Before the High Court

Revisiting the Contract of Employment — *Byrne and Frew v Australian Airlines Limited*

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The appeal proceedings in *Byrne and Frew v Australian Airlines Ltd* [1] (hereinafter "*Byrne and Frew*") provide the High Court with a rare opportunity to re-examine, and perhaps reinvent, many aspects of the common law contract of employment. Although the Court has dealt with a welter of industrial litigation over the years and fashioned detailed principles of collective labour law, it has only infrequently had an opportunity to analyse the individual employment relationship. The most significant High Court decision concerning the contract of employment is probably the 1946 case, *Automatic Fire Sprinklers Pty Ltd v Watson*.[2] At least some aspects of that decision are likely to be reviewed when the High Court reaches its decision in *Byrne and Frew*.

The limited opportunities for superior courts to deal with the contract of employment may explain the observation that employment law in Australia remains "curiously undeveloped".[3] This argument is usually based upon the long list of common law implied terms in the contract of employment with their origin in the master and servant relationship, and the limits on available remedies in the event of a contractual breach.[4] The question which arises out of this is whether the contract of employment should be freed from its historical master and servant trappings and treated as an ordinary contract. Just how the High Court will approach the contract of employment in *Byrne and Frew* becomes more tantalising when one considers the Court's preparedness over the last decade or so to depart from traditional doctrine in the area of contract law, and to replace it with fresh principles based upon fair dealings between

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1 High Court proceedings Nos S24 and S25 of 1994. Special leave to appeal to the High Court was granted on 8 August 1994. The matter was originally heard by Hill J (1992) 45 IR 178. A subsequent appeal was heard by the Full Court of the Federal Court — Black CJ, Keely, Beaumont, Gray and Heerey JJ — (1994) 52 IR 10. For a recent comment on the decisions in *Byrne and Frew v Australian Airlines Ltd*, see Forsyth, A, "Contractual Incorporation of Award Terms: *Byrne and Frew v Australian Airlines Ltd*" (1994) 36 *JIR* 417.

2 (1946) 72 CLR 435.

3 See Gray J in *Byrne and Frew v Australian Airlines Ltd* (1994) 52 IR 10 at 70, and also *APESMA v Skilled Engineering Pty Ltd* (1994) 54 IR 236 at 241–2. Gray J has suggested that the limited number of employment cases reaching high level appellate courts in Australia stems from the prevalence of industrial awards regulating the employment relationship (1994) 52 IR 10 at 71.

4 These are most obviously the general reluctance of common law courts to order specific performance of an employment contract and the restriction on damages in a wrongful dismissal claim to whatever the employee would have received had proper (or "reasonable") notice of termination been given: see *Addis v Gramophone Co Ltd* [1909] AC 488.

contracting parties.[5] It is fair to say that since 1983 the High Court has almost entirely reshaped Australian contract law.[6] In that context it would seem unlikely that the court will not be tempted to undertake a similar reform operation on the hitherto neglected contract of employment when it considers the issues in *Byrne and Frew*.

The Issues in Byrne and Frew v Australian Airlines Ltd

The contract of employment issues in *Byrne and Frew* reach the High Court in a neatly disguised way. The central issue in the case is the relationship between an industrial award and the individual employment contract, or more particularly, whether an award provision (here a term prohibiting harsh and unreasonable termination of employment) becomes a term of the individual contract. Such a result would mean that conduct in breach of an award might give rise to a contractual-based action for damages. This necessarily raises an argument about the appropriate mechanism whereby this "incorporation" of award terms might take place. Obviously enough, the parties may agree that their relationship is governed by the award, but what happens in the absence of express agreement?

Other features of the case are also of contractual significance. These include whether a dismissal in breach of an award is a nullity and thereby able to constitute a wrongful repudiation of the employment contract entitling the employee to damages.[7] A further matter which is likely to be considered is whether the High Court is prepared to endorse the introduction of an implied common law duty of fairness between the parties in an employment relationship. A related issue arising on the facts (although tort-based in nature) is whether the breach of an award provision can give rise to a damages claim for breach of statutory duty. The decision in *Byrne and Frew* provides the High Court with an opportunity to examine these and other issues of importance to the employment contract. It should be stated, however, that this present discussion is primarily concerned with questions arising out of the relationship between awards and the contract of employment.

The two appellants were baggage handlers employed by Australian Airlines Ltd at Sydney Airport. Their employment was regulated by the terms of a federal industrial award, the Transport Workers (Airlines) Award 1988, and they were members of the Transport Workers Union. Relevantly, clause 11(a) of the award provided that "[t]ermination of employment by an employer shall not be harsh, unjust or unreasonable".[8] The particular circumstances

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5 Some evident examples are the development of a general unconscionability doctrine in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; a new principle of unilateral mistake in *Taylor v Johnson* (1983) 151 CLR 422; and the Court's pronouncements on promissory estoppel in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Verwayen v The Commonwealth* (1990) 170 CLR 394.

6 An excellent discussion of the High Court's recent approach appears in Carter, J W and Stewart, A, "Commerce and Conscience: The High Court's Developing View of Contract" (1993) 23 *UWALR* 49.

7 This is an argument based on principles developed in *Automatic Fire Sprinklers Pty Ltd v Watson*, above n2.

8 This was a standard form award provision included in most federal awards following the

were that Byrne and Frew were dismissed because of suspicions that they interfered with passenger baggage on Australian Airlines flights. It seems that the airline had been concerned about allegations of theft from passenger baggage for some time and eventually conducted an investigation in conjunction with the Australian Federal Police which included video surveillance of baggage loading operations. One such video appeared to show Byrne and Frew (together with two other employees) interfering with baggage. The appellants were subsequently dismissed on the basis of this alleged misconduct, and they in turn claimed that the dismissal was harsh, unjust and unreasonable, and in breach of the award provision. The original trial of the matter was heard by Hill J who accepted that the award provision formed part of the individual employment contracts of the two employees but then decided that they had not been harshly or unreasonably dismissed (that is, there was no breach of the award). An appeal to the Full Court of the Federal Court reached a quite different conclusion. By majority, the Full Court rejected the argument that award terms were "incorporated" within the contract but found, nevertheless, that the employees had been unfairly dismissed in breach of the award provision.

It would appear that there were some evident procedural defects in the way the dismissals were carried out.[9] There was, for example, a delay of some months before the matter was drawn to the attention of the employees, and the allegations were conveyed in a rather general way. The Full Court accepted that this denied the employees a proper opportunity to respond to the allegations. Another problematic issue was the airline's failure to interview one of the members of the baggage-handling team. This allowed the Full Court to find that the airline had failed to conduct a full investigation into the matter.[10] These procedural flaws persuaded the members of the Full Court that the dismissal was in breach of the award. The language used by Beaumont and Heerey JJ, for example, was that the airline's conduct "fell short of the standards that are reasonably to be expected of a reasonable employer".[11] The statements of the Full Court provide the most detailed and considered analysis yet given by an Australian court about the requirements of procedural fairness in a dismissal. They have become an important reference point for dealing with the issue of fairness in dismissals under the new unlawful termination provisions in the *Industrial Relations Act* 1988 (Cth) ("hereinafter the *IR Act*").[12] It is to be assumed that the High Court will not interfere with the Full Court's findings in this area of procedural fairness.

Assuming there was a breach of award by the airline in *Byrne and Frew*, the employees were obviously entitled to commence enforcement proceedings under the *IR Act*. The maximum penalty for such an award breach is $1000.[13] Since the decision of the Full Court of the Federal Court in *Gregory v Philip*

TCR Test Case decision in the early 1980s. See, eg, *Termination Change and Redundancy Case* (1984) 8 IR 34; 9 IR 115.

9 This was the view of all members of the Full Court in *Byrne and Frew*, above n1.

10 See, eg, id at 38 per Beaumont and Heerey JJ, and at 65 per Gray J.

11 *Byrne and Frew v Australian Airlines* (1994) 52 IR 10 at 39.

12 See Pt VIA, Div 3 of the *IR Act*. These provisions, based on certain International Labour Organisation Conventions, lay down various minimum employment standards including protection against "unlawful termination" for all Australian employees.

13 Section 178(4) of the *IR Act*.

Morris,[14] (hereinafter "*Gregory*") however, a far more imaginative cause of action has arguably been available. In that case it was decided that the standard form TCR award prohibition of harsh, unjust and unreasonable termination of employment actually formed part of the individual employee's contract of employment. The breach of the particular term thereby enabled the unfairly dismissed employee to maintain an action for contractual damages. According to a majority of the Full Court in *Byrne and Frew* the decision in *Gregory* should be overruled and the contractual cause of action it conceived, extinguished.[15] The High Court proceedings will, of course, re-open this argument about the relationship between the award provisions and the individual employment contract.

Implications of the Decision in Gregory v Philip Morris

It was the possible availability of contractual damages for dismissed award employees which was the most interesting aspect of the *Gregory* decision from a practical point of view. In *Gregory* and subsequent Federal Court decisions in *Wheeler v Philip Morris*[16] and *Gorgevski v Bostik (Australia) Pty Ltd*[17] award employees were entitled to damages far in excess of what they would have received in a common law action for wrongful dismissal. The measure of damages in a *Gregory*-style action was thought to be different from a wrongful dismissal claim. Rather than being limited to damages for the appropriate notice period (which in normal circumstances would put the employee in the position that he or she would have been in had the contract been properly determined), here the dismissed employee was entitled to damages to place him or her in the position they would have been in had the contract been ended *fairly*. The cases have generally indicated that an unfairly dismissed employee in such circumstances is entitled to damages to compensate for lost wages and entitlements right up to the date of retirement, discounted to take into consideration all the possibilities that the employment might be fairly determined prior to that time.[18]

The decision in *Gregory* remains of great significance. Since March 1994 it has been possible for all Australian employees (or at least all award employees, and all non-award employees under a $60 000 salary cap)[19] to bring an application for unlawful termination from employment to the newly established Industrial Relations Court of Australia.[20] In circumstances where the remedy of compensation is available[21] to an unlawfully terminated applicant

14 (1988) 80 ALR 455.

15 In the Full Court three justices (Beaumont, Keely and Heerey JJ) rejected the principle established by *Gregory v Philip Morris*, while Gray J would have upheld the decision in full, and Black CJ supported the decision in part.

16 (1989) 97 ALR 282.

17 (1991) 39 IR 229, and note the Full Court appeal decision at (1992) 41 IR 452.

18 For a detailed analysis of the damages issues in these *Gregory*-style decisions, see Brooks, A, "Damages for Harsh, Unjust and Unreasonable Dismissal: The Implications of *Gorgevski v Bostik (Australia) Pty Ltd*" (1995) 8 *AJLL* (forthcoming).

19 Section 170CD of the *IR Act*. The salary limit on applications for unlawful termination was introduced by amendments to the *IR Act* in June 1994. See Act No 97 of 1994.

20 For discussion of the unlawful termination provisions in the *IR Act* see, Pittard, M J, "International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment" (1994) 7 *AJLL* 170.

21 The provisions in the *IR Act* indicate that compensation is only available in circumstances

it is subject to an upper ceiling of either 6 months' salary or $30 000 (whichever is the lesser) for non-award employees, and 6 months' salary for employees subject to an industrial award.[22] One implication, at least, of the High Court's decision in *Byrne and Frew* is whether the *Gregory*-type damages action will again become available for unfairly dismissed award employees. If so, such individuals would presumably be entitled to pursue a contractual claim and thereby circumvent the limit on compensation which now appears in the *IR Act*.

The crucial passage in *Gregory v Philip Morris* concerning the relationship between an award provision and the individual contract of employment appears in the judgment of Wilcox and Ryan JJ. Due to the importance attached to the language used by the justices it is worth quoting this passage in full. They stated as follows:

> It has long been recognised that an employee is entitled to sue at law to recover the moneys payable to him or her under an award, notwithstanding that no independent express agreement has been made about those moneys: see *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66. As we understand it, that is because the award provision imports a term into the contract of employment independently of the intention of the parties: see *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 per Dixon J at 431. Similarly, Windeyer J in *R v Gough; Ex Parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237 at 246, described the award provision as operating to "create new rights as between master and servant superimposed on the common law incidents of their relationship".
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> The second basis for holding that the provisions of the award were part of the contract of employment, in the present case, is that an agreement to that effect ought to be implied.[23]

Wilcox and Ryan JJ thereby considered that there were two available bases to justify an award provision forming part of the individual contract. The first was the notion of *statutory importation* whereby a term was incorporated "independently of the intention of the parties". In a sense this is analogous to a term implied *in law* (that is, a term which is regarded as a proper incident of a particular class of contract and is unrelated to the actual intention of the parties). The second basis for incorporation was an implied agreement between the parties whereby (subject to any express agreement between them to include terms more beneficial than the award) they are assumed to have intended that their agreement should include provisions of the award as in force from time to time. This implied agreement is akin to a term implied *in fact* whereby a court seeks to fill gaps in the contractual arrangement by attempting to give effect to the intention of the parties. The majority justices indicated that the required implication must satisfy the five-part test for such implied terms developed by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*.[24] Applying this test Wilcox and Ryan JJ

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where the primary remedy of reinstatement is "impracticable" (s170EE(2)).

22 Section 170EE of the *IR Act*.

23 Above n14 at 478–9.

24 (1977) 16 ALR 363. The five conditions identified by the Privy Council before a term might be implied into a contract were: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract; (3) it must be so obvious that it goes without saying; (4) it must be capable of clear expression; and (5) it must not contradict

found that a contract of employment which did not contain various award provisions concerning hours of work, wages, and the ways in which the contract could be terminated would lack content on "fundamental" matters. Further, they considered that if the parties were asked at the point of recruitment whether the award would govern the terms of their employment "each would have unhesitatingly answered in the affirmative".[25] These are, of course, important findings which have been challenged by the Full Court's decision in *Byrne and Frew*.

The view that award terms become part of the employment contract was not accepted by the third member of the Full Court in *Gregory*. Jenkinson J doubted, for example, whether the concept of an implied agreement could apply in circumstances where parties would be bound without discussion or agreement by award variations made from time to time. He also suggested that the implication was not necessary to give business efficacy to the contract of employment, especially when one considered that the relationship between the parties was already "regulated by the provisions of the award without their agreement that it should be so".[26] In addition, Jenkinson J considered the concept of a term imported by statute as "metaphorical" and not readily adaptable to "an award prescription of wages payable to employees who (were) neither members of an organisation bound by the award nor otherwise parties to the dispute in settlement of which it was made".[27] The position reached by Jenkinson J was that an award provision (such as the obligation to pay award wages) may have been conditioned upon the existence and performance of an employment contract, but it was not itself contractual. Such a provision may confer rights upon an individual employee, but did not necessarily become part of the employment contract. In an interesting twist Jenkinson J nevertheless found that Gregory was entitled to damages, but on the quite different ground that the apparent breach of the award prohibition against harsh, unjust and unreasonable termination of employment gave rise to the tortious action of breach of statutory duty.

The reservations about "incorporation" of award terms (whether by statutory importation or implied agreement) expressed by Jenkinson J indicated that there were considerable doubts about the validity of the Wilcox and Ryan JJ analysis. A number of academic articles subjected the judgment to considerable scrutiny,[28] reviewing the case law relied upon and identifying issues that were not fully explored in the judgment, such as the applicability of incorporation in the case of non-union members. There are many problems associated with the statutory importation argument. For one, it does not differentiate between award provisions and various statutes which might bear upon the employment relationship, or indeed between different types of award provision. Obviously enough there are many award provisions which are simply

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any express term of the contract.

25 Above n14 at 480.

26 Id at 459.

27 Id at 460.

28 Mitchell, R and Naughton, R, "Collective Agreements, Industrial Awards and the Contract of Employment" (1989) 2 *AJLL* 252; Tolhurst, G, "Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment" (1992) 66 *ALJ* 705.

inappropriate for incorporation in an individual contract. And surely the principle does not mean that general statutes which regulate activity in a workplace (for example, occupational health and safety legislation) form part of an individual employment contract. Support for the principle in the High Court authorities cited by Wilcox and Ryan JJ appears to be equivocal at best,[29] and just as easily supports the view that the award provision creates an enforceable right quite separate from the contract. The problem is that cases like *Mallinson* and *True* (referred to in the passage quoted above) relate to the contractual enforceability of award wages. As Forsyth has recently argued:

> It is one thing to accept that an action may lie in contract for the recovery of award wages, as those cases seem to suggest.[30] It may be stretching the point, however, to argue that they established, for all purposes, that award terms are automatically incorporated into employment contracts.[31]

Due to the prevalence of award regulation of employment conditions in Australia it is hard to understand why the issue of contractual enforcement of award provisions has not arisen more frequently, or that there had not developed a clearer understanding of the relationship between awards and the contract of employment. It may have been useful, for example, for Wilcox and Ryan JJ to consider the process of incorporation which has been adopted in Britain to explain how the provisions of collective agreements find their way into individual employment contracts. The position is rather unclear. One explanation for the process of "implied incorporation" is similar to the implied agreement mechanism identified in *Gregory*.[32] The more popular explanation, however, and one which is said to explain "the reality of employment conditions"[33] (especially the way the collective agreements apply to all workers regardless of their knowledge and approval) is the explanation of collective bargaining as "crystallised custom".[34] The general proposition is that the terms of the agreement play such a well understood and acknowledged role in regulating industry that they are incorporated into individual contacts in the same way that trade usages or customs might form part of commercial contracts. Given the role of award regulation in Australia this sort of explanation for incorporation seems quite plausible, perhaps more so than the process of statutory importation developed in *Gregory*.

In spite of its apparent uncertainty, the majority judgment in Gregory was confirmed in a number of subsequent Federal decisions,[35] including the

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29 It has been suggested that the decisions in *Mallinson* and *True* might be understood as saying little more than "that wages due to be paid might be enforced through contractual means, and through either contractual or statutory means when those statutory means are available", ie, the award is likely to provide a separate right of recovery. See, eg, Mitchell and Naughton, id at 269.

30 Even this point must be subject to doubt, however, if we accept the view that the award simply provides an alternative statutory right of recovery, unrelated to the contract.

31 Forsyth, above n1 at 426–7.

32 For discussion, see Mitchell and Naughton, above n28 especially at 263.

33 Hepple, B and Fredman, S, *Labour Law and Industrial Relations in Great Britain*, (1986) at 95–6.

34 This was the explanation originally given by Professor Kahn-Freund. See Kahn-Freund, O, "Legal Framework" in Flanders, A and Clegg, H (eds), *The System of Industrial Relations in Great Britain* (1954) at 58.

35 Most notably above n16 and above n17.

judgment of the trial judge (Hill J) in *Byrne and Frew*. Writing in 1992 McCallum contended that the *Gregory* line of cases was "certainly the most remarkable piece of judicial labour law which has yet been crafted by the Federal Court".[36] The uncertain status of *Gregory* and the spectre of unprecedented damages awards being made to unfairly dismissed employees made an appeal to the High Court almost a foregone conclusion. Interestingly, the question which might now be asked is whether *Byrne and Frew* happens to be the appropriate vehicle to test the law in this area.

As stated earlier the most controversial aspect of *Gregory* was the possibility of an unfairly dismissed award employee utilising the contractual cause of action to secure a large damages award. In *Byrne and Frew*, however, there were no damages awarded. Even though the trial judge accepted that he was bound by the majority position in *Gregory*, he ultimately found that the dismissal was not harsh, unjust or unreasonable. This meant that there was no "decision" which appeared to be based upon one or other aspect of the Wilcox and Ryan JJ incorporation rationale, or the alternative route to damages chosen by Jenkinson J. The Full Court judgments in *Byrne and Frew* also indicate that there were no oral submissions made by counsel concerning the correctness of *Gregory* during the proceedings. Rather, the matter was dealt with by written submissions submitted at the conclusion of the Full Court appeal.[37] The majority members of the Full Court nevertheless decided that the decision in *Gregory* should be reconsidered, and indeed, overruled. There were a number of reasons for this. The authority of the decision concerning the incorporation of award provisions remained uncertain.[38] Beaumont and Heerey JJ strongly rejected the analytical basis for the majority judgment in *Gregory*. They also thought the decision should be reconsidered for other reasons. These included the fact that the decision "did not rest upon a principle carefully worked out in a significant succession of cases",[39] and the important policy reasons at stake because of the economic and societal impact of large damages awards being imposed on employers.[40]

The Full Court's Response to the Incorporation Issue

Four of the five members of the Full Court (Black CJ, Keely, Beaumont and Heerey JJ) rejected the *statutory importation* explanation for incorporation. According to Black CJ this was mainly because the authorities relied upon by Wilcox and Ryan JJ in *Gregory* did not support any general importation of award terms into the contract of employment.[41] As well as doubting the efficacy of earlier authorities,[42] Beaumont and Heerey JJ were at pains to clearly differentiate between the arbitral dispute-settling function which gives rise to industrial awards, and the individual employment contract. In their words: "The award creates rights and obligations, and the Act confers remedies in the

36 McCallum, R C, "A Modern Renaissance: Industrial Law and Relations Under Federal Wigs 1977–1992" (1992) 14 *Syd LR* 401 at 420.
37 For further observations, see judgments of Black CJ above n11 at 12 and Gray J at 66.
38 Id at 13 per Black CJ.
39 Id at 41.
40 Id at 58.
41 Id at 14–5.
42 Id at 41–6.

case of breach, both independently of the agreement of the parties and the common law of contract".[43] The lone supporter of the principle of importation of award terms "independently of the intention of the parties" was Gray J whose reasoning appears to open up some room for the High Court to manoeuvre in this area. Rather than raking over the earlier authorities, Gray J indicated that the award provision prohibiting harsh and unreasonable termination of employment was imported into an individual's contract "because the law regards it as a proper incident of an employment contract".[44] According to Gray J such a decision did not mean that all award terms are so imported, rather the proposition would only apply to those terms which satisfy this overriding requirement. Although it is not stated in express terms, Gray J seems to be treating the issue of importation of award terms as terms implied *in law*, whereby it is possible for the term to be implied because the *nature* of the contract demands it, or else the term is a legal incident of the particular type of contract.[45] A term implied in law is said to depend on the presumed rather than the actual intention of the parties. A recent High Court statement of the circumstances in which such a term might be implied appears in the judgment of Deane J in *Hawkins v Clayton*.[46] Deane J suggested that such a term might be implied when it "is necessary for the reasonable or effective operation of a contract of that nature".[47]

The second basis of incorporation suggested in *Gregory* — the implied agreement (or term implied *in fact*) — was also rejected by a majority of the Full Court (Keely, Beaumont and Heerey JJ). Their general position was that the term sought to be implied did not satisfy the five-part test required by *BP Refinery v Shire of Hastings*.[48] The suggested implication was not "necessary to give business efficacy to the employment contract"[49] and neither was it "so obvious that it goes without saying". On this issue a dissenting view was adopted by Black CJ and Gray J. According to Black CJ, for example, an award term dealing with termination of employment was of "fundamental importance", and in cases where the particular contract fails to spell out in detail just how the contract can be brought to an end it ought to "be easy to imply a term that the award provisions for termination, as in force from time to time, are part of the contract as minimum standards".[50] Another observation made by Black CJ is that this sort of implication should to some extent be expected in cases where the contract is not detailed and comprehensive, which is likely to be the case in an employment context. To some extent this relies on a general principle, ignored by the Full Court majority, that the *BP Refinery v Shire of Hastings* test ought not be applied with its full rigour in cases where the

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43 Id at 50. This is similar to the position reached by Jenkinson J in *Gregory*.

44 Id at 73.

45 See, eg, *Liverpool City Council v Irwin* [1977] AC 239; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

46 (1988) 164 CLR 539.

47 Id at 573.

48 Above n24.

49 It was said, eg, that the agreement would continue to have *business efficacy* without the implied term particularly as the award provision continued to apply by force of statute whether or not it was part of the contract: above n11 at 50.

50 Id at 15–6.

contract is informal, or where the written document is not complete on its face.[51] There is an argument, at least, that a more flexible application of the *BP Refinery v Shire of Hastings* test might have led to a quite different result on this issue.

Where Now for the High Court?

For the present the "incorporation" doctrine in *Gregory* appears to have met its demise, but there seem to be a number of approaches for the High Court to adopt if it chooses to resuscitate this idea that award provisions may form part of an individual's contract of employment. It might rather adventurously decide that award provisions operate as "crystallized custom" — as well-acknowledged industry standards which customarily find their way into individual employment contracts. Alternatively, the Court may develop the concept of an award provision being implied into an employment contract on the basis that it is *a legal incident* of that type of contract. These approaches are likely to be controversial, but they provide an arguable explanation for the relationship between awards and the contract of employment. A more conventional route, perhaps, would be for the Court to acknowledge the existence of an "implied agreement" between the parties that the award provisions assume contractual significance. This would seem to be a relatively unexceptional conclusion assuming the Court applies the test used to identify terms implied *in fact* in a flexible way.

There are other matters to be addressed by the court in *Byrne and Frew*. What of the argument that breach of an award term gives rise to a tortious damages claim for breach of statutory duty? This was rejected by the Full Court on the ground that an award does not necessarily operate to protect the interests of a particular class, as is the case with a statutory provision. In addition, there are specific statutory penalties which come into play when an award is breached. It was thought to be unlikely that the legislators intended an individual employee to have a general right to damages in circumstances where the *IR Act* refers to a specific penalty. A further issue which was discussed and ultimately rejected by the Full Court was the possible existence of a claim for damages based upon the principle developed in *Automatic Fire Sprinklers Pty Ltd v Watson*. It was contended, for example, that a harsh and unreasonable dismissal in breach of the award provision was likely to be a nullity, with the consequence that it operated as a repudiation of the employment contract by the employer. This in turn meant that a particular employee would be entitled to damages for wrongful repudiation. As a matter of construction this sort of claim was rejected by a majority of the Full Court, largely because the nature, purpose and language of the award provision was able to be distinguished from the relevant National Security regulation[52] that was at issue in *Automatic Fire Sprinklers v Watson*. According to the majority

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51 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 121; above n46 at 571–2 per Deane J.

52 Regulation 14 of the National Security (Man Power) Regulations (SR 1942 No 34–1944 No 175).

justices, a dismissal in breach of award is not a nullity, but of course this issue is likely to be reconsidered by the High Court.

Finally, of course the High Court may use its opportunity when dealing with *Byrne and Frew* to radically reshape employment law by accepting that some general principle of "fairness" should be implied into all employment contracts as a matter of policy in an attempt to place the parties on an equal footing.[53] While at first glance such a result seems an enormous step for the Court to take, it may actually be not so far removed from some of the significant changes the Court has already made in the area of general contract law.

53 For some discussion of the development of such an implication in other jurisdictions, see above n11 at 71–2 per Gray J.