

19/08; [2008] VSC 56

SUPREME COURT OF VICTORIA

INTERNATIONAL FLAVOURS & FRAGRANCES v HOFF

Byrne J

21, 22 February, 7 March 2008

CIVIL PROCEEDINGS – EMPLOYER AND EMPLOYEE – EMPLOYEE'S EMPLOYMENT TERMINATED BY COMPANY – TERM IN CONTRACT OF EMPLOYMENT THAT EMPLOYEE WOULD RECEIVE CERTAIN ENTITLEMENTS IN THE EVENT OF TERMINATION FOR REDUNDANCY – CLAIM BY EMPLOYEE FOR ENTITLEMENT – WHETHER EMPLOYEE DISMISSED FOR REDUNDANCY – LEGAL TEST FOR DETERMINING REDUNDANCY – FINDING BY MAGISTRATE THAT EMPLOYEE DISMISSED FOR REDUNDANCY – WHETHER MAGISTRATE IN ERROR.

1. Redundancy occurs where the employer no longer wishes the job performed by the employee to be performed by anyone. In the present case, the employee had to prove on the balance of probabilities that the disappearance of her job was the reason for the termination of her employment. What is required is an analysis of each of the two jobs in terms of the overall duties and responsibilities which it comprises and its place in the structure of the enterprise. It is only where the disparity between the two is such that the job of the dismissed employee can be said no longer to exist that the circumstances for redundancy can arise.

2. Where a magistrate found that there was evidence to infer that the reasons for the employee's dismissal was that her functions and responsibilities had been incorporated into a different and expanded job for which she was considered unsuitable and which was given to another employee, it was open to the magistrate to conclude that the employee had been terminated for redundancy.

BYRNE J:

1. The respondent, Sandra Bridgette Hoff, was employed by the appellant, International Flavours & Fragrances (Australia) Pty Ltd ("IFF"), from 4 January 1988 until 11 January 2006 when her employment was terminated by IFF. At the time of termination she held the position of purchasing manager of materials for the IFF factory at Dandenong. The business of IFF at Dandenong was the manufacture of flavours and seasoning for the food industry.

2. It was a term of her contract of employment that, in the event that her employment was terminated for redundancy, Ms Hoff would receive certain entitlements which, in her case, were \$100,000. At the time of termination, IFF took the position that her employment was not terminated for redundancy and that she had no entitlement. She disagreed with this and commenced a proceeding in the Magistrates' Court in March 2006 seeking \$100,000 and interest.

3. On 21 February 2007, following a two day hearing, Ms AJ Chambers M published her reasons for concluding that Ms Hoff's claim should succeed. An order was duly made on 14 March 2007 that IFF pay to her \$100,000 plus \$11,490.40 interest, and costs which were agreed at \$30,000. By notice of appeal dated 27 April 2007, IFF appeals against the Magistrates' Court orders.

4 The questions of law raised in the notice of appeal, as amended, may be summarised as follows:

1. Did the Magistrate fail to identify the correct legal test for determining redundancy?
2. Did the Magistrate fail to apply these tests?
3. Did the Magistrate effectively reverse the ultimate onus of proof by imposing it on IFF?
4. Was the conclusion that the determination of employment was for redundancy open on the evidence?

5. I shall address each of these questions in turn, but not in the order presented. The grounds of appeal number 16 and range over six pages. I will not set them out.

QUESTION 1 - THE CORRECT LEGAL TEST

6. The reasons for decision of the Magistrate were detailed. In four paragraphs^[1] her Honour comprehensively sets out the legal features of redundancy at common law. She accepted, as did the parties, that the terms of the contract of employment imported this common law concept so that it was to the leading cases discussing this concept that she turned.^[2] She concluded that redundancy occurs where the employer no longer wishes the job performed by the employee to be performed by anyone. Cases such as *Jones v Department of Energy and Minerals*^[3] and *Foster's Group Ltd v Wing*^[4] show that, since a job is a collection of duties and responsibilities performed by an employee, it may be that, where these duties and responsibilities are dispersed to other employees, there is a redundancy for the employee notwithstanding that the employer continues to have the benefit of those services which had previously been performed by the employee as part of his or her job. It is sufficient that the duties and responsibilities of the employee which constitute his or her job have been changed or reorganised so that, for practical purposes, the original job no longer exists.^[5] Her Honour correctly identified these as the principles relevant to this case.

7. Her Honour also concluded that the entitlement of Ms Hoff depended upon her proving that her employment was terminated for redundancy. This means that she must establish that the disappearance of her job was the reason for the termination of her employment.^[6] In this case, IFF contended that the termination was for a number of matters which were collectively called performance issues. These issues were, in summary, issues as to the efficient performance of her duties and also as to her attitude towards other employees in the company.

8. The principal criticism offered on behalf of IFF was that her Honour made no mention in her reasons of *Foster's case*, which, it was said, was a decision on similar facts. This is, of course, not a valid criticism unless it be shown that her Honour misstated the legal principles which she applied.

9. I am satisfied that her Honour correctly identified the legal principles which underlie the concept of termination for redundancy. The first question of law must be answered in the negative.

QUESTION 3 - THE ONUS OF PROOF.

10. The Magistrate stated, correctly in my view, that the plaintiff before the Court bore the onus of establishing her case on the balance of probabilities. If, at the end of the day, Ms Hoff failed to persuade the Magistrate to that standard that she was terminated for redundancy, then she should fail.

11. IFF, as I have mentioned, joined issue upon the question that, if there were redundancy, this was not the reason for termination. It did so by advancing another reason, namely, performance issues concerning Ms Hoff. Accordingly, the Magistrate considered this contention and the evidence offered in support of and against it. An examination of the transcript^[7] shows that this contention occupied a large part of the hearing. Her Honour was not, in the end, persuaded that there was any substance in this contention of IFF. Her Honour did not, by so doing, impose any ultimate burden on IFF as to the reason for termination. It was just that there were two competing reasons offered and she found on the balance of probabilities that the reason offered by Ms Hoff was established.

12. Accordingly, the third question of law should be answered in the negative.

QUESTIONS 2 AND 4 - THE APPLICATION OF THE REDUNDANCY TEST

13. The uncontradicted evidence showed that in November 2005, some two months before the termination of Ms Hoff's employment, IFF interviewed one Matthew Ellis for the position of planning manager. By letter dated 19 December 2005 he was offered that position but the letter of offer does not describe his duties or responsibilities other than identifying his position by its title. Mr Ellis commenced work with IFF in that position in the first week of February 2006, some three weeks after Ms Hoff was terminated.

14. It was Ms Hoff's case that her job was not performed by anyone after her departure on 11 January 2006. IFF contended that Mr Ellis assumed her duties and responsibilities and certain others when he commenced in February.

15. It should be noted that these matters, namely, what work was Mr Ellis employed to perform in November 2005 and what work he did in fact perform when he commenced in February 2006, were matters of which Ms Hoff had no direct knowledge. She was not involved in his employment; indeed, the evidence of the IFF witnesses was to the effect that she was not told of this because he was to take her place in the factory. She had no knowledge of what he did in February 2006 for she was then no longer employed by IFF. She was, of course, able to give evidence of her own responsibilities and duties but, for those of Mr Ellis, she depended upon others. She called no other witness in the Magistrates' Court. The witnesses called by IFF were Jennifer Louise Marlow, the IFF human resources manager, and Morris Clayton Mahaley, at the time the IFF operations manager at Dandenong. Not called were Matthew Rouse, the country manager, and Mr Ellis himself. Ms Hoff's line manager was Peter Smith who reported to Mr Mahaley who, in turn, reported to Mr Rouse. The evidence showed that it was Mr Rouse whose responsibility it was ultimately to make the decision to terminate Ms Hoff.

16. In the circumstances, counsel for Ms Hoff argued that the Magistrate should draw a *Jones v Dunkel* inference against IFF for its failure to call Mr Rouse and Mr Ellis. The Magistrate accepted this submission and applied the rule, correctly in my view, without using the failure to call these witnesses to fill gaps in the proofs of Ms Hoff.

17. Having reviewed the evidence and made certain findings as to factual matters, her Honour at paragraph 48 of her reasons set out the conclusion which formed the basis for her finding as to whether the contract of employment was terminated for redundancy. Her findings were in these terms:

48. On 19 December, 2005 Mr Ellis and IFF entered into a contract of employment, with Mr Ellis being offered employment as Planning Manager, reporting to the Supply Chain Manager. His position was changed to Planning and Purchasing Manager in August, 2006. His duties included manufacturing duties as well as the purchasing duties performed by [Ms Hoff]. I find that whilst the purchasing duties of [Ms Hoff] continued to be performed by Mr Ellis, they were in fact incorporated into an expanded role that was given to Mr Ellis, one including manufacturing duties. As was conceded by Ms Marlow, it made good business sense to amalgamate the dual roles in this way.

18. On behalf of IFF, it was submitted that the findings of fact made in this paragraph and their application to the law were erroneous. By way of explanation, it should be noted that the evidence showed that after he commenced employment the duties and responsibilities of Mr Ellis changed. In evidence was an IFF document entitled Job Description for him dated August 2006. The evidence was that his earlier job descriptions existed but that they had been discarded when the August 2006 document came into existence. In this document Mr Ellis' job title is planning and purchasing manager. His key responsibilities are given as follows:

- Consistently achieve customer service level of 96% minimum
- Achieve predetermined inventory targets as measured by days of inventory and % of obsolete and slow moving stock
- Deliver cost saving initiatives for purchased items
- Monitor purchase orders to ensure that raw material levels are adequate to meet production requirements
- Implement demand management strategies to achieve customer service of 96% minimum
- Monitor production schedules to ensure that finished goods levels are adequate and timely to meet customer orders
- Ensure integrity of the department processes and procedures.

None of these appears to be that of purchasing manager of materials for use in the manufacturing process. It may be that the customer referred to in dot points 1, 5 and 6 was the manufacturing department of IFF. On a reading of this document, the Magistrate was entitled to conclude that, by August 2006, the job of Mr Ellis was far removed from that which Ms Hoff had performed prior to her dismissal.

19. In terms of the management hierarchy, Mr Ellis is shown in the August 2006 document as reporting to one Lloyd Majoros, the supply chain manager, and that he had, in turn as subordinates, a demand manager, five production planners/buyers, and a shop floor controller.

20. Another document in evidence was an organisational chart of the IFF supply chain dated 25 September 2006. This shows that Mr Ellis was one of three managers reporting to Mr Majoros. His position is described as planning manager. Six, or perhaps seven employees report to him: three supply coordinators, a purchasing coordinator, a demand manager, and a senior planner. Reporting to the senior planner is a person whose position is described as shop floor controller. The evidence of Ms Hoff was that, of these persons, she did not have reporting to her the senior planner or the demand manager. Mr Mahaley, who moved from Dandenong in August 2006, said that, in a number of respects, this chart did not reflect the organisational structure in place when Mr Ellis joined the organisation.

21. What was put on behalf of Ms Hoff to the Magistrates' Court was that Mr Ellis' responsibilities in a large part concerned the planning of material purchases and supply to the factory, a role which she never had. Her purchasing work was performed by him or by persons under his control, but this was not a major part of the job he was employed to perform.

22. I have mentioned that both of these documents bear dates some seven or eight months after Ms Hoff's termination in January 2006 and, to that extent, may not truly reflect the position in January and February of that year.

23. Mr Mahaley said that, when she was terminated, her responsibilities were that of vendor management, supply management and a leader of the purchasing team. All of these three functions have passed to Mr Ellis. I interrupt myself to observe that his key responsibilities in the August 2006 document do not appear to bear this out. Mr Mahaley said that when Mr Ellis was first employed his first task was to clear the gaps in the purchasing department and to evaluate the skills and capacities of those in that department. He said that in April 2006, following the resignation of an employee, Joanne Luke, Mr Ellis' role was enlarged to take in the day-to-day responsibilities of purchasing and planning as well as demand planning.

24. Ms Marlow, too, said that Ms Hoff's responsibilities were solely directed to the roles of supply and purchasing of materials for use in the manufacturing processes and that these passed to Mr Ellis upon his appointment. She said, also, that, when he was engaged, "we did discuss with him about the demand position, that we would be looking at demand reporting into that area". And when asked whether there was good reason to combine the roles of demand planning and purchasing, the witness said "it was what Ms Hoff had to do anyway". This role of planning and demand reporting, which essentially concerned the relationship of the material supply and the demands of the manufacturing activities at the factory, was referred to in the context at the hearing as manufacturing duties. Ms Hoff said that her duties did not include manufacturing duties.

25. In the light of this, the Magistrate in the passage which I have quoted above^[8] summarised the factual position as she saw it as being that, when he commenced employment in February 2006, Mr Ellis continued to perform Ms Hoff's purchase duties but that by August they had been incorporated in an expanded role which included the manufacturing duties. These findings were open on the evidence and I find no error of law in this. There may be some uncertainty as to when the duties were enlarged, but nothing turns on this. Question four must be answered in the affirmative.

26. I come now to the nub of this aspect of the appeal. It is said on behalf of IFF that such a finding must inevitably lead to the conclusion that Ms Hoff's job continued after her dismissal for this is what Mr Ellis was doing. Accordingly, her employment was not terminated for redundancy.

27. In response, it was put that, upon a proper analysis, what the Magistrate found was that Ms Hoff's position was abolished. Her functions were rolled up into a new and different position which she was not offered, presumably because she was not seen as suitably qualified. It was submitted that there was evidence to support such a factual conclusion. I was referred to the following findings of the Magistrate:

- The title of Mr Ellis' position was that of planning manager, as an indication that his principal activity was that of planner
- The only competing reason for termination offered by IFF, the professional issues, was rejected
- The reason given to Ms Hoff by Mr Mahaley and Ms Marlow for her termination at the dismissal meeting on 11 January:

I find that [Ms Hoff] was told by Mr Mahaley that due to a restructure of the company her role was no longer required, the company was moving in a different direction, a different skills set was needed and that her employment was being terminated.^[9]

- The Magistrate, upon a vital issue in the case, rejected the evidence of Mr Mahaley and Ms Marlow as to what was said at the meeting on 11 January. Her Honour was entitled to treat this as a credit issue when assessing their assertions in evidence as to the circumstances and reasons for the dismissal.

28. I remind myself that the conclusion is largely one of fact. It is not my role to revisit questions of fact which lie in the province of the trial judge. I am to determine whether there was evidence before the Magistrate which would support the inference of fact which she drew that the reason for Ms Hoff's dismissal was that her functions and responsibilities had been incorporated into a different and expanded job for which she was considered unsuitable and which was that given to Mr Ellis.

29. The question of law is whether these facts amount to redundancy. It is clear from the judgment of the Court of Appeal in *Foster's case* that where the circumstances are that the work previously performed by the suggested redundant employee continues to be performed by another job-holder after that employee is terminated, the answer to the question whether the job of the dismissed employee has been abolished must be one of comparing the job of the dismissed employee with that of the other job-holder. It is not a matter of the labels given by management to the two jobs, although this may be a factor. It is not sufficient to say that the job has not been abolished simply because the duties and responsibilities continue to be performed by another employee. If this were the case the job of purchasing manager could never be abolished; it would seem always to be necessary for a manufacturer like IFF to have someone manage the purchase of its raw materials. What is required is that there be an analysis of each of the two jobs in terms of the overall duties and responsibilities which it comprises and its place in the structure of the enterprise. It is only where the disparity between the two is such that the job of the dismissed employee can be said no longer to exist that the circumstances of dismissal for redundancy can arise.

30. It is clear from her Reasons that the Magistrate addressed this question and reached the conclusion that the totality of the responsibilities and duties which Mr Ellis was engaged to assume and perform were so different from those previously assumed and performed by Ms Hoff that it may be said that his was a new job requiring different skills so that her role was no longer required. I find no appellable error in this conclusion. The second question must be answered in the negative.

31. It follows from this that the appeal must be dismissed.

[1] Paragraphs [12]-[15].

[2] *R v Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-Operative Ltd* (1977) 16 SASR 6; (1977) 44 SAIR 1202, *Jones v Department of Energy and Minerals* (1995) 60 IR 304 (Fed Ct) and *Dibb v Commissioner of Taxation* [2004] FCAFC 126; (2004) 136 FCR 388; (2004) 207 ALR 151; 55 ATR 786; [2004] ALMD 5780.

[3] (1995) 60 IR 304.

[4] [2005] VSCA 322; (2005) 148 IR 224 (Vic Court of Appeal).

[5] *Foster's Group Ltd v Wing* [2005] VSCA 322; (2005) 148 IR 224 (Vic Court of Appeal) at [36].

[6] *Dibb v Commissioner of Taxation* [2004] FCAFC 126; (2004) 136 FCR 388 at 404 [43]- [44]; (2004) 207 ALR 151; 55 ATR 786; [2004] ALMD 5780.

[7] The transcript for the first day of the hearing in the Magistrates' Court comprises only notes taken of the evidence; not a full transcript.

[8] See para [17] above.

[9] Magistrate's Reasons para [41].

APPEARANCES: For the appellant International Flavours & Fragrances: Mr TJ Ginnane SC and Mr J Forbes, counsel. Freehills, solicitors. For the respondent Hoff: Mr NJD Green QC and Mr MR Champion (21 February 2008), counsel. Mr AJ McDonald (Sol) (22 February 2008). McDonald Murholme, solicitors.