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23 August 2005

Justice Stephen Rothman

Superficially the judgment in Blackadder (*Blackadder v Ramsey Butchering* (2005) 79 ALJR 975) deals primarily with the construction of the *Workplace Relations Act* as to the meaning of the word "reinstatement" and turns on the question of statutory construction, albeit, based on an understanding from the history of industrial regulation of the term "reinstatement". At other levels, it deals with the changing nature of employment as understood in the courts and, to a lesser degree, the remedies available under statute, common law and equity for conduct related to employment.

For those less familiar with the Blackadder judgment, I should briefly set out the relevant facts and its litigious history.

Stephen Blackadder was a meat worker (boner) employed at an abattoir in Grafton in New South Wales under a tally payment system that remunerated employees on the basis of the production of the team in which any particular employee worked. He was, prior to the particular date, employed on chilled boning. On 27 September 1999, in answer to a subpoena, Blackadder gave evidence against the interests of his employer. On 28 September 1999, on his first attendance at work after the court appearance, he was directed to perform work on the slaughterfloor to carry out hot neck boning. He objected to the change of duties which he alleged were outside his skills and outside his capacity. At the time of his initial employment, he had a subsisting injury which inhibited certain rotational movement in his shoulder and elbow which movement was probably required for hot neck boning.

After the usual positioning by the employer and the employee (or those who were representing them), the employee was dismissed. Blackadder was employed under an Australian Workplace Agreement (AWA). The union took proceedings in the Australian Industrial Relations Commission (the Commission) under the provisions of the *Workplace Relations Act* (the Act) relating to unfair dismissal.

Commissioner Redman heard the case. Blackadder gave evidence. Part of the material before the Commissioner was the unfitness of Blackadder to perform the hot neck boning work. The employer, or its Principal, Ramsey, gave evidence. In the judgment of Kirby J in the High Court of Australia, he summarises the findings of Commissioner Redman in the following succinct way:

> *"[24] The Commissioner found that the respondent's termination of the appellant's employment, which immediately followed these events, was unfair and unlawful. He accepted the appellant's evidence 'without reservation'. He did not accept the evidence of Mr Ramsey, the Managing Director of the respondent, whom he described as 'aggressive, evasive and forgetful'. He characterised Mr Ramsey's aggression as 'as startling as it was inappropriate'. He concluded that 'whenever the truth and Mr Ramsey's business interests conflict, truth would not be the winner'."*

The Commissioner ordered reinstatement in the following terms:

> *"1. [Blackadder] shall be reinstated to the position in which he was employed prior to the termination without loss of continuity of service or entitlements within 21 days from the date of this decision.*

> *2. [Blackadder] is to be reimbursed for all lost salary and entitlements from the date of termination to reinstatement less the salary the parties agree [Blackadder] received through alternative employment."*

There was an attempt to appeal that decision and order of the Commission to a Full Bench of the Commission who denied leave. Reinstatement did not occur. What occurred was that the employer implemented a practice, which had become a common or growing device, which was to pay the employee wages and deny the employee work. There was, during the course of this payment and denial of work, a period during which no payment was made and there were requests or demands by the employer for Blackadder to attend medical examinations to prove "his fitness for work".

Proceedings were taken in the Federal Court of Australia to enforce the reinstatement order which proceedings claimed that the effect of the reinstatement order was to require the employer to provide work. They were heard by Madgwick J who found that there had been a breach of the reinstatement order and ordered, with some qualifications which are unnecessary to repeat, that the employer to provide work for a period.

The employer continued to refuse to provide work and appealed to a Full Court of the Federal Court. A Full Court of the Federal Court, by majority, upheld the appeal and quashed the order, the effect of which was to require work to be provided.

Complicating the kind of orders that could be made was the fact that the proceedings for the enforcement of the reinstatement order were coupled with proceedings alleging that the employer had breached the AWA. The Full Court consisted of Tamberlin and Goldberg JJ (the majority) with Moore J dissenting.

The matter proceeded by way of special leave to the High Court of Australia which upheld the appeal by Blackadder and, with a minor variation that was agreed between the parties, "reinstated" the orders of Madgwick J.

It is necessary to explain the rationale of the majority of the Full Court of the Federal Court to understand, fully, the nature of the proceedings in the High Court and the way in which it concluded. Fundamentally, the Full Court of the Federal Court, arguing from first principles associated with the nature of the contract of employment and the obligations of an employer under such a contract, determined that an order for reinstatement under s.170CH of the Act did not grant to an employee (or oblige an employer) to more than existed prior to the dismissal. The majority of the Full Court determined that, because the contract of employment did not oblige an employer to provide work, upon reinstatement, there was no obligation to provide such work and therefore the order of Madgwick J, requiring the employer to provide to Blackadder work in the job he had been performing, was not an order enforcing reinstatement, nor was it an order available in the Federal Court of Australia on the basis of such a Commission decision.

The issues that were raised in the High Court of Australia were three different, but related issues. The first issue was whether "reinstatement" under the terms of the Act required an employer to provide work. The second issue, which was only necessary to be decided if Blackadder was unsuccessful on the first issue, was that, as an employee who was wholly or partly paid on the basis of production, the common law rules required work to be provided by the employer and, therefore, the basis of reasoning of the majority of the Federal Court was wrong. Thirdly, an issue required to be decided only if both of the first two issues were decided against the appellant, was the continuing validity of the common law rules which, under a contract of employment, did not require an employer to provide work to employees.

The High Court (McHugh, Kirby, Hayne, Callinan and Heydon JJ) determined that the Act, when it referred to "reinstatement" required "restoration of the terms and conditions of the employment in the broadest sense of those terms. It empowers the Commission to do more than restore the contract of employment. So far as practicable, the employee is to be given back his 'job' at the same place and with the same duties, remuneration and working conditions as existed before the termination." (per McHugh J at [14]) All the Judges of the Court came to the same conclusion in slightly different words. The most complete judgment to which all of the other Judges refer is the joint judgment of their Honours Justices Callinan and Heydon.

Having come to that conclusion, it was unnecessary for the High Court, technically, to deal with any other issue. Nevertheless, the Court dealt at length with the terms of the AWA, his position as a tally worker and the common law position (albeit in the last mentioned matter, not to arrive at any final

conclusion).

The joint judgment of Callinan and Heydon JJ referred to the term "reinstatement" in a way which has general import in the reinstatement jurisdiction. They said (at [75]):

> *"[75] Section 170CH(3)(a) and (b) describe the way in which the reinstatement may be effected. 'Reinstate' literally means to put back in place. The pay the appellant but not to put him back in his usual situation in the workplace would not be to reinstate him. The words 'reappoint' and 'position' should not be read in any restricted way. They are intended to apply to a very wide range of workplaces and certainly not to a particular officer or officers. It was therefore within the power of the Commission to make such an order as would contemplate or require that the employer provide a reappointed or reinstated worker with actual work to do."*

The above quote represents the rationale of the judgment insofar as it deals with the construction of the Act. Much of the discussion of the requirements of the AWA and whether there was a breach of the AWA were occasioned by the argument of the respondent that the reinstatement order of the Commission could not allow reinstatement in circumstances where the employee was refusing to perform work that was otherwise within his contract of employment or was in breach of the *Occupational Health and Safety Act*.

Most significantly, the High Court held that whether or not an employee breaches his contract of employment after reinstatement is irrelevant. The requirement is to reinstate. The employee must be put back in his usual situation in the workplace. Thereafter, if the contract of employment allowed for an alteration to his situation, that was a fundamentally different issue. Further, on the view of the High Court, the AWA and/or contract of employment did not provide, in the particular case, a requirement to do hot boning work.

> *"[78] It is no answer, as the respondent submits, that the appellant may be unwilling to do hot boning work or that he may lack the physical and other capacities to do it. It is true that … the AWA provides an employee shall work as directed, but [the AWA] makes it clear that the directions may relate to such duties as are within an employee's skill, competence and training only. [The Commission] has held, and it has not so far been controverted, that the appellant has not been trained, and is not fit, to do hot boning work. The Act empowers the Commission to reappoint an employee to the position in which he was employed immediately before his termination, or to another position, and this it did, by reappointing him to work in the chilled boning room. It is not for this Court to anticipate, by making an order in advance, what may follow from that."*

The reasons for judgment of the High Court of Australia do not deal, expressly, with the argument that it was impermissible to order reinstatement in circumstances where the reinstatement or utilisation of the employee on work, would be contrary to the *Occupational Health and Safety Act*. During the course of the proceedings in the High Court of Australia, the argument to that effect was given short shrift. The view expressed by all but one of the Judges in argument was that, to the extent that the federal power validly granted to the Commission the power to reinstate and that included the provision of work, it would override any duty imposed by state legislation. Certainly the effect of the reasons for judgment and the order of the High Court is to implement such a view.

As to the position at common law, the only comment made is in the joint judgment of Callinan and Heydon JJ in the following terms:

> *"[80] … It is … unnecessary to consider whether the categories of cases in which, at common law, actual work must be provided for an unlawfully terminated employee or contractor are closed, although one might question the current relevance of judicial pronouncements made more than 60 years ago in the United Kingdom as to the extent to which an employer might be obliged to dine at home in order to provide work for his cook. It may be that in modern times, a desire for what has been called 'job satisfaction' and a need for employees of various kinds to keep and to be seen to have kept, their hands in by actual work have a role to play in determining whether work in fact should be provided. Nor is it necessary to have regard to the fact, which appears to have been overlooked by*

> *the Full Court, that the appellant's remuneration here could be affected by the actual work that he did, a matter which might of itself, at common law, justify an order that he be provided with actual work to do."*

The judgment has a significant effect on the reinstatement jurisdiction of the Commission (to the extent that it continues to subsist).

Firstly, it makes clear that the orders of the Commission to reinstate mean that work must be performed and a person must be put back into their "job".

Secondly, it makes clear that employers who have a practical reason for not putting someone back on duties, must agitate that practical reason in the proceedings before the Commission in order to bring themselves within the exception to reinstatement orders being that which is "not practicable".

Thirdly, it probably makes it harder for employees to obtain reinstatement in that "impracticability" now has some work to do. If an employee could be employed and not put on work, it would be, subject to financial issues, impossible to show that it would be impracticable to employ the person.

But there are other, more interesting aspects for most of you as practitioners.

Industrial law, as I mentioned at the outset, is a jurisdiction, or an area of practice, that requires far greater knowledge of general law principles than of particular specialty. There is sometimes an overemphasis on the specialty. In reality industrial law, in the old sense of the resolution of industrial disputes, is a form of administrative law involving the construction of various statutes and the exercise of discretion thereunder. But it always also concerned, and as of late has more greatly concerned, the principles of contract law with particular emphasis on employment contracts; the principles of tort law with particular emphasis on the economic torts, on one hand, and duties toward employees, on the other; the principles of equity at least so far as fiduciary duties toward employees and employers, the organisation of unions either corporate or unincorporated and the doctrines of confidentiality are concerned; in so far as Occupational Health and Safety is concerned, the principles of criminal law; and, to some extent, the Trade Practices area.

The point is that you will never be able to do your job professionally unless these areas are familiar to you.

This case (and *Koehler* on which Walker SC is speaking) show up that point.

Moreover, the more that governments vacate the field in industrial law, the more it will be necessary to draw on remedies under the general law and the more the courts will have to consider them.