

RETHINKING THE REINSTATEMENT REMEDY IN UNFAIR DISMISSAL LAW

ABSTRACT

Reinstatement is said to be the primary remedy for unfair dismissal under the *Fair Work Act 2009* (Cth). The Fair Work Commission is granted a broad discretion to determine whether to award reinstatement, but in the vast majority of cases it does not do so. This article considers the purpose of reinstatement by reference to the context and history of the unfair dismissal provisions, and argues that it is aimed at protecting the individual interests of the employees. This statutory context must be considered when the Fair Work Commission exercises its discretion in granting or refusing reinstatement. It is argued that the Fair Work Commission, in exercising its discretion, has overlooked some of this context and frustrated some of the purposes of the Act. This article makes some suggestions for reform of the law of reinstatement.

I INTRODUCTION

Under the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*), reinstatement is to be the 'primary remedy' for unfair dismissal,¹ with compensation being awarded only if reinstatement is inappropriate.² However, reinstatement is awarded only rarely in Australia. Of 182 dismissals found to be unfair by the Fair Work Commission ('FWC') in 2016–17, only 25 resulted in an award of reinstatement.³

Without further empirical research, it is not possible to conclusively determine exactly why reinstatement is so rarely awarded. In many cases, the jurisdictional and procedural requirements for unfair dismissal claims may hinder the ability of some workers, or some classes of workers, to seek unfair dismissal remedies. For example, Joanna Howe, Laurie Berg and Bassina Farbenblum argue that a 'range of practical

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¹ Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1555].

² *Ibid*; *Fair Work Act* s 390(3).

³ Fair Work Commission, *Annual Report* (2016–17) 84.

and legal obstacles' impede the ability of temporary migrant workers to bring unfair dismissal claims.⁴

This article is limited to consideration of the legal principles on reinstatement. It argues that in some cases, the FWC has exercised its remedial discretion in a way that is inconsistent with the purposes of the *Fair Work Act* and the norms recognised and created by the Act. In particular, it argues that in some instances, the FWC has too readily denied reinstatement on the basis of an employer's alleged loss of trust and confidence in the employee.

Some of the FWC's decisions involve an incongruity with the purposes of the *Fair Work Act* and the norms recognised by it. The notion of incongruity is drawn from issues that arise in other areas of private law, including contracts, negligence and trusts, where common law principles interact with statutes containing explicit or implicit recognition of norms of conduct. The potential incongruity arises where the *Fair Work Act* recognises a norm of conduct relating to the injustice, harshness or unfairness of dismissing an employee for a particular reason, but the FWC allows the employer, in relying on that same reason in exercising its discretion, to deny reinstatement to the employee.

Part II of this article briefly outlines the law of unfair dismissal and reinstatement in Australia and explores the justifications for reinstatement as a remedy. Part III analyses loss of trust and confidence as a ground for denying reinstatement. Part IV states the key conclusions of the article: first, that reinstatement is aimed at protecting workers from unfair treatment; and, second, that the discretion to grant an unfair dismissal remedy should be exercised in accordance with legal norms including this purpose.

II UNFAIR DISMISSAL AND REINSTATEMENT

A *Unfair Dismissal*

Employee protections under the common law employment contract were generally regarded as unsatisfactory.⁵ An employment contract could provide that the employer did not breach the contract even by dismissing the employee for no reason, and whether or not the employer afforded the employee procedural fairness.⁶ Even where

⁴ Joanna Howe, Laurie Berg and Bassina Farbenblum 'Unfair Dismissal Law and Temporary Migrant Labour in Australia' (2018) 46 *Federal Law Review* 19, 38.

⁵ Peter R A Gray, 'Damages for Wrongful Dismissal: Is the Gramophone Record Worn Out?' in Ron McCallum, Greg McCarry and Paul Ronfeldt (eds), *Employment Security* (The Federation Press, 1994) 41. See generally Karen Wheelright, 'Remedies for Unfair Dismissal under the *Workplace Relations Act 1996* — A Fair Go All Round?' (2001) 1 *Macquarie Law Journal* 173, 174–5.

⁶ *Pillai v Singapore City Council* [1968] 1 WLR 1278, 1284, cited in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 443 (McHugh and Gummow JJ).

a dismissal was in breach of contract, the employee's remedy would generally be limited to damages. Throughout the 20th century, courts generally refused to award specific performance or injunctive relief for either an employer's wrongful dismissal or an employee's failure to serve.⁷ Later in the century, courts were more likely to depart from this general rule,⁸ but the perception remained that it was very difficult for an employee to obtain specific relief: as late as 1995, a majority of the High Court considered that 'exceptional circumstances' were required to justify such relief.⁹

The concept of unfair dismissal, and the remedy of reinstatement, were devised to rectify this inadequacy in the common law. In their modern incarnation, they are contained in pt 3-2 of the *Fair Work Act*. Section 381 sets out the overall object of pt 3-2, providing that '[t]he procedures and remedies ... [for unfair dismissal] and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned'.

Section 385 of the *Fair Work Act* defines unfair dismissal:

A person has been *unfairly dismissed* if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Section 385 includes the clearly normative criteria of 'harsh, unjust or unreasonable'. The origins of this formulation are in the *Termination, Charge and Redundancy Case*,¹⁰ which approved the use of the words in a standard award clause. In interpreting the words 'harsh, unjust or unreasonable', the High Court has held that a dismissal may be unfair for both procedural and substantive reasons; 'Procedures adopted in carrying out the termination might properly be taken into account in determining whether the termination thus produced was harsh, unjust or unreasonable'¹¹

⁷ See, eg, *Lucy v Commonwealth* (1923) 33 CLR 229; *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701; *Ridge v Baldwin* [1964] AC 40.

⁸ See, eg, *Gregory v Philip Morris Ltd* (1988) 80 ALR 455; *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478; *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482.

⁹ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428 (Brennan CJ, Dawson and Toohey JJ).

¹⁰ (1984) 8 IR 34.

¹¹ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 468 (McHugh and Gummow JJ).

However, the Court has clarified that it is ‘relevant also to examine the nature and seriousness of the conduct itself.’¹²

The unfair dismissal test must also be interpreted in light of the object of pt 3-2 as ensuring a ‘fair go all round’, as set out in s 381 and adopted in *Re Loty and Holloway v Australian Workers’ Union*.¹³ In *Loty*, Sheldon J identified some criteria of fairness as including

the importance but not the inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is made.¹⁴

The concept of fairness in the *Loty* test involves not just individual justice, but industrial justice or fairness more broadly; as such, the interests of the employer are relevant to the exercise of the discretion to award an unfair dismissal remedy.

Howe observes that the idea of a ‘fair go’ has an especially pronounced place in Australian political culture and in its application to ‘underdogs’.¹⁵ Of course, in the context of *Loty*, a ‘fair go’ is to be afforded to all affected parties, including the employer, in the pursuit of industrial justice. Thus, as Howe points out, the ‘fair go’ test may be used to deny remedies to the employee where the grant of those remedies would be inconsistent with the employer’s right to manage their business or where the employer successfully argues that they have lost trust and confidence in the employee.¹⁶

It is important to make explicit the distinction between wrongful dismissal and unfair dismissal. Wrongful dismissal is merely a termination of the employee in breach of contract.¹⁷ It does not require proof that the dismissal was ‘harsh, unjust or unreasonable’, and a breach of contract need not be any of those things. Conversely, unfair dismissal need not be in breach of contract: a contract may allow an employer to dismiss an employee in circumstances that are harsh, unreasonable or even unjust.¹⁸ Unfair dismissal necessarily involves the making of a normative judgment about

¹² *Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537, 542–3, [23] (Buchanan J, Allsop CJ and Siopis J agreeing).

¹³ [1971] AR (NSW) 95 (*Loty*).

¹⁴ *Ibid* 99.

¹⁵ Joanna Howe, ‘Why Do So Few Employees Return to their Jobs? In Pursuit of a Right to Work Following Unfair Dismissal’ in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2015) 255, 260–1.

¹⁶ *Ibid* 261.

¹⁷ See, eg, Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation Press, 5th ed, 2015) 360.

¹⁸ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 466 (McHugh and Gummow JJ), citing *R v Industrial Court of South Australia; Ex parte General Motors-Holden’s Pty Ltd* (1975) 10 SASR 582, 586 (Bray CJ).

the actions of the employer, but wrongful dismissal does not. Establishing a breach of contract does not involve establishing fault or blame on the part of the breaching party.¹⁹ An employer who unfairly dismisses an employee causes a harm that the legislature has seen fit to protect against and provide a remedy for. The normative element in unfair dismissal, which arises from the nature of that harm, necessarily affects the manner in which the procedures and remedies for unfair dismissal should be applied, as will be argued later.

B *Reinstatement as a Discretionary Remedy*

It is useful to first explain the legal framework within which the FWC makes decisions to grant or refuse reinstatement. The key provision conferring on the FWC the power to award unfair dismissal remedies, and setting out when that power should be exercised, is s 390:

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
 - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
 - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

As discussed below, a decision to reinstate is not an exercise of judicial power; it does not uphold an existing right, but creates a new one.²⁰ A finding of unfair dismissal has been described as a function performed in the exercise of arbitral power.²¹

¹⁹ See, eg, Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 399.

²⁰ *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 663–4.

²¹ *Ibid* 665–6. Given that it is no longer necessary for the powers of industrial tribunals to be founded in the conciliation and arbitration power (s 51(xxxv) of the *Constitution*), the characterisation of a power to order reinstatement as a form of 'arbitral power' is likely to no longer be necessary or important.

References to a ‘duty to reinstate’ have long been read not as references to a pre-existing legal duty, but as a duty ‘imposed by considerations of industrial fairness’.²² The role of the FWC is to ascertain what industrial fairness requires, as confirmed by the reference in s 381 to a ‘fair go all round’. The language of a ‘fair go all round’, and the lack of any specific criteria for the award of reinstatement other than ‘appropriateness’, gives the FWC a broad discretion in deciding whether to award reinstatement.²³

Francis Bennion identified the defining features of a discretionary power as follows:

Discretion is applied where the empowering enactment leaves it to the chosen functionary to make a determination at any point within a given range ... In reaching a decision, D [the decision-maker] is not required to assume there is only one right answer. On the contrary D is given a choice dependent to a greater or lesser extent on personal inclination and preference.²⁴

It may seem that discussion of legal principle is of limited relevance where the relevant decision-maker has a broad discretion and is free, to an extent, to make determinations ‘dependent to a greater or lesser extent on personal inclination and preference’. However, no statutory discretion is unconfined. The other element of Bennion’s definition — that such an exercise of power must still be ‘within a given range’ — must be borne in mind. A purported exercise of discretion outside that range will be unlawful. Whether an exercise of discretion is outside that range depends on whether the decision-maker correctly applied relevant legal principles. As the Full Court of the Federal Court recently affirmed:

it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well-settled principles ...²⁵

The FWC’s discretion under s 390, however broad, must still be guided by principle. In that respect, it is no different to any other exercise of statutory power, the principles governing which are well known. Such powers must be exercised in a manner that is ‘legal and regular, not arbitrary, vague and fanciful’ and ‘according to the rules of reason and justice’.²⁶ Decision-makers must only take into account relevant

²² Ibid 660, citing *Australian Iron & Steel Ltd v Dobb* (1958) 98 CLR 586, 598 (Dixon CJ).

²³ *Toms v Harbour City Ferries* (2015) 229 FCR 537, 545 [30].

²⁴ Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2001) 137–8.

²⁵ *Toms v Harbour City Ferries Pty Ltd* (2015) 229 FCR 537, 558 [99] (Buchanan J, Allsop CJ and Siopis J agreeing), quoting *Norbis v Norbis* (1986) 161 CLR 513, 519 (Mason and Deane JJ) (citations omitted).

²⁶ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363 [65] (Hayne, Kiefel and Bell JJ).

considerations.²⁷ Where the statute does not comprehensively enumerate the considerations that may and may not be taken into account and instead confers a discretion without explicit limits, as s 390 does, such limits must be identified by ‘implication from the subject-matter, scope and purpose of the Act’.²⁸

The remainder of this article identifies a particular way in which the FWC’s power to deny reinstatement should be limited. It argues that the FWC has, in some cases, too readily denied reinstatement because of the employer’s asserted loss of trust and confidence in the employee. In so doing, it may have had regard to considerations that it was bound not to consider, or failed to have regard to considerations that it was bound to consider.

C The Purpose of Reinstatement

Part III below will place some reliance on the purposes of the *Fair Work Act* and the norms of conduct it recognises. As the exercise of a discretionary power is conditioned by its subject-matter, scope and purpose, it is necessary to consider the text, context and history of the Act insofar as those matters shed light on the purposes of the Act. As a preliminary to this discussion, however, Dixon J’s cautionary observation about analyses of parliamentary intention should be kept in mind:

an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction.²⁹

Any attempt to discover the purposes of an Act of Parliament must proceed by reference to accepted rules of construction and the meaning of the text. Propositions about the general policy that the legislation is aimed to fulfil are of limited utility. This is particularly so given that, as McHugh and Gummow JJ observed in the context of industrial legislation, such propositions tend to ‘disguise the compromises between contradictory positions which may be involved in obtaining the passage of legislation’.³⁰ Further, ‘no legislation pursues its purposes at all costs’.³¹

²⁷ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J).

²⁸ *Ibid* 40; see also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364.

²⁹ *O’Connor v S P Bray Ltd* (1937) 56 CLR 464, 478.

³⁰ *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 459.

³¹ *Rodriguez v United States*, 480 US 522, 525–6 (1987), quoted in *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 633 [41].

1 *Text and Context*

The text of the *Fair Work Act* provides limited guidance about the purposes to which it is intended to give effect. The objects clause³² provides that the object of the Act is ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’, including by

enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, *protecting against unfair treatment and discrimination*, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms ...³³

For the reasons set out in the remainder of this part, the unfair dismissal provisions can be characterised as giving effect to the purpose of ‘protecting against unfair treatment and discrimination’.

A conclusion like this must be drawn with care. In addition to the problem of legislation that strikes a balance between competing interests, there are three major reasons why objects sections should be used with caution: (i) they may be so general as to be unhelpful;³⁴ (ii) they may be qualified by specific provisions;³⁵ and (iii) they might not provide sufficient grounds to depart from the ordinary meaning of specific provisions where such provisions are not ambiguous or uncertain.³⁶ However, the use of s 3(e) to interpret s 390 does not suffer from these issues. First, while s 3(e) is general, it still directs attention to the interest of workers in not being treated unfairly as a specific element of a ‘balanced framework for cooperative and productive workplace relations’.³⁷ Second, s 390 does not place clear or specific qualifications on s 3(e), providing that reinstatement is to be refused only where it is ‘inappropriate’. Given that the language of ‘inappropriate’ calls for consideration of the broad purposes of the Act, as explained in Part II B of this article, this qualification makes the objects clause more, rather than less, significant. Third, the language of ‘inappropriate’ is uncertain and can be illuminated by considering the general purposes of the Act.

The text of some of the specific provisions dealing with unfair dismissal and reinstatement in pt 3-2 are set out above. Despite the title of ch 3, ‘[r]ights and responsibilities of employees, employers, organisations etc.’, pt 3-2 is drafted so as

³² *Fair Work Act* s 3.

³³ *Fair Work Act* s 3(e) (emphasis added).

³⁴ See, eg, *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 269 [33] (Heydon J, McHugh ACJ, Gummow, Kirby and Hayne JJ agreeing).

³⁵ See, eg, *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

³⁶ See, eg, *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 14 ALR 257, 260 (Barwick CJ); *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 263 [13].

³⁷ *Fair Work Act* s 3.

not to prohibit unfair dismissal, in a manner that suggests that it is *not* intended to protect the rights of employees. Part 3-2 confers no explicit right not to be unfairly dismissed. The contrast with pt 3-1 div 3 is stark. That division creates what are explicitly called ‘workplace rights’ and explicitly prohibits ‘adverse action’ taken in relation to workplace rights.³⁸ In pt 3-2, the FWC is instead given a discretion to award an unfair dismissal remedy if it is ‘satisfied’ that an employee who was ‘protected from unfair dismissal ... has been unfairly dismissed’.³⁹ The drafting of pt 3-2 indicates that, as has always been the case with federal unfair dismissal law, employees are not conferred any right against unfair dismissal.

Even in the guide to the operation of ch 3 of the *Fair Work Act*,⁴⁰ the same contrast appears. The language of ‘protection’ and ‘workplace rights’ is used in relation to the pt 3-1 protections in s 6(2). On the other hand, the unfair dismissal provisions are described in a separate subsection stating that pt 3-2 ‘deals with unfair dismissal ... and the granting of remedies when that happens’.⁴¹

Further, the *Fair Work Act* balances the interests of all parties. As noted above, the guiding principle of a ‘fair go all round’ requires consideration of employers’ interests. The unfair dismissal provisions, and the remedy of reinstatement, are aimed at protecting employees, but only to a limited extent. In s 390, this is reflected by the allowance that reinstatement is to be denied if the FWC considers it inappropriate.⁴²

It might be thought that these matters weigh against an interpretation of reinstatement as being designed to protect the individual interests of employees. However, they only show that unfair dismissal law is not about creating or protecting substantive, legislatively enshrined rights. The text of the unfair dismissal provisions does not qualify the purpose set out in s 3(e): it simply provides for how the purpose is to be achieved, which is by a different mechanism to the mechanism for protecting workplace rights. The mechanism created by the unfair dismissal provisions is the FWC’s power to review, and apply standards of reasonableness to, employers’ decisions to terminate employees.

Two other considerations support the conclusion that the unfair dismissal provisions, and reinstatement specifically, are aimed at protecting employees. These are the purpose of labour law and the history of unfair dismissal law in Australia.

2 *The Purpose of Labour Law*

One consideration is the purpose of labour law as a whole. As unfair dismissal is a subset of labour law, the objectives of labour law provide valuable context in

³⁸ Ibid s 340.

³⁹ Ibid ss 385, 390.

⁴⁰ Ibid s 6.

⁴¹ Ibid s 6(3).

⁴² Ibid s 390(3)(a).

understanding the purposes of unfair dismissal law. Since Otto Kahn-Freund's seminal text, labour law has generally been understood as serving as a 'countervailing force' to the 'inequality of bargaining power which is inherent ... in the employment relationship.'⁴³ Richard Mitchell goes so far as to say of this statement that 'most labour law courses, most labour law texts and most labour law policy ... can (or at least could) be understood or related to almost entirely in light of these sentiments'.⁴⁴ On this view, labour law is a system of laws aimed at 'securing "justice" for employees' by addressing the inherent imbalance of power between employer and employee.⁴⁵

In his discussion of the origins of labour law as a field of study, Mitchell lists the areas of law put in place to address the power imbalance inherent in the employment relationship: 'the establishment and maintenance of collective rights, collective bargaining, other dispute resolution mechanisms, the rights of trade unions and rights to industrial action.'⁴⁶ It is clear that the scope and subject matter of the *Fair Work Act* continues to reflect this conception of labour law.

The scope and subject matter of the *Fair Work Act* — which, in addition to its purposes, are the considerations that limit the scope of a discretionary statutory power⁴⁷ — support Mitchell's conclusions. Among other things, the *Fair Work Act* deals with:

- Setting minimum standards for employment (pts 2-2 and 2-3, establishing the National Employment Standards and modern awards);
- Creating a mechanism for such standards to be negotiated through collective bargaining and reviewed by an impartial body (pt 2-4, dealing with enterprise agreements, and pt 2-5, empowering the FWC to make workplace determinations);
- Minimum wages (pt 2-6);
- Equal pay between genders (pt 2-7);
- Protection from adverse action (pt 3-1);
- Regulation and facilitation of industrial action (pt 3-3); and
- Various non-curial dispute resolution mechanisms (pts 5-1 to 5-2, and throughout the substantive parts of the Act).

⁴³ Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons Limited, 2nd ed, 1977) 6.

⁴⁴ Richard Mitchell, 'Where Are We Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2011) 24 *Australian Journal of Labour Law* 45, 48.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* 49.

⁴⁷ See above nn 26–8 and accompanying text.

This view of labour law associates it with the protection of workers. Rosemary Owens, Joellen Riley and Jill Murray similarly argue, in the context of labour law, that ‘the protection of the worker’ is among ‘the most significant of the traditional functions for law’.⁴⁸ This is, again, due to the inequality of bargaining power between employers and employees.⁴⁹ According to Owens, Riley and Murray, labour law protects workers in two ways: first, it may impose ‘standards to govern the work relation’ that override the contractual arrangement; and second, it may ‘establish mechanisms that enable workers to join together to bargain with business’.⁵⁰

Of these two methods, unfair dismissal law is clearly an example of the first. The unfair dismissal provisions of the *Fair Work Act* establish standards of fairness that must be met by the employer in dismissing a worker who is protected from unfair dismissal. These standards are different in character from the standards set by the general protections provisions in pt 3-1, or other provisions of the *Fair Work Act* such as the National Employment Standards,⁵¹ which contain more substantive rights that employees must be afforded.

3 *Legislative History*

Another consideration is the history of unfair dismissal law in Australia.⁵² The ‘existing state of the law’ is part of the “‘context” in its widest sense’ against which all legislation must be construed.⁵³ This history suggests a move, at the federal level, from a collective approach to labour law to one more focussed on protecting individual interests, particularly when unfair dismissal provisions were first inserted into federal legislation. This change was partly driven by constitutional considerations.

(a) *Constitutional Considerations*

Unfair dismissal law has been heavily shaped by its constitutional and historical background. When the FWC finds that an employee has been unfairly dismissed, and awards an unfair dismissal remedy, it is not adjudicating on the existence of pre-existing rights but deciding whether to create new rights and obligations.⁵⁴ An employee’s legal rights are not violated when he or she is unfairly dismissed: the FWC simply recognises that the dismissal of the employee fits a particular legal

⁴⁸ Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 21.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* 22.

⁵¹ *Fair Work Act* pt 2-2.

⁵² A more detailed discussion of the history of unfair dismissal legislation can be found in Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 627–60.

⁵³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

⁵⁴ *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1987) 163 CLR 656, 666.

description ('unfair, unjust or unreasonable') and has an administrative discretion to award reinstatement or compensation as a result. This framing of unfair dismissal followed constitutional difficulties that troubled earlier attempts at establishing industrial relations regimes administered by non-judicial tribunals.

The *Boilermakers' Case*⁵⁵ established that the judicial power of the Commonwealth cannot be exercised by any non-judicial body, such as an arbitral tribunal, including in relation to unfair dismissal.⁵⁶ This would prevent any non-judicial body from determining questions about pre-existing rights, and in *R v Gough; Ex parte Meat and Allied Trades Federation of Australia*, an award provision allowing an arbitral body to order reinstatement in resolving a dispute was struck down by the High Court as an impermissible conferral of judicial power on a non-judicial body.⁵⁷

There were previously additional constitutional obstacles.⁵⁸ There had to be an 'industrial dispute' extending 'beyond the limits of any one State' for s 51(xxxv) of the *Constitution*, the 'industrial relations power', to enable the enactment of federal industrial relations legislation. It was once thought that the industrial relations power could not support laws regulating the relationship between employers and former employees,⁵⁹ although the High Court later resiled from that view.⁶⁰ Almost all of these constitutional obstacles have now been circumvented by the Commonwealth's reliance on the external affairs power⁶¹ and the corporations power⁶² to support industrial relations legislation,⁶³ as well as the state referrals of legislative power in support of the *Fair Work Act*.⁶⁴

⁵⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers' Case*').

⁵⁶ (1956) 94 CLR 254.

⁵⁷ (1969) 122 CLR 237, 245 (Windeyer J). Justice Menzies and Justice Owen reached the same conclusion on the basis that the power was non-arbitral.

⁵⁸ For more comprehensive discussion of these constitutional obstacles, see William B Creighton, William J Ford and Richard J Mitchell, *Labour Law: Text and Materials* (The Law Book Company Limited, 2nd ed, 1993) pt II; Ronald Clive McCallum, Marilyn Jane Pittard and Graham Floyd Smith, *Australian Labour Law: Commentary and Materials* (Butterworths, 2nd ed, 1990) chs 5–11.

⁵⁹ See, eg, *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312.

⁶⁰ See, eg, *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656.

⁶¹ *Constitution* s 51(xxxi).

⁶² *Ibid* s 51(xx).

⁶³ *Workplace Relations Act 1996* (Cth) ('*WR Act*') s 170CB(1)(c), read with s 4(1), definition of 'constitutional corporation'.

⁶⁴ *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (Commonwealth Powers) Act 2009* (SA); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas); *Fair Work (Commonwealth Powers) Act 2009* (Vic).

The first federal legislation to create a comprehensive unfair dismissal regime was the *Industrial Relations Reform Act 1993* (Cth), which amended the *Industrial Relations Act 1988* (Cth) ('*IR Act*'). As McCallum has argued, federal Australian labour law had a heavily collectivist focus until the 1970s, partly because it was primarily dealt with in the realm of conciliation and arbitration.⁶⁵ Creighton has argued that the *Conciliation and Arbitration Act 1904* (Cth) was 'strongly collectivist in character', and industrial law retained this character for most of the 20th century.⁶⁶ This began to change when the ideals of international human rights law rose in influence in Australian politics.⁶⁷

(b) *Changes and Continuities in Federal Unfair Dismissal Law*

The 1993 reforms were heavily influenced by the International Labour Organisation ('ILO') instruments to which Australia was a signatory.⁶⁸ Mitchell et al identify this as the most significant legislative change in Australian labour law over the past 40 years.⁶⁹ Post-1993, the *IR Act* had relatively strict pre-conditions for termination, including an absolute requirement that there be a 'valid reason ... connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, enterprise or service'.⁷⁰ Reasons for dismissal would not be valid if the dismissal was 'harsh, unjust or unreasonable.'⁷¹ Where an employee was unfairly dismissed, the Industrial Relations Court could award reinstatement or compensation, or make a declaration.⁷² Justice Gray described these laws as constituting 'a charter of rights for employees' and as 'directed towards the protection of the existing jobs of employees.'⁷³

As Anna Chapman has argued, the ILO's influence decreased with the Liberal-National Government's *WR Act*.⁷⁴ She points out that the changes made by the *WR*

⁶⁵ Ronald McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22 *Melbourne University Law Review* 42, 44–5.

⁶⁶ Breen Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-collectivisation of Australian Labour Law' (2011) 40 *Journal of Industrial Relations* 116, 117.

⁶⁷ McCallum, above n 65, 45.

⁶⁸ *IR Act* s 170CA. See also Marilyn Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *Australian Journal of Labour Law* 170.

⁶⁹ Richard Mitchell et al, 'The Evolution of Labour Law in Australia: Measuring the Change' (2010) 23 *Australian Journal of Labour Law* 61, 63.

⁷⁰ *IR Act* s 170DE(1).

⁷¹ *Ibid* s 170DE(2).

⁷² *Ibid* s 170EE(1), (2).

⁷³ *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168, 189.

⁷⁴ Anna Chapman, 'The Declining Influence of ILO Standards in Shaping Australian Statutory Provisions on Unfair Dismissal' (2003) 29 *Monash University Law Review* 104, 125–35.

Act to unfair dismissal law were driven by the view that the previous scheme was ‘far too detailed, too prescriptive and too legalistic and hence a disincentive to employment’.⁷⁵ The 1993 reforms were also affected by the High Court’s declaration of the invalidity of s 170DE(2) of the *IR Act* (prohibiting dismissals that were ‘harsh, unjust or unreasonable’).⁷⁶

Among other things, the *WR Act* removed the requirement of a valid reason. As in the *Fair Work Act*, the ‘harsh, unjust or unreasonable’ test, read in light of the ‘fair go all round’ test, was a ground to apply to the Australian Industrial Relations Commission for an unfair dismissal remedy at the Commission’s discretion.⁷⁷ Chapman argues that the primacy of the ‘harsh, unjust and unreasonable’ and ‘fair go all round’ tests reflects a preference for Australian concepts over international ones, such as the requirement for a ‘valid reason’.⁷⁸

The *Work Choices* legislation,⁷⁹ amending the *WR Act*, drastically reduced the scope of unfair dismissal protections. The two major limitations it imposed were the exception for employees dismissed for a ‘genuine operational reason’ (who would not be treated as unfairly dismissed) and the small business exception (which exempted businesses of less than 101 employees from federal unfair dismissal law).⁸⁰ Moreover, *WR Act* s 16 excluded the application of state and territory industrial laws in relation to unfair dismissal where the *WR Act* could apply, taking advantage of the constitutional ascendancy of federal over state legislation.⁸¹ This was particularly significant for the reinstatement remedy, as by this point, reinstatement was available under all state unfair dismissal legislation.⁸²

The *Fair Work Act* reversed these limitations. The Explanatory Memorandum noted that an additional three million workers employed by over 100 000 employers would be protected from unfair dismissal compared to under the *Work Choices* regime due to the removal of the small business exception.⁸³ However, it also introduced a

⁷⁵ Peter Reith, ‘Better Pay for Better Work: The Coalition’s Industrial Relations Policy’ (18 February 1996) 11, quoted in Chapman, above n 74, 126.

⁷⁶ *Victoria v Commonwealth* (1996) 187 CLR 416.

⁷⁷ *WR Act* ss 170CE(1)(a), 170CA(2).

⁷⁸ Chapman, above n 74, 130.

⁷⁹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘*Work Choices*’).

⁸⁰ For further discussion of these changes, see Anthony Forsyth, ‘Australian Regulation of Economic Dismissals: Before, During and After “Work Choices”’ (2008) 30 *Sydney Law Review* 506; Anthony Forsyth, ‘Protection Against Economic Dismissals: Australian Law Compared with Five Other OECD Countries’ (2009) 51 *Journal of Industrial Relations* 723.

⁸¹ *Constitution* s 109.

⁸² *Fair Work Act 1994* (SA) s 109; *Industrial Relations Act 1979* (WA) s 23A; *Industrial Relations Act 1984* (Tas) s 30; *Industrial Relations Act 1996* (NSW) s 89; *Industrial Relations Act 1999* (Qld) s 78.

⁸³ Commonwealth of Australia, Explanatory Memorandum, Fair Work Bill 2008, r 13.

longer minimum employment period (one year) for small business employees before they would be protected from unfair dismissal.⁸⁴ The ‘genuine operational reason’ exception was also removed.

As explained above, federal unfair dismissal law changed significantly after 1993, but it retained several features throughout this period. These include the availability of reinstatement as a remedy, an emphasis on the question of whether a dismissal is ‘harsh, unjust or unreasonable’, and an emphasis on the question of whether there is a valid reason for the dismissal. An important difference between the 1993 legislation, and all subsequent unfair dismissal legislation, is that subsequent legislation involves the application of the ‘fair go all round’ standard. Justice Gray pointed out that the 1993 legislation did not involve a balancing of employers’ and employees’ interests or the application of the ‘fair go all round’ standard when he described it as a ‘charter of rights for employees’.⁸⁵

However, it is also notable that the exception to this — what Gray J called ‘a discretion of the most minimal kind’ — was the discretion for the Industrial Relations Court to order compensation rather than reinstatement if reinstatement would be ‘impracticable’.⁸⁶ This feature of the unfair dismissal regime has remained the same, suggesting that the purpose of reinstatement has remained constant. Of course, differences in the type of conduct that enliven the power to order reinstatement are important — even in the unfair dismissal context, ‘[t]he remedy cannot be divorced from the right’.⁸⁷ Nonetheless, the concepts of ‘harsh, unjust and unreasonable’ and of a ‘valid reason’ for dismissal continue to be central to the existence of the power to order reinstatement and focus the inquiry on the fair treatment of the worker.

The development of unfair dismissal law from 1993 to the *Fair Work Act* reflects differing views of the balance that should be struck between the interests of employees and employers. The value of job security has been weighed against the regulatory burden on employers, particularly small businesses.⁸⁸ As a result, the purpose of federal unfair dismissal law is not perfectly coherent. However, some core features of the 1993 reforms have clearly been retained. These include the language of ‘harsh, unjust or unreasonable’ and the importance of a ‘valid reason’ for dismissal, even if these concepts do not play the same role as they did in 1993. The availability of a reinstatement remedy, which did not exist at the federal level until 1993,⁸⁹ is also an important continuity. These continuities suggest that the objectives of the 1993 reforms were not completely abandoned by subsequent legislative regime. The differences related mostly to the extent to which those objectives should be pursued.

⁸⁴ *Fair Work Act* s 383(b).

⁸⁵ *Fryar v Systems Services Pty Ltd* (1995) 130 ALR 168, 189.

⁸⁶ *Ibid.*

⁸⁷ *Liddell v Lembke* (1994) 56 IR 447, 464.

⁸⁸ See generally Owens, Riley and Murray, above n 48, 473–83.

⁸⁹ McCallum, above n 65, 42.

The above discussion of the purposes of reinstatement informs the next part of the article: a doctrinal examination of the case law on reinstatement, focused particularly on the ‘loss of trust and confidence’ ground for refusing reinstatement to an unfairly dismissed employee.

III LOSS OF TRUST AND CONFIDENCE

Much has been written on trust and confidence in the context of terms implied into the employment contract.⁹⁰ This part will discuss the loss of trust and confidence as a relevant consideration in denying reinstatement, on which there is considerably less literature. Employers frequently rely on the loss of trust and confidence to argue that reinstatement is inappropriate.⁹¹ The key conclusions of this analysis are: that whether reinstatement should be denied due to a loss of trust and confidence is a largely objective question, despite trust and confidence being subjective concepts in ordinary language; the relevance of such loss is conditioned by the purposes of the *Fair Work Act* and the norms of conduct it creates; and a more structured approach would assist in ensuring that these objective principles are properly applied.

A Principles

The leading case is *Perkins v Grace Worldwide (Aust) Pty Ltd* (‘*Perkins*’).⁹² In *Perkins*, the manager of a furniture removal company was dismissed based on allegations that he had supplied marijuana cigarettes to two other employees. The Industrial Relations Court, at first instance, held that the allegations were unfounded and the dismissal was unfair. However, it denied reinstatement. The employer successfully argued that it had lost trust and confidence in the applicant. The applicant appealed to the Full Bench, which reversed the decision and ordered his reinstatement. In doing so, it set out what has now become the leading statement of principle on the trust and confidence consideration. The Court, constituted by Wilcox CJ, Marshall and North JJ said that,

⁹⁰ See, eg, Joellen Riley, “‘Mutual Trust and Confidence’ on Trial: At Last’ (2014) 36 *Sydney Law Review* 151, 151–2 and the works there cited.

⁹¹ See, eg, *Australasian Meat Industry Employees’ Union v G & K O’Connor Pty Ltd* [2000] FCA 627 (12 May 2000) (‘*AMIEU*’); *Nguyen v Vietnamese Community in Australia* [2014] FWC 4314 (8 July 2014) (‘*Nguyen*’); *Farmer v KDR Victoria Pty Ltd* [2014] FWC 6539 (22 September 2014) (‘*Farmer*’); *Goodwin v Shanaya Pty Ltd* [2016] FWC 4317 (7 July 2016) (‘*Goodwin*’); *Millard v K & S Freighters Pty Ltd* [2017] FWC 105 (6 January 2017) (‘*Millard*’).

⁹² (1997) 72 IR 186. *Perkins* was decided under the old legislation under which reinstatement would be denied if ‘impracticable’, but it is generally accepted that the test for ‘impracticability’ is the same as that for ‘inappropriateness’: *Lambley v DP World Sydney Ltd* [2012] FWA 1250 (21 March 2012) [55], affirmed in *King v Catholic Education Office Diocese of Parramatta* [2014] FWC 6413 (7 October 2014) [55]. Both terms confer a broad discretion that appears to be confined only in the manner discussed above.

[t]rust and confidence is a necessary ingredient in any employment relationship ... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.⁹³

Two aspects of this passage are worth considering in further detail. First, the Court said that ‘whether there has been a loss of trust and confidence is a *relevant consideration*’⁹⁴ in determining whether reinstatement should be denied. It did not say that loss of trust and confidence is a criterion for reinstatement being denied. Loss of trust and confidence is neither necessary nor sufficient for a denial of reinstatement. Even if the employer establishes that there has been a loss of trust and confidence, it does not necessarily follow that reinstatement must be denied. The overall test remains the one created by the statute — it must be ‘inappropriate’ to grant reinstatement, and any loss of trust and confidence must, even if it is a ‘relevant’ loss of trust and confidence, be balanced against other considerations in determining whether reinstatement is inappropriate.

Second, the Court said that ‘such loss of trust and confidence [must be] soundly and rationally based’. This principle applies an objective overlay to the notion of trust and confidence. In ordinary language, trust and confidence are subjective notions. Whether one has trust and confidence in another person depends entirely on one’s actual mental attitude to that person. The fact that one’s loss of trust and confidence is unfounded or unreasonable does not change the fact that one has lost it. *Perkins* qualifies this position by considering that an irrational or unsound loss of trust and confidence is of no relevance to the question of reinstatement.

The Court continued,

[t]rust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case.⁹⁵

Loss of trust and confidence is not by itself enough to justify denying reinstatement, even if it is rationally based: it must be a loss of trust and confidence that makes the employment relationship unworkable. For example, as other cases have explained, a greater loss of trust and confidence might be tolerable in a corporate environment where no close personal relationship exists between the employer and employee.⁹⁶ Obviously, a slight loss of trust and confidence might not, in most cases, mean that reinstatement is inappropriate: ‘In most cases, the employment relationship is

⁹³ *Perkins* (1997) 72 IR 186, 191.

⁹⁴ Emphasis added.

⁹⁵ *Ibid.*

⁹⁶ *AMIEU* [2000] FCA 627 (12 May 2000) [42].

capable of withstanding some friction and doubts'.⁹⁷ In others, where the employer and employee depend on each other for their personal safety, even minor doubts about the employee may mean that reinstatement should be denied.⁹⁸ In all cases, as Gostencnik D-P reiterated in *Colson v Barwon Health*, 'assessment must be made as to the effect of the loss of trust and confidence on the operations of the workplace'.⁹⁹

The ordinary subjective notion of trust and confidence does relatively little work in an analysis of whether reinstatement should be denied. Most of the work is done by the principles, just discussed, which supply the objective aspect of trust and confidence. It follows that the dictionary meanings of the words 'trust' and 'confidence' are of questionable relevance, despite the FWC's consideration of them in *Haigh v Bradken Resources Pty Ltd* ('*Haigh*').¹⁰⁰ It is easy for an employer to give evidence that it has subjectively lost trust and confidence in an employee in the ordinary sense of the words. Whether reinstatement should be denied will not turn on that evidence alone or its credibility: as Gray J said in *AMIEU*, '[r]esort to an assertion that trust and confidence in a particular person have been lost cannot be a magic formula for resisting ... reinstatement'.¹⁰¹ It will turn on the application of objective principles which govern the relevance of a loss of trust and confidence. Establishing a loss of trust and confidence in the ordinary subjective sense is only the first step of the inquiry.

B *Legal Norms in the Fair Work Act*

'Inappropriate' is a statutory criterion, and words in a statute are to be given their 'grammatical meaning' but with 'due consideration of the relevant matters drawn from the context (using that term in its widest sense)'.¹⁰² There is no reason to abandon this principle where, as in s 390, the statutory word in question confers a broad remedial discretion. Any such discretion must still be exercised in accordance with established legal principles.¹⁰³ Context 'in its widest sense' includes, inter alia, the prior state of the law, the mischief the legislation was enacted to remedy, the overall scheme of the Act and the language and purpose of other provisions of

⁹⁷ *Perkins* (1997) 72 IR 186, 191.

⁹⁸ *Ibid.*

⁹⁹ [2013] FWC 8734 (11 November 2013) [22], citing *AMIEU* [2000] FCA 627, [42] affd *Colson v Barwon Health* [2014] FWCFB 1949 (24 March 2014).

¹⁰⁰ [2013] FWC 7493 (3 October 2013) [31]–[33].

¹⁰¹ *AMIEU* [2000] FCA 627 (12 May 2000) [43]. See also *Regional Express Holdings Ltd v Richards* [2010] FWAFB 8753 (12 November 2010) [26] (Guidice P, Kaufman S D-P, and Commissioner Ryan): '[the question of whether reinstatement should be denied] cannot be answered solely by reference to the views of management witnesses'.

¹⁰² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'), quoting Francis Bennion, *Statutory Interpretation* (Butterworths, 3rd ed, 1997) 343–4.

¹⁰³ *Norbis v Norbis* (1986) 161 CLR 513, 519 (Mason and Deane JJ).

the same legislation.¹⁰⁴ Moreover, the *Acts Interpretation Act 1901* (Cth) s 15AA requires that of the possible interpretations of a provision, the one to be adopted is the one that best furthers the purposes of the Act.

In determining what considerations are relevant to exercising the s 390 discretion, decision-makers must therefore have regard to context and purpose in this wide sense. From that context can be derived what will here be called ‘legal norms’.¹⁰⁵ Legal norms include community values and expectations recognised by the law as well as norms of conduct created by the *Fair Work Act* itself — importantly, given that statutes are presumed to give effect to harmonious ends¹⁰⁶ — and other legislation. Legal norms are especially important when interpreting a criterion like inappropriateness because it is a broad and open-ended term. Much like with the prohibition of misleading or deceptive conduct in trade or commerce,¹⁰⁷ or authorising copyright infringement,¹⁰⁸ Parliament has mostly left it to the decision-makers to set out detailed principles on applying the criterion.¹⁰⁹ In setting out those principles, there is nowhere else to look but the context and purpose of the statutory provision and whatever assistance is available from general community standards. Relatively little assistance can be gained from looking at the bare words of s 390.

Legal norms have always been important in the law of unfair dismissal. The aim of an industrial tribunal was famously said to ensure ‘a fair go all round’,¹¹⁰ words which are now enshrined in the *Fair Work Act* s 381. The discretion in ordering reinstatement was once described by the High Court as largely guided by considerations of fairness.¹¹¹ Giving content to this notion of fairness requires consideration of community expectations and norms created by statute.

A legal norm makes trust and confidence relevant to the question of inappropriateness in the first place. Simply looking at the words of s 390 will not reveal that

¹⁰⁴ Examples of the High Court affirming this broad understanding of context are numerous and include *Project Blue Sky* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ), *Singh v Commonwealth* (2004) 222 CLR 322, 349–50 [54] (McHugh J); *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555, 570 [30] (French CJ); *Minister for Immigration and Border Protection v Kumar* (2017) 91 ALJR 466, 471–2 [20] (Bell, Keane and Gordon JJ).

¹⁰⁵ There is no magic in this label; it is simply one adopted for convenience to denote those standards, values, and normative expectations that have a legitimate place in the exercise of statutory discretions and which can be identified by considering the context and purposes of the Act.

¹⁰⁶ *Ross v The Queen* (1979) 141 CLR 432, 440 (Gibbs J).

¹⁰⁷ *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

¹⁰⁸ *Copyright Act 1968* (Cth) s 36.

¹⁰⁹ See Mark Leeming, ‘Equity: Ageless in the “Age of Statutes”’ (2015) 9 *Journal of Equity* 108, 116.

¹¹⁰ *Loty* [1971] AR (NSW) 95, 99 (Sheldon J).

¹¹¹ *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1987) 163 CLR 656, 665.

trust and confidence is relevant to the question of inappropriateness. One must also understand that mutual confidence has traditionally been considered a requirement of an employment relationship. So much is clear from the statement in *Perkins* that it is a ‘necessary ingredient’ of any employment relationship,¹¹² as well as the historical reluctance of courts to grant specific relief requiring an employer to re-hire an employee.¹¹³ This reluctance was based in large part on equity’s hesitation to force the parties into a relationship of servitude where they no longer had confidence in each other.¹¹⁴

There is much literature on the status of mutual trust and confidence as an essential element in the employment relationship, and what implications this has for how the common law of implied contractual terms should develop in light of statutory regulation of employment.¹¹⁵ Phillipa Weeks and Riley have argued that judges have avoided developing the common law of implied contractual terms out of fear that they might undermine legislative policy choices.¹¹⁶ It might be thought that these fears would also make the FWC hesitant to guide its decision-making by reference to legal norms. This is especially so given that, in *Commonwealth Bank of Australia v Barker*, one major reason for the rejection of an implied term of mutual trust and confidence was its potential to intrude into subject matter best left to the legislature and already subject to significant legislative intervention.¹¹⁷

However, those issues should not prevent the consideration of legal norms in the context of reinstatement, where mutual trust and confidence may legitimately be taken into account by the FWC. This is because legal norms are to be used only

¹¹² *Perkins* (1997) 72 IR 186, 191.

¹¹³ *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, 298 (Dixon J) (*J C Williamson*’).

¹¹⁴ See *Quinn v Overland* [2010] FCA 799 “(28 July 2010) [97] (*Quinn*’); *Gregory v Phillip Morris* (1988) 80 ALR 455, 482; Wheelwright, above n 5, 175. The other major reason was that such an order would require the continued supervision of the court. However, *contra Quinn* [2010] FCA 799 (28 July 2010), caution should be taken in uncritically accepting that these factors were the *primary* reasons for denying specific enforcement of an employment contract. In *J C Williamson* (1931) 45 CLR 282, 298, Dixon J’s decision appeared to substantially be based on lack of mutuality in the available remedies. Courts will not compel an employee to work for an employer, as that would be tantamount to slavery; as a result, damages are the only remedy available for the employer; and courts of equity will not grant specific relief to one party where the other would only be able to get damages at law. Neither the requirement of mutual confidence nor the issues relating to continued supervision are necessary to this line of reasoning.

¹¹⁵ See above n 90.

¹¹⁶ Phillipa Weeks, ‘Employment Law — A Test of Coherence between Statute and Common Law’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 166–96; Joellen Riley, ‘Uneasy or Accommodating Bedfellows? Statute and Common Law in Employment Regulation’ (Paper presented at the Phillipa Weeks Lecture in Labour Law, Australian National University, Canberra, 25 September 2013).

¹¹⁷ (2014) 253 CLR 169, 195 [40] (French CJ, Bell and Keane JJ), 217 [118] (Gageler J).

where the legislature itself confers a broad discretion on a decision-maker. Where the decision-maker exercises that discretion by reference to legal norms and in the absence of specific rules or choices by the legislature, there is no risk of legislative policy choices being disturbed.

Just as a legal norm justifies the relevance of a loss of trust and confidence, other legal norms qualify its relevance. The previously mentioned requirement that any loss of trust and confidence be ‘soundly and rationally based’¹¹⁸ is one such norm. Again, simply looking at the words of s 390 does not reveal the requirement of a rational basis. The rational basis requirement might simply be the result of a general community expectation that people should act reasonably toward each other.

C *Incongruity with Legal Norms*

*Nguyen*¹¹⁹ establishes that the inappropriateness criterion must be applied in a way that is coherent, or not incongruous, with other legal norms created by the *Fair Work Act*.

The employees in *Nguyen* were teachers at a Vietnamese language school. They made various complaints about being underpaid by the employer. Eventually, tensions came to a head and they were dismissed. All parties accepted that the dismissal was unfair.¹²⁰ Senior Deputy President O’Callaghan, at first instance, determined that reinstatement should be denied. He found that the relationship between the parties had deteriorated to such an extent that it could not be re-established.¹²¹ He made his finding partly because the employees had continued to seek relief for the employer’s alleged underpayment, and ‘continued litigation relative to the applicants’ underpayment claims is likely and will bring with it continuing ill-will between the parties’.¹²² On appeal, the Full Bench affirmed the Senior Deputy President’s orders, but held that he erred in considering the underpayment claims as relevant to denying reinstatement. The Full Bench found that the employees were exercising a workplace right within the meaning of s 341(1)(b) of the *Fair Work Act*, namely the right to complain in relation to their employment. The Full Bench held that

‘[i]t would be incongruous if the exercise of a workplace right operated as a barrier to reinstatement in an unfair dismissal proceeding in circumstances where Part 3-1 of the FW Act prohibits an employer from terminating the employment of an employee who exercises a workplace right.’¹²³

¹¹⁸ *Perkins* (1997) 72 IR 186, 191.

¹¹⁹ [2014] FWC 4314 (8 July 2014).

¹²⁰ *Ibid* [6]. No finding was made as to whether the unfairness was due to lack of a valid reason or denial of procedural fairness.

¹²¹ *Ibid* [15].

¹²² *Ibid* [14].

¹²³ *Nguyen* [2014] FWC 7198 (21 October 2014) [37] (Ross P, Gostencnik D-P and Commissioner Wilson).

The Senior Deputy President erred in treating the employees' complaints as relevant to the appropriateness of reinstatement.

Again, this finding of the Full Bench cannot be justified solely by a literal reading of the *Fair Work Act*. While employers are prohibited from taking adverse action against employees for exercising workplace rights, there is no provision of the *Fair Work Act*, which prohibits the FWC or a court from denying a remedy due to the employee's exercise of a workplace right. However, we would argue that the Full Bench's decision on this point was clearly correct. The *Fair Work Act*'s protection of certain workplace rights creates a legal norm that employees are not to be disadvantaged by their exercise of those rights.

The reference to incongruity calls to mind the treatment of illegality as a defence to actions in negligence, contract and trusts and more general notions of coherence in private law.¹²⁴ In such areas the High Court has described coherence — the opposite of incongruity — as a central policy consideration, for example in determining whether a plaintiff's illegal conduct should preclude her from recovering damages for negligence.¹²⁵ According to the leading negligence case on the issue, *Miller v Miller*, the relevant question is whether it would be incongruous for the law to prohibit the relevant conduct yet allow the plaintiff to recover damages for loss suffered while engaging in that conduct.¹²⁶ Central to the rule is 'the recognition that there are cases where the breach of a norm of conduct stated expressly or implied in the statutory text requires the conclusion that an obligation otherwise created or recognised is not to be enforced'.¹²⁷ Incongruity can arise because, in prohibiting certain behaviour, the statute creates a 'norm of conduct' which allowing a negligence claim would undermine in some way. In the earlier case of *Gala v Preston*, Brennan J described the question as whether allowing the negligence claim would undermine the 'normative influence' of the statutory norm.¹²⁸ However, courts must be cautious in undertaking this inquiry because 'the legislature has in fact expressed no intention on the subject'.¹²⁹ Care must be taken in ensuring that any purpose or norm attributed to

¹²⁴ On coherence in private law, see generally Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *University of New South Wales Law Journal* 1002; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *University of New South Wales Law Journal* 367; Ross B Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42 *Monash University Law Review* 360. On illegality in contracts and trusts, see *Nelson v Nelson* (1995) 184 CLR 538.

¹²⁵ *Miller v Miller* (2011) 242 CLR 446, 454–5 [15]–[16], 473 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹²⁶ *Ibid* 455 [16].

¹²⁷ *Ibid* 459 [27].

¹²⁸ (1991) 172 CLR 243, 271.

¹²⁹ *O'Connor v S P Bray Ltd* (1937) 56 CLR 464, 477–9 (Dixon J), cited in *ibid* 459 [29].

the statute must be justifiable by reference to its words, structure and context and not ‘conjured up by judges’.¹³⁰

The parallels with reinstatement and *Nguyen* are obvious: in *Nguyen*, the norm of conduct was the norm against taking adverse action against a person for exercising their workplace rights. The question asked by the Full Bench was whether it would be incongruous for the law to prohibit adverse action for an employee’s exercise of a workplace right, yet allow an employer to deny the employee a remedy because of the employee’s exercise of a workplace right. It answered that question in the affirmative. *Nguyen*, then, suggests the existence of another principle that qualifies the relevance of trust and confidence. Loss of trust and confidence is only relevant to the appropriateness of reinstatement if denying a remedy because of it would not be incongruous with other norms created by the statute.

The Full Bench might not have recognised the full extent of the incongruity issue. The reasons in *Nguyen* do not explain exactly why the relationship between the employer and employees broke down because it was conceded that there was no valid reason for the dismissal. The fact that the dispute appears to have arisen largely because of the wage complaint raises the possibility that the denial of reinstatement was based on a natural consequence of the employees’ exercise of a workplace right. Naturally, where an employee complains about their working conditions, there will be tensions in the employment relationship. If the exercise of a workplace right is an impermissible consideration, surely so is any deterioration of the relationship to the extent that the deterioration was a natural consequence of the exercise of that right. However, conduct subsequent to the termination — in this case, the Commissioner relied on the employees’ conduct at a compulsory conference — could have justified the decision where that conduct was not directly connected to the exercise of the workplace right.¹³¹ The denial of reinstatement might also have been justified by some ground other than loss of trust and confidence, for example, if the position no longer existed.¹³² The interests of an innocent third party, such as a person hired in place of the unfairly dismissed employee, would also need to be considered. Where such a person is hired, and the employer is unable to re-employ the unfairly dismissed worker as a result, it would likely be appropriate to deny reinstatement. Such a case would be analogous to a case where the employee’s position no longer exists.

Millard v K & S Freighters Pty Ltd (*‘Millard’*)¹³³ is illustrative of another legal norm and a less direct form of incongruity. The employee was a truck driver who was dismissed based on his employer’s allegation that he tampered with a truck camera.

¹³⁰ *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405, cited in *Miller v Miller* (2011) 242 CLR 446, 459 [29].

¹³¹ *Koulouris v Ludowici Sealing Solutions Pty Ltd* [2016] FWC 5636 (3 November 2016) [58]–[64]; *Lama v Konute Enterprises* [2016] FWC 1814 (19 April 2016) [40]; both cases involved the denial of reinstatement based on conduct subsequent to the termination.

¹³² *Ball v Metro Trains Melbourne* [2012] FWA 8384.

¹³³ [2017] FWC 105 (6 January 2017).

He had a previous history of work incidents, including multiple minor collisions.¹³⁴ Commissioner Gregory found that the dismissal was unfair, partly because there was no valid reason for the employee's dismissal: his dismissal was *not* 'sound, defensible or well founded',¹³⁵ because the allegation was based on insufficient evidence and even if proved, it would only be a minor instance of misconduct.¹³⁶ Nonetheless, he subsequently held that it would be inappropriate to order reinstatement of the employee because the employer had lost trust and confidence in him, and that loss of trust and confidence was soundly and rationally based.¹³⁷ The employee's history of work incidents justified the employer's loss of trust and confidence.

The potential incongruity that arises from *Millard*¹³⁸ is this: if the employee's conduct was objectively sufficient for the employer to lose trust and confidence in him, why was it not sufficient to provide a valid reason for his termination? Further, why did the FWC nonetheless find that the termination was not just wrongful (in the sense of a 'mere' breach of contract), but 'harsh, unjust or unreasonable' (as required for a finding of unfair dismissal)? When a decision-maker finds that a dismissal was unfair because there was no valid reason for it, the decision-maker recognises the dismissal as being a breach of a legal norm, namely the norm that employees should not be unfairly dismissed. When the decision-maker makes such a finding, but then allows the employer to deny the employee a remedy by relying on the justification that was found to be invalid, the decision-maker seems — to use Brennan J's language — to undermine the normative influence of the rule against unfair dismissal.

Where an employee is found to have been unfairly dismissed yet the employer pleads a loss of trust and confidence, the FWC must consider whether accepting the employer's claim would undermine the influence of the norm against unfair dismissal. As in the private law cases, that is to be determined by ascertaining the purposes of the statute creating the norm.¹³⁹ In *Miller v Miller*,¹⁴⁰ that was partly ascertained by looking at the legislative history, which showed that the relevant illegal conduct was taken increasingly seriously by the legislature. The same considerations are apparent in the *Fair Work Act*. As explained in Part II, one objective of the *Fair Work Act*'s unfair dismissal provisions is to protect the interests of individual employees. That objective would be undermined if an employer can too easily prevent the award of the primary remedy Parliament has created for unfair dismissal.

¹³⁴ Ibid [94].

¹³⁵ Ibid [68], quoting *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373 (Northrup J) ('*Selvachandran*'), applying *Fair Work Act* s 387(a). The employer also failed to afford procedural fairness: *Farmer* [2014] FWC 6539 (22 September 2014) [66].

¹³⁶ *Millard* [2017] FWC 105 (6 January 2017) [77]–[78].

¹³⁷ Ibid [93].

¹³⁸ [2017] FWC 105 (6 January 2017).

¹³⁹ *Miller v Miller* (2011) 242 CLR 446, 473 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁴⁰ (2011) 242 CLR 446.

It is also important that in *Millard* and cases like it, the FWC found the dismissal unfair not just on procedural grounds, but because there was no valid reason for it. The explanation relied on by the employer was not ‘sound, defensible or well-founded’, but ‘capricious, fanciful, spiteful or prejudiced’,¹⁴¹ which is clearly normative language. To find that an employee was unfairly dismissed for no valid reason is to find, within the framework of the unfair dismissal provisions, that the reason relied on by the employer cannot justify the employer’s actions. It is to make a normative assessment not only of the employer’s conduct, but an assessment, required by the statute,¹⁴² of the reason relied on by the employer. After making such an assessment, it would be incongruous for the FWC to use that very same reason to deny a remedy to the employee.

That may be what happened in *Millard*.¹⁴³ *McCulloch v Calvary Health Care Adelaide* (*‘McCulloch’*) is similarly problematic.¹⁴⁴ The employee was dismissed for allegedly verbally abusing a colleague. Commissioner Wilson held, again, that there was no valid reason for the dismissal. Nonetheless, he denied reinstatement because of that conduct combined with, first, ‘serious allegations to an external authority about the hospital’s conduct that were investigated by the external authority and found to be without substance’; and second, ‘comments ... at the time of their altercation that [the employee] was going to leave and meet with ... the CEO’,¹⁴⁵ though the later was said by the employee to be for an unrelated matter (and his evidence to that effect was not rejected by the Commissioner). The Commissioner said that taking all these matters together showed that the employee was someone who ‘reacts poorly to things around him, including when he does not have all the relevant information’.¹⁴⁶

First, it appears that the employee’s allegations to the external authority may have been an irrelevant consideration per *Nguyen*¹⁴⁷ as protected complaints under s 341. The exact details of the complaint were not set out in the Commissioner’s reasons, so it is not possible to determine whether the complaint was made in relation to the employee’s employment. The Commissioner should have considered this possibility before making the determination. Second it is not clear how the employee’s conduct, despite not providing a sufficient reason for dismissal, could be relied upon by the employer to deny a remedy. Unlike in *Millard*,¹⁴⁸ the Commissioner took both the unfounded allegations to the external authority, and the comments about meeting with the CEO, into account in determining that the dismissal was unfair.¹⁴⁹ An incongruity

¹⁴¹ *Selvachandran* (1995) 62 IR 371, 373.

¹⁴² *Fair Work Act* s 387(a).

¹⁴³ [2017] FWC 105 (6 January 2017).

¹⁴⁴ [2014] FWC 9191 (19 December 2014).

¹⁴⁵ *Ibid* [83].

¹⁴⁶ *Ibid* [85].

¹⁴⁷ [2014] FWCFB 7198 (21 October 2014).

¹⁴⁸ [2017] FWC 105 (6 January 2017).

¹⁴⁹ [2014] FWC 9191 (19 December 2014) [45]–[46].

between the finding of an unfair dismissal and the denial of reinstatement appears to arise in *McCulloch*.¹⁵⁰

It is notable that cases in which this kind of incongruity is raised will be cases where the dismissal is unfair specifically because of a lack of a valid reason. It will not be raised in cases where there is a valid reason, but the employer failed to afford procedural fairness: in *Mora v QUBE Pty Ltd*, Asbury D-P rightly observed that the existence of a valid reason to dismiss the employee, and the procedural nature of the unfairness, was relevant to the denial of reinstatement.¹⁵¹ It might be raised where there is a valid reason, but for other substantive (as opposed to procedural) reasons the dismissal is still considered harsh, unjust or unreasonable.¹⁵² Where the reason relied on by the employer is found to justify termination, there is no incongruity for the employer to rely on that same reason to deny reinstatement. That observation sheds some light on how incongruity can be tested for in the first place. There is no incongruity because the unfairness of the dismissal, if it is purely procedural, has no connection to trust and confidence issues. Similarly, in *Nguyen*¹⁵³ and *Millard*,¹⁵⁴ the denial of reinstatement may have been based on conduct that was subsequent to the unfair dismissal, and if so then the unfairness of the dismissal would have no connection to that subsequent conduct. The fact that the employee does not want reinstatement¹⁵⁵ would, again, be a relevant factor that does not raise incongruity issues because of its lack of connection to the unfairness of the dismissal.

The test for incongruity would then mirror the test in negligence law. In negligence law, the test is whether there is a direct connection between the illegality and the injury;¹⁵⁶ here, the test would be whether there is a direct connection between the reason previously held to be invalid and the reason subsequently relied on to deny reinstatement. This test would explain why no incongruity issue arises when reinstatement is denied because the employee's position no longer exists:¹⁵⁷ there is no

¹⁵⁰ [2014] FWC 9191 (19 December 2014); see also *Farmer* [2014] FWC 6539 (22 September 2014); *Goodwin* [2016] FWC 4317 (7 July 2016).

¹⁵¹ [2014] FWC 1042 (17 February 2014). Other such cases include, eg, *Haigh* [2013] FWC 7493 (3 October 2013); *Walsh v Ambulance Victoria* [2014] FWC 482 (20 January 2014); *Cook v Australian Postal Corporation* [2016] FWC 5692 (18 August 2016).

¹⁵² The issue thus arises in *Jin v University of Newcastle* [2013] FWC 1049 (15 February 2013), where Smith D-P found the employee's dismissal to be for a valid reason, but held that it was harsh: at [1]. Reinstatement was denied in circumstances very similar to *Brambleby v Australian Postal Corporation* [2014] FWCFB 9000 (16 December 2014), discussed in detail below.

¹⁵³ [2014] FWCFB 7198 (21 October 2014).

¹⁵⁴ [2017] FWC 105 (6 January 2017).

¹⁵⁵ See, eg, *Lewis v Glendale RV Syndication Pty Ltd* [2014] FWC 1086 (4 March 2014).

¹⁵⁶ *Miller v Miller* (2011) 242 CLR 446, 456 [21] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438, 458 (Dixon and McTiernan JJ).

¹⁵⁷ See, eg, *Ball v Metro Trains Melbourne* [2012] FWA 8384 (1 October 2012).

connection between that rationale and the reason for dismissal which was found to be invalid.

D *A Complication*

The Full Bench of the FWC considered, and rejected, a submission raising this incongruity in *Brambleby v Australian Postal Corporation* ('*Brambleby*').¹⁵⁸ The facts in *Brambleby*¹⁵⁹ were superficially similar to *Millard*.¹⁶⁰ The employee was unfairly dismissed for misconduct. That dismissal was unfair because it was unreasonable. It was unreasonable because it was disproportionate: a lesser sanction, such as demotion, would have been more appropriate.¹⁶¹ This conclusion amounts to a finding that the employer did not have a valid reason to dismiss the employee — only to impose a lesser sanction. Reinstatement was not, however, denied on the basis of a loss of trust and confidence: the Full Bench found that any such loss could not be rationally based.¹⁶² Nonetheless, in rejecting the employee's incongruity argument, it did say something that may seem to be in tension with the argument so far: 'it does not necessarily follow that where there is a finding that termination was not justified based on employee misconduct there must be some other factor, other than the misconduct, to make reinstatement inappropriate'.¹⁶³

There was, however, no incongruity between the finding of an unfair dismissal and the denial of reinstatement. The case can be distinguished from *McCulloch*¹⁶⁴ and similar cases. The reason reinstatement was denied in *Brambleby*¹⁶⁵ was not because the employer had rationally lost trust and confidence in the employee such as to make a productive working relationship impossible. Rather, it was a result of the fact that an employee cannot be reinstated to a lower position: reinstatement must be 'to the position in which the person was employed immediately before the dismissal'.¹⁶⁶ Thus, it was open for the Full Bench to say, as it did, that (i) it was unfair for an employee to be dismissed, but (ii) it would be inappropriate for the employee to remain in their supervisory position, and (iii) because reinstatement would require reappointment to that supervisory position, it is inappropriate.¹⁶⁷

There is no incongruity in that overall conclusion because the employer could point to a relevant distinction between what conclusion the misconduct supported in the context of the dismissal, and what conclusion the misconduct supported

¹⁵⁸ [2014] FWCFB 9000 (16 December 2014) [56].

¹⁵⁹ [2014] FWCFB 9000 (16 December 2014).

¹⁶⁰ [2017] FWC 105 (6 January 2017).

¹⁶¹ [2014] FWCFB 9000 (16 December 2014) [52].

¹⁶² *Ibid* [81].

¹⁶³ *Ibid* [56].

¹⁶⁴ [2014] FWC 9191 (19 December 2014).

¹⁶⁵ [2014] FWCFB 9000 (16 December 2014) [56].

¹⁶⁶ *Fair Work Act* s 391(1)(a).

¹⁶⁷ *Brambleby* [2014] FWCFB 9000 (16 December 2014) [94].

in the context of the denial of reinstatement. In the context of the dismissal, the employer tried to say that the misconduct justified removing the employee from the workplace altogether. That was unreasonable. However, in the context of the denial of reinstatement, the employer said that the misconduct justified — perhaps even required — removing the employee from his *supervisory position* and re-appointing him to a *lower position*. That was reasonable.

The decision in *Brambleby*¹⁶⁸ does not undermine the normative influence of the legislation because the norm against unfair dismissal is not a norm against demoting an employee — it is a norm against *dismissing* an employee. To deny reinstatement on the basis that an employee's demotion is justified will not lessen the normative force of the unfair dismissal norm. It could even be said that the main reason the employee is denied reinstatement is not their misconduct but the requirement in s 391(1) that reinstatement cannot be to a lower position.

*Brambleby*¹⁶⁹ does indicate that s 391(1) is unduly restrictive. The Full Bench found that the employer could not rationally have lost trust and confidence in the employee, so re-appointing the employee to a non-supervisory position would have been appropriate, but because that was not an option available to it, the employee was left with compensation. It is likely that the requirement for an employee to be reappointed to the position they were in immediately before the dismissal exists to protect the employee by ensuring that employers do not reappoint employees but on significantly less favourable terms to punish employees. This is suggested by the wording of the alternative 'no less favourable' requirement in s 391(1)(b) (that is, no less favourable to the employee). As in *Brambleby*,¹⁷⁰ however, the provision can be used to deny reinstatement due to the lack of a middle ground between denying reinstatement and reinstatement on terms no less favourable. Section 391(1), though inserted to protect employees, has instead operated to deny employees the primary remedy of reinstatement.

It is submitted that s 391(1) should be amended to provide that middle ground and enable the FWC to reinstate an employee to a lower position, perhaps in the following terms:

- (c) If the FWC is satisfied that
 - (i) it would be inappropriate to reappoint the person to the position the person held immediately before the dismissal; and
 - (ii) it would be inappropriate to appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal; and

¹⁶⁸ [2014] FWCFB 9000 (16 December 2014).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

- (iii) it would not be inappropriate to reinstate the person to a lower position, or a position on terms and conditions less favourable than those on which the person was employed immediately before the dismissal;

an order for the person's reinstatement may be an order that the person be appointed to a position on terms and conditions less favourable than those on which the person was employed immediately before the dismissal.

E *Structuring the Inquiry*

Even though objective principles and legal norms largely govern, or should govern, any inquiry as to whether reinstatement is inappropriate due to a loss of trust and confidence, the FWC's consideration of trust and confidence is largely unstructured. There is no clear analytical framework through which it conducts that inquiry. As a result, decisions have been made which do not rule out the possibility that some of the considerations relied on were irrelevant because of their incongruity with a legal norm. Sometimes, this is because (as in *Nguyen*¹⁷¹ and *Millard*¹⁷²) the FWC did not set out the facts in sufficient detail — it did not, for example, make clear whether the employee engaged in conduct subsequent to the termination which supported a finding that there was a loss of trust and confidence. The principles set out in *Perkins*¹⁷³ and the analysis of incongruity suggest that the following structure should be applied by the FWC.

First, the FWC must be satisfied that the employer has subjectively lost trust and confidence in the employee in accordance with the ordinary meaning of the words. The direct evidence of management witnesses can easily establish this, but the following stages of the inquiry limit the relevance of this first stage.

Second, it must be satisfied that the loss of trust and confidence, including all the events and conduct relied upon to demonstrate a loss of trust and confidence, are relevant considerations. It will not be relevant if, and to the extent that, it is not rationally based. It will also not be relevant if relying on it to deny reinstatement would be incongruous with a legal norm created or recognised by the *Fair Work Act*. Thus, any loss of trust and confidence based on or evidenced by the employee's exercise of a workplace right would be an irrelevant consideration. So would any loss of trust and confidence which was a natural consequence of the employee's exercise of a workplace right. So would any loss of trust and confidence which is directly connected to the unfairness of the dismissal of the employee. In determining questions of incongruity, it must be asked whether there is a direct connection between the reason found to be invalid and the reason relied on to deny reinstatement. However, due to the current requirement that reinstatement be to the employee's previous position or one no less favourable, it would not be incongruous for the FWC

¹⁷¹ [2014] FWCFB 7198 (21 October 2014).

¹⁷² [2017] FWC 105 (6 January 2017).

¹⁷³ (1997) 72 IR 186.

to deny reinstatement based on its view that the employer's reason justified demoting the employee but not dismissing them.

Third, the FWC must be satisfied that the employer's loss of trust and confidence is such that no productive or workable employment relationship is possible, and that the relationship cannot be reconciled.

It is important to keep stage two conceptually separate from stage three. *Perkins*¹⁷⁴ makes it clear that it is wholly impermissible to consider a loss of trust and confidence that is not rationally based. An irrational loss of trust and confidence does not just carry less weight; it is simply not a relevant consideration. Similarly, *Nguyen*¹⁷⁵ makes it clear that it is wholly impermissible to consider a loss of trust and confidence if to do so would be incongruous with the employee's workplace rights. Such considerations must be excised from the inquiry.

IV CONCLUSION

The unfair dismissal provisions of the *Fair Work Act* pursue competing objectives and must balance incompatible interests. However, at least one objective they pursue is protecting individual employees from unfair treatment, particularly in relation to the termination of their employment. The discretion to award reinstatement as a remedy for unfair dismissal is conferred in broad terms. This makes it particularly important to pay attention to the subject matter, scope and purposes of the *Fair Work Act* in deciding how the decision of whether to award reinstatement should be made. This article has argued that the FWC has sometimes paid insufficient attention to the purposes of the *Fair Work Act*. Legal norms are founded on those purposes, and the possibility of incongruity with those norms makes the FWC's current approach unsatisfactory.

¹⁷⁴ Ibid.

¹⁷⁵ [2014] FWCFB 7198 (21 October 2014).