EMPLOYEES - SUMMARY DISMISSAL

On author has said that unless "an employee has a job as a mattress tester or a similar occupation, sleeping on duty is neglect of duty".

It is clear that employers may summarily terminate a contract of employment without notice in certain circumstances. Incompetence is, of course, a sufficient ground upon which to exercise a right of summary dismissal. The legal basis for such action is twofold, namely, an express or implied representation by the employee that he was competent to undertake the task, and secondly, actual incompetence.

Other bases for dismissal include wilful disobedience of lawful orders, neglect in the performance of duties, and misconduct. Indeed, on one view, "misconduct" is the umbrella under which all other grounds of summary dismissal are included.

Obviously, it is not possible to categorise various forms of human conduct to pre-determine what will amount to misconduct. It is in all instances a question of fact. For example, the use of insulting and objectionable language may constitute misconduct. So, too, may drunkenness. Immorality may be sufficient. Dishonesty in the course of employment may, if sufficiently serious as a single act, justify instant dismissal.

Summary dismissal is a swift and effective remedy available to an employer where the circumstances warrant it. It requires neither due notice nor the payment of wages in lieu. It is, in short, a right of immediate self-help.

- Reprinted with permission from Colin Biggers & Paisley, Solicitors' NEWS.

DISMISSED MANAGER WINS HIGH PAYOUT

- Tony Thomas

Compensation for unfair dismissal is increasing dramatically as new precedents are being set

A new chapter has been written in the saga of determining suitable compensation for a senior executive who has been unfairly dismissed. The decision, by a deputy president of the Industrial Relations Commission of Victoria, Brian Lawrence, concerned a case brought by Colin Bunnett. Bunnett was sacked in August 1988, when he was general manager of the automotive suspension group of Hendersons Federal Springs Works. Bunnett, 45, had been on a salary of $92,000, with other benefits taking his package to $110,000. He had been with the company 16 years and had responsibility at Hendersons for four factories and 450 workers.

All of Bunnett's superannuation contributions were paid by the employer and when he left the company he was paid his entitlement of $153,000. The deputy president rejected his employer's argument that this was a partial substitute for longer notice of dismissal.

Lawrence also dealt with the extent to which a senior executive should see the risk of dismissal as part of his lifestyle. He said:

> "At senior management levels in some firms and industries, organisational change will be endemic. Changes could take place as a result of internal company reorganisations, or following acquisitions by the employer, or by the employer selling off part of its business, or consequent upon control of the employer passing into the hands of another company. Mr Bunnett was in such an environment."

But Lawrence went on to argue that since Bunnett had been unfairly dismissed, he should get at least as good a payout as if he had been made blamelessly redundant. This led him to award an extra amount of quasi-severance pay of two weeks per year for Bunnett's 16 years of service.

In another interesting stand, Lawrence said Bunnett's base pay of $92,000 was the relevant figure and not his total package of $110,000. In all, Bunnett got $95,000 (54 weeks' pay) as compensation. In November 1988, he found another job, at a package of $75,000-$80,000.

Lawrence said the jurisdiction of the commission to award compensation had only recently been recognised, although he might well have added that the commission conferred the power on itself. The relevant section 34(5) does not mention compensation, only making up of lost wages, but the commission's new power has been affirmed by the Victorian Supreme Court. The NSW Industrial Commission has power only to restore lost wages, not to give compensation, but the SA commission can and does award compensation.

> "It was not a pleasant or easy experience," Bunnett told BRW. "It was the principle of getting justice that kept me going. The case took from August 1988 to July 1989. I think the deputy president was aware that he was creating a precedent and that's why he went into such detail. I had four days in court with a barrister and it cost me a large amount - well over $10,000. Each party has to pay its own costs in the industrial commission regardless of who wins. I think that is an unfairness that needs to be addressed."

In July 1987, Hendersons took over National Springs to become Australia's main supplier of car suspension parts. Hendersons was taken over in November 1987 by Natcorp Investments and Natcorp, in turn, was taken over this year by its affiliate, National Consolidated, and is now part of the web of companies in John Spalvins' Adsteam group.

The Natcorp executives got rid of various Hendersons senior executives, including Bunnett, who was sacked allegedly for incompetence and given a month's pay in lieu of notice. He did not have a service agreement. Other Hendersons managers who went - but with a good handout via their service agreements - were the managing director, John Collingwood, the director of finance, Michael Helstrom, and the corporate development manager, Fergus Stewart, who all left on 4 July 1988.

Large-company personnel managers who have studied the judgment say that Natcorp management does not emerge from the case in a good light. Personnel managers

also point to industrial commissioners' lack of sympathy for hard-driving executives who sometimes lack tact. This is how deputy president Lawrence characterised Bunnett and Peter Callaghan, the Natcorp director who sacked Bunnett:

> "Mr Bunnett presented as a man with a genuine and active concern for his fellow employee. Mr Callaghan, on the other hand, presented as a man so committed to the pursuit of profit and other financial targets that good employee relations were bound to suffer ...."

Lawrence rejected that Bunnett had been incompetent, and found that he had been unfairly dismissed. This won Bunnett an extra five months' pay. The novelty of the judgment is that the commission decided he deserved a further six months' pay by way of compensation. This appears part of a growing trend - alarming for employers - for the Industrial Relations Commission to award quasi-damages to employees.

The Bunnett case also indicates the difficulty of proving that a middle/senior manager is incompetent. At senior levels, responsibilities are diffused and overlapping. If a top executive discovers a gross problem in company operations, he cannot merely seek a scapegoat.

Hendersons certainly had a gross problem: in the wash-up from the merging of the National Springs and Hendersons suspension factories, a "calamitous" stock shrinkage of about $1.3 million was gradually discovered at the Alexandria factory in NSW.

No one could explain the stock shrinkage. One of the proposed causes was even "a virus in the computer system", although an alleged "shambles" in the stock recording system seemed a likely culprit and Bunnett was in the process of fixing it. Natcorp's case against Bunnett was further weakened by the fact that performance appraisals of Bunnett during the Henderson management regime rated him highly.

Callaghan and Natcorp managing director Pat Elliott sacked Bunnett on 19 August last year without warning and without a chance to justify himself. What was said to him is disputed, but several days later Bunnett asked Callaghan why he had been sacked, and Callaghan replied only: "I would have thought that was obvious."

Callaghan told deputy president Lawrence that Bunnett had not only failed to report the true extent of the stock problem, but had reported that the plant was performing better than Natcorp had expected: "He had at least two stocktakes down, which were under his control and if he did not pick it (the shortfall) up in that time, then he was never going to pick it up, so he just grossly underperformed," Callaghan said.

Lawrence traced the detail of the stock problem and concluded that the criticism of Bunnett was unwarranted. Bunnett had done his best to rationalise operations and had only a shared responsibility for stock control, properly relying on others for the detailed work. Lawrence thought it important that only a month or so earlier, Natcorp had agreed to a request by Bunnett for a guarantee of six months' salary if the Hendersons operation was sold off and if Bunnett then became redundant. And, after Bunnett was sacked, Natcorp offered to pay him to be a consultant to his successor.

Lawrence, after bumping up Bunnett's pay in lieu of notice from one month to six, rejected Bunnett's claim for severance pay for redundancy. But he went on to say that compensation for unfair dismissal should not stop at pay in lieu of reasonable notice.

Lawrence said that criteria had not yet emerged from cases on how much compensation was warranted for unfair dismissal. He said the time-honoured industrial principle of "a fair go for all concerned" would be important, but other factors were involved.

The Right Steps to Take

The Bunnett judgment, handed down last July, was initially overlooked in the industrial relations circles, but is now a conversation piece among personnel managers in big Melbourne companies.

Leigh Duthie, of legal firm Baker & McKenzie, which ran the case for Natcorp, believes the details of the case have not yet appeared in any of the legal reporting journals. He says it will become a guide in cases of senior-management dismissals rather than for lower-level workers.

Duthie says that deputy president Lawrence made it clear he was not setting down a general rule that an unfair dismissal warranted a payout equivalent to severance (redundancy) pay as well as a payout for inadequate notice.

The sting in the tail is that companies might need to raise the sums they have been offering voluntarily to an employee. If the amount is not high enough (defining that is the problem) an element of "unfairness" arises and the employee might seek compensation.

Duthie says the forum of the Industrial Relations Commission is attractive to dismissed managers. Conciliation often get quick results. If that fails, an application can be brought on with minimum legal costs, and many employers then prefer to settle to avoid the publicity and the hassle. An employee can represent himself, and the court might rule that the employer forgo use of counsel in court.

The safest procedure for the employer is to pay generously, conditional on the employee (after getting his own legal advice) signing away his right to further payment. If the employee later sought to overturn the signed deed, it would involve him in a difficult legal task.

Duthie says ruefully that 95% of employers who make enquiries to his firm have already sacked the employee and only later realise that they have not followed the correct procedures. "Essentially, an employer needs to give the employee a chance to respond to any allegations, followed by counselling and then warnings, preferably in writing."

- Reprinted from BRW - Australia's Leading Business Magazine.