated, but before the period of her maternity leave would have expired, the respondent hired additional sales consultants. The evidence of Ms Chisholm, the present Sales Manager, is that four consultants resigned in the period October, 1996 to January, 1997. No offer was made to the applicant of such a position. The operational requirement relied upon by the respondent would not have resulted in the termination of the applicant's employment, if the period of the leave had been allowed to run and the applicant had been allowed to return to work either earlier than or at the conclusion of her maternity leave.

In opening and in the evidence it was put on behalf of the respondent, that work performance and conduct issues did not form any part of the reason for the selection of the applicant for redundancy. I do not accept that this was so. The applicant was selected according to a process of judging her capabilities as a team player and her relations with her manager. These matters were clearly the subject of some criticism. It was the negative view of her capabilities, held by Mr. Sykes that was the reason why she was selected for redundancy. I am satisfied that the applicant was entitled to be informed of these matters by which she was being judged as less capable than other employees. She was also entitled to the opportunity to address the criticisms of her. The applicant was given no opportunity to be heard in relation to either of these matters. Further, the selection was made in a circumstance where a recommendation was made by a supervisor, Mr. Sykes, the person who raised the issues about her performance, yet the decision of confirming the selection left to persons who had no knowledge of the applicant's performance or conduct vis a vis other employees. The ultimate decision maker, Mr. Abotomey had not met the applicant prior to these proceedings, as he commenced his duties as General Manager after the applicant went on Maternity leave. This is another aspect of the selection of the applicant which identifies the severe disadvantage which she suffered in the selection process as a consequence of being absent from the workplace on maternity leave. She was not present to be able to

prove her capacity and performance qualities and she was not given any opportunity to speak to those matters raised against her in this regard.

Consequently there has been a failure to comply with the obligations arising under s170DC of the Act. I am also satisfied that the failure to have regard to these obligations, or the disadvantage under which the applicant suffered, in implementing the redundancy constituted the termination of the employment as unsound or capricious and thus not for valid reason.

For the reasons set out above I find that the respondent did not have valid reason for the termination of the applicant's employment. There has been a contravention of s170DE(1) of the Act. I am not satisfied that the respondent did not have as part of its reason for the termination of the applicant's employment, her parental responsibilities and her absence on authorised maternity leave. There has been a contravention of s170DF(1)(f) and s170DF(1)(g) of the Act. I find also that the respondent failed to accord the applicant an opportunity to be heard in relation to allegations as to her conduct and work performance, being matters which were taken into account in selecting the applicant for redundancy. There has been a contravention of s170DC of the Act. I turn now to consider the question of remedy.

Remedy

As to damage, the respondent contends that there is no compensable damage because the applicant would not have been earning for the period she was on maternity leave and that she was paid a substantial redundancy payment. I do not accept this contention. The purpose of maternity leave is to preserve aspects of benefit in ongoing employment such as seniority, reputation, and career prospects. It is also to provide for return to employment in circumstances where being otherwise on the employment market, may place a new mother at a substantial disadvantage. Those matters are aspects of the damage to the applicant which are ongoing, and not remedied by the payment of a redundancy payment on the same terms as paid to others not suffering from the employment disadvantages and disabilities consequent upon having a young child. One example of this disadvantage arises from the difficulties attendant upon obtaining adequate child care services. The applicant had obtained a place in a child care centre for the period after the expiration of her maternity leave. She had also attempted to obtain a place earlier, in anticipation of returning to work earlier than scheduled. As a consequence of losing her job, and being uncertain of future employment, she was unable to maintain her long standing booking at an adequate child care facility. The applicant faces now the uncertainty of the employment market and the added difficulty of arranging for satisfactory, safe and cost effective child care services. It is obvious that these are the very matters that the provision of maternity leave are designed to address. By enabling a certainty in the period of absence from and return to work, the parent is able to effectively plan for future employment return.

One other aspect is the availability and capacity to look for alternative employment, in circumstances where one is also the attendant carer of a new baby. All of the other employees who were made redundant obtained other positions within days or weeks of the redundancy. This is because they were in a position to make application for such positions and present on a day to day basis at the workplace,

enabling them to focus their time and energies on the issues arising. That the Applicant was not available, nor able to pursue her career interests at that time, is a matter arising in my view as a direct consequence of her parental responsibilities and consequent absence on maternity leave and not as a consequence of any failure on her part to mitigate or attempt to mitigate her loss. In this regard I distinguish the applicant's position from the circumstances in *Bechara v Harrison Healey &Co* (1996) 65 IR 382. In that case the applicant had a clear and unequivocal opportunity to return to the former employment, with none of the difficulties which arose for the applicant in this proceeding. No such opportunity was accorded to the applicant in these proceedings.

The applicant's evidence was that as a result of the termination of her employment and its timing, she had suffered a serious loss of self esteem and confidence. She also expressed an ongoing anxiety and difficulty in resolving the issues arising from the incident. For these difficulties she is seeking professional assistance. I accept the applicant's evidence that as a result of the respondent's conduct and the difficulties set out above she felt it was necessary for her to reassess her future career options. I accept that this reassessment was brought about directly as a consequence of the respondent's conduct and could not be assumed to have arisen, but for that conduct. It is apparent from the demeanour and evidence of the applicant that she is struggling to resolve the issues that have arisen as a result of the termination of her employment. The applicant does not seek reinstatement to the employment. In view of the circumstances of the termination and the numerous matters set out above, I accept that such an order would be impracticable. I am satisfied that in all of the circumstances the applicant is entitled to a remedy and that remedy ought be in compensation.

The applicant is entitled to compensation. The compensation awarded arises from my assessment of the ongoing financial loss to the applicant as a consequence of the respondent's conduct. The applicant received a redundancy payment from the respondent. When she went on unpaid maternity leave, the applicant was earning a gross amount of $755.00 per week. She had indicated a desire to return to work earlier than January, 1997, and I am satisfied that but for the decision of the respondent to terminate her employment, the applicant would have returned to work in either June or July, 1996. At that time she would return on the same salary as previously earned. At the time of the hearing of this matter the applicant had not obtained alternative employment. I accept that the applicant's losses were ongoing to at least the date of the trial. It is uncertain when she will be in a position to re-establish herself in full time employment. I accept that the redundancy payment in part is attributable to the period of time after the date of the employment terminated. Having regard to the likely early return to work, that period runs beyond that time and some account ought be made for the ongoing loss suffered by the applicant.

It is clear in this proceeding that a redundancy payment was made. This is a matter to be taken into account in determining the compensable loss of the applicant. I accept the submission of Ms. Richards as to the components of the redundancy payment made to the applicant. I am satisfied that the redundancy payment included a component attributable to pro-rata long service leave. This is the sum of $5,331.49. The rest of the payment is made up in accordance with a formula of 3 weeks pay for each year of service, amounting to a sum of $15,859.20. There was no evidence in the proceedings to the contrary in terms of the manner of calculating the entitlement. It is clear from the authorities as to the purpose and components of redundancy payments (see in this regard *Termination, Change &*

Redundancy Case [1984] AILR 256) that only part of that redundancy payment is attributable to the ongoing losses suffered in terms of income. A significant component of any redundancy benefit is attributable to loss of career prospects, future accrued leave entitlements, pay increases, seniority, superannuation accruals, sick leave accruals, and other benefits not necessarily payable as cash, such as private use of motor vehicles.

In the particular circumstances of the applicant I am satisfied that the losses exceed those which may have been compensated by the redundancy payment. One example of this additional loss is that is apparent that the applicant, unlike all other sales representatives made redundant on the same day, did not obtain employment shortly thereafter. In the circumstances I am satisfied that it appropriate in awarding compensation, to account for half of the redundancy payment when compensating the loss, as this can reasonably be attributable as a payment to compensate for future lost income. This is the amount of $7,929.60. The 4 weeks payment in lieu of notice, the statutory entitlement paid should also be deducted from any compensation order. It is not relevant to take into account that amount which I have attributed to a Long Service Leave component, nor consequently, to additionally compensate for that loss in any order for compensation.

I am satisfied that the applicant is entitled to compensation equivalent to 6 months remuneration, on account of the period between July, 1996 and mid January, 1997. That is an amount of $18,124.80. However, that amount is to be reduced by the sum of $10,950.40 on account of the matters set out above. The order for compensation will be in the sum of $7,174.40. This is a gross amount and payable as such.

I certify that the preceding fourteen (14) pages

are a true copy of the reasons for decision of

Judicial Registrar Parkinson.

Associate :

Dated : 2 May 1997

APPEARANCES

Counsel appearing for the applicant : Ms. M. Richards

Solicitors for the applicant : Slater & Gordon

Counsel appearing for the respondent : Mr. S. Wood

Solicitors for the respondent : Arthur Robertson & Hedderwicks

Date of hearing : 19 & 20 February 1997.