Work Choices
and contractual remedies

Walker v Citigroup Global Markets Australia Pty Limited and _Nikolich v Goldman Sachs J B Were Services Pty Ltd_

By Emma Reilly

> A careful balance must be found between the rights of employers to exercise managerial prerogative in the efficient operation of their business, and the rights of employees to job security. Each of these may be characterised as being in the public interest.

A statutory remedy for unlawfully terminated employment was introduced with the *Industrial Relations Reform Act* 1993 (Cth), which came into force on 30 March 1994. Its provisions provided a remedy of reinstatement or, when that was not possible or practical, compensation, in the event that an employee could prove that his or her employment was terminated for reasons that were not valid,[1] or whose termination was harsh, unjust or unreasonable.

The *Workplace Relations Act* 1996 (Cth) was intended to put the responsibility for wages, conditions and work practices back into the hands of employers and employees, and thereby put agreement-making at the centre of Australia's workplace relations. A federal minimum safety net was devised to underpin the system.

This regime also provided statutory remedies through the Australian Industrial Relations Commission (AIRC) for unfair dismissal (harsh, unjust and unreasonable) and unlawful dismissal (notice, pay in lieu and dismissal on discriminatory grounds).

As has been widely publicised, the government has again reformed Australia's industrial relations scheme, by amending the *Workplace Relations Act* 1996 (Cth) through the recent *Work Choices* legislation.

Work Choices has been touted by the government as a simpler system, providing a more flexible labour market to stimulate economic growth and employment opportunities. However, it has been condemned by human rights and employee groups on the grounds that it reduces the rights of employees, including in respect of unfair dismissal.

Under *Work Choices*, employers with up to and including 100 employees are exempt from unfair dismissal laws. The method for calculating the number of employees in a business includes part-time and certain casual employees, as well as employees of the employer's 'related bodies corporate', such as subsidiary companies and holding companies.

Unlawful termination provisions continue to apply to all employees in Australia. Employees can apply to the AIRC where they believe that their employment has been terminated for an unlawful reason, including temporary absence from work because of illness or injury; trade union membership/activities; the filing of a complaint; participation in proceedings against an employer; and discrimination for race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

However, given that an employment relationship is a contractual relationship, statutory remedies are not the only recourse in the context of unfair or unlawful dismissal.

DUTIES UNDER CONTRACT

Recent decisions of the Federal Court in *Nikolich v Goldman Sachs J B Were Services Pty Ltd*[2] and the full Federal Court in *Walker v Citigroup Global Markets Australia Pty Limited*[3] emphasise that the employment contract contains express terms, including in the letter of offer and in company handbooks and practice manuals. A court will also imply terms into the contract, depending on the particular circumstances.

Examples of employees' obligations

- Obey the employer's reasonable commands.
- Co-operate and act in the interests of the enterprise.
- Protect the company/firm reputation.
- Exercise skill with care and competence.
- Do not misuse confidential information.

Examples of employers' obligations

- Pay wages.
- Provide work.
- Exercise duty of care for health and safety of employees.
- Indemnify employees for liabilities incurred as a result of performance of duties.

Employers should be aware that breach of employment contract claims are expected to rise in the context of the *Work Choices* legislation, with the costs and remedies available likely to exceed the previous exposure in the AIRC.

NIKOLICH v GOLDMAN SACHS J B WERE SERVICES PTY LTD

This case involved a financial adviser who suffered a psychological injury that was connected to the actions of the office manager who reallocated clients when a colleague left the firm. One of the issues discussed by the full Federal Court was whether the actions of the office manager had caused the employer to breach its employment contract, and whether damages were then payable in respect of the distress and mental illness suffered by the employee. The employee also alleged unlawful termination of employment and that the employer had engaged in misleading and deceptive conduct contrary to the *Trade Practices Act* 1974 (Cth).

The statutory unlawful termination claim on behalf of the employee did not succeed, nor did the claims under the *Trade Practices Act*.

The contract claim did succeed, on the basis that a company document called *Working With Us* (WWU) was held to be part of the employment contract.

The employer argued that while WWU was intended to bind the employees, it was not binding on itself. The employer described the document as 'a manifestation of its right to issue lawful and reasonable directions to its employees, and the corresponding obligation of employees to comply with such directions'.

The court held that the document contained numerous provisions that purported to be promises made by the employer or that granted specific entitlements to employees. Many of these provisions related to matters that one would normally expect to find covered by a contract of employment. It was found that if the document did not bind the employer at all, then those of its provisions that constituted promises by the company, or which purported to confer entitlements, were 'misleading, a cruel hoax'. Also, employees to whom the document was issued would have no enforceable right in respect of numerous matters that were routine employee entitlements.

WWU was therefore held to be part of the employment contract. The court found that there was a breach of the WWU health and safety obligations on behalf of the employer, largely due to the employer's awareness of the employee's distressed state. Breaches in relation to harassment and failure to comply with grievance procedures were also found.

The employer then argued that the psychological injury suffered by Mr Nikolich was too remote to sound in damages. This argument was rejected, and the employee recovered damages in excess of $500,000 for loss of income and general damages (for pain and stress, etc – not recoverable in the statutory regime).

The employer has filed an appeal.

WALKER v CITIGROUP GLOBAL MARKETS AUSTRALIA PTY LIMITED

This case involved an employment contract that had a provision for termination without cause. The contract was repudiated by the proposed employer.

Mr Walker was an executive director and head of research at ABN-AMRO, a company that he joined in 1995. He severed his employment relationship to take up an offer of employment with Citigroup (or its related entity) as a senior resource analyst within the research department of the equities division of NatWest.

After Mr Walker signed the contract to work at NatWest, and before he commenced work, the contract was purported to be terminated, since the employer company had been bought out. Although the employee had been aware of the likelihood of the buyout, he had been assured that it would not affect his offer of employment.

The proposed remuneration under the contract was to be a salary of $275,000 per annum, plus a guaranteed bonus of $250,000, plus other miscellaneous amounts.

The court held that it was necessary to construe the contract as a whole and to construe individual clauses in that context. The objective was to give as much meaning as possible to all parts of the contract to avoid making any repugnant or absurd provisions. Where clauses had been especially framed with the individual circumstances in mind, together with standard form clauses, it was appropriate to give greater weight to the specially negotiated clauses.

It was held that effect could be given to all parts of the contract and repugnancy avoided only if the standard form provision for termination without cause was read as applying after the end of 1998 (the original contract had provided a guarantee of employment until the end of that year, with likelihood that it would continue beyond, with promotion).

There was stated to be no satisfactory basis for concluding that, had Mr Walker been allowed to commence his duties, the employer would have exercised a right to bring the contract to an end on one month's notice without cause. It was considered unlikely that the employer would have sacked a skilled and competent employee holding a high-profile position within the company in this way.

Mr Walker was awarded damages of approximately $2,300,000. Damages were included for psychological injury and damage to reputation, a calculation of damages that differed from the statutory formula, which closely reflects the notice period in a contract.

As has been demonstrated in these recent decisions, the partial demise of the statutory regime for unfair dismissal does not necessarily mean that employees have no rights. Similarly, employers must be aware of a greater capacity to award damages in a breach of contract claim, and that documents such as practice and procedure manuals are read into employment contracts, along with any implied terms.

Whether the common law avenue will be adopted by dismissed workers on a wide basis remains to be seen. While these cases highlight a 'new' legal avenue for dismissed workers, the cost of such actions may mean that they are limited to relatively highly paid employees. ■

Notes: **1** Valid reasons include the conduct or capacity of the employee or the operational requirements of the employer. **2** [2006] FCAFC 101. **3** [2006] FCA 784.

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