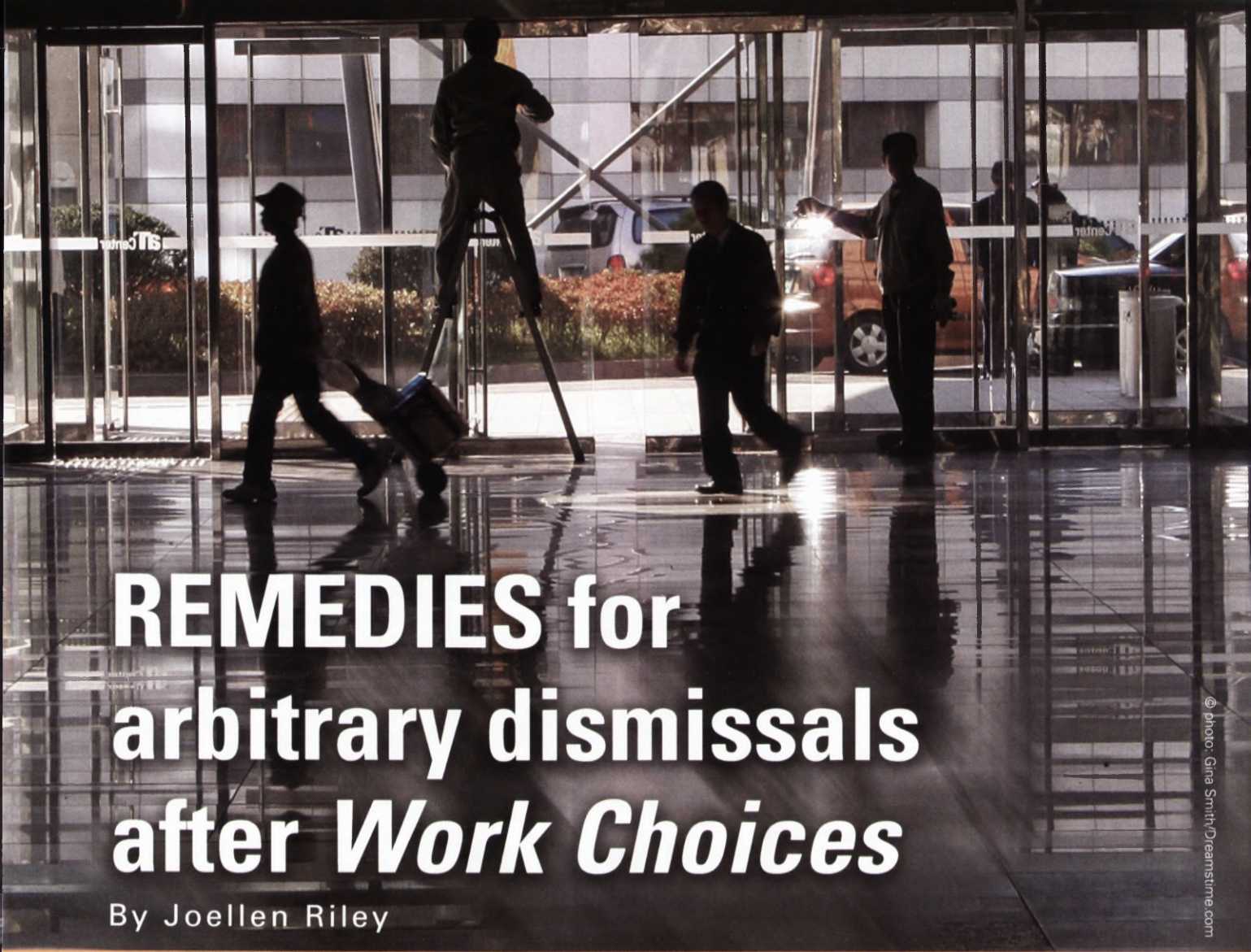

REMEDIES for arbitrary dismissals after *Work Choices*

By Joellen Riley

The 'small business' exemption to unfair dismissal laws created by the recently enacted *Work Choices* legislation will not necessarily mean that small companies will be able to sack staff arbitrarily with no risk of legal action. So long as aggrieved employees can find the financial means to support a legal contest, an arbitrary dismissal may be challenged as an unlawfully discriminatory dismissal, or even as a breach of a common law employment contract.

IMPACT OF *WORK CHOICES*

From 27 March 2006, employees working for companies with fewer than 101 employees will no longer be able to challenge capricious and arbitrary sackings before a specialist industrial tribunal. Section 16 of the *Workplace Relations Act* 1996 (Cth) (WR Act) will remove any right such an employee may have had to go to a state industrial relations tribunal for an unfair dismissal remedy, and s643(10) will exclude them from the protection of federal unfair dismissal remedies. Unions representing such employees will not be able to bargain with employers to include guarantees of procedural fairness in decisions to dismiss, because the Minister has tabled Workplace Relations Regulation 8.5(5), which prohibits any such clause from a workplace agreement made under the WR Act. The consequences of trying to lodge an agreement with any prohibited content in it are serious – fines of 60 penalty units (amounting to more than $30,000).

Do these changes to federal workplace laws mean that employees of small- to medium-sized businesses lack any means of legal redress if they are unceremoniously sacked, without a reason? Not necessarily. Employees subjected to this kind of treatment will still have some statutory rights, and may also have rights under a common law employment contract.

REMAINING STATUTORY RIGHTS

All employees – even those in small enterprises – will keep their entitlement to use federal unlawful dismissal provisions to challenge any dismissal for discriminatory reasons. Section 659 of the WR Act (former s170CK) continues to operate to protect employees from being dismissed because they have suffered a temporary

illness, taken parental leave, refused to sign an Australian Workplace Agreement (AWA), or maintained their involvement in a trade union. Section 659(2)(f) also protects all employees from discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. An employer who has dismissed an employee for one of those reasons has to prove that the characteristic in question made the employee unfit to fulfil the 'inherent requirements' of the position before the dismissal will be justified.

An employee alleging one of these 'unlawful' grounds for dismissal will enjoy the benefit of a reversed onus of proof under s664. The employer bears the burden of proving that the prohibited reason was not among the reasons motivating their decision to terminate the employment. Employees must pursue complaints of this nature first by making an application (within 21 days of termination) to the Australian Industrial Relations Commission (AIRC), which will first attempt to conciliate the matter. If conciliation fails, the AIRC will issue a certificate enabling the applicant to take proceedings to the Federal Court. On finding unlawful discrimination, the Federal Court is empowered to grant a range of remedies, including reinstatement and compensation of up to six months' salary. An employer found to have contravened s659 can also be fined up to $10,000 (s665).

Employees who have been dismissed because they enjoy the benefit of a particular industrial instrument – an award or a collective agreement, for instance – may be able to bring an action against the employer for breach of the freedom of association provision in Part 16 of the WR Act. Sections 792 and 793 prohibit an employer from dismissing an employee if the 'sole or dominant reason' for dismissal is that the employee has the benefit of an award or workplace agreement. On 5 April 2006, Australian newspapers reported the story of an abattoir that had purportedly terminated the employment of 29 employees, then offered them the opportunity to apply for 20 new positions on considerably lower wages. If the sole or dominant reason for dismissing those staff was to take away their entitlement to an award or agreement, the dismissal would be in breach of s792. As with the unlawful dismissal provisions, employers face a reversed onus of proof with allegations of breach of the freedom of association provisions (s809).

So the WR Act still provides some limited protection from dismissal, even for employees of small companies. But not all employees who have been capriciously dismissed will be able to identify an unlawfully discriminatory reason for their dismissal. A worker who has lost a job in a small company for no better reason than that a supervisor was in a bad mood on the day will have no statutory remedy at all. The employee will need to look to any rights that s/he may have under a contract of employment to base any claim for a remedy.

COMMON LAW RIGHTS

It is often said that, at common law, an employer may dismiss an employee for a good reason, a bad reason, or no reason at all. Under the common law employment contract, the employer is not obliged to give a reason for dismissal, nor to give warnings or opportunities to respond before terminating an employee. This orthodox view often cites Lord Reid in *Malloch v Aberdeen Corporation:*[1] "At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid." It must be remembered, however, that Lord Reid went on immediately to say: "The servant has no remedy *unless the dismissal is in breach of contract*" (my emphasis). It seems clear – and a recent decision of the Federal Magistrates Court of Australia confirms the view – that the common law *will* enforce a requirement that an employer give reasons for dismissal, and fair warnings, where the contract of employment expressly includes commitments to afford employees procedural fairness.

In *Dare v Hurley*,[2] Driver FM had to consider a complaint from a young woman, Kisha Dare, that her employment had been terminated in breach of the *Sex Discrimination Act* 1984 (Cth), and in breach of her contract of employment. She was pregnant at the time, but had not been working for the 12-month qualifying period for a statutory entitlement to take parental leave. Her employer, PGH Environmental Planning, of which Mr Hurley was a principal, had dismissed her summarily, claiming that she had been guilty of misconduct in the performance of her duties.

Ms Dare contested the allegation of misconduct. Her contract claim was based on her assertion of a contractual entitlement to procedural fairness – at the minimum a warning and an opportunity to respond to allegations – before the employer could dismiss for misconduct. Driver FM found that Ms Dare's contract of employment, contained in a letter of appointment, provided that she could be dismissed summarily if she was found to be 'guilty of serious misconduct', and also provided that she agreed to adhere at all times to company policies and procedures.[3] The employer's procedures manual stipulated certain performance measures and standards of conduct, and provided that an employee who failed to meet those requirements would be given either oral or written warnings depending on the alleged breach.

Although the letter of appointment did not state expressly that the employer would also adhere to the policies and procedures, Driver FM held that such a commitment must be implied into the contract of employment on the principles set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings.*[4] In particular, Driver FM held that it was necessary to imply that the obligation to observe the procedures manual was a reciprocal obligation on both parties, in order to give the agreement the necessary 'business efficacy'. Otherwise, the mutual obligations imposed by the policy manual would be unworkable. Driver FM observed that Mr Hurley "placed great store on following procedures" and had "taken the trouble" to ensure that his company became "a quality endorsed business by Standards Australia".[5]

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Driver FM made one further observation of particular importance to the employment contract claim. He held that it would be inconsistent with the obligation of mutual trust and confidence, implied by law into all employment contracts, if the employer were free to ignore the procedures that bound the employee.[6] Ever since the landmark House of Lords case of *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)*,[7] employment lawyers have been investigating the potential of this implied obligation of mutual trust and confidence to provide remedies in contract for harshly treated employees.[8] It seems clear that in Australia at least, the mutual trust and confidence obligation will not in itself give rise to any common law obligation to afford an employee procedural fairness on termination. So much has been asserted by the Court of Appeal in Victoria in *Intico (Vic) Pty Ltd v Walmsley*,[9] where it was held that there was no common law right to a fair investigation of allegations of misconduct before dismissal. (Although it must be said that the High Court of Australia has held, more recently, that a deputy commissioner of police, employed 'at pleasure', must necessarily be afforded procedural fairness before termination of his employment.[10]) Nevertheless, the mutual trust and confidence obligation will assist a court in making the connection between policies and procedures manuals that promise fair performance management procedures, and an employee's rights under the contract of employment.

In *Thomson v Orica Australia Pty Ltd*,[11] for example, Allsop J in the Federal Court also held that the employer's obligation not to destroy mutual trust and confidence meant that it was committed to observe its own human resources policies in the way it treated its employees. In that case, failure to provide a woman returning from maternity leave the benefits promised in the HR policy manual was held to be a clear breach of mutual trust, and therefore a breach of the employment contract giving rise to a right for the employee to claim contract damages.

ASSESSING DAMAGES

The benefit to the employee of a finding that the employer has breached a contractual obligation to provide procedural fairness is that damages will be assessed on the basis of expectations: what benefits would the employee have earned, had the promise of procedural fairness been fulfilled? In *Dare v Hurley*, Driver FM found that the real reason for dismissing Ms Dare was that she was pregnant and planning to take leave. There were four months between the termination of her employment and her confinement. Driver FM estimated that if she had been given the warnings stipulated in the procedures manual, she would have had a 50% chance of keeping her job for the whole four-month period, so he awarded her 50% of the income she would have earned in that period in respect of economic loss. (This sum was held to satisfy her *Sex Discrimination Act* claim as well as her breach of contract claim.)

This method of determining damages according to the court's assessment of the employee's prospects of keeping the job was adopted in a number of cases brought before the Federal Court for breach of 'termination change and redundancy' (TCR) clauses in awards,[12] in the days before the High Court of Australia held that such award clauses did not ordinarily form part of the employment contract.[13] In *Bostik v Gorgevski*, for example, a long-serving employee dismissed for smoking on the job was awarded contract-based damages amounting to several years' salary, on the basis that the TCR award clause effectively gave him a contractual right to remain in employment until retirement age, unless he was dismissed fairly for cause. Being an exemplary employee in all other respects besides his smoking habit, the court was prepared to assume that Mr Gorgevski would never have given the employer good cause for termination. Although such a result may seem extreme, it conforms to the standard judicial practice of assessing damages for loss of opportunity or loss of a chance.[14]

FUTURE DIRECTIONS?

Dare v Hurley suggests that a loss of statutory unfair dismissal remedies will not necessarily mean that all small company employees can be fired at the employer's whim without any prospect of legal redress. A promise set out in a policy manual or in a letter of appointment that the employer will observe fair procedures before dismissing an employee will be contractually binding, and breach may sound in damages, so long as the employee has not in fact engaged in serious misconduct or incompetence. An employee who is found guilty of a serious breach of the employment contract will be defeated by an argument that the employer has elected to terminate the employment contract summarily in response to the employee's repudiation of the contract. This would release the employer from any further performance of any contractual obligations whatsoever, including any obligations to provide warnings or other performance management processes.

This was demonstrated by a recent case before the Western Australian Supreme Court, *Bednall v Wesley College*.[15] A school principal had been dismissed summarily on allegations of accessing child pornography sites, but the college had failed to follow its own published procedures in investigating these serious allegations. The court held that although the principal's contract of employment expressly provided for summary dismissal only in three circumstances (actual conviction of a criminal offence, insolvency and unsoundness of mind), the employer nevertheless retained a common law right of summary dismissal for repudiatory conduct by an employee.[16]

Even so, the employer will be put to the test at some point in proceedings to determine whether there was in fact good reason to summarily dismiss the employee or not. For example, in *Intico*

(Vic) Pty Ltd v Walmsley – a case noted for its blunt assertion that there is no common law right to a fair investigation of allegations prior to dismissal – the Victorian Court of Appeal nevertheless sent the matter back for retrial on the question of whether there had been sufficient grounds for the summary dismissal of the employee. If there were no such grounds, the employer would be obliged to pay the employee an amount of damages in place of reasonable notice. There is still a common law right to have a court determine the question of whether a summary dismissal was warranted or not, and in the course of a hearing, the court will investigate the employer's reasons for the summary dismissal. Ultimately, the employer will be required to give justifiable reasons for the dismissal. An employer who wants to avoid a court hearing – maybe *three* court hearings, if *Intico* is a typical case – would be well-advised to observe the 'best practice' standards set out in their own procedures manuals in the first place. Giving employees reasons and a chance to explain prior to dismissal may save the considerable legal costs that would result from having to defend an allegation of breach of contract, or unlawful discrimination. If small employers have resented the time and costs involved in defending unfair dismissal proceedings before tribunals, how much more will they be aggrieved if they are taken to the Federal Court?

CONCLUSION

Unless *Work Choices* effects a radical change in Australian employment practices, it is likely that many employees will continue to enjoy some entitlement to procedural fairness under their contracts of employment. Widespread access to unfair dismissal protection by many workers in recent years has engendered a human resources management culture in corporate enterprise of providing fair procedures for terminating under-performing workers. Performance management systems have become so standard in HR practice, that many employees will have a contractual entitlement to the protection of those procedures.

Of course, a right, no matter how secure, is of little benefit without ready access to a remedy. The real loss for employees of small- to medium-sized enterprises is perhaps not a loss of rights to procedural fairness, but a loss of a readily accessible means to vindicate those rights. The state industrial tribunals and the AIRC provided relatively inexpensive, expeditious resolution of these issues. Common law court processes, on the other hand, are notoriously expensive and prone to delay. If the state governments want to do something constructive to strike back at *Work Choices*, one of the most valuable things they could do would be to fund a system of accessible, low-cost tribunals for the resolution of individual employment contract disputes, able to give effect to the body of law already developing in the Federal Court. For an employer who wants to avoid these costs, the solution is simple: treat your staff respectfully in the first place. And for the employee, clarify your rights and obligations in procedure manuals and letters of employment or employment contracts – these may potentially offer vital protections.

Notes: **1** [1971] 1 WLR 1578 at 1581. **2** [2005] FMCA 844 (12 August 2005). **3** *Ibid*, at paragraph [120]. **4** (1977) 180 CLR 266 at 283. **5** Above n.2 at paragraph [112]. **6** Above n.2 at paragraph [121]. **7** [1997] 3 WLR 95. **8** For a full discussion of the development and potential of mutual trust and confidence, see J Riley, *Employee Protection at Common Law*, Federation Press, Sydney, 2005, Chapter 3. **9** [2004] VSCA 90 (21 May 2004). **10** See *Jarrett v Commissioner of Police for NSW* [2005] HCA 50. **11** (2002) 116 IR 186. **12** See *Gregory v Philip Morris* (1987) 80 ALR 455; *Bostik (Australia) Pty Ltd v Gorgevski* (No. 1) (1992) 36 FCR 20. **13** See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410. **14** See *Poseidon & Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. **15** [2005] WASC 101 (24 May 2005). **16** *Ibid*, at paragraph [47].

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