

EMPLOYEE REMEDIES

under section 52 of the *Trade Practices Act*

By Tim Davey

Although *Work Choices* spells the end of unfair dismissal rights for a significant proportion of Australian employees, most senior employees have in fact never enjoyed those rights. These employees have often had to resort to limited common law remedies when their employment has been terminated.

Section 52 of the *Trade Practices Act 1974* (Cth) (the TPA) can, however, provide relief well in excess of that available at common law. This avenue might be available where the termination of employment, although not in breach of contract, is contrary to representations made by the employer during pre-employment negotiations. This article examines the limited remedies at common law, and explores the circumstances in which relief may be available under the TPA and the requisite elements of a successful action.

WHY SUE UNDER s52?

At common law, a contract of employment can usually be terminated without cause once the requisite notice has been given. Where the contract contains no express notice period, the law will imply a term of reasonable notice. If the notice requirement has been complied with, the employer has no other obligations at common law in respect of the termination. In particular, the common law does not impose any obligation on the employer to dismiss fairly or provide reasons.

If the employer wrongfully terminates the contract of employment – for example, by terminating the contract without notice where no grounds for summary dismissal exist

– damages awarded to an employee who successfully sues for breach of contract will usually be capped at the amount they would have earned during the applicable notice period, commonly one month's salary.

Damages for breach of s52, by contrast, are not subject to such a limitation. For example, in *Magro v Fremantle Football Club Ltd*,¹ the plaintiff was an assistant coach with Collingwood Football Club in Victoria. He was induced to accept employment as an assistant coach with Fremantle Football Club by representations including the promise of a three-year term. These representations did not form part of the contract, and the plaintiff was dismissed less than a year after his appointment. In assessing damages, the court found that if the plaintiff had not accepted employment with Fremantle, he would probably have worked as a coach for another 10 years. The court assessed damages as the difference between the plaintiff's likely earnings over that 10-year period had it not been for the misrepresentations and his actual earnings.

ELEMENTS OF AN ACTION FOR BREACH OF s52

A successful claim for breach of s52 requires proof of four elements:

1. conduct in contravention of s52;

2. the loss or damage suffered by the plaintiff;
3. a causal link between the loss or damage and the contravening conduct; and
4. the amount of the loss or damage.²

CONDUCT IN CONTRAVENTION OF s52

Section 52(1) of the TPA provides:

'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

Corporation

Obviously, the conduct must be done by a corporation. Conduct of non-corporate employers will not be caught by s52, although it may be caught by the equivalent provisions of state and territory fair trading Acts.

Trade or commerce

A threshold consideration is whether the impugned conduct is 'in trade or commerce'. This question must ultimately be resolved by reference to the High Court decision in *Concrete Constructions (NSW) Pty Ltd v Nelson*.³ In that case, an employee was seriously injured after being given misleading information about some equipment by another employee. In determining whether the conduct was 'in trade or

commerce', the joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ considered two competing constructions of the phrase. These were summarised by Wilcox J in *Barto v GPR Management Services Pty Ltd*:

'After making the point that the phrase "in trade or commerce" has a limiting operation in s52, their Honours considered two possible interpretations. The first possibility was that conduct "in trade or commerce" is "conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business". They cited as examples the giving of a misleading hand signal by a driver of a truck used in a company's haulage business and the alleged facts of the case at bar.

The alternative possibility canvassed by the majority was that the phrase referred "only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character". For reasons which they gave, their Honours favoured this interpretation...⁴

The impugned conduct in *Concrete Constructions* was held to be an internal communication lacking the requisite trading or commercial character.

It is now reasonably well settled that representations made to an employee during negotiations for employment may be in trade or commerce.⁵ As Wilcox J explained in *Barto*:

'... the conduct of the corporation in the course of negotiations for employment of senior staff is conduct potentially falling within s52. It is true that an employment contract does not directly produce income, but the making of such a contract is part of the total activities in trade or commerce of the corporation. *Critically, it is intrinsically commercial conduct. It is directed to the creation of a contractual relationship.*⁶ [emphasis added]

It may also be the case that representations made by a corporation to an existing employee in the course of negotiations about future employment

arrangements are made in trade or commerce. In *Patrick v Steel Mains Pty Ltd*, Wilcox J stated that:

'In negotiating with employees, or prospective employees, about future employment a trading company acts "in trade or commerce".⁷

In subsequent cases the Federal Court has rejected the notion that there is any relevant distinction between negotiations with prospective employees and negotiations with existing employees for the purposes of s52.⁸

Misleading or deceptive conduct

Typically, misleading or deceptive conduct on the part of a corporation will take the form of false or misleading representations made to a prospective employee during employment negotiations (whether by the employer or by a recruitment agency). By virtue of s51A of the TPA, representations about future matters are taken to be misleading or deceptive unless the corporation is able to establish that there were reasonable grounds for making them.

Representations may be made to assure a prospective employee about the terms of the employment in order to induce them to leave existing employment. In *O'Neill v Medical Benefits Fund of Australia*,⁹ representations about the level of job security attaching to a position were found to be misleading or deceptive. The applicant was induced to leave secure employment as a manager with National Mutual Health to take up employment with a competitor, MBF. MBF had told Mr O'Neill that the job he was being offered would be at least as secure as his current position and that it was for 'the long haul'.

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Employment negotiations can include representations in 'trade or commerce'.

Approximately two years later, Mr O'Neill was made redundant by MBF. The Federal Magistrates' Court at first instance held that 'the respondent had little regard to whether the representation was true or not and was simply concerned to recruit from a competitor an employee then thought to be an appropriate acquisition for the respondent'. The respondent did not take steps to determine the accuracy of the representation and had no reasonable grounds for making it. Further, the representation could not be regarded as a mere prediction and, even if it could, it would still have contravened s52 because the respondent had no reasonable and honest belief that it would be fulfilled. Accordingly, the court found that the respondent had engaged in misleading and deceptive conduct.¹⁰ That was so even though the employment contract contained a provision for termination on one month's notice.¹¹

In *Walker v Salomon Smith Barney Australia Securities Pty Ltd*,¹² it was announced during negotiations for employment that the respondent's business would be sold to the second respondent. Before entering into the contract of employment, the applicant sought and obtained an assurance that he would be employed by the second respondent on the same terms and conditions following the sale of the business. Relying on that assurance, the applicant took steps to sever ties with his existing employer. But before the applicant started work, the second respondent reneged on the contract. The court held that the second respondent had no reasonable grounds for giving the assurance and so, under s51A, its conduct was found to be misleading and deceptive.

LOSS OR DAMAGE

If a breach of s52 is established, it is necessary to consider what remedies, if any, are available to an employee. Sections 82 and 87 of the TPA provide

remedies for a party who has suffered, or is likely to suffer, loss or damage as a result of conduct in contravention of s52. Section 82(1) of the TPA provides:

'A person who suffers loss or damage by conduct of another person that was done in contravention of [s52] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.'

Section 87 provides that where a party has suffered, or is likely to suffer, loss or damage by conduct of another person in contravention of, relevantly, s52, the court may make such orders as it thinks appropriate against the contravening party to compensate the party who has suffered loss and damage or to prevent or reduce the loss or damage.

Loss and damage is the 'gist of the action' under s52.¹³ A plaintiff will not recover simply because representations were misleading and the rights or obligations under the contract differ from them.¹⁴ The plaintiff must establish on the balance of probabilities that s/he has suffered *some* loss or damage.¹⁵

In most cases, the question of whether the plaintiff has suffered loss will not be difficult. However, the situation is more complex where there are contingencies associated with the hypothetical earnings of the plaintiff. In *Sellars*, the High Court considered whether the loss of an opportunity to obtain a commercial advantage constituted 'loss or damage' within the meaning of s82(1) of the TPA. The plaintiff had entered into a heads of agreement with the defendant. The executive of the defendant had exceeded his authority and the heads of agreement did not reflect the deal authorised by the defendant's board. Prior to entering into the heads of agreement, the plaintiff had been in negotiations with a third party, which would have resulted in an agreement between them had it not been for the defendant's conduct. The plaintiff subsequently entered into an agreement with the third party, but on

less favourable terms than had it entered into the heads of agreement with the defendant. Numerous contingencies would have had to have been satisfied in order for the plaintiff to receive the benefits under the first proposed agreement.

The court considered whether the plaintiff had to demonstrate that, on the balance of probabilities, it would have received the benefit, or whether it was sufficient to demonstrate that there were some prospects of deriving the benefit. After discussing cases in tort and contract where loss was assessed 'by reference to the degree of probabilities and possibilities' of obtaining a benefit, the court held that 'damages for deprivation of a commercial opportunity ... should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued'.¹⁶ In relation to the issue of causation and loss, the court held:

'On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable.'¹⁷

So, a plaintiff who had a 49% chance of obtaining a benefit and who loses the opportunity of obtaining the benefit by reason of a contravention of s52 is not deprived of a remedy merely because s/he is unable to show on the balance of probabilities that the benefit would have been realised.

CAUSATION

A plaintiff must show that s/he suffered loss or damage 'by' conduct in breach of s52. This is a question of fact to be determined by reference to common sense and experience.¹⁸ Causation is established where a person acts in reliance on the misrepresentations.¹⁹ Where a representation is calculated to induce a person to enter a contract and the person does so, it is a reasonable inference that they were induced by the representation.²⁰ The contravening conduct need not be the only, or even the major, inducement; it is sufficient that it plays some part in the loss.²¹

ASSESSMENT OF DAMAGES

The measure of damages in tort will almost always be the appropriate measure in an action for breach of s52.²² The object is to put the injured party in the position they would have been in but for the contravention. Where an employee has left existing employment in reliance on representations, this will involve a comparison of the employee's actual earnings with the (hypothetical) earnings they would have received had they remained in the original employment. The plaintiff is theoretically entitled to recover damages for the duration of the period that s/he would (hypothetically) have remained in the original employment.²³

The task of assessing damages becomes more complicated when there are contingencies associated with the hypothetical earnings of the employee. In *Sellars*, the High Court held that the value of an opportunity was to be assessed 'by reference to the degree of probabilities or possibilities' of its occurrence.²⁴ A similar approach to assessing loss has been adopted in the employment context in a number of cases. In *Walker*, the court found that the plaintiff would have earned approximately \$2.5 million over a five-year period in his original employment, had it not been for the second respondent's misleading and deceptive conduct. However, the applicant's original employer underwent a restructure shortly after

his departure that resulted in numerous redundancies. On this basis, the court determined that even if he had not left his employment because of the respondent's misleading conduct, there was only a 33% chance that he would have retained his job. Accordingly, the applicant's loss of \$2.5 million (mitigated by amounts actually earned) was reduced by two-thirds.²⁵

In *Magro*, the court found that had the plaintiff not accepted employment with Fremantle, he would probably have remained in coaching for another 10 years and had favourable prospects of obtaining a position as a senior coach. Consistent with the approach in *Sellars*, the court found he had a 50% chance of becoming a senior coach in the short term, and that he probably would have remained in a senior coaching position for four seasons. However, there were some substantial negative contingencies, including the possibility that:

- he may have been unemployed for one or more seasons between coaching appointments;
- had he become a senior coach, he may have held the position for fewer than four years; or
- his coaching career could have ceased altogether following a first stint as a senior coach.

The court then set out the method of assessing the plaintiff's damages as follows:

1. calculate the loss of 10 years' earnings as an assistant coach;
2. deduct an amount of one-third to allow for negative contingencies;
3. adjust the net figure to allow for the 50% chance that the plaintiff would have become a senior coach; and
4. deduct the plaintiff's actual earnings, including earnings from the defendant.

In relation to step 3, rather than relying on the statistical probabilities of having a second stint as a senior coach and the probability that coaching income would cease altogether after the first stint as senior coach, the court made a global, broad-brush assessment of the damage flowing from the loss of the chance to become senior coach as \$50,000.

CONCLUSION

As the cases demonstrate, courts are prepared to recognise that conduct in employment negotiations may constitute misleading and deceptive conduct in trade or commerce. In the case of senior employees, the amounts recoverable can be very substantial – certainly far in excess of the damages that could be awarded in an unfair dismissal or common law claim. This is particularly so where the employee remains unemployed for a considerable period following termination. For these employees, the TPA will continue to offer a valuable source of relief with respect to termination of employment in the post-*Work Choices* world. ■

Notes: **1** [2005] WASC 163. **2** *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 356 per Brennan J. **3** (1990) 169 CLR 594. **4** (1991) 105 ALR 339 at 342. **5** See *Walker v Salomon Smith Barney Australia Securities Pty Ltd* [2003] FCA 1099 at [180] - [185] and the cases cited therein; compare *Martin v Tasmania Development and Resources* [1999] FCA 593 and *Mulcahy v Hydro-Electric Commission* (1998) 85 FCR 170. **6** *Op. Cit.*, at 344. **7** (1987) 77 ALR 133 at 136. **8** See *Barto* at 344-5; *Stoelwinder v Southern Health Care Network* (2000) 177 ALR 501 at [6]. **9** [2002] FCAFC 188 **10** *Ibid.*, at [7]. **11** *Ibid.*, at [23]. **12** [2003] FCA 1099. **13** *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ. **14** *Marks v GIO Australia Holdings Ltd* [1998] HCA 69 at [47]. **15** *Sellars* at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ. **16** *Ibid.* **17** *Ibid.* **18** *Wardley* at 525 per Mason CJ, citing *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. **19** *Sellars* at 348 per Mason CJ, Dawson, Toohey and Gaudron JJ. **20** *Gould v Vaggelas* (1985) 157 CLR 215 at 236 per Wilson J. **21** *Ibid.* **22** *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 14 per Mason, Wilson and Dawson JJ. **23** *O'Neill* at [29]. **24** *Sellars* at 355. **25** This decision is currently subject to appeal.

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