

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.170CE application for relief in respect of termination of employment

James Allan

and

Australian Postal Corporation
(U2006/3119)

SENIOR DEPUTY PRESIDENT ACTON MELBOURNE, 12 SEPTEMBER 2006

Termination of employment.

DECISION

Introduction

[1] This matter concerns an application by Mr James Allan for relief in respect of the termination of his employment by the Australian Postal Corporation (Australia Post). Mr Allan's employment was terminated on 23 February 2006.

[2] Following the issuing of a conciliation certificate in the matter, Mr Allan elected to proceed to arbitration of his application. The matter came to me for arbitration.

Relevant Evidence

[3] Mr Allan commenced working for Australia Post as a Postal Delivery Officer in the late 1980's.¹ At the date of the termination of his employment he suffered from myoclonic epilepsy, resulting from a work related injury.²

[4] Between 1995 and 2005, Mr Allan provided Australia Post with WorkCover Certificates of Capacity from his medical practitioner, detailing the period he was fit for modified duties and the nature of his work restrictions.³

[5] On 16 October 2003, when Mr Allan reached 65 years of age, weekly compensation payments in respect of Mr Allan ceased. Section 23(1) of the *Safety, Rehabilitation and Compensation Act 1998* (Cth) provides that weekly compensation payments in respect of an employee are not payable to an employee who has reached 65 years of age.

[6] Australia Post sent the following letter, dated 14 October 2003, to Mr Allan in respect of the cessation of the weekly compensation payments:

“Dear Mr Allan,

**SAFETY, REHABILITATION AND COMPENSATION ACT 1998
SECTION 23 – COMPENSATION FOR INCAPACITY NOT PAYABLE
IN CERTAIN CASES**

I am writing to you regarding your workers’ compensation claim, for which weekly payments are being made under the above Act.

As you are aware, you are currently in receipt of 85% of your normal weekly earnings (of \$768.70), being \$653.40 per week in accordance with section 19 of the Safety Rehabilitation and Compensation Act.

According to records held by Australia Post, your date of birth is 16 October 1938 and on 16 October 2003 you will turn 65 years of age. Consequently, Section 23(1) of the Act provides that once a person being paid under section 19 turns 65 compensation payments will cease.

Your weekly compensation incapacity payments will cease as of 16 October 2003. Other entitlements such as medicals will still be considered under the Act.

Liability for your claim will be reviewed periodically in relation to medical expenses only.

Should you have any enquiries, please contact me on the telephone number listed above.

Yours sincerely

[Signed]

*Jeanette Rankin
Claims Manager
Australian Postal Corporation”.*⁴

[7] Following the cessation of the weekly compensation payments, Mr Allan’s accrued sick leave was used to maintain his weekly wage rate.⁵

[8] On 24 December 2004, Mr Allan’s paid sick leave credits were exhausted and his weekly wage rate dropped accordingly.⁶

[9] Mr Allan subsequently provided to Australia Post a WorkCover Certificate of Capacity dated 7 March 2005 from his medical practitioner which stated that he was fit for modified duties from 8 March 2005 to 30 June 2005 and his work restrictions were:

- No sorting
- No throwing off
- No work requiring rapid eye movement
- No riding of bike.⁷

[10] The previous WorkCover Certificate of Capacity that Mr Allan had provided to Australia Post from the same medical practitioner, which was dated December 2004, had stated Mr Allan was fit for modified duties from 8 December 2004 to 7 March 2005⁸ and his work restrictions were:

- No rapid eye movement
- No riding of bike
- No machine operation.⁹

[11] The WorkCover Certificate of Capacity dated September 2004 from Mr Allan's medical practitioner had stated Mr Allan was fit for modified duties from 7 September 2004 to 7 December 2004 and his work restrictions were:

- No operations requiring rapid eye movement
- No riding of bike
- No machinery operation.¹⁰

[12] The WorkCover Certificate of Capacity dated June 2004 which Mr Allan provided to Australia Post from his medical practitioner had stated Mr Allan was fit for modified duties from 7 June 2004 to 7 September 2004 and his work restrictions were:

- No operation necessary rapid eye movement
- No riding of bike
- No machinery operation.¹¹

[13] Australia Post considered Mr Allan's WorkCover Certificate of Capacity of March 2005 set out different work restrictions to those involved in the three preceding WorkCover Certificates of Capacity he had provided to them.¹²

[14] Mr Allan's evidence was that at that time he was sorting, throwing off, setting up and delivering mail.¹³

[15] Mr Allan's employment was subject to the *Australia Post General Conditions of Employment Award 1999* (the General Conditions Award).¹⁴ At the relevant time, clauses 26.5.10 and 26.5.11 of the General Conditions Award provided that:

"26.5.10 Employee to provide medical report

Australia Post may require an employee to furnish a medical report or undergo an examination by a medical practitioner nominated by Australia Post where the employee:

26.5.10(a) *may be unfit or incapable of discharging duties;*

26.5.10(b) *may be a danger to other employees or members of the public due to state of health;*

26.5.10(c) *has been absent through illness for a continuous period exceeding 13 weeks;*

26.5.10(d) *has been absent through illness and the authorised employee believes that the employee is not fit to resume duty.*

26.5.11 Timing of Medical Report

An employee who is required to furnish a medical report or undergo a medical examination under 26.5.10 must do so as soon as practicable.”

[16] On 20 April 2005, Mr Allan was sent the following letter by Australia Post notifying him of an appointment for a fitness for duty medical examination:

“Dear Mr Allan,

FITNESS FOR DUTY EXAMINATION (INITIAL)

An appointment has been scheduled for you to be medically reviewed to determine your fitness for duty as a Postal Delivery Officer (push bike).

The details of the appointment are as follows:

Date: Friday 22 April 2005

Time: 10:30 am

Where: Rowville Central Clinic

Suites 1&2, 7 Fulham Rd, Rowville Vic 3178

It would be appreciated if you could take any medical reports (if applicable) you may have with you on the day of examination.

Please allow 1 hour for the duration of the examination.

Any costs incurred for travel (ie taxi fares, private vehicle or public transport) will be re-imbursed by you manager. If applicable please retain receipts. Any questions you may have with regards to this matter can be directed to your Manager.

If you are unable to attend the above appointment, notification must be given as soon as possible to myself on telephone number (03) 9299 4415.

Yours sincerely

Helen Dislakis

for Manager – Human Resources

Mail & Networks Division”¹⁵

[17] This examination was subsequently rescheduled and Mr Allan was sent the following letter in regard to its rescheduling:

“Dear Mr Allan,

FITNESS FOR DUTY EXAMINATION

An appointment has been re-scheduled for you to be medically reviewed to determine your fitness for duty as a Postal Delivery Officer. As agreed during our meeting on 19/4/05, this was to proceed as soon as possible in light of the medical restrictions advised by Dr Cayetano, your treating doctor, on a WorkCover Certificate of Capacity dated 7/3/05 and submitted by yourself on 19/4/05.

You are required to attend the following appointment with Dr Soliman in accordance with Clauses 26.5.10 and 26.5.11 of the Australia Post General Conditions of Employment Award 1999:

Date: Thursday 28 April 2005
Time: 9:30 am
Where: Rowville Central Clinic
Suites 1&2, 7 Fulham Rd, Rowville Vic 3178

Please allow 1 hour for the duration of the examination. Any costs incurred for travel (ie taxi fares, private vehicle or public transport) will be re-imbursed by you Manager. If applicable please retain receipts. Any questions you may have with regards to this matter can be directed to your Manager.

It would be appreciated if you could take any medical reports you may have with you on the day of examination. I note that you advised your manager on 22/4/05 that you required a copy of Dr Poppenbeek’s medical report prior to attending the appointment. As discussed during our meeting on Tuesday 19/4/05, the report will be released to your treating doctor once you provide the name and address details of your nominated doctor. You will receive separate correspondence on this matter and this will not be an impediment to your attendance at the medical examination.

I also note that you gave an assurance to your Manager that you will attend this appointment. Failure to attend this appointment with the Australia Post nominated doctor for a fitness for duty assessment, without reasonable cause, will result in action under the Australia Post Employees Counselling and Discipline Process.

Please sign the attached Confirmation of Attendance and return it to Ms Helen Dislakis, Staffing Services, in the envelope provided.

Yours sincerely

[Signed]

*Alexandra Lipinski
for Manager – Human Resources
Mail & Networks Division”¹⁶*

[18] On 27 April 2005, Mr Allan wrote to Dr Soliman at the Rowville Central Clinic as follows:

“Dear Dr. Soliman

Re: FITNESS FOR DUTY ASSESSMENT

I refer to above assessment commissioned by my employer ‘Australia Post Corporation’ on behalf of this writer.

This letter will serve to advise that under no circumstances are any reports, conclusions etc to be furnished to my employer, or any one else without my first sighting them, and without my express written consent.

I refer to the ‘Privacy Act’ and inform you that my employer did not seek permission, nor did I authorise them to release to you any part of my medical history, and as such you are advised to return to my employer (without omission) those documents already in your possession.

This writer will require written assurances from you before submitting to the examination, in that you fully appreciate my employer will in all likely hood act on your recommendations with regard to my continuing, and or type of employment, and that you accept full and final responsibility for any errors, omissions, wrong diagnosis etc which as a consequence may place this writer in a position of Jeopardy.

Upon receipt of a signed acceptance of all of the above, I will agree to proceed with the examination.

Yours Sincerely

[Signed]

*Jim Allan”.*¹⁷

[19] Dr Soliman wrote to Australia Post on 28 April 2005 as follows:

“Attention: Ms. Alex Lipinski

Dear Alex,

*Regarding: Mr James Allan
Occupation: Postal Delivery Officer – Pushbike
Employer : Australia Post
Date of Examination : 28/04/05*

Thank you for referring this patient for medical assessment. For preparation of this report I had your referring letter with a copy of Dr. Ralph Poppenbeek’s medical report, a copy of Dr. J. Cayetnao’s medical certificate and a copy of Dr. Kranz’s report.

Mr Allan refused to sign the medical information release authorization and refused the medical assessment.

Mr Allan asked me to sign a typed letter, which prevents me from releasing any information about him to the employer without him seeing the information and authorizing it to be released.

I have explained again to Mr Allan the reason for assessment and examination including my role as Independent medical examiner under section 112 of the Workcover Act, and that I would be providing a report to the request author, Ms Alex Lipinski at the conclusion of the assessment. I also have explained to him the importance of performing the assessment to determine the appropriate and suitable duties for his condition.

Mr Allan refused the assessment and left his letter on my disk and walked out.

I would be more than happy to see Mr. Allan at any time in the future on the basis of him signing the medical authority and understanding that I will not be signing any letters. Please don't hesitate to contact me if you have any further queries.

Yours Sincerely

*Dr. S. Soliman
MBBCH.FRACGP.DRACOG
Grad. Diploma. OCC. Health".¹⁸*

[20] Australia Post sent the following letter to Mr Allan on 4 May 2005:

"Dear Mr Allan,

I refer to our meeting on 19/4/05, the outcome of your fitness for duty medical examination on 28/4/05 and Mr Avram's subsequent discussion with you on 29/4/05.

Dr Soliman has advised Australia Post that you attended the medical appointment on 28/4/05, refused to sign the medical release authorisation, refused the medical assessment and requested Dr Soliman to sign a typed letter which would prevent him from releasing any information about you to Australia Post without you sighting the information and authorising it to be released.

I remind you in particular of the following matters that were discussed and agreed during our meeting on 19/4/05 and which were subsequently brought to your attention by your manager on 29/4/05:

- You submitted a medical certificate on 19/4/05, dated 7/3/05, from your treating doctor which stated 'fit for modified duties 8/3/05 – 30/6/05. Work restrictions – No sorting. No throwing off. No work requiring rapid eye movement. No riding of bike.'*

- *This medical information appears to conflict with the previous medical restrictions advised by your treating doctor/s and differs from the medical restrictions recommended by the Australia Post nominated doctor in December 2003.*
- *You confirmed your treating doctor's advice and stated that you were unable to sort or throw off mail. You also agreed to attend a fitness for duty medical examination as soon as possible. On this basis I agreed to accommodate your current restrictions of no sorting / no throwing off pending immediate confirmation of your medical restrictions by the Australia Post nominated doctor. I have accommodated these restrictions from 20/4/05.*

I am disappointed that despite this, you failed to attend your fitness for duty examination on 22/4/04 and failed to co-operate during your re-scheduled fitness for duty medical examination on 28/4/05.

As Australia Post is unable to confirm your current medical restrictions I am unable to identify suitable and safe duties within the restrictions of your medical condition and cannot assess suitable redeployment options. You are therefore directed on sick leave from commencement of shift 5 May 2005 pending confirmation of your medical restrictions by an Australia Post nominated doctor.

Given that you have exhausted all paid sick leave until your next sick leave accrual on 19/7/05, should you wish to use any other available leave credits such as recreation leave or long service leave in lieu of sick leave without pay, you must submit a leave application form to your manager.

Please contact me should you need to discuss any aspect of the above.

Yours sincerely

[Signed]

*Peter Lunt
Area Manager – Central Delivery”¹⁹*

[21] From 5 May 2005, therefore, Australia Post directed Mr Allan to take sick leave and, as his sick leave credits had been exhausted, the sick leave was unpaid. On 17 September 2005, Mr Allan had accrued three weeks paid sick leave credits but by 8 October 2005 his paid sick leave credits were exhausted and he reverted to unpaid sick leave.²⁰

[22] On 6 May 2005, Mr Allen wrote to Australia Post as follows:

“Dear Mr Lunt

I refer to your two letters dated May 4th 2005 one hand delivered by yourself on the morning of May 4th and one retrieved from my mailbox same day.

I will attend to your hand delivered letter first.

I am surprised at your disappointment (your words) I failed to attend a fitness for duty assessment on 24/4/04 is this a typing error and do you mean 05?. If indeed you do mean 05, a perfectly plausible explanation was provided by this writer for the non attendance.

The re-scheduled examination was never agreed to ‘unconditionally’ refer to my memo dated 24/4/05, I’m sure you have a copy, and I take umbrage at your insinuation that I had failed to co-operate ‘whatever that means’, are you saying that I should co-operate with someone who refuses to take responsibility for his actions? and irrespective, knowing these pre conditions why did you allow this sham to proceed?

Why do you continually assert that my current Medical Certificate conflicts with previous restrictions when you know this not to be the case?

How is it that Australia Post is unable to confirm my current medical restrictions when you have countless documents in your possession which clearly demonstrates these.

How is it that you chose to ignore the fitness for duty assessment conducted by Dr. Poppenbeek.

How is it that you have directed this worker on sick leave pending confirmation of my medical restrictions by an Australia Post nominated doctor when you already have two of these in your possession, and when considering that my condition is permanent and that you are provided with Medical Certificates on a continuing basis.

Your posted letter

1/ Medical Reports

What are you talking about? this writer did not accept or agree with Lipinski’s explanation and never will. The question is why did it take six requests and eighteen months before providing the explanation particularly as the contents were of such a nature that to ignore them was placing this writer in an unsafe environment.

2/ Compensation Incapacity Payment

Thank you for quoting the obvious, however you did not address my concerns that is an agreement was reached by the participating solicitors without reference to and apart from the (SRC) Act and that section 19 of the Act should not apply.

3/ Salary payments post 16/10/03

I will contend that the position and work performed by this writer for the past eight years up until 19/4/05 was my nominal position and not that of PDO (push bike) and that my redeployment to Boxhill Delivery Centre was of a permanent nature and that I had provided you with documentation during our meeting 19/4/05 clearly stating this and that the duties I performed were not modified to suit my medical condition and that I was required by Australia Post to carry out all of the duties of a full time Postal Delivery Officer and that my work has never been restricted to 4 hours per day in written form or otherwise other than via a suggestion by one of your facility nominated doctors which of course you had chosen to ignore and that Australia Post are derelict in their actions with regard to the seizure of my sick leave credits and salary payments.

4/ VRP

I have seen no evidence of any action in this regard.

Yours sincerely

[Signed]

Jim Allan".²¹

[23] Australia Post responded to Mr Allan on 9 May 2005 as follows:

"Dear Mr Allan

I refer to your letter of 6 May 2005 and note that you are not satisfied with Australia Post's response to the matters your raised. Nevertheless, these matters were reviewed and you were advised of the outcome in previous correspondence.

Contrary to your belief that Australia Post has failed to comply with the Australia Post nominated doctor's recommendations of December 2003 and your treating doctor/s medical restrictions, I bring to your attention the following points:

- *Australia Post has adhered to the medical restrictions recommended by Dr Poppenbeek, an Australia Post nominated doctor, following your medical examination on 11/12/03. In making his assessment Dr Poppenbeek was provided with a current Work Cover Certificate of Capacity submitted by you from your treating doctor, Dr Sivapalan, certifying 'light duties'.*
- *Subsequent Work Cover Certificates of Capacity submitted by you to your manager, from your treating doctors – Dr Sivapalan, Dr Solana and Dr Cayetano, certified 'No riding of bike. No machinery operation. No operation requiring rapid eye movement.' These work restrictions did not differ from the Australia Post nominated doctor's assessment.*
- *During our meeting on 19/4/05 you submitted a further Work Cover Certificate of Capacity from Dr Cayetano dated 7/3/05 certifying 'No sorting. No throwing off. No work requiring rapid eye movement. No riding of bike' covering the period 8/3/05 – 30/6/05. These work*

restrictions differ from previous medical information supplied by you and therefore require confirmation by an Australia Post nominated doctor.

- *As previously advised to you, in accordance with the provisions of clause 26.5.10(a) of the General Conditions of Employment Award 1999, 'Australia Post may require an employee to undergo a medical examination by a medical practitioner nominated by Australia Post where the employee may be unfit or incapable of discharging duties.'*
- *You failed to permit Australia Post to confirm your medical restrictions with an Australia Post nominated doctor and you were consequently directed on sick leave from 5/5/05 pending confirmation of your medical restrictions by said doctor.*

The matters you have raised over the last 5 months have been more than adequately addressed and explained to you both in person and in writing. I consider that further responses from Australia Post on those particular matters are unnecessary and consider these matters now closed.

Should you reconsider attending a medical examination with an Australia Post nominated doctor and provide the required medical release authority, please contact me I will endeavour to arrange an appointment for you at your earliest convenience.

Your sincerely

[Signed]

*Peter Lunt
Area Manager – Central Delivery*".²²

[24] Mr Allan responded to Australia Post on 11 May 2005 as follows:

"Dear Mr Lunt

I am in receipt of your letter dated 9th May 2005 and once again express my dismay at the seeming incompetence emanating from Australia Post middle management 'it is either incompetence or deliberate evasiveness' either way this whole affair is becoming a ludicrous farce and the selective nature of your responses to my letters is both comical and insulting.

- (1) *You did not adhere to the restrictions and recommendations stated by Dr Poppenbeek. Where for example is the graduated return to full time work?*
- (2) *My walk round was not low pressured in regard to time, and certainly not in the sorting requirement. This worker was required to sort 2 deliveries of 'Tax mail' each day, one delivery by 7 am. And one further by 7.30 am. I'm sure I have no need to inform you of the volumes of mail for this client. (A faster than standard rate is required in order to meet this delivery requirement). I of course was required to complete all of the my duties in 4 hours or less and I assure you this necessitated anything but 'light duties'.*

- (3) *Sorting and throwing off using a Namco frame requires more eye movement than would the present methods. The frame was not specially adapted to accommodate my medical restrictions as is now and again alluded to, it was in fact necessary in order to accommodate the volumes of mail.*
- (4) *I was required on a daily basis to lift far greater weights than that recommended by Poppenbeek.*
- (5) *In order to put an end to these continuous and perplexing assertions regarding my Work Cover Certificates of Capacity, whereby you continually state my latest Certificate differs from previous information submitted, the following have been picked at random and covering a time span of approx. 10 years. September 1995, April 2000, September 2000, December 2001, January 2002, March 2005. Please peruse these and cease these annoying assertions.*
- (6) *I ask again, why do you require a further 'Fitness for duty assessment' when you have two of these already in your possession and my medical restrictions are unchanged, they have been documented over the years by six or more specialist doctors and in spite of this Australia Post have required that I perform work in direct contravention of all this.*
- (7) *When considering all of the above, I will contend that Australia Post are derelict in their duty by directing this worker on sick leave without having attempted to offer some other form of employment. Further they would have continued to require that I perform the work I had been doing for the last ten years had it not been for the fact that I had complained about my wages and conditions. I will further contend that my employer is in breach of Duty of Care, has breached the Privacy Act, has actively practiced Discrimination, Intimidation and Harassment. All of these contentions are well documented and are undeniable.*
- (8) *I further contend that rather than attempt to retain this employee in work, Australia Post in fact one week after the anniversary of my 65th birthday were devising strategies in an endeavour to terminate my employment.*

The matters I have raised over the last 5 months have been ignored, never mind adequately attended to save that of 'selective responses' by yourself and others and in particular my memos addressed to the HR Dept. and in particular M/s. Lipinski.

These memos contain many specific questions with regard to my salary and employment conditions, not only have they not been attended to, but in fact have been treated in a contemptuous manner. I refer you to various emails between yourself, M/s. Lipinski, Sam Avram, Clint Draper etc. and I note you consider any further action with regard to this writers concerns as unnecessary and consider the matters closed.

Let me assure you, these matters are not closed and if you are unwilling or unable to properly (not adequately) address this workers concerns, then I suggest you pass on the file to someone who is.

Yours Sincerely

[Signed]

Jim Allan".²³

[25] On 12 December 2005, Australia Post wrote to Mr Allan as follows:

"Dear Mr Allan

I refer to Mr Peter Lunt's correspondence of 4/5/05 and 9/5/05 informing you that because you failed to permit Australia Post to confirm your medical restrictions with an Australia Post nominated doctor, Australia Post was unable to confirm your medical restrictions and therefore unable to identify suitable redeployment within the restrictions of your medical condition. Consequently you were directed on sick leave from 5/5/05 pending confirmation of your medical restrictions by an Australia Post nominated doctor.

Clause 3 of the Australia Post Principal Determination provides that 'If an employee is found to be inefficient or incompetent or unable to discharge or incapable of discharging the duties applicable to the employees position, the employee may be:

- a) Transferred to another position having the same classification (in the same locality or elsewhere)
- b) Reduced to a lower position and salary, or
- c) Retired from the Corporation.'

*You are hereby advised that unless Australia Post is able to apply provisions 3(a) & 3(b) above, you will be retired from the Corporation. Should you reconsider attending a medical examination with an Australia Post nominated doctor and provide the required medical release authority **please advise me in writing by no later than Friday 23 December 2005.***

Your sincerely

[Signed]

*C L Draper
Manager Human Resources
Mail & Networks Division*".²⁴

[26] Mr Allan responded on 21 December 2005 as follows:

“Dear Mr Draper

I am in receipt of your written ultimatum/directive dated 12 December 2005 and ask where, because of Mr. Peter Lunt’s correspondence dated 4/5/05 and 9/5/05 do you feel you are justified in issuing this ultimatum. Where for example does my current situation differ from that of say September 1995, April 2000, December 2001 etc., and if you do feel you are justified why did you fail to apply your so called Australia Post Principal Determination at those times.

My medical restrictions did not differ, nor has my medical condition changed during any and all of the time span forementioned and as you well know, in all of that time I was required to, and did perform, all of the duties of a Full Time Postal Delivery Officer. This requirement of Aust. Post was in spite of, and contrary to the restrictions contained in the Work Cover Certificates I had supplied to you.

In your letter you mention my ‘failure to permit Aust. Post to confirm my medical restrictions with an Aust. Post nominated doctor’. I have never failed to honour the requirements of my employer and I take umbrage at the insinuation.

For the record, it was your so called Facility Nominated Doctor who failed to permit confirmation of my medical restrictions. When asked if he was prepared to accept responsibility for his actions, he disappeared like a startled rabbit. For the umpteenth time, it was he who refused to conduct this latest of three F.F.Ds in as many years and of course you had failed to act on the recommendations of the two prior.

This entire F.F.D. farce will be resolved in another place, but in the meantime I will continue to play your game and submit to yet again another of these. However before providing a medical release authority will you please forward to me copies of precisely that medical and other information which you would intend to supply the examining doctor and a written explanation as to why you have chosen this time to apply your ultimatum when you did not do so during any of the past times mentioned above.

Yours Sincerely

[Signed]

*Jim Allan”.*²⁵

[27] Australia Post again wrote to Mr Allan on 3 January 2006 as follows:

“Dear Mr Allan

I refer to your letter of 21/12/05, in particular your advice that you require copies of all medical information which would be supplied to the Australia Post nominated doctor before providing a medical release authority. I bring to your attention that you were advised both verbally during a meeting on 19/4/05 and subsequently in writing of the procedure for requesting medical information and also the reasons why you were required to be medically examined. I do not

consider it necessary to re-iterate this information again. Please refer to correspondence dated 27/4/05, 4/5/05 (two letters) and 9/5/05.

Further, as previously explained to you in my letter of 12/12/05, if Australia Post is unable to confirm your medical restrictions an assessment of whether suitable redeployment options exist either at your nominal full time PDO level or in a part time capacity cannot be undertaken. If suitable redeployment cannot be identified you will be retired in accordance with the provisions of Clause 3(c) of the Australia Post Principal Determination.

Clause 3 of the Australia Post Principal Determination provides that 'If an employee is found to be inefficient or incompetent or unable to discharge or incapable of discharging the duties applicable to the employees position, the employee may be:

- a) Transferred to another position having the same classification (in the same locality or elsewhere)
- b) Reduced to a lower position and salary, or
- c) Retired from the Corporation.'

Notwithstanding previous correspondence I am advising you that you will be retired from Australia Post in accordance with Clause 3(c) of the Australia Post Principal Determination effective from Thursday 12 January 2006 unless you unconditionally consent to:

1. *Attend a fitness for duty medical examination and fully co-operate with the Australia Post nominated doctor during the examination and*
2. *Sign the attached medical release authority the purpose of which is firstly, to authorise the Australia Post nominated doctor to provide a medical report to Australia Post, and secondly, to authorise your nominated doctor/s to exchange information on your medical condition with the Australia Post nominated doctor for the purpose of determining your medical fitness for duty.*

*Please confirm your agreement to attend a fitness for duty medical examination by completing and signing the enclosed medical release authority by no later than **close of business Wednesday 11 January 2006**. A pre-addressed envelope is provided for your convenience.*

Your sincerely

[Signed]

*C L Draper
Manager Human Resources
Mail & Networks Division".²⁶*

[28] In a letter dated 6 January 2006, Mr Allan responded to Australia Post, without providing a signed medical release authority, as follows:

“Dear Sir

I am in receipt of your letter of January 3rd 2006 and wonder why you found it necessary to threaten this employee with retirement from the corporation by a set date if I did not comply with your demands.

You would know from my letter to you 23rd December 2005 that I have no objection to your insistence that I submit to yet again another of your so called Fitness for Duty assessments, and upon receipt of the appointed time date and place will duly attend.

In your arsenal of determinations, awards, conditions of employment etc, there is nowhere of which I am aware, whereby I am required to provide authority to exchange Medical, and/or any other information before a Fitness for duty assessment can proceed, and to this end I will not provide an authority other than in this instance only, and authorise the Australia Post nominated doctor to provide a medical report to Australia Post. This should not be a deterrent to the assessment taking place and I refer you to electronic mail from a Dean White to Alexandra Lipinski dated Friday 7th November 2003.

I refer you to paragraph 4 your letter January 3rd 2006 and inform you that we do not yet live in a Police State and your use of the word ‘unconditionally’ is entirely inappropriate, I also inform you that co-operation is not a one-way street.

You keep quoting clause 3 from Australia Post Principal Determinations as though this somehow is not the actual matter in dispute and in spite of the fact that this very matter is presently before the Human Rights and Equal Opportunity Commission.

You would also know that the Commission is close to adjudicating on the matter. I suggest that in these circumstances you are exceeding your authority by forcing this worker to submit to yet another of these medical assessments under the threat of dismissal from the corporation before the Commission can bring down its findings. You would also know that there are various avenues open to me, which would effectively prevent you from doing this, such as an interim injunction, however, I would hope that common sense can prevail and an action such as this would not be necessary. I am also painfully aware that having stated this, and knowing your form, it in all likelihood will be necessary.

All of the above notwithstanding, and assuming that you will apply common sense, you need only to provide the date, time and place of your so called fitness for duty assessment and as stated earlier I will duly attend.

Yours Faithfully

[Signed]

Jim Allan”.²⁷

[29] Again, Australia Post wrote to Mr Allan on 11 January 2006 as follows:

"I refer to your letter of 6/1/06 in which you consented to attend a Fitness for duty medical assessment and sign a limited medical release authority authorising the Australia Post nominated doctor to release the report of the fitness for duty medical examination findings to Australia Post.

I bring to your attention that the purpose of the medical release authority, a copy of which was provided to you in my letter of 3/1/06, is also to enable the Australia Post nominated doctor to correspond with your treating doctor/specialist.

Previous medical examinations notwithstanding, the purpose of requiring you to undergo a fitness for duty medical examination is to confirm your current medical restrictions. Furthermore, given that you advised Australia Post during a meeting on 19/4/05 that your medical certificate dated 7/3/05 precluded you from performing any sorting duties and your advice conflicted with previous medical information provided by you (refer correspondence dated 4/5/05), the Australia Post nominated doctor will need to correspond with your treating doctor/s and exchange information on your medical condition in order to confirm your medical restrictions. This is necessary before an assessment can be made as to whether there are suitable and safe duties available within the restrictions of your medical condition.

*Therefore, I am providing you with a final opportunity to complete and sign the enclosed medical release, which will enable the Australia Post nominated doctor to contact your treating doctor/s and provide a report to Australia Post, by no later than **close of business Wednesday 18 January 2006**. A pre-addressed envelope is provided for your convenience. Following receipt of the signed medical release authority, a fitness for duty medical examination will then be scheduled and you will be notified of the details.*

Should you fail to provide the necessary medical release, Australia Post will be unable to confirm your medical restrictions and therefore unable to identify whether suitable redeployment exists at or below your nominal level. You will then be retired from Australia Post in accordance with Clause 3(c) of the Australia Post Principal Determination effective from Thursday 19 January 2006.

Your sincerely

[Signed]

*Clint Draper
Manager Human Resources
Mail & Networks Division".²⁸*

[30] Mr Allan responded on 17 January 2006 in a letter dated 16 January 2006, as set out below, without providing a signed medical release authority:

“Dear Mr Draper

I am in receipt of your letter dated 11/01/06 and once again find myself perplexed at the continuous stream of misinformation contained in this, and other correspondence emanating from Australia Post.

If, as you have admitted, Aust. Post is unable to confirm my medical restrictions without the need to consult with my treating doctors, surely then, confirmation from these doctors of my medical restrictions without the need to attend one or your so called facility nominated doctors would be sufficient. My treating doctors are in possession of all relevant data, and in your own words, your facility nominated doctors alone will not be able to furnish an assessment of any consequence.

Given the above circumstances, I contend that your Mr. Peter Lunt and Australia Post once again failed in their duty by suspending this writer from work without regard to proper procedure. If as you state my medical report dated 7/3/05 differed from previous reports I had supplied, then it was incumbent upon you to request access to the relevant medical practitioner to obtain clarification before taking the action you did. You of course made no attempt to do this.

Advice I may have provided during the 19/4/05 meeting concerning my Work Cover Certificate dated 7/3/05 certainly did not conflict with previous Work Cover Certificates I had supplied, you well know this (please cease asserting otherwise). You have in your possession several work cover certificates detailing the precise same restrictions as contained in the certificate dated 7/3/05.

It is gratifying although disappointing that after all these years Aust. Post has finally recognized the need to provide duties to this worker that would be suitable and safe. The three previous attempts by your facility nominated doctors were a complete sham and your continual disregard of some restrictions contained in all of the work cover certificates I had supplied verges on the criminal. I have no doubt the relevant statutory authorities will apply the appropriate penalties when the time comes.

The stipulations contained in my letter 6/1/06 still apply, however, upon receipt of the criteria which you would require I will undertake to have my treating doctor provide (on a one only, one at a time basis) to Aust. Post a fitness for duty assessment based on that criteria.

I note your penchant to continually quote clauses from various awards, determinations etc. and once again you quote clause 3(c) Australia Post Principal Determinations. I do not share the same penchant and will resist the temptation to require that you accept my right to have my treating doctor provide a fitness for duty report. As an aside, and just a suggestion you should include an additional clause in your principal determinations 3(d) elevated to a higher position and salary.

It never ceases to amaze me how you people continually accentuate the negative in all of these matters. It is a great pity, but of course indicative of the entire culture and overlooks the fact that injured workers just may have something positive and constructive to contribute.

Yours Sincerely

[Signed]

Jim Allan".²⁹

[31] Finally, on 19 January 2006, Australia Post sent the following letter to Mr Allan:

"Dear Mr Allan

NOTIFICATION OF INCAPACITY RETIREMENT

I acknowledge receipt of your letter dated 16/1/06. I am disappointed that despite previous correspondence to you dated 12/12/05, 3/1/06 and 11/1/06 explaining the reasons why you were required to attend a medical examination conducted by an Australia Post nominated doctor and sign a medical release authority enabling the Australia Post nominated doctor to contact your nominated medical practitioner/s and provide a report to Australia Post, you have chosen not to do so.

Australia Post is therefore unable to confirm your medical restrictions and consequently unable to identify whether suitable redeployment exists at or below your nominal level in accordance with clauses 3(a) & (b) of the Australia Post Principal Determination.

Clause 3 of the Australia Post Principal Determination *provides that:*

'If an employee is found to be inefficient or incompetent or unable to discharge or incapable of discharging the duties applicable to the employees position, the employee may be:

- a) Transferred to another position having the same classification (in the same locality or elsewhere)*
- b) Reduced to a lower position and salary, or*
- c) Retired from the Corporation.'*

*You have been given a period of 5 weeks notice and your retirement from Australia will therefore be effective from **Thursday 23 February 2006**, following which you will receive a separate advice regarding any outstanding entitlements.*

If you consider the decision to retire you to be harsh, unjust or unreasonable you have the right to submit a written application requesting a review of the decision by a Board of Reference. The application must be lodged within 14 days of the date of this letter, addressed to:

Chairman
Australia Post Board of Reference
C/- Manager – Human Resources (Mail & Networks Division)
GPO Box 20208
MELBOURNE VIC 3001

If you avail of the review option, you should indicate if you want the relevant union to be advised of the appeal.

Should you exercise your right of appeal to a Board of Reference, and your appeal is successful, you will be required to repay in full, all monies paid in lieu of leave, including any leave bonus(es) and any monies associated with payment for a period of notice, which were paid on the termination of your employment. Failure to repay these monies in full, immediately on recommencement, will result in service prior to resumption of employment not being counted for leave accrual purposes.

Your sincerely

[Signed]

*C L Draper
Manager Human Resources
Mail & Networks Division”³⁰*

Relevant Legislation

[32] Section 652(3) of the *Workplace Relations Act 1996* (Cth) (the Act) provides in relation to terminations of employment that occur before 27 March 2006, as follows:³¹

“652 (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 employee’s capacity or conduct (including its effect on the safety and welfare of other employees) 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) the degree to which the size of the employer’s undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*

- (f) *the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*
- (g) *any other matters that the Commission considers relevant.”*

[33] I will deal with each of these matters in turn.

Valid Reason

[34] I am satisfied there was a valid reason for the termination of Mr Allan’s employment by Australia Post related to his conduct.

[35] The evidence reveals that the 7 March 2005 WorkCover Certificate of Capacity that Mr Allan provided to Australia Post from his medical practitioner differed in respect of Mr Allan’s work restrictions from the three previous WorkCover Certificates of Capacity Mr Allan had provided to Australia Post.

[36] The differences between the work restrictions in the 7 March 2005 WorkCover Certificate of Capacity and those in the previous three WorkCover Certificates of Capacity were significant given that Mr Allan’s duties at that time involved the very activities that the 7 March 2005 WorkCover Certificate of Capacity stated were now work restrictions.

[37] The *Australia Post General Conditions of Employment Award 1999*³² provided that Australia Post may require an employee to undergo an examination by a medical practitioner nominated by Australia Post where the employee may be unfit or incapable of discharging duties.

[38] In the circumstances, I think it was reasonable for Australia Post to require Mr Allan to undergo an examination by an Australia Post nominated medical practitioner.

[39] I also think it was reasonable for Australia Post to require Mr Allan to sign a medical release authority authorising the Australia Post nominated medical practitioner to provide a medical report to Australia Post and authorising Mr Allan’s nominated medical practitioner(s) to exchange information on his medical condition with the Australia Post nominated medical practitioner.

[40] I consider it was reasonable for Australia Post to require Mr Allan to sign a medical release authority authorising the Australia Post nominated medical practitioner to provide a medical report to Australia Post, so that Australia Post could act on the Australia Post nominated medical practitioner’s examination of Mr Allan.

[41] I consider it was reasonable for Australia Post to require Mr Allan to sign a medical release authority authorising Mr Allan’s nominated medical practitioner to exchange information on Mr Allan’s medical condition with the Australia Post nominated medical practitioner, so that Mr Allan’s current medical related work restrictions could be confirmed.

[42] However, when Australia Post did require Mr Allan to undergo an examination by a medical practitioner nominated by Australia Post, Mr Allan did not agree to proceed with the examination until the Australia Post nominated medical practitioner agreed to refrain from reporting to Australia Post on the examination without Mr Allan's consent.

[43] Subsequently, Mr Allan advised he would attend an examination with an Australia Post nominated medical practitioner but would not provide a medical release authority until Australia Post provided him with the medical and other information it intended to supply to the medical practitioner.

[44] Mr Allan later agreed to attend an examination with an Australia Post nominated medical practitioner but stated "*there is nowhere of which I am aware, whereby I am required to provide authority to exchange Medical, and/or any other information before a Fitness for duty assessment can proceed, and to this end I will not provide an authority other than in this instance only, and authorise the Australia Post nominated doctor to provide a medical report to Australia Post.*"³³

[45] Finally, Mr Allan indicated to Australia Post that his previous stipulation continued to apply but he stated that "*upon receipt of the criteria which you would require I will undertake to have my treating doctor provide (on a one only, one at a time basis) to Aust. Post a fitness for duty assessment based on that criteria.*"³⁴

[46] Since I consider it was reasonable for Australia Post to require Mr Allan to undergo an examination by an Australia Post nominated medical practitioner and to require Mr Allan to sign a medical release authority authorising the Australia Post nominated medical practitioner to provide a medical report to Australia Post and Mr Allan's nominated medical practitioner(s) to exchange information on his medical condition with the Australia Post nominated medical practitioner, I consider Mr Allan's unwillingness to co-operate in respect of the medical release authority constituted a valid reason for the termination of Mr Allan's employment by Australia Post.

Notified of Valid Reason and Opportunity to Respond

[47] In light of the correspondence between the parties, as set out in the evidence above, I am satisfied Mr Allan was adequately notified of the valid reason for the termination of his employment and given an opportunity to respond.

Warnings about Unsatisfactory Performance

[48] As the termination of Mr Allan's employment did not relate to unsatisfactory performance by him, I am satisfied the issue of whether Mr Allan was warned about any unsatisfactory performance is not relevant in this matter.

Size of Employer and Absence of Dedicated Human Resources Management

[49] Australia Post is a large employer with significant and dedicated human resource management specialists and expertise. I am not satisfied the size of Australia Post or its dedicated human resource management specialists and expertise had any detrimental impact on the procedures it followed in effecting the termination of Mr Allan's employment.

Other Matters

[50] Another matter I consider is relevant is that Mr Allan was placed on sick leave, both paid and unpaid, without being asked if he wished to be placed on it. It is a matter which goes towards a conclusion the termination of Mr Allan's employment by Australia Post was harsh, unjust or unreasonable.

Conclusion

[51] Bearing in mind my conclusions, as set out above, regarding all the matters in ss.652(3)(a) to (g) of the Act, I have decided that in the circumstances the termination of Mr Allan's employment by Australia Post was not harsh, unjust or unreasonable. The matters going against a conclusion the termination was harsh, unjust or unreasonable, being the valid reason for the termination of Mr Allan's employment together with the notification of that valid reason to Mr Allan and the opportunity given to him to respond, are such as to outweigh the matter going towards a conclusion the termination was harsh, unjust or unreasonable.

[52] In so deciding, I have been conscious of the objects of the relevant Division of the Act and, in particular, my decision has been made in the context of the need to ensure a "*fair go all round*" is accorded both to Mr Allan and Australia Post.

[53] Mr Allan's application for relief in respect of the termination of his employment by Australia Post is, therefore, dismissed.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

Decision Summary

Termination of employment – unfair dismissal – workplace injury – fitness for duty – relevant award allows Australia Post (AP) to require employee to undergo examination by medical practitioner nominated by AP to ascertain fitness for duty – applicant terminated after refusing to fully co-operate with such request – was reasonable for AP to (1. make such request and (2. require applicant to sign medical release authorising AP's nominated medical practitioner to provide medical report to AP, and (3. require applicant's own medical practitioner to exchange information with AP nominated medical practitioner – satisfied applicant's unwillingness to co-operate in respect of medical release authority constituted valid reason for termination – procedural fairness afforded – fair go all round – application dismissed.

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Endnotes:

¹ Exhibit A1 at p.1.

² Exhibit A1 at p.1.

³ Exhibit A1, Exhibit A37 at p.9 and Exhibit R28 at PL4.

⁴ Exhibit R22 at AL1.

⁵ Exhibit R22 at paragraph 28 and Exhibit R5.

⁶ Exhibit R22 at AL11.

⁷ Exhibit R25 at PL4.

⁸ The WorkCover Certificate of Capacity dated December 2004 actually stated Mr Allan was fit for modified duties from 8 December 2004 to 7 March 2004, but the latter date of 7 March 2004 must be regarded as a slip.

⁹ Exhibit R2.

¹⁰ Exhibit R4.

¹¹ Exhibit R3.

¹² Exhibit R22 at paragraphs 45-46 and AL12.

¹³ Exhibit A1 in the "To Whom it May Concern" attachment dated 10 April 2005.

¹⁴ AW766597, Print S0871.

¹⁵ Exhibit R22 at AL13.

¹⁶ Exhibit R22 at AL14.

¹⁷ Exhibit R22 at AL17.

¹⁸ Exhibit R22 at AL18.

¹⁹ Exhibit R28 at PL5.

²⁰ Exhibit R22 at paragraphs 53 and 56-57.

²¹ Exhibit R28 at PL6.

²² Exhibit R28 at PL7.

²³ Exhibit R28 at PL8.

²⁴ Exhibit R30 at CLD2.

²⁵ Exhibit R30 at CLD3.

²⁶ Exhibit R30 at CLD4.

²⁷ Exhibit R30 at CLD5.

²⁸ Exhibit R30 at CLD6.

²⁹ Exhibit R30 at CLD7.

³⁰ Exhibit R30 at CLD8.

³¹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), Schedule 4, Part 2, Division 3, s.7.

³² AW766597, Print S0871.

³³ Exhibit R30 at CLD5.

³⁴ Exhibit R30 at CLD7.