VERA SAPEVSKI, VELIKA TRAJKOSKA, CVETANKA PLEVNAROVSKA, TODONKA RISTEVSKA,
ROSA ANGELKOVSKA, MIRIAN MORALES, ROSA SAGREDO AND MYRIAM ARANEDA V. KATIES
FASHIONS (AUSTRALIA)

Nos. NI 3769, 3774, 3778, 3780, 3783, 3784, 3785 & 3787

IRC No. 219/97

Number of pages - 54

Industrial Law - Discrimination Law

IN THE INDUSTRIAL RELATIONS COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

PATCH JR

INDUSTRIAL LAW - EMPLOYMENT LAW - TERMINATION OF EMPLOYMENT - Consideration of the meaning of VALID REASON - A TERMINATION OF EMPLOYMENT which is unlawful by reason of being in breach of a State Act, cannot be justified and is not for a VALID REASON.

INDUSTRIAL LAW - EMPLOYMENT LAW - TERMINATION OF EMPLOYMENT - SEX DISCRIMINATION - The termination of the applicants' employment was a result of indirect discrimination on the basis of sex, and in breach of the Anti Discrimination Act 1997 (NSW). It was therefore not for a VALID REASON.

INDUSTRIAL LAW - EMPLOYMENT LAW - TERMINATION OF EMPLOYMENT - SEX DISCRIMINATION - STATUTORY INTERPRETATION - The prohibitions in the Workplace Relations Act, 1996, of terminations of employment for reason of an employee's sex prohibit terminations resulting from both direct and indirect DISCRIMINATION on the basis of the employee's sex - Consideration of the International>> <<Labour>> Organisation TERMINATION OF EMPLOYMENT CONVENTION.

DISCRIMINATION LAW - Consideration of the relationship between the requirement in the Workplace Relations Act 1996 (C'mth) that there be a VALID

REASON for a TERMINATION OF EMPLOYMENT and the prohibition in the Anti Discrimination Act (NSW) of TERMINATIONS OF EMPLOYMENT resulting from SEX DISCRIMINATION.

INDUSTRIAL LAW - EMPLOYMENT LAW - TERMINATION OF EMPLOYMENT - In the circumstances of this case, employees who signed a document, in which, in terms, they acknowledged their acceptance of a voluntary redundancy offer, were merely accepting the fait accompli that their employment was to end - The TERMINATION OF EMPLOYMENT in each case was, therefore, AT THE INITIATIVE OF THE EMPLOYER.

INDUSTRIAL LAW - EMPLOYMENT LAW - TERMINATION OF EMPLOYMENT - APPLICATIONS FOR LEAVE TO FILE APPLICATIONS OUT OF TIME - Decisions of Judicial Registrars are to be followed by the Australian Industrial Relations Commission - For the guidance of the Commission, consideration of the principles governing such applications - The Workplace Relations Act (1996) is beneficial legislation, and it should be easier for applicants under this legislation to obtain leave than under the Administrative Decisions (Judicial Review) Act - The applicants in this case were all migrant women, who spoke poor English, and has no or little understanding of their legal rights - The courts in this country must be assiduous not to visit upon persons in the position of the applicants an injustice because of understandable ignorance of their rights and misunderstanding and confusion about what to do.

INDUSTRIAL LAW - EMPLOYMENT LAW - TERMINATION OF EMPLOYMENT - COMPENSATION - Discussion of the degree to which a redundancy payment is to be taken into account when determining the quantum of compensation - DUTY TO MITIGATE LOSS - An applicant who worked in the family pizza business, and in respect of whom there was no concrete evidence to establish actual income, either earnt sufficient so as to have had no economic loss, or failed to take reasonable steps to mitigate her loss - In any event, it was not appropriate to make, in her case, an order for compensation.

Administrative Decisions (Judicial Review) Act 1975, s.11

Anti-Discrimination Act (1977) NSW, ss:25(1)(a), 25(1(b), 25(2)

Evidence Act 1995: s.144(1)(b)

Industrial Relations and other Legislation Amendment Act (Act No. 168 of 1995), Schedule 2, Items 5 and 14

Workplace Relations Act 1996, ss: 3(g) 170CA, 170CB, 170DE(1), 170DF, 170EA(3), 170EDA(2), 170EHA, 376(4), Schedule 10

<<International>> <<Labour>> Organisation Convention Concerning Discrimination in Respect of Employment and Occupation

<<International>> <<Labour>> Organisation Convention Concerning Termination of Employment at the Initiative of the Employer

Report III (Part 4B) of the Committee of Experts, on the Application of Conventions and Recommendations, to the 83rd session of the <<International>> <<Labour>> Conference in 1996 (<<International>> <<Labour>> Office, Geneva, 1996)

1988 Rreport of the Committee of Experts to the 75th Session of the <<International>> <<Labour>> Conference

Andersen v Umbakumba Community Council (1994) 126 ALR 121

APESMA v David Graphics Pty Ltd, Industrial Relations Court of Australia, Wilcox CJ, 12 July 1995, unreported

Australian Iron & Steel Propriety Ltd v Banovic & others (1987) 168 CLR 165

Bogg v ICI Australia Pty Ltd, Industrial Relations Court of Australia, Patch JR, 23 June 1997

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298

Burazin v Blacktown City Guardian, Industrial Relations Court of Australia, Full Court, 13 December 1996, unreported

Carrigan v Darwin City Council, Industrial Relations Court of Australia, von Doussa J, 20 March 1997, unreported

Coker-Godson v National Dairies Ltd, Industrial Relations Court of Australia, Keely J, 22 August 1994, unreported

Coyne v Ansett Transport Industries, Industrial Relations Court of Australia, Full Court, 24 September 1996

Davis v Portseal Pty Ltd, Industrial Relations Court of Australia, Full Court, 10 April 1997, unreported

Eggleton v Kingsgrove Medical Centre Pty Ltd, Industrial Relations Court of Australia, Patch JR, 5 March 1997, unreported

Food Preservers Union of Australia v Wattie Pict Ltd (1985) 172 CAR 227

Fryar v System Services Pty Ltd, Industrial Relations Court of Australia, von Doussa J, 10 May 1996, unreported

Gerard Westen v Union des Assurances de Paris, Industrial Relations Court of Australia, Madgwick J, 17 December 1996, unreported

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344

Jones v Dunkel (1959) 101 CLR 298

Kenefick v Australian Submarine Corporation Pty Ltd (No 2) 65 IR 366

Kerr v Jeroma Propriety Ltd, Industrial Relations Court of Australia, Marshall J, 7 October 1996, unreported

Kidd v D.R.G. (U.K) Ltd [1985] ICR 405

Matthews v Coles Myer Ltd (1993) 47 IR 229

May v Lilyvale Hotel Pty Ltd 68 IR 112

Mohazab v Dick Smith Electronics Pty Ltd, (No 2) (1995) 62 IR 200

Nelson v Scholle Industries (1995) 64 IR 9

Rheinberger v Huxley Marketing Pty Ltd (1996) 67 IR 154

Shipping Corp of India Ltd v Gamlen Chemical Co (A'Asia)Pty Ltd (1980) 147 CLR 142

Sinclair v Anthony Smith and Associates Pty Ltd, Industrial Relations Court of Australia, von Doussa J, 1 December 1995

Termination Change and Redundancy Case (1984) 8 IR 34

Turner v K & J Trucks Coffs Harbour Pty Ltd (1995) 61 IR 412

SYDNEY, 25-26 August, 2 September, 4 and 15 December 1995, 31 January, 18 March and 2-3 April 1996, 13-15 May, 29-31 July and 1 August 1996 (hearing), 8 July 1997 (decision)

#DATE 8:7:1997

#ADD 18:7:1997

Counsel for the applicants P. Reitano and C. Howell

Solicitors for the applicants Geoffrey Edwards & Co

Counsel for the respondent R. Goot

Solicitors for the respondent Minter Ellison

THE COURT ORDERS THAT:

Vera Sapevski

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $10,475.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Velika Trajkoska

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $5,000.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Cvetanka Plevnarovska

The Court orders and declares as follows;

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $8,500.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Todonka Ristevska

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of

$8,500.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Rosa Angelkovska

The Court declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

Mirian Morales

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $10,475.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Rosa Sagredo

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $10,475.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Myriam Araneda

The Court declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

Note: Settlement and entry of orders is dealt with by Order 36 of the Industrial Relations Court Rules

PATCH JR

REASONS FOR DECISION

VARIOUS MATTERS HEARD TOGETHER

Before the Court commenced hearing the evidence in these matters, it became apparent that, if the Court were to, at the same time, hear evidence in respect of all 20 applications which were before the Court, the hearing would have been too unwieldy. As a consequence, I suggested that the way to proceed would be for each "side" to pick 4 applicants, in order to have what might be called a "quasi representative" hearing. The representatives of the parties complied with that request, and, as a result, the following selections were made:

Selections by the Applicant's Counsel

Name Number

Vera Sapevski 95/3769

Velika Trajkoska 95/3778

Cvetanka Plevnarovska 95/3783

Todonka Ristevska 95/3787

Selections by the Respondent's Counsel

Name Number

Rosa Angelkovska 95/3774

Mirian Morales 95/3780

Rosa Sagredo 95/3784

Myriam Araneda 95/3785

It was agreed that the Court would initially proceed to final determination of the above matters only - but that I would remain part-heard in all of the other matters, and that the evidence heard in the above matters would be evidence in the matters to which I did not proceed to final determination.

It was understood that the parties would be guided by the decision of the Court in the listed matters, and that, if at all possible, the remaining matters would be settled in accordance with the principles set out in the judgments of the listed matters.

It should be noted at this point that these proceedings are not representative proceedings in the sense of Order 73 of the Industrial Relations Court Rules - although, in many ways, if all the matters are settled in accordance with the judgments in the listed matters, the course of conduct adopted will have, as a practical matter, the same effect.

It is, of course, greatly to be desired that the remaining matters are, in fact, settled in accordance with the principles set out in these reasons for judgment. The parties are urged to bear in mind the wording of what is sometimes called the "Penalty Costs" section of the *Workplace Relations Act* 1996 ("the Act") - section 170EHA.

BACKGROUND FACTS

The respondent ("Katies") is a corporation which operates a chain of retail women's fashions and accessories stores in Australia and New Zealand.

All the applicants (and all of the employees whose employment was terminated by the respondent in this particular episode) are women.

All of them are immigrants to this country, and from non-English speaking backgrounds. All of them had a limited understanding of English, and none of them spoke English as their first language. Their understanding of English varied, but, generally speaking, they did not understand how to speak English fluently, and few of them could read English. Their first languages were either Macedonian, Croatian, Serbian, or Spanish.

The applicants whose cases are included in the list of those to be determined in these reasons for judgment, had varying lengths of service with Katies - Ms Sapevski had 19 and half years, Ms Plevnaroska had 8 years, Ms Angelkovska 8 and half years, Ms Trajkoska 12 years, Ms Ristevska 8 years, Ms Morales 6 years, Ms Araneda 8 years and Ms Sagredo 5 and half years.

There was, and is, no suggestion that any of the applicants were, in the course of their employment, anything other than satisfactory employees.

All of the applicants were employed by the respondent as "Splitters and Packers" at its warehouse located at Surry Hills in New South Wales. The function of a "Splitter" involved splitting stock into size, colour and style and placing the stock in position for packing. The function of a "Packer" was to pack stock into boxes. Stock would arrive at the warehouse from manufacturers, would be "split" according to stores, and then "packed", into boxes, to be distributed to the various Katies retail outlets. Hanging stock was "bagged" (by men), for distribution, after it had been "split."

Up until 22 March 1995 (the date of the termination of employment of most of the applicants) the workforce at the Katies warehouse at Surry Hills consisted of approximately seventy permanent full time employees and approximately twenty casual employees. Of these employees, there were ten male stock receipt and despatch persons, six male bagging staff (who bundled hanging

garments together and placed bags over them) a female stationary clerk, two ticketing persons (one male and one female), five despatch clerks (all female) and six administration staff (some male and some female).

Of the 34 splitters and packers (all of whom were women), 4 worked in the "New Zealand section" and the remainder worked in the "Australian section".

From time to time, according to demand, some of the men would help the female splitters and packers to do splitting and packing.

From time to time, according to demand, some of the women would help the men in some of "their" jobs.

It should be noted at this point that one of the issues in the case is whether the female staff were capable of doing the "heavy work" associated with the jobs reserved to men.

For some time prior to the decision to terminate the employment of the applicants, the respondent had been looking for a new site for its warehouse and distribution functions. The warehouse at Surry Hills was too small, and its design was not suited to current technology.

In 1994, the respondent found a new site at Waterloo. The Waterloo Distribution Centre was developed, using up-to-date technology. The automation at Waterloo resulted in a requirement for a much smaller workforce than was the case at the Surry Hills warehouse.

On or about 14 September 1994 a meeting was convened with all the employees at the Surry Hills warehouse.

Initially, all of the employees at the warehouse were at the meeting. The new facilities at the Waterloo Distribution Centre were outlined to them, transport facilities to the centre were outlined, and it was emphasised that it would be a good place at which to work.

At some point, after that information had been given, all of those present, other than the 31 splitters and packers in the "Australian section", were asked to leave. The management representatives were the respondent's then Managing Director, Mr Peter Shepherd, the respondent's then Employee Relations Manager, and the Manager of the warehouse, Mr Gordon Barber. There were also 2 additional staff who were asked to remain behind to act as "interpreters".

In respect of these "interpreters", I am satisfied that they did not succeed in translating everything that was said by management to all of the workers present. They were not trained interpreters in any event, and were merely workers with some understanding of English, although this fell short of fluency. There were not enough "interpreters" to interpret to all of those present. There was no evidence as to their ability to interpret, and several of the applicants gave evidence that all that was said was not interpreted to them.

Nonetheless, the applicants did, in one way or another, have some understanding of what had occurred at that meeting - either by listening to what was said, or by listening to what the "interpreters" said, or by discussions with their colleagues after the meeting finished. They all understood that all, or nearly all, would be losing their jobs at some time in the near future, because of the transfer of the warehouse and distribution operations from Surry Hills to Waterloo.

I am satisfied that, prior to that meeting, the respondent had decided that all of the persons who were going to be made redundant would come from the (all female) splitters and packers in the "Australian section" of the splitters and packers workforce. After all, this is exactly what they were told at the September meeting. The respondent's witnesses were also quite frank in agreeing to that proposition.

At the September meeting, the applicants all received an identical letter (Exhibit 50, Annexure B) which, in terms, invited them to accept "voluntary redundancy." The deadline set in the letter was 21 October 1994. None of the applicants accepted that offer by that date.

On 16 November 1994 the respondent arranged a meeting between, on the one hand, all of the applicants (and the other splitters and packers whose employment was to be terminated) and, on the other hand, representatives of the Commonwealth Employment Service, and the Department of Social Security. Representatives of the National Union of Workers were also present.

The purpose of that meeting was to inform the employees of what assistance was available, and what procedures had to be followed in order to obtain that assistance, in relation to social security and employment matters.

WAS THE TERMINATION OF EACH OF THE APPLICANT'S EMPLOYMENT A TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER, OR DID ANY OF THE APPLICANTS RESIGN THEIR EMPLOYMENT BY ACCEPTING VOLUNTARY REDUNDANCY?

The terms *"termination"* and *"termination of employment"* as used in the *Workplace Relations Act,* 1996, have, by virtue of section 170 CB of the Act, the same meaning as they have in the <<International>> <<Labour>> Organisation Convention Concerning the Termination of Employment at the Initiative of the Employer (schedule 10 of the Act). In that Convention those terms are defined as meaning *"termination at the initiative of the employer"*.

The meaning of the phrase *"at the initiative of the employer"* was discussed by the Full Court of this Court in *Mohazab v Dick Smith Electronics Pty Ltd, (No 2)* (1995) 62 IR 200.

The Court said, at page 205:

> *"It accords with the purpose of the Convention to treat the expression 'termination at the initiative of the employer' as a reference to a*

termination that is brought about by an employer ***and which is not agreed to by the employee****. Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship."*

(Emphasis added).

The Court went on to say, at pages 205 and 206:

"In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequently in the termination of the employment ***and the employment relationship is not voluntarily left by the employee****. That is, had the employer not taken the action it did, the employee would have remained in the employee relationship."*

(Emphasis added).

The Court also said this, at 206:

"When an employee has no effective or real choice but to resign, it can hardly be said that the termination of his or her employment is truly at the employee's initiative."

The Court also said, at 207:

".....industrial tribunals and courts have long accepted that an employee who resigns from his or her employment can and should be treated as having been dismissed by the employer if the dismissal is one where the employee did not resign willingly and, in effect, was forced to do so by the employer."

The Court then noted what Wilcox CJ had said in *APESMA v David Graphics Pty Ltd*, Industrial Relations Court of Australia, Wilcox CJ, 12 July 1995, unreported. At page 5 of that judgment, his Honour said:

"I agree with the proposition that termination may involve more than one action. But I think it is necessary to ask oneself what was the critical action, or what were the critical actions, that constituted a termination of the employment."

In *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154, his Honour, Moore J, discussed *Mohazab*. He said, at page 160:

"However, it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her

> *employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume for the present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable result of the employer's conduct."*

His Honour went on the say:

> *"Mohazab (supra) illustrates a case where not only did the employer create the environment in which an employee tendered his resignation but also exerted pressure on the employee to follow the course he did. In this case there is no real basis for suggesting that the Company, through Mr Wilson, exerted any such pressure or took any step which was intended to cause the applicant to say what she did about her resignation or would probably have that result".*

By January 1995 none of the splitters and packers in the "Australian section" of the Surry Hills warehouse had accepted the respondent's "offer of voluntary redundancy". This "offer" had been made at the September meeting, and had been repeated in letters dated 16 November 1994 to all of the employees targeted for redundancy. (See Annexure "F" to the statement of Lorraine Burgis) (Exhibit 50). Ms Burgis was, until February 1995, the respondent's Payroll Manager.

In November and December 1994 the National Union of Workers ("the NUW") was negotiating with the respondent company about the terms of the redundancy package. In essence, the NUW was trying to obtain better redundancy terms for the workers who were to be dismissed.

On 18 January 1995, in support of its claims on behalf of its members, the NUW called a strike of all its members at the Surry Hill warehouse. The bulk of the warehouse staff went out on strike, and some of the workers picketed the respondent's store in the Pitt Street Mall. On behalf of the respondent, the Retail Trader's Association notified an industrial dispute to the Industrial Relations Commission of New South Wales. A conciliation conference followed, as did negotiations between the NUW and the respondent company. The principal negotiator for the Union was Mr John Ivancic. The principal negotiator on behalf of the respondent was Mr Easton from the Retail Trader's Association of New South Wales. Mr Staniland and Mr Ware, who were elected union delegates at the Surry Hills warehouse, also took part in the negotiations.

Ms Burgis and Mr Easton gave evidence that, during the negotiations, Mr Ivancic said that the NUW had the authority to act for the splitters and packers who were targeted for redundancy, and that "twenty-seven of the employees

want to go. One of them is from the New Zealand section".

I accept that Mr Ivancic said something to that effect to Mr Easton and Ms Burgis.

As a result of the negotiations an agreement was reached between the NUW and the respondent company. That agreement was as follows:

> ***Katies Redundancy Agreement*** *The following is agreed between Katies Fashion (Aust) Pty Ltd, the National Union of Workers, NSW Branch, and its members: 1. Redundant employees as a result of the relocation of the Katies Warehouse from Surry Hills to Waterloo shall receive the following: (a) four (4) weeks pay in lieu of notice, plus (b) four (4) weeks pay for the first completed year of service, plus (c) two weeks pay for each completed year after the first year. 2. (a) A call for voluntary redundancy will be made from within the Australian packers and splitters section. This offer will close on close-of-business Wednesday January 25, 1995. (b) If there is not 27 volunteers from the Australian section the shortfall is to be made up from discussions between the company and the Union in accordance with the spirit of agreement reached by the parties. 3. The union will positively assist the company in the upcoming transition. 4. This agreement shall not be used as a precedent. SIGNED BY: DATE*
> _____ *State Secretary N.U.W., NSW Branch* _____ *Managing Director Katies Fashion (Aust) Pty Ltd"*

Although the agreement includes the words "and its members", and although the NUW told the respondent company that it was acting with the authority of the splitters and packers at the Surry Hills warehouse, I do not accept that that was the case.

The authority given to the NUW to negotiate on behalf of the splitters and packers was limited to negotiating a better redundancy package.

The evidence of all the applicants was consistent in this regard - at no time did they give the NUW authority to accept "voluntary redundancy", and at no time did any of them indicate to any of the union representatives, Mr Ivancic, Mr Staniland and Mr Ware, that they would leave the employment of the respondent "voluntarily", or that they "wanted to go.".

Any representation made by the NUW that it did have authority to accept "voluntary redundancy" was false. My finding in this respect is strengthened by the failure of the respondent to call Mr Ivancic or Mr Ware, the principal persons involved.

Employees cannot be bound by ***mis***representations of a union, even if they are members of that union, and even if the union has the authority, in some limited and related way, to negotiate on their behalf. The applicants in this case, in particular, are not bound by what the NUW said and did. I should add, for the

sake of completeness, that nothing the applicants said or did was capable of leading a reasonable person to think that they had given the NUW the authority in question. In other words, there was no ostensible authority for the NUW to commit the applicants to an acceptance of "voluntary redundancy."

On 25 January 1996, the NUW provided the respondent company with a list of the employees who, according to the NUW, had accepted the company's offer of voluntary redundancy. A copy of that list is attached to the statement of Lorraine Burgis (Exhibit 50) as Annexure "H".

The list contained 36 names. Thirty of the names were Australian splitters and packers. One of the thirty one Australian splitters and packers was not on the list (Magdalena Szijarto, probably because she was on workers compensation at the time). The names of 3 New Zealand splitters and packers and 3 other warehouse employees also appeared on the list.

The list indicated that, of the 36 names, three of the Australian splitters and packers, Snezana Radeska, Jadranka Talevska and Rosa Angelkovska, and the 3 New Zealand splitters and packers did not agree to the company's offer of "voluntary redundancy".

On 16 February 1995 Mr Lakeman wrote to each of the 30 employees on the list who were listed as having accepted the company's offer of "voluntary redundancy", asking them to sign and return an acknowledgment that they had accepted "voluntary redundancy".

Ten splitters and packers only returned those letters to the company, having signed them to indicate they "accepted" the "offer of voluntary redundancy". Ms Angelkovska (whose case will be dealt with below) returned a similar letter from the company dated 23 March 1995.

Of those applicants whose cases are being dealt with to finality in these reasons for judgment, the following did not sign Mr Lakeman's letter and return it:

Vera Sapevski

Velika Trajkoska

Cvetanka Plevnarovska

In respect of those 3 applicants, in my opinion, there is simply no evidence at all to suggest, in any way, that they resigned by accepting any offer of voluntary redundancy.

In my opinion, their employment was terminated against their will at the initiative of the respondent.

Those employees who did sign an acknowledgment of an "acceptance of the voluntary redundancy offer."

The applicants who fall into this category are the following:

Todonka Ristevska

Rosa Angelkovska

Mirian Morales

Rosa Sagredo

The question to be dealt with in respect of the applicants is this:

Despite the fact that NUW had no authority to, on behalf of the employees at the warehouse, accept a "voluntary" redundancy package, did the employees, nonetheless, accept "voluntary" redundancy (and thereby resign) by signing and returning to the respondent an acknowledgment of acceptance of the "voluntary redundancy offer" negotiated by the NUW?

On 16 February 1995, as I have said, Mr Lakeman, the Personnel Manager of the respondent company, wrote to all of the 30 employees on the Union's list who, supposedly, had accepted voluntary redundancy. That letter was in these terms:

> *"Dear (Name of Employee)* ***RE: REDUNDANCY OFFER*** *You have indicated your acceptance of the Voluntary Redundancy offer put to you by your union delegate and organiser. To confirm the fact that you are willing to be made redundant, would you kindly sign below and return this to me. Yours faithfully KATIES FASHIONS (AUST) PTY LTD* ***R.J. LAKEMAN Personnel (Admin & Ind Rel) Manager)*** *I accept the redundancy offer as agreed between Katies and the N.U.W. Signed ..... Date ....."*

The 4 applicants who did sign and return the letter all gave evidence to the same general effect as to why they did that. They said that they signed and returned the letter because they understood that, if they did not do so, they would not receive any redundancy pay - and that they believed that, no matter what they did, their employment would be terminated.

They were mistaken in the belief that, if they did not sign and return the letters, they would not receive redundancy pay. All of the workers whose employment was terminated received redundancy pay - regardless of whether or not they signed and returned the letter.

It is important to understand that all of the workers who signed and returned the letters had a limited understanding of the English language. The letters themselves referred to something which had simply not occurred - that the workers had accepted a voluntary redundancy offer which had been put to them by the union delegate and organiser. This must have been very confusing to the recipients of the letters.

I accept the evidence of the applicants. In my view, by signing and returning the letters, the applicants were not resigning their employment by way of the acknowledgment of the prior acceptance of a voluntary redundancy offer.

In any event, any prior voluntary redundancy offer, as referred to in that letter, simply did not exist. This is because no such voluntary redundancy offer had, on the evidence, been put to the employees by the union delegate and organiser. In effect, the workers were being asked to acknowledge the existence of something which did not exist - or to affirm an occurrence of an event which had never occurred.

I accept the evidence of Ms Angelkovska which was to the effect that she sought the redundancy payment on the day of final notification of termination of employment, because she thought that her employment would be terminated in any event, and that she was in danger of not receiving the redundancy payment unless she signed the letter.

In my view, in respect of all of the above applicants, the signing and return of the letters was merely an acknowledgment of a fait accompli - their employment was going to be terminated in any event, at the initiative of the respondent employer, and they were seeking to make the best of what they regarded as a bad situation.

The respondent had, prior to the September meeting, decided to terminate the employment of all, or nearly all, of the splitters and packers in the "Australian section" of the Surry Hills warehouse. By February 1995, all of the splitters and packers knew that. They understood, in my view correctly, that, no matter what they, did their employment was going to be terminated. It follows that the signing and returning of the letters was not a resignation - it was merely a response to a situation in respect of which they had no control.

In my view, to quote the Full Court in *Mohazab* (cited above) at page 205, the actions of the employer in this case, in repeatedly informing the applicants that their employment was, in any event, to be terminated, was "*the principal contributing factor which* (led) *to the termination of the employment relationship*" in respect of each of the applicants. In none of the cases was the termination of employment *"agreed to by the employee"*.

To put it another way, using the words of Wilcox CJ in *APESMA*, the critical actions which constituted the terminations of employment in this case were the company's repeated insistence that, in any event, the employment of the applicants was to be terminated.

Ms Araneda's position

Ms Araneda asked the company for earlier redundancy in February 1995. Her husband and her owned (in a marriage "partnership") a pizza shop. She took the opportunity to fit what she thought was the inevitable termination of her employment in with her husband's need to have her assist him in the pizza shop.

Ms Araneda's evidence was that she believed that her employment was to be terminated in any event, and that she simply asked to leave earlier rather than later. I accept her evidence.

An employee who has been told by the employer that their employment is destined to be terminated at some time in the near future, but who elects to leave earlier, is not, in my opinion, a person whose employment is terminated at their own initiative.

In fact, in the circumstances of this case, it was the repeated insistence of the respondent that, no matter what happened, the employment of all of the splitters and packers would be terminated, which was the principal contributing factor which resulted in the termination of Ms Araneda's employment.

In my view, Ms Araneda's employment was terminated at the initiative of the respondent.

HAS THE RESPONDENT PROVEN THERE WAS A VALID REASON FOR THE TERMINATION OF EACH OF THE APPLICANT'S EMPLOYMENT?

Section 170DE (1) of the *Workplace Relations Act* 1996 ("the Act") is as follows:

> *"170 DE (1) **[Termination must be for a valid reason]** An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service."*

Section 170EDA (1) (a) provides that a termination of employment is *"taken to have contravened section 170DE (1) unless the employer proves that ..... there was a valid reason, or valid reasons, of a kind referred to in subsection 170DE (1)."*

The meaning of "*valid reason*" in section 170DE (1) of the Act.

It must first be borne in mind that the respondent has to justify the termination of employment of ***each*** particular, individual, applicant.

It is not enough for the respondent to demonstrate that there was, on an objective analysis of the facts, justification for the decision that the overall number of employees in the Warehouse/Distribution Centre was to be reduced. See *Kenefick v Australian Submarine Corporation Pty Ltd (No 2)* 65 IR 366, at pages 372 and 373. See also *Gerard Westen v Union des Assurances de Paris*, Industrial Relations Court of Australia, Madgwick J, 17 December 1996, unreported, at page 14, where his Honour said:

> *".... the first task is to focus on the relevant inquiry. This is not whether some change in the functioning of the undertaking, which change accompanies or immediately precedes or follows the employee's termination, is made for a valid reason based on the*

operational requirements of the undertaking. The inquiry is whether there is a valid reason for the actual termination in question. This was brought up by the Full Court judgment in Kenefick."

The phrase "valid reason" is not defined in the Act. However, section 170CB of the Act reads as follows:

"An expression has the same meaning in this Division as in the Termination of Employment Convention."

It is therefore necessary to examine the Termination of Employment Convention ("the Convention") in order to determine the meaning of the phrase "*valid reason*". The Convention is Schedule 10 to the Act.

Article 8, paragraph 1 of the Convention is as follows:

"A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

Article 9, paragraph 1 of the Convention is as follows:

"The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and other circumstances relating to the case and to render a decision on whether the termination was justified."

Article 9, paragraph 3 of the Convention is as follows:

"In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reason are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention."

Article 10 of the Convention is as follows:

"If the bodies referred to in Article 8 of this convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate."

It is apparent from the repeated use of variations of the word "*justified*" in the

Convention, that a reason is not a valid reason if it cannot be "*justified*".

What this means is that a termination of an employee's employment cannot be for a "*valid reason*" unless it is "*defensible or justifiable on an objective analysis of the facts*". See *Kerr v Jeroma Propriety Ltd*, Industrial Relations Court of Australia, Marshall J, 7 October 1996, unreported, at page 21.

In my view, a termination of employment which is unlawful, for the reason that it is done in breach of a state law, cannot be "*justified*". (See *Ferry v Minister for Health, Western Australia*). It would not, therefore, be for a valid reason, and be in contravention of section 170DE (1) of the Act.

Such a law would be the *Anti Discrimination Act* (1977) (NSW).

The respondent submits as follows:

> *"A finding that the respondent has engaged in conduct amounting to a breach of State law cannot, as a matter of law, amount to a finding that there is not a valid reason for termination." The Anti Discrimination Act and the Act involve the determination of "different questions".*

I do not agree. In my view, the onus being on the respondent to justify the termination of each applicant's employment, the respondent has to prove that the termination of each applicant's employment was not in breach of the State Anti Discrimination Act.

The respondent also submits "*that it is not open to the Court to rule on a question of State law in circumstances where, inter alia, the applicants have not invoked the accrued jurisdiction of the Court pursuant to section 430 of the Act.*"

No arguments are advanced by the respondent in support of this rather unusual assertion. I do not agree with it. In my view, it is not necessary for an applicant to *"invoke the accrued jurisdiction of the Court pursuant to section 430 of the Act"* in order to raise the question of whether or not the respondent has acted in breach of a state law. Indeed, in many cases in the Court, applicants have done just that. For example, see the decision of von Doussa J in *Carrigan v Darwin City Council,* Industrial Relations Court of Australia, 20 March 1997, unreported.

Was the termination of the applicants' employment in breach of the NSW Anti Discrimination Act 1977?

The applicants allege that the termination of their employment was in breach of the provisions of the *Anti Discrimination Act* 1977 (NSW) ("the NSW Act"). Section 25 (2) of the NSW Act is as follows:

> *It is unlawful for an employer to discriminate against an employee on the ground of sex: (a) in the terms or conditions of employment*

> *which the employer affords the employee; (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or (c) by dismissing the employee or subjecting the employee to any other detriment.*

Section 24 (1) of the NSW Act refers to discrimination on the ground of a person's sex. That section is as follows:

> *A person ("**the perpetrator**") discriminates against another person ("**the aggrieved person**") on the ground of sex if, on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative of associate of that sex; or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have such a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.*

Section 24 (1) (a) of the NSW Act covers what is commonly referred to as "direct" discrimination on the basis of sex.

Section 24 (1) (b) of the NSW Act covers what is usually referred to as "indirect" discrimination on the basis of sex.

(i) Did the actions of the respondent constitute "direct" discrimination on the basis of sex against the applicants?

In *Australian Iron and Steel Propriety Ltd v Banovic and others* (1987) 168 CLR 165, the High Court dealt with the difference between "direct" and "indirect" discrimination under the (then) provisions of the NSW Anti Discrimination Act - provisions which, for the purposes of this case, are, in practical effect, the same as those in force from September 1994 until March 1995. The decisions of the majority made it clear that there is no overlap between the operations of what is now section 24 (1) (a) on the one hand, and section 24 (1) (b) on the other.

"Direct" discrimination deals with discriminatory treatment (often in cases where there is a motive or intention to discriminate, although this is not a necessary criterion of liability - see Deane & Gaudron JJ in *Banovic* at pages 176 and 177), while "indirect" discrimination deals with the effect of a policy which may be "fair on its face", but discriminatory in outcome or effect.

The applicants submit that the actions of the respondent in terminating the applicants' employment constituted ***both*** "direct" discrimination under section 24 (1) (a) of the NSW Act ***and*** "indirect" discrimination under section 24 (1) (b)

of the NSW Act.

In the light of *Banovic*, that submission cannot be sustained. See, in particular, the judgment of Dawson J in *Banovic*, at 184, where he said:

> "... *when s. 24(1)* (the predecessor to 24 (1) (a) of the current Act) *is read with s. 24(3)* (the predecessor to the current section 24 (1) (b)) *it is clear to my mind that s.24(1) cannot be read so as to cover indirect discrimination, for to do so would be to render s. 24 (3) superfluous."*

In support of the applicants' submission that the conduct of the respondent constituted "direct" discrimination within the meaning of section 24 (1) (a) of the NSW Act, their counsel quoted the decision of Deane and Gaudron JJ in *Banovic* at page 176, where their Honours said:

> "....It is not difficult to envisage situations in which the ground of an act or decision may be identifiable as one falling within s. 24 (1) (a), (b) or (c) notwithstanding that the act or decision is not actuated by a motive to discriminate. One need go no further by way of example than an act or decision - as in the past frequently happened - denying women certain opportunities by reference to the inadequacy of toilet facilities. And in that situation it is possible that "consciousness" may extend only to the inadequacy of toilet facilitates without a full appreciation that that consideration is but an aspect of a characteristic that appertains generally or is generally imputed to women. And there may be other situations in which habits of thought and preconceptions may so affect an individual's perception of persons with particular characteristics that genuinely assigned reasons for an act or decision may, in fact, mask the true basis for that act or decision. Thus, in the ascertainment of the true basis of an act or decision it may well be significant that there is some factor, other than the ground assigned, which is common to all who are adversely affected by that act or decision. In certain situations that common factor may well be seen to be the true basis of the act or decision. And that may also be the case where some factor is identified as common to a significant proportion of those adversely affected."

In response, counsel for the respondent pointed out that it is also necessary to consider the immediately following passage of their Honours' judgment, at page 177, namely:

> *"Even it could be said that a factor common to all or to a significant proportion of those who were adversely affected by the decision of A.I.S to retrench by the "last on, first off" method was that they were women, a further finding that that was the true basis of the decision would be necessary to render s. 24 (1) applicable. See* ***James v Eastleigh Council****. There is no finding to that effect by the Tribunal. And the argument made on behalf of the first respondents does not*

> *even go so far as to suggest that the true basis of the decision to retrench by the method of "last on, first off" was in any way related to the fact some of the persons who would be retrenched were women. Instead it merely identifies the factor which caused some women ironworkers to be within the group retrenched or the group likely to retrenched rather than within the group unaffected by the decision. That is not sufficient to render s. 24 (1) applicable."*

Banovic was a case in which a "last on, first off" principle was selected as the ground for retrenchment - in a circumstance where the respondent employer had had, for many years, a sexist discriminatory recruitment policy which had the effect of greatly reducing the number of women in the workforce. That policy had been abandoned some few years prior to the commencement of retrenchments, but, in fact, it still resulted in a greater proportion of women being retrenched on a "last on/first off" basis than would have been the case if the policy had not previously been in force.

At page 184 in *Banovic*, Dawson J said:

> *"..... discrimination will not amount to discrimination on the ground of sex within the meaning of s. 24 (1) merely because it is upon a ground which produces an effect equivalent to the effect of discrimination upon the ground of sex, unless the ground upon which the discrimination is based is a characteristic that appertains generally to persons of the complainant's sex or is a characteristic that is generally imputed to persons of the complainant's sex. I do not think that this construction of s. 24 (1) requires it to be applied subjectively. The mere assertion of a ground which is not sex will not take discrimination out of the sub-section if the true basis for the action in question is in fact sex. Thus, in the present case if it could have been shown that the "last on, first off" principle was selected as the ground for retrenchment, not as an equitable means of shedding redundant employees, but as a means of shedding female employees more quickly, s.24 (1) would have applied. The true ground would then have been sex and any discrimination would have been on that ground. But that was not shown and in my view s. 24 (1) had no application."*

In the circumstances of this case, I do not think that it is necessary for the applicant to go so far as establishing that the selection criterion used was adopted *"as means of shedding females employees more quickly"* in order to establish a breach of section 24 (1) (a) of the current NSW Act. However, if the applicants establish that the *"true basis"* (a phrase also used by Deane & Gaudron JJ) of the decision to make only the workers engaged as splitters and packers redundant was the fact that they were women, then the applicants succeed in establishing that section 24 (1) (a) of the NSW Act is applicable, and has been breached.

True it is that all of the "splitters and packers" were women. It is also correct to say that all of the stock receipt and despatch persons, and all the bagging staff,

were male, and that none of those male persons were made redundant. It is also correct to say that this gender-based division in the workforce had its origins in the perception of management that women were unable to do the so-called "heavy work" which was sometimes required to be done by the male workers in the stock receipt and despatch, and bagging, positions. As I find (see below) this perception was not, in the circumstances of the case, reasonable.

However, that is not to say that "true basis" of the decision to choose only the "splitters and packers" for redundancy was the fact that they were women. In my opinion, that was not the case.

In fact, in my opinion, the decision to choose the "splitters and packers" for redundancy, instead of another group of the workforce, or the workforce as a whole, (from which a selection, on some other basis, or bases, could have been made), was merely the choice of the factor which caused the women splitters and packers to be made redundant. The "splitters and packers" were chosen for redundancy ***not directly*** because they were women, but because all, or nearly all, of the "splitters and packers" jobs ceased to exist after the move to Waterloo. That is not sufficient to render section 24 (1) (a) of the NSW Act applicable. See *Banovic*, per Deane & Gaudron JJ, at 177, and Dawson J, at 184.

(ii) Did the decision of the respondent to choose only the female "splitters and packers" for redundancy involve "indirect" discrimination on the basis of their sex?

It is still necessary to consider whether the decision of the respondent to choose the splitters and packers for redundancy was a decision which constituted "indirect" discrimination against them in the sense of section 24 (1) (b) of the NSW Act. If so, the termination of their employment was unlawful because of the operation of s.25(2) of that Act.

In order to establish whether or not the actions of the respondent in terminating the employment of the applicants constitute "indirect" discrimination within the meaning of s.24(1)(b) of the NSW Act, it is necessary to take a number of steps. They are:

(i) The identification of the "requirement or condition with which the respondent required the applicants ["the aggrieved persons" within the meaning of s24(1)(b)] to comply;

(ii) The requirement having been identified, s.24(1)(b) then demands that a comparison be made between the compliance rates for each sex, in order to determine whether *"a substantially higher proportion of persons of the opposite sex* (to the applicants) ..... *comply or are able to comply*" with the requirement or condition previously identified;

(iii) Decide whether the requirement or condition *"is not reasonable having regard to the circumstances of the case"*.

(iv) Determine whether it is a requirement or condition *"with which the* (applicants) *do not or are not able to comply."*

(i) The identification of the "requirement or condition"

It is common ground that the basis for the selection of the applicants for redundancy was the fact that they were working as splitters and packers in the "Australian section" of the splitters and packers workforce.

In view of that fact, in my view, the *"requirement or condition"* in question in this case was that, for an employee at the Katies warehouse to remain in employment after 22 March 1995, he or she must not, as at that date, be classified as a "splitter and packer" working in the "Australian section" of the Surry Hills warehouse workforce.

(ii) The comparison

In *Banovic*, the most vexed question before the Court was the question of what was the appropriate sample with which to make the necessary comparison.

His Honour, Dawson J, quoted with approval the dictum of Waite J, in delivering a decision of the (UK) Employment Appeal Tribunal in *Kidd v D.R.G. (U.K) Ltd* [1985] ICR 405, at page 409, in which Waite J said:

> *"..... for the purposes of the statutory comparison, like must be compared with like in a context appropriate to the case under review. The consequence is that the particular section of the members of the public upon whose lives the impact of the relevant requirement or condition has to be measured is liable to vary from case to case - ranging from the population as a whole at one end of the scale to employees of a single work-place at the other end: and there is liable also to be ample scope for debate in many instances as to which section of the public within that range is the right one to choose for a particular case."*

The choice of the base group, or sample, is potentially important, because the choice must be made in such a way as to *"produce the exercise required by s.24(1)(b) namely, the ascertainment whether sex is significant to compliance"* (see Deane and Gaudron JJ in *Banovic*, at page 179.)

However, in the particular facts of this case, the selection of the base group does not really matter. If the base group were the permanent employees at the warehouse on 22 March 1995 (which, roughly speaking, was one third male and two thirds female) a comparison of those able to comply with the requirement or condition with those unable to comply with the requirement or condition reveals that all of the males were able to comply with the requirement or condition whereas about two thirds of the females were not.

If one chooses as the base group the population as a whole (about 50% male and 50% female), the result stills reveals a discrimination.

In other words, the requirement or condition impacted only upon the (female) splitters and packers - to the complete exclusion of all the male employees.

(iii) Was the requirement or condition reasonable?

Mr Gordon Barber was the manager of the warehouse for the seven years prior to the move to Waterloo, and the manager at the Waterloo site until November 1995.

He was asked this question (transcript page 86):

> *"Q. To the best of your knowledge was there an employment practice that designated women to the occupational group of splitters and packers and men to other occupational groups within the Surry Hills warehouse? A. I would have to say that as far as the men were concerned, yes, we would try to fill positions where heavy lifting was concerned with men, but in terms of splitters and packers I guess it didn't really matter."*

Shortly after that answer he said that the fact all the splitters and packers were, and, to his knowledge, always had been, female was "coincidence". He explained what he meant by that as follows:

> *"..... when we wanted people in these positions, splitting and packing over the years, if we wanted extra people, the supervisor on the floor would simply say to the ladies that were there, "can you please bring in 3 or 4 people? We need them to help us. We've got extra work". I guess that's how it has sort of evolved over the years."*

It is clear from Mr Barber's evidence that there was policy of excluding women from employment in the categories of jobs that required what he described as *"heavy lifting."*

As a result of the exclusion of women from those jobs, and as a result of the fact that persons working in those jobs were not made redundant, the requirement or condition above (that persons not be working as splitters and packers) impacted more severely or adversely on women than on men in the workforce.

In my view, the question of whether the requirement or condition (for continued employment) that a worker not be working in the "Australian section" of the splitters and packers workforce was reasonable, is to be determined by the answer to the question of whether it was reasonable to exclude women from those jobs which required what was, in the opinion of Mr Barber and other members of the respondent's management, "heavy work".

After identifying a number of types of work as "heavy work" Mr Barber was asked this question:

> *"Q. It being, as you have described, "heavy work", it was not work*

that you considered appropriate for women to do? A. Correct."

Mr Barber listed the types of work that he regarded as *"heavy work"* at the Surry Hills warehouse as follows:

* Lifting bags for despatch;

* Unloading cartons off trucks;

* Unloading cartons off conveyers and putting cartons onto conveyers;

* Working in the bond store - "its all cartons";

* Unloading racks of hanging garments on the static rails throughout the warehouse;

* Tying and bagging fashion products;

* Lifting static reserve stock (on hangers) up onto the top rail.

Although the new warehouse at Waterloo was much more automated, and less labour intensive, Mr Barber described some of the work that needed to be done there as *"still quite heavy work."* The work that he described in this way was as follows:

* Moving hanging stock (within the back of the truck) from the rails in the truck to the rails on a boom gate which swings into the truck. This involves taking hanging stock off racks in a truck, turning, taking one or two steps, and then hanging them onto mobile rails on a boom gate.

* There was, according to Mr Barber, "very little change to the bagging process".

* In relation to cartons Mr Barber said *"once the cartons are received off the truck they are by way of conveyer moved down to floor level and from there they have to sorted onto pallets, size and colour, on the floor."*

Mr Barber said that, to his knowledge, the women in the Surry Hills warehouse were not required to lift the cartons.

It must said that Mr Barber was, apparently, in a reasonable position to know this. If there had been no evidence to the contrary, the Court would have accepted his evidence.

However, evidence called on behalf of the applicants contradicted him. In my view, it is more likely that the people who actually did the work gave accurate evidence about this sort of thing - Mr Barber probably did not realise that the women did, in fact, lift boxes, and that they lifted the "bagged" clothes, as well as men.

Mr Barber's evidence was probably a reflection of the rather rigid, gender-based, division in jobs in the workplace at the Surry Hills warehouse - which rigid division would have tended to obscure the rather less rigid reality.

Furthermore, I observed the applicants when they gave their evidence. When they gave their evidence about the type of work they performed they were, without exception, giving evidence which seemed to me to be "off the cuff", which had a natural air of truth and reality to it. Mostly, their assertions were not challenged in cross-examination. I accept what they say.

Some examples of the applicants' evidence will suffice.

Ms Vera Sapevski was the first applicant to give evidence. She said (transcript page 158 and following) that the men would bring 3 boxes (this must have been from the conveyer belts) and that she would then put the boxes, herself, on her working table, or, as the interpreter sometimes put it, her *"shelf"*. She would then unpack those boxes, *"split"* the goods, and repack them into the same boxes, for redirection to the stores. She would lift the packed boxes off the work bench, and put them on to the ground. This is, in essence, exactly the same as lifting the boxes off and on conveyers. It is clear that she could have done that.

Ms Sapevski also gave evidence that she sometimes (although not often) would hang garments in the reserved stock section - one of the types of work described as *"heavy work"* by Mr Barber.

Ms Sapevski's evidence as to the lifting of boxes from her table or shelf and putting it on the floor was not challenged in cross examination - indeed, in cross examination she made it clear that it was not only her, but all the splitters and packers who did that. She also made it clear that lifting boxes from her table or shelf and putting them on the floor happened *"all the time"*. She said *"not sometimes, all the time - that was our job"* (transcript page 190.)

This evidence was not challenged in cross-examination. I accept it.

With Ms Sapevski's evidence alone, the respondent's case that the bulk of the so-called *"heavy work"* was *"inappropriate"* for women, or could not reasonably have been demanded of them, or could not have been done by them (it was put in various ways) is exposed as being without factual foundation. In other words, it was a mere assertion, or, at best, a misunderstanding, without any basis in

fact. It cannot, therefore, be said to be *"reasonable in the circumstances"* as required by s.24(1)(b) of the NSW *Anti-Discrimination Act*.

For the sake of completeness, it is necessary to go over some of the other evidence on this matter. I should add here that the respondent's evidence did not end with Mr Barber, but I do not find it necessary to traverse, on this aspect of the case, the remainder of the respondent's evidence. His evidence was the best the respondent had on this particular point, and I prefer, on this aspect of the case, the evidence called in the applicants' cases.

Ms Ristevska also gave evidence of lifting boxes full of garments. She said she would put an empty box on top of another box, and would pack it and seal it. She then went on to say:

> *"and I would put it underneath with my own hands, and then I would put the next box on top of the other. The one would stay there but I would put another on top. I would put in it until I wouldn't be able to reach, and then with my own arms I would lift it and put it on other side."* (sic)

In cross-examination she added that the men would then come, lift the boxes and take them away.

Once again, it is clear from Ms Ristevska's evidence that the women splitters and packers would, routinely, lift full boxes of garments.

Ms Morales' evidence was slightly different. In response to a question as to whether in her job was she required to *"lift things"* she answered as follows: (see page 349 transcript):

> *"First we had to assemble a box on the floor; then we would assemble another box on top of the first one; then we had to make room, so that meant lifting up a box and placing it to one side and we would continue assembling the other boxes until we would finish with one shop. Sometimes there wasn't much room and we had many boxes; so to make room, either with assistance of a fellow worker, we had to move the box to one side or we did that ourselves when we had a bit of time, and we moved it to one side. And not always good. We can't with assistance of fellow workers. Sometimes we had to manage the best we could on our own because there was only one boy helping with the boxes."*

A short while afterwards she said, *"that box when it was filled very much I would have try and find a fellow worker to help me to move it. If there was nobody available I myself had try and move it the best I could."*

Ms Morales then explained that the *"fellow worker"* would be a woman.

The effect of Ms Morales' evidence was that, at least in respect of her, she would sometimes move the boxes with the assistance of a fellow worker, but if

she had to, she would do it herself.

Ms Morales explained (transcript pages 363 and 364) that she would pack garments into boxes on top of another box. When that box was full, it had to be moved away, down on to the floor. She said *"I had to move them myself with my body and sometimes they were very heavy I'd ask another girl to help me."*

She went on to explain this as follows, *"When I asked for help it was because there wasn't room near me and we had to move them to another place."*

At the best for the respondent, some of the applicants gave similar evidence to Ms Morales that, sometimes (with the heaviest boxes) they would ask other women workers to help them lift them. If those other workers were not available, they would lift them themselves.

In respect of the other so-called "heavy work" listed by Mr Barber - in particular, bagging, - there is simply no evidence that the women were unable to do it. It is merely an assumption.

In particular, Ms Sagredo gave evidence that, although it was men who would put bags over bundles of garments (after they had been sorted for distribution to go to the stores) the bags of garments would have to be taken off the rack where they were hanging, sealed, and put back on to the racks. It was women who took the bags off the racks, sealed them and put them back on the racks. This involved lifting to at least the same degree as that done by the men when they did the bagging.

It is transparently obvious from this that men and women were equally capable of doing the "bagging". It follows from this conclusion that the exclusion of women from the "bagging" positions in the Surry Hills workforce was, in the circumstances of the case, not reasonable.

There were six "bagging" positions at the Surry Hills warehouse - none of the men in those positions were made redundant. If women had been permitted to work in those positions, rather than being excluded from them as a result of the respondent's sexist discriminatory work practices, the women who would have been in those positions would also not have been made redundant as a result of the move to Waterloo.

If the respondent wished to prove that women were incapable of doing the so-called "heavy work", then the respondent should have called evidence of better calibre. It would not have been difficult, if it were the fact of the matter, to call expert evidence to show that women find great difficulty doing that sort of work, or cannot do it. No such evidence was called. In my opinion, the evidence in the case (limited as it is) is sufficient to establish this proposition: most women (and most men) are capable of doing the so-called "heavy work" that Mr Barber did not consider it "appropriate for women to do."

To put it bluntly, the assertion that women could not do the so-called "heavy work" was never more than a sexist assumption.

It was that assumption upon which the rigid division of jobs in the Surry Hills warehouse was based.

That rigid division of jobs resulted in a far greater proportion of women workers being made redundant than men.

(iv) Could the applicants comply with the requirement or condition?

Obviously not - the inability to comply was inherent in their position in the workforce.

In my view, the applicants have established that the decision to terminate their employment was discriminatory in the sense of s.24(1)(b) of the NSW *Anti Discrimination Act*.. It follows that the termination of their employment was unlawful by virtue of s.25(2) of that Act.

For the reasons set out earlier in this judgment, it follows that, the termination of the applicants' employment being unlawful by reason of the provisions of NSW *Anti Discrimination Act*, they are also not for a valid reason and in contravention of s.170DE(1) of the *Workplace Relations Act* 1996.

DID THE RESPONDENT TERMINATE THE APPLICANTS' EMPLOYMENT FOR REASONS OF THEIR SEX, OR FOR REASONS INCLUDING THEIR SEX?

Section 170DF of the Act is as follows:

> *"170DF(1) **[Employer not to terminate on certain grounds]** An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons: (a) temporary absence from work because of illness or injury; (b) union membership or participation in union activities outside working hours or, with the employer's consent, during working hours; (c) non-membership of a union or of an association that has applied to be registered as a union under the provisions of this Act; (d) seeking office as, or acting or having acted in the capacity of, a representative of employees; (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (g) absence from work during maternity leave or other parental leave. 170DF(2) **[Inherent requirements of position]** Subsection (1) does not prevent a matter referred to in paragraph 1(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position. 170DF(3) ....."*

Section 170EDA(2) is as follows:

*"170EDA(2) **[Onus of proof on employer]** If an application under section 170EA alleges that a termination of employment of an employee contravened subsection 170DF(1) on the ground that the termination: (a) was for a particular reason or reasons referred to in that subsection that were stated in the application; or (b) was for reasons stated in the application that included a particular reasons or reasons referred to in that subsection; the termination is taken to have contravened subsection 170DF(1) unless the employer proves that: (c) the employment was not terminated for the particular reason or reasons or for reasons that included the particular reason or reasons; or (d) the particular reason was a reason, or the particular reasons were reasons, to which subsection 170DF(2) or (3) applied."*

It will readily be seen that s.170DF(1) does not contain within it any distinction between "direct" and "indirect" discrimination such as that which is to be found in the *NSW Anti Discrimination Act* 1977 - although even the NSW Act does not use that particular terminology.

The question therefore arises as to whether s.170DF(1) of the Act prohibits "indirect" discrimination - it being clear that it prohibits "direct" discrimination.

Section 170DF of the Act was enacted pursuant to the external affairs power of the Commonwealth Parliament. It is based upon a number of <<International>> <<Labour>> Organisation ("ILO") Conventions and Recommendations. The principal ILO instrument upon which s.170DF of the Act is based is Article 5 of the *Convention Concerning Termination of Employment at the Initiative of the Employer ("the Termination of Employment Convention")* which is Schedule 10 of the Act.

S.170CA of the Act is as follows:

*"170CA(1) **[Reason for Division defined]** The object of this Division is to give effect or give further effect; to: (a) the Termination of Employment Convention; and (b) the Termination of Employment Recommendation, 1982, which the General Conference of the <<International>> <<Labour>> Organisation adopted on 22 June 1982 and is also known as Recommendation No. 166, and a copy of the English text of which is set out in Schedule 11 170CA(2) **[Inclusion of sex and disability references]** Without limiting subsection (1), the reference in paragraph 170DF(1)(f) to sexual preference, age and physical or mental disability, have been included in order to give effect, or further effect, to: (a) the Convention concerning Discrimination in respect of Employment and Occupation, a copy of the English text of which is set out in Schedule 1 to the Human Rights and Equal Opportunity Commission Act 1986; and (b) the Recommendation referred to in paragraph 170BA(c). 170CA(3) **[Inclusion of other parental leave references]** Without limiting subsection (1), the reference in paragraph 170DF(1)(f) to other parental leave has been included in order to give effect, or further effect, to the Family Responsibilities Convention and to the*

Recommendation referred to in paragraph 170KA(1)(b)".

Section 3 sets out the objects of the Act. Section 3(g) of the Act is as follows:

> *"**3.** The principal object of this Act is provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia by: .... (g) helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin".*

Article 1 of the ILO *Convention Concerning Discrimination in respect of Employment and Occupation* (ILO Convention 111), which is Schedule 1 to the *Human Rights and Equal Opportunity Commission Act* (1986) is as follows:

> *"1. For the purpose of this Convention the term 'discrimination' includes - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employer's and worker's organisations, where such exist, and with other appropriate bodies. 2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. 3. For the purpose of this Convention the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment."*

When construing the meaning of an international treaty to which Australia is a signatory, (including, in this context, when construing the meaning of legislation giving effect to such treaties) it is necessary to adopt a broad, non-technical approach, so that treaties are, as far as possible, given uniform effect throughout the world. See *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, at pages 124 and 125; and *Shipping Corp of India Ltd v Gamlen Chemical Co (A'Asia)Pty Ltd* (1980) 147 CLR 142, at 159, per Mason and Wilson JJ.

Report III (Part 4B) of the Committee of Experts, on the Application of Conventions and Recommendations, to the 83rd session of the <<International>> <<Labour>> Conference in 1996 (<<International>> <<Labour>> Office, Geneva, 1996) provides considerable assistance in the determination of the question of whether s.170DF(1) of the Act prohibits "indirect" discrimination on the basis of sex.

Paragraphs 23, 24, 25 and 26 of that report are as follows:

> ***"Definition of discrimination 23.*** *Article 1, paragraph 1(a), of Convention No. 111 defines discrimination as 'any distinction, exclusion or preference [based on certain grounds] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. This purely descriptive definition contains three elements: - a factual element (the existence of a distinction, exclusion or preference originating in an act or omission) which constitutes a difference in treatment; - a ground on which the difference in treatment is based; and - the objective result of this difference in treatment (the nullification or impairment of equality of opportunity or treatment). Through this broad definition, the 1958 instruments cover all the situations which may affect the equality of opportunity and treatment that they are to promote.* ***24.*** *Most national legislation contains essentially these same elements using the same terms as the Convention. Prohibited distinctions are enumerated along with the fields in which the prohibition applies. The legislation specifies that any difference in treatment based on a prohibited ground and applying to one of the fields enumerated, a priori constitutes discrimination.* ***25.*** *Any discrimination - in law or in practice, direct or indirect - falls within the scope of the 1958 instruments. General standards that establish distinctions based on prohibited grounds constitute discrimination in law. The specific attitude of a public authority or a private individual that treats unequally persons or members of a group on a prohibited ground constitutes discrimination in practice.* ***26.*** *Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job."*

The subject of "indirect" discrimination was also referred to in the *1988 report of the Committee of Experts to the 75th session of the <<International>> <<Labour Conference*, in much the same terms.

In that report (paragraph 28), they said, under the heading ***"The Objective Consequences of Discrimination"***:

> *"In referring to 'the effect' of a distinction, exclusion or preference on equality of opportunity and treatment in employment and occupation, the definition given by the 1958 instruments"* (which includes the Convention Concerning Discrimination in respect of Employment and Occupation) *"uses the objective consequences of these measure as a criterion. Indirect forms of discrimination and phenomena such as occupational segregation based on sex consequently come within the scope of the Convention. The concept of indirect discrimination refers to situations in which apparently neutral regulations and practices result in inequalities in respect of persons with certain characteristics*

or who belong to certain classes with specific characteristics (race, colour, sex, religion, for example)."

Paragraphs 35 and 38 of the 1996 Report of the Committee of Experts are as follows:

"(c) Sex 35. *Distinctions based on sex are those which use the biological characteristics and functions that differentiate men from women. Such distinctions include those established explicitly or implicitly, to the disadvantage of one sex or the other. Women are most commonly affected, especially in the case of indirect discrimination, by these distinctions, which stem from traditional attitudes that still persist strongly in certain societies, while in others they have lost considerable ground, mainly as a result of greater participation by women in every sphere of activity. Legislation concerning non-discrimination between the sexes is an important step in a policy of equality of opportunity and treatment in employment and occupation.* ***36.*** *.....* ***37.*** *Even when it no longer stems from a presumption of inferiority, discrimination against women in employment is still often fuelled by other considerations that limit their opportunities of obtaining or remaining in employment.* ***38.*** *Distinctions linked to civil status can affect both men and women and are not in themselves discriminatory. They are only discriminatory within the meaning of the Convention if they result in a requirement or condition being imposed on an individual of one sex that would not be imposed on someone of the other sex. The discriminatory nature of distinctions based on pregnancy, confinement and related medical conditions is demonstrated by the fact that, by definition, they can only affect women.* ***The same applies to physical requirements or conditions that are apparently applied equally but result in de facto discrimination. This often appears to be the case, for example, of requirements concerning height or weight which are the same for both men and women. All of these distinctions are often considered to be indirect discrimination (see paragraph 26 above).***"

(Emphasis added).

In this context it is important to note that the "*Convention Concerning Termination of Employment at the Initiative of the Employer ("the Termination of Employment Convention")* (Schedule 10 of the Act) provides in Article 5(d) that *"race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin"* shall not constitute valid reasons for termination.

Paragraph 108 of the 1996 Report of the Committee of Experts is as follows:

"108. *As regards collective dismissals for economic reasons, protection against discrimination should also relate to indirect discrimination resulting from the criteria established to determine the*

order of dismissals. It is necessary to ensure that conditions that appear to be neutral, that are included in collective agreements and that are applied across the board, do not in fact lead to indirect discrimination affecting one of the categories of persons characterised by one of the grounds referred to in the Conventions. Women are particularly affected when the rule of 'last in, first out' is applied; and in sectors where they have only recently gained access to the workplace, the effect on women may be particularly significant. The Committee emphasised in its above-mentioned General Survey that it is important for the choice of the workers to be affected by a collective dismissal to be made as objectively as possible in order to avoid any risk of reaching arbitrary decisions, and that, as advocated in Recommendation No. 166, these criteria should be established in advance. The criteria most often applied relate to occupational skills. length of service, family circumstances and even to the difficulty of finding alternative employment. Inequitable treatment of men and women, and of disadvantaged categories of workers, can arise from the application of such measures, in particular in the current increasingly frequent situations of economic crisis, in which countries face structural adjustment problems, unemployment, underemployment and the demands of increased competitiveness as a result of globalisation of the economy."

Section 170DF(1)(g) of the Act does not, in terms, refer to "discrimination", yet alone "direct" or "indirect" discrimination - it merely prohibits termination of employment for reasons including the employee's sex. This is a broadly phrased prohibition intended to benefit employees in a way consistent with the objectives of the Act, and Australia's international obligations. That requires ***all*** termination of employment by reason of the employee's sex be included within the prohibition - regardless of whether the gender basis of the reason arises directly or indirectly.

In my opinion, the requirement for continued employment with the respondent which was imposed upon the workforce at the Katies Warehouse (namely, that workers ***not*** be employed in the "Australian" "splitters and packers" section of the workforce) was, to use the words of paragraph 26 of the 1996 Report of the Committee of Experts "*indirect discrimination*" in the nature of an *"apparently neutral situation..... which in fact results in unequal treatment of persons with certain characteristics"*. In the circumstances of this case, the imposition of that requirement has resulted *"in a disproportionately harsh impact"* on the female workers in the Australian section of the splitters and packers workforce, "*on the basis of* (their) *sex*".

It follows that the respondent has failed to prove that the termination of the employment of the applicants was not for the reason of their sex, or for reasons including their sex.

It follows from that that the termination of each of the applicant's employment was for a reason prohibited by s.170DF(1)(g) of the Act, namely their sex.

For the same reasons that I found that the work practices of the respondent were not in all the circumstances of the case "reasonable", (i.e. that there was no objective basis for the assumption that women could not do the so-called "heavy work") I find that the discriminatory work practices (as outlined above) were not based on an inherent requirement of the particular positions held by the splitters and packers. The termination of their employment was, therefore, unlawful.

SHOULD THE COURT ALLOW THE APPLICANTS TO MAKE THEIR APPLICATIONS OUT OF TIME?

Did the applicants receive written notice of termination?

Prior to the passage of the *Industrial Relations and other Legislation Amendment Act* (Act No. 168 of 1995) ("the Amendment Act"), s.170EA of the (principal) Act reads as follows:

> *"**170EA(1) [Employee may make application]** A person (**"the employee"**) may apply to the Court for a remedy in respect of termination of his or her employment. **170EA(2) [Trade Union may apply on employee's behalf]** A trade union whose rules entitle it to represent the industrial interests of a person (**"the employee"**) may, on the employee's behalf, apply to the Court for a remedy in respect of termination of the employee's employment. **170EA(3) [Conditions of application]** An application must be made: (a) within 14 days after the employee receives written notice of the termination; or (b) within such further period as the Court allows on an application made during or after those 14 days."*

Item 14 of Schedule 2 of the Amendment Act is as follows:

> *"**14. Application (1)** The amendments of the **Industrial Relations Act 1988** made by an item of this Schedule other than item 2, 9 or 10 apply: (a) in relation to a termination of the employment of an employee that occurs on or after the day fixed by Proclamation for the commencement of that item; and (b) in relation to a termination of the employment of an employee that occurs before that day if neither the employee nor a trade union on behalf of the employee has made an application to the Industrial Relations Court of Australia for a remedy under section 170EA of the **Industrial Relations Act 1988** as in force before that day. **(2)** The amendments of the **Industrial Relations Act 1988** made by items 9 and 10 of this Schedule apply: (a) in relation to a termination of the employment of an employee that occurs on or after the day fixed by Proclamation for the commencement of those items; and (b) in relation to a termination of the employment of an employee that occurs before that day if: (i) neither the employee nor a trade union on behalf of the employee has made an application to the Industrial Relations Court of Australia for a remedy under section 170EA of that Act as in force before that day; or (ii) if such an application has been made to that Court before that*

day but the Court has not pronounced final judgment in respect of the application before that day."

Item 5 of Schedule 2 of the Amendment Act repealed the pre-existing s.170EA of the (principal) Act, and substituted a new s.170EA as follows:

"***170EA(1)*** *A person (**"the employee"**) may lodge with the Commission an application for relief in respect of termination of his or her employment. (2) A trade union whose rules entitle it to represent the industrial interests of an employee (**"the employee"**) may, on the employee's behalf, lodge with the Commission an application for relief in respect of the termination of the employee's employment. (3) An application under subsection (1) or (2) must be lodged: (a) within 14 days after the employee receives written notice of the termination; or (b) within such further period as the Commission allows on an application made during or after those 14 days. (4) An application so lodged is to be treated by the Commission as a request to attempt to settle the matter by conciliation. (5) Unless the Commission otherwise orders, the parties to such a conciliation proceeding are: (a) the employer and the employee concerned; and (b) if the application is lodged under subsection (2) - the trade union concerned."*

All of the applications made their applications to the Court before 15 January 1996, which was the day fixed by Proclamation for the commencement of Item 5.

It follows that s.170EA of the Act, as it was before 15 January 1995, applies in respect of the applications. It is the Court, therefore, which will determine question of whether the applicants should be given leave to apply out of time.

If no written notice of termination was received by the dismissed employee, then there is no 14 day time limit, and the question of the Court giving leave to file an application out of time does not arise.

In *Nelson v Scholle Industries* (1995) 64 IR 9, his Honour, von Doussa J, found that an Employment Separation Certificate constituted written notice within the meaning of s.170EA of the Act. I agree with the submissions of the respondent that *Nelson v Scholle Industries* is authority for the propositions that:

(a) it is not necessary for a document to be addressed to an applicant personally to constitute written notice for the purpose of paragraph 170EA(3)(a);

and

(b) for the purpose of paragraph 170EA(3)(a), written notice of termination can be given before ***or*** after the termination of the applicant's employment.

Upon the termination of their employment, each of the applicants were given an envelope in which there were several documents. One of those documents was

an Employment Separation Certificate. In my opinion, by giving the applicants that document alone (and putting aside, as unnecessary to determine, the question of whether any of the other documents constituted "written notice") the respondent gave each of the applicants "written notice" within the meaning of s.170EA of the Act.

Factors governing the grant of leave to apply out of time.

It is probable that this is the last occasion upon which the Court will have the opportunity to consider the principles governing such applications, which are now to be determined by the Australian Industrial Relations Commission ("the Commission").

Decisions of the Court, whether made by a Judge or a Judicial Registrar - there being no difference in legal effect, as the exercise of the Court's powers by a Judicial Registrar is "*taken to have been exercised by the Court or a Judge, as the case requires*" (see s.376(4) of the Act) - are, because the Commission is not a judicial body, to be followed by the Commission.

It is, therefore, opportune that the Court, for the guidance of the Commission, set out what the relevant principles are.

In *Coyne v Ansett Transport Industries*, Industrial Relations Court of Australia, Full Court, 24 September 1996, the Court cited with approval the judgment of Marshal J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at pages 299 and 300.

The principles set out by his Honour in *Brodie-Hanns* were as follows:

> *"1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend. 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time. 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time. 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time. 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time. 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."*

The Full Court in *Coyne* also refer to, again with approval, the decision of her Honour Justice Beazley in *Turner v K & J Trucks Coffs Harbour Pty Ltd* (1995) 61 IR 412, at 414-415.

Each of the cases referred to by the Full Court, as did the primary judge in *Coyne*, took the decision of Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 as the starting point for the consideration of the legal principles involved in the exercise by the Court of its discretion under s.170EA (3)(b).

However, in my view, it is significant that the remedies granted to employees by the Act are remedial and beneficial in nature - they were intended by Parliament to change, in a substantive way, the law as to dismissals. Employees were given substantive rights to challenge unjustifiable dismissals, rights which had, in many cases, not existed before. The legislation, with some specified exceptions, granted these rights to all employees within the nation.

For the above reasons, in my opinion, the principles to be applied in respect of applications for extensions of time under the Act are not quite the same as those to be applied for applications for extensions of time under section 11 of the *Administrative Decisions (Judicial Review) Act* (1975), the Act which was being considered by Wilcox J in the *Hunter Valley* case.

In particular, with respect, I agree with what her Honour Justice Beazley said in *Turner v K & J Trucks* in which she agreed with the following observations of Keely J in *Coker-Godson v National Dairies Ltd*, Industrial Relations Court of Australia, Keely J, 22 August 1994 unreported, at pages 6-7:

> *"..... the wording of s.170EA(3) is such that it may well be easier for an applicant, under the sub-section, to persuade this court to allow a 'further period' than it is for an applicant, under s.11 of the Judicial Review Act, to persuade the Federal Court ie on the principles distilled by Wilcox J in Hunter Valley at 348 'to guide, not in any exhaustive manner, the exercise of the court's discretion' under the Judicial Review Act. In saying that I am referring in particular to the statements in principle 1 that: (a) 'the court will not grant the application unless positively satisfied that it is proper to do so', (b) 'it is the prima facie rule that proceedings commenced outside that period will not be entertained' and (c) it 'is a pre-condition ... that the applicant show an 'acceptable explanation of the delay'. As the matter has not been argued I shall not express any opinion on the question."*

I now move to a consideration of the particulars factors in this case.

Was there an acceptable reason for the delay in filing the applications?

The 14 day time limit expired, in the case of Ms Araneda, on 3 March 1995, and in the cases of the other applicants on 6 April 1995. The applications were all lodged on 22 September 1996.

All of the applicants, broadly speaking, gave a similar explanation for the delay. This was that they had no knowledge at all that they might have had the right to challenge the termination of their employment until about mid September 1995.

True it is that a few of the applicants did try and obtain some legal advice prior to the termination of their employment. The nature of the advice that was given is not in evidence before the Court. The subject matter of the advice is also not in evidence before the Court. In view of the applicants' evidence that they did not know they had the right to challenge the termination of their employment until about mid September 1995, I am not prepared to simply assume from the absence of evidence as to the nature and subject matter of the legal advice that the legal advice concerned their right to take action to challenge their terminations.

It must be clearly borne in mind in assessing whether or not the applicants have put forward an acceptable or reasonable reason for the delay in filing their applications that their first language is not English and they come from other cultures. As counsel for the applicants put it in written submissions, *"the applicants have had to overcome barriers of language and culture in a complicated factual situation."*

In May 1995 Ms Sharon Tobin, an Industrial Liaison Officer with the NSW Working Women's Centre, was contacted by Kate Metrevski, of the St George Migrant Resource Centre. The St George Centre is a community based organisation providing advice and services to migrants and others from a non-English speaking background. Ms Metrevski asked Ms Tobin to speak to some women (who turned out to be the applicants) who had contacted her. Ms Metrevski wanted Ms Tobin to explain to the women what had happened. Ms Metrevski told Ms Tobin (and I quote from Ms Tobins' affidavit, Exhibit 49) *"that there appeared to be a great deal of confusion about what happened to them".*

Ms Metrevski's opinion was corroborated by the direct evidence of the applicants themselves, and I accept Ms Tobin's recitation of Ms Metrevski's opinion as evidence of the fact of the matter. Although it was, strictly speaking, hearsay, it was admitted without objection, and is now evidence of the fact.

Following that contact from Ms Metrevski, Ms Tobin made a series of contacts with the NSW Office of the National Union of Workers. She was trying to find out from the NUW what had happened. In June she spoke to Mr Ivancic, who told her that he would have further discussions with the women to further explain what had happened and, if required, he would have the case reopened in the Industrial Relations Commission of NSW.

Ms Tobin gave evidence that in the weeks that followed she continued to contact Mr Ivancic, who repeatedly gave her his assurance that he would do something about the matter, but that, after about 4 or 5 weeks, she formed the view that he was not going to do anything about it.

It is clear from this that Mr Ivancic was simply fobbing her off with what now, in hindsight, appear to be false assurances that he would do something. I accept Ms Tobin's evidence. She was not cross-examined to the contrary. Furthermore, no reason was given for the respondent's failure to call Mr Ivancic as a witness. In this respect, in my opinion, I should draw the inference that Mr Ivancic was not called as a witness because his evidence would not have assisted the

respondent's case (see *Jones v Dunkel* (1959) 101 CLR 298).

As a result of the lack of success with Mr Ivancic, Ms Tobin then contacted Mr Frank Belan, the State Secretary of the NUW. She had a discussion with him about the matter, and Mr Belan suggested that she contact Mr Lakeman, at Katies, in order to ascertain what exactly had happened to the women in question.

On 25 July 1995, Ms Tobin spoke to Mr Lakeman. Ms Tobin's evidence as to what Mr Lakeman had said was as follows:

> *"Mr Lakeman told me that basically it was a redundancy situation, that the women were no longer required to work for the Company and that the men who were transferred to the new Warehouse were only the men who had worked at the dock at the old Warehouse. From what I was told I considered that the women in question might have some rights under the Anti Discrimination Act and continued to investigate the matter."*

(See paragraph 4 of Exhibit 49).

It is important to realise that the time limit for proceedings under the *Anti Discrimination Act* 1997 (NSW) is 6 months - and at this stage Ms Tobin did not realise that, in a redundancy situation, dismissed employees had rights under the *Workplace Relations Act*, (then the *Industrial Relations Act* 1988).

Ms Tobin gave evidence, which I accept, that on 18 August 1995 a meeting was arranged with Ms Metrevski, Mr Ivancic, most of the applicants, some interpreters, and herself. She gave evidence that Mr Ivancic told the meeting that the NUW would notify a dispute to the Industrial Relations Commission of NSW.

Again, Mr Ivancic did nothing. Eventually, after being told on 13 September 1995 that he had not lodged a dispute notification, but that the NUW had put the (respondent) company on notice that they might, it became apparent to Ms Tobin that neither Mr Ivancic nor the NUW intended to take up the case.

In between late August 1995 and mid September 1995, Ms Tobin spoke to quite a few people about what the applicants could do

The first time that Ms Tobin became aware that the applicants, even though they were persons whose employment had been terminated as a result of a *"redundancy"*, had rights to challenge the terminations under the (then) *Industrial Relations Act* 1988, was on or about 16 September 1995, when she spoke to Ms Claire Howell, who was then a solicitor employed in the firm of Geoffrey Edwards & Co. Ms Howell gave Ms Tobin advice as to the rights of the applicants to initiate proceedings in the Court.

A meeting was convened on 19 September 1995 with the applicants, at which each of them were asked to sign their unfair dismissal applications, and a

complaint to the Anti Discrimination Board of NSW.

Each of the eight applicants whose applications will be finally determined in this judgment signed their forms at that time, and they were filed at the Court on 22 September 1995.

Ms Tobin discovered, after the meeting, that some of the other applicants did not sign their forms at the meeting, and there were, in respect of some of the applicants, some further slight periods of delay, resulting in applications being filed in October. My prima facie view, not having heard submissions on it, and being, of course, open to those submissions, is that, in the scale of things, that short further delay is of little importance in the case.

Ms Tobin was not a lawyer. I accept her evidence that she was not aware that the applicants had rights under the (then) *Industrial Relations Act* 1988 to challenge their dismissals in the Court. I accept her evidence that, up until she received the advice from Ms Howell, her principle focus had been the consideration of the possibility of a claim under the *NSW Anti Discrimination Act*.

It was not due to Ms Tobin's "inaction", per se, that the applications were not filed in May - rather it was her imperfect knowledge of the law. Furthermore, even inaction by solicitors, if not the fault of the client, does not necessarily have to be visited on their clients, resulting in a decision that the client does not have an acceptable reason for delay. (See *Comcare v Ahearn* 119 ALR 85).

In my opinion, particularly given the applicants' language and cultural difficulties, and their and Ms Tobin's lack of understanding of their rights, they have established an acceptable reason for the delay in filing their applications.

Action taken by the applicants to contest the termination of their employment

The respondent was not made aware, until the serving of the applicants in late September 1995, that the applicants were challenging the termination of their employment.

However, in my view, the reason for this is exactly the same as the reasons for the delay in filing the applications, namely, that the applicants were not aware of their rights.

In view of that, the failure of the applicants to, as it were, "put the respondent on notice" that the terminations of employment could be challenged, is a neutral fact in the case. (This is putting aside questions of possible prejudice to the respondent, which will be dealt with below).

Prejudice to the respondent

There is no evidence that the quality of the evidence in the respondent's case has deteriorated as a result of the delay in the filing of the applications. In

paragraph 122 of his submissions, counsel for the respondent submits as follows:

> *"Further, had the respondent been put on any sort of notice within the time required by the Act, it could have, inter alia obtained statements from a number of employees, including Mr Lakeman, Mr Ware, Mr Sheppard, Ms Mather and Mr Carboni whilst they were still employees of the respondent."*

There is no evidence of any attempt to obtain statements from these former employees - let alone evidence of a failure to do. I, therefore, have no regard to that aspect of the respondent's submissions.

The respondent also submits that it was prejudiced in that, following the termination of the applicants' employment, "it proceeded with its relocation to Waterloo."

In my opinion, this is not "prejudice" at all. The relocation to Waterloo was what the respondent was going to do, in any event. The relocation took place within the 14 days time limit. Even if the applicants had all filed applications alleging unlawful termination of employment on 23 March, the relocation would, I have no doubt whatsoever, have proceeded.

There is one aspect of the case which, could be, potentially, seriously prejudicial to the respondent. This is the fact that the applicants are seeking reinstatement.

In the period from 22 March 1995 until September 1995 the respondent conducted its operations at the new warehouse at Waterloo in the reasonable belief (simply because no hint of a challenge had been made) that nothing would be done to disturb the workforce at the new warehouse.

If the Court were to order reinstatement, these long settled employment arrangements would be seriously disturbed.

However, for reasons which are set out below, reinstatement is, in the circumstances of this case, impracticable, and will not be ordered. It follows that that potential area of prejudice can be ignored in the circumstances of this case.

It should also be borne in mind, in respect of possible prejudice to the respondent, that many of the important facts in this case are simply not in dispute. There was no evidence that the respondent's evidence had been weakened by the passage of time in those relatively few matters which were in dispute.

The merits of the substantive application

As can be seen from the above reasons for judgment, in my view, the applicants have a case which, apart from the question of the granting leave to

proceed out of time, will succeed. It follows that this particular factor is one which, in the circumstances of this case, weighs heavily in favour of granting leave to proceed out of time. This is because, in my view, an injustice would be wrought to the applicants if they were not able to continue with the proceedings in this Court.

Considerations of fairness and equity as between the applicants and other persons in a like position

As Beazley J said in *Turner v K & J Trucks*, at page 418:

> *"the length of the delay, the explanation for the delay and the absence of prejudice, or alternatively the minimal prejudice to the respondent, have to be balanced to determine if it is just and equitable to grant the extension of time."*

On this question it is important to bear in mind the objects set out in s.3 of the Act which include, in s.3(g) *"helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical and mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin."*

I agree with the submission of counsel for the applicants, in which they said *"if an extension of time is not granted in the present case the applicants will be denied their entitlements and the protections afforded by the Act and the Convention because of their lack of knowledge, their language disadvantage and because of their race and their ethnicity. ..... such an outcome would be contrary to the objects of the Act and to the spirit of the Convention."*

As I have stressed before, it is important to understand that the applicants are people who do not have English as their first language, and who come from different cultures. I accept that they were not aware of their rights under the Act, and were confused as to what to do.

The courts in this country must be assiduous not to visit upon persons in the position of the applicants an injustice because of understandable ignorance of their rights, and misunderstanding and confusion as to what to do.

In my opinion, in all the circumstances of this case, it is just and equitable to grant the extensions of time.

REMEDIES

Reinstatement

It is not necessary, in the circumstances of this case, to consider whether, to use the words of the opening paragraph of s.170EE(1) of the Act, it is *"appropriate in all the circumstances of the case"* to order the reinstatement of the applicants.

This is because, for reasons set out below, in the view of the Court, it would be impracticable so to do.

Is it impracticable to order the reinstatement of the applicant?

In *Bogg v ICI Australia Pty Ltd*, Industrial Relations Court of Australia, Patch JR, 23 June 1997, I considered the authorities in relation to this question. The principles which I extracted from the cases and legislation are as follows:

> *"1. The Court has a discretion as to the remedies it may grant. 2. That discretion is not absolute, and all the circumstances of the case must be taken into account. 3. In exercising that discretion, the Court has to first determine the question of whether, in all the circumstances of the case, an order for reinstatement is an appropriate order. 4. The Court then has to consider whether, in all the circumstances of the case, the reinstatement of the employee would be impracticable. 5. Reinstatement is the primary remedy under the Act. This follows from the necessity to consider the question of impracticability of reinstatement before considering the question of whether compensation is appropriate. 6. Reinstatement* ***should*** *be ordered if the Court considers it an appropriate order,* ***unless*** *the Court finds it to be impracticable so to do. 7. 'Impracticable' means something less than impossible, but reinstatement will not be impracticable if it is merely inconvenient, difficult or disruptive, without causing an unacceptable problem, or unacceptable embarrassment, or seriously effecting productivity, or seriously effecting harmony within the employer's business."*

The applicants' employment was terminated on 22 March 1995, but they did not file their applications for a remedy in this Court until 22 September 1995. In the meantime, the respondent conducted its normal operations at the new warehouse at Waterloo, and staff who had moved there, and no doubt, new staff, settled in to what all regarded as permanent jobs.

In my view, it would be impracticable to order the reinstatement of the applicants, because to do so would seriously disrupt productivity at the respondent's new warehouse at Waterloo. Furthermore, the displacement of long established employees at the warehouse would probably seriously affect harmony at the warehouse.

In respect to those applicants (that is to say, those applicants other than Ms Sagredo and Ms Araneda) who seek reinstatement, the Court, therefore, declines to make such an order.

Compensation

Each of the applicants received a notice and severance payment. They also received a payment to pay out their accrued sick leave entitlements. These payments are as follows:

Employee Notice and Severance Sick Leave

Payment (nett - not taxed) Payment

Vera Sapevski 44 weeks $19,047.60 $6,714.50

Cvetanka Plevnarovska 22 weeks $8,863.80 $188.20

Rosa Angelkovska 22 weeks $8,863.70 $1,791.83

Velika Trajkoska 30 weeks $12,087.40 $3,174.95

Todonka Ristevska 22 weeks $8,863.80 $833.36

Myriam Araneda 20 weeks $8,058.00 $318.08

Rosa Sagredo 16 weeks $6,446.40 $1,060.26

Mirian Morales 18 weeks $7,252.20 $699.77

In *May v Lilyvale Hotel Pty Ltd* 68 IR 112, at pages 117-118, his Honour, Wilcox CJ, said:

> *"A redundancy payment must clearly be taken into account in considering the extent of the employee's loss, and therefore the amount of compensation that would be appropriate in the absence of the s.170EE(3) cap. As has been pointed out more than once, the proper approach is for the person assessing compensation, first, to assess the appropriate amount of compensation in the light of all relevant circumstances (including any redundancy payment) but disregarding the cap; secondly, to consider whether that amount exceeds the permissible maximum award and, if so, thirdly, to reduce the assessed amount accordingly: see Perrin v Des Taylor Pty Ltd (1995) 58 IR 254 at 258; Cox v South Australian Meat Corporation (1995) 60 IR 294 and Messervy. It is wrong to deduct the amount of any redundancy payment from the cap fixed by s.170EE(3). There is no warrant in the legislation for that course. I accept that this may expose an employer who makes a redundancy payment to a greater total pay out than one who does not; but arbitrary legislative limits usually cause anomalies and unfairness."*

That particular passage was approved by the Full Court in *Davis v Portseal Pty Ltd*, Industrial Relations Court of Australia, Full Court, 10 April 1997, unreported, at page 9.

For the reasons set out in my judgment in *Eggleton v Kingsgrove Medical Centre Pty Ltd*, Industrial Relations Court of Australia, Patch JR, 5 March 1997, unreported, in my opinion, the word *"remuneration"* in s.170EE(3) of the *Workplace Relations Act* 1996, does not include superannuation payments made to a fund as a result of a statutory obligation, and in respect of which the

obligation to make payments does not flow from the contract of employment. It follows that the amount of compensation ordered to be paid by the respondent does not, in respect of all of the applicants, include any allowance for any superannuation payments.

Of course, it may be (and I make no finding in this respect) that the respondent is obliged to make an appropriate superannuation payment in proportion to compensation ordered as a result of a statutory or award obligation in any event. But that is not a matter which is before the Court.

In what way is a redundancy payment to be taken into account on the question of the calculation of the amount of compensation?

In *Fryar v System Services Pty Ltd*, Industrial Relations Court of Australia, von Doussa J, 10 May 1996, unreported, his Honour said, at pages 20 and 21:

> *"There is a distinction between the nature and purpose of a period of notice or payment in lieu, and a severance payment. The distinction is reflected in Articles 11 and 12 of the Termination of Employment Convention. Whilst the two are often treated together to arrive at a global redundancy package, the separate nature and purpose of the two entitlements remain, and assume importance in this case. A period of notice is to give an employee the opportunity to adjust to the change in circumstances which is to occur and to seek other employment: Matthews v Coles Myer Ltd (1993) 47 IR 229. The period may be worked out, as s.170DB allows, and it often is as it is recognised that the employee's prospects of obtaining other employment may be better if the search is undertaken whilst the employee remains in employment: see for example Sinclair v Anthony Smith and Associates Pty Ltd (Industrial Relations Court of Australia, von Doussa J, 1 December 1995 at p.8). A severance payment however is intended to provide a payment as compensation for the loss of non-transferable credits and entitlements that have been built up through length of service such as sick leave and long service leave, and for inconvenience and hardship imposed by the termination of employment through no fault of the employee: Termination Change and Redundancy Case (1984) 8 IR 34 at 62, 73. The inconvenience and hardship includes the disruption to an employee's routine and social contacts and the competitive disability to long term employees arising from opportunities foregone in the continuous service of the employer: Food Preservers Union of Australia v Wattie Pict Ltd (1975) 172 CAR 227. Such a payment is taxed on the favourable terms which apply to an Eligible Termination Payment. It is quite inconsistent with the nature and purpose of the payment, and the taxation regime, that the severance entitlement should be worked out as if the number of weeks used to calculate the entitlement were weeks of notice."*

The purpose of compensation under s.170EE of the Act is compensate a dismissed employee for the effects of the termination of his or her employment.

Such effects would in, the normal course, be directly economic, in the sense of loss of pay. However, the Court has recognised (see *Burazin v Blacktown City Guardian,* Industrial Relations Court of Australia, Full Court, 13 December 1996, unreported that, in an appropriate case, compensation may be awarded for distress or humiliation, stress, or the like, caused by the termination of employment.

There is a significant degree of overlap between the nature and purpose of a severance payment, and the nature and purpose of compensation for unlawful termination of employment. However, that overlap is not total.

Some of the effects of termination of employment for which a severance payment is designed to compensate (*"disruption to an employee's routine and social contact, and the competitive disability to long term employees arising from opportunities foregone in the continuous service of the employer"*) are not matters which can be taken into account on the question of the calculation of the quantum of compensation for unlawful termination of employment.

Although *"a redundancy payment must clearly be taken into account in considering the extent of the employee's loss, and therefore the amount of compensation that would be appropriate ....."* (*May v Lilyvale Hotel Pty Ltd*, at page 117), because of the different purposes served by the payments for compensation for unlawful termination of employment, and redundancy payments, it is not, in my opinion, appropriate to simply deduct any redundancy payment from the amount which would otherwise, in the absence of a redundancy payment, have been ordered by way of an order for compensation.

There is no mathematical formula to be applied, in the sense of a particular percentage of the redundancy payment which is to be deducted, and a corresponding percentage which is not to be deducted. The decision of the Court is, rather, focused on the "appropriate" amount to be ordered by way of compensation.

Are sick leave payments to be deducted from any orders for compensation?

Normally, the right to sick leave is not a right which gives rise to a right to payment upon termination of employment. However, in this case, it appears that the respondent regarded it as such. In those circumstances, in my opinion, it is not appropriate to take any account at all of the sick leave payments made to the applicants.

I will deal with each of the applicants individually.

Vera Sapevski

Ms Sapevski gave evidence on 13 May 1996. Her evidence was that since about one month after the termination of her employment she had been working doing casual ironing work for a neighbour, two days a week, at $10.00 per

hour.

I assume an 8 hour working day. On that basis, from about 22 April 1996 until 13 May 1996 Ms Sapevski earnt $160.00 per week (gross).

She earned no income for the month following the termination of her employment.

Her weekly rate of pay was (in common with all the other applicants) $402.90 per week (gross).

I calculate her actual economic loss up to 13 May 1996 as follows:

1. In the 4 weeks following the termination of her employment, during which time she was unemployed, $1,611.60;

2. In the period of 1 year and about 3 weeks since she started doing casual ironing work at $160.00 per week, her loss, per week, has been $242.90. Multiplying that figure by 55 weeks gives the sum of $13,359.50.

Her total economic loss, therefore, up until 13 May 1996 was about $15,000.00.

As noted above, it is necessary to take into account the sum of $19,047.60 (gross) in notice and severance payment which she received.

However, it is also necessary to include an amount to compensate for likely future economic loss. (See *May v Lilyvale Hotel*).

Ms Sapevski was, on 16 February 1996 (the date of her statement), aged 59 years of age. She migrated to Australia in 1968 from Macedonia. She describes her English as follows *"my English is average but I do not understand a lot of what is said to me in English"*. She commenced working with the respondent on 16 September 1975. She is, although very experienced, only trained to do the sort of work she did at the Surry Hills warehouse, which was splitting and packing.

In my opinion, it is extremely unlikely that Ms Sapevski will be able to obtain another full-time job ever again. I accept her evidence that, but for the termination of her employment, she would have stayed working at Katies.

If it were not for the statutory limit of a sum equivalent to 6 months remuneration, I would have ordered the respondent to pay her a sum equal to ***at least*** 3 years (taking into account the vicissitudes of life, and the slight possibility that she might get another full-time job) remuneration, as compensation for the unlawful termination of her employment.

It follows that, even if the Court were to fully deduct all of the payments made to Ms Sapevski upon the termination of her employment, she is still entitled to the maximum amount of compensation payable under the Act. The order that the Court makes is, therefore, that the respondent, within 21 days of today,

pay Ms Sapevski the sum of $10,475.00.

Velika Trajkoska

Ms Trajkoska gave evidence on 14 May 1996. She was unemployed from the time of the termination of her employment on 22 March 1995 until 15 November 1995, when she obtained what she described as *"casual but full-time"* employment as a machinist, at the rate of $365.00 per week nett, or to use her words *"clear"*.

There is no evidence as to what $365.00 per week nett represented in terms of gross income. I assume that Ms Trajkoska is eligible for the tax free threshold in her new job, and I assume that she provided her employer with her tax file number. I take judicial notice of the fact that, in the financial year to 30 June 1997, a gross income of $454.00, on the foregoing basis, would have resulted in a nett income of $365.00. This information is readily available in documentary form from the Australian Taxation Office.

In my opinion, I am able to take judicial knowledge of that fact, because it is *"knowledge that is not reasonably open to question and is..... capable of verification by reference to a document the authority of which cannot reasonably be questioned."* (See s.144(1)(b) of the *Evidence Act* 1995).

Ms Trajkoska gave evidence on 14 May 1996, and on that date she was still working in that position. Putting aside for the moment the question of notice and severance payment made to Ms Trajkoska upon the termination of her employment, I calculate her actual economic loss until the time of the giving of her evidence on 13 May 1996 as follows:

1. Prior to the termination of her employment she was earning $402.90 per week (gross). If she had remained in employment with the respondent, she would have earnt, up to 14 May 1996, (a period of about 60 weeks) the sum of about $24,174.00.

2. From 15 November 1995 until 13 May 1996, a period of about 26 weeks, she earnt about $11,804.00 as a casual machinist

3. Her actual economic loss up until 14 May 1996 was, therefore, about $12,370.00.

The amount of notice and severance payment paid to Ms Trajkoska was $12,087.40.

For the reasons given above, I do not simply deduct the amount paid by way of redundancy payment from any amount which otherwise might be paid by way of compensation for unlawful termination of employment. However, I do take it into account as a factor, which significantly reduces the amount of compensation that otherwise would be appropriate.

I note that Ms Trajkoska's employment (as at 14 May 1996), was as a casual,

and that there is, therefore, a certain element of insecurity in that position. I take that into account, in that there is some possibility of future economic loss.

I note that Ms Trajkoska is aged 51, that she arrived in Australia from Macedonia in 1973, that her first language is Macedonian, and that she does not speak English very well. I note that her education is limited to four years primary school education in Macedonia.

In all of the circumstances, in my opinion, the appropriate sum to order by way of compensation in Ms Trajkoska's case is $5,000.00. That sum is to be paid to her by the respondent, less any tax deducted and paid to the Commissioner of Taxation, within 21 days of today.

Cvetanka Plevnarovska

Ms Plevnarovska gave evidence on 13 May 1996. Her employment history since the termination of her employment on 22 March 1995 was as follows.

In 1995, at a time which is not clear in the evidence, she worked "in a hospital" for a month, for 4 hours a day. Neither counsel asked her any questions as to what she earnt during that month, but I am prepared to assume it was unskilled work, at about $13.00 per hour. I assume she worked a 6 day week. On that basis, assuming 25 working days in that month, she would have earnt $1,300.00 gross. I note here that this is probably a bit more than she actually earnt, but, due to the lack of evidence, I determine any ambiguity in favour of the respondent on this particular point.

Ms Plevnarovska also gave evidence that, at some indeterminate time, she worked for "2 weeks in a hotel". Again, neither counsel asked her any questions about this.

I assume that she worked full-time, doing unskilled work, and earnt about $400.00 per week gross. On that basis, she would have earnt about $800.00 during this two week period.

In January 1996, Ms Plevnarovska started work "at the airport", doing work which she described as "cleaning windows and attending to toilets". Initially, she said that she worked from 7.00am to 3.00pm five days a week, earning $10.00 an hour, and that she earnt $730.00 per fortnight "clear".

After that evidence, three of her pay slips were tendered (Exhibit 16). They show that, per fortnight, she earnt about $912.00 gross. That is, $456.00 per week (gross).

I assume that she commenced work at the airport in early January 1996. Her economic loss ceased to accumulate when she commenced work at the airport.

Ms Plevnarovska's actual economic loss (ignoring, for the moment, notice and severance pay) is calculated as follows:

1. In the period of about 41 weeks until she started work at the airport, she would have earnt about $16,518.90.

2. She actually earnt $2,100.00.

3. It follows that her actual economic loss was about $14,420.00.

In my opinion, in the circumstances of Ms Plevnarovska's case, taking into account her actual economic loss of about $14,420.00, and taking into account her notice and severance payment of $8,863.80, the appropriate amount to order by way of compensation is $8,500.00. The respondent is to pay this sum, less any tax deducted at the appropriate rate and paid to the Commissioner of Taxation, within 21 days of today. Formal orders will be made at the end of these reasons for judgment.

Ms Ristevska

Ms Ristevska, in common with the other applicants, was earning $402.90 per week (gross) in her employment with the respondent.

On 23 March 1995, the date immediately following the termination of her employment by the respondent, she commenced work as a cleaner, working 28 hours per week.

Exhibit 30 is a pay slip of hers, for the period from 29 January 1996 to 11 February 1996. In that two week period she earnt $376.46 per week (gross).

Also on that pay slip, was a statement of her gross earnings in the "year to date", which I take to mean the period from the beginning of the financial year. In the 226 days from 1 July 1995 to 11 February 1996 (the period referred to as the "year to date" on her pay slip, Exhibit 30) she earnt $11,261.96 (gross).

Dividing that sum by 226 (to reach the daily rate) and multiplying the resulting figure by 365 (to give the figure for a year), Ms Ristevska, in the period from 1 July 1995 to 11 February 1996, was earning an income at the rate of $18,190.00 per annum (gross). She was still earning the same income when she gave evidence on 15 May 1996. On that basis, in the 418 days from 23 March 1995 until 15 May 1996 she would have earnt about $20,830.00.

If she had remained in employment with Katies, at the rate of $402.90 per week, she would have earnt, in that same period of 418 days, about $24,060.00.

Her actual economic loss (putting aside the question of severance pay) was, therefore, up until the time she gave evidence on 15 May 1996, the sum of about $3,230.00.

If Ms Ristevska had stayed in employment with Katies, at the rate of remuneration she was earning when her employment was terminated, she would have earnt about $21,010.00 per annum. She is, therefore, suffering an

ongoing economic loss at the rate of about $2,820.00 per annum.

I note that in February 1996 Ms Ristevska was 51 years of age, that she migrated to Australia on 4 October 1969 from Macedonia, that her first language is Macedonian, and that her English is poor. I note that she was first employed by the respondent in 1985, initially as a casual, but worked at the warehouse at Surry Hills on a full-time basis from 17 June 1986.

In my opinion, it is unlikely that Ms Ristevska would leave her current job, at least in the reasonable future. This assumes that her employment is not terminated. In my opinion, the appropriate amount to be ordered by way of compensation for ongoing economic loss, taking into account the vicissitudes of life, the possibility that her current employment might be terminated, and the balancing possibility that she might get a better job, is a sum roughly equivalent to 4 years loss, which comes to about $11,000.00. That is in addition to her actual economic loss to 15 May 1996 of about $3,230.00.

I take into account that Ms Ristevska received the sum of $8,863.80 as notice and severance payment. In my view, in the circumstances of this case, the appropriate amount to order by way of compensation is the sum of $8,500.00. That sum is to be paid to the applicant by the respondent, less any payment by way of tax to the Commissioner of Taxation, within 21 days of today.

Rosa Angelkovska

In June 1995, Ms Angelkovska started work as a cleaner, working 3 hours a day, being paid $180.00 per week "clear" ie (nett).

After six weeks, she commenced working 6 hours a day, being paid the sum of $340.00 per week "clear". She was working 5 days per week. At the time that she gave her evidence on 13 May 1996, she was still working and earning at the same rate.

None of her pay slips were tendered, and there was no evidence as to the gross amount she was earning. However, I take judicial notice (see above) of the fact that, in the financial year to 30 June 1997, for an employee eligible for the tax free threshold, who has supplied her tax file number to the employer, a gross income of $415.00 per week would give a nett income of $340.00 per week. I calculate any compensation to be paid to Ms Angelkovska on the basis that since about the middle of July 1995 she has been earning at the rate of about $415.00 per week (gross).

Likewise, I take judicial notice of the fact that a gross income of about $257.00 per week results in a nett of income of $180.00 per week. Any compensation to be paid to Ms Angelkovska will be calculated on the basis that in the six week period from the beginning of June 1995, she earnt at the rate of $257.00 per week (gross).

On that basis, in that six week period, she earnt $1,542.00 (gross).

From the time in about mid-July 1995, when Ms Angelkovska started working 6 hours per day, earning at the rate of about $415.00 (gross) per week she suffered no ongoing economic loss. She was still in that position on 13 May 1996 when she gave evidence.

For the purposes of calculation of compensation, I regard her economic loss as a result of the termination of her employment as having come to an end in about the middle of July 1995.

If Ms Angelkovska had remained in employment with the respondent she would have earnt, up until about the middle of July 1995, (a period of about 8 weeks) $3,223.20 (gross). Her actual earnings, as noted above, were $1,542.00.

Her actual economic loss, as a result of the termination of her employment (putting aside the question of notice and severance pay) was, therefore, about $1,680.00.

Ms Angelkovska was paid, by way of notice and severance payments, the sum of $8,863.70.

In my opinion, Ms Angelkovska has suffered no economic loss as a result of the termination of her employment.

In respect of her case, the Court will declare that the termination of her employment was unlawful, but no order will be made in respect of compensation.

Mirian Morales

Ms Morales gave evidence that, since the termination of her employment, she has looked for work. She has been, generally speaking, unsuccessful, and has only been able to find some part-time cleaning work as follows:

She worked as a cleaner from July 1995 to October 1995 working for 15 hours per week.

Neither counsel in the case asked her what she was paid per hour, nor what her gross or nett earnings were.

I assume, however, consistent with the other evidence in the case, that she earnt about $13.00 per hour, which would be equal to about $195.00 per week (gross). For the period of approximately 17 weeks that she worked in this job, she would have earnt, therefore, about $3,315.00 (gross).

She had another cleaning job from February to 30 April 1996, just before she gave her evidence on 15 May 1996.

In that job she worked 6 hours per week. Making the same assumptions as above, in that period of approximately 12 weeks she would have earnt about $936.00 (gross).

It follows that her total earnings up until the time she gave evidence on 15 May 1996 were about $4,250.00 (gross).

Ms Morales migrated to Australia on 11 May 1988 from Uruguay. Her first language is Spanish, and she speaks and understands some English. She does not have any formal qualifications, and did sewing work in Uruguay. She did not finish high school.

If Ms Morales had remained in employment at Katies, earning at the rate of $402.90, in the period of approximately 60 weeks to 15 May 1996 she would have earnt about $24,160.00.

It can readily be seen that her actual economic loss (putting aside, for the moment, the question of notice and severance payments) comes to about $19,910.00.

In addition to that, at the time she gave her evidence, she was unemployed. In my opinion, given her personal circumstances, it is likely that she will either remain unemployed, or, at best, work intermittently at part-time, poorly paid jobs for many years. She is clearly suffering a very substantial ongoing economic loss.

But for the statutory limit on the amount of compensation which can be awarded, I would have awarded her, as compensation for her economic loss, a sum equal to ***at least*** 3 years remuneration at the time of the termination of her employment.

In those circumstances, it is unnecessary to take into further account the sums that she was paid by way of notice and severance payments.

The maximum that she can be awarded is $10,475.00.

The respondent will be ordered to pay that amount to her within 21 days of today, less any sums paid to the Commissioner of Taxation by way of taxation in respect of that amount.

Rose Sagredo

Ms Sagredo, at the time that she gave evidence on 30 July 1996, had been unemployed since the time of the termination of her employment.

She migrated to Australia on 19 January 1988 from Chile, her first language is Spanish and she understands "a little English". In 1988 she commenced work, on a casual basis, with the respondent at the Surry Hills warehouse, and became a permanent employee on 26 June 1989. In February 1996 she was 52 years of age.

Her actual economic loss up until the she gave her evidence was substantial. In my view, in view of her background and circumstances, it is likely that she will remain unemployed, or at best, find intermittent, poorly paid, work. Her

continuing economic loss will probably be very substantial. But for the statutory limitation, I would have ordered the respondent to pay her ***at least*** 3 years remuneration as compensation.

In view of these facts, the determination of the amount of compensation in her case is very simple. She is clearly entitled to the maximum amount of compensation, even given the fact that she received $6,446.40 by way of notice and severance payments, and $1,060.26 by way of sick leave payment.

The respondent will be ordered to pay to her, as compensation for the unlawful termination of her employment, the sum of $10,475.00 within 21 days of today, less any amount paid to the Commissioner for Taxation in respect of that amount.

Myriam Araneda

Ms Araneda finished work with the respondent on 17 February 1995. She knew that her employment was to be terminated in any event, in the very near future, and because of her personal circumstances, and the circumstances of her family, she asked if her employment could finish earlier rather than later. As stated above, in my opinion, she was merely accepting the fait accompli that her employment was being terminated at the initiative of the respondent. As stated above, I do not regard this as a resignation.

Since the time of the termination of her employment, up until the time she gave evidence on 29 July 1996, she had worked in a pizza shop jointly owned by herself and her husband. The shop is in his name, but she said they have a common income, and "we are a family" and, therefore, any profits are shared between herself and her husband.

She says that she does "everything" in the pizza shop - cleaning, preparing pizzas, chopping things and selling. Her husband and her work together, opening the shop at 11.00am in the morning, closing at 2.00pm, and then working again from 5.00pm to 11.00pm, every day of the week except Mondays.

It is clear that Ms Araneda decided to work in the pizza shop (for reasons which, I stress, are perfectly reasonable and understandable) instead of looking for paid employment outside of the family business. In so doing, she gave up the opportunity to earn wages, which wages would have mitigated the loss she suffered as a result of the termination of her employment.

Furthermore, it is clear from the evidence that the work she did in the pizza shop did result in an income to her. The business was paying off a loan, and the money to pay off the loan came from the business. Ms Araneda and her family were supported by the endeavours of herself and her husband in the pizza shop. Although there is no evidence as to the amount of money that she and her husband earned, it was clearly sufficient to pay off a loan and support the family. It may well be that she earnt more than she would have if her employment had not been terminated. The onus is on an applicant asserting

economic loss to prove the loss. I should, thefore, resolve the factual uncertainty in respect of Ms Araneda's earnings in favour of the respondent.

Furthermore, in my view, there is a duty placed upon employees whose employment is terminated unlawfully to act reasonably to mitigate the loss suffered by them. This is because the Court is empowered to order such compensation as, in the opinion of the Court, is *"appropriate"* in the circumstances of the case.

In my view, it would not be appropriate to permit a person whose employment has been terminated, albeit unlawfully, to work in the family business and earn less than otherwise would have been possible and not try and obtain alternative, paid, employment, and then to seek compensation from the Court to replace the (greater amount of) money that could have been earnt in that (non-family) paid employment.

The authorities support the conclusion that where compensation is sought as a remedy, there is a duty on the dismissed employee to mitigate the loss suffered. See *Bechara v Gregory Harrison Healey & Co* (1996) 65 IR 382.

In the circumstances, in my opinion, it would not be appropriate to make any order of compensation in respect of Ms Araneda's case.

The order of the Court in her case will therefore be confined to a declaration that the termination of her employment was unlawful.

OTHER PROCEEDINGS

The Court is aware that the applicants have other proceedings, "on hold" as it were, pending the outcome of these cases. The Court says nothing about the merits of those other proceedings.

However, it may well be the case that remedies, or grounds for damages or compensation, are available in those other proceedings that are not available to the Court. The applicants may have an action for breach of an implied term of the contract of employment - something which, despite s.430 of the Act, was not litigated in these proceedings, and, remains, therefore, undecided.

It is not the intention of these orders (if that could be the case, a matter upon which the Court says nothing) to necessarily remove any other remedies, in respect of matters outside the limits of the Court's jurisdiction in these particular cases (including, but not limited to the fact that the Court's jurisdiction as to quantum of compensation is limited to 6 months remuneration).

ORDERS

Vera Sapevski

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $10,475.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Velika Trajkoska

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $5,000.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Cvetanka Plevnarovska

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $8,500.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Todonka Ristevska

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of

$8,500.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Rosa Angelkovska

The Court declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

Mirian Morales

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $10,475.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Rosa Sagredo

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

2. As compensation for the unlawful termination of her employment, the respondent to pay to the applicant, within 21 days of today, the sum of $10,475.00.

3. Any sum paid by the respondent to the Commissioner of Taxation within 21 days of today as taxation in respect of the above sum is to be regarded as having been paid in pro tanto satisfaction of the judgment debt.

Myriam Araneda

The Court orders and declares as follows:

1. The termination of the applicant's employment by the respondent was unlawful.

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