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Flawed HR structure renders Telstra unable to meet consultation requirements, says AIRC

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In an important private dispute resolution ruling that might provide an alternative channel to challenge unfair dismissals under Work Choices, the AIRC has reinstated three employees made redundant by Telstra. It found that flaws in the structure of the telco's HR management mean it is unable to comply with obligations to consult employees and their union about restructuring plans.

The CEPU made an application under s134 of the 1998 IR Act, which was a predecessor to s170LW of the pre-reform Workplace Relations Act, for the reinstatement of 48 employees made redundant by the company.

Commissioner Smith rejected Telstra's jurisdictional objection to the application. The company claimed that employees no longer had access to the dispute resolution provisions of their agreement once they had been dismissed.

He said that last week's full bench ruling in ING Administration had "found that where an employee raised a dispute over the proper operation of an agreement and was subsequently terminated, then the matter could continue".

Commissioner Smith said that on the basis of the full bench majority view in *ING* and Justice Catherine Branson's decision in *Miller* (which he indicated took an even broader view), he had jurisdiction to proceed with the case.

Job swaps not available, but Telstra fails on consultation

Commissioner Smith rejected the union's argument that the employees were still entitled to pursue "job swaps" as an alternative to being made redundant. He accepted that job swaps were not provided for under the current agreement.

However, he accepted the union's point that Telstra had failed to meet its obligations to consult with the CEPU on the possibility of measures to avert redundancies or mitigate their effects.

Both sides accepted that the underlying principles applying to consultation meant it would have to be genuine and provide an opportunity to influence the decision maker, but not be a "frustrating barrier", Commissioner Smith said.

He said that while the redundancies occurred in one "business line", Telstra gave no consideration to whether suitable vacancies were available in another business line.

While the HR function was responsible for making organisational judgements, it had no authority to "make and implement judgements about the proper application of the Agreement", he said.

"HR advises redundant employees that they can apply for vacancies within Telstra but no responsibility is taken to see if vacancies can be matched with skills.

"It is inconsistent with the Agreement to treat persons who are being made redundant in the same manner as any external applicant.

"Whilst it is necessary to ensure that the inherent requirements of any vacant position can be undertaken by an existing (declared redundant) employee, HR should be able to ensure that such

persons are placed in a vacant position and given any familiarisation training necessary."

Commissioner Smith cited research by the University of Melbourne's Carol Kulik and Hugh Bainbridge showing with the devolution of HR functions, some issues became "hot potatoes", because "neither HR nor line management had proper responsibility to manage".

"The approach to this matter by Telstra has shown a structural flaw which may have operated to the detriment of the four persons concerned.

"It is possible that the way in which these employees' issues were addressed by the business as a whole rendered them, in a sense, as organisational 'hot potatoes'," he said.

Three workers reinstated

Commissioner Smith found he had the power to grant remedies, in line with Justice Branson's ruling in *Miller*.

He reinstated two of the redundant employees, who each had more than 20 years service. He further ordered that Telstra reinstate another of the redundant workers, if it can find a suitable vacancy within the next three months.

New way to challenge unfair dismissals?

Under Work Choices, employers can rely on the operational reasons defence to argue that redundancy decisions are justified.

But today's decision might open up a new way for employees to challenge termination of employment decisions without facing the jurisdictional hurdles of unfair dismissal applications under the new system.

CEPU v Telstra. PR75016 (13 December 2006)

- In an earlier stage of the case, Vice President Michael Lawler withdrew from proceedings, after Telstra accused him of apprehended bias (see transcript).

He said that during conciliation in an unrelated dispute resolution involving Telstra making a long-serving employee redundant only a few years short of his retirement, he expressed the view "that a decent employer would not throw this man onto the scrap heap after giving many years of faithful service in circumstances where there was no complaint about his performance and he was only a few years short of qualifying for superannuated retirement."

He observed during the conciliation, "that redundancies ought not be processed in a fashion like the assembling of McDonald's hamburgers."

Commissioner Smith took over the case after Vice President Lawler stepped down.