Australian court upholds unbridled right to hire and fire

Terry Cook
30 January 2007

In what the Howard government and employer groups have hailed a "landmark" decision, the Australian Industrial Relations Commission (AIRC) has overturned a successful unfair dismissal claim by Village Roadshow employee Warren Carter, 51.

Carter was laid off last July when the company closed the cinema complex he managed in Doncaster, Melbourne. The complex was later demolished. While the 11 other employees were redeployed across the large Australia-wide company, Carter, an employee of 19 years, was not. The company even rejected his offer to take extended long-service leave until a position, even one less senior, could be found.

In September, AIRC Commissioner Len Hingley ruled that Carter's dismissal had been unfair because the company had no complaint with the standard of his work and it had not made a reasonable effort to redeploy him. "The applicant was a long-serving multi-skilled employee who had worked in numerous locations. He was therefore eminently redeployable," Hingley stated.

The Howard government, determined to make the sacking a test-case, appealed against the ruling to the full bench of the AIRC, insisting Carter's dismissal was allowable under its new WorkChoices industrial laws, as the company claimed it was for "genuine operational reasons".

WorkChoices, which became operational last March, abolished unfair dismissal laws for millions of workers in small companies with 20 or less employees. Minimal protection was supposed to still apply for workers in large companies—except if an employer could show the layoffs were for "operational reasons," including technological, economic or structural changes.

Even though the new laws immeasurably strengthened the ability of employers to sack workers at will, large companies were reluctant to apply the "operational reasons" clause. Their concerns were prompted by the controversy surrounding the use of the clause at Cowra Abattoirs, which sacked 29 workers last April and attempted to rehire them on inferior pay and conditions.

The Office of Workplace Services (OWS)—the body established by Howard to oversee WorkChoices—eventually ruled the Cowra sackings were legal under the new industrial relations laws. But the associated drawn-out investigation and legal proceedings were not what employer organisations had expected or wanted.

The full bench ruling on January 16 upheld the government's appeal. It declared that under WorkChoices an employee is not protected even if the sacking was not "valid, meaning sound, defensible or well founded". The termination did not even have to be "a logical response to the employer's operational requirements".

The ruling established that large companies could restructure their operations free of unfair dismissal challenges and without any obligation to offer redeployment even to long-serving employees.

Associate Professor Peter Sheldon from the University of NSW's industrial relations research centre, commented that the case had given "the whip hand" to employers. "The important thing here is that the full bench differentiated the new Act from the old Workplace Relations Act of 1996 by showing that in the 1996 Act employers needed to show they had a valid reason based on operational requirements," he said. "Under the new Act—and they say it's very clear what the parliament meant—the reasons no longer have to be valid. You can in fact be a harsh, punitive employer as long as you can point to genuine operational requirements."

Similarly, Flinders University law professor Andrew Stewart declared: "This decision says that as soon as the commission is satisfied that there were genuine operational grounds, they can't look any more at whether it was a fair decision or not. At the very least, the

'operational reasons' defence prevents employers from being forced to justify their decision where there is a genuine redundancy, even if the employer has ignored available alternatives or not consulted adequately with staff."

Australian Chamber of Commerce and Industry chief Peter Hendy hailed the ruling in glowing terms. "There was a problem prior to WorkChoices where the test was heavily loaded in favour of the employee. The new legislation is more balanced. How anybody can object to a decision that says that a person can be made redundant for genuine operational reasons is beyond us," he said.

Outgoing federal Workplace Relations Minister Kevin Andrews told ABC radio on January 16: "This is a case where the entire Village complex has been demolished, you can drive past and it doesn't exist, people can't go to a film there. And in these circumstances, the independent umpire, the full bench of the Industrial Relations Commission, found that there were genuine operational reasons."

ABC presenter Peta Donald asked: "Well couldn't Village Roadshow find him [Carter] a job somewhere else? It's a big company." Andrews failed to even address the question, replying: "These were matters which were put before the independent umpire, the Industrial Relations Commission, and taken into account by the Industrial Relations Commission."

Andrews felt obliged to add: "No employer should get excited about this decision because they can't just assert carte blanche that there are operational reasons, they have to produce evidence". The ruling, however, makes clear that the company does not have to justify the reasons, only provide evidence that a restructuring took place. In other words, "genuine operational reasons" are whatever employers deem them to be.

The overriding message from the AIRC ruling for workers is: don't go that road, the outcome is preordained. Given the litigation costs involved—up to $30,000 according to the Australian Council of Trade Unions (ACTU)—most workers have already been deterred.

ACTU president Sharan Burrow condemned the AIRC ruling, saying it demonstrated that WorkChoices had given employers "unwarranted power to sack at whim". "What an amazing story," she said, "when Australians can now face a situation where they simply have no guarantees of job security."

But the AIRC ruling also exposed the ACTU's own campaign against WorkChoices, which is more about preserving the interests of the unions than defending workers' rights and conditions. The ACTU is campaigning for the return of a Labor government at federal elections later this year and calling for legislative changes to reestablish the AIRC's broad powers in an arbitrated industrial relations system involving the unions in collective work agreements.

The AIRC ruling in the Carter case, however, makes clear that the court has never been "an independent umpire" but is dedicated to upholding the collective interests of employers. The real purpose of the previous arbitration system was to contain the struggles of the working class by establishing legally-binding collective agreements to be enforced with the assistance of the trade unions.

It is just as fanciful to rely on Labor to provide legal protection against unfair dismissal. While paying lipservice to the defence of workers' rights, workplace relations spokesperson Julia Gillard is yet to spell out Labor's policy.

Gillard was asked last month: "Where would you go with unfair dismissal laws, back to pre-Howard?" While conceding that workers should have the right to contest unfair dismissals, she avoided giving a clear answer. "Nothing we do will be going backwards, we believe in moving forward," Gillard declared, indicating that Labor would not reinstate previous laws.

Business groups and the media are putting predictable pressure on Labor. The *Courier Mail* insisted this month: "At some point, Labor is going to have to declare its stand on unfair dismissal... business is red-hot on this issue and will fight any move from Labor for a return to the old law... Labor is going to have to find a way through that makes it look like the government's hard line is being tempered but without any real effect."

That is no doubt exactly what Gillard is seeking to do: oppose WorkChoices in words to dupe the electorate, but ensure that big business understands there will be no change in substance if Labor is elected.