

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1988*  
s.134H – Procedures for preventing and settling disputes

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia**

and

**Telstra Corporation Limited**  
(C2006/3010)

*Workplace Relations Act 1998*  
s.668 – Application for orders to consult unions

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia**

and

**Telstra Corporation Limited**  
(C2006/3011)

**TELSTRA REDUNDANCY AGREEMENT 2002**  
(ODN C No. 30337/1993)  
[AG817967 Print K7494]

Telecommunications services

COMMISSIONER SMITH

MELBOURNE, 19 OCTOBER 2006

*Alleged failure to consult re proposed retrenchments.*

**DECISION**

[1] There are two applications before the Commission. Each is made by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The applications seek that Telstra Corporation Limited (Telstra) consult with the CEPU about proposed redundancies and that the Commission determine the proper operation of the *Telstra Redundancy Agreement 2002* (the Agreement).

[2] Telstra has determined that 48 redundancies have arisen for designers in Service Delivery East – CAN Provisioning – NSWC, and CEPU seek urgent interim orders that Telstra be prevented from terminating the employment of persons who have been determined as redundant until the matters it wishes to agitate are heard and determined.

[3] There is some history procedurally to the matters which is not necessary at this stage to recite, but suffice it to say they now fall for determination.

[4] The first application is made pursuant to s.668 of the *Workplace Relations Act 1996* (the Act). Orders are sought in relation to consultation on the proposed redundancies. Given the interim orders sought by the CEPU, this application received little attention. I do not make any rulings on this application at this stage. I do note however the terms of s.668(3)(a) and (b).

[5] The second application has been the focus of submissions. This is an application which seeks to invoke the terms of the Dispute Settlement clause of the Agreement. The Agreement was certified pursuant to the *Industrial Relations Act 1988* and the dispute settlement procedure was authorised by s.134H of that Act. It is put that the relevant dicta that has developed in relation to s.170LW of the *Workplace Relations Act 1996* (the pre-reform Act) before it was amended by the *Workplace Relations Amendment (WorkChoices) Act 2005*, is to be applied in the current matter. For the purpose of this decision, and should it become necessary but without deciding it, I will adopt that view.

[6] The CEPU, at this stage, seek that the Commission make an order preventing Telstra from terminating the employment of four persons (currently) for a period of six months to enable it and its members to consider alternatives to redundancy or other outcomes which would mitigate the effects of redundancy. It is submitted that the course it suggests is consistent with a proper operation of the Agreement.

[7] The reason why it is only four persons at this stage is related to a view put by Telstra that the Commission should not entertain any dispute by a person who has not been through the various stages of the dispute settlement process in the Agreement. In any event, the matter can be decided in relation to those four persons.

[8] The four persons are Mr Steven Griffiths, Mr Garry Comisari, Mr Dale Burgess and Mr Fred Hammer. For those four persons, the time in which they could access the grievance procedure in the Commission varied between nine and three working days. For example, the time in which Mr Hammer could grieve about the proper operation of the Agreement under the disputes procedure is three working days before he is dismissed today.

[9] Telstra opposed the order sought by the CEPU and drew attention to the Full Bench decision in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation*. This was an appeal against Lawler VP where he found that he had power to make an interim order preventing Telstra from terminating employees whilst a controversy about the proper operation of the Agreement was resolved. The Full Bench found:

*“Of more relevance, however, is cl.17.3. That clause deals with disputes generally. It provides that while any dispute is being resolved any process shall continue without interruption. Since, as we have found, there was a dispute about the application of the Agreement which was being resolved, Telstra was entitled by cl.17.3 to continue with the process provided for in the Agreement. That process culminates potentially in termination of employment. An order enjoining Telstra from terminating the employment of the persons concerned would be inconsistent with the Agreement if in fact Telstra was complying with the process. With respect, for that reason, we disagree with the Vice President's finding that the Commission had an unqualified power to make an interim order restraining the terminations. In the circumstances there was no power to issue such an order in this case. This is not to say that the Commission would be powerless should it subsequently find that retrenchments were unjustified under the Agreement, but we do not need to examine that question.*

## Conclusion

*In summary, we agree with the Vice President's conclusion that:*

- (1) in the circumstances there was a dispute over the application of the Agreement;*
- (2) applicable s.111(1) powers are made available to the Commission by s.111(2) when exercising dispute settling functions pursuant to a dispute settlement provision in a certified agreement;*
- (3) the Commission cannot exercise s.111(1) powers which are inconsistent with the terms of an agreement;*
- (4) the Commission had power to settle the dispute by arbitration; and*
- (5) the Commission had power to make an order requiring the production of documents.*

*We disagree that the Commission had an unqualified power to issue an interim order enjoining Telstra from terminating employment. There was a dispute which was in the process of being resolved, therefore Telstra had an entitlement under cl.17.3 to continue the process, even up to termination of employment. Accordingly there was no power to make the orders sought.”<sup>1</sup>*

[10] The two Agreement provisions in question are:

*“17.3 While any dispute is in process of being resolved, work will continue without interruption in any manner whatsoever and any process under this Agreement shall continue without interruption.*

*17.4 Should any case of retrenchment become the subject of dispute, subject to it having been processed in accordance with the Agreement, there is no obligation on management to stay the retrenchment.”*

[11] The CEPU argue that the redundancies were not processed in accordance with the Agreement. It particularly drew upon the words of the Full Bench where it said: *“An order enjoining Telstra from terminating the employment of the persons concerned would be inconsistent with the Agreement if in fact Telstra was complying with the process.”*<sup>2</sup> The CEPU argued that Telstra was not, in fact, complying with the process as it was the process that was the subject of the dispute.

[12] In the ordinary course, if circumstances existed where:

- there was a serious question to be tried,
- a prima facie case had been made out, and
- the party seeking relief would suffer irreparable damage for which compensation would not be sufficient,

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<sup>1</sup> (2003) 128 IR 385 at PN50-52.

<sup>2</sup> Ibid at PN50.

then the balance of convenience might weigh in favour of the person seeking interim relief<sup>3</sup>. If final relief is within power then it is usually the case that interim relief is available. This would be particularly compelling where a person is given only three working days to raise and have a grievance determined in accordance with the dispute settlement procedure in the Agreement.

[13] However, it is also clear that the Full Bench found that the terms of this Agreement between the parties precluded interim relief. It is not to the point to say that the process had not been followed, as the CEPU did, and seek to distinguish the Full Bench decision. The same broad circumstances which face me faced Lawler VP.

[14] The proposition was put to Telstra:

*“THE COMMISSIONER: Yes. So the Full Bench’s decision must be read mustn’t it as saying whether or not you are complying with the process no interim order can issue restraining you from terminating.*

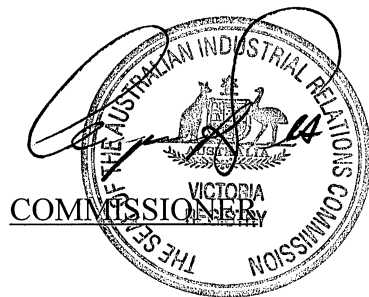
*MR WOOD: That’s as I read it, Commissioner, that’s exactly as I read it.”<sup>4</sup>*

[15] In my view the decision must be read in the way contended for by Telstra and I am obliged to follow it. The Full Bench has decided that these parties have constrained the power of the Commission to grant that which might otherwise be within power.

[16] I find that the Agreement, in its terms, precludes the issuing of interim orders which would prevent Telstra from terminating the employment of the four persons who have proceeded through the disputes procedure.

[17] As to the substantive dispute over the proper operation of the Agreement and the relevance of job swaps to that Agreement, the CEPU is directed to file and serve any material by close of business 27 October 2006. Telstra shall file any material in reply by close of business 3 November 2006. The matter will be listed for hearing in Sydney on 6 and 7 November 2006.

BY THE COMMISSION:



*Appearances:*

*D. Dwyer and S. Murphy for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.*

*S. Wood, of Counsel, with C. Gardner, Solicitor for Telstra Corporation Limited.*

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<sup>3</sup> *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153.

<sup>4</sup> Transcript, 17 October 2006 at PN696-697.

*Hearing details:*

Before Senior Deputy President Drake:

2006.

Sydney:

September 12.

October 9, 11.

Before Commissioner Roberts:

2006.

Sydney:

October 16.

Before Vice President Lawler:

2006.

Sydney:

October 17.

Before Commissioner Smith:

2006.

Sydney:

October 17.

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