Legal Developments Affecting Human Resource Management in Australia

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Introduction

The legal obligations of employers to individual employees have been in a state of flux in recent times. Many of these changes have considerable implications for Human Resource Management. In early 1998 ACIRRT presented a conference entitled "Legal Developments Affecting Human Resource Management in Australia" which explored the increasingly important and challenging links between the law and Human Resource Management. This working paper is based on the proceedings of that conference.

1. Employers' Rights Over Workers Outside the Workplace

Ron McCallum

INTRODUCTION

The task which I have set myself in this paper is to explore when, and on what occasions, employers are able to legally control the behaviour of their employees outside their standard hours of work. In other words, when can the legal rules that subordinate the employee in the public domain of paid work, operate to partially govern that employee within the private domain of her or his life? My thesis this morning is that post-modern forms of work - performance-based rewards and flexible work arrangements - coupled with the rise of professional employment and what I shall call staff employment have led to an expansion of the public domain of employment as against the private sphere of life outside the workplace. Not since the 18th century have employers been able to exercise such controls over the private lives of their workforces.

Given the boundaries of this paper, time and space will not permit me to analyse the laws governing post-employment controls. In brief, the restraint of trade doctrine and the rules of equity will not permit employers to limit the behaviour of former employees, merely to protect themselves against competition. However, employers are free to covenant that former employees not utilise confidential information and/or trade secrets which are their property. (For details on these rules, see the series of articles by Andrew Stewart (Stewart, 1988, 1992, 1997).) This morning, I shall be content to examine the legal rules governing the out of work behaviour of current employees.

THE ORIGINS OF THE EMPLOYMENT CONTRACT

The contract of employment is a very different creature from the commercial contract for the sale of goods. For example, where A sells a car to B: once cash and car have changed hands, usually the transaction is complete and A and B may never meet one another again. However, the contract of employment is what MacNeil describes as a relational contract (MacNeil, 1981). It is a set of rules - many being implied by force of law - which governs the continuing relationship of two persons, an employer and an employee.

This legal relationship grew out of the old pre-19th century master and servant laws where the master had the status of master, and the servant that of servant (Kahn-Freund, 1977). The master had complete control of the servant, somewhat akin to the controls which 18th and 19th Century husbands and fathers had over their wives and children. Servants had total obligations to their masters, but masters also had obligations to their servants, such as to clothe and feed them in sickness or in health.

With the advent of the industrial revolution and with the coming of factory work - and later of mass-production - these old master and servant rules were transmogrified by the common law judges into the employment contract (Merritt, 1982 and McCallum and Pittard, 1995: 48-53). Thus, even pursuant to the implied terms of the employment contract of the late 20th Century, employees must obey all lawful and reasonable directions, and they owe their employers duties of fidelity and confidentiality (Creighton and Stewart, 1994: 161-168, McCallum and Pittard, 1995: 91-114 and Macken et al., 1997: 133-142). These duties are in

all employment contracts unless expressly disallowed. This is because these duties become implied terms of the contract by force of law (*Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 345-6 per Mason J; and *Breen v Williams* (1996) 138 ALR 259, 271-272 per Dawson and Toohey JJ), (Carter and Harland, 1996: 203-212).

THE RISE OF THE TIME SERVICE CONTRACT

What the factory system and the mass-production assembly line did was to create the typical employment relationship as the 9:00 to 5:00 full-time employee - mostly male (Owens, 1993) - who operated under what Hugh Collins describes as the time service contract (Collins, 1990). The employer purchased the time of the employee for set hours each week and the employee performed set tasks - usually of a manual or clerical nature - for the employer during that period of time. For the factory worker and the low-level administrator, what she or he did out of hours was usually no business of the employer. Provided the work was done, then in most circumstances the behaviour an/or the morals of the employee were not the concern of the employer. What business was it of an employer if a factory worker operated a lawn mowing business on weekends? When circumstances arose concerning out-of-hours conduct, more often than not the issues were clear-cut. The standard example is the post-World War II decision of *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169. The English Court of Appeal was prepared to issue an injunction forbidding several skilled employees who made valves for hearing aids, secretly to work for a competitor body on weekends. The Court had no difficulty in holding that they had breached their implied duty of fidelity. A similar example for Australia is the 1933 High Court decision of *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66. In this case, a high-ranking employee became a director of a company which had the potential to compete with the business of the employer. While the High Court judges did not hold that this state of affairs warranted summary dismissal, they made it clear that if a conflict of interests arose the employee would be in breach of the duty of fidelity.

A more recent example is the unreported decision of Spender AJ in the New South Wales Supreme Court in *Cementaid (NSW) Pty Ltd v Chambers* (unreported, Spender AJ, Supreme Court of New South Wales, 29 March 1995). The employee was employed as a salesperson of concrete products on a base salary with commission. Unbeknown to the employer, the employee took on another sales job selling copper pipe insulating material. Spender AJ - on a case stated - held that the legal issues were: whether the second job was incompatible with the first; whether there was a conflict of interests; and whether in all the circumstances moonlighting in the second job amounted to a breach of the duty of good faith and fidelity (Macken et al., 1997: 147-148). However, as I shall argue, in post-modern professional employment the duty of professional fidelity will place greater limitations upon employees.

THE POST-MODERN SERVICE ECONOMY AND EMPLOYEE PERFORMANCE

By the mid to late-1980s, Australia's manufacturing economy was in decline. Since the turn of the century this sector had employed most Australians. While mining and agriculture remain very significant in our export-driven economy, they employ relatively few people. From the mid-1980s onwards, we have witnessed the growth in the service sector that now employs more Australians than does any other area of our economy.

The new service-driven economy has several significant characteristics. First, these new enterprises seek more from their workers than service over a given time each week. In other words, the time service factory/style contract is less suitable. I am not suggesting that employers are less interested in time per se, but rather that more and more they employ persons to carry out tasks. While control - or at least the right to control - is retained by most employers, more and more workers, especially at the professional para-professional and staff levels are being placed on task performance contracts (Collins, 1990). Under these arrangements, it is the performance of the task that is central and not the time taken by the employee to complete the task.

Second, increasingly, employment arrangements adopt performance-based pay regimes where employee performance is the key determinant for financial reward. These regimes, more often than not, use annualised salaries where notions of overtime pay and/or penalty rates are regarded as obsolete.

Finally, flexible employment relations, where in many instances employees are on call - that is they operate on rosters or have variable spreads of hours which are determined by their employers - limit the capacity of employees to engage in other remunerative activities.

INDIVIDUAL CONTRACTS AND STAFF EMPLOYMENT

The partial deregulation of our federal and State systems of compulsory conciliation and arbitration has created a type of legal vacuum. However, in law as in physics, vacuums speedily disappear. In Australia, aspects of industrial tribunal regulation are being replaced by individual employment contracts that expressly incorporate the terms and obligations set out in documents like company policies and procedures.

Some of these individual contracts seek to establish regimes of staff employment where the primary loyalty of staff employees is to the corporation. In my view - and this issue has not yet been determined at law - the legal rules governing staff employment are akin to the legal obligations placed upon professional employees. This is because like professionals, staff employees are obliged to perform tasks and do not have set hours of work, other than that they cannot be compelled to work more hours than are reasonable. It also appears that a strong duty of fidelity - often expressly stated in the written contract - is placed upon them.

A useful example of staff employment is the standard contract that CRA offered to the employees at the Weipa Smelter. I have decided to use this standard contract because it is within the public domain as it has been published in the law reports. (See *Australian Manufacturing Workers' Union and Ors v Alcoa Australia Ltd and Ors* (1996) 63 IR 138, 161-163. For an analysis of the Weipa dispute, see (Moir, 1996).) I do not seek to criticise this or any other form of staff contract: rather, my purpose is to explore their legal breadth.

The Weipa staff contract deals with hours of work in the following manner. The relevant paragraph states:

> Your remuneration is for the performance of your role and not hours spent at work. While the normal working week is 40 hours, you will be required to work such reasonable time as is necessary to perform your duties.

The following three paragraphs deal with outside employment activities and conflicts of interest. They provide:

> It is a condition of your employment that you do not undertake any paid or unpaid activity which is damaging to the interests of the Company.
>
> It is your responsibility to raise any potential conflicts of interest with your superintendent and you will be informed if the activities are judged to be in conflict with the Company's interests.
>
> Involvement in social, sporting, community, welfare, religious, artistic and political activities would not normally conflict with Company interests.

In my view, the rise of the task performance contract, coupled with professional, para-professional and staff employment, will in time, lead to a diminution of the private sphere of life. This will be because of the expansion of the legal rules which govern the world of work. It is now timely to examine the duties and obligations which the common law places upon professional employees.

THE DUTIES OF THE PROFESSIONAL EMPLOYEE

More than a decade ago, the English Divisional Court spelled out the duties of professional employees, drawing a sharp distinction between the time service industrial employee and the post-industrial professional. The case is *Sim v Rotherham Metropolitan Borough Council* [1986] 3 WLR 851, where Scott J was asked to rule upon the contractual duties and obligations of secondary school teachers. Although the following quotation is lengthy, it is revealing. At p. 873 he said:

> ... [A] teacher could not excuse a failure to be properly prepared for a class or a failure to mark school work within a reasonable time after it had been done by pointing out, correct though the observation might be, that he or she had not had time within school hours to do the work. It is, perhaps, one of the hallmarks of professional employment, as opposed to employment in non-professional capacities, that professionals are employed to provide a particular service and have a contractual obligation to do so properly. A worker in a car factory or shop may clock off at 5:30 pm or, perhaps, work late on an overtime basis. An employed professional does not usually have an overtime option. He is employed to provide a particular service to proper professional standards. His contract may require his attendance in an office or other place of work for particular hours but his contractual obligations are not necessarily limited to work done within those hours.

Thus, the professional, the para-professional and the staff employee are not governed by the clock but instead are required to complete designated tasks. (See also *Johnstone v Bloombury Health Authority* [1991] 2 WLR 1362 where the English House of Lords held that young doctors could be held to working very long hours in order to perform their professional duties.)

Professionals are also required to uphold the image of the firm. In the *Hart* Case, for example, the Federal Court held that the Australian Telecommunications Commission - it is now Telstra - was able to control the dress of its employees when they came into contact with the public (*Australian Telecommunications Commission v Hart* (1982) 65 FLR 41).

Although this point has not been tested in Australia, I am confident that a court would hold some private activities of lawyers, accountants, executives and other staff with comparable rank, to be incompatible with the professional image of the firm or the corporation. For example, a young solicitor could be restrained from driving cabs at weekends as she or he

might pick up clients. This type of moonlighting would, I suggest, tarnish the image of the firm and amount to a breach of the employee's duty of fidelity.

In the area of social behaviour, the courts have given employers power to control improper social behaviour even when it is out of working hours, provided it affects employment. in the recent case of *McManus v Scott* (1996) 140 ALR 625, for example, Finn J in the Federal Court held that a public sector employer could reprimand a male employee for making intrusive telephone calls out of working hours to a female employee with whom he had never had a relationship. This anti-social behaviour impacted upon the female employee in the performance of her work.

THE NEED FOR A CONCOMMITENT DUTY TO PROVIDE WORK

While the demands and the controls upon professional and staff employees have increased, the concomitant duty of employers to provide adequate work for professionals is still back in the age of the industrial revolution. Apart from entertainers (*Curro v Beyond Productions Pty Ltd (1993) 30 NSW LR 337*) and sportspersons (*Bartlett v Indian Pacific Ltd* (1988) 68 WAIG 25081), employers do not have a duty to provide adequate work to professionals and staff in order for them to increase their skill base and to enhance their marketability (*Mann v ACT Health Commission* (1981) 54 FLR 23). The law appears to be much the same as it was in 1940 when the English judge Asquith J could say:

> It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out: *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647, 650.

CONCLUSION

The burden of this paper has been to show that the common law employment contract has given enormous control to employers now that we have moved into the post-industrial and post-modern ages where the growing service sector is dominated by professional, para-professional and staff employees. Flexible patterns of employment, the rise of the task performance contract and the implied term of good faith and fidelity have increased employer controls. I have argued that there are no longer rigid boundaries between the public domain of work and the private sphere. Finally, I have suggested that with respect to employer obligations to professionals, the common law should recognise the obligation of the employer to provide the professional with adequate and sustaining tasks in this task performance driven world.

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2. Unfair Dismissals - Investigating Allegations of Misconduct

Iain Ross

INTRODUCTION

Before turning to the focus of this paper – investigating allegations of misconduct – I need to put this issue in a broader statutory context.

I simply want to identify the recent changes in the test for determining whether a termination was *'harsh, unjust or unreasonable'* and procedural fairness issues. Section 170DC of the former *Industrial Relations Act 1996* is relevant in this regard. It provided:

> An employer must not terminate an employee's employment for reasons related to the employee's conduct or performance unless:
>
> (a) the employee has been given the opportunity to defend himself or herself against the allegations made.
>
> (b) the employer could not reasonably be expected to give the employee that opportunity.

A number of decisions of the Industrial Relations Court have clearly stated that s.170DC is not a mere technical requirement but provides employees with a valuable right. As noted by Moore J in *Perrin v Des Taylor Pty Ltd* [(1995) 58 IR 254] the purpose of s.170DC is at least twofold. First, it gives the employee the opportunity to demonstrate that the allegations have no foundation in fact or they should not be viewed as reflecting on the employee's capacity.

A second purpose of s.170DC is that an employee with whom an allegation has been raised may be able to persuade the employer that, while the allegation is of substance, there are factors that should persuade the employer not to terminate the employment. They may be extenuating personal circumstances or they may involve undertakings about future conduct.

In *Nicholson v Heaven and Earth Gallery Pty Ltd* [(1995) 126 ALR 233] Wilcox CJ made the following observations about s.170DC(a) at 243-244:

> The paragraph does not require any particular formality. But this does not mean that it is unimportant or capable of perfunctory satisfaction. .... The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. ... The principle is, I believe, well understood in the community. It represents part of what Australians call 'a fair go'. In the context of s170DC, it is not to be treated lightly. The employee is to be given the opportunity to defend himself or herself 'against the allegations made'; that is, the particular allegations of misconduct or poor performance that are putting the employee's job at risk. Section 170DC(a) is not satisfied by a mere exhortation to improve ...

In *Gibson v Bosmac Pty Ltd* [(1995) 60 IR 1 at 7] Wilcox CJ elaborated on the comments he made in Nicolson's case [see further: *Selvachandran v Peteron Plastics Pty Ltd* [(1995) 62 IR 371] and Johns v Gunns Limited [(1995) 60 IR 258]].

It is apparent from the decided cases that mere general exhortation to an employee to improve their performance, even when rather pointed, did not satisfy the obligations in s.170DC. There needs to be:

(i) an identification to the employee of the aspects of performance with which the employer is unhappy - referred to as *'allegations'* in s.170DC(a); and

(ii) an opportunity afforded to the employee for him or her to respond to the criticism - referred to in s.170DC(a) as an opportunity to *'defend himself or herself against the allegations'*: (*Lloyd v R.J. Gilbertson (Qld) Pty Ltd* (1996) 68 IR 277, Madgwick J).

In assessing compensation for a breach of s.170DC the Court had regard to whether or not the employee concerned would prove suitable in the position in the long term. In *Nicolson v Heaven & Earth Gallery Pty Ltd*, where long term suitability was considered unlikely, Wilcox CJ stated, at 213:

> If I had reached the question of compensation, I would have assessed it on the basis that the procedural irregularity deprived Mr Nicolson of a chance of retaining his employment. However, I would not have awarded him a large sum.

In different factual circumstances the Court has awarded a substantial amount of compensation for a breach of s.170DC. For example in *Perrin v Des Taylor Pty Ltd* Moore J held at 258:

> The conduct of the respondent in contravening s.170DC resulted in the applicant losing employment that, apart from the contravention, he might have remained in for some period of time.
>
> In my opinion the applicant is entitled to a substantial and not nominal amount of compensation. He has been dismissed from employment of a type that he has generally been engaged in for eighteen years in contravention of s.170DC. He is 51 years old. His salary was, on average, approximately $410.00 per week gross. Making some allowance for the possibility that the applicant would have been lawfully dismissed during the period following his termination because his work was unsatisfactory, I decide that the applicant should be awarded $9,500 compensation for the loss of employment arising from the unlawful termination and I so order.

I now turn to deal with the former s.170DE.

In this regard it is important to bear in mind that s.170DE(1) may be conceptually considered to comprise of two requirements, namely:

- there must be a valid reason or reasons;
- which is connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment service.

The former ss.170DC and 170DE can be contrasted with the provisions of the current Act. In determining whether a termination was *'harsh, unjust or unreasonable'* under the *current Act* s.170CG(3) provides that the Commission must have regard to:

(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and

(b) whether the employee was notified of that reason; and

(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

(d) if the termination related to unsatisfactory performance by the employee – whether the employee had been warned about that unsatisfactory performance before the termination; and

(e) any other matters that the Commission considers relevant.

There are clear differences between the old and the new statutory provisions.

It is apparent from s.170CG(3)(a) that the existence of a *'valid reason'* for the termination is a factor to which the Commission must have regard – it is not the only factor. Unlike the position under s.170DE(1) of the *former Act* the question of whether there was a valid reason for the termination is not determinative but merely one factor which the Commission must have regard to in making its assessment of whether the termination was harsh, unjust or unreasonable. The same point can be made with respect to the procedural fairness issues identified in s.170CG(3)(b), (c) and (d). Unlike the position under s.170DC of the *former Act* the failure to accord an employee procedural fairness is not determinative.

It is against this legislative history that I now want to go to the specific issue of investigating questions of misconduct. The leading Commission decision on this issue is *Uink v Department of Social Security* [(1997) 77 IR 244].

Mr Uink had been employed by the Department of Social Security in Western Australia. He worked as a supervisor in the Newstart section. As such he was required to approve and determine new claims, deal with the more complex claims assessments, offer technical advice to subordinate staff and to undertake general supervisory duties.

On 6 January 1997 Mr Uink was charged with misconduct under the *Public Service Act* on three separate charges.

Central to each of the charges, and the substance of charge A, was the relationship between Mr Uink and a DSS customer referred to as VDB. The question of whether VDB was entitled to the benefits approved by Mr Uink was central to charges B and C.

In essence it was alleged that Mr Uink had breached a departmental instruction relating to conflict of interest. The relevant instruction said:

> To avoid situations where there is or could be a conflict of interest between a staff member's duty as a departmental officer and their personal connection with a customer, staff must not handle the cases of persons with whom they have a relationship in a private capacity. This includes family members, friends, close personal acquaintances or persons with whom they are connected through community organisations such as service clubs or sporting associations.

An inquiry into the allegations commenced on 6 January 1997. On 29 January the inquiry officer, Mr Van Der Ende concluded that Mr Uink had, among other things, breached the Department's instructions. In particular he decided that Mr Uink had approved the payment of a Job Search Allowance to a person who was a friend or close personal acquaintance. The Inquiry Officer directed that Mr Uink be dismissed from the public service.

The fairness of the inquiry conducted by the employer was one of the issues raised for determination.

In the decision subject to appeal the Commissioner had concluded that Mr Uink had not been provided with:

- the benefit of receiving all of the relevant details forming the basis of the Department's allegations;
- a proper investigation; or
- a proper opportunity to respond before his employment was terminated.

In reaching this conclusion the Commissioner took into account:

- the charges related to events which were six months old at the time they were investigated;
- Mr Uink did not have access to documents which formed the basis of the claims against him.

The Appeal Bench found that the Commissioner's conclusion was reasonably open to her.

Two particular matters relating to the Inquiry were commented upon. The *first* relates to Mr Uink's request to the Inquiry Officer that he have regard to a statement from Mr Hughes. In the proceedings below Mr Hughes gave evidence which corroborated Mr Uink's testimony in a number of respects.

The Inquiry Officer did not contact Mr Hughes in relation to his statement, nor did he identify the statement as one of the matters he had regard to in reaching his conclusion. Mr Hughes' statement was shown to a policy expert, Ms Conroy, and the Inquiry Officer accepted Ms Conroy's views in preference to those advanced by Mr Hughes in his statement.

The Inquiry Officer did not contact Mr Hughes to seek to resolve any inconsistencies between his statement and Ms Conroy's views. He simply accepted the views expressed by Ms Conroy.

The Appeal Bench held that it would have been an appropriate, prudent and fair course of action for the Inquiry Officer to speak to Mr Hughes to discuss and investigate those matters from his report with which he disagreed.

Mr Hughes was available. All it required was a telephone call to Canberra. This is particularly significant since the outcome of the investigation was termination, not some lesser penalty.

> If an employee raises an issue that can be investigated or a witness who can be interviewed about a matter raised in his defence an employer should attend to it where it is practicable to do so.

The *second* matter noted by the Appeal Bench concerned the failure to provide Mr Uink with documents which formed the basis of Mr Van Der Ende's dismissal determination. The failure to provide this document was a breach of the Department's own guidelines for the conduct of disciplinary inquiries.

'...in conducting a disciplinary inquiry an employer is not required to adopt the standards applied to a judicial inquiry. In this regard we adopt the following remarks by Heerey J in *Schaale v Hoechst Australia Ltd* (1993) 47 IR 249 at 252:'

> It would be harsh, unjust and unreasonable for an employer to dismiss an employee summarily in the ground of serious misconduct without taking reasonable steps to

> investigate those allegations and give the employee a fair chance of answering them: see *Gregory* at 413; 471; *Wheeler v Philip Morris Ltd* (1988) 32 IR 323 at 346; 97 ALR 282 at 306.
>
> In my opinion the respondent's conduct in this regard did not breach the requirements of the award. The allegation against Mr Schaale was a clear and simple one. Did he breach security of climbing over the fence? The award has to operation "in a practical way in a commercial and industrial environment": *Gregory* at 413; 471. Employers are not required to have the skills of police investigators or lawyers. By inspecting the site of the alleged entry and taking statements from potential witnesses it seems to me the respondent acted quite reasonably. In the interview on the following morning the allegation was put very clearly to Mr Schaale and he persisted in an account which the respondent was reasonably entitled to reject.

It is clear from the above extract that what is required is that the employer take reasonable steps to investigate the allegations and give the employee a fair chance of answering them.

THE ROLE OF THE COMMISSION

In a number of cases it has been submitted that in circumstances where an employee is terminated for misconduct and the employer believes, on reasonable grounds after sufficient inquiry, that the employee has been guilty of misconduct then a *'valid reason'* exists for the termination within the meaning of s.170CG(3) of *the Act* and the Commission should not disturb that decision. In support of this proposition reliance is usually placed on *Sangwin v Imogen Pty Ltd* (No. SA 95/116 IR, unreported decision of von Doussa J, 8 March 1996 at 11-18). [See also *Gregory v Philip Morris* (1988) 24 IR 397; *Byrne v Australian Airlines* (1994) 47 FCR 300 at 331 per Beaumont and Heerey JJ, with whom Keely J agreed at 313; *Bi Lo Pty Ltd v Hooper* (1994) 53 IR 224 at 229-230.]

The leading Commission decision on this issue is *Australian Meat Holdings Pty Ltd v McLauchlan* [Print Q1625]. In that case the Commission concluded that in determining a s.170CE(1)(a) application the Commission is bound to consider whether, on the evidence in the proceedings before it, the termination was *'harsh, unjust or unreasonable'*, provided that the evidence concerns circumstances in existence when the decision to terminate the employment was made.

The Commission also decided that findings made by an inquiry established by the employer will be relevant to the Commission's determination of the issues before it provided it is established that:

- the employer conducted a full and extensive investigation into all of the relevant matters as was reasonable in the circumstances;
- the employer gave the employee every reasonable opportunity to respond to allegations; and
- the findings were based upon reasonable grounds.

However, while such findings are relevant they do *not* conclusively determine whether the termination was harsh, unjust or unreasonable. That issue is to be decided by the Commission on the evidence in the proceedings before it. The test is *not* whether the employer believed, on reasonable grounds after sufficient inquiry, that the employee was guilty of the conduct which resulted in termination.

A termination may be unjust because, on the evidence before the Commission, the employee was not guilty of the misconduct on which the employer acted. Further, a termination may be unreasonable because it was decided on inferences which could not reasonably have been drawn from the material before the employer. Even where the findings of an employer's enquiry are reasonable the Commission may conclude that a termination of employment on the basis of those findings was harsh because the penalty was disproportionate to the misconduct.

The Commission's conclusions in *McLauchlan's case* are consistent with the joint judgment of their Honours McHugh and Gummow JJ in *Byrne v Australian Airlines* [(1995) 185 CLR 410 at 468]. In that case their Honours said, at 465-468:

> It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.
>
> Procedures adopted in carrying out the termination might properly be taken into account in determining whether the termination thus produced was harsh, unjust or unreasonable. The submissions for the respondent in the present appeals appear to concede this. But the burden of the respondent's submissions is that there was error in determining the issue without regard to the very material circumstances of the finding of the primary judge as to the complicity of the appellants in pilfering.
>
> Those submissions should be accepted. This means that the primary judge was bound to consider whether, on the evidence given at the trial, the respondent could resist the allegation of breach of cl 11(a), provided that the evidence concerned circumstances in existence when the decision to terminate the employment was made.

A number of cases decided after *Byrne* are also consistent with *McLauchlan's case.*

In *Yew v ACI Glass Packaging Pty Limited* [unreported IRCA, 11 December 1996] Wilcox CJ dealt with an application by a former employer, ACI Glass Packaging Pty Limited, for a review of a decision by a Judicial Registrar in an unlawful termination of employment case. In the course of his decision the Chief Justice said, at 6:

> Before turning to the matter of relief, it is desirable for me to comment on one particular submission by Mr Rothman concerning s.170DE(1). I do so because it indicates a misunderstanding of the operation of that subsection. Mr Rothman said: "The Court does not sit as an appeal from the decision of the employer to dismiss". He also said ACI "was entitled" to believe Mr Swadling's version of events. The implication was that the Court could uphold a claim of breach of s.170DE(1) only if it came to the conclusion that ACI's view about the cause of the fight was one unsupported by any evidence or was otherwise perverse.
>
> That is not the position at all. The effect of s.170DE(1) is to make unlawful a termination of employment effected without a valid reason. If the termination comes before the Court, it is the duty of the Court to determine for itself whether, upon the balance of probabilities, there was a valid reason for the termination. It must do this by reference to the evidence. The Court is not concerned with the question whether, upon the information available to the employer, the conclusion reached by the employer was,

> or was not, a reasonable one. I agree that the Court 'does not sit as an appeal' from the employer's decision; but only because the reference to an appeal implies that the Court is concerned to examine the employer's decision-making process. It is not. It is concerned to ascertain whether there was a valid reason for the conclusion that the employee's employment should be terminated. The Court does this for itself, and on the basis of the evidence of the primary facts placed before it.

The decision in *Yew's case* was cited with approval and followed by Drummond J in *Cornwall v Qantas Airways Limited* (unreported, Federal Court of Australia, Drummond J, 8 December 1997), and more recently by Moore J in *Sherman v Peabody Coal Limited* (unreported, Federal Court of Australia, Moore J, 27 February 1998) [see further: *Pahuru v Woolworths Limited trading as Max Liquor* (unreported, NI2180 of 1995, 17 June 1997 per Locke JR); *Elvidge v Burswood Resort Management Ltd* (1996) 78 IR 122].

CONCLUDING OBSERVATIONS

The investigation of alleged misconduct is increasingly an important part of an employer's function.

If the relevant facts are not clear then the employer has an obligation to establish those facts before dismissing an employee. As Lord Mackay of Clashfern said in *Smith v City of Glasgow District Council* [1987] IRLR 326 at 329:

> As a matter of law a reason could not reasonably be treated as sufficient reason for dismissing Mr Smith when it had not been established as true nor had it been established that there were reasonable grounds upon which the special committee could have concluded it was true. *[cited with approval in Gregory v Phillip Morris (1980) 80 ALR 455 at 471 per Wilcox and Ryan JJ]*

In conducting an inquiry:

- the employer must take reasonable steps to investigate the allegations and give the employee a fair chance of answering them;
- the employer is not required to adopt the standards applied to a judicial inquiry;
- the employee should be provided with material which forms the basis of the allegation against him or her;
- if the employee raises an issue that can be investigated or a witness who can be interviewed about a matter raised in his defence then the employer should attend to it where it is practicable to do so.

The findings made by an inquiry established by the employer will be relevant to the Commission's determination of whether the termination was *harsh, unjust or unreasonable.* However, while such findings are relevant they do *not* conclusively determine the matter before the Commission. That issue is to be decided by the Commission on the evidence in the proceedings before it. Even where the findings of an employer's inquiry are reasonable the Commission may conclude that a termination of employment on the basis of those findings was harsh because the penalty was disproportionate to the misconduct.

3. The New Contract of Employment

Dr Max Spry

INTRODUCTION

In this paper I intend to briefly overview recent developments on the implication of terms into contracts of employment - on what basis may terms, not expressly agreed to by the parties, be incorporated into the employment contract. In particular I wish to focus on the relatively recent implied term of trust and confidence recognised by the House of Lords in *Malik*. I wish to outline the content of this implied term and in what circumstances the courts in the UK, Canada, NZ and Australia have been willing to find such a term. Finally I wish to canvass some possible remedies for breach of the term, noting that this area of the law is in a state of considerable flux and uncertainty.

IMPLYING TERMS INTO CONTRACTS OF EMPLOYMENT

As in other contracts, generally speaking, terms may be implied into employment contracts on the basis of fact or law.

In *Breen v Williams* (1996) 186 CLR 71 at 102-103, Gaudron and McHugh JJ summarised the distinction as follows:

> The common law draws a distinction between terms which are implied in fact and terms which are implied by law. Leaving aside terms that are presumed to apply because of the custom or trade or business, the courts will only imply a term in fact when it is necessary to give efficacy to the contract. A term implied in fact purports to give effect to the presumed intention of the parties to the contract in respect of a matter that they have not mentioned but on which presumably they would have agreed should be part of the contract. A term implied by law on the other hand arises from the nature, type or class of contract in question. Some terms are implied by statutes in contracts of a particular class, for example, money lending and home building contracts. ... Other terms are implied by the common law because, although originally based on the intentions of parties to specific contracts of particular descriptions, they 'became so much a part of the common understanding as to be imported into all transactions of the particular description.' Many of these terms are implied to prevent 'the enjoyment of the rights conferred by the contract [being] rendered nugatory, worthless or perhaps, ... seriously undermined', the notion of necessity being central to the rationale for such an implication.

The High Court's decision in *Breen v Williams* follows on from its earlier discussion of the implication of contractual terms in *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410. *Byrne and Frew* is concerned with the implication of terms in employment contracts. The High Court rejected the argument that clause 11 (a) of the Transport Workers (Airlines) Award 1988, requiring terminations of employment not be harsh, unjust or unreasonable, was an implied term of Byrne and Frew's employment contract with the respondent.

In recent years there is judicial authority for the implication of terms such as:

- the exercise of due skill and attention in the preparation of a reference required by an employee seeking alternative employment: *Spring v Guardian Assurance plc* [1994] 3 All ER 129.

- to draw attention to an employee the existence of a valuable right available to him or her where the employment contract had not been negotiated directly between the employee and the employer: *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563.

- the employer will provide and monitor for his or her employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance of the employee's duties: *Waltons & Morse v Dorrington* [1997] IRLR 488 (Employment Appeal Tribunal).

- the employer will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of grievances: *WA Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 (EAT).

- to act in good faith in dismissing an employee: *Wallace v United Grain Growers* (minority opinion) (Supreme Court of Canada, unreported, 30 October 1997); *Whelan v Waitaki Meats* [1991] 2 NZLR 74; *Stuart v Armourguard Ltd* [1996] 1 NZLR 484.

- not to, without reasonable and proper cause, act in a manner likely to seriously damage the employee's reputation, or cause him or her undue mental distress or humiliation: *Stuart v Armourguard Ltd* [1996] 1 NZLR 484.

- the implied term of trust and confidence: *Malik*

THE IMPLIED TERM OF TRUST AND CONFIDENCE

In *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 at 191 the Full Industrial Relations Court of Australia (Wilcox CJ, Marshall and North JJ) stated that:

> Trust and confidence is a necessary ingredient in any employment relationship. That is why the law imports into employment contracts an implied promise by the employer not to damage or destroy the relationship of trust and confidence between the parties without reasonable cause.

In *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95, it was stated that the term:

> is expressed to impose an obligation on that the employer shall not 'without reasonable and proper cause, conduct itself in a manner calculated to destroy or seriously damage the relationship of confidence and trust between employer and employee'(at p 109).

In *Malik*, Lord North (at 99) said that 'operating a dishonest and corrupt business' constituted a breach of the implied term.

Other examples

Carrigan v Darwin City Council (von Doussa J, IRCA, 20 March 1997): failure to provide an effective rehabilitation program.

Ryan v Aboriginal Gallery of Dreamings (Murphy JR, Federal Court, 20 June 1997): alleged victimisation following giving evidence in civil proceedings against the respondent.

Raffoul v Blood Transfusion Service of the Australian Red Cross Society (Gray J, Federal Court, 10 November 1997): failing to give preference in employment after promising to do so.

Brighouse Ltd v Bilderbeck [1995] 1 NZLR 158: (NZ Court of Appeal): 'in discharging the implied obligation to preserve the relationship of trust and confidence between them, the employer should act with sensitivity and consideration to staff being made redundant' (per Casey J, at p 179)

Courtaulds Northern Textiles v Andrew [1979] IRLR 84 (Employment Appeal Tribunal): unfounded and unwarranted criticism.

Sita (GB) Ltd v Burton [1997] IRLR 501 (Employment Appeal Tribunal): actions of third parties.

SUMMARY

The implied contractual term of trust and confidence is a term of every contract of employment. It:

- is implied by law;
- places obligations on both employer and employee, but its greatest significance lies in the obligations it places on the employer;
- recognises that a balance needs to be struck between legitimate management interests and the legitimate interests of employees in being treated fairly;
- does not consider employer intentions in determining breach; an objective test is used to determine whether the implied term of confidence and trust has been breached;
- offers, in a practical sense, a useful management tool.

POSSIBLE REMEDIES

What remedies are available to an employee when his or her employer breaches the implied term of trust and confidence? I wish, now, to canvass some possible remedies for breach of the term, noting that this area of the law is in a state of considerable flux and uncertainty.

Although the implied term of trust and confidence may have arisen in a particular legislative context, it is now a feature of common law contracts of employment. Nevertheless, the case law on the implied term tends still to reflect its origins in the dismissal context. It seems clear the courts are prepared to treat a breach of the implied term as so fundamental that an employee is entitled to treat the breach as a repudiation of the contract, enabling the employee to claim that he or had been 'constructively dismissed'.

But is this really that important in the Australian context? The employee could simply claim that the behaviour complained of was such that it amounted to a termination at the initiative of the employer, and hence the employee may seek a remedy under the relevant statutory scheme.

More importantly, may a breach of the implied term give rise to a claim for damages? And, if so, under what circumstances will damages be available? Secondly, if damages are

available, what are they to compensate for? Is it possible to obtain damages for financial loss, humiliation, mental distress and 'injured feelings'?

Burazin v Blacktown City Guardian (1996) 142 ALR 144, (decided before the decision of the House of Lords in *Malik*) accepted the existence of the implied term of confidence and trust. The full Industrial Relations Court in *Burazin* did not need to decide whether the applicant was entitled to damages for breach of the implied term of confidence and trust as it found that 'Ms Burazin is entitled under her statutory claim to be compensated for the distress she suffered as a result of her treatment by the respondent' on the relevant dates. However, the Court (at 154) seemed to suggest that breach of the term, while it might assist the employee in establishing a termination by the employer, indicated that damages might not be available:

> Although it might seem strange to concede the existence of an implied contractual term but deny its capacity to give rise to liability in damages, it must be remembered that the term is intended to bolster an ongoing relationship. To permit an action for damages during the currency of the employment relationship, it might be argued, would be antithetical to the reason for implying the term; the action itself would presumably cause a further deterioration in the relationship. That argument would not apply in a case like *Malik* [the decision in the Court of Appeal], where the relationship had already come to an end. But in some such cases, the implied term would have played its part in enabling the employee to improve his or legal position by placing responsibility for the termination on the employer.

However, if damages are to be awarded for breach of the implied term of trust and confidence, on what basis should they be calculated?

The possible heads of damage for breach of the implied term were discussed by the House of Lords in *Malik*, albeit in circumstances where the employment relationship had come to an end. Lord Nicholls, in particular, (at 100-103) discussed this issue at some length. His Lordship suggested damages may be available for the financial losses suffered under the following heads:

- loss of financial benefits (such as 'salary and commission and pension rights');
- loss of promised benefits (eg. 'a course of training, or publicity for an actor or pop star');
- the lessening of the employees attractiveness to other employers, (or, 'stigma compensation') by positively damaging the employees future employment prospects; and
- financial losses flowing from the manner of dismissal. Lord Nicholls said (at 103) that *Addis v Gramophone Co* [1909] AC 488 could not preclude

> the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss. *Addis v Gramophone Co Ltd* was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time.

See also *Gregory v Philip Morris Ltd* (1988) 80 ALR 455; *Wheeler v Philip Morris Ltd* (1990) 97 ALR 282.

In *Malik* the House of Lords did not need to decide whether damages are available for mental distress or 'injured feelings' flowing from the breach of the employment contract. Does the rule in *Addis v Gramophone Co* [1909] AC 488, barring recovery of damages for

mental distress due to the manner of dismissal continue to apply? Or is it now possible to obtain damages for mental distress or 'injured feelings' for breach of the implied term of trust and confidence, whether that breach occurs in relation to dismissal or not? *Addis* was recently affirmed, but not entirely without criticism, by the High Court in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

The general rule that damages are not available for distress caused by breach of contract was also recently discussed by the Industrial Relations Court in *Clunne v Nambucca Shire Council* (1995) 63 IR 304. Moore J noted that one of the exceptions to the general rule that damages are not awarded for mental distress for breach of contract is that 'damages may be awarded for distress arising from physical injury occasioned by breach of contract' (at 315).

In *Malik*, the House of Lords held that damages may be available for financial losses flowing from a breach of the implied term of trust and confidence. Authority in Canada and New Zealand suggests that damages may also be available for 'injured feelings' or mental distress flowing from a breach of the implied term. Whether the High Court will be persuaded by such authorities remains to be seen.

It has been noted above that the implied contractual term of confidence and trust remains in its nascent stage, the circumstances in which it will be applied and the remedies available are still being developed. The term might be utilised however by employees who claim to be subjected to workplace harassment but who are excluded from the protection of the anti-discrimination legislation.

CONCLUSION

It seems clear that the common law contract of employment contains an implied term of trust and confidence. The practical significance of this term, and in particular, the remedies available for breach of the term, remain to be fully worked through.

4. Developments In Unfair Contracts Law

Paul Ronfeldt*

INTRODUCTION

This paper discusses recent developments in unfair contract laws as they affect employers in New South Wales. Accordingly, the paper focuses on the unfair contract provisions of the *Industrial Relations Act* (NSW) 1996. This jurisdiction has seen a number of developments in recent times of considerable significance to human resource managers. In particular, the provisions have become a popular post-termination remedy for employees who are excluded because of their level of remuneration from State and federal unfair dismissal laws.

UNFAIR CONTRACTS LAWS

Before discussing the operation of the New South Wales provisions in any detail, it is significant to note that unfair contract provisions of a somewhat more limited scope also exist within the federal and Queensland Workplace Relations Acts.[1] Like the New South Wales provisions, which have existed in similar terms to the current provisions since 1959[2], the provisions in the federal and Queensland Workplace Relations Acts are principally directed towards remedying the abuse of independent contracting relationships. As independent contractors are commonly excluded from the protection of awards and many statutory 'employment' benefits,[3] the role of unfair contract provisions has traditionally been to provide a means whereby the more egregious abuses of contractual relations can be remedied.

Sections 127A to 127C of the *Workplace Relations Act* 1996 (Cth) are specifically limited to this role. Work relationships classified as 'employment' under the common law are not covered by these provisions. In addition, the provisions only apply to independent contractors who are natural persons. This imposes a considerable limitation on the application of the federal provisions as the majority of independent contractors in Australia will operate via a proprietary limited company for taxation purposes.[4] By contrast, while the New South Wales[5] and Queensland[6] provisions are primarily designed to resist the abuse of

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1 See sections 127A to 127C of the *Workplace Relations Act* 1996 (Cth) and section 290 of the *Workplace Relations Act* 1997 (Qld).

2 For a discussion see M. Holmes , 1995, 'An Historical Analysis of the Jurisdiction Conferred on the Industrial Court by s. 275 of the Industrial Relations Act 1991' 69 *ALJR* 49.

3 For a discussion regarding the different treatment of independent contractors in relation to award and statutory entitlements see B. Creighton & A. Stewart, 1994, *Labour Law: An Introduction*, Federation Press, Sydney, pp.128-135.

4 Another less significant limitation is that the provisions apply only to independent contracts made with corporations, to independent contracts made in relation to the business of a corporation, to independent contracts relating to interstate trade and commerce, to independent contracts that take place or are connected with a Territory or to independent contracts to which the Commonwealth or a Commonwealth authority is a party: see section 127C.

5 Section 106(1) of the *Industrial Relations Act* 1996 (NSW) provides that the power of the Industrial Commission of NSW under section 106 applies to any 'contract whereby a person work in any industry'. The breadth of these words is described below.

independent contractor relationships, they also apply to contracts between employees and employers – that is, to the archetypal employment relationship.

Unfair contracts provisions exist as an adjunct to the more general arbitral powers of industrial tribunals to regulate the terms and conditions of employment. Such laws allow industrial tribunals and, in the case of the federal provisions, the Federal Court of Australia, to determine individual complaints of unfairness in contractual relationships by making orders varying contracts and, in the case of the New South Wales and Queensland laws, by ordering persons to pay compensation. Despite this residual function, the significance of such laws within our system of industrial regulation, particularly within New South Wales, has increased dramatically in recent times.

Section 106 of the NSW Industrial Relations Act

The New South Wales provisions have been in existence in some form since 1959. First as section 88F of the *Industrial Arbitration Act* 1940 (NSW) and then as section 275 of the *Industrial Relations Act* 1991 (NSW). Broadly speaking, the Industrial Relations Commission in Court Session may make a range of orders under section 106: the Commission may declare that a contract is wholly or partly void; the Commission may vary the contract; the Commission may make orders granting an amount of compensation which it considers to be just in the circumstances; and, the Commission may make orders for costs. The Commission may also make orders targeted toward preventing a person from entering into a specified kind of contract or inducing other persons to enter into such a contract. An application for a review of a contract may be made by either a party to a contract, a trade union or an employer's association.

The most remarkable aspect of section 106 is the scope of its application. The Commission may make orders relating to any contract 'whereby' – that is, which involves or which leads to – 'a person performing work in any industry'. It is particularly significant to note that the definition of 'contract' extends far beyond the common law concept of legally binding relations; a "contract" is defined to include arrangements, conditions which are related to contracts, or collateral arrangements.[7]

The breadth of the words 'whereby a person performs work in any industry' have been amply illustrated over the forty years since the introduction of section 88F. Not surprisingly there have been numerous claims by independent contractors alleging unfairness or the denial of benefits that they would have received as employees. There have also been numerous claims applying to contracts which fall outside the traditional conception of industrial relations. These include contracts and arrangements involving the sale of machinery, such as an arrangement whereby a person buys or leases a truck or delivery van and, as part of the deal, is offered carting work. Similarly, there have been a number of successful claims involving the review of franchise arrangements whereby individuals purchase franchises to operate a business. Indeed, section 106 has become a significant arena for commercial litigation in New South Wales.[8] Examples include commercial leases, share-farming agreements and music royalty agreements. Perhaps the most striking example of a commercial arrangement being reviewed under section 106 involved the decision in

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6 Section 290 of the *Workplace Relations Act* 1997 (Qld) applies to two classes of contracts: 1. employment contacts that are not covered by industrial instruments; 2. contracts for services (that is, contracts with independent contractors) which are designed to or which have the effect of avoiding the provisions of an industrial instrument.

7 *Industrial Relations Act* 1996 (NSW) s. 105.

8 M. Holmes, 1995, 'An Historical Analysis of the Jurisdiction Conferred on the Industrial Court by s275 of the *Industrial Relations Act* 1991' 69 *ALJR* 49.

State Bank of NSW v Grover[9] in which it was held that representations made by a bank gave rise to a 'collateral arrangement' under which the applicant, an abalone diver, 'worked in an industry'.

Applications for review of 'contracts' (including arrangements, conditions or collateral arrangements) may be made on four separate bases.[10] In short, an applicant may allege that the contract was unfair because it:

1. was unfair, harsh or unconscionable; or

2. was against the public interest;[11] or

3. provided remuneration that is less than a person performing the work would receive as an employee performing the work; or

4. was designed to or did avoid the provisions of an industrial instrument.

The third and fourth grounds are obviously directed towards independent contractors and others whose terms of engagement exclude them from the benefits that persons undertaking equivalent work as employees would enjoy. An example of the second ground, 'against the public interest', is a post employment restraint which is unreasonable or contrary to the law.

The most common claim relies on the first ground of unfairness – 'unfair, harsh or unconscionable'. Importantly, this ground is not limited to any particular circumstance. That is, any aspect of a contract, arrangement, condition or collateral arrangement whereby a person undertakes work could form the basis of an unfair contract claim. In determining such claims, the Commission's role is not to enforce a pre-existing and static concept of fairness, rather, it is to make orders according to a common-sense notion of what is just. In essence, an order under the section is the same as an award. It is an exercise of arbitral rather than judicial power. As Justice Sheldon put it in 1967, the approach of the Commission to orders under section 106 should be 'a plain matter of morals, not law'.[12]

Accordingly, it is impossible and somewhat foolhardy to attempt to distil general principles from previous decisions as to what will constitute unfairness. In certain circumstances, an arrangement or contractual provision will be considered 'unfair' – whereas in other circumstances the existence or absence, as the case may be, of a particular entitlement will not involve unfairness.

Section 106 and Employment

In recent times, the most intriguing aspect of section 106 has been its application to employment relationships. As a number of decisions illustrate, section 106 has been used by employees to successfully challenge human resource practices which have previously been unregulated by State or federal industrial laws; particularly those which relate to the treatment of employees upon termination of employment. In spite of the reservations expressed above concerning attempts to distil general principles of fairness from previous unfair contract determinations, it is possible to chart some of the aspects of employment relationships that have been affected by section 106 claims.

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9 (1996) 64 IR 451.

10 *Industrial Relations Act* 1996 (NSW) s. 105.

11 An example is a restriction against competing with a former employer or some other person for whom work has been undertaken which, in the eyes of Commission, is considered to be against the public interest.

12 *Davies v General Transport Development Pty Ltd* [1967] AR (NSW) 371 at 373.

Employment Entitlements

One of the most significant applications of section 106 to employment is as a means of recovering the benefit of promises from employers. Frequently employers make comments during the course of recruiting employees about prospective entitlements and opportunities. Representations about future benefits are also commonly made to employees in the context of performance reviews, redeployments and promotions. In certain cases, employees may have an action under the common law to claim the benefit of these promises on the basis that they formed part of their contract of employment. In many cases however, such representations will not be actionable because they are inconsistent with the terms of any subsequent contract of employment or lacking sufficient certainty and clarity to qualify as binding contractual terms. Despite this, section 106 allows employees to claim that it was 'unfair' that they did not receive the benefit of representations made prior to, and during, the course of employment. For example, in *Nordby v Barclays Australia Investment Services* Ltd[13] an investment adviser was 'assured' that he would not be no worse off under a new commission arrangement introduced as part of a corporate merger. In practice, his commissions were reduced substantially. Justice Schmidt determined that the new arrangements operated unfairly towards Mr Nordby and awarded him substantial compensation, including an amount equivalent to the commission he would have received had the employer's commitment been honoured.

Unfair Notice

One of the most common claims by employees under section 106 has been that the period of notice expressed in their contract is unfair. This usually involves the situation where a person is dismissed after being engaged for a prolonged period of time, with only a relatively modest period of notice or payment in lieu of notice. The Commission has been quite willing to determine that standard periods of notice (such as four weeks) are in such circumstances unfair, and has ordered that the employee be paid additional amounts in lieu of a more appropriate period of notice. For instance in *Pullen v Reckitt and Coleman Products Pty Ltd*[14], the entitlement of a 55 year old factory supervisor, with 30 years' service, to notice was increased from 4 weeks to 7 months.

Another class of such claims involves the associated allegation that the dismissal was unjustified (or premature) and resulted in the unfair denial of certain benefits which would have accrued with additional service such as share options, bonuses and superannuation arrangements.[15] For example, in *O'Donnell v GIO Australia Ltd*[16] the Commission found that an actuarist aged 50 years, with 7 years service, on a remuneration package of around $160,000.00, should have received 9 months' notice on termination rather than the 4 weeks provided by his contract of employment.[17]

Severance Entitlements

It is also common for employees to use section 106 in relation to redundancy entitlements. In New South Wales, all State-award employees are entitled to severance pay on termination

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13 (1993) 53 IR 319.

14 (1994) 60 IR 183.

15 For a discussion on the application of unfair contracts provisions to superannuation requirements, see G. Warburton, 1989, 'Dealing with Superannuation Surpluses in New South Wales and Elsewhere' 2 AJLL 40.

16 (1996) 64 IR 297.

17 See also *Nordby v Barclays Investment Service* (1993) 53 IR 319 where an investment advisor's notice was increased from two weeks (as provided in his contract of employment) to six months partly on the basis of the affect that the shorter notice had on his entitlement to commission payments (at 334-335).

for reasons of redundancy.[18] There is however, no statutory minimum entitlement to redundancy pay for non-award employees. In spite of this, the New South Wales Industrial Relations Commission has used its powers under section 106 to provide compensation to non-award employees who have been denied severance payments.

For example, in *Baker v National Distribution Services Ltd*[19] the applicant had been employed for 27 years, predominantly as a weekly employee, and for the last 12 years as a staff employee. Baker was retrenched along with several hundred award and staff employees. The staff employees received redundancy payments which exceeded the community standard. However, because of union demands, a more generous redundancy payment was given to award employees. The Industrial Court[20] determined that the employer had unfairly disregarded the interests of staff employees by failing to provide them with a reasonable opportunity to discuss a redundancy package. Accordingly, the employer was ordered to provide Mr Baker with additional severance entitlements calculated on the same basis as used for union members, even though his original redundancy entitlements were well in excess of community standards.

Protection against unfair dismissal

Most recently, there has been a number of successful claims by employees alleging that their 'contracts' are unfair because they fail to protect against harsh, unjust or unreasonable termination. In effect, such employees have been using the unfair contract jurisdiction as a quasi unfair dismissal jurisdiction and as a means to claim additional entitlements upon termination. However, unlike the unfair dismissal laws under the *Workplace Relations Act* 1996 (Cth), the *Industrial Relations Act* 1996 (NSW) and other state industrial laws which impose a limit of six months remuneration on the amount of compensation that may be awarded, there is no cap on the level of compensation that the Commission can order under section 106. Moreover, such claims most commonly have been made by persons whose level of remuneration would ordinarily exclude them from any remedy in relation to unfair dismissal.[21] Such claims, particularly by dismissed executives, frequently involve many hundreds of thousands of dollars.

A flood of these claims has occurred in the two years the *Industrial Relations Act* 1996 (NSW) commenced operation. One of the changes created by the Carr Labor Government's 1996 *Industrial Relations Act* was to clarify an issue that had caused much uncertainty in the preceding years.[22] The traditional approach had been that the focus of any inquiry under the unfair contract law was on the *terms* of a contract or any arrangement. Thus, if a person was dismissed and provided with inadequate notice, it was possible to vary the provision of the contract to provide more notice or to establish an entitlement to severance payments and to make a consequential order for compensation in favour of the employee. However, this approach did not consider that an employee could make a claim for compensation merely

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18 Even if a State award (or industrial instrument) is silent as to an employee's severance entitlement, the Employment Protection Act 1982 provides a minimum entitlement to severance.

19 (1993) 50 IR 254.

20 Under the *Industrial Relations Act* 1991 (NSW), the power to review contracts under section 275 (the previous version of section 106) was exercised by the Industrial Court of New South Wales.

21 For instance, under s. 83 of the *Industrial Relations Act* 1996 (NSW) only three classes of employees may bring claims of unfair dismissal in NSW: public sector employees; employees whose employment is regulated by a State industrial instrument and employees earning less than $66, 200.

22 See R. Baragry, 1997, 'Certain Justice or Uncertain Injustice: Developments in Unfair Work Contract Law', in Frazer et al (eds), 1997, *Individual Contracts and Workplace Relations*, Working Paper 50, Australian Centre for Industrial Relations Research and Training; and A. Brooks, 1994, 'Approaches to the Regulation of Atypical Working Arrangements or Labour Law and Science Fiction', in McCallum, et al (eds) 1994, *Employment Security*, Federation Press, Sydney.

because they had been treated unfairly by their employer in relation to the termination of employment. There had been a few cases, however, where the Commission had found that a contract or arrangement was unfair because it permitted an employer to treat an employee unfairly. Despite these cases, the majority of the New South Wales industrial bench had resisted this approach.

In 1994, in the case of *Walker v Industrial Court of New South Wales*[23] three judges of the New South Wales Court of Appeal strongly supported the view that the unfair contract provisions permitted a claim that a contract was unfair because it permitted termination which was, in the circumstances, unfair. This view was expressly incorporated into the provisions of the 1996 Act. Section 106 now provides that a contract can be unfair 'at the time it was entered into, or that it became an unfair contract because of the conduct of the parties, any variation of the contract or any other reason'.[24]

The most obvious application of this notion of fair conduct in relation to termination has been to provide warnings and an opportunity to respond to allegations prior to termination. For example, in *Helprin v Westfield Ltd*[25] a senior executive was terminated for unsatisfactory performance. Justice Marks held at 51:

> ...it is my opinion that fairness dictates that the applicant's employer should have afforded him some regular feedback as to his performance in terms of how that performance was measuring up against what was reasonably expected of him by the employer. This could be accommodated either by means of a formal assessment process or by means of an informal regular review. In order to render the employment situation fair it would also have been necessary for the applicant's employer to counsel him about any perceived failure to measure up to any performance criteria, to warn him if his employment prospects were in jeopardy and to give him a reasonable time in which to take such steps as were open to him to improve his performance.

On appeal, the Industrial Relations Commission largely agreed with Marks J's findings that the arrangement between the parties was unfair.[26] The Commission ordered:

> The contract of employment between Mr Helprin and Westfield be varied as from 24 January 1989 to require Westfield to inform Mr Helprin fully about matters of concern which could impact upon his continued employment, and to provide him with a period of not less than three months in which to improve his performance before any action be taken to terminate his employment for reasons associated with any such matters.
>
> Westfield to pay to Mr Helprin three month's salary, attributable to the failure of Westfield to provide a period of not less than three months in which to improve his performance before giving notice of termination, together with amounts which would have been payable under the Annual Holidays Act and the Long Service Leave Act in respect of such a period of employment. [Plus interest]

The most striking application of the scope of the Commission's powers to review issues of unfairness in termination occurred in *Cukeric v David Jones*.[27] Mr Cukeric was retrenched from his position as a national merchandise manager with David Jones after 35 years service. The decision to terminate his employment followed a restructure of the company's senior management. On termination, Mr Cukeric formally agreed to a package amounting to approximately $600,000 including 12 months' notice, his accrued leave entitlements and his

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23 [(1994) 53 IR 121].

24 Emphasis added; see *Industrial Relations Act* 1996 (NSW) s. 106(2).

25 (1996) 68 IR 25.

26 Unreported, 24 March 1997; CT1100 of 1996.

27 (1996) 70 IR 26.

superannuation entitlements. The significance of the decision lies in the fact that the Commission at both first instance and on appeal accepted Mr Cukeric's argument that his contract was unfair because it did not provide him with an entitlement to be treated with fairness or, in the words of the Full Bench of the Commission, to be provided with 'fair consideration' in circumstances where his employment was to be affected by organisational change. The management restructure required the number of persons at Mr Cukeric's level to be reduced from 10 to 6 persons, necessitating the selection of 4 persons for retrenchment. The Commission determined that the manager who conceived the restructure failed to conduct a proper assessment of Mr Cukeric's suitability for continued employment with the company. The full bench stated:

> ...a senior employee of Mr Cukeric's standing and service was entitled to expect *fair consideration* to be given to whether there was a position available to him in the new structure. Such an assessment would involve regard being had to perfectly ordinary considerations, such as Mr Cukeric's past performance, the experience and skills which he possessed, the skills the Company required in the various positions available under the new structure and, of necessity, some adequate discussion of those matters with him.[28]

The Commission found that the manager responsible for the decision to retrench Mr Cukeric had failed to discuss the restructure with him and had not applied an objective set of criteria to assess his future employment prospects in a manner which was consistent with the way they assessed others. In short, the manager had formed a view that Mr Cukeric wasn't one of the people she wished to retain and proceeded with the restructure and with Mr Cukeric's retrenchment on the basis of that mere impression. The Commission ordered David Jones to pay an amount equivalent of 6 months' salary to Mr Cukeric as compensation for their failure to provide him with fair consideration.

The other very significant point to emerge from *David Jones v Cukeric* was that the Commission decided that a deed of release that Mr Cukeric signed as a condition of receiving his payment did not prevent Mr Cukeric's from taking proceedings under section 106 and claiming that his contract was unfair. Generally speaking, where an employee signs a suitably drafted deed of release upon termination, the terms of that release will prevent them from taking any further legal action against their former employer about their entitlements during their employment or, for compensation or damages arising out of the circumstances of their dismissal or retrenchment. However, the Commission in *David Jones v Cukeric* decided that the deed of release, signed by Mr Cukeric, was part of the *arrangement* whereby he performed work in industry, and was, accordingly, subject to review under section 106. In the Cukeric case, the Commission found that David Jones had obtained the deed of release from Mr Cukeric by conduct that was reprehensible and unconscionable. In short, Mr Cukeric was summarily dismissed, that is, he was given no opportunity to serve out his notice, nor was he given any opportunity prior to his termination to negotiate the terms of his redundancy payment and other termination entitlements. Furthermore, and perhaps most significantly, David Jones withheld the payment of his lawful entitlements until such time as he entered into the deed of release. Accordingly, the Commission decided to make an order declaring the deed to be void, meaning that it was no bar to Mr Cukeric's claim of unfairness upon termination.

Proposed Amendments

Not surprisingly, the opening up of section 106 as a de facto unfair dismissal jurisdiction for managerial employees has created considerable problems for employers. It has meant that,

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[28] Emphasis added; unreported, NSW IRC, 3 December 1997.

despite the income-related exclusions contained in State and federal termination laws, any employee working in New South Wales[29] can claim compensation for unfair termination under section 106. Moreover, unlike applications for unfair dismissal under Part 6 of Chapter 2 of the 1996 Act, unfair contracts claims tend to be highly legalistic and very expensive to defend. Moreover, the Commission in Court Session has a discretion to award costs. As a result of previous high compensation awards and the potential to have to pay both their own and the employee's legal costs, there has been a tendency for employers to settle claims rather than run the risk of defending claims before the Commission.

Without question, this circumstance has increased the cost of terminating managerial employees in New South Wales. Arguably, the use of section 106 has also led to an anomaly within the State's system of employment regulation. Whereas the Parliament has determined that only public sector employees and private sector employees covered by an award or earning less than $66,200 per annum should have protection against unfair dismissal, the New South Wales Industrial Relations Commission has adopted a practice of determining equivalent claims from otherwise excluded employees. Also, while the Parliament has limited the compensation payable as a result of unfair dismissal to the amount of remuneration that the applicant received during the 6 months prior to being dismissed,[30] an applicant under section 106 can claim amounts far in excess of any such limit.

On 8 April 1998, the New South Wales Attorney General introduced amendments to the *Industrial Relations Act* designed to overcome this anomaly.[31] The amendment proposed to introduce section 109A into the Act. This proposed section provided that:

> The Division does not apply to a contract of employment that is alleged to be an unfair contract for any reason that:
>
> (a) an application has been or could have been made by the employee under Part 6 (Unfair Dismissals); or
>
> (b) such an application could have been made but for the provisions of section 83 that exclude the employee from making an application under that Part

Although the drafting of the amendment is somewhat obscure, the amendment would have the effect of excluding claims under section 106 based on an allegation that a contract is unfair because it allows for 'unfair dismissal', or that an employee's entitlements upon termination were inadequate because of the circumstances of the termination or the conduct or omissions of the employer prior to termination.

The explanatory memorandum to the Bill stated that the amendments would have the effect of preventing the Commission from exercising its unfair contract jurisdiction in relation to claims that:

- The employee was not given a reasonable period of notice before dismissal;
- The employee did not receive adequate compensation for the dismissal.

This would appear to suggest that claims relating to the inadequacy of severance payments would also be excluded.

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29 Or, if working outside of NSW, whose employment is governed by the law of NSW.

30 *Industrial Relations Act* 1996 (NSW) s. 89 (4).

31 See *Industrial Relations Amendment (Unfair Contracts) Bill* 1998.

Despite the breadth of the proposed amendments, a number of legal observers expressed concern that the Bill failed to achieve its purpose of preventing unfair dismissal claims by persons excluded from Part 6 of Chapter 2 of the Act. The major concern has been that because the provisions of Part 6 apply only to *dismissals* it would still be open to allege that a contract was unfair because of the conduct of employers *during the course of employment.* For instance, an executive employee might still be able to argue that their entitlement to notice of termination or to severance entitlements was unfair because their express contract of employment or letter of appointment provided them less protection than that expressly given to other employees in the organisation or 'promised' to them via representations made in human resource policies.

Another instance where the amendments may fail to exclude termination-related issues could be where the reason for the alleged unfairness relates to a variation that took place during the course of a person's employment. For example, an employee may have originally been employed on terms which entitled them to a redundancy payment because they were covered by an award, enterprise agreement or because of an 'entitlement' expressed in a human resource policy. Over time, that person's circumstances may have changed through promotion or redeployment involving variations to their contract of employment. Such changes may have led to the employee's exclusion from entitlements to redundancy payments. In these cases, it may still be open to an employee to allege that the unfairness to them arose not because of their dismissal – or more accurately, their retrenchment - but because of the circumstances of the variation of the contract of employment.

Furthermore, the New South Wales Government's amendments stopped short of excluding all unfair contract claims by executives. Thus, claims relating to the operation of remuneration arrangements, especially bonuses, share option and superannuation arrangements, would still fall within the scope of section 106; that is, even where the claim arises after the termination of employment. It is not difficult to see that any amendment to section 106 which is limited to excluding 'unfair dismissal' claims, would simply encourage a new class of claims which emphasise unfair and inconsistent treatment during the course of employment.

In response to such criticisms, the New South Wales Government has decided not to proceed with the amendments until further consultation regarding their construction can take place. Accordingly, it remains to be seen whether the Government chooses to continue with the amendments in their current form or whether they will determine that a more extensive exclusion of high paid employees from unfair contracts law is justified.

CONCLUSION

Unfair contract law has become an increasingly more important source of employment regulation in New South Wales. Human resource managers need to be aware of the law and to be vigilant in ensuring that the policies and practices that they establish and administer are immune from challenge under this law. Similarly, while less extensive than the provisions under the *Industrial Relations Act* 1996 (NSW), the unfair contract provisions in the *Workplace Relations Act* 1996 (Cth) and the *Workplace Relations Act* 1997 (Qld) are also significant for Human Resource management, particularly in relation to the engagement of independent contractors.