REINSTATEMENT IN VICTORIA — THE TOBIN CASE

By Richard Johnstone* and Jane Patrick**

[In Victoria a dismissed employee may obtain an order for reinstatement under two statutes, the Equal Opportunity Act 1984 and the Industrial Relations Act 1979. In the Tobin *case a dismissed employee made an application for reinstatement to the Industrial Relations Commission and also laid a complaint before the Equal Opportunity Commission. The matter was heard by both bodies with reinstatement being ordered by the Equal Opportunity Commission. This article discusses the case which raises issues in relation to the overlapping jurisdictions of both bodies, the reasoning of both bodies in regard to the contract of employment, the interpretation of section 21 of the Equal Opportunity Act and the willingness of the Equal Opportunity Commission to order reinstatement. The authors conclude that the right result was reached despite questionable legal reasoning by both bodies and jurisdictional confusion.]*

On 7 October 1985 the Victorian Equal Opportunity Board handed down its decision in *Tobin v. Diamond Valley Community Hospital.*[1] The case is interesting for a number of reasons:

(i) It involved the Equal Opportunity Board making its first order of reinstatement under the Equal Opportunity Act 1984 (Vic.).[2]

(ii) It was the first case to explore the interaction of the jurisdictions of the Industrial Relations Commission of Victoria and the Equal Opportunity Board, and is an interesting case study of the progress of a matter from the relevant Conciliation and Arbitration Board to the Industrial Relations Commission, and then on to the Equal Opportunity Board.

(iii) The case also raised interesting legal issues relating to the contract of employment and the willingness of the Industrial Relations Commission and Equal Opportunity Board fully to explore these contractual issues.

(iv) The decision of the Equal Opportunity Board raised some complex issues relating to the interpretation and proof of discrimination under section 21 of the Equal Opportunity Act 1984.

(v) It casts light upon some of the issues judicial bodies face in making orders to reinstate employees.

1. *The facts*

The facts of the case are complex, and a detailed exposition is necessary for a proper analysis of the decisions of the Industrial Relations Commission and

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[1] (1985) E.O.C. 92-139.

[2] The Equal Opportunity Act 1984, which repealed its predecessor, the Equal Opportunity Act 1977. Note that in *Wardley v. Ansett Transport Industries (Operations) Pty Ltd* (1984) E.O.C. 92-002 the Equal Opportunity Board ordered the respondent to employ the complainant, an order perhaps even more radical than an order of reinstatement.

Equal Opportunity Board. In 1951 the complainant, a State registered nurse, was employed for two years by the Diamond Valley Community Hospital. When she commenced her second period of part time employment in 1967, she was not advised by the respondent of any age for retirement. In fact, the Hospital had no policy relating to the retirement age of either female or male employees until June 1979, when the Board of Management resolved that there be a policy requiring female employees to retire at age 60 and males at age 65.

Early in 1980 a Sister Thomas was given notice to retire at the age of 60. In May 1980, the complainant by letter enquired of the Secretary of the Hospital Board as to the retirement policy of the Hospital. She was informed, by a letter dated 19 June 1980, that the Hospital's retirement policy was followed by many, but not all other hospitals, and 'is based on the assumption that the age of qualifying for an Old Age Pension is a suitable age of ceasing full time work in an establishment such as this Hospital'. The letter added that this was not a rigid policy, 'but very strong reasons are required to justify a departure from the policy'.[3] This was the first time the complainant had received written advice of the policy. She testified before the Equal Opportunity Board that she knew of certain departures from this policy, and did not believe it to be a rigid policy.

In 1981 a booklet explaining the general details of the hospital's new superannuation fund was circulated to employees, together with a circular offering them an opportunity to join the fund. The booklet stated that the 'normal retirement date' of hospital employees was 'the date on which you reach your 60th birthday . . . By agreement, some other retiring age may apply in certain circumstances.' The respondents led evidence that the Hospital's retirement policy changed with the adoption of the superannuation scheme.[4] A number of other documents, all emanating from the hospital in 1984 or 1985,[5] reiterated that it was the policy of the Hospital to have all employees retire at age 60. Amongst these documents was a memorandum to all Hospital staff dated 22 August 1985 stating 'that at a meeting of the Board of Management held on Wednesday, 21 August 1985, it was resolved as follows:

> All employees of the Diamond Valley Community Hospital shall be retired at age 60 years.

Prior to this memorandum, there had been no notification to the thirty per cent (approximately) of employees who did not join the superannuation scheme that there had been a decision of the Hospital Board that the introduction of the scheme would have any effect on their retirement age. There was no evidence in the Board of Management minutes produced before the Equal Opportunity Board of any decision by the Hospital Board to change the retirement age. As the Equal Opportunity Board noted, it might be anticipated that such a significant change from the 1979 retirement policy would be recorded in the minutes in the same manner as the previous policy.[6]

[3] (1985) E.O.C. 92-139, 76,372.
[4] The principal evidence led was the testimony of two members of the Hospital Board of Management, Mr Ralph and Mr Jeffreys, and certain extracts of the minutes of Board of Management meetings: see (1985) E.O.C. 92-139, 76,374-5.
[5] Listed in (1985) E.O.C. 92-139, 76,373.
[6] (1985) E.O.C. 92-139, 76,375.

The complainant joined the superannuation scheme in 1982, but did so in the belief that this did not affect the age at which she could be required to retire. In April 1985 she received a letter from the Director of Nursing stating that she would be required to retire on 27 June 1985, her sixtieth birthday, in accordance with Board policy.

Sister Tobin wished to continue working at the Diamond Valley Community Hospital after her 60th birthday because she said she enjoyed the work and found it financially rewarding. The Hospital made no suggestion that her work was in any way unsatisfactory. It nevertheless refused her request to be permitted to remain in employment after her 60th birthday and at least until her husband retired in February 1986.[7]

2. *The proceedings before the Industrial Relations Commission of Victoria*

It was at this point that notification of 'the existence of a probable dispute between the Hospital and the [Hospital Employees] Federation'[8] resulted in the matter coming before the Registered Nurses Conciliation and Arbitration Board on 21 and 26 June 1985.

The basis of the dispute before the Board was outlined in a letter dated 20 May 1985 from the Hospital Employees Federation of Australia to the Hospital. The letter stated that '[a]ny action taken by the Hospital will be interpreted by the Federation as a harsh, unjust or unreasonable dismissal and will be pursued in accordance with sections 34(7) and 44[9] of the Industrial Relations Act 1979'.

Section 34(7) vests Conciliation and Arbitration Boards[10] with jurisdiction to hear a dispute arising from an alleged unfair dismissal if an application is made by the former employee within four days of the termination. Prior to late 1983 it appeared that the Boards did not have the power to order the reinstatement of a dismissed employee.[11] The Act was amended in 1983[12] so that section 34(5) now provides that:

7 The Industrial Relations Commission of Victoria in Full Session noted in passing that this 'was not an unreasonable request': Case No. 65/1985 at p. 3 of the decision handed down on 26 July 1985.

8 *The Diamond Valley Community Hospital and the Hospital Employees Federation of Australia*, Case No. 65/1985, 4. Note that the Conciliation and Arbitration Board does not have jurisdiction to hear reinstatement matters unless an application for reinstatement is made by the employee (or former employee): Industrial Relations Act 1979 s. 34(7). That application was made by Sister Tobin. The statement in the text is a reflection of the procedure in industrial disputes other than those concerning unfair dismissals. S. 44(1) of the Industrial Relations Act 1979 provides that an employer or an association of employers or employees with an interest in an industrial dispute may notify the Registrar of that dispute. The Registrar must then inform the President of the Commission and the chairman of the relevant Board (s.44(2)). Prior to the decision in *R. v. Marshall and Ors; ex parte Plumrose (Aust.) Ltd* [1983] V.R. 469 (*infra* n.11 at p.105) and the subsequent amendments to the Act (*infra* n.12) unfair dismissal disputes would have been dealt with in this way.

9 *Ibid.*

10 S.4 of the Industrial Relations Act 1979 (Vic.) establishes the Industrial Relations Commission of Victoria, which consists of a President, two commissioners and so many members as may be necessary for the administration of the Act. These members are the chairmen of the 205 Conciliation and Arbitration Boards. The Boards are the primary tribunals in the system and carry out most of the work of the Commission.

11 *R. v. Marshall and Ors; ex parte Plumrose (Aust.) Ltd* [1983] V.R. 469. In that case the Full Court of the Supreme Court of Victoria held that a dispute between an ex-employee and a former employer could not be said to be an industrial dispute and, therefore, the Industrial Relations Commission did not have jurisdiction to order reinstatement. The decision was subsequently overruled by the High Court in *Slonim v. Fellows* (1984) 54 A.L.R. 673.

12 Act No. 10000.

A Board may hear and determine any question in an industrial dispute as to whether the dismissal or threatened dismissal from his employment of an employee, not being an employee who has under any Act or law a right of appeal or review against his dismissal, was or would be harsh, unjust or unreasonable and the Board may direct the employer of that employee to re-employ that employee in his former position on terms that are not less favourable to the employee than if he had not been dismissed from his employment or not to dismiss him from his employment (as the case requires).

Section 3(1) was amended at the same time to include within the definition of industrial dispute 'a dispute arising from the dismissal or threatened dismissal from his employment of an employee'.

The Act makes provision for matters to be referred from Boards to the Commission. Section 44(4) enables a Board to apply to the Commission 'at any time during the course of a dispute for an order referring the matter of the dispute to the Commission for hearing and determination'. A matter may also be referred through section 37(8) which empowers a Board or a chairman of a Board 'to apply to the Commission in Court session to have any matter referred to the Commission for hearing and determination'.

It is unusual for matters to be referred to the Commission in this manner. From 14 December 1983 to 30 June 1986 there were 2,126 applications for reinstatement. Of those, seventeen were referred to the Commission. Ten of these were referred to determine a jurisdictional issue. Such questions usually centre on whether a Federal Award applies, in which case the Commission does not have jurisdiction. It may also concern a threshold legal question. In one case the employer questioned whether there had been a dismissal or threatened dismissal or whether the contract of employment had been terminated in some other way.[13]

A similar question was raised in the *Tobin* case. At a meeting of the Registered Nurses Conciliation and Arbitration Board the Hospital's representative requested that the matter be referred to the Commission on the ground that there was a question of law to be considered. The chairman of the Board referred the dispute to the Industrial Relations Commission for hearing and determination 'because of the significant range of principles involved in this matter'.[14] The Board's usual practice is to attempt to resolve the dispute through conciliation without becoming enmeshed in legal issues. When the hearing of a legal issue becomes necessary Boards will allow the parties to have legal representation or will grant an adjournment to allow the parties' representatives to seek legal advice. It is not clear why this practice was not considered suitable in this case.[15]

The formal application under section 44(4) was heard by the Commission in Full Session on 27 June 1985. After discussions with the parties the Commission reluctantly decided that the matter was unlikely to be resolved by conciliation at the Board level and that it would grant the application for a hearing by the Commission in Full Session.

In the proceedings before the Industrial Relations Commission in Full Session

[13] Hospital Medical Ancillary Services Conciliation and Arbitration Board, 12 April 1985.

[14] Case No. 65/1985, 1.

[15] It was suggested by the President of the Commission during the hearing of the application that the Chairman of the Board was aware that he would be away from the Commission for some time and would not be able to see the case through to its conclusion: see the Transcript of Proceedings before the Industrial Relations Commission, 2 July 1985, 18-19.

the Hospital argued that the terms of Sister Tobin's contract of employment arose from more than one source, and included the Registered Nurses Award, legislation[16] and the Hospital's retirement age policy of 1979. The Hospital argued that the 1979 retirement policy had been 'accepted' by the complainant, and that 'age 60 retirement' had become a term of the contract. The contract was 'comparable to a fixed term contract' in that it automatically terminated on the complainant's 60th birthday without either party having to do anything to end the employment relationship. As a consequence, it was argued, the Hospital was 'simply a passive passenger in the contract of employment' and had not in fact dismissed the complainant, so that the Commission had no jurisdiction to hear the matter.[17] In other words, the Hospital asked the Commission to determine a point of law, namely that the contract between Sister Tobin and the Hospital contained a term that she was to retire on her 60th birthday.

In its decision handed down on 27 July 1985, the Commission held that, at the time of the hearing, the 1979 retirement policy was the prevailing policy and had not been subsequently changed. After hearing all the evidence, the Commission concluded that 'the Hospital has generally but not completely satisfied any burden of proof and standard of proof (on the balance of probabilities) required of it'.[18] The Commission then considered the evidence that the Hospital had not invited its employees to renegotiate their contracts of employment in the aftermath of the change of retirement policy in 1979 and concluded that:

> (subject to Equal Opportunity Act questions) the employee's contract of employment now contains an implied term that her service with the Hospital would end when she attained the age of 60 years, subject to any strong reasons which might be seen as justifying an extension of time.[19]

The inference was that there was not a 'dismissal', and therefore there was no need to examine whether the termination of the contract was 'harsh, unjust or unreasonable'.

The Commission concluded that 'it is not impossible that what [it had] found to otherwise be an implied term of a contract of employment could be found to contravene a provision of [the Equal Opportunity Act]'.[20] It decided not to call for further argument on the point, but rather to adjourn proceedings until Sister Tobin's complaint lodged with the Registrar of the Equal Opportunity Board had been fully resolved. It also recommended that the complainant be kept on in employment by the respondent on a 'without prejudice' basis until the matter was resolved between the parties, conciliated by the Equal Opportunity Commissioner, or heard and determined by the Equal Opportunity Board. By the time the matter had come before the Equal Opportunity Board, the respondent had given notice to the complainant, who ceased work in accordance with that notice on the night of 21 July 1985.[21]

16 *E.g.* Industrial Relations Act 1979 (Vic.) Parts VI and VII.

17 *Cf.* the Employment Protection (Consolidation) Act 1978 (U.K.) s. 55(2)(b) which states that an employee shall be treated as 'dismissed' if a fixed term contract is not renewed. Note that the Commonwealth Conciliation and Arbitration Commission refused to embrace this wider definition of 'dismissal' in its decision in the *Termination, Change and Redundancy* case (1984) 8 I.R. 34, 44.

18 Case No. 65/1985, 9.

19 *Ibid.*

20 *Ibid.* 10.

21 (1985) E.O.C. 92-139, 76,372.

3. *The proceedings before the Equal Opportunity Board*

In its decision the Industrial Relations Commission noted that a complaint had been lodged with the Registrar of the Equal Opportunity Board on 2 July 1986. Sister Tobin alleged that the Board of Management of the Hospital had a policy of retiring its female employees when they reached 60 years of age, and its male employees when they attained 65 years of age. She argued that, as a consequence of this policy, female employees were treated less favourably than male employees by reason of their sex. It was argued that this amounted to unlawful discrimination under sections 21(1)(a), (b) and (c), and 21(2) of the Equal Opportunity Act 1984 (Vic.). Section 21(1) provides that it is unlawful for an employer to discriminate against a person on the grounds of, *inter alia*, the sex of the person (a) in determining who should be offered employment; (b) in the terms on which employment is offered; and (c) 'by refusing or deliberately omitting to offer employment'. Section 21(2) makes it unlawful for an employer to discriminate against an employee (a) 'by denying the employee access, or limiting access by the employee, to opportunities for promotion, transfer or training or to any other benefits connected with employment' or (b) 'by dismissing the employee or subjecting the employee to any other detriment'.

The Equal Opportunity Board held that the compulsory retirement policy resolved upon by the Board of Management on 21 August 1985 could not affect the complainant's case as she had already been dismissed, but concluded that it did show that a uniform retirement age of 60 years had not previously been adopted by the Hospital. The Board added that it had 'some difficulty with the proposition that the resolution of 21 August 1985 and the memorandum to staff can affect the position of existing staff without any renegotiation of their contracts of employment'.[22]

The Board held that the respondent did not, during the period of the complainant's employment, take any action resulting in a change to its retirement policy adopted on 27 June 1979 that females retire at age 60 and males at age 65. It further held that this policy resulted in less favourable treatment of women employees in that it 'significantly reduces their earning capacity by reducing their overall period of employment'.[23] The complainant was offered employment on less favourable terms than a male employee would have been offered in breach of section 21(1)(b) of the Equal Opportunity Act 1984, and was dismissed in circumstances where a male employee would not have been, in breach of section 21(2)(b) of the Act.

The Board dismissed the complainant's claim that she had been denied the benefit of continuing her employment in breach of section 21(2)(a) of the Act, because, while the complainant appeared to have been treated less favourably than other employees in this regard, there was evidence showing that other female employees had had the period of their employment extended beyond the age of 60. This indicated that it was not clear that the reason for this allegedly differential treatment of the complainant was that she was a woman. Complaints

22 (1985) E.O.C. 92-139, 76,376.
23 *Ibid.*

under section 21(1)(a) and (c) of the Act were dismissed because there was no evidence of any attempts by the complainant to obtain re-employment with the hospital.

The Board ordered the respondent to re-employ the complainant within 14 days as a part time nursing sister on similar terms and conditions to those on which she was employed immediately before her dismissal. After allowing both parties the opportunity to make submissions relating to damages and their taxation, the Board ordered the respondent to pay the complainant damages of $6,007.32. Both parties in their submissions had agreed that such damages were taxable under the Commonwealth Income Tax Assessment Act 1936.

The matter was relisted for hearing before the Industrial Relations Commission in Full Session on 9 January 1986. After hearing of the decision of the Equal Opportunity Board, the Commission was satisfied that the dispute was settled and that the case was concluded.

4. *Did Sister Tobin's contract of employment specify a retirement age?*

The basis of the Industrial Relations Commission's deferment of consideration of whether the termination of Sister Tobin's employment was 'harsh, unjust or unreasonable', and the reason that the Commission was prepared for the matter to go before the Equal Opportunity Board, was the Commission's finding that there was a term in her contract of employment that it would end when she reached the age of 60. The logic of this finding was that the Commission was sympathetic to the Hospital's argument that Sister Tobin was not 'dismissed' on her 60th birthday — rather her contract of employment had reached its agreed end without any action by either party to it.

One problem with this analysis is that it is difficult to see how the retirement age of 60 for women employees became part of the contract of employment between Sister Tobin and the Diamond Valley Community Hospital. This difficulty revolves around the following interrelated issues. First, what kind of term was it? Secondly, when did the term become part of the contract? Thirdly, what was the exact content of the term? Finally, how was the term affected by the Equal Opportunity Act 1984 (Vic.)? The Commission left this final point to be considered by the Equal Opportunity Board, and it will therefore not be canvassed in this section.

The Industrial Relations Commission decided that the term was 'an implied term', but did not explain how it reached this conclusion. Presumably the Commission rejected the argument that the Board of Management resolution of June 1979 became an express term of the contract. It is difficult to see how it could have become an express term because, as the Commission stated, the hospital did not renegotiate its contracts of employment with its employees. The Commission seemed to accept Sister Tobin's evidence that, although she was aware of the 1979 policy, she had not expressly accepted it as varying her contract of employment.[24] Therefore there could be no express bi-lateral variation of the contract of

[24] See the Transcript of Proceedings before the Industrial Relations Commission, 11 July 1985, 38-9.

employment. Nor was it open to either party unilaterally to change the terms of the contract of employment.[25] It is also difficult to argue that the fact that Sister Tobin knew of the 1979 retirement policy meant that it automatically became part of her contract of employment. Once a contract is concluded an employer cannot argue that terms subsequently brought to the notice of an employee are binding upon that employee without her or his express or implied agreement.[26]

The Board concluded that the term was 'implied', but did not give the reasons for this finding. In addition to terms of a contract of employment arising from the express agreement of the parties, statute[27] or collective agreements, the common law may fill gaps in the contract by means of implied terms. The test for implied terms in Australia is set out in *B.P. Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of the Shire of Hastings*[28] as follows:

> for a term to be implied, the following conditions (which may overlap) must be satisfied:
> (1) it must be reasonable and equitable;
> (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
> (3) it must be so obvious that 'it goes without saying';
> (4) it must be capable of clear expression;
> (5) it must not contradict any express term of the contract.

Before examining whether these conditions have been satisfied in Sister Tobin's contract of employment, it is necessary to look at two other issues: when did the implied term become part of the contract and what was the exact content of the term? In the absence of a subsequent variation to the contract, a term must be part of a contract when the contract is formed.[29] Therefore, the test in the *B.P. Refinery* case, even though it was *applied* by the Industrial Relations Commission in 1985, must have been applied to the circumstances surrounding the formation of Sister Tobin's contract of employment in 1967, and must reflect the presumed intention of the parties at that time. But what exactly was the term to be implied? According to the Industrial Relations Commission it was that Sister Tobin's service with the Hospital 'would end when she attained the age of 60 years, subject to any strong reasons which might be seen as justifying an extension of time'. This formulation suggests that the implied term was merely that Sister Tobin would retire at 60 years of age, with no mention of a retirement age for male employees. An alternative, albeit highly unlikely formulation of the implied term is that any resolution of the Hospital Board of Management relating to a retirement age for hospital employees automatically becomes the retirement

25 *R. S. Components Ltd v. Irwin* [1974] 1 All E.R. 41, 43.

26 See *Olley v. Marlborough Court Ltd* [1949] 1 K.B. 532; Hepple, B. A., and O'Higgins, P., *Employment Law* (4th ed. 1981) 118. *Cf. Petrie v. Mac Fisheries Ltd* [1940] 1 K.B. 258, where a plaintiff who commenced employment in 1930 was held bound by a term posted at the defendant's works in 1926. See also *Carus v. Eastwood* (1875) 32 L.T. 855.

27 In Australia statutory terms include awards under State and Federal conciliation and arbitration systems: see Creighton, W. B., Ford, W. J. and Mitchell, R. J., *Labour Law: Materials and Commentary* (1983) 48, para. 513.

28 (1977) 16 A.L.R. 363, 376. See also *Secured Income Real Estate (Aust.) Ltd v. St. Martins Investments Pty Ltd* (1979) 144 C.L.R. 596, 605-6; *Codelfa Construction Pty Ltd v. State Rail Authority of N.S.W.* (1982) 149 C.L.R. 337 and *Hospital Products Ltd v. U.S. Surgical Corporation and Others* (1984) 156 C.L.R. 41.

29 See *Olley v. Marlborough Court Ltd* [1949] 1 K.B. 532; Hepple, B. A. and O'Higgins, P., *Employment Law* (4th ed. 1981) 118. It is implicit in the 'officious bystander test' that an implied term must 'go without saying' at the time the parties were concluding their bargain: see n. 33 *infra*.

age governing the contract of employment. If the latter formulation were correct, it would easily account for the precise fixing of Sister Tobin's retirement age at 60 years. However, it is difficult to see how such a term could be implied in the circumstances, particularly given that the Industrial Relations Commission did not refer to a formulation of this type in its decision. Indeed, neither the hospital's representatives nor the Commission adverted at any stage of the proceedings to a formulation of this kind.

Applying the test in the *B.P. Refinery* case it is fair to say that the term to be implied is 'capable of clear expression'.[30] Looking at the other aspects of the test, it is clear that the implied term did not contradict any express term of the contract,[31] because no express term of the contract dealt with the issue of retirement.

Problems arise with the implication of a term as to retirement age when other aspects of the *B.P. Refinery* test are examined. The second and third parts of the test encapsulate the '*Moorcock* principle'[32] and its subsequent refinements.[33] In the absence of frustration or breach of the contract, or of a term expressly providing that the contract will automatically end when a fixed term expires or when a specified date is reached, a contract may usually be terminated by one of the parties giving sufficient notice to the other party.[34] It is difficult to see how a contract without an express term as to the employee's date of retirement will be 'ineffective' — clearly the employer can bring the contract to an end merely by giving the requisite period of notice.[35] It is therefore unlikely that the officious bystander, when faced with the question of whether Sister Tobin would have to retire on her 60th birthday, would respond with the words 'of course'. Such an implied term is not so obvious that 'it goes without saying'. Even if it was arguable that there was an implied term specifying her retirement age, 'business efficacy' does not suggest that the specified age should be 60 rather than 65 years. Certainly, the contract is effective, workable and intelligible[36] as it stands without an implied term specifying that all resolutions of the Hospital Board of Management relating to retirement age become part of the contract of employment.

In *Codelfa Construction Pty Ltd v. State Rail Authority of N.S.W.*[37] the High Court intimated that it is harder to imply a term in a contract which is 'not a

30 The fourth requirement of the test, *supra*.

31 The fifth requirement of the test, *supra*.

32 See *The Moorcock* (1889) 14 P.D. 64, 68, where Bowen L.J. stated that 'what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen.'

33 See *Shirlaw v. Southern Foundries (1926), Ltd* [1939] 2 K.B. 206, 227, where MacKinnon L.J. said that '[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common cry of "Oh, of course!"'

34 See Macken, J. J., McCarry, G. J. and Sappideen, C., *The Law of Employment* (2nd ed. 1984) 76; Creighton, Ford and Mitchell, *op. cit.* 125; Sykes, E. I., *Labour Law in Australia: Volume 1 — Individual Aspects* (2nd ed. 1980) ch. 3; and McCarry, G. J., 'Termination of Employment Contracts by Notice', (1986) 60 *Australian Law Journal* 78.

35 Note also the *dictum* of Mason J. in *Secured Income Real Estate (Aust.) Ltd v. St. Martins Investments Pty Ltd* (1979) 144 C.L.R. 596, 605, where he stated that '[t]he fact that such a provision would provide a greater protection for the respondent is not a sufficient reason for implying it'.

36 *O'Donnell v. Thor Industries Pty Ltd* (1977) 136 C.L.R. 296.

37 (1982) 149 C.L.R. 337.

negotiated contract'[38] but rather has its terms imposed by one of the parties. While *Codelfa* did not deal with a contract of employment, the High Court's reasoning could be applied to a contract between an employee and a large hospital where the employee has very little scope for 'negotiating' any of the terms of employment. This would be a further factor against the implication of a term specifying the age of retirement.

An alternative approach to the implication of a term relating to Sister Tobin's retirement age is to argue that such a term can be implied as being part of the custom of the trade or industry on the grounds that it is 'reasonable, certain and notorious'.[39] It is difficult to argue that this is the basis of the implied term in the *Tobin* case because there is no mention of such an approach in the Commission's decision. Indeed, neither of the parties to the proceedings seriously argued that there was a term to be implied by custom, nor was any evidence led about its reasonableness, certainty or notoriety. In fact, the Hospital's retirement records and the evidence led before the Equal Opportunity Board indicated that the 60 year retirement age was by no means standard in the Hospital.

In conclusion, then, it is difficult to support the Industrial Relations Commission's finding of an implied term specifying Sister Tobin's retirement age.

It is possible that what the Industrial Relations Commission was driving at in its reference to an 'implied term' was really an 'implied agreement' by Sister Tobin to the insertion into her contract of employment of the Board of Management's retirement policy. If this is so the Commission should not have used the phrase 'implied term' as this has a clear technical meaning in the law of contract.

For this 'implied agreement' view to have any basis, it would have to be argued that Sister Tobin 'accepted' the new retirement policy by her conduct in that she did not bring her objections to the policy to the attention of the Hospital within a reasonable period of time. Such 'acceptance', however, would have to be supported by consideration of some sort, such as compliance to a request to work in another job.[40] It is difficult to see what the consideration was in Sister Tobin's case. She was offered neither alternative employment nor, it appears, any additional retirement benefits. Alternatively, Sister Tobin's 'acceptance' could arguably give rise to an estoppel preventing her from denying that she was bound by the retirement age.[41] However, for an estoppel to operate the Hospital must have acted upon Sister Tobin's conduct to its detriment.[42] No evidence was led in the proceedings of the Hospital suffering any such detriment.

5. *The reasoning of the Equal Opportunity Board*

It appears from the tenor of the decision of the Equal Opportunity Board that what the Board held to be discriminatory was the retirement policy resolved upon by the Hospital's Board of Management in 1979, and that this policy was not

38 *Ibid. per* Mason J., 356 and Aikin J., 374.
39 See for example *Sagar v. Ridehalgh* [1931] 1 Ch. 310.
40 See Hepple and O'Higgins, *op. cit.* 88 (para. 183).
41 *Ibid.* 122 (para. 256); see *Smith v. Blandford Gee Cementation Co. Ltd* [1970] 3 All E.R. 154; O'Higgins, P., 'The Contracts of Employment Act 1963' [1964] *Cambridge Law Journal* 220, 224.
42 Hepple and O'Higgins, *op. cit.* 122 (para. 256).

only still in place at the time Sister Tobin was dismissed but was also the reason for her dismissal. It is difficult to argue that a policy requiring women to retire at 60 and men at 65 years of age is not discriminatory. The Board was certainly correct when it held that the 1979 retirement policy amounted to unlawful discrimination for the purposes of section 21 of the Equal Opportunity Act.[43]

The Board, however, appears to have avoided the central issue raised by the Industrial Relations Commission, namely whether Sister Tobin was in fact 'dismissed' by the respondent, or whether the contract came to an end without the need for direct action by either party because of the implied term relating to Sister Tobin's retirement age. The Equal Opportunity Board was not bound to follow the Industrial Relations Commission's finding of an implied term, and was free to hear fresh argument about the terms of Sister Tobin's contract. Nowhere in its decision does the Equal Opportunity Board affirm or dispute the Industrial Relations Commission's finding in relation to the implied term.

If the Commission was correct in implying a term specifying Sister Tobin's retirement age, the Equal Opportunity Board could not argue that the Hospital 'dismissed' Sister Tobin, because the contract provided for its own termination. Therefore the Hospital would not be liable for unlawful discrimination pursuant to section 21(2)(b) of the Equal Opportunity Act, because that section requires a 'dismissal'. If there was no 'dismissal' the Board would have to inquire whether the alleged implied term contravened some other provision of the Act. But it does not appear to have addressed this distinction between a 'dismissal' pursuant to a discriminatory policy, and an implied term which contravened the Act. Rather it assumed that Sister Tobin was 'dismissed' pursuant to the 1979 retirement policy, and completely ignored the issue, and consequences, of the Industrial Relations Commission's finding about the implied term.

The Board may have been on firmer ground in relation to section 21(2)(b) if it had argued that the Hospital's 1979 retirement policy had subjected Sister Tobin to a 'detriment' because of her sex. This would have avoided the 'dismissal' issue.

The Board held that Sister Tobin was offered employment on terms less favourable than a male would have been offered, in breach of section 21(1)(b) of the Act. The Board's decision does not make it clear when this 'offer' took place. The 'offer' could relate to the initial offer of employment in 1967, or to an 'offer' of further employment after Sister Tobin's 'retirement' in June 1985. The transcript of proceedings indicates that Sister Tobin's complaint related to an offer of further employment in June 1985. But that would then fall under paragraphs (a)

43 See, for example, the decision of the New South Wales Equal Opportunity Tribunal in *Anstee v. Allders International Pty Ltd* (1985) E.O.C. 92-132. In that case the Tribunal held that a company policy that required female employees to retire at 60 years, in contrast to male employees, who were allowed to retire at age 65, was discriminatory and in contravention of the Anti-Discrimination Act 1977 (N.S.W.). The Tribunal dismissed the argument that the existence of social security benefits, which are available to women at age 60, provided a justificaton under the Anti-Discrimination Act for compelling women to retire at an earlier age than men. The decision was affirmed by the New South Wales Supreme Court in *Allders International Pty Ltd v. Anstee* (1986) E.O.C. 92-157. See also *Marshall v. Southampton and S. W. Hanto A.H.A. (Teaching)* [1986] I.R.L.R. 140, where the European Court of Justice reached a similar conclusion in relation to the E.E.C. Equal Treatment Directive.

or (c) of section 21(1) of the Act, which relate to decisions as to whom shall be offered employment (section 21(1)(a)), or a refusal, or deliberate omission to offer employment to the complainant (section 21(1)(c)). The Board held, in relation to section 21(1)(a) and (c), that no evidence was led that Sister Tobin sought re-employment, and therefore dismissed those complaints.

It appears, therefore, that the 'offer' referred to in section 21(1)(b) must relate to the 'offer' of employment in 1967. The problem which then arises is that Sister Tobin was 'offered' employment 12 years before the Board of Management resolved upon its retirement policy. There could only be discrimination against Sister Tobin on the grounds of her sex if, in 1967, male employees had been offered different terms to those offered to her. Neither the Board nor the Industrial Relations Commission investigated the terms offered to male employees in 1967. Given the shakiness of the Commission's implied term analysis of Sister Tobin's contract of employment, it is difficult to see how it could convincingly be argued that there was an implied term setting out a retirement age of 65 years in contracts of employment offered by the hospital to *male* employees in 1967.

6. *Issues arising out of the Equal Opportunity Board's order of reinstatement*

The Equal Opportunity Board ordered that 'the respondent re-employ the complainant as a part time nursing sister on similar terms and conditions to those on which she was employed immediately before her dismissal'.[44] As a result of the Equal Opportunity Board's decision Sister Tobin entered into a new employment relationship with the Hospital. The Board did not take the opportunity to clarify the precise terms and conditions of this new contract. A clear statement of the terms and conditions of Sister Tobin's new contract, and in particular her retirement age, would have served to prevent any further dispute over the terms of her employment. It is not clear, for example, whether Sister Tobin was to retire when her husband retired, or whether she could continue until a later date.

The Equal Opportunity Board's decision is of interest for another reason — the Board's willingness to order reinstatement as the appropriate remedy. The Board made no reference to any potential difficulties in a reinstatement order. Apparently it saw Sister Tobin's return to work as a straightforward matter. The Board's attitude does not seem at all remarkable until it is contrasted with the traditional approach of the courts to the issue of reinstatement at common law.

[44] (1985) E.O.C. 92-139, 76,377. The Equal Opportunity Act 1984 gives the Board great flexibility in the orders it may make. Section 46(2) provides that the Board, after hearing the evidence and representations that the parties to the proceedings relating to a complaint desire to adduce or make, may make one or more of the following orders:

(a) It may order the person with respect to whom the complaint was made ('the respondent') to refrain from committing any further act of discrimination against the complainant;

(b) It may order the respondent to pay within a specified period to the person who made the complaint such damages as it thinks fit to compensate the last-mentioned person for loss damage or injury suffered by him in consequence of the act of discrimination to which the complaint relates;

(c) It may order the respondent to perform any acts specified in the order with a view to redressing any loss damage or injury suffered by the person who made the complaint as a result of the act of discrimination; or

(d) It may order that the complaint be dismissed.

In cases where the employer has breached the contract of employment by wrongfully dismissing the employee the courts can use the equitable remedies of declaration and injunction to enable the employee to return to her or his job. They have been extremely reluctant to do so. Specific performance is available as a remedy for breach of contract in other situations. Why should it not be available where the contract involved is a contract of employment? The English courts were not prepared to take this step. A general rule developed that specific performance would not be granted where a contract of employment had been breached.[45] The aggrieved party would have to rely on damages as a remedy.[46]

That general rule has now been modified somewhat. Damages are not always a suitable remedy and there have been several cases in which a declaration or injunction has been granted.[47] The courts now appear willing to allow exceptions to the rule if special circumstances are shown.[48] However, even in those exceptional cases, the relief given has not amounted to a specific injunction to reinstate the employee. This point can be illustrated by looking at an important case in the development of the English courts' acceptance of the possibility of granting specific performance in employment cases.

In *Hill v. C. A. Parsons & Co. Ltd*[49] the defendant employer had entered into a 'closed shop' agreement with a union to which the plaintiff did not belong. The plaintiff was given inadequate notice of the termination of his employment with the defendant. The Court of Appeal granted an injuction restraining the employer from treating the inadequate notice as determining the plaintiff's employment. The Court appeared to be motivated by the fact that if the plaintiff was given

[45] *De Francesco v. Barnum* (1890) 45 Ch. D. 430; *Whitwood Chemical Company v. Hardman* [1891] 2 Ch. 416, 426; *Warner Brothers Pictures Incorporated v. Nelson* [1937] 1 K.B. 209, 216; *Stevenson v. United Road Transport Union* [1977] I.C.R. 893, 906.
Acceptance of the general rule leads to the argument that because specific performance was not available, contracts of employment (unlike other contracts) could be terminated by the action of one party even if the termination was not accepted by the other party: *Taylor v. National Union of Seamen* [1967] 1 W.L.R. 532, 551; *R. v. East Berkshire Health Authority* [1984] 3 All E.R. 425, 433. The more accepted view appears to be that the contract cannot be terminated unilaterally: *Hill v. C. A. Parsons and Co. Ltd* [1972] Ch. 305, 313, 318-9; *London Transport Executive v. Clarke* [1981] I.R.L.R. 166, 170; *Gunton v. Richmond-Upon-Thames London Borough Council* [1981] Ch. 448, 459; *Thomas Marshall (Exports) Ltd v. Guinle* [1979] Ch. 227, 243; *Automatic Fire Sprinklers Pty Ltd v. Watson* (1946) 72 C.L.R. 435, 450, 469, 476; *Turner v. Australasian Coal and Shale Employees Federation* (1984) 55 A.L.R. 635, 647-8.

[46] *Whitwood Chemical Company v. Hardman* [1891] 2 Ch. 416.

[47] Where the employee was also a common law or statutory office-holder see *Vine v. National Dock Labour Board* [1957] A.C. 488; *Ridge v. Baldwin* [1964] A.C. 40; *Kanda v. Government of the Federation of Malaya* [1962] A.C. 322. Cases where the employee was not a common law or statutory office holder include *Lumley v. Wagner* (1852) 1 De G.M. & G. 604; *Warner Brothers Pictures Incorporated v. Nelson* [1937] 1 K.B. 209; *Taylor v. National Union of Seamen* [1967] 1 W.L.R. 532; *Hill v. C. A. Parsons and Co. Ltd* [1972] Ch. 305; *Stevenson v. United Road Transport Union* [1977] I.C.R. 893; *Giles v. Morris* [1972] 1 W.L.R. 307; *Irani v. Southampton and South-West Hampshire Health Authority* [1985] I.R.L.R. 203. It has been suggested that decisions such as *Taylor* and *Stevenson* seem to suggest that the British Courts are moving away from the 'common law statutory officeholder' categorization, and towards a recognition that the provisions of the contract of employment itself may confer certain rights upon the employee which will be protected by declaration and (where appropriate) injunction: see Creighton, W. B., Ford, W. J. and Mitchell, R. J., *Labour Law: Materials and Commentary* (1983) para. 10.15.

[48] *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 1 W.L.R. 1411, 1417; *Hill v. C. A. Parsons and Co. Ltd* [1972] Ch. 305, 314 *per* Lord Denning M.R., 319 *per* Sachs L.J.

[49] [1972] Ch. 305. It has been suggested that this case should be regarded as an 'exception': *Chappell v. Times Newspapers Ltd* [1975] I.C.R. 145, 173, 176. However, in *Irani v. Southampton and South-West Hampshire Health Authority* [1985] I.R.L.R. 203, the Court took a very similar approach to that of the Court of Appeal in *Hill v. Parsons*: see *infra*.

adequate notice, the termination of his contract of employment would be delayed until the Industrial Relations Act 1971 (U.K.)[50] came into force. Even if he was immediately lawfully dismissed, he could seek a remedy under the new legislation. The Court seemed more concerned with the protection of those rights than the protection of his job.

The decision in *Hill* was followed in *Irani v. Southampton and South-West Hampshire Health Authority*.[51] There the plaintiff sought an interlocutory injunction to restrain the defendant from implementing a notice of dismissal until the correct procedures for resolving the dispute between him and his employer had been followed.[52] The injunction was granted but it was granted on the basis that Irani had given an undertaking that he would not attempt to work at any hospital run by the defendant.[53] Again, whilst partial specific performance was granted, it is clear that Irani was not to be reinstated to his former position.

Traditionally, Australian courts have appeared to accept the general presumption against an order for the specific performance of a contract of employment.[54] A recent case in the Federal Court of Australia, *Turner v. Australasian Coal and Shale Employees and Another*[55], suggests an acknowledgement that the general rule is not always appropriate and that in cases where 'special circumstances'[56] exist 'the courts will no longer set their faces against granting the remedies of declaration and injunction with respect to contracts of employment'.[57] Despite that acknowledgement, it is difficult to tell from the Court's decision how far they would be prepared to go in ordering an employer to reinstate an employee. It was the Court's opinion that specific performance is not necessarily impractical.[58] It went on to discuss examples of situations in which specific performance might be appropriate. All the examples concerned cases in which the remedies were sought to protect 'continuing obligations and rights'[59] rather than to ensure the employee's right to return to work.

The Court made the further point that granting specific performance 'is not to say that a court will decree that an employee can never leave the employment, or be dismissed by the employer'.[60] It is difficult to imagine that a court would ever make an order in those terms. Reinstated employees generally have the same

50 Provisions of the Industrial Relations Act 1971 (U.K.) made 'closed shop' agreements unlawful in certain circumstances. If employers sought to implement unlawful agreements by dismissing an employee they would be guilty of an unfair industrial practice. In that situation an industrial tribunal could recommend the employee's reinstatement or re-engagement. The industrial tribunals now have a broader power to order re-employment under the Employment Protection (Consolidation) Act 1978 (U.K.), ss 68 and 69. The power is rarely used: see Dickens, L., Jones, M., Weekes, B. and Hart, M., *Dismissed* (1985) 108; Upex, R., *Termination of Employment: The Legal and Financial Implications* (1983) 116.

51 [1985] I.R.L.R. 203.

52 *Ibid*. 206.

53 *Ibid*.

54 *Lucy v. The Commonwealth* (1923) 33 C.L.R. 229, 237, 248-9, 253; *Automatic Fire Sprinklers Pty Ltd v. Watson* (1946) 72 C.L.R. 435.

55 (1984) 55 A.L.R. 635.

56 *Ibid*. 649. 'Cases where continuing obligations and rights are in question might give rise to such special circumstances.'

57 *Ibid*. 649.

58 *Ibid*. 648-9.

59 *Ibid*. 649.

60 *Ibid*.

terms and conditions[61] of employment as they had prior to their dismissal. A dismissal which does not breach these terms and conditions, and which complies with the law, will validly terminate the contract of employment. The Court was perhaps expressing an underlying anxiety about orders of specific performance. It went on to give the reassurance that, being an equitable remedy, the courts could make an order which suited the circumstances of the case. The order in *Hill v. Parsons* was given as an example.[62] This suggests that, while the Court said that remedies of injunction and declaration were appropriate in relation to contracts of employment and may be used to protect certain obligations and rights, it was less than enthusiastic about ordering the reinstatement of a dismissed employee.[63]

The Courts have expressly relied on a number of factors to justify this cautious attitude. These cover a range of issues, some of which arise fom the application of general contractual theory to the contract of employment. Others stem from doubts as to the likely success of an order for reinstatement. They include the following:

(1) that damages are an adequate remedy;
(2) the difficulty of supervision [by the courts];
(3) the want of mutuality;
(4) public policy, for it is wrong that someone should be ordered by the court to employ a person whom he does not wish to employ.[64]

Reliance on damages as a remedy may initially have been the result of the traditional refusal to grant an order of specific performance rather than a reason for that refusal. An employee who had been unlawfully dismissed could not obtain an order for reinstatement but could get damages.[65] However, damages may not always be an adequate remedy. Common law damages for breach of a contract of employment are limited to the amount of remuneration that the employee would have received had the employment continued up to the time when the contract of employment could have been lawfully terminated.[66] Such damages are clearly inadequate when an employee wants her or his job back or when the protection of status or rights is required.[67]

Regular and constant supervision by the courts would obviously be impractical. However, it is questionable whether supervision is necessary. Injunctions are granted by the courts in other situations without provision for supervision by

61 These terms and conditions may ensure a high degree of job security. In *McClelland v. Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594, the employer purported to dismiss the employee, a woman who had recently married. It was the employer's policy not to employ married women. The Court held that, under her original contract of employment, the employee could only be dismissed if gross misconduct, inefficiency or unfitness were proved. Accordingly, her contract of employment had not been validly terminated.

62 *Turner v. Australasian Coal and Shale Employees' Federation* (1984) 55 A.L.R. 635, 649.

63 The Court ordered that the matter be remitted to the Federal Court of Australia, constituted by a single judge, for a decision on whether any relief should be granted by the employer: (1984) 55 A.L.R. 635, 652. At the time of writing, there is no record of any decision on this matter.

64 Fry, E., *A Treatise on the Specific Performance of Contracts* (6th ed. 1921), 50, referred to by counsel in *Hill v. C. A. Parsons and Co. Ltd* [1972] 1 Ch. 305, 309.

65 *Whitwood Chemical Company v. Hardman* [1891] 2 Ch. 416, 420.

66 *Addis v. Gramophone Co. Ltd* [1909] A.C. 488.

67 *Hill v. C.A.Parsons and Co. Ltd* [1972] 1 Ch. 305; *Vine v. National Dock Labour Board* [1957] A.C. 488; *Walker v. The Queen Elizabeth Hospital and South Australian Health Commission and The State of South Australia* (1983) 25 A.I.L.R. 366.

the courts. The possibility of punishment for contempt of court is relied on as a sufficient incentive to obey the injunction.[68] The problem of enforcement of injunctions is not confined to the area of contracts of employment, and it is not clear why it should be a reason for refusing to grant specific performance of these contracts.[69]

The problem arising from the want of mutuality illustrates the difficulties inherent in a strict application of contractual principles to the contract of employment. Contracts ordinarily must be equally enforceable against either party.[70] Employment contracts will not be enforceable against employees as the notion of compelling a person to work seems both impractical and undesirable.[71] If courts cannot grant specific performance against an employee, then granting specific performance against the employer would offend against the rule of mutuality.[72] Conforming to the rule of mutuality may not be unfair if the employment relationship is seen as one to which ordinary contractual principles should be applied. In reality the employer and employee are not in an equal situation. The consequences for a dismissed employee will usually be far more serious than the consequences for an employer whose employee decides to terminate her or his contract of employment.[73]

Courts in more recent cases[74] have not referred to lack of mutuality as being a problem. In part, that may reflect an acceptance of the reality of the inequalities inherent in the employment relationship. It is more likely to indicate that the courts have only sought to protect certain rights and obligations in the contract of employment and have not gone so far as to order an employer to reinstate a former employee.

It is the fourth reason which seems to cause the greatest difficulty. It embodies two aspects that are of concern to the courts. First, the courts would be interfering with management's right to hire and fire.[75] Secondly, there may be difficulties in sending a person back to work when the relationship between employer and employee has broken down.[76]

The courts have seen great difficulties in reinstating former employees once

68 *C. H. Giles and Co. Ltd v. Morris and Others* [1972] 1 W.L.R. 307, 318.

69 *Turner v. Australasian Coal and Shale Employees' Federation* (1984) 55 A.L.R. 635, 648.

70 See Starke, J. G. and Higgins, P. F. P., *Cheshire and Fifoot Law of Contract* (4th Australian ed. 1981) 672-3, para. 2746.

71 *Whitwood Chemical Company v. Hardman* [1891] 2 Ch. 416, 420; *Giles v. Morris* [1972] 1 W.L.R. 307, 318; *De Francesco v. Barnum* (1890) 45 Ch. D. 430, 438.

72 Kahn-Freund, O., *Selected Writings* (1978) 316.

73 *United Kingdom Royal Commission on Trade Unions and Employers' Associations 1965-1968 Cmnd Report 3623* (the 'Donovan Report') (1968) 142.

74 *E.g. Hill v. Parsons, Giles v. Morris, Turner v. Australasian Coal and Shale Employees' Federation.*

75 For an example of expression of this concern about interference with employers' rights of 'hire and fire' see the Second Reading speeches on the Industrial Relations (Amendments) Bill 1983 in the Victorian Legislative Assembly, Victoria, *Parliamentary Debates*, Legislative Assembly, 23 November 1983, 2226 and 2229. The same concern has been shown by the chairman of the Registered Nurses Conciliation and Arbitration Board: see Case B840533 ('the *Yarrawonga* case') Decision dated 8-8-84, 8. A member of the Board of Management at the Diamond Valley Hospital expressed a similar view in the *Tobin* case. He said 'an employer has the right to have a discretion in retiring people': see Equal Opportunity Board, Transcript of Proceedings 11-9-85, 47.

76 *Chappell and Others v. Times Newspapers Ltd and Others* [1975] I.C.R. 145, 178; *Page One Records Ltd and Another v. Britton and Others* [1968] 1 W.L.R. 157, 165; *Hill v. C. A. Parsons and Co. Ltd* [1972] 1 Ch. 305, 314; *Gunton v. Richmond-Upon-Thames London Borough Council* [1981] Ch. 448.

the employment relationship has broken down. However, the Equal Opportunity Board showed a more positive approach when faced with this issue in the case of *Thorne v. R.*[77] The complainant, a teacher with the Education Department of Victoria, was not dismissed but was transferred from teaching duties to an administrative position. The Director-General had transferred her in response to pressure resulting from the publication of her supposed views on the ability of children to consent to sexual intercourse.[78] Conditions were then imposed which had to be met before the complainant could resume teaching. The Director-General apparently felt that those conditions would be impossible to meet.[79] The complainant wished to resume teaching duties and lodged complaints with the Registrar of the Equal Opportunity Board alleging that she had been discriminated against by reason of her private life.[80] Although the complainant had not been dismissed the problem facing the Equal Opportunity Board was similar to that faced in dismissal situations. The Board had to decide whether it would order the Department to return the complainant to a teaching position when the Director-General, the Minister and the Premier had shown that they were opposed to her return to the classroom.[81] Despite this opposition the Board ordered the Department to appoint the complainant to a teaching position at one of ten technical schools to be listed by the complainant.[82] It also ordered that for the purposes of promotion, appointment and transfer the complainant should be treated as though she had been in a teaching position during the time she was transferred to an administrative position.[83]

A number of other practical problems might also arise — for example, the employer may have already employed someone else in the position formerly occupied by the dismissed person.[84] It is of interest to note that this problem has come to the attention of the Equal Opportunity Board. In *Arumugam v. Health Commission of Victoria*[85] the Board decided that Dr Arumugam had suffered discrimination when he applied for the position of Psychiatrist Superintendent of Plenty Hospital.[86] The Board felt that the only adequate remedy was to order the Health Commission to employ Dr Arumugam in that position. The difficulty was that another doctor had already been employed in that position at Plenty Hospital. The Board subsequently ordered the Health Commission to appoint Dr

[77] (1986) E.O.C. 92-182. The Board has been prepared to act despite the breakdown of a relationship in a different context. In *Oldham v. Women's Information and Referral Exchange* (1986) E.O.C. 92-158 the Board ordered the respondent to reinstate the complainant as a member of their collective despite their opposition to certain views held by the complainant.

[78] *Ibid.* 76,724.

[79] *Ibid.* 76,726-8.

[80] *Ibid.* 76,723.

[81] *Ibid.* 76,736-7.

[82] *Thorne v. R.* Order of the Equal Opportunity Board, 27 November 1986. Both parties accepted that the complainant should not return to the school from which she had initially been transferred. The case is therefore not one of reinstatement.

[83] *Ibid.*

[84] *Page One Records Ltd v. Britton* [1968] 1 W.L.R. 157; *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 1 W.L.R. 1411; *Hill v. C.A. Parsons and Co. Ltd* [1972] 1 Ch. 305. The possibility of continuing industrial action may also be a problem: see *Chappell v. Times Newspapers Ltd* [1975] I.C.R. 145; *Gordon v. State of Victoria* [1981] V.R. 235.

[85] (1986) E.O.C. 92-155.

[86] *Ibid.*

Arumugam to an equivalent position in another hospital.[87] The Health Commission was able to find such a position and appointed Dr Arumugam to it. This case illustrates the point that, particularly when large organisations are involved, the fact that a replacement has been employed may not be an insurmountable problem.[88]

In both *Arumugam* and *Thorne*[89] the Board has shown that it is prepared to be flexible in the orders it makes. In both cases it sought to redress results of discrimination but also acknowledged the practical difficulties and tailored its orders to deal with them.[90]

The brief description of the courts' difficulties when faced with issues of reinstatement highlights the contrasting approach of the Equal Opportunity Board in the *Tobin* case. The readiness of the Board to order reinstatement indicates that the courts have put too much emphasis on the practical difficulties they perceived to be involved in giving specific performance of the contract of employment. It appears that changed employment practices are reducing the opposition of some employers to reinstatement. The courts have shown that they are aware of these changes and are beginning to take them into account.[91] Decisions such as that in the *Tobin* case add to the pressure on the courts to justify their reluctance to order specific performance of the contract of employment.

7. *The relationship between the unfair dismissal provisions of the Industrial Relations Act and the Equal Opportunity Act*

The *Tobin* case illustrates very clearly the problems arising out of the overlapping provisions of the Industrial Relations Act and the Equal Opportunity Act in relation to unfair dismissals.

The Industrial Relations Commission appears to have adopted a practical approach to the issue of overlapping jurisdictions. It is concerned to maintain at least one avenue of appeal for an aggrieved party. The following procedure has been adopted whenever an alternative avenue of appeal appears to be available to the applicant. The Registrar accepts the application. At the Board meeting the applicant is asked whether a complaint has been lodged with the Registrar of

87 *Arumugam v. Health Commission of Victoria*, Order of the Equal Opportunity Board, 24 April 1986.

88 The United Kingdom reinstatement legislation specifically refers to the replacement of a dismissed employee and provides that the fact such a replacement has been found will not automatically mean that a reinstatement order in respect of an unfairly dismissed employee is impractical. Employment Protection (Consolidation) Act 1978 (U.K.) s. 70(1).

89 After the Board's decision the parties reached an agreement that Ms Thorne would be given a position in a College of Technical and Further Education (tertiary) rather than in a secondary technical school: *Age* (Melbourne) 5 December 1986. Although the Board's order was not fully implemented it apparently gave some impetus to the parties to settle the matter.

90 In both cases the Board could have avoided the difficult issues and ordered damages. Instead it sought to make full use of the flexibility allowed it by s. 46(2) of the Equal Opportunity Act 1984 (Vic.): *supra* n. 44.

91 *Chappell v. Times Newspapers Ltd* [1975] I.C.R. 145, 175; *Hill v. C. A. Parsons and Co. Ltd* [1972] 1 Ch. 305, 321; *R. v. British Broadcasting Corporation; ex parte Lavelle* [1983] I.C.R. 99, 111. See generally McMullen, J., 'A Synthesis of the Mode of Termination of Contracts of Employment' [1982] *Cambridge Law Journal* 110, and Burrows, A. S., 'Specific Performance at the Crossroads' (1984) 4 *Legal Studies* 102, 114.

the Equal Opportunity Board. If it has, and the Registrar of the Equal Opportunity Board accepts jurisdiction, the matter is usually withdrawn from the Conciliation and Arbitration Board. The Board may however, feel that there are industrial issues involved in addition to issues of discrimination. In such cases the matter might not be withdrawn from the Board.

It may be that this approach is not possible under the legislation as it now stands. Section 34(5) of the Industrial Relations Act vests jurisdiction in the Conciliation and Arbitration Board to hear any disputes arising from the dismissal or threatened dismissal of an employee 'not being an employee who has under any Act or law a right of appeal or review against his dismissal'. Could it not be argued that Sister Tobin had 'a right of review' against her dismissal under the Equal Opportunity Act, and that, as a consequence, the Conciliation and Arbitration Board could not deal with her dismissal under section 34(5)? The right to have the matter heard under the Equal Opportunity Act would seem to constitute 'a right of appeal or review'. The Equal Opportunity Board is empowered, *inter alia*, to inquire into all the circumstances of the case and to substitute its own decision for that of the employer. Such proceedings would certainly constitute 'appeal to review' on a broad interpretation of the words.[92] They may even constitute a 'review' on a narrow interpretation.

These arguments were not considered by the Commission in *Tobin's* case. They have, however, been addressed by the South Australian Industrial Commission, the South Australian Supreme Court and the High Court of Australia. In *Caridi v. Steiger Australia Ltd*[93] the South Australian Industrial Commission was asked to consider whether a provision in the South Australian Industrial Conciliation and Arbitration Act 1972[94] which precluded an application for relief against an unfair dismissal 'where the dismissal of the employee is subject to appeal or review under some other Act or law' was triggered by a complaint against a dismissal to the Human Rights Commission under the Commonwealth Sex Discrimination Act 1984. The Industrial Commission decided that the applicant's dismissal *was* 'subject to' appeal or review under the Sex Discrimination Act and was therefore debarred *ab initio* from being considered by the Industrial Commission. Stewart notes that the Industrial Commission assumed that the exclusion was activated 'at the point where it became clear that a *claim* had been laid before the Human Rights Commission in terms that raised the question of unfair dismissal.'[95] The complainant could thus choose the forum for her complaint, and would then be bound by that election.[96]

92 See Wells J. in *R. v. The Industrial Court of South Australia; ex parte District Council of Karoonda East Murray* (1980) 24 S.A.S.R. 117, 125-6.

93 [1986] A.I.L.R. 128 (Eglinton, C.).

94 S. 32 (2).

95 Stewart, A., 'The New Unfair Dismissal Jurisdiction in South Australia' (1986) 28 *Journal of Industrial Relations* 367, 383. (Emphasis in original.)

96 *Ibid*. A similar situation arose in Victoria in July 1986. (Case B860737, Commercial Clerks' Conciliation and Arbitration Board, 15 July 1986.) There the complainant indicated that she would await the outcome of proceedings before the Commercial Clerks' Conciliation and Arbitration Board before deciding whether to pursue her remedies under the Equal Opportunity Act. The Commercial Clerks' Board, however, requested her to make her choice there and then. After discussions she withdrew her application to the Industrial Relations Commission, and announced that she would proceed with her complaint under the Equal Opportunity Act. There was no suggestion, however, that this approach was based on the reasoning in *Caridi*.

It is not clear why the appearance of the words 'subject to' should result in the requirement that a complaint under the Sex Discrimination Act should have *commenced* before the complainant's rights under the South Australian legislation were lost.[97] In *Ex Parte Karoonda*[98] the South Australian Supreme Court considered a debarring provision identical to the one in section 34(5) of the Victorian Act. It was held that a right of review available to the applicant under the Local Government Act 1934 (S.A.), operated so as to exclude any application to the South Australian Industrial Court. In *North West County Council v. Dunn*[99] the High Court reached the same conclusion in relation to two Acts, the Local Government Act 1919 (N.S.W.) and the Industrial Arbitration Act 1940 (N.S.W.). Both Acts provided an avenue of appeal against a dismissal but neither Act contained a debarring provision. The Court held that the existence of a right of appeal under the Local Government Act excluded the jurisdiction arising from the Industrial Arbitration Act. This was despite the fact that the applicant had not even commenced proceedings under the Local Government Act and was out of time. These two decisions suggest that the fact that Sister Tobin had a *right* to make a complaint under the Equal Opportunity Act barred her from seeking relief under section 35(5) of the Industrial Relations Act. She could not even exercise a choice as to her preferred jurisdiction.

Stewart suggests that there is only one argument against this logic, namely that the Conciliation and Arbitration Board or the Industrial Relations Commission are in no position to determine whether a section 34(5) application also falls within the provisions of the Equal Opportunity Act.[1] As a consequence, he argues, the Board or Commission is justified in looking solely at the complaint before them, and not any hypothetical claim.[2] In the context of the *Tobin* case this is highly persuasive — the Industrial Relations Commission expressly stated that it believed it was not competent to adjudicate upon matters coming under the Equal Opportunity Act and was happy to see the matter argued before the Equal Opportunity Board.[3]

Whilst Stewart's argument may be persuasive, two decisions of the Industrial Relations Commission and one in the Victorian Supreme Court support an interpretation of section 34(5) that is consistent with the approach taken in *Caridi*, *Karoonda* and *Dunn*. The two cases before the Industrial Relations Commission, *Royal Children's Hospital v. Tuccitto*[4] and *Royal Children's Hospital v. Zappulla*,[5] concerned dismissals from the Royal Children's Hospital. Under the Hospital's by-laws a procedure existed whereby a dismissal could be reconsidered by an internal committee. Marshall P. in *Tuccitto* decided that this procedure amounted to 'a right of appeal or review' and that the Industrial

[97] Stewart, *loc. cit.*

[98] *R. v. Industrial Court of South Australia; ex parte District Council of Karoonda East Murray* (1980) 24 S.A.S.R. 117.

[99] (1971) 126 C.L.R. 247.

[1] Stewart, *op. cit.* 384.

[2] *Ibid.*

[3] Taking this reasoning to its logical conclusion suggests, however, that once the Equal Opportunity Board upheld Sister Tobin's complaint, the Commission lost its jurisdiction, and should not have relisted it for a report back.

[4] (1985) 1 V.I.R. 484

[5] (1985) 2 V.I.R. 30.

Relations Commission therefore had no jurisdiction to hear the matter. This decision was followed by the Industrial Relations Commission in *Zappulla*. Both cases went on appeal to the Supreme Court of Victoria and were decided together by Vincent J.[6] He held that the procedures available to the applicants did not constitute an 'appeal or review' within section 34(5).[7] Although he disagreed with the Commission on this point, Vincent J. appeared to agree that the Industrial Relations Commission's jurisdiction would have been excluded if the procedure had constituted an 'appeal or review' within section 34(5). He stated that 'if one right is to be excluded by the availability of another, then it would be reasonable to infer that they must be concerned with the same subject matter'.[8] It would appear from these cases that the Victorian Supreme Court would follow the line taken in *Carida*, *Karoonda* and *Dunn*.

There is one great disadvantage in the Conciliation and Arbitration Board losing its jurisdiction to hear and determine unfair dismissals involving issues of discrimination. It is most important that unfair dismissal cases be heard and determined as quickly as possible. The longer the delay, the more difficult it is to overcome any problems arising in relation to reinstatement. This policy consideration is reflected in the requirement that applications for reinstatement be lodged with the Registrar of the Industrial Relations Commission within four days of the dismissal. It is possible that the interests of a person seeking reinstatement could be prejudiced by the length of time taken by proceedings under the Equal Opportunity Act.[9]

It would thus appear that the issue of the overlapping of the provisions of the Equal Opportunity Act and the Industrial Relations Act in relation to unfair dismissal should be dealt with by Parliament. One solution could be to amend the legislation to reflect the present practice of the Industrial Relations Commission. In addition, it may be worthwhile giving the chairman of the Conciliation and Arbitration Board, or for that matter the Registrar of the Industrial Relations Commission, the power to refer an application for reinstatement to the Equal Opportunity Board when the matter comes within the ambit of the Equal Opportunity Act. The referral need only take place once a Conciliation and Arbitration Board's attempt to conciliate the matter proved unsuccessful. This would have the advantage of utilizing the industrial relations expertise of the Conciliation and Arbitration Board to conciliate the matter according to industrial principles.[10] If conciliation failed, the matter could be adjudicated by the Equal Opportunity Board interpreting the provisions of the Equal Opportunity Act.

8. *Conclusion*

The above analysis suggests that, while the Equal Opportunity Board's willingness in the *Tobin* case to make an order for the reinstatement of the

6 *R. v. Marshall; ex parte Tuccitto, R. v. Marshall; ex parte Zappulla* (1985) 2 V.I.R. 125.

7 *Ibid.* 133, 134, 136.

8 *Ibid.* 132.

9 Concern as to the length of time taken by the Equal Opportunity Board was expressed by the chairman of the Registered Nurses Conciliation and Arbitration Board in Case B851259, 4 December 1985.

10 See further *infra*. p. 124.

complainant to her former employment is to be warmly welcomed, the analysis of the Equal Opportunity Board and of the Industrial Relations Commission is flawed in many respects. It appears that the Commission was eager to have the matter taken out of its hands and argued before the Equal Opportunity Board, as it perceived, quite correctly, that the Equal Opportunity Board was better equipped to deal with issues of discrimination raised by Sister Tobin's complaint.

However, the basis of this attempt to transfer the matter to the Equal Opportunity Board, revolving around the 'implied' term that Sister Tobin must retire at age 60, appears ill-founded. It is very difficult to justify or explain the Commission's conclusion that Sister Tobin's contract of employment contained a term specifying her retirement age. Instead of adopting a rigorous contractual analysis of the problem, and examining whether there was an implied term or subsequent variation of the contract, the Commission seemed to reach its conclusion by plucking an implied term out of the air. This reflects the general inability of Australian courts and tribunals to deal sensibly with the contract of employment.[11] It also shows the problems which arise when an industrial tribunal has to decide a complex legal issue without the benefit of technical legal argument. While it is generally sound policy to discourage the use of lawyers before industrial tribunals, the parties should perhaps be encouraged to seek legal representation when arguing the substantive legal issues before the tribunal.

One consequence of the decision of the Commission that there was an implied term relating to Sister Tobin's retirement age is that the dispute was resolved on technical legal grounds, and not on industrial principles as is the usual approach of the Commission. As a result, the Commission was precluded from considering the industrial consequences of the Hospital's retirement policy. On a conceptual level, an application for reinstatement under section 34(7) of the Industrial Relations Act is an attempt to resolve an individual's problem on industrial principles, or if necessary (as in this case) on purely legal principles. An alternative approach may be to try to resolve the broader problem of the hospital's retirement policy through an award covering hospital employees. Perhaps the Hospital Employees' Federation erred by not seeking an award provision relating to the retirement age of hospital employees, instead of supporting the reinstatement of Sister Tobin.

On the other hand, the Equal Opportunity Act limits the role of the Equal Opportunity Board to solving an individual's problem on the legal principles set out in the legislation. The Board is restricted to applying the facts of an individual case to the legislation. It cannot attempt to resolve broader issues, or use industrial principles. But if the Board, in making an order of reinstatement, clearly specifies terms upon which the employee is reinstated, the terms can serve as a basis for heading off future disputes over a similar issue at the same enterprise.

[11] For a further example of this malaise, see *Automatic Fire Sprinklers Pty Ltd v. Watson* (1946) 72 C.L.R. 435.

There are other logical and procedural problems in the Commission's decision. What, for example, would have happened if the respondent had not argued that the contract terminated on Sister Tobin's 60th birthday, but instead had simply given Sister Tobin adequate notice of the termination of her contract of employment on her 60th birthday? The Commission would then have been faced squarely with the issue of whether this 'threatened dismissal' was 'harsh, unjust or unreasonable' and would not have been able to resort to the argument that the contract provided for its own expiration without the necessity of action by either party. The Commission's problems would have been further compounded if Sister Tobin had not already lodged a complaint with the Registrar of the Equal Opportunity Board, because the Commission does not have the power to refer matters to the Board. It could merely suggest that the complainant herself initiate such proceedings.

In summary, the Industrial Relations Commission should have addressed the question of whether it had jurisdiction to hear Sister Tobin's claim. The better view seems to be that it did not. If it decided that it *could* hear the matter, it would have been on firmer ground if it had held that Sister Tobin's contract of employment did not contain a term specifying her retirement age. It would then have been in a position to hear evidence as to whether her dismissal was 'harsh, unjust or unreasonable'. This would have enabled the Commission to resolve the matter using industrial principles. Alternatively, the Commission could have immediately adjourned proceedings until Sister Tobin had exhausted her remedies under the Equal Opportunity Act.

The Equal Opportunity Board should have made its own finding as to whether Sister Tobin's contract of employment contained a term specifying her retirement age. The better view would be that there was no such term. That finding would open the way for the Board to hold that she was 'dismissed' and that her dismissal constituted unlawful discrimination under section 21(2)(b) of the Equal Opportunity Act. Alternatively, the Board could have held that the Hospital's 1979 retirement policy subjected Sister Tobin to a 'detriment' because of her sex.

In conclusion, the *Tobin* case opens up a number of issues dealing with the roles of the Industrial Relations Commission and the Equal Opportunity Board in dealing with the issue of unfair dismissal and reinstatement of employees. In the end the worthwhile result attained by the reinstatement of the complainant was predicated upon doubtful legal reasoning and fortuitous forum hopping. Despite these flaws, common sense suggests that, for once, the end justified the means.