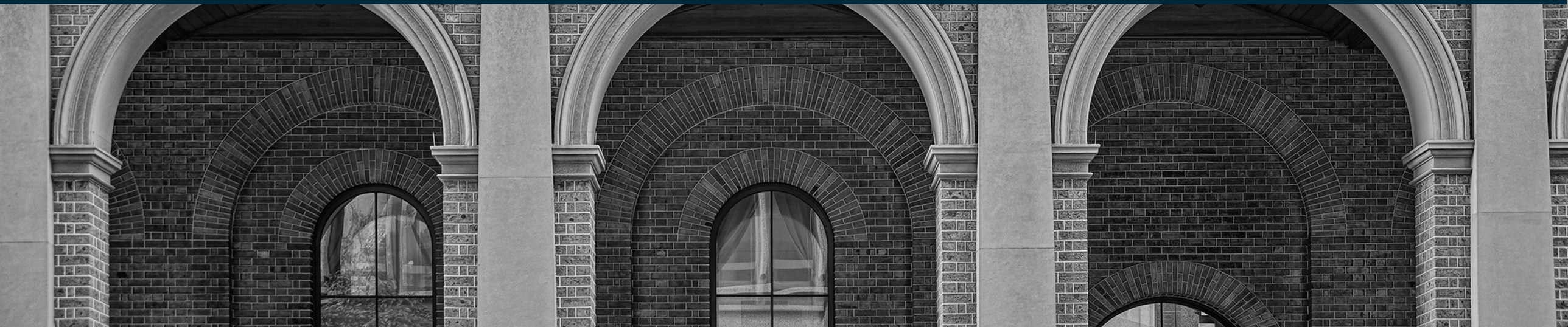
GREENWAY CHAMBERS

The hottest topics in employment law in 2023

7 March 2023: Jamie Darams, Oshie Fagir and Faheem Anwar



Overview

1. Faheem Anwar will discuss:
    a. The recent Court of Appeal decision *Wipro Limited v State of New South Wales [2022] NSWCA 265* about the calculation of ‘continuous service’ for long service leave
2. Jamie Darams will discuss:
    a. The reverse onus under s 361 of the *Fair Work Act 2009* (**FW Act**) in respect of corporate decision making**;** and
    b. The decision in *Qantas v TWU* (2022) 292 FCR 34 (baggage handlers outsourcing case) and the upcoming High Court case.
3. Oshie Fagir will discuss:
    a. Future developments in the law of employment contract.

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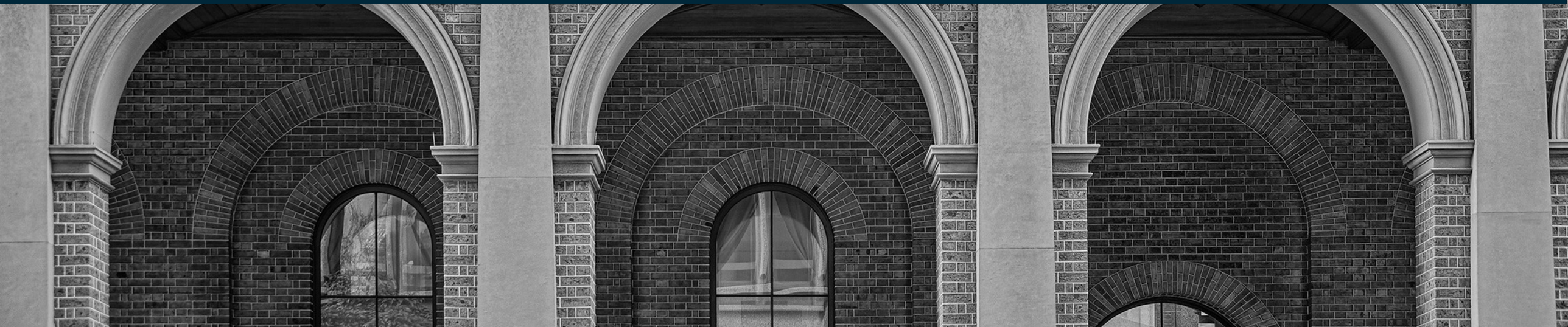
Wipro Limited v State of New South Wales [2022] NSWCA 265

Court of Appeal overturns a half-century old test for long service leave

Faheem Anwar



Long Service Leave Act 1955

- A worker who has completed at least 10 years service with an employer is entitled to long service leave – s 4(2)
- A service of a worker with an employer means **continuous service** – s 4(11)

Australian Timken Pty Ltd v Stone (No 2) [1971] AR 246

Facts

- Worker engaged for employment as an engineer in Victoria
- Immediately after his engagement he was sent to work for the employer's parent company's office in the United States, where he worked for 2 years
- He then returned to Australia and was directed to work in New South Wales

Australian Timken Pty Ltd v Stone (No 2) [1971] AR 246

Held

- At the time of occurrence of completion, termination or cessation of employment *"the service, looked at as a whole, may fairly be said to be to a substantial extent New South Wales service."*
- Whether it is or not to a substantial extent New South Wales Service must be a question of fact and degree in each case.
- If service is being performed in New South Wales when the relevant event occurs, that is strong but not conclusive, evidence that the service had a **substantial connection** with New South Wales.

Cummins South Pacific Pty Ltd v Keenan (2020) 281 FCR 421

Facts

- The applicant worked for Cummins in UK for approximately 14 years
- He then moved to Victoria and worked for Cummins for just under 12 years
- He was then seconded to work for a related corporation of Cummins in the United States for approximately 6 years
- He then returned to Australia and worked for Cummins in Victoria for almost 2 years before his employment was terminated

Cummins South Pacific Pty Ltd v Keenan (2020) 281 FCR 421

Held

- *"the substantial connection test as applied in New South Wales is a characterisation test which essentially asks whether the service provided by the employee may be fairly characterised as 'New South Wales service'."*
- The service of Mr Keenan was service of some 34 years. Approximately 20 years of that service was provided to Cummins, a Victorian based employer. Of that service provided, some 12 years was provided in Victoria including the last 1.75 years. Those features of Mr Keenan's overall service demonstrate a substantial connection between Mr Keenan's service and Victoria sufficient to characterise that service as Victorian service.

Infosys Technologies Ltd v State of Victoria (2021) 64 VR 61

Facts

- Two workers had served more than 7 years of continuous employment with the employer
- Each worker's employment commenced in India and ended in Victoria, with the service in Victoria being less than 3 years.

Infosys Technologies Ltd v State of Victoria (2021) 64 VR 61

Held

- *"An employee is entitled to long service leave by reason of completing seven years of continuous employment with one employer."*
- The completion of seven years of continuous employment is the central conception of the long service leave legislation in Victoria
- That central conception of continuous employment must have a connection with Victoria.
- As the workers' initial periods of employment in India had no connection with Victoria, that period did not form part of their continuous employment.

Wipro Limited v State of New South Wales [2022] NSWCA 265

Facts

- The plaintiff Wipro is a multinational company that provides IT consulting services in a number of different countries.
- The second defendant worked for Wipro for 5 years and 11 months in India under his Indian employment contract and for 4 years and 9 months in New South Wales under his ‘deputation’ agreement.
- The issue was whether his service in India should be counted as part of continuous service.

Wipro Limited v State of New South Wales [2022] NSWCA 265

Held

- It is fundamental to the operation of the LSL Act that there be "continuous service" by the worker with an employer.
- That is the central conception of the legislation and an inquiry as to its connection with New South Wales must be undertaken.
- In this case the defendant's initial period of employment in India did not have any substantial connection with New South Wales and therefore should not be counted as part of the period of continuous service.
- Whether there is a substantial connection with the "continuous service" is to be assessed when the service occurs rather than retrospectively on cessation of the service as would be required by the decisions in *Australian Timken*

***Wipro Limited v State of New South Wales* [2022] NSWCA 265**

Key Takeaways

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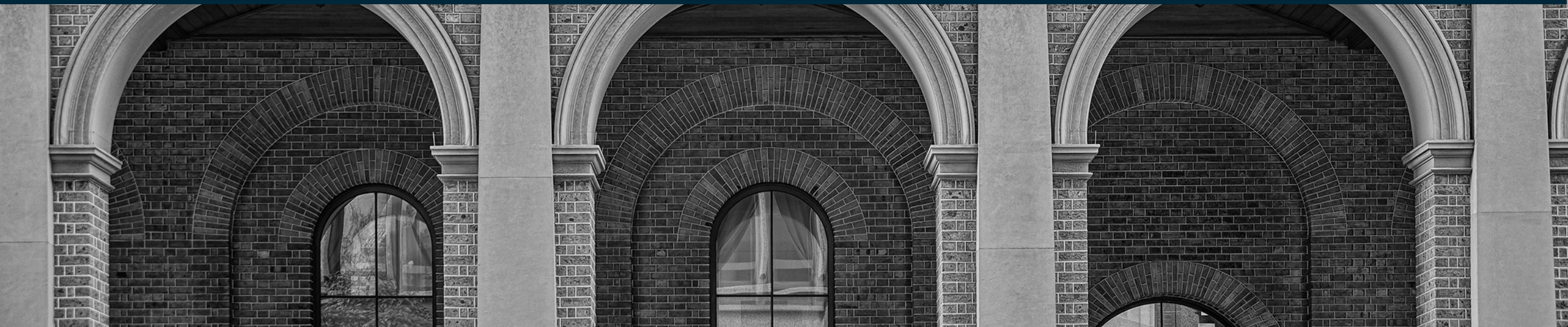
Reverse onus for corporate decision making and the *Qantas v TWU* (2022) 292 FCR 34 (baggage handlers outsourcing case)

Jamie Darams



The reverse onus under s 361

1. Section 361(1) of the FW Act provides that if something is alleged to have been taken for a particular reason or particular intent, which would result in a contravention of the FW Act, it is presumed to have been taken for that reason or intent **unless** proved otherwise.

2. A few matters to note about the operation of the section:
   - Its purpose is to throw onto a respondent the onus of proving that which is peculiarly within their knowledge: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 (***Bendigo***) at [50].
   - requires proof on the balance of probabilities and usually requires decision-makers to give direct evidence of their reasons for taking the adverse action: *Bendigo* at [43]-[44].

The reverse onus under s 361

- evidence of the decision-maker as to the reasons for the taking of the adverse action is not a necessary pre-condition: *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 (***BHP Coal***) at [192]; *Australian Red Cross Society v Queensland Nurses' Union of Employee*s (2019) 273 FCR 332 at [72].
- rejection of the decision-maker's evidence will ordinarily be "a weighty consideration and often a determinative consideration" in the determination (*Cummins South Pacific Pty Ltd v Keenan* (2020) 281 FCR 421 at [116]), but the rejection does not relieve the Court from considering all the evidence probative of whether the reason asserted by the applicant has been negated: *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at [272].

The reverse onus under s 361 – corporate decisions

- Particular questions arise in the context of decisions taken by corporations. In short, who is to be included in the concept of a "decision maker".
- Various decisions influence that question.
    - *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139: reasons for dismissing an academic not just in the minds of those who made the decision also those who authored a memorandum recommending it happen.
    - *Elliot v Kodak Australasia Pty Ltd* (2001) 129 IR 251: an assessment process as part of a redundancy program. The employer's reasons also resided in the minds of the two supervisors who had made "an indispensable contribution to the rankings" used.

The reverse onus under s 361 – corporate decisions

- *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Ltd* (2015) 253 IR 166: decision-maker acknowledged that he "could not have made his ultimate decision" without referring to a ranking spreadsheet prepared by another employee.

- In *Wong v National Australia Bank* (2022) 318 IR 148 the Full Court heard an appeal from a decision of Snaden J ([2021] FCA 671). At first instance, his Honour expressed some reservations with how these decisions could be reconciled with *Bendigo* and *BHP Coal.* He said (at [93]):

  "The reasons of those who significantly or indispensably influence (or, as Reeves J put it in Clermont Coal, 198 [121]: have "a material effect on") such decisions ought not to qualify, merely by reason of that influence, as reasons that animate resultant corporate conduct."

The reverse onus under s 361 – corporate decisions

- His Honour then went on to say (at [95]) that he was:

  "Unable to see how an individual officer might qualify as a maker of any given corporate decision unless he or she can be thought to have exercised some authority or executive power to effect it, be that actual or ostensible, formal or otherwise."

- However, he then noted he was effectively bound by *Elliot* (at [97]). His Honour made findings about who had a role in the decision leading to the employee's dismissal. He found that an employee, Mr Arnott, had a "significant" role in the process. But, and notwithstanding his acceptance of the binding effect of *Elliot*, he found that Mr Arnott should not be understood to <u>have possessed any power or authority, formal or otherwise, to effect that removal</u> such that he should be understood to have decided jointly with the person who had that authority that it should occur (at [196]).

The reverse onus under s 361 – corporate decisions

- A point run and accepted by the Full Court (at [40], [80]) was that whilst his Honour stated he was bound by *Elliot*, he did not in fact apply those principles but instead applied a test more aligned to his views as to what the law should be.
- His Honour's findings at [196] perhaps being the best illustration of that, but also findings at [304].
- Authority in terms of the executive power to effect a decision, is relevant, but it is not the test. So what is the relevant approach? Unsurprisingly, the Full Court (at [78]) observed:

  "The inquiry into whether Mr Arnott contributed to the decision-making process culminating in the adverse actions to a degree sufficient to warrant interrogation of his state of mind involved an evaluation of the objective facts in light of the principles stated in the authorities."

The reverse onus under s 361 – corporate decisions

- The Full Court (at [38]) said that like the Full Court in *Australian Red Cross*, it considered it "unnecessary to summarise the authorities" in a single verbal formula or test.
- So, it is all going to depend on the facts. That said, a common fact among some of the cases is a recommendation being made by a person some action be taken (*Royal Melbourne, Wong*). Another is a ranking or assessment of the employee being undertaken that is then used to make a decision (*Elliot, Clermont*)
- As an aside, in *Transport Workers' Union of Australia v Qantas Airways Limited* (2021) 308 IR 244 Lee J (at [232]) observed that if there was a Full Court case where it was argued that *Elliot* was plainly wrong, it would no doubt be necessary to evaluate the points usefully raised by Snaden J.
- Watch the space in terms of this issue.

The decision in *Qantas v TWU* (2022) 292 FCR 34

- A number of different points argued on appeal. One is now subject of an appeal to the High Court.
- At first instance, Lee J found that Qantas' decision to outsource its ground handling operations contravened s 340(1)(b) of the FW Act (to prevent the exercise of a workplace right). Lee J found that whilst the decision was made for commercial/economic reasons, the reasons also included a prohibited reason.
- The prohibited reason being to prevent the exercise by Qantas employees of their workplace right to organise and engage in protected industrial action and participate in bargaining in 2021.
- On appeal, Qantas contended that s 340(1)(b) of the FW Act was not engaged. It argued that was because the relevant employees *did not have a presently existing workplace right*. The nominal expiry date had not passed and other steps had not been taken.

The decision in *Qantas v TWU* (2022) 292 FCR 34

- Qantas' argument is that where s 340(1)(b) speaks of a workplace right it is one that *presently exists* and is able to exercise, not one "that does not yet, and may never, exist". Argue that s 340(1)(b) is a complementary provision. Aimed at action which seeks to remove the circumstances in which the right could be exercised by the employee.
- The TWU's primary contention is that that is too narrow an approach. They argue that Qantas' construction of s 340(1)(b) already falls within s 340(1)(a)(i) – that is, preventing the exercise of a presently existing workplace right would be action taken because the person *has a workplace right*. Section 340(1)(b) would have no work to do if it was limited to presently existing rights.
- Another watch this space case. To be argued this year. Maybe a decision before the end of the year.

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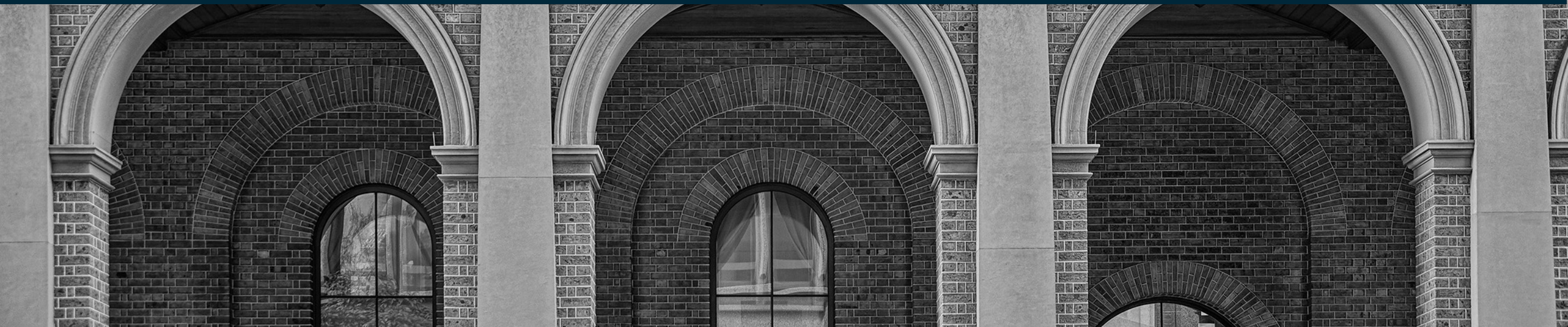
Is there excitement in our future?

Oshie Fagir



The future of the employment contract

"The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with [others]…

Values, norms and community expectations can develop and change over time. Customary morality develops "*silently and unconsciously from one age to another*", shaping law and legal values… These laws… reinforce the recognised societal values and expectations."

Developments elsewhere

The implied term of trust and confidence: *Malik v BCCI* [1998] AC 20

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The implied term of trust and confidence: *Malik v BCCI* [1998] AC 20

- an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee

Developments elsewhere

The implied term of trust and confidence: *Malik v BCCI* [1998] AC 20

- an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee
- this term places a "*portmanteau, general obligation*" on the employer "*not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages*"

Revolution through evolution

- The purpose of the trust and confidence implied term is to facilitate the proper functioning of the employment contract and protect the employment relationship. It seeks to strike a balance between "*an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited*"

Revolution through evolution

- The purpose of the trust and confidence implied term is to facilitate the proper functioning of the employment contract and protect the employment relationship. It seeks to strike a balance between "*an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited*"
- Part of the broad obligation goes to anything that affects the continuation of the relationship, and thus may overlap or be related to constructive dismissal. Nonetheless, a breach of this implied term can support an independent cause of action separate from constructive dismissal.

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- Part of the broad obligation goes to anything that affects the continuation of the relationship, and thus may overlap or be related to constructive dismissal. Nonetheless, a breach of this implied term can support an independent cause of action separate from constructive dismissal.
- "*The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far reaching is the implied term of trust and confidence. But there have been others.*"

Rationale for the implied term

- Given *"the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets… The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past."* —Lord Steyn in *Johnson v Unisys*
- the development of the implied term is *"consistent with the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination."—South Australia v McDonald*

Developments in commercial and consumer law

Statutory unconscionability – ACL s21

A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person; or

(b) the acquisition or possible acquisition of goods or services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

Developments in commercial and consumer law

Statutory unconscionability – ACL s21(4)

It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour…

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

  (i) the terms of the contract; and

  (ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

Developments in commercial and consumer law

Statutory unconscionability – ACL s22

…the court may have regard to:

- the relative strengths of the bargaining positions of the supplier and the customer;
- whether the customer was able to understand any documents;
- whether any undue influence or pressure was exerted, or any unfair tactics were used
- the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers

Developments in commercial and consumer law

Statutory unconscionability – ACL s22

…the court may have regard to:

- the extent to which the supplier was willing to negotiate the terms and conditions of the contract
- the terms and conditions of the contract
- the conduct of the supplier and the customer in complying with the terms and conditions of the contract
- any conduct that the supplier or the customer engaged in… after they entered into the contract;
- the extent to which the supplier and the customer acted in good faith

Developments in commercial and consumer law

Statutory unconscionability – ACL s21

"The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers…

Values, norms and community expectations can develop and change over time. Customary morality develops "*silently and unconsciously from one age to another*", shaping law and legal values… These laws of the States and the operative provisions of the ACL reinforce the recognised societal values and expectations."

- *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90; ATPR ¶42–447 (Allsop CJ, Jacobsen and Gordon JJ)

Developments in commercial and consumer law

- Unfair contracts– ACL s23
  - Standard form consumer or small business contracts
  - Unfair terms of such contracts are void
  - A term is unfair if it would cause a significant imbalance in rights and obligations and is not reasonably necessary to protect the legitimate interests of the beneficiary
- *Contracts Review Act* 1980 (NSW): where a contract term is found to have been unjust in the circumstances relating to the contract at the time it was made, the Court may:
  - Declare the contract void in whole or in part
  - Refuse to enforce its provisions
  - Vary in whole or in part the contract
  - As ancillary relief – order compensation

Developments in the law of the employment contract

- Effective repeal of s106 of the *Industrial Relations Act 1996* (NSW)

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- *CBA v Barker* [2014] HCA 32; 253 CLR 169

CBA v Barker

[Statements in *Malik* and *Unisys*] *were linked to the suggestion that the contract of employment could be described in modern terms as a "relational contract". The breadth of the statements made by Lord Hoffmann and Lord Steyn* ***points to a specific societal context*** *for the development of the common law in the United Kingdom and* ***considerations which****, to the extent that they exist* ***in Australia, would ordinarily be directed to legislatures.***

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A judicial announcement of an obligation of mutual trust and confidence, to be applied as an incident of employment contracts… ***involves the assumption by courts of a regulatory function defined by reference to a broadly framed normative standard.***

Broadly framed normative standards are familiar to courts required to apply, in common law or statutory settings, criteria such as "reasonableness", "good faith" and "unconscionability". ***However, the creation of a new standard of that kind is not a step to be taken lightly.***

CBA v Barker

"[the development of the implied term] *could be said to mark an extension of the duty of co-operation 'from the restricted obligation not to prevent or hinder the occurrence of an express condition… to a positive obligation to take all those steps which are necessary to achieve the purposes of the employment relationship ...'.*

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"[the development of the implied term] *could be said to mark an extension of the duty of co-operation 'from the restricted obligation not to prevent or hinder the occurrence of an express condition… to a positive obligation to take all those steps which are necessary to achieve the purposes of the employment relationship ...'.*

That extension was said to reflect a broader functional view, essentially a tribunal's view, of good industrial relations practice, embracing not only the material conditions of employment such as pay and safety, but also the psychological conditions which are essential to the performance by an employee of his or her part of the bargain.

CBA v Barker

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The complex policy considerations encompassed by those views of the implication mark it, in the Australian context, as ***a matter more appropriate for the legislature than for the courts to determine.***

It may, of course, be open to legislatures to enshrine the implied term in statutory form and leave it to the courts, according to the processes of the common law, to construe and apply it. ***It is a different thing for the courts to assume that responsibility for themselves.***

Developments in the law of the employment contract

- Effective repeal of s106 of the *Industrial Relations Act 1996* (NSW)
- *CBA v Barker* [2014] HCA 32; 253 CLR 169
- *ZG Operations v Jamsek* [2022] HCA 2; 96 ALJR 144; *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1; 96 ALJR 89

CFMMEU v Personnel Contracting Pty Ltd

Not only is there no reason why, subject to statutory provisions or awards, established legal rights and obligations in a contract that is entirely in writing should not exclusively determine the relationship between the parties but there is every reason why they should. **The "only kinds of rights with which courts of justice are concerned are legal rights"**.

CFMMEU v Personnel Contracting Pty Ltd

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The employment relationship with which the common law is concerned must be a legal relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties. By contrast, **there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights.**

Meanwhile in the world of trade and commerce…

"The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers…

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BUT WAIT!

- Pay secrecy provisions
- Restraint restraint proposals

Restraint restraint proposals

…a new rule would ban employers from imposing noncompetes on their workers, a widespread and often exploitative practice that **suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses….**

The freedom to change jobs is core to economic liberty **and to a competitive, thriving economy**… Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand… the FTC's proposed rule would **promote greater dynamism, innovation, and healthy competition.**

…noncompete[s] hinder innovation and business dynamism in multiple ways—from preventing would-be entrepreneurs from forming competing businesses, to inhibiting workers from bringing innovative ideas to new companies. This ultimately harms consumers; in markets with fewer new entrants and greater concentration, consumers can face higher prices—as seen in the health care sector.

Restraint restraint proposals

- Proposed by US competition regulator (Federal Trade Commission) to appear in competition law regulations
- Banned as an "*unfair method of competition*"
- Ban on non-competes but not non-solicits
- Would capture employees and contractors
- Would apply to existing contracts
- Exclusion for sale of business restraints

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BUT WAIT!

- Pay secrecy provisions
- Restraint proposals
- Winds of change?

The last word

Assistant Minister for Competition, Charities and Treasury, Andrew Leigh:

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…Why should we ban unfair contract terms when it comes to a big business contracting with a small businesses, yet allow unfair contract terms when it comes to a big business contracting with an individual employee?