Employment policies can be contractually binding

Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] FCAFC 120

By Steven Penning

With the demise of statutory unfair dismissal provisions under the Howard government's *WorkChoices* legislation, employment and industrial lawyers have increasingly looked to the common law and other potential statutory remedies for unfairness associated with termination of employment.

The past decade has also seen a significant increase in the use by employers of detailed employment policies. These often tightly regulate the way that work is undertaken. It is now the norm for employers of all sizes to have policies for matters including occupational health and safety, discrimination and harassment, email and electronic usage.

In *Goldman Sachs J B Were Services Pty Limited v Nikolich*, the full court of the Federal Court considered circumstances of the incorporation of terms from employment policies into the common law contract of employment. The Court upheld an award of damages for breach of contract of in excess of $500,000, arising substantially from psychological injury to the employee.

THE FACTS

The employee, Mr Nikolich, was an investment adviser with Goldman Sachs for four years until his employment was terminated. Before starting his employment, the company sent him a written offer of employment, as well as a detailed, 119-page policy document, *Working with Us*. This document contained policies in areas such as 'conflict of interest', 'harassment', 'integrity', and 'occupational health and safety'.

A central question of the appeal was whether the parties had intended to incorporate into the contract some, or all of the matters from the *Working with Us* policy.

At first instance,[1] Wilcox J found that Goldman Sachs had breached Mr Nikolich's contract of employment by failing to follow its obligations under the *Working with Us* policy. Mr Nikolich's manager had allocated client accounts away from Mr Nikolich and had acted in other ways that caused Mr Nikolich's psychological damage, including:

> '"malicious personal attacks, threatening and disturbing" actions; making comments, including false accusations; and a "barrage of insults and abuse", which caused Mr Nikolich anxiety, stress and discomfort.'[2]

CONTRACT OF EMPLOYMENT

On appeal, Black CJ distinguished between those aspects of the *Working with Us* policy that he described as 'of a broadly informative nature' or which 'reflect the employer's aspirations' or were 'merely advisory'.[3] In contrast, other aspects of the policy were clearly expressed in the language of contract. A section headed 'Other Employment', for example began:

> 'It is a condition of employment with the firm that no person who is employed on a full-time basis may engage in work for anyone else...'[4]

Less emphatically contractual in language, but nevertheless more than merely advisory, the obligations concerning electronic mail in the policy were prefaced by the phrase 'for the duration of your employment you will agree to...'

From the employer's perspective, the *Working with Us* policy was intended to serve various purposes. One was to portray the company as a desirable place to work because of the pervasive nature of its 'culture and family approach', as reflected in the policy. In this way, Goldman Sachs, like many other firms, was seeking to make itself out as being attractive to talented people. Other purposes of such policies included to inform and inspire employees.

The Goldman Sachs 'health and safety' policy in the *Working with Us* document included the statement:

> *'[The company] will take every practicable step to provide and maintain a safe and healthy work environment for all people'.*[5]

This policy continued with statements that 'prevention is the most effective health and safety principle' and that 'through a shared responsibility, co-operation and support for all people', the firm would realise its health and safety obligations. The policy continued 'in fulfilling this responsibility, the firm has a duty to provide and maintain, so far as is practicable, a working environment that is safe and without risk to health'.[6]

On appeal, the company argued that the language of the health and safety policy was not contractual, and that the statements were 'merely aspirational'. Black C J stated:

> 'What matters is what the language used, in context, would have led a reasonable person in the position of Mr Nikolich to believe. Context is very relevant. Here, it is plain that [in the policy] the firm was holding itself out as having

> a commitment, which it regarded as very important, to providing a caring and safe working environment based upon mutual respect and concern ... The language used, taken in the context as a whole, points to the statement embodying a contractual obligation and the trial judge was correct in holding that it was a term of the contract.'

The health and safety policy was held to give rise to contractual obligations, but other policies, including in relation to 'harassment' and 'grievance procedures', breaches of which had been found at first instance, were not held on appeal to be contractually binding. The language in those policies was held to be descriptive of the culture of the firm, its perceived benefits as an employer of choice and the firm's general aspirations. The language was descriptive and not promissory.

BREACH

The finding of the trial judge – that the employer breached its contractual health and safety policy obligation – was upheld by the majority. The finding at first instance of breach of the policy was based on the employer's delay in taking action to alleviate an unhealthy work environment: Mr Nikolich was working in a small office and being managed by a supervisor with whom he had serious conflict, whose actions had been intimidating and threatening, and with whom he was no longer on speaking terms. [7]

The court held that the delay in attending to the problems that Mr Nikolich had complained about was unacceptable, and in breach of the employer's obligation under its policy to 'take every practicable step to provide and maintain a safe and healthy work environment'.

CAUSATION AND REMOTENESS

The court noted that the plaintiff bears the burden of proving causation, as a question of fact that should be resolved as a matter of 'ordinary commonsense and experience'. The trial judge was held to have approached the issue of causation as he was entitled to do, as a practical matter of commonsense and, in so doing, he made proper use of the medical evidence and the evidence of the plaintiff.[8]

The court noted that damages could be awarded for psychiatric injury caused by breach of contract, including breach of a contract of employment.[9] The court said that it would not be the first time that damages had been awarded against an employer whose failure to respond to bullying or harassment in the workplace caused psychiatric injury to an employee.[10]

CONSEQUENCES

The full court decision confirms that employment policies can be incorporated into the employment contract. Whether or not a particular policy is incorporated will be an objective assessment, based principally on the terms of the document. It does not matter whether the employer did not subjectively intend that it would be bound by a particular policy.

It is important for both employment and personal injury lawyers to assess policy documents, in the event of injury to employees, for potential breach of contract rights.

Notes: **1** *Nikolich v Goldman Sachs J B Were* [2006] FCA 784. **2** [2007] FCAFC 120 at [44]. **3** At [13-14]. **4** *Ibid* at [13]. **5** *Ibid* at [25]. **6** *Ibid* at [26]. **7** *Ibid* at [48]. **8** *Ibid* at [66]. **9** See *Gogay v Hertfordshire County Council* [2000] IR LR 703. **10** See also *Naidue v Group 4 Securitas* [2005] NSWSC 618.

Steven Penning *is an accredited specialist in employment and industrial law, a partner at Turner Freemans Lawyers and a member of the Precedent editorial committee.* **PHONE** *02 8222 3306*
EMAIL *smp@turnerfreeman.com.au*