AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

*Workplace Relations Act 1996*
s.120 - Appeal to Full Bench

**Appeal by Allan**
(C2006/3136)

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

Allan

and

Australian Postal Corporation
(U2006/3119)

SENIOR DEPUTY PRESIDENT DRAKE
SENIOR DEPUTY PRESIDENT LACY
COMMISSIONER EAMES SYDNEY, 17 JANUARY 2007

*Workplace injury – WorkCover – cessation of benefits at age 65 - Certificate of Capacity – medical restrictions – change in restrictions – employer requirement for employee to undergo medical examination – employee authority for exchange of medical information between examining doctors and employer – employee unwilling to cooperate.*

## DECISION

**[1]** This decision arises out of James Allan's application for leave to appeal against the decision of Senior Deputy President Acton[1] given in Melbourne on 12 September 2006. In the decision her Honour dismissed Mr Allan's application for relief in respect of the termination of his employment from Australian Postal Corporation (Australia Post).

**[2]** The only stated ground of appeal is that her Honour erred in determining that there was a valid reason for the termination of Mr Allan's employment. In a detailed statement providing particulars of the alleged error, and in opening his case, Mr Allan contended that her Honour had overlooked, misinterpreted and misconstrued evidence and had failed to take into account some material considerations. In substance Mr Allan argued that Senior Deputy President Acton had erred in the exercise of her discretion in determining that:

- his employer's requirement for him to submit a medical examination was reasonable; and

- he was unwilling to give authority for his treating doctor to provide information about his medical condition to the employer's nominated doctor.

[1] PR973929.

**[3]** Australia Post appeared at the hearing and defended the decision of Senior Deputy President Acton. It contended that Senior Deputy President Acton made no appealable error and that Mr Allan merely sought to re-argue his case in defiance of the principles governing appeals against a discretionary decision. There is no dispute that the decision is one of a discretionary nature.

**[4]** It is convenient at this point to recite the well established principles for determining an application for leave to appeal and those governing appeals against discretionary decisions in the Commission. The Full Bench of the Commission in *Chand v State Rail Authority of NSW*[2] stated the well established principle for a grant of leave to appeal thus:

> *An appeal to the Full Bench lies only by leave of a Full Bench: s.120(1). A Full Bench must grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted: s.120(2). Otherwise, a grant of leave is governed by the conventional considerations for the grant of leave to appeal by an appellate court which include whether the decision is attended with sufficient doubt to warrant its reconsideration or whether substantial injustice may result if leave is refused. However,* "[t]hese 'grounds' should not be seen as fetters upon the broad discretion conferred by [s.120(1)], but as examples of circumstances which will usually be treated as justifying the grant of leave" although "[i]t will rarely, if ever, be appropriate to grant leave unless an arguable case of appealable error is demonstrated. This is so simply because an appeal cannot succeed in the absence of appealable error".[3]

**[5]** The appellate jurisdiction conferred on us by s.120 of the WR Act in relation to an appeal concerning an order arising from the arbitration of an application under s.643 is conditioned by s.685 which limits the grounds of an appeal. The only ground is that the member of the Commission who conducted the arbitration was in error in deciding to make an order. That can be an error of fact or an error of law.[4]

**[6]** Because a Full Bench of the Commission has power under 120(6) of the WR Act to receive further evidence on appeal, an appeal under that section is properly described as an appeal by way of rehearing. And, because there is nothing to suggest otherwise, its powers under sub-s (7) are exercisable only if there is error on the part of the primary decision-maker. And that is so regardless of the different decisions that may be the subject of an appeal under s.120.[5]

**[7]** The types of error that may constitute grounds for review of a discretionary decision of the kind here under consideration were re-stated in *Coal & Allied* in the following way:

> *Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process [See* Norbis v Norbis *(1986) 161 CLR 513 at 518-519 per Mason and Deane JJ]. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in*

[2] PR975108.
[3] *Wan v AIRC* (2001) 116 FCR 481 at [30].
[4] See *Smith v Moore Paragon Australia Limited*, PR915674.
[5] See *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 193, [17].

*the decision-making process were identified, in relation to judicial discretions, in* House v The King *in these terms:*

> `If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. *[(1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ].* [6]

**[8]** We proceed to determine Mr Allan's application in accordance with these principles.

**Factual Context**

**[9]** Australia Post employed Mr Allan as a Postal Delivery Officer from the late 1980's until the termination of his employment on 23 February 2006. In the period between 1995 and when Mr Allan reached the age of 65 years on 23 October 2003 he suffered a workplace injury and was in receipt of weekly compensation payments. The payments ceased in accordance with the provisions of the *Safety, Rehabilitation and Compensation Act* 1988 upon Mr Allan attaining the age of 65 years. Thereafter, Australia Post debited his weekly wage rate against his accrued sick leave credits until those credits were exhausted on 24 December 2004.

**[10]** In December 2004 Mr Allan presented a WorkCover Certificate of Capacity from his treating medical practitioner certifying that Mr Allan was fit for modified duties from December 2004 until 7 March 2005, specifying the following restrictions:

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

**[11]** Mr Allan had previously presented two WorkCover Certificates of Capacity covering the periods 7 September to 7 December 2004 and 7 June to 7 September 2004 with restrictions that were substantially the same as those specified in the December 2004 Certificate. Mr Allan presented a further WorkCover Certificate of Capacity for the period 8 March 2005 to 30 June 2005, in which the following restrictions were specified:

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

[6] *Ibid*, [21].

**[12]** The two newly imposed restrictions in respect of *sorting* and *throwing off* prompted Australia Post to call on Mr Allan to present for a *Fitness for Duty Examination*. An appointment initially made for Mr Allan to attend for a medical examination on 22 April 2005, was rescheduled for 28 April. Although Mr Allan attended the appointed place for the medical examination it did not proceed because of an issue between the examining doctor and Mr Allan. Mr Allan refused to sign a medical information release authorisation and the examining doctor's refusal to accede to Mr Allan's demand that the doctor not disclose the results of his examination to anyone without Mr Allan's express authorisation.

**[13]** Following the aborted medical examination on 28 April 2005 Australia Post directed Mr Allan to take sick leave pending confirmation of his medical restrictions by an Australia Post nominated doctor. Mr Allan having exhausted all sick leave credits went off on unpaid sick leave and, except for a brief period in which he received sick leave payments as new sick leave credits accrued, he remained employed in that status until the termination of his employment.

**[14]** A voluminous exchange of correspondence between Australia Post and Mr Allan followed his departure from work on sick leave. The substance of it was Australia Post's insistence that Mr Allan present for a medical examination to determine his fitness for duty and Mr Allan's assertions that the examination was unnecessary. The exchanges continued until 19 January 2006, when Australia Post wrote to Mr Allan notifying him of its determination to compulsorily retire him from service on the ground that it was unable to confirm his medical suitability for redeployment in the absence of confirmation of his medical restrictions.

**Decision at first instance**

**[15]** In her reasons for decision Senior Deputy President Acton found that there was a valid reason for the termination of Mr Allan's employment. Her Honour found that the change in the restrictions on Mr Allan's capacity for work, as determined by his treating medical practitioner, was significant. In the circumstances Senior Deputy President Acton was satisfied that Australia Post had acted reasonably:

- in its requirements for Mr Allan to undergo a medical examination by a medical practitioner nominated by Australia Post;

- in requiring Mr Allan to sign medical release authorities authorising the release of the Australia Post's medical examiner's report to Australia Post and the exchange of medical reports between Mr Allan's treating medical practitioner and the Australia Post nominated medical practitioner.

**[16]** Senior Deputy President Acton went on to find that Mr Allan:

- did not agree to proceed with the medical examination by the Australia Post nominated medical practitioner until the doctor agreed to refrain from reporting to Australia Post without Mr Allan's consent;

- would not provide a medical release authority until Australia Post provided him with the medical and other information it intended to supply to its nominated medical practitioner;

- gave qualified agreement to an authority for the Australia Post medical practitioner to report to Australia Post.

**[17]** In consequence of the findings as to the actions of Australia Post and the conduct of Mr Allan her Honour was satisfied that Mr Allan had been unwilling to cooperate in respect of the medical release authorities and that his unwillingness constituted a valid reason for the termination of his employment.

**[18]** Taking account of all of the factors prescribed by s.652(3)(a) to (g) of the Workplace Relations Act 1996, including Mr Allan's enforced sick leave with and without pay, Senior Deputy President Acton was satisfied that the termination of Mr Allan's employment was not harsh, unjust or unreasonable.

**Determination**

**[19]** It is common ground that Mr Allan's employment was subject to the *Australia Post General Conditions of Employment Award 1999* (General Conditions Award). It relevantly provides that 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:

- may be unfit or incapable of discharging duties;

- may be a danger to other employees or members of the public due to state of health;

- has been absent through illness for a continuous period exceeding 13 weeks.

The General Conditions Award further provides that an employee who is required to furnish a medical report or undergo a medical examination must do so *as soon as practicable*.[7]

**[20]** When Mr Allan presented the WorkCover Certificate of Capacity in March 2005 showing additional restrictions on his capacity for work Australia Post reasonably concluded that Mr Allan may be unfit or incapable of discharging the duties that had been assigned to him. Senior Deputy President Acton, correctly in our view, so decided. Clearly, it was Australia's Post's right under the General Conditions Award to require Mr Allan to furnish a medical report or to undergo an examination by its nominated medical practitioner. While it was unnecessary for Australia Post to secure an authority from Mr Allan to have him undergo an examination by its medical practitioner, Mr Allan's authority was necessary for an exchange of medical reports between his treating medical practitioner and Australia Post's nominated medical examiner. Australia Post asked Mr Allan for such an authority. He did not give it.

**[21]** We agree with the conclusion reached by Senior Deputy President Acton that Mr Allan's unwillingness to give an authority for exchanges of medical reports as between the medical practitioners and Australia Post was of itself sufficient conduct justifying the termination of his employment. We agree that there was a valid reason for terminating Mr Allan's employment. We agree also with her Honour's conclusion that the termination of Mr Allan's employment was not harsh, unjust or unreasonable. Mr Allan has not demonstrated any appealable error. Leave to appeal is refused and the application will be struck out. An order to that effect will issue separately.

[7] see General Conditions Award, Clauses 26.5.10 and 26.5.11.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

**Decision Summary**

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Termination of employment – unfair dismissal – workplace injury – WorkCover – cessation of benefits at age 65 – certificate of capacity – medical restrictions – medical examination – exchange of medical information – appeal – Full Bench – Commission at first instance found valid reason for termination based on applicant's unwillingness to authorise exchange of medical reports between medical practitioner and employer to enable employer to assess fitness for duty – applicant appealed on basis that Commission misinterpreted evidence – satisfied employer had right under award to require employee to undergo medical examination and exchange medical information – employer acted reasonably – valid reason for termination – no jurisdictional error – leave to appeal refused – application dismissed.

Appeal by Allan against decision of Acton SDP on 12 September 2006 [PR973929] – Re: Australian Postal Corporation;

C2006/3136 [2007] AIRCFB 34
Drake SDP
Lacy SDP
Eames C Sydney 17 January 2007
**Citation:** *Appeal by Allan against decision of Acton SDP on 12 September 2006 [PR973929] – Re: Australian Postal Corporation;* [2007] AIRCFB 34 (17 January 2007)

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*Appearances:*

*J Allan* on his own behalf.

*J D'Abaco* of Counsel for Australian Postal Corporation.

*Hearing details:*

2006.
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