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Court of Appeal's solution to direct dilemma over unfair contracts

The NSW Court of Appeal recently prevented the NSW Industrial Relations Commission from hearing an unfair contract claim about a commercial contract – before the Commission even had an opportunity to consider whether it could hear the claim. Lawyer Louise Keats reports.

This decision¹ confirms that an employer faced with a claim under section 106 of the *Industrial Relations Act 1996* (NSW) (the **Act**), about a commercial agreement, can attempt to bypass the Commission's jurisdiction.

The facts

Mr Fish asked the Commission to exercise its unfair contract jurisdiction to vary the terms of the share sale agreement he signed when he sold his business, FishTech, to Solution 6. The agreement allowed Solution 6 to pay most of the \$19 million sale price in Solution 6 shares, but contained no floor price. When the price of the shares fell dramatically, Mr Fish was left with only a fraction of the agreed purchase price. He asked the NSW Commission to vary the agreement to insert a floor price mechanism.

After the parties had filed their summary documents, Solution 6 (the respondent) brought a claim in the NSW Court of Appeal, asking the court to prevent the Commission from hearing the matter. At that stage:

- Solution 6 had not challenged the Commission's jurisdiction in the Commission; and
- the Commission had not begun hearing the claim or even considered whether the claim was within its jurisdiction.

1. *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW & Ors* [2004] NSWCA 200.

Jurisdictional issue

Section 106 of the Act gives the Commission the power to vary a contract that is unfair if it is a contract 'whereby a person performs work in any industry'. If a contract does not come within this description, it is outside the Commission's jurisdiction, and no orders can be made. In this case, the question for the Court of Appeal was whether the agreement was a contract whereby a person performs work in any industry.

The test: directness

Citing the High Court decision in *Stevenson v Barham*,² Chief Justice Spigelman (Justices Mason and Handley agreeing) held that the Commission cannot consider whether a contract is unfair under s106, unless the contract leads directly to a person working in an industry. In deciding whether a contract leads *directly* to a person working in an industry, the court will consider whether a contract:

- directly envisages the performance of work; and
- has a recognisable impact on the conditions of that work.

The court may also look to whether the purpose of the contract is the performance of work. If the test of directness is not met, the Commission has no jurisdiction.

Chief Justice Spigelman stressed that, although the Act's industrial context may assist the court in applying the directness test, his earlier judgment in *Mitchforce*³ was not intended to reinstate an 'industrial colour or flavour' test or to qualify the *Stevenson v Barham* test.

Court of Appeal's findings

The court held that the agreement in this case was beyond the Commission's reach under s106. Although the agreement stated that Mr Fish's employment with Solution 6 was a condition precedent to the sale of the business:

- it did not set out any of Mr Fish's conditions of work, which were contained in a separate contract of employment; and
- the purpose of the agreement was the sale of a business, and not the performance of work.

Based on these factors, the court found that the relationship between the agreement and the

performance of work was only consequential and not sufficiently direct to ground an unfair contract claim.

Submissions: observe the principle of restraint

The Commission and Mr Fish argued that the Court of Appeal should continue to be guided by the principle of restraint, referred to in its previous judgments, when playing a supervisory role. That principle requires the court to exercise restraint when reviewing the Commission's decisions.

The court rejected this argument, saying that the principle of restraint was developed before the enactment of s179 of the Act. Section 179 protects decisions of the Commission by removing any right of appeal. The court found that since the introduction of s179, the court has a legitimate role if the Commission might be making decisions in error, not subject to any right of appeal.

Commission lacks commercial experience

In an explanation for his decision, which has already given rise to much comment in industrial circles, Chief Justice Spigelman also stressed that the Commission's lack of commercial expertise justified the court's intervention. As he observed, the Commission's judges are drawn mainly from the industrial bar and few, if any, of them have substantial commercial law experience.

Implications

The Solution 6 decision is one of a growing number of recent Court of Appeal decisions that consider the Commission's ability to judge the unfairness of a contract that has a commercial flavour and contemplates the performance of work. The decision is important because it represents a pre-emptive strike against the Commission before it could assess the matter for itself.

In light of this decision, an employer faced with a challenge to what it considers a commercial contract can ask the Court of Appeal to step in, even before the Commission considers the issue of its jurisdiction.

Mr Fish has filed the necessary paperwork to ask the High Court to grant him leave to appeal against the decision. We will keep you updated on developments arising from that appeal in future *Focus: Workplace Relations*.

2. (1977) 136 CLR 190.

3. *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212.

Personal criminal liability for OHS offences

Lawyers Ric Morgan and Dr Kirk Lovric examine the recent *Gretley* decision in NSW and outline the circumstances where an individual may be personally liable for occupational health and safety breaches.

Deaths at the Gretley mine in 1996

In November 1996, a group of seven mine workers were underground at the Gretley Colliery near Newcastle in NSW. They were cutting a roadway when water and gas suddenly rushed in from the coalface. The men were using a continuous miner and had broken into the abandoned workings of a previous colliery that were full of water. The four men working at the face were swept away and drowned.

After a coronial inquest, the occupational health and safety (OHS) regulator brought charges. In addition to the 52 charges against two corporate defendants, eight individuals were also charged.

Individual liability

The charges against the managers were brought under section 50(1) of the *Occupational Health and Safety Act 1983* (NSW). This section imposes strict liability on those 'concerned in the management of the corporation' and remains in the new Act as s26.⁴ There has been no guidance from the courts about what these words mean in the context of OHS legislation.

An individual charged under this section can defend the charge by showing that they have used all due diligence or that they were not in a position to influence the conduct of the corporation.

'Concerned in the management of the corporation'

In the *Gretley* decision, Justice Staunton found three individuals were 'concerned in the management of the corporation'. As these three were unable to establish a defence under s50, they were found guilty. Each is yet to be sentenced.

Justice Staunton held that an individual is 'concerned in the management of the corporation' if they are:

... in a position to influence, by advice or decision making, the conduct of the corporation in relation to its contravention or whose decision making powers within the corporation comprehends activities the consequences of which have a significant bearing on the conduct of the corporation relevant to its contravention.

To assist with understanding this principle, her Honour establishes three main criteria. First, control of the corporate mind can be attributed to individuals outside the board and its directors if the individual exercises an element of decision making that affects the corporate enterprise as a whole.

Second, if a person does not make decisions that impact on the company as a whole, but makes decisions in relation to the specific contravention of the Act in question, they are also 'concerned in the management of the corporation'.

Third, accountability is not limited to decision makers. It is extended to those who give advice used by decision makers where the advice is 'a decisive factor in decisions taken at the corporate level'. However, Justice Staunton cautions against too broad an interpretation, noting that 'because the sanction is criminal, decisions about liability should not be given a construction that creates unfairness'.

The decision has implications in other states, as similar words are used in OHS legislation in Victoria and Queensland to hold individual company officers liable in addition to the corporation and the directors.

Policy background

The decision comes at a time when individual liability for OHS offences is under public scrutiny. The recent OHS policy debate in Australia and the UK has centred upon arguments that individuals and managers should

4. *Occupational Health and Safety Act 2000* (NSW).

be held personally accountable for OHS failures, particularly where there have been fatalities.

These debates have led to the introduction of industrial manslaughter legislation in the ACT, attempts to introduce similar legislation in Victoria, and the recent report of the NSW General Purpose Standing Committee that has recommended the introduction of industrial manslaughter legislation. A more recent report to WorkCover NSW recommends alternative proposals for sanctioning workplace deaths (see *Focus: Workplace Relations*, July 2004).

Disability Discrimination Act review

Senior Associate Rebecca Davern examines the recommendations on reasonable adjustment and unjustifiable hardship contained in the Productivity Commission's final report on the *Disability Discrimination Act*.

Reasonable adjustments

The recent High Court decision in *Purvis v New South Wales (Department of Education and Training)*⁵ clarified that the *Disability Discrimination Act 1992* (Cth) (*DDA*) creates no general obligation upon organisations to make reasonable adjustments to accommodate the needs of people with disabilities. Prior to *Purvis*, there appeared a belief that the *DDA* provided such an obligation, notwithstanding that the term 'reasonable adjustments' did not appear.

In its report, the Productivity Commission endorsed the concept of reasonable adjustment and recommended that it be included explicitly in the *DDA* as a stand-alone duty. While this would mean that failure to provide reasonable adjustment could itself be unlawful discrimination and the subject of a complaint, the Productivity Commission makes this recommendation subject to the unjustifiable hardship defence.

Unjustifiable hardship

Presently, the defence of 'unjustifiable hardship' applies to limited areas of the *DDA*. The Productivity

Commission recommended that the defence be expanded to apply to all areas, including education after enrolment has been accepted, employment between hiring and firing, and administration of Commonwealth laws and programs.

No health and safety exemption

While the Productivity Commission recognised the potential for conflict between the *DDA* and health and safety laws, it failed to recommend that a specific exemption be included in the *DDA* for health and safety compliance. In *Purvis*, Chief Justice Gleeson implied that where there is serious conflict between the *DDA* and occupational health and safety laws, occupational health and safety law may override the *DDA*. The Productivity Commission disagreed with this assertion.

Despite there being considerable litigation about the interaction between health and safety laws and the *DDA*, the Productivity Commission decided that the current mechanisms are adequate to deal with any conflict. Unfortunately, without a specific exemption for health and safety compliance, it is likely that litigation in this area will continue and that employers will be faced with ongoing uncertainty about compliance.



Better to kill than to maim

The UK House of Lords has drawn a subtle distinction between damages claims arising out of employment and those arising out of termination.⁶ Partner Julian Riekert and Articled Clerk Tess Hardy report.

Duty of trust and confidence

The House of Lords accepted previously in *Johnson v Unisys Ltd*⁷ that a duty of trust and confidence cannot form the basis of a damages claim to the extent that the employer's breach of contract involves termination of employment. The Lords were influenced heavily by the existence of the statutory regime for

6. *Eastwood and Anor v Magnox Electric plc; McCabe v Cornwall County Council and Anor* [2004] UKHL 35.

7. [2003] 1 AC 518.

5. (2003) HCA 62.

unfair dismissal and the special features of it, such as capped compensation, the exclusion of certain applicants, and the involvement of a specialist tribunal applying a specialist process.

While the Lords in *Eastwood* expressed some reticence in endorsing this principle, they found that the *Johnson* limitation does not extend to cases where employees suffer loss as a result of the employer's conduct before their dismissal.

Background

Mr Eastwood and Mr Williams pursued claims for unfair dismissal, alleging that their former employer, Magnox Electric plc, had participated in a malicious bid to terminate their employment by creating false evidence to embarrass, humiliate and isolate them from their colleagues. Similarly, in a separate action, Mr McCabe, a teacher, successfully argued that he had been unfairly dismissed by the Cornwall County Council following allegations of inappropriate behaviour towards female students.

In addition to their unfair dismissal claims, each employee commenced common law proceedings for negligence and breach of contract, alleging that the actions of their employers leading up to their dismissals resulted in psychiatric injury. These actions were originally dismissed, based on the *Johnson* principle.

House of Lords

Lords Hoffmann, Rodger and Brown all concurred with Lord Nicholls' judgment, which drew a distinction between the principle in *Johnson* and the situations before them.

To enable a dismissed employee to pursue a cause of action at common law, Lord Nicholls identified the boundary of the '*Johnson* exclusion area'. According to Lord Nicholls, this demarcation exists between the statutory code *applying to unfair dismissal*, and situations where loss has resulted from the employer's failure to act fairly in the period leading up to dismissal. In the latter case, the statutory code for unfair

dismissal does not apply and the employee is not prevented from bringing a separate claim.

Lord Nicholls acknowledged that this legalistic distinction may give rise to difficult questions of causation, particularly in cases where financial loss is claimed as a consequence of psychiatric illness induced by the employer's conduct. In effect, does the loss flow from the termination or perhaps from an earlier disciplinary investigation?

Lord Steyn also allowed the appeals, though he did so with 'considerable diffidence'. In his view, the reasoning in *Johnson* meant that, although the exercise of the power to suspend must be exercised with regard to trust and confidence (or fairness), the more drastic power of dismissal could be exercised free of any equivalent constraints. This echoes the traditional maxim that it is better to kill than to maim. Moreover, in his view, the majority in *Johnson* had proceeded on the 'fundamentally wrong assumption' that the employment tribunal necessarily has jurisdiction to award compensation for financial loss flowing from psychiatric injury.

Conclusion

The implied term of trust and confidence emerged in England out of a necessity to protect the statutory entitlements of employees in circumstances where employers were making the workplace unbearable for the employees, who subsequently resigned from their employment. These decisions are not necessarily applicable to Australia, as such actions are generally caught by our statutory regime, which encompasses the English notion of constructive dismissal and allows unfair dismissal claims to be brought if the termination is 'at the initiative of the employer'.

Australian courts are, however, heavily influenced by House of Lords' decisions and it would be unwise to assume that employees will not try the same argument here. Importantly, the process of carrying out investigations and acting in good faith may be of increasing significance, particularly when dealing with employees exempt from the unfair dismissal regime.



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