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## Termination of Employment

*Two recent cases provide guidance in respect of issues relating to termination of employment. In CSR Viridian Ltd v Claveria [2008] FCAFC 177 the Full Federal Court provided clarification on what constitutes a “competent administrative authority”, while the case of Royle v Cheetham Salt Ltd [2008] AIRC 709, reminds employers to consider procedural fairness in the dismissal process, even when misconduct is involved.*

**Who is a “COMPETENT ADMINISTRATIVE AUTHORITY”?: CSR Viridian Ltd v Claveria (2008) 171 FCR 554; [2008] FCAFC 177; BC200809544**

The Full Federal Court has overturned a decision of a single judge of the Federal Court in finding that the Construction, Forestry, Mining and Energy Union (Union) is not a “competent administrative authority” for the purposes of the Workplace Relations Act 1996 (Cth) (Act).

The case of *CSR Viridian Ltd v Claveria*<sup>1</sup> concerned the dismissal of Mr Claveria from his employment at CSR Viridian Limited (CSR). Mr Claveria’s employment was terminated shortly after he complained to the Union that he was being subjected to constant surveillance by his line manager and the Union took the matter up with CSR.

At first instance it was found that the termination of Mr Claveria’s employment was in contravention of s 659(2)(e) of the Act, which provides that an employer must not terminate an employee’s employment for, amongst other things, taking recourse to a competent administrative authority.

However, on appeal a full bench of the Federal Court found that the Union was not a “competent administrative authority” for the purposes of the Act.

In a joint judgment, Goldberg and Jessup JJ looked to the International Labour Organisation’s Convention Concerning Termination of Employment at the Initiative of the Employer (Convention) to determine the correct meaning of the phrase “competent administrative authority”.

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<sup>1</sup> (2008) 171 FCR 554; [2008] FCAFC 177; BC200809544

Construed in accordance with the Convention, Goldberg and Jessup JJ said that a “competent administrative authority” is:

- a governmental or public body or official;
- exercising a power or function of an executive, ministerial or administrative nature (rather than, for example, of a legislative or judicial nature); and
- having competence to receive the complaint as to which the worker had recourse to it.

Although their Honours said that it could be possible that a trade union might be constituted as a government or public body with functions that might relevantly be described as “administrative”, in their view that was not the situation in the present case. Their Honours stated that “although undoubtedly competent to deal with [Mr Claveria’s] complaint in its role as a representative of employees, and in its role as a party to the certified agreement [that covered Mr Claveria’s employment], the Union was not a government or public body, and its powers and functions, relevant to the complaint, were not administrative in the sense we have attempted to explain”.

In a separate judgment, Gray J agreed that the Union was not a “competent administrative authority” in the present case, but stated that the question of whether a particular entity is to be regarded as a competent administrative authority is to be answered by reference to the nature of the powers of that entity in relation to the matters about which the employee concerned has had recourse to it, rather than by reference to the nature of the entity itself. In Gray J’s view “any person or entity could be constituted as a competent administrative authority for a particular purpose if the recourse to that person or body was with respect to a matter within the scope of powers conferred on the person or body”.

The result of the appeal meant that CSR should not have been found to have contravened s 659(2)(e) of the Act in relation to the termination of Mr Claveria’s employment.

### **What this case means for employers**

This case provides a useful and detailed view of what is a “competent administrative authority” and will be useful for employers who are dealing with termination processes where a “complaint” has or may be made to a union.

### **Procedural fairness: *Royle V Cheetham Salt Ltd* [2008] AIRC 709**

The recent decision in *Royle v Cheetham Salt Ltd*<sup>2</sup> is a reminder of the need for employers to ensure there is procedural fairness in the dismissal process — even when there is a valid reason for the dismissal. In this case the employer was required to pay the dismissed employee compensation amounting to 5 week’s pay, even though her conduct gave rise to a valid reason for her dismissal.

Ms Royle had been employed by Cheetham Salt Limited (Cheetham) for a period of 18 years and 9 months, most recently as a receptionist, until she was summarily dismissed in March 2008. The basis provided by Cheetham for terminating Ms Royle’s employment was “improper accessing,

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<sup>2</sup> [2008] AIRC 709

utilisation and dissemination of highly confidential Senior Executive communication". Ms Royle was said to have become aware of the contents of confidential emails during lunchtime walks with Ms Garner, another employee who was receiving the confidential emails by mistake. Ms Royle then passed on the information to others.

Ms Royle argued that her dismissal was harsh, unjust or unreasonable as Ms Garner was the person responsible for disseminating the information contained in the emails. Ms Royle also argued that she had been denied procedural fairness in relation to the dismissal as Cheetham did not conduct a proper investigation into the matter.

When Ms Royle was asked to attend a meeting to discuss the issue she was also asked whether she wanted a witness. Ms Royle stated she could think of nothing which she had done which would require her to have a witness present. Cheetham terminated Ms Royle's employment at the meeting on account of the above conduct. The reasons for the termination that were given to Ms Royle in the meeting were not as detailed as those provided to her in a letter a few days later or the statements and submissions prepared for the Commission.

On the basis of the evidence relied upon by Cheetham at the hearing, Commissioner Foggo accepted that Ms Royle did not access or print the emails but found that there was a valid reason for the termination of Ms Royle's employment on the basis that she read and disclosed the information contained in the emails.

However, in respect to whether Ms Royle was denied procedural fairness Commissioner Foggo stated that there were some matters associated with the procedures leading to the termination of the employment which did not afford procedural fairness to Ms Royle. The Commissioner accepted that Ms Royle was unaware of the seriousness of the meeting in which her employment was terminated, and that she had no idea that it concerned the email issues or that her employment would in any way be jeopardised. Commissioner Foggo was also not satisfied that Ms Royle knew in sufficient detail the reasons why she was asked to attend the meeting, so that she could determine whether to have a witness present.

Commissioner Foggo also had concerns regarding the detail of the allegations put to Ms Royle at the meeting. In respect of this she said "there must be a balance in the procedural process between the clarity of the allegations against an employee and the desire of the [employer] to hear a general account from the employee of the issues at point".

The letter of termination given to Ms Royle after the meeting was also reasonably brief and contained only a "generic" reason for her dismissal. However, a subsequent letter contained far more precise detail of the reasons for the dismissal.

In Commissioner Foggo's view it would have been preferable for the more detailed reasons to have been discussed in full with Ms Royle. Commissioner Foggo said "perhaps if there had been time between the first meeting and the decision to dismiss rather than it all occurring at the only meeting and without a break for any of the participants to further consider the issues, the process may have been more balanced ... In my view she was not given a 'fair go all round'".

The termination of Mr Royle's employment was therefore found to be harsh and an order was made that Cheetham pay Ms Royle compensation equivalent to 5 week's pay.

## **What this case means for employers**

This case is a reminder for employers of the need to be careful to adopt procedurally fair processes whenever they are dealing with an issue of misconduct that may lead to summary dismissal, regardless of how strong the evidence is believed to be. In particular, this decision reminds employers that the process should include the following core steps:

- Prior to a disciplinary meeting, ensure that the employee is informed of the reason for the meeting. The information given must be sufficient to allow the employee to comprehend the seriousness of the issues.
- Notify the employee of the allegations against them – in full.

Give the employee an opportunity to respond to all allegations made against them and investigate whether the responses provided are justified.