Eastern Suburbs Law Society CLE

Hot Topics in the Workplace

29 October 2014

1. The most important contract that most people make is the one that governs their work. Only rarely do they seek legal advice. In the field of employment law, even elemental concepts such as whether a person is an employee are subject to great discussion. Many of the cases in this area have led to great titillation for the public and public humiliation for the parties[1].

2. The contract for work is also governed by a range of Commonwealth and State statutes. The Commonwealth legislative regime has been substantially rewritten twice in the last decade. The *Workchoices* case[2] which dealt with the validity of Commonwealth regulation of corporations is perhaps one of the most important constitutional cases in history.

3. In both of the contractual and statutory regimes, difficulties abound. This paper is written to illustrate some of those difficulties. In particular, this paper will look at the basis for some of the rights and responsibilities held by employees and employers.

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[1] As an example see the case of *GLS v PLP*. In that case the respondent (a lawyer) repeatedly and grossly sexually harassed the applicant who was doing her practical experience as a lawyer. Somewhat bizarrely, Mr PLP recorded those conversations and kept the recordings; all of which turned up in evidence and were helpfully appended to the decision. To aggravate things further, he then opposed her admission as a lawyer on the basis that she was not a fit and proper person.

[2] *New South Wales v The Commonwealth* [2006] HCA 52; (2006) 81 ALJR 34; 231 ALR 1.

Start with the contract

4. The application of classical contractual notions into an employment contract is not easy. As McHugh J said in *Integrated Computer Services*[3]:

> in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.

5. There is now a clear line of authority that corporate policies may be incorporated as contractual terms in certain circumstances. This is subject to such terms being of a contractual nature rather than simply aspirational or advisory[4].
6. There is now also a line of authority that there is an implied duties of good faith and mutual trust and confidence within employment contracts. The history of such implication is set out in *Russell*[5]. In setting out the history, Rothman J held that such a term was essential to the relationship. As his Honour said "Without trust and confidence there is no contract of employment": at [129].
7. Since the heady days of *Russell*, a number of judges of the Federal Court have shown a substantial scepticism about the implied duty of good faith[6]. These authorities were collected in the more recent decision of *Van*

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[3] *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR at 11, 117*

[4] *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (7 August 2007) at [13], [15], [30], [41] and [161]

[5] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* [2007] NSWSC 104 (19 February 2007), 69 NSWLR 198 at [105 – 133]

[6] *Walker v Citigroup Global Markets Pty Ltd* [2005] FCA 1678; (2005) 226 ALR 114 at [203]; *McDonald v Parnell Laboratories* (Aust) Pty Ltd (2007) 168 IR 375 at [83] - [94]

Efferen[7]. In that decision, Tracey J stated that he did not consider these decisions to be clearly wrong.

8. In more recent developments, two members of the Full Federal Court found such a term was implied[8]. The third member strongly and carefully dissented.
9. Last month that debate came to an end. The High Court found that the term was not implied.
10. All of these arguments are relatively undeveloped and the subject of significant debate. They also suffer from the problem of determining damages in employment cases. There is a respectable line of authority that damages for termination of a contract are limited to the period of notice set out in the contract[9]. In most contracts with express terms as to the point, this is usually four weeks pay. Obtaining a judgment of such order is generally unfulfilling.
11. The holy grail for plaintiff lawyers is the employee without an express term of notice. At common law they are entitled to reasonable notice of termination. For high earners, these amounts can be considerable.

<u>Restraints of Trade</u>

12. The most important item in most solicitor's practices is a client list. That list can be protected through the duty not to disclose confidential information and by restraints of trade within the contract.
13. In very simple terms, the common law will only enforce restraints of trade if those restraints are reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public[10]. An employer seeking to enforce a restraint must prove that the

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[7] *Van Efferen v CMA Corporation Limited* [2009] FCA 597 (4 June 2009) at [83] – [85]
[8] *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83 (6 August 2013)
[9] *McDonald v Parnell Laboratories (Aust)* [2007] FCA 1903 (7 December 2007) at [92] – [93]
[10] *Nordenfelt* [1894] AC 535 at 565

restraint is reasonable and can only enforce the restraint to the extent that it provides adequate protection [11].

14. In looking at employment contracts, a provision restraining an employee or contract from engaging in employment with a competitor is prima facie invalid[12].

15. The situation is significantly different in New South Wales. The *Restraints of Trade Act* allows the NSW Supreme Court to enforce a restraint to the extent that it is not against public policy. This test is one that often involves great personal discretion. It is not unfair to say that the result in such a case may often depend upon the identity of the judge.

16. These difficulties are not confined to Australia. As Arup has said[13]:

> One court in the United States described the law there as 'sea-vast and vacillating, overlapping and bewildering [from which one] can fish out of it any kind of strange support for anything, if he lives so long.'

17. The notion of confidential information is becoming more difficult to define. Most lawyers now use internet sites such as Facebook and Linkedin. To the extent that they add clients of their employer, these sites allow immediate notification of new employment to the clients of the former employer. Most lawyers will have client details in their mobile phone as well as their home computer. The distinction between confidential information of the employer and public information of the employee is increasingly difficult to draw.

<u>The statutory regime</u>

18. One strong trend of the last decade is the inexorable extension of a national legislative regime as to workplace law. The *Fair Work Act* (like the *Workplace Relations Act* before it) largely relies upon the capacity of the Commonwealth to regulate corporations. That capacity is based upon

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[11] *Amoco v Rocca Bros Motor Engineering Co* 133 CLR 288 at 315
[12] *Herbert Morris Limited v Saxleby* 1916 AC 688 at 702
[13] Arup, Christopher *What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge* [2012] MelbULawRw 10; (2012) 36(2) Melbourne University Law Review 369

the constitutional head of power dealing with corporations that includes 'trading corporations'.

19. That term has been broadly interpreted (at least by federal courts). Local government councils, universities and a number of social welfare bodies have been held to be trading corporations[14]. There are contrary authorities which focus upon the governmental nature of the various bodies[15] or the gratuitous or loss making provision of public welfare services[16].

20. That left unincorporated employers such as sole traders and partnerships in the State sphere. A number of the states then 'referred' to the Commonwealth the power to regulate those people. This happened by the introduction of a NSW Act called the *Industrial Relations (Commonwealth Powers) Act* 2009 No 115 and the Commonwealth *Fair Work (State Referral and Consequential and other Amendments) Act* 2009.

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[14] See generally *Fair Work Act* commentary on Constitutional Corporation by Lexis Nexis. The cases below are taken from that commentary. See the cases referred to in *Burrows v Shire of Esperance* (1998) 86 IR 75.

[15] *City of Mandurah v Hull* (2000) 100 IR 406; [2000] WASCA 216; at [32] – [35]; *Shire of Ravensthorpe v John Patrick Galea* [2009] WAIRCom 1149 (2 November 2009) at [151], [185], [245], *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102; 175 IR 383; [2008] FCA 1268; at [22], [151],

[16] See *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102; 175 IR 383; [2008] FCA 1268; at [22], [151], where Spender J held that the functions performed by that council lacked the essential quality of trade in that almost all of them ran at a loss and were directed to public benefit objectives within the shire. He stated that it was "inconceivable that the framers of the Constitution and the parliament which enacted it intended that the Commonwealth should have power in respect of local government which is a body corporate of state government, having legislative and executive functions": at [22]. To similar effect, in *E v Australian Red Cross Society* (1991) 27 FCR 310, Wilcox J held that trading activities did not include "gratuitous provision of a public welfare service, substantially at government expense". This distinction was applied in *Fowler v Syd-West Personnel Print*, AIRC, McIntyre VP, 30 June 1998, Print Q2463. See also *Kirinari Residential Services (Vic) and (NSW) Inc*, AIRC O'Shea C, 13 June 1996, Print N2535 and the majority decision in *Aboriginal Legal Service of Western Australia v Lawrence (No 2)* (2008) 37 WAR 450; 228 FLR 318; 178 IR 168; [2008] WASCA 254; .

21. That legislation is complex but it seems to leave the Crown and local government in the state sphere. Complicated arguments await as to whether some aspects of the *Fair Work Act* apply to these bodies and their subsidiaries.

Check the Minimum Standards

22. The *Fair Work Act* now sets out a number of minimum conditions of employment. They are set out in s 61:

> The National Employment Standards are minimum standards applying to employment of employees
> (1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).
> Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.
> (2) The minimum standards relate to the following matters:
> (a) maximum weekly hours (Division 3);
> (b) requests for flexible working arrangements (Division 4);
> (c) parental leave and related entitlements (Division 5);
> (d) annual leave (Division 6);
> (e) personal/carer's leave and compassionate leave (Division 7);
> (f) community service leave (Division 8);
> (g) long service leave (Division 9);
> (h) public holidays (Division 10);
> (i) notice of termination and redundancy pay (Division 11);
> (j) Fair Work Information Statement (Division 12).

<u>Some examples</u>

<u>Maximum weekly hours</u>

23. Section 62 of the Act provides in part that:

> (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
> (a) for a full-time employee--38 hours; or
>
> (3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:
> (a) any risk to employee health and safety from working the additional hours;
> (b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;
(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
(e) any notice given by the employer of any request or requirement to work the additional hours;
(f) any notice given by the employee of his or her intention to refuse to work the additional hours;
(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;
(h) the nature of the employee's role, and the employee's level of responsibility;
(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;
(j) any other relevant matter.

Paid Parental Leave

24. There now seems to a bipartisan agreement that parental leave should be paid and that this should be paid for by the taxpayer. While the *Paid Parental Leave Act* 2010 is complex even by Commonwealth standards, to receive payment, the person must (broadly):

(a) satisfy the work test, the income test and the Australian residency test; and
(b) be the child's primary carer; and
(c) not have returned to work.

Bullying

25. Section 789FD of the *Fair Work Act* states that:

(1) A worker is bullied at work if:
(a) while the worker is at work in a constitutionally-covered business:
(i) an individual; or
(ii) a group of individuals;
repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

26. Under s 789FF

> **(1)** If:
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> (a) a worker has made an application under section 789FC; and
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> (b) the FWC is satisfied that:
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> (i) the worker has been bullied at work by an individual or a group of individuals; and
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> (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;
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> then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

27. These sections have been described by one practitioner as having been written by a bunch of 20 year olds who know nothing. In particular, the section has been held not to apply to a person who is no longer employed. That does provide some inducement to dismiss the employee (subject to adverse action protections[17]). Further, there is no capacity to make a monetary order. Lastly, there is significant debate as what such orders would mean. There is only a very small number of cases dealing with these sections. In *Ms SB* [2014] FWC 2104 at [36], Hampden C described the task as determining: whether an individual or group of individuals have repeatedly behaved unreasonably towards

> the applicant and whether any such behaviour has created a risk to health and safety. Depending upon the nature of those findings, in considering whether there has been repeated unreasonable behaviour, I also need to consider whether any of the conduct was reasonable management action taken in a reasonable manner.

28. He went on to further explain a number of these concepts holding that:

> [41]…There is no specific number of incidents required for the behaviour to represent 'repeatedly' behaving unreasonably (provided there is more than one occurrence), nor does it appear that the same specific behaviour has to be repeated. What is required is repeated unreasonable behaviour by the individual or individuals towards the applicant worker or a group of workers to which the applicant belongs.

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[17] In *Chang v General Reinsurance* [2014] FCCA 2014; interim relief was refused in these circumstances

> [44]…there must be a causal link between the behaviour and the risk to health and safety. Cases on causation in other contexts suggest that the behaviour does not have to be the only cause of the risk, provided that it was a substantial cause of the risk viewed in a common sense and practical way. This would seem to be equally applicable here. A risk to health and safety means the possibility of danger to health and safety, and is not confined to actual danger to health and safety.

29. Finally, the Commissioner found that:

> [51] The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'. In general terms this is likely to mean that:
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> • management actions do not need to be perfect or ideal to be considered reasonable;
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> • a course of action may still be 'reasonable action' even if particular steps are not;
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> • to be considered reasonable, the action must also be lawful and not be 'irrational, absurd or ridiculous';
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> • any 'unreasonableness' must arise from the actual management action in question, rather than the applicant's perception of it; and
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> • consideration may be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.

<u>Harrassment</u>

30. A number of Commonwealth and State statutes prohibit the taking of certain harassing or discriminatory action against another.

31. Under s 14 of the *Sex Discrimination Act* 1984, it is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy, breastfeeding or family responsibility. Similar provisions exist in relation to discrimination on the basis of disability.

32. Under section 28B of the *Sex Discrimination Act* 1984, it is unlawful for a person to sexually harass:

> (a) an employee of the person; or
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> (b) a person who is seeking to become an employee of the person.

33. There is some overlap between both sections. Acts of harassment may also constitute sexual discrimination[18].

What is an act of sexual harassment?

34. Section 28A defines sexual harassment as being where a person makes unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

35. That conduct is prohibited in the workplace. Section 28B (6) defines "workplace" as a "place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant."[19]

36. It is not easy to determine from the cases how damages are derived. At least in relation to acts of sexual harassment; the range for non economic loss has been said to be broadly between $8 000 and $20 000[20]. A recent study showed that that in almost 38 per cent of settlements, victims receive less than $5000 and in only 6 per cent is the payout $50,000 or more[21].

37. The Full Federal Court has said of these cases that[22]:

> Even this cursory overview of the quantum of awards historically awarded in these other fields to successful claimants in situations not wholly unlike Ms Richardson's reveals a substantial disparity between the level of those awards and the typical compensatory damages provided to victims of sexual discrimination and harassment. Such disparity bespeaks the fact that today an award

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[18] *Elliot v Nanda* (2001) 11FCR 240 at [127]; see authorities collected in *Font v Paspaley* [2002] FMCA 142 at [136] – [138]
[19] See generally *Ewin v Vergara (No. 3)* [2013] FCA 1311
[20] Chris Ronalds, *Discrimination Law and Practice* (3rd ed, 2008), 223.
[21] http://www.smh.com.au/national/payouts-in-sexual-harassment-settlements-hardly-worth-the-trouble-20120415-1x1q2.html
[22] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (15 July 2014) at [109]

> for sexual harassment, though within the accepted range for such cases, may be manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards.

Adverse action

38. The sleeping, or perhaps comatose, giant of workplace law seems to be the adverse action provisions in the *Fair Work Act* which prohibit injury because of the exercise or proposed exercise of a workplace rights.

39. The law as to adverse action is set out at Chapter 3 Part 3.1 of the *Fair Work Act*. That chapter broadly states that a person may not take adverse action against another person who has a workplace right or has exercised that right. Workplace right as defined in section 341 as the right to make a complaint requiring either to a person having the capacity to seek compliance with the law or if the person is an employee in relation to his or her employment.

40. Clause 361 reverses the onus of proof applicable to civil proceedings for a contravention of Part 3-1[23]. Generally a civil action places the onus on the complainant to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully: *Explanatory Memorandum to the Fair Work Bill 2009* at paragraphs 1459 – 1461.

41. The Full Federal Court dealt with this in the case of *Barcl*ay[24]. In that case, the Trial judge had accepted the decision maker's evidence that she was not motivated by a prohibited reason. Nevertheless the majority held he that:

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[23] See generally ss 361 of Butterworths *Commentary to the Fair Work Act*
[24] *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212; 274 ALR 570; [2011]FCAFC 14;

> The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.

42. The High Court did not agree. In *Barclay*[25], the High Court overturned the Full Federal Court. In doing so, French CJ and Crennan J held at [44] that there:

> is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression 'because' in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains 'why was the adverse action taken?'

43. Heydon J held at [146] that:

> To search for the "reason" for a voluntary action is to search for the reasoning actually employed by the person who acted. Nothing in the Act expressly suggests that the courts are to search for "unconscious" elements in the impugned reasoning of persons in Dr Harvey's position. No requirement for such search can be implied. This is so if only because it would create an impossible burden on employers accused of contravening s 346 of the Act to search the minds of the employees whose conduct is said to have caused the contravention. How could an employer ever prove that there was no unconscious reason of a prohibited kind? An employer's inquiries of the relevant employees would provoke, at best, nothing but hilarity. The employees might retort that while they could say what reasons they were conscious of, they could say nothing about those they were not conscious of.

44. Further protections exist in relation to the engaging in industrial activity: s 346, to protection from discrimination: s 351, temporary absence from

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[25] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; BC201206652 (7 September 2012), 86 ALJR 1044, 220 IR 445, 290 ALR 647

illness or injury: s 352 and sham independent contracting arrangements: s 357.

45. Those sections are still in a reasonably infantile stage of development[26]. Assuming that a court finds that adverse action has taken place, how should the court then determine what orders for compensation should be made? It is tempting, if dangerous, to approach this exercise from common law contractual principles[27]. At common law, an employer is generally entitled to terminate a contract upon the payment of the notice expressed in, or implied into the contract of employment[28]. Damages for non-economic loss are generally precluded[29] while damages in tort are awarded with the object of placing the person in which he/she would have been had the tort not been committed[30],

46. The provisions of the *Fair Work Act* encompass more than the awarding of damages that would be available in contract. Section 545(1) gives the court power to make any order the court considers appropriate where satisfied that a civil penalty provision has been contravened. Subsection (2) defines those orders to include an order awarding compensation for loss that a person has suffered because of the contravention.

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[26] The High Court adopted an orthodox interpretation of the reverse onus in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]* [2012] HCA 42 (3 October 2012)

[27] See to similar effect in relation to the powers under the *Trade Practices Act: Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12; 158 ALR 333; [1998] ATPR 41,402 (41-665); [1999] ASAL 57412 (55-014); [1998] HCA 69; (1998) 196 CLR 494 (11 November 1998) at [38].

[28] *New South Wales Cancer Council v Sarfaty* (1992) 28 NSWLR 68; 44 IR 1; 34 AILR 294 (5 August 1992); although cf *Guthrie v News Limited* [2010] VSC 196 (14 May 2010) at [52].

[29] *Addis v Gramophone Co Ltd* [1909] AC 48; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; 67 ALJR 228; 111 ALR 289; [1993] ASC 58,187 (56-206 (10 February 1993).

[30] *Gates v City Mutual Life Assurance Society* (1986) [1986] HCA 3; 60 ALJR 239; 63 ALR 600; 6 IPR 462; [1986] ATPR 47,360 (40-666); 4 ANZ Insurance Cases 74,104 (60-691); [1986] ASC 55-462; 160 CLR 1 (20 February 1986) at [12]; As to the reasons for these differences see *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12; 158 ALR 333; [1998] ATPR 41,402 (41-665); [1999] ASAL 57412 (55-014); [1998] HCA 69; 196 CLR 494 (11 November 1998) at [503].

47. In one of the few cases dealing with the assessment of damages in adverse action cases, Barker J of the Federal Court used the following formulation to determine damages:

> In accordance with usual principle, an order awarding compensation must be assessed on the basis that an applicant establishes loss that a person has suffered because of the contravention and that this requires an appropriate causal connection between the contravention and the loss claimed[31].

48. In that case, the Court determined the economic loss suffered until the date of the hearing and deducted moneys paid in alternative employment. This formulation left some questions hanging. As his Honour noted, it did not take into account loss likely to be suffered after the hearing date. Logically there would be little reason for compensation to be extinguished as at the date of hearing[32]. Would such loss include non economic loss such as loss of enjoyment of work? And what would happen if the contravenor could prove that the likely length of employment (but for the contravention) would have been limited by the likelihood of termination upon other grounds. Would compensation be limited to that period?[33]
49. Further, it is possible that such orders are not limited either by the foreseeability of consequential damage or remoteness[34]. Compensation for non economic loss for distress, hurt or humiliation may also be awarded[35].
50. What might be the limits of these words? The definition of compensation

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[31] *Australian Licensed Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* 193 FCR 526 at [423].
[32] Although see the difficulties referred in *Kavassilas v Migration Training Australia Pty Ltd* [2012] FMCA 22 (27 January 2012) at [91] – [93]
[33] See support for this position in the case of *Silver v Rogers & Rogers* [2012] FMCA 674 (8 August 2012) at [68]
[34] See the comments of Gaudron J in a *Trade Practices Act* context in *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64; 74 ALJR 209; 167 ALR 575 (9 December 1999) at [106]
[35] *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* 193 FCR 526; 205 IR 392; 63 AILR 101-330; [2011] FCA 333 (8 April 2011) at [447], *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 (26 August 2011) at [23].

seems confined to actual loss and might not include punitive damages[36]. The objects of the Act may provide some contextual limitation[37]. Intersection with other legislation may provide further limitation[38].

51. At the risk of seeking to predict the judicial future, I think that a successful applicant would probably be subjected to the following formula for determining compensation:

> Value of loss of employment (likely length of employment (including a deduction for vicissitudes) from time of dismissal x annual income) – mitigation (redundancy pay + notice + likely alternative work + (possibly) workers compensation payments) + Out of pocket expenses + Distress, hurt and humiliation + Penalty + Interest

Unfair Dismissal

52. The *Fair Work Act* also sets out protections from what is popularly known as unfair dismissal. Under s 385, a person has been unfairly dismissed if FWA is satisfied that:

> (a) the person has been dismissed; and
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> (b) the dismissal was harsh, unjust or unreasonable; and
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> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
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> (d) the dismissal was not a case of genuine redundancy.

53. Both the reasons for the dismissal and the requirement of procedural fairness have a role to play in deterring whether the dismissal was unfair. While reinstatement is seen as the primary remedy, compensation is capped at 6 months pay. Prospective earnings are to be determined by the following formula:

> STEP 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment.
> STEP 2: Deduct moneys earned since termination. Workers compensation payments are deducted but not social security

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[36] See *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64; 74 ALJR 209; 167 ALR 575 (9 December 1999) at [106]
[37] *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 (26 August 2011) at [47]
[38] See for example s 44 of the *Safety Rehabilitation and Compensation Act 1988*

> payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation awarded.
> STEP 3: The remaining amount of compensation is discounted for contingencies.
> STEP 4: The impact of taxation is calculated to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.
> STEP 5: The legislative cap on compensation is applied. Section 170EE(3) limits the Court and the Commission to an amount not exceeding the amount of remuneration that the employee would have earned in the six months immediately following the termination, if the termination had not occurred. This is simply an arbitrary cap on the amount that may be awarded. It does not operate as a maximum amount to be awarded only in the most grievous or serious cases [39].

54. As SDP Richards held in *Bryson v Dy-Mark (Aust) Pty Ltd*, [2007] AIRC 339, 163 IR 357at [75] – [76]:

> The purpose of the application of the *Re Sprigg* guidelines is not to ascertain the level of "compensation" a member might think is appropriate. Rather, the guidelines are applied in order to ascertain the "amount" the employee may have earned prospectively but for the decision by the employer to terminate his employment ...

55. This amount, once ascertained by way of the application of the *Re Sprigg* guidelines, is but one matter …amongst all the matters in … [the section] of the Act, including "all the circumstances of the case" as well as the statutory direction … to provide a "fair go all round", to which a member has regard for purposes of determining the amount to be ordered in lieu of reinstatement.

56. The proceedings are generally costs free. The 2012 Annual Report of Fair Work Australia show about 14000 claims last year[40]. About 500 went to arbitration. Of these reinstatement was ordered in less than two dozen

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[39] *Sprigg v Paul's Licenced Festival Supermarket* (1998) 88 IR 21 at 29; although that decision is a guide to the exercise of discretion in awarding compensation. A member is not obliged to slavishly follow its outline in all circumstances: *Kane v South Eastern Group of Melbourne Legacy Inc* [2011] FWA 4651; [2011] FWAFB 4651 (21 July 2011).

[40] http://www.fwa.gov.au/documents/annual_reports/ar2011/FWA_annual_report_2010-11.pdf

cases. Anecdotal evidence shows that compensation is generally in the order of one or two thousand dollars[41].

57. An alternative reinstatement power exists under the Workers Compensation Act for injured workers[42].

The *Work Health and Safety Act*

58. As part of a move to a 'harmonised' occupational health and safety regime, the Commonwealth and most states passed similar legislation dealing with the subject. The Commonwealth legislation covers the Commonwealth and private sector employers who have successfully sought to self insure under the Comcare scheme.

59. Under the *Work Health and Safety Act*, employers have an obligation to ensure that their workplaces are safe.

> **19 Primary duty of care**
>
> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
> (a) workers engaged, or caused to be engaged by the person, and
> (b) workers whose activities in carrying out work are influenced or directed by the person,
> while the workers are at work in the business or undertaking.

60. In S*livak v Lurgi (Aust) Pty Ltd*[43]*17*, Gaudron J set out three general propositions on the meaning of "reasonably practicable

> • The phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
> • What is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
> • to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.

61. The High Court has stated in *Kirk* at [18] that

> The measures which must be taken are those which are reasonably

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[41] http://www.abc.net.au/7.30/content/2012/s3474428.htm
[42] See s 240 – 250 of the *Workers Compensation Act* NSW.
[43] *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; 205 CLR 304; 177 ALR 585; 75 ALJR 481 at [53]

practicable. The term is not defined in the OH&S Act, but It may often involve a common sense assessment.

62. Section 27 extends these duties to officers of those companies. It states in part that:

> (1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation…

63. In one of the first defended hearing to be decided in NSW[44]; Curtis J dealt with an employee who was aware of the risk that ultimately killed him and the safe procedure that would have obviated the risk. He had significant amounts of methamphetamine in his system. Workcover alleged the following risks:

> (i) no formal documented risk assessment;
> (ii) failure to instruct;
> (iii) failure to provide documented formal training
> (iv) failure to supervise

64. Curtis J rejected each particular. He found that the employee had been trained as to the safe procedure. His failure to observe it would not have been changed by the imposition of a documentary process. He dismissed the information and ordered that the prosecutor pay costs. The importance of this case is very great. It embodies an approach that seems to apply concepts from criminal law to the health and safety jurisdiction. In particular, the approach seems that the prosecution must prove its case beyond reasonable doubt.

The *Competition and Consumer Act 2010*

65. Section 31 of the *Competition and Consumer Act 2010* [formerly s 53B of the TPA] states that

> **31** A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:
>
> (a) the availability, nature, terms or conditions of the employment; or

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[44] *Workcover v Patrick Container Ports* 17 February 2014

66. (b) any other matter relating to the employment.

Note:
A pecuniary penalty may be imposed for a contravention of this section.

67. In order to make out his case under s 31, an employee would need to establish:

(1) that a representation was made;
(2) that, viewed objectively, the representation was liable to mislead him as to the availability, nature, terms or conditions, or another matter relating to the employment proposed; and
(3) that he relied on the representation.
(4) that there is a causal connection between the respondents' conduct and the loss for which he sought compensation[45]

The *Independent Contractors Act*

68. Lastly, it should be remembered that there is a capacity to set aside and vary contracts that apply to independent contractors. Section 12 of the *Independent Contractors Act* states that:

12 Court may review services contract

(1) An application may be made to the Court to review a services contract on either or both of the following grounds:

(a) the contract is unfair;

(b) the contract is harsh.

Note: A proceeding pending in the Federal Magistrates Court may be transferred to the Federal Court of Australia: see Part 5 of the *Federal Magistrates Act 1999*.

(2) An application under subsection (1) may be made only by a party to the services contract.

(3) In reviewing a services contract, the Court must only have regard to:

(a) the terms of the contract when it was made; and

(b) to the extent that this Part allows the Court to consider other matters—other matters as existing at the time when the contract was made.

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[45] *Walker v Salomon Smith Barney Securities Pty Ltd* (2003) 140 IR 433 at 473; (2003) ATPR (Digest) 46-240; [2003] FCA 1099; BC200305908 at [186].

69. In one of the few cases that has advanced into this jurisdiction; a number of matters have become clear:

- To be fair, a contract, or a provision in a contract, has to be fair to both parties[46].
- the substantive issue is whether the contract is unfair or harsh by its very terms; the procedural issue is whether it is unfair or harsh because of the means by or circumstances in which the agreement was reached[47].
- there is no impediment to the Court making an order which has a retrospective quality[48].
- There is nevertheless some question as to how damages may be sought for breach of such varied orders. Although s16(5) contemplates orders subsequent to an avoidance or variation being made to enforce those original orders, it makes no reference to damages being awarded consequent upon avoidance or variation of a contract.[49].

And just remember

70. If there is one lesson from these cases, it is that litigation is generally good for litigators. It is often not so good for those litigating. The course of litigation is not always straight or smooth. It can lead to enormous reputation damage and financial cost. With erudition that most of us could only dream of, Megarry J once said that:

> the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change[50].

Ian Latham

Denman Chambers

29 October 2014

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[46] *Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd* [2008] FMCA 1167 (22 August 2008); 176 IR 316 at [78]
[47] id at [82]
[48] *Keldote Pty Ltd v Riteway Transport Pty Ltd* [2009] FMCA 319 at [33] although cf *Informax International Pty Ltd v Clarius Group Limited (No 2)* [2011] FCA 934 (18 August 2011)
[49] Above at [94]
[50] *John v Rees* [1970] Ch 345

Ian Latham is a barrister at Denman Chambers. He specialises in industrial and employment law. He writes for the Lexis *Fair Work Act* and NSW *Industrial Relations Act* looseleaf services. He also writes articles on industrial and employment law. His best work can be found in his contributions to the *Football Almanac* and *Bruce the Wonderdog*.

His CV can be found at
http://www.denmanchambers.com.au/index.php/barristers/ian-latham/