

FOCUS

WORKPLACE RELATIONS



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LANDMARK FINDING ON IMPLIED DUTIES AND OTHER ARTICLES

In this issue: we examine a landmark NSW Supreme Court decision on implied duties; complaint-handling procedures; the AIRC's powers in relation to union rights of entry; what is required to prove sex discrimination; and probationary and qualifying periods on a transmission of business.

An examination of the latest issues in workplace relations, including a landmark Supreme Court decision on implied duties

LANDMARK FINDING ON IMPLIED DUTIES

Implied terms of good faith and of trust and confidence have returned to the agenda following recent findings by the Supreme Court of New South Wales. Senior Associates Simon Dewberry and John Naughton report.

HOW DOES IT AFFECT YOU?

- The court's description and application of the implied duties demonstrates that a wide range of employer conduct could be reviewable. While each situation will require consideration on its facts, at the least employers should avoid acting arbitrarily toward their employees.
- In practical terms, the case is likely to attract a range of claims alleging breach principally as a bargaining chip to extract more beneficial

settlements out of employers. However, until an appellate court reviews the issues, there remains substantial doubt about the scope of implied terms.

BACKGROUND

Mr Russell was dismissed from his employment with the Roman Catholic Church for the Archdiocese of Sydney (the **church**). The dismissal followed an investigation finding neglect regarding children in Mr Russell's care.

Mr Russell obtained an order for reinstatement from the NSW Industrial Relations Commission. However, Mr Russell spent significant legal costs in the process.

SUPREME COURT

Mr Russell subsequently claimed damages in the NSW Supreme Court for breaches by the church of:

- an implied term that it would act in good faith towards him in the administration of his employment contract; and



- an implied term that it would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between it and Mr Russell.

The court found that these duties do arise (though noting that the issues will inevitably require clarification by an appellate court).¹ Importantly though, the court found that the implied duties cannot operate to limit or restrict the employer's right to terminate. This is clear in cases of termination without cause. However, if the claim relates to other conduct of the employer, either unrelated to termination or part of the lead-up to establish cause, the implied terms apply. This was the case here. This leads to some anomalies, as an employer is effectively encouraged to refrain from acting to determine whether there is legitimate cause to terminate. Even if the employee is protected by an unfair termination law, there is far greater exposure under contract where damages are not capped.

ACTS CONSTITUTING A BREACH

The decision demonstrates the difficulty in describing what the implied duties require of an employer. In particular, the decision variously describes the duty of good faith as requiring prudence, caution, diligence, due care, honesty and reasonableness.

In addition to the difficulty in describing the duties, employers are likely to have significant difficulty determining what the implied duties require in practice. Here, the court accepted that the decision to dismiss Mr Russell represented a proper balancing of the implied duties against the church's non-delegable duty of care to the children.

However, the court concluded that the church breached its duty of good faith by failing to interview a key witness face-to-face. The interview was by telephone, because the witness was located in Perth. The court held that the church should have interviewed the witness in person, considering:

- the potential prejudicial effect of the interview upon Mr Russell; and
- the church had sufficient resources to send the investigator to Perth.

This conclusion is not beyond criticism, as the court decided that the employee suffered no

loss from the breach as the outcome would have been the same. It might be argued that the church's analysis of the situation justified the decision to interview by telephone and that, in context, it did not breach any term.

EMPLOYER FINED FOR FAILING TO FOLLOW PROCEDURE

Adopting a generous complaint-handling procedure can expose an employer to serious penalties for breach. Lawyer Adrian Fisher reports.

HOW DOES IT AFFECT YOU?

- In establishing a complaint-handling procedure, take care to ensure that the procedure created is simple and effective.
- When handling a complaint under such a procedure, take care to follow the procedure, particularly those steps that ensure procedural fairness to the employee against whom a complaint is made.

BACKGROUND

Following an inquiry, the University of Western Australia (the **university**) informed one of its professors, Mr McAleer, that allegations of sexual harassment had been made against him.

The university purported to follow the procedure for handling allegations of misconduct set out in the University of Western Australia Academic Staff Agreement 2004 (the **2004 agreement**), which at the time governed Mr McAleer's employment. This procedure involved the referral of the matter to a Misconduct Investigation Committee (the **committee**).

Mr McAleer commenced proceedings, claiming that the university had breached the 2004 agreement, particularly by failing to provide sufficient details of the allegations against him.² He sought an injunction preventing the university from further investigating the allegations.

The university agreed that it had breached certain provisions of the 2004 agreement.

1. *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* [2007] NSWSC 104.

2. *McAleer v The University of Western Australia* [2007] FCA 52.

It sought a declaration that the committee was invalidly constituted and should be prevented from proceeding with its hearings and deliberations. The university claimed that it would deal with the allegations under the University of Western Australia Academic Staff Agreement 2006 (the **2006 agreement**), which came into effect after the proceedings began and did not require the referral of a complaint to the committee. In effect, the university wanted to dissolve the committee and deal with the allegations afresh under the new procedure.

DECISION

The Federal Court declared that the university had breached its complaint-handling procedure by not providing Mr McAleer with sufficient details of the allegations made against him. The court granted an injunction preventing the university from pursuing the allegations before the committee.

The court also imposed a \$20,000 penalty on the university to be paid to Mr McAleer. In making this order, the court noted that it is important that the university follow its agreed complaint-handling procedure to minimise the risk of unwarranted damage to the international reputations of the university's academic employees.

Finally, the court rejected the university's claim that it could deal with the allegations under the 2006 agreement, as it had already begun disciplinary proceedings against Mr McAleer at the time the 2006 agreement became effective.

COMMISSION POWERS AND RIGHT OF ENTRY

The Australian Tax Office has successfully appealed a decision requiring it to publicise a visit by a union official and to allow the official to approach staff at their workstations. Senior Associate John Naughton and Lawyer Elena Tsangari report.

HOW DOES IT AFFECT YOU?

- While the *Workplace Relations Act 1996* (Cth) places restrictions on union rights of entry, the AIRC retains broad powers to make orders where disputes arise.
- Employers must ensure that any limitations they impose on a permit holder's right of entry

are reasonable, having regard to both their own interests and those of employees and the permit holder.

BACKGROUND

Mr Lapidos, an officer of the Australian Services Union, issued entry notices to the Australian Taxation Office (the **ATO**) specifying that he intended to hold discussions with employees as part of an investigation into suspected breaches of the enterprise agreement.

The ATO sought to place a number of limitations on Mr Lapidos' right of entry, including that Mr Lapidos was not to approach staff at their workstations but instead was to conduct the interviews from a designated room.

In response, Mr Lapidos notified a dispute to the Australian Industrial Relations Commission (the **AIRC**), contending that the ATO's conditions prevented him from properly exercising his right of entry powers under the *Workplace Relations Act 1996* (Cth) (the **Act**).

DECISION OF SINGLE COMMISSIONER

Senior Deputy President Lacy found that each of the alleged breaches warranted Mr Lapidos, in the course of his investigation, viewing the workstations and speaking with employees in the performance of their work.

Among other things, the Senior Deputy President ordered that:

- Mr Lapidos be permitted to approach individuals at their workstations and invite them to meet with him for the purpose of an interview; and
- the ATO notify its employees of Mr Lapidos' presence and of its permission for the employees to meet with him for an interview under the Act.

APPEAL AND DECISION OF FULL BENCH

The ATO appealed to the Full Bench of the AIRC on the grounds that the commissioner:

- did not have power under the Act to make an order that the ATO notify its employees of Mr Lapidos' presence and of its permission for the employees to meet with him for an interview; and
- erred in finding the ATO's requests as to how Mr Lapidos' right of entry was to be exercised were unreasonable.³

3. *Australian Municipal, Administrative, Clerical and Services Union v Australian Taxation Office* [2007] AIRCFB 36.

The Full Bench rejected the ATO's first ground of appeal.

However, in relation to the second ground of appeal, the Full Bench commented that when considering whether an employer's request is reasonable, the AIRC is required to take all of the circumstances into account and to consider the legitimate interests of the employer, the employees and the permit holder.

The Full Bench held that the ATO's requirement that a designated room be used for the interviews was reasonable and that the order permitting Mr Lapidos to approach individuals at their workstations was unnecessary and was made in error.

WHAT IS REQUIRED TO PROVE SEX DISCRIMINATION?

A recent decision of the United Kingdom Employment Appeal Tribunal appears to provide a basis for challenging the commonly held view in Australia that sexual harassment automatically involves sex discrimination. Senior Associate John Naughton reports.

HOW DOES IT AFFECT YOU?

- Where a complainant alleges that workplace conduct also amounts to sex discrimination, it may be possible to resist that allegation if the real reasons for the conduct are unrelated to the person's gender.
- It may not be sufficient for a complainant to simply assert that the conduct complained of would not have occurred but for his or her sex. Rather, a tribunal will need sufficient evidence that the reason for the harassing conduct was that person's sex.

BACKGROUND

It is well-established in Australian law that instances of sexual harassment in the workplace can also constitute sex discrimination.⁴ The rationale has usually been that when a person (usually a woman) is subjected to sexual harassment, she is subjected to that conduct because she is a woman, and a male employee would not have received that treatment in the same circumstances. Therefore, the

discrimination is said to be on the basis of sex. Put another way, the female employee would not have been subjected to the harassment but for the fact of her being a female.

WHAT ABOUT OTHER MATTERS CONTRIBUTING TO HARASSING CONDUCT?

Australian courts have recognised that in some cases there may be other matters, in addition to the sex of the complainant, contributing to the harassment. As a consequence, not all women are subjected to the harassment. However, they have found that this does not alter the conclusion that a single incident of harassment may also constitute sex discrimination.

CRITIQUE OF THE 'BUT FOR' TEST

A recent decision of the United Kingdom Employment Appeal Tribunal (**EAT**)⁵ challenges the wisdom of the 'but for' test if other matters contribute to the conduct.

In the case before the EAT, the female complainant had been employed by the male respondent in a small legal practice and an intimate relationship had developed between them. However, when the respondent discovered that the complainant was having a relationship with another man, he dismissed her summarily. The complainant then sued the employer for unfair dismissal and sex discrimination.

Before the Employment Tribunal (**ET**), the complainant was successful in both complaints. The ET accepted that:

- the complainant had been dismissed unfairly; and
- her dismissal constituted sex discrimination because she would not have been dismissed but for the fact that she was a woman.

On appeal, the EAT accepted the ET's finding that the employee had been unfairly dismissed but rejected the claim that this constituted sex discrimination.

The EAT accepted that the real reason for the dismissal was the respondent's jealousy upon discovering the complainant's new relationship – not the complainant's gender.

4. For example, see *O'Callaghan v Loder and the Commissioner for Main Roads* [1983] 3 NSWLR 89, *Hill v Water Resources Commission* (NSW) 14 IR 158, *Aldridge v Booth* (1988) 80 ALR 1.

5. *B v A* [2007] UKEAT 0450_06_0901, 9 January 2007.

In its decision, the EAT attacked the 'but for' test, quoting with approval the following excerpt from the case of *Martin v Lancehawk Ltd*⁶:

... we interpret the Tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for her dismissal, not because she was a woman. We accept that, but for her sex, there would have been no affair in the first place. It could, however equally be said that there would have been no such affair (but for) the fact (for example) that she was her parents' daughter or that she had taken up employment with Lancehawk. But it did not appear to us to follow that reasons such as those could fairly be regarded as providing the reason for her dismissal.

Having determined that the real reason for the dismissal was the relationship breakdown, the EAT concluded that there was simply no evidence for the ET's conclusion that the reason for the dismissal was the complainant's gender.

The EAT noted that the *Sex Discrimination Act 1975* (UK) was not designed to protect employees from 'bad behaviour or spurned relationships', but to protect people from being treated less favourably because of their gender.

PROBATIONARY AND QUALIFYING PERIODS ON TRANSMISSION OF BUSINESS

On transmission of a business, probationary and qualifying periods for transferring employees run from the commencement of employment with the purchaser. Senior Associate Simon Dewberry and Lawyer Stacey Van der Meulen report.

HOW DOES IT AFFECT YOU?

- Probationary and qualifying periods of employment run from the date of the transmission of a business.
- A vendor might avoid the risk of a claim for redundancy benefits by making it a term of the sale of a business that the purchaser

6. *Martin v Lancehawk Ltd* UKEAT/0525/03/ILB, 22 March 2004. waive probationary or qualifying periods for transferring employees.

BACKGROUND

Thakral Pty Ltd (*Thakral*) sold its business to Reflections Group Pty Ltd (*Reflections*) and a number of Thakral's employees, including Mr Rogers, accepted employment with Reflections. Seven weeks later, Reflections terminated Mr Rogers' employment.

Mr Rogers applied for relief to the Australian Industrial Relations Commission (the *AIRC*), arguing the termination was harsh, unjust or unreasonable. Reflections sought to have the claim dismissed on the basis that Mr Rogers was serving a probationary period.

DECISION

The AIRC considered whether the probationary period in Mr Rogers' contract and the qualifying period under the *Workplace Relations Act 1996* (Cth) ran from the commencement of Mr Rogers' employment with Reflections, or whether those periods had been served with Thakral.⁷

It was held that the probationary and qualifying periods ran from the date of the transmission, because Mr Rogers' employment with Thakral terminated and he commenced a new period of employment with Reflections.

RISK FOR THE VENDOR

The AIRC commented that Mr Rogers could take advice on whether he was entitled to claim redundancy benefits from Thakral. The risk for Thakral is that Reflections' offer of employment was on less favourable terms than Mr Rogers enjoyed with Thakral and, consequently, he may have a claim for redundancy benefits.

A vendor might avoid this risk by making it a term of the sale that the purchaser waive probationary or qualifying periods for transferring employees.

A similar issue arises with workplace agreements, as their tenure is potentially cut short on transmission of the 12-month period following sale. This is another area where vendors are requiring purchasers to commit to the full balance of the term to avoid a possible reduction in benefits.

7. *William Rogers v Reflections Group Pty Ltd* [2007] AIRC 2.

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