

Seminar paper

Breach of Contract:

Common Law and other alternatives to Unfair Dismissal

Presented by

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Freeman**

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TABLE OF CONTENTS

About the author	ii
1. <i>WorkChoices</i> : reduction of protection from unfair dismissal	1
2. Potential Common Law remedies.....	3
2.1 Summary termination (termination without notice).....	9
2.2 Breach of an implied term of reasonable notice.....	14
2.3 Breach of company policies as an implied term of contract	15
3. <i>Trade Practices Act</i> remedies	18
4. Protection of redundancy entitlements	22
5. Conclusion	24

ABOUT THE AUTHOR



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1. WORK CHOICES: REDUCTION OF STATUTORY PROTECTION FROM UNFAIR DISMISSAL

The Work Choices amendments to the *Workplace Relations Act* 1996(Cth) (WR Act) very substantially reduce statutory protection from unfair dismissal for employees of constitutional trading corporations in the following major respects:

1. Employees of a company employing 100 employees or fewer are exempt from making an unfair dismissal claim (section 643(10)).
2. Employees are exempt from making an unfair dismissal application if the termination was for "genuine operational reasons or reasons that include genuine operational reasons" (section 643(8)). Operational reasons are defined to essentially mean a business restructure which results in redundancy (section 643(9)).
3. The statutory qualifying or probationary period of employment is extended to six months (section 643(7)) but if there is a written agreement or a written qualifying period for a lesser period eg three months then the shorter period applies. (Thus, an employee who has passed a written three month probationary period but is terminated inside six months can make a claim).

Given that there are potential cost penalties if an unfair dismissal application is made outside jurisdiction and that no practitioner wants to make an invalid claim the following matters should be assessed:

First Steps in Assessment

Determine whether the worker was employed by a company (specifically a constitutional trading corporation) and therefore subject to the WR Act unfair dismissal provisions rather than unfair dismissal laws under the *Industrial Relations Act* 1996 (NSW) (NSW IR Act) or other state IR legislation.

Employees who will generally not be covered under the WR Act include:

- State public servants and employees of statutory authorities (the terms of the legislation constituting the statutory authority need to be checked).
- Employees of an employer which is not incorporated including sole traders and partnerships.
- Employees of incorporated associations which are not "trading corporations" ie trading is not the predominant and characteristic activity of the business: for a recent judgment see the Decision of President Hall of the Industrial Court of Queensland in *Educong Ltd and Queensland Independent Education Union* (unreported) (C2006/35) (10 July 2006).

Employees of the above employers may still bring either an unfair dismissal or an unfair contract claim (pursuant to section 106 of the NSW IR Act) against their employer and not be subject to the exemptions or restrictions of the WR Act.

If there is doubt about whether an employer engages more than 100 employees then the following steps can be taken:

- Undertake an Internet search. The Company's website may say how many persons it employs.
- Check if the terminated employee has or can obtain an internal telephone list.
- Send a facsimile to the Company and ask for a response as to whether it employs more than 100 employees.

It is important to note that for purposes of the 100 employees unfair dismissal exclusion account is taken of the employees of companies which are defined as related bodies corporate under section 50 of the *Corporations Act 2001* (WR Act section 643(11)).

A simple and inexpensive company search can generally disclose related corporations. The provision in respect of related corporations and how it will be interpreted by the AIRC does not appear to be limited to only employees engaged within Australia. An employer which may have less than 100 employees within Australia may have related companies with employees engaged outside Australia who would take the total number of employees over 100. If such material is to be relied upon in support of a claim it should be obtained prior to the unfair dismissal application being made and provided to the respondent employer and the Commission at the earliest opportunity if a jurisdictional challenge is made.

The mere description by an employer of a termination as being for "operational reasons" is not of itself sufficient to mean an unfair dismissal claim cannot be successfully pursued. Many employers describe a termination as being for "operational reasons" when the reality may be considerably different and an objective analysis of the evidence does not support that description. A business re-organisation for example where only one employee is terminated (even where a redundancy payment is received) suggests the restructure may not be "genuine", see *Prociv and Ors v Bilfinger Services (Australia) Pty Ltd* PR973542 (14 August 2006) and *Perry v Sevills (Vic) Pty Ltd* PR973103 (20 June 2006).

If it appears that the termination was not for operational reasons but may have been for unlawful, discriminatory reasons then the application to the AIRC should be made on both unfair dismissal and unlawful termination grounds.

Section 659 of the WR Act (former section 170CK) continues to operate to protect employees from dismissal because they have suffered a temporary illness, taken parental leave, refused to sign an Australian Workplace Agreement (AWA) or maintain their involvement in a trade union. Section 659(2)(f) also protects employees (irrespective of the size of the business) from discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

A significant majority of unfair dismissal/unlawful termination claims continue to be successfully conciliated before the AIRC. Considerable costs for all parties will still arise from a formal hearing of an application and this continues to provide an inducement for sensible conciliation.

2. POTENTIAL COMMON LAW REMEDIES

With the significant reduction of statutory unfair dismissal rights under Work Choices and the exclusion of unfair contract claims by employees of constitutional corporations arising from section 16(1) of the WR Act the attention of employment lawyers has turned to potential remedies for common law breach of contract and/or other statutory breaches, including under the *Trade Practices Act 1974*(Cth).

Check the Documents

Post Work Choices it is now important to obtain the following documents from a terminated employee or from the employer:

- Contract of employment documents (this may include an initial letter of offer and any subsequent letters of offer or appointment to promotional or different positions).
- Any written policies which applied at the workplace (eg human resources or personnel manuals, specific policies which may be on company intranets). Policies which will be potentially particularly relevant include: termination of employment, misconduct, occupational health and safety and grievances.
- All documentation relevant to the circumstances of termination (eg letters of warning, emails, performance appraisals etc).

What entitlements may flow at common law from the termination of an employee subject to the following letters of offer which constituted the written contract of employment?

Letter of Offer of Employment to Employee 1 contains no termination or notice clause.

Dear Employee 1

I am writing to offer you the position as Production Manager with [company]. Details of this offer are contained in this Letter of Offer.

Your employment will be at [address] or such other place the company may reasonably require.

Your package shall include the following:

- Base salary of [amount]
- 8% superannuation guarantee up (to the maximum annual charge)
- Quarterly performance bonus (see below)
- Mobile phone expenses for business related calls
- Mileage, Rego & Insurance paid on private vehicle

Quarterly Performance Bonus shall be paid at the following rates:

1 st Quarter (April to June)	\$5,000 Guaranteed
2nd Quarter (July to September)	\$5,000 Guaranteed
3rd Quarter (October to December)	\$5,000 on budget to be negotiated
4th Quarter (January to March)	\$5,000 on budget to be negotiated

I [Employee] acknowledge that I understand and agree with the above.

Letter of Offer of Employment to Employee 2 refers to certain representations by management and to a two-year employment term in the attached Employment Agreement

Dear Employee 2

LETTER OF OFFER

We have much pleasure in confirming our offer to you of the position of [position] with [company], reporting directly to the head of [company] and as otherwise directed by the [company] CEO.

Further to your discussions with [manager 1] and [manager 2] your Employment Agreement and all associated documentation is enclosed. We would like to confirm our offer to you of a base salary of [amount] with an additional Bonus Payment to be paid in accordance with Schedule 1 of that Agreement.

Our offer of employment is subject to your acceptance by signing and returning this letter to us. We look forward to you joining our team on [date].

Let me take this opportunity to welcome you to our dynamic company and trust that we will have a long associate that will be both successful and mutually rewarding.

EMPLOYMENT AGREEMENT FOR EMPLOYEE 2 (extracts)

Location

The head office is [address] in the State of New South Wales. However, during the course of the Employee's employment with [company] the Employee may be required to work in other operating locations. Your home office is reflected at Item [insert] of the Schedule.

Term

The term of this agreement is for a period of [insert] from the date of commencement of this Agreement on the following terms:

1. this Agreement shall continue in force for an initial probationary period of 3 months from the date of commencement of this Agreement during which [company] may terminate at any time without notice; and
2. this Agreement may be renewed for a further term of 12 months at each anniversary of the date of commencement of this Agreement with the express written agreement of both parties.

Termination

Should [company] wish to terminate this employment agreement for any reason (other than grounds that warrant dismissal), two(2) weeks' notice in writing or the payment or forfeiture of two (2) weeks' total remuneration is required during your initial six (6) month probationary period. Beyond your initial probationary period, a notice of four (4) weeks will apply.

Events of termination

[Company] may terminate this agreement with immediate effect on any of the following grounds:

1. the Employee (being a natural person) becomes, or is found to be a bankrupt;
2. the Employee enters into any arrangement, compromise or composition with or assignment for the benefit of its creditors or any class of them;
3. a receiver or receiver and a manager is appointed with respect to the Employee or any of its assets and is not removed within 3 days of his/her appointment;
4. the Employee breaches a provision of this Agreement and has not remedied that breach within 24 hours after service of notice of the breach by [company];
5. the Employee commits a wilful or substantial breach of this Agreement or under general law;
6. the Employee is found to be or have been under the influence of alcohol or other substances during normal business hours or during any communication with a Customer outside normal business hours.

The letter of offer of employment to Employee 3 incorporates employment policies into the contract of employment.

Dear Employee 3

EMPLOYMENT AGREEMENT

Following the introduction of the Work Choices legislation, which came into effect on 27 March 2006, the merger of [company] and [company], in order to ensure our conditions of service are preserved in an equitable manner for all staff, I am please to be able to formally offer you a new employment agreement with effect from 3 July 2006. The agreement is intended to comply with the provisions of Australian Workplace Agreements and an explanatory statement from the Office of the Employment Advocate is attached.

This Agreement will remain in place until 30 June 2011, unless varied by agreement beforehand.

While this is a new employment agreement, your present leave accruals and service will be recognised and will continue with this new appointment.

The general terms and conditions of your employment are in accordance with the attached "Staff Charter and Code of Conduct" (which forms part of this letter of offer) and the [Employer's] Human Resources Manual (HR Manual), as may be varied from time to time. The human resources manual is available on the Intranet and specifies your conditions of employment in full.

HUMAN RESOURCES MANUAL (extracts)

TERMINATION OF EMPLOYMENT / REDUNDANCY

Termination

Employment maybe terminated either by a staff member or the Employer according to the terms of the Employer, or as otherwise stated in writing, on appointment.

Redundancy Policy

The Employer has an obligation to its members and staff to ensure that it is in a position to develop, yet remain sufficiently flexible to cope with inevitable changes. The Employer is a dynamic organisation and therefore will having changing requirements. Some present positions may not be required in the future even though, in the long term, the Employer expects to grow. The loss of a position may occur because of economic downturn, organisational restructure or technological change.

Consequently, the Employer has developed a redundancy and retrenchment policy to apply in those situations where a staff member's position is no longer required by the Employer. A redundant position does not reflect on the incumbent staff member as an individual or on their skills and commitment to the Employer. Whatever changes occur, the Employer values its staff highly and is committed to providing the maximum level of support possible. The Employer will make every effort to relocate the staff concerned into another continuing position. Some staff may not wish to be relocated and will opt for voluntary retrenchment; in other cases, relocation may not be possible and the redundancy provisions will apply.

The provisions of this policy apply only to those staff of the Employer who have continuing appointments, whether full-time or part-time.

Definitions

Redundancy is where the Employer no longer has a requirement for particular functions to be performed or a particular position or needs to reduce the number of positions with the Employer because of its business requirements.

Retrenchment is where the employment of a staff member who has a continuing appointment with the Employer, is terminated as a result of a redundancy and where redeployment to a suitable alternative employment with the Employer is not available.

Voluntary Retrenchment is where the incumbent of a redundant position, who has a continuing appointment with the Employer, seeks retrenchment under the terms of this policy rather than seek redeployment with the Employer.

General Features

- Once a position is declared redundant, the Employer will endeavour to redeploy the incumbent;
- Retrenchment entitlements will be available to employees only if their position has become redundant;
- Where a position is declared redundant, the incumbent of another position may seek a voluntary retrenchment package if it is possible to relocate the incumbent of the redundant position.
- Management, as a last resort, may initiate retrenchment.

There is no difference in benefits between voluntary and management-initiated retrenchment.

The redundancy policy is a policy of the Board and will be subject to review from time to time.

The redundancy process will be the responsibility of the CEO. The essential elements include:

4. Determining whether there is a need for the position.
5. Determining whether a transfer to another position is possible.
6. Establishing the retrenchment benefits and employee entitlements.
7. Identifying any outplacement service to be offered.
8. Ensuring that staff are treated fairly and equitably.
9. Ensuring that all legal and industrial requirements have been met.
10. Ensuring that information to staff, Unions, members and media are managed correctly.

Notice Period

All continuing staff occupying a redundant position will be entitled to a notice period of 4 weeks. Staff will not be required to work out the notice period; payment will be made in lieu.

An additional notice period of 2 weeks will be given to any retrenched member of staff who, at the time of the redundancy, is 45 years of age or older.

Severance Payment

In addition to the above notice, retrenched staff will receive a severance payment in accord with the following table, based on their total substantive remuneration package.

Length of Service	Severance Pay	Length of Service	Severance Pay
Less than 1 year	2 weeks	6 to 7 years	14 weeks
1 to 2 years	4 weeks	7 to 8 years	16 weeks
2 to 3 years	6 weeks	8 to 9 years	18 weeks
3 to 4 years	8 weeks	9 to 10 years	20 weeks
4 to 5 years	10 weeks	10 to 15 years	22 weeks
5 to 6 years	12 weeks	15 + years	24 weeks

2.1 SUMMARY TERMINATION (termination without notice)

Where an employer purports to rely upon the terms of the employment contract for a summary dismissal, then the employer must prove that the alleged misconduct occurred and that it was sufficiently serious to warrant immediate dismissal.

CONNOR V GRUNDY TELEVISION PTY LIMITED [2005] VSC 466

Connor demonstrates an important limitation on the ability of an employer to summarily dismiss an employee for serious misconduct.

An employer who summarily dismisses an employee must be able to prove that the employee was guilty of serious misconduct that warranted the immediate termination of the employment relationship. The right to terminate for serious misconduct exists in the period immediately following the employer discovering the particular behaviour.

The Facts

If an employer elects to continue the employment relationship by warning the employee as opposed to an immediate termination, the employer will lose the right to summarily dismiss the employee on the basis of the particular act of misconduct. Any attempt to justify summary dismissal on the basis of this past act of misconduct may amount to a breach of contract and make the employer liable to pay potentially very substantial damages. In this case Connor was awarded over \$196,000 in damages.

Shane Connor is an actor who starred in the popular television program *Neighbours*. Grundy Television Pty Ltd employed him on a series of fixed term contracts. The contract incorporated the terms of the Actors Television Programs Agreement, 2000.

The Victorian Supreme Court stated:

"[T]he fundamental dispute between the parties is whether the plaintiff's actions in late September 2003 justified the summary termination of his employment. That dispute is in the first instance a dispute of fact in respect of which the defendant bears the onus of demonstrating conduct by the plaintiff amounting to misconduct or negligence."

The Decision

The Court reiterated the well-settled rule that in cases involving summary dismissal of an employee it is for the employer to justify the summary dismissal by proving that the alleged misconduct occurred and that it was sufficiently serious to warrant immediate dismissal.

The Court held that the defendant had failed to prove conduct justifying summary dismissal in September 2003. It acknowledged that "[t]he defendant had grounds to summarily dismiss the plaintiff for misconduct at the commencement of May 2003 but it elected not to do so. It was not entitled to summarily terminate the plaintiff's employment almost five months later unless the plaintiff again acted unprofessionally and breached the terms of the employment agreement (including his obligation to perform in good faith and to the best of his ability) in a manner which

was not utterly trivial." The defendant was therefore unable to show conduct at the time of termination that would justify Connor's summary dismissal.

The Court rejected the defendant's submission that the behaviour of Connor in September 2003 was the "last straw" in a continuing pattern of behaviour that could, in a cumulative sense, amount to a repudiation of the employment contract. The "evidence did not demonstrate a pattern of unsatisfactory evidence over the last days of the plaintiff's employment." The plaintiff ceased using drugs and his performance at work improved dramatically. The Court found it untenable to suggest that there was a pattern of unsatisfactory behaviour continuing from April 2003 to the termination of the plaintiff's employment.

In order for this argument to succeed there must be an actual pattern of behaviour rather than a number of discrete events, and the cumulative affect of the behaviour must indicate an intention not to be bound by the contract. The "last straw", which is the event that leads to the termination in a contemporaneous sense, does not have to be a serious breach of contract in itself. It may not be a breach of contract at all. What is required is that the final act, when taken in conjunction with the earlier acts, amounts to a pattern of behaviour that is contrary to the ongoing relationship of trust and confidence between the employee and the employer.

The Court therefore found that it was "not satisfied that the plaintiff's conduct in September 2003 either regarded in itself or cumulatively with his prior conduct up until the end of April 2003 did amount to a failure to perform in good faith and to the best of his ability the services required of him." Connor had been wrongfully dismissed and was entitled to damages.

As this was a contract of a fixed term and Connor had been wrongfully dismissed the damages payable to him were calculated as the balance of his fixed term contract, less any income earned in mitigation. Connor received \$196,709 in damages.

JARRETT V COMMISSIONER OF POLICE NEW SOUTH WALES [2005] HCA50

In Jarrett the High Court emphasised the importance of procedural fairness in termination of employment cases and pointed to options for common law claims.

The Facts

On the evening of 5 September 2001, the Deputy Commissioner of Police NSW, Jeffrey Jarratt, received at his house a copy of a press release. This stated that the Commissioner had recommended that Jarratt's contract be terminated "on the grounds of performance". At the time, there seems to have been no doubt in the minds of Jarratt or the Commissioner that Jarratt had been dismissed. However, Jarratt had been given no notice, nor an opportunity to respond. The legality of the dismissal was resolved by the High Court judgment that raised important points about the requirements of natural justice, the prerogative of the Crown to dismiss at pleasure and the entitlement to damages where a contract is repudiated as a result of an invalid exercise of statutory power.

Court Proceedings

In the first instance Mr Jarratt sought various declarations of invalidity of the termination of his office, breach of contract, damages and costs. Jarratt complained that he was given no opportunity to be heard on the substance of any criticisms of his performance before a recommendation was made that he be removed. The respondents argue that Jarratt was not entitled to this opportunity as he had held his position “at the pleasure of the Crown”.

Simpson J in the NSW Supreme Court held that the ‘dismissal at pleasure principle’ had been reformulated in *Annetts and McCann* (1990), and that unless expressly excluded by statute the rules of natural justice regulate the principle of ‘dismissal at pleasure’.

Therefore, by reason of the failure of the Commissioner to accord Jarratt procedural fairness, the decision to remove him and to terminate his contract was invalid. The refusal to allow Jarratt to perform his duties for the remainder of his term of employment amounted to wrongful dismissal. As a result he was awarded damages in the sum of \$642,936.35.

The NSW Court of Appeal overturned this decision, concluding that Jarratt had not been entitled to natural justice as s51 confirmed the dismissal at pleasure principle. Importantly it was seen that where there is a contract and a statute controlling the terms of employment, the contract must be consistent with any statutory provision that affects the relationship. The existence of a contract does not exclude the right to dismiss at will and that Jarratt had not proved that the principle of ‘dismissal at pleasure’ had been displaced. In reaching this decision the Court of Appeal emphasised the language of s51 and held that the words at any time was required. Furthermore, it was held that Simpson J was wrong in using the analogy of an unfair dismissal to assess contractual damages. Mason J stated that a claim for unfair dismissal is one that is based on the breach of the employer’s promise of work either for an indefinite period or for a fixed term. As the contract between Jarratt and the Crown had no such terms, there was no breach of contract and thus the case should not have proceeded as if contractual damages were to be assessed as on a wrongful dismissal.

The Decision

Jarratt appealed this decision successfully. The High Court set aside the orders of the Court of Appeal and ordered that the appeal to that Court be dismissed with costs and that the award of damages of \$642,936.35 be reinstated. In general terms, the arguments of Simpson J were seen to be persuasive and it was concluded that Jarratt had been entitled to procedural fairness.

In drawing this conclusion the High Court looked at the intent of the Act and the intent of the employment contract. It was held that the Act did not expressly enact the ‘dismissal at pleasure’ principle but rather, it set out the procedure by which a Deputy Commissioner can be removed. Critically, it was seen that the procedure and the presence of the procedure, conflicted with an ability to dismiss ‘at pleasure.’

Entitlement to damages for breach of contract

Jarratt’s entitlement to damages flowed from his wrongful removal from office and the termination of his employment. The majority upheld Simpson J’s analogy of a wrongful dismissal and held that the damages were not properly characterised as damages for breach of contract. Rather, according

to Callinan J, as Jarratt's removal was invalid, he remained in office and was entitled to remuneration for the time that he could have expected to serve. While the respondents argued that Jarratt should not be compensated for the whole of the balance of the unexpired term of his appointment because it was likely that his appointment would have been terminated before the term of his contract elapsed, Callinan J ruled that this argument is analogous to an argument of a failure to mitigate, the onus of which lies upon the defendant. As there was no reason for removal proved or suggested and thus no evidence of how the applicant might have responded to it, the Court was not able to make any assessment of the respondent's argument in this regard.

This case demonstrated the sovereignty of the principle of procedural fairness. The Crown's right to 'dismiss at pleasure' was conditioned upon the observance of the rules of natural justice, unless this right is expressly abrogated by statute. Where these principles are not observed and a contract is repudiated, very substantial damages can be awarded as a result of an invalid exercise of power.

RANKIN V MARINE POWER INTERNATIONAL PTY LIMITED [2001] 107 IR 117

In Rankin the Supreme Court of Victoria considered a common law claim for wrongful dismissal of an employee who had failed to comply with company policy and who was subsequently terminated summarily. It was found that the allegations of misconduct, failure to comply with reasonable directions and negligence were not made out to a level to justify summary dismissal. As the employee had been wrongfully dismissed he was held to be entitled to a period of reasonable notice and in the circumstances of approximately 13 years employment reasonable notice was held to be payment of salary for 12 months.

Mr Rankin was employed by Marine Power International. In 1982 he was appointed as the Finance and Administration Director and held this position from 1982 to 1996. There was a policy regarding spending of company funds on projects. Confirmation was required for spending above the initial approval level. The cost of a particular project in China went over budget and breach of the terms of the company policy Mr Rankin failed to report this to senior management. Mr Rankin was then terminated and given 3 months' pay in lieu of notice.

Misconduct required to be serious

The contract of employment in this case was oral. There was no written contract. As the employer was held not to have made out its case that there was a basis for summary dismissal the Court then turned to assess what the basis was for reasonable notice. Gillard J held (219 and 220):

"The issue as to what length of notice is reasonable is a question of fact, to be determined after consideration of all relevant circumstances. There have been many decisions dealing with the issue but each case must be considered in relation to the particular circumstances. The cases do not lay down any rule for ...

In determining what is a reasonable period in respect of an employee, it must be steadily borne in mind what the primary purpose of giving a period of notice is. It is to enable the employee to obtain new employment of a similar nature. Some types of employment are not readily available, while others are ..."

In *Thompson v Broadley* [2002] QSC 255, the Supreme Court of Queensland considered the employer's reliance on allegations including that the employee had used bad language, allegedly had a bad attitude and poor performance, and had removed confidential documents and records from the employer's premises. The employee sued for wrongful dismissal at common law.

The Court held that:

- a single incident of bad language could not be found to justify summary dismissal;
- the allegations of poor performance were unfounded and the employee's performance was objectively above the norm; and
- that there was a public interest in disclosing the employer's conduct and that outweighed the employer's entitlement to preservation of confidential information.

In circumstances where the termination by the employer for alleged serious misconduct was not made out then the employee was entitled to payment for reasonable notice. As there was no express term in the contract for reasonable notice the Court found that it could imply reasonable notice and damages for 12 months' pay were awarded.

2.2 BREACH OF AN IMPLIED TERM OF REASONABLE NOTICE

Where there is no express provision in an employment contract for the period of notice of termination, as a general rule the common law implies the term requiring the giving of 'reasonable notice'. The period of notice which is reasonable in particular cases can vary enormously from a matter of weeks to twelve months or more. The period of 'reasonable notice' is determined as at the time notice of termination of employment is actually given. It can be affected by many factors. Some of the factors in the following list were mentioned by Power J of the Supreme Court of NSW in *Kray v Tynan Motors Pty Limited & Ors* [1992] 41IR 173:

- the type of employment;
- the practice in the employer's industry or locality;
- the practice in the employee's professional trade;
- the intervals at which remuneration is paid or by reference to which remuneration is specified;
- the seniority of the employee's position;
- the importance of the employee's position;
- the size of the employee's salary;
- the employee's length of service;
- the age of the employee;
- the reputation of the employee and prospects of obtaining suitable alternative employment elsewhere;
- any special skill, expertise or know-how brought into the employment by the employee and passed on to other employees for the benefit of the employer;
- the qualifications of the employee;
- any dislocation of the employee and/or his or her family as a consequence of entering into the employment or its termination.

In *Waterson v Mortgage Acceptance Corporation Limited (unreported)* BC9301752, the NSW Supreme Court considered circumstances where the plaintiff, Waterson was employed for a period of approximately 10 months and the employment relationship was to be of an ongoing nature. The employment was terminated on the basis that Waterson was "not satisfactorily doing the job for which he had been engaged and that his behaviour, particularly in the matter of drinking at work warranted immediate dismissal".

The letter of appointment was found to contain all the matters that the parties had directly agreed on. The letter was not specific about the length of employment and therefore the engagement was indefinite. The engagement could be brought to an end by the giving of reasonable notice or by repudiatory breach. As the contract was silent as to the length of notice to be provided in the case of termination, Waterson was entitled to reasonable notice given that the allegations of misconduct were not sufficiently made out. In determining the question of reasonable notice, the facts found to be relevant included: the nature of the appointment; the size of the salary; the nature of the employment; the fact that it was contemplated as a possibility by both parties that Waterson would put some of his own capital into the business; and the level and nature of his past employment as known to the employer. Reasonable notice was held to be six months.

2.3 BREACH OF COMPANY POLICIES AS AN IMPLIED TERM OF THE CONTRACT

NIKOLICH V GOLDMAN SACHS J B WARE SERVICES PTY LIMITED [2006] FCA 784

In *Nikolich*, Wilcox J of the Federal Court awarded damages of around \$500,000 (plus interest) representing approximately two and a half years pay. The decision is under appeal. The significance of *Nikolich* is that the breach of contract arose from breach of employment policies as they concerned safety of employees, harassment and grievances. In *Nikolich* damages were also awarded for psychological injury.

The Facts

Nikolich commenced employment with Goldman Sachs in May 2000 as an investment adviser. When he accepted the offer of employment, *Nikolich* was provided with several Goldman Sachs documents including one which was a human resources/personnel manual titled "Working with Us". This 119 page document set out information about the company and contained a number of provisions which *Nikolich's* Counsel argued in the proceedings constituted conditions of employment binding on both the relevant employee and on Goldman Sachs. At the request of the company's Human Resources Officer, *Nikolich* signed and returned a copy of the letter containing his offer of employment. *Nikolich* was not asked to sign a copy of the Working With Us Human Resources document.

Subsequently, under a team based approach by Goldman Sachs, *Nikolich* and two other investment advisers formed a small team - called the "DKN Partnership". They prepared a business plan which was submitted to and accepted by Goldman Sachs. There was an income split between the three team members. The business plan provided that no clients would leave the DKN Partnership if a team member resigned. One of the team members, however, did resign. *Nikolich's* manager then assigned most of the DKN Partnership's investment advisers to another team. This led to *Nikolich* filing a grievance against his manager and the situation subsequently deteriorated. After *Nikolich* had not returned to work for a period of time he was formally advised by the company that if he did not return within a specified time his employment would be terminated. *Nikolich's* employment was terminated in December 2004.

The Decision

The proceedings in Nikolich were brought on three grounds including unlawful termination of employment on the basis of a temporary absence from work and disability. For purposes of the present analysis the most significant grounds of the proceedings were the claim for breach of contract and employment policies in the Working With Us policy and secondly the claim for misleading and deceptive conduct contrary to sections 52 and 53 of the Trade Practices Act 1974(Cth) and section 42 of the Fair Trading Act 1987 (NSW).

In respect of the claim for breach of contract his Honour Wilcox J stated [at para 286]:

"I think the real question in relation to this claim is whether Working With Us casts on Goldman Sachs a legally enforceable obligation to conduct an adequate and timely investigation into an employee's complaint.

The relevant section of Working With Us states 'the door is wide open at all times for people to discuss any issue' with, amongst others, Human Resources. Discussions are said to be welcomed 'as the firm has been built on the principle that it is a team with common interests and deals'.

The document goes on to invite contact with Human Resources by anyone who has a complaint or grievance. There is then a promise: 'We are committed to make sure that anyone who makes a genuine complaint will be able to discuss the concern confidentially, will be supported by the firm and is not penalised in any way'.

There is no doubt that the complaints made in Mr Nikolich's letter of 28 July 2003 were genuine. Consequently, as it seems to me, they were covered by Goldman Sachs promise. Mr Nicolich was able to discuss his concerns confidentially; there can be no complaint about that aspect of Goldman Sachs' conduct. However, the promise of support necessarily includes, at least, an implied promise to carry out an adequate and timely investigation into the merits of any complaint or grievance, and to endeavour to achieve a result that will resolve the problem an accord with Goldman Sachs culture of each member of the team being 'able to work positively and productively' and to be 'treated with the respect and courtesy'. That did not happened in this case. The result was to exacerbate the stress that Mr Nicolich was already suffering as a result of Mr Sutherland's conduct.

I conclude that Goldman Sachs breached its contract with Mr Nikolich in respect of provisions in Working With Us concerning health and safety, harassment and the grievance procedures. I will deal later with the issue of quantum of damages for those breaches." (emphasis added)

Wilcox J further stated [at para 330]:

"In the present case, as I have pointed out, the contractual obligations are intended to provide peace of mind to existing and prospective employees. It must be taken to have been within the contemplation of the parties that, if the obligations were not fulfilled, the particular employee to whom the obligations were owed might become upset, stressed and disturbed. It is notorious that stress and disturbance of mind may lead to a psychological disability. It may be unusual for disturbance of mind to lead to a psychological condition as severe as that suffered by Mr Nikolich; there is no evidence on the point. However, that is a statement about the extent of the injury, not its type, this is not a case, as in Rowe v McCartney, of a mental disability arising out of irrational guilt feelings that had only a tenuous connection with the plaintiff's cause of action. This is a case of a mental disability that was a particularly severe manifestation of the very type of detriment that the Working With Us promises were designed to prevent."

Damages for past economical loss were calculated as two years' salary (less a small amount of income received) plus interest. A further award of \$130,000 was made for future economic loss (ie based on an anticipated period before Nikolich would find alternate work). A further sum of \$80,000 was awarded as general damages for psychological injury.

3. TRADE PRACTICES ACT REMEDIES

The *Trade Practices Act 1974*(Cth) (the TPA) and/or the *Fair Trading Act 1987* (NSW) potentially provide an alternate or additional avenue to obtain relief in respect of a termination of employment.

The application of the TPA in an employment law context will generally involve utilization of one or more of the following provisions:

- (1) Section 51AA (Part IVA), which prohibits conduct by a corporation, in trade or commerce, "that is unconscionable within the meaning of the unwritten law, from time to time, of the states and territories".
- (2) Section 52(Part V), which prohibits a corporation in trade or commerce, from engaging in "conduct that is misleading or deceptive or is likely to mislead or deceive".
- (3) Section 53B (Part V), which prohibits a corporation, in relation to employment that is to be, or may be offered by the corporation or by another person, from engaging in misleading conduct "as to the availability, nature, terms or conditions of, or any other matter relating to, the employment".
- (4) Section 51A (Part V), which must be read in conjunction with section 52 and 53B, is "an interpretive section ... (which) ... does not of itself create a cause of action". Section 51A reverses the onus of proof, requiring a corporation which has made representation about a future matter, to prove there were reasonable grounds for making the representation".
- (5) Section 80 (Part VI), which enables an injunction to be brought to prevent breaches or proposed breaches of various provisions of the TPA, including Parts IVA and V.
- (6) Section 80(Part VI), which enables a party to seek damages for loss or damage suffered as a result of a breach of sections 51AA, 52 or 53B.
- (7) Section 87 (Part VI), which offers a broader range of remedial relief than that provided under section 82, similar to the relief accessible under section 106 of the New South Wales IR Act.

A successful claim for breach of section 52 requires proof of four elements:

1. Conduct in contravention of section 52;
2. The loss or damage suffered by the plaintiff;
3. A causal link between the loss or damage and the contravening conduct; and
4. The amount of the loss or damage.

A threshold consideration in a TPA claim is whether the impugned conduct is "in trade or commerce". It is now reasonably well settled that representations made to an employee during negotiations prior to and for employment are made be "in trade or commerce".

As Wilcox J stated in *Barto v GPR Management Services Pty Limited* [1991] 105 ALR 339 at 344:

" ... the conduct of the corporation in the course of negotiations for employment of staff is conduct potentially falling within section 52. It is true that an employment contract does not directly produce income, but the making of such a contract is part of the total activities in trade or commerce of the corporation. Critically, it is intrinsically commercial conduct. It is directed to the creation of a contractual relationship".

Representations made by a corporation to an existing employee in the course of negotiations about future employment arrangements may also be made in trade or commerce.

A number of decisions of the Federal Court appear to reject the notion that there would be any relevant distinction between negotiations with prospective employees and negotiations with existing employees for the purposes of section 52 (see *Barto* at 344-5 and *Stolewinder v Southern Health Care Network* [2000] 177 ALR 501 at para 6.

Typically, misleading or deceptive conduct on the part of a corporation will take the form of false or misleading representations made to a prospective employee (whether by the employer or by a recruitment agency). By virtue of section 51A of the TPA, representations about future matters will be misleading or deceptive unless the corporation is able to establish that there were reasonable grounds for making the representation.

WALKER V CITIGROUP GLOBAL MARKETS [2006] FCAFC 101

The Full Court of the Federal Court in June 2006 awarded damages to the plaintiff employee, Walker, of between 4 and 5 years pay (around \$2,500,000 plus interest). Walker had not commenced work for the employer, Citigroup Global Markets (formally Salomon Smith Barney). The award of damages of over four years pay occurred despite an express one month notice of termination provision in the employment contract. Walker is also significant as \$100,000 was awarded under the Trade Practices Act in relation to the circumstances of the termination - including damages for loss of reputation.

The Facts

Walker was a senior financial analysis. He was approached by a recruitment company/head hunter on behalf of the respondent. Representations were made by both the recruitment company and Citigroup that the position would continue for a minimum of one year and that Walker would be promoted to a higher position towards the end of the first twelve months.

Despite the discussions about the employment being of a longer term nature the formal letter of offer of employment, which Walker accepted and signed, provided that the employment could be terminated by either party giving only one month's notice in writing, or in the case of the company payment in lieu. The letter of appointment further provided that the respondent's employment policies formed a part of the employment contract and a part of the terms and conditions of employment.

After receipt of the employment offer and after signifying his acceptance of the new employment offer, Walker gave notice to his then current employer. After Walker gave notice to the previous employer, a restructure occurred within Citigroup and Citigroup advised Walker that the position he had previously been offered was no longer available. There was some further discussions regarding an alternate position but a further offer did not eventuate. Ultimately Citigroup told Walker that it had no position for him any denied and any contractual liability.

The Decision

The Full Court held that it was necessary to read the contract as a whole. The fact that the contract and the offer of employment to Walker included a proposed promotion towards the end of the first twelve months and provision for a guaranteed bonus were held to be terms which contemplated employment for a minimum twelve months. It was held therefore that the clause providing for termination by one months notice by either side would not have been operative so as to permit termination within the first twelve months. The Court held that the objective of the award of damages for breach of contract is to place the innocent party in the position it would have been in if the contract had been performed, so far as money can do so. On this basis an initial award of twelve months' salary was made. Thereafter an assessment was made as to the chances of termination by either party. The Court then assessed that for a further period of approximately four years there was a likelihood of Walker remaining in employment and continuing to receive and similar level of remuneration and bonuses. A 25% discount was applied to that sum to take account of the possibility of early termination for one reason or another.

The Full Court of the Federal Court also upheld Walker's Trade Practices Act appeal. Kenny J at first instance had upheld Walker's Trade Practices Act action but only awarded \$5,000. The Full Court found that there was sufficient evidence by Walker that City Group had engaged in misleading and deceptive conduct and an award of \$100,000 was made for consequential effects of the loss of job on Mr Walker's business reputation and personal life - including the breakdown of his marriage. Such damages for non-economic loss would not normally have been available for breach of contract because of the *Addis v Gramophone Co. Ltd* decision [1909] AC 488. Interest and costs were also awarded.

O'NEILL V MEDICAL BENEFITS FUND OF AUSTRALIA [2002] FCAFC 188

This decision of the Full Court of the Federal Court on appeal from the Federal Magistrate's Court concerned the damages to be awarded for breach of section 52 of the TPA.

O'Neill commenced employment with MBF in June 1998. Prior to that he had worked for National Mutual. He had been persuaded to leave secure employment with National Mutual to work for MBF. He was made redundant by MBF in July 2000. The employer had made representations to the effect that O'Neill's employment would be secure at least to the extent that his current employment with National Mutual was. Damages were sought under section 82 of the TPA for MBF's alleged breach of section 52.

The Full Court held that corporations who engage "head hunting" agencies must be responsible for representations made by and on their behalf during the course of that recruitment process. Where an employee is recruited and representations made then employers ought to bear responsibility and be aware of the fact that such conduct has the potential of exposing respondents to the risk of a claim for breach of section 52 of the TPA.

Damages were held to be the difference, over the period it would have been likely the plaintiff would have remained in employment with the initial employer, between what would have been earned in that employment and that which was actually received in the employment of the subsequent employer (less monies earned in mitigation) [at 29].

For a fuller discussion of the Trade Practices Act alternatives in employment claims see for example Kelly Godfrey, "the Trade Practices Act Alternative", Australian Journal of Labor Law, volume 18, July 2005; and T Davy, "Employee Remedies under Section 52 of the Trade Practices Act", Australian Lawyers Alliance, Precedent, issue 74, May/June 2006.

4. PROTECTION OF REDUNDANCY ENTITLEMENTS

Recent publicity concerning an application by Tristar to terminate the Certified Agreement that applies to its employees shows that severance pay entitlements contained in a collective agreement are extremely vulnerable. Consideration should therefore be given to mechanisms to protect what can be extremely valuable entitlements.

Section 170MH of the *Workplace Relations Act* provides that the Australian Industrial Relations Commission “must” terminate a collective agreement after its nominal expiry date unless “the Commission considers that it is not contrary to the public interest” to do so.

The issue of public interest, in the context of section 170MH(3), was considered by a Full Bench of the Australian Industrial Relations Commission in *Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000*. In that matter the Full Bench held:

“That test [under section 170MH(3)] is based on the public interest alone. If the legislature had intended that the interests of the negotiating parties should also be considered it could have made specific reference to those interests.”

Thus in an Application by Radio Rentals Ltd, to terminate the Radio Rentals Technical Services Certified Agreement 2002 (PR973113), Senior Deputy President O’Callaghan held that the Commission could not find that “a broader public interest consideration” was involved despite concluding “that termination of the certified agreement is likely to result in the loss of benefits to employees.”

In these circumstances it may be appropriate for legal practitioners and organisations representing workers to consider other mechanisms to protect severance pay entitlements. One such mechanism is the protection of redundancy entitlements by express incorporation. Express incorporation can be achieved by marrying the provisions of Redundancy Agreements, negotiated at an industry or enterprise level, with the common law contract that underpins every employment relationship.

The doctrine of incorporation of a trade agreement by express reference is dealt with by Professor G R Treitel in *The Law of Contract* 9th ed. 1995 at 175. An example of how the doctrine operates is described in the following terms:

“... where a contract is made subject to standard terms settled by a trade association. Those terms are then incorporated by reference into the contract; if there are several editions of the standard terms, the contract is prima facie taken to refer to the most recent edition [fn Smith v South Wales Switchgear Ltd [1978] 1 W.L.R. 165].”

Alternatively, consideration can be given to incorporation of a redundancy agreement set out in a workplace manual. This requires the contract of employment to make express reference to the fact that both the employer and employee agree to be bound by the terms of that manual (See for example, *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 (4 July 2000)).

Caution should be exercised, in the case of incorporation of a workplace or company manual, to identify those provisions that can be varied unilaterally by the employer and those which require consent of employees or their union. Obviously provisions relating to accrued entitlements should require consent before variation. Such stipulation would avoid subsequent argument about capricious variation by the employer or variation at odds with the purpose of the contract (see for example *Ansett Transport Industries v Commonwealth* (1977) 139 CLR 54 at 61 and *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 63, 137 – 138).

It is suggested that the protection of redundancy entitlements by express incorporation into the common law contract of employment is preferable to attempting to confirm those rights in an unregistered collective agreement. This is because the enforcement of unregistered collective agreements is an area of considerable complexity (see in particular *Ryan v Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235).

Most workers would be alarmed to realise that, under the provisions of the *Workplace Relations Act*, they could lose their accrued severance pay entitlements. Failure to adopt measures to secure those entitlements in advance of a redundancy situation could result in employees losing a considerable amount of money at a time of extreme vulnerability.

5. CONCLUSIONS

There can be no doubt that Work Choices has significantly reduced the statutory rights and protections previously afforded to workers under the WR Act and under state industrial legislation.

One of the challenges which legal practitioners working in employment and industrial law now face is to assess and develop alternatives to the statutory protections previously available. Greater consideration is now being given to common law and Trade Practices Act actions both of which have been significantly under utilised and underdeveloped over the past 10 to 15 years. That underdevelopment and underutilisation will rapidly change.

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