Law Society of the Northern Territory

Don’t Come Monday: remedies in the federal courts for termination of employment

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Federal Magistrate Toni Lucev*

(*The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrates Court or any other Federal Magistrate. This paper is an edited version from the transcript of the presentation on 23 September 2010.)

Introduction

1. "Don't come Monday" was a form of peremptory dismissal once common in the Australian workplace. It became increasingly rare from the 1960's to the 1970's with the rise of unfair dismissal remedies in State industrial tribunals, and then from the 1980's with the advent of additional remedies, under federal law for unlawful terminations.[1] What I am going to focus on tonight are two areas of federal legislative remedies for unlawful terminations under the *Fair Work Act 2009* (Cth).[2] They are unlawful terminations under s.772(1), and the "new" adverse action terminations in relation to workplace rights under s.340.

2. The first of those, unlawful terminations, are terminations for a prohibited reason, and now have a long history, almost two decades under federal industrial law. The second, termination because of adverse action taken against an employee in relation to workplace rights is nominally new, but when you look at it and break it down a lot of the elements of it are in fact borrowed from earlier federal unfair dismissal and unlawful termination laws. I will also make mention of the issue of remedies, as that is in the title of the talk! I am going to do this by looking first at the legislation, the substantive law in the two areas I have just mentioned, and in respect to remedies, and then I will focus on two or three or four cases (because you could otherwise quite literally drown in the number of unlawful termination cases there are federally, from the Federal Court, and now the Federal Magistrates Court, and the old Industrial Relations Court of Australia). So, I just want to take you to two or three of those by way of example of where the law has been in the last year or so.

3. The first two cases that I'll take you to are cases of mine, and I am doing that for convenience because I am reasonably familiar with them! The two cases with respect to adverse action provisions are Federal Court judgments from June 2010 so they are fairly recent, but there have not yet been a lot of judgments on s.340.

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[1] See generally, C Murphy, Don't come Monday: a UTLC oral history on adult unemployment (Adelaide: Kitchener Press, 1989), and T Lucev, "Don't Come Monday – The new Federal Unfair Dismissal Laws" (1994) Brief, Vol. 21 No 11, pp.6-10.

[2] "*FW Act*". Unless otherwise specified all legislative provisions referred to in this paper are references to the *FW Act*.

Section 772 – unlawful termination

4. Section 772 provides that employment must not be terminated on certain grounds and sets those out, as follows:

> *(1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:*
>
> *(a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;*
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> *(b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;*
>
> *(c) non-membership of a trade union;*
>
> *(d) seeking office as, or acting or having acted in the capacity of, a representative of employees;*
>
> *(e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*
>
> *(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
>
> *(g) absence from work during maternity leave or other parental leave;*
>
> *(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.*
>
> *Note: This subsection is a civil remedy provision (see Part 4-1).*

5. In relation to temporary absence from work as a result of illness or injury of a kind prescribed by the regulations, I'll take you to *Rogers v Millennium Inorganic Chemicals Ltd & Anor.*[3]

[3] (2009) 229 FLR 198; [2009] FMCA 1 ("*Rogers*").

6. In relation to a claim based on participation in proceedings against an employer and the making of an inquiry or complaint, I'll take you to *LHMU v Cuddles Management Pty Ltd*,[4] involving a child care centre worker.

7. With respect to absence on maternity or other parental leave s.772(3) says, to avoid doubt, that if an employer terminates the employee's employment, but the reason for the termination is that the position held by the employee no longer exists, or will no longer exist, and the reason the position held by the employee no longer exists is the employee's absence on maternity leave or other parental leave, then there is a presumption that the termination is unlawful. That is, of course, because otherwise it is an easy provision to side-step: if somebody leaves for up to 6, 9 or 12 months on maternity leave the employer then says that position is not needed anymore, lets abolish it. The Federal Parliament has dealt with that by saying that if you do that there is, in those circumstances, a presumption that the prohibition has been contravened.

8. Procedurally, one thing you need to know is that in an action brought under s.772, and generally speaking for termination related actions in the Federal Magistrates Court and Federal Court, you need a certificate from Fair Work Australia. Without it the federal courts have no jurisdiction.[5] Go to Fair Work Australia first, they conciliate, and if conciliation is unsuccessful, Fair Work Australia gives you a certificate under s.777 for s.772 matters and under s.369 for s.340 matters saying that conciliation has been unsuccessful, and it is for the Court to now determine the lawfulness of the termination. One exception to that is that if you are applying for an interim injunction, which enables the federal courts to stop the termination or reinstate the employee if the termination is said to be on a prohibited ground, then a certificate is not required.

9. There is a 14 day time limit for the filing of applications.[6]

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[4] (2009) 183 IR 89; [2009] FMCA 463 ("*Cuddles Management*").
[5] Sections 371 and 779: *Rentuza v Westside Auto Wholesale* (2009) 236 FLR 231 at 237 per Lucev FM; [2009] FMCA 1022 at paras.21-23 per Lucev FM. See also *Hughes v Mainrange Corporation Pty Ltd (No. 2)* (2009) 190 IR 351 at 354 per Lucev FM; [2009] FMCA 1044 at para.14 per Lucev FM.
[6] Sections 371(2) and 779(2).

10. There are also "reverse onus" provisions – ss.361 and 783 – whereby the reason for the action is presumed to be as is alleged by the employee, unless it is proved otherwise. When I say as is alleged it is not a bare allegation, the cases make it quite clear, and have done so for many years, that the employee actually has to have some factual underpinning to the allegation. An employee cannot just plead or speak of the allegation, but if the employee has got an allegation with a factual underpinning, then it is for the employer to disprove those matters, or prove matters to the contrary.[7]

Sections 340-342 – adverse action

11. A new provision, s.340, dealing with adverse action and workplace rights is interesting because of its potential, when read with ss.341 and 342. If you read the words they are wide in scope, and I am not sure that everybody has quite got their head around, at this early stage, how wide s.340 has the potential to be. There have only been a handful of Federal Court judgments on s.340 at this stage.

12. Section 340 of the *FW Act* says as follows:

> *(1) A person must not take adverse action against another person:*
>
> *(a) because the other person:*
>
> *(i) has a workplace right; or*
>
> *(ii) has, or has not, exercised a workplace right; or*
>
> *(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or*
>
> *(b) to prevent the exercise of a workplace right by the other person.*
>
> *Note: This subsection is a civil remedy provision (see Part 4-1).*
>
> *(2) A person must not take adverse action against another person (the **second person**) because a third person has*

[7] *Hayward v Rohd Four Pty Ltd* (2008) 177 IR 212 at 218-221 and 223-224 per Wilson FM; [2008] FMCA 1490 at paras.11-21 and 34 per Wilson FM; *Buckingham v KSN Engineering Pty Ltd* (2008) 177 IR 427 at 450 per Lucev FM; [2008] FMCA 546 at para.93 per Lucev FM.

exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

13. Section 340(2) says that if a third person exercises those rights, for example a union official or union delegate, a State or Territory statutory appointee (somebody appointed under occupational health and safety legislation for example), the same provisions apply: you cannot terminate a person because another person has taken action on the person's behalf in relation to a workplace right.[8]

14. Workplace rights are defined very broadly, but the legislation also gives an example of what they mean.

15. Workplace rights are defined in s.341 as follows:

Meaning of workplace right

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

Meaning of process or proceedings under a workplace law or workplace instrument

[8] Under s.342(1) the adverse action protection extends to other categories of person such as principal and independent contractor, independent contractors and sub-contractors, and industrial associations, their officers and members and other persons, but this paper deals only with employer and employee, and prospective employer and employee.

(2) Each of the following is a process or proceedings under a workplace law or workplace instrument:

(a) a conference conducted or hearing held by FWA;

(b) court proceedings under a workplace law or workplace instrument;

(c) protected industrial action;

(d) a protected action ballot;

(e) making, varying or terminating an enterprise agreement;

(f) appointing, or terminating the appointment of, a bargaining representative;

(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;

(h) agreeing to cash out paid annual leave or paid personal/carer's leave;

(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);

(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;

(k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

(3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

Exceptions relating to prospective employees

(4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer

makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.

(5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 (which deals with transfer of business).

16. Essentially, workplace laws include the *FW Act*, *Fair Work (Registered Organisations) Act 2009*, the *Independent Contractors Act 2006*, and any other Commonwealth, State or Territory law regulating the employment of employees including occupational health and safety laws and workplace laws.[9] Workplace instruments basically are orders, awards and enterprise agreements registered by industrial tribunals and the like.[10]

17. A person has a workplace right if they:

a) are able to initiate, or participate in, a process or procedures under a workplace law or workplace instrument; or

b) are able to make a complaint or inquiry:

i) to a person having the capacity to investigate that complaint or inquiry to seek compliance with that complaint or inquiry; or

ii) if the person is an employee they are able to make a complaint or inquiry in relation to their employment.[11]

This latter provision seems very broad, and if you are drafting contracts of employment, and put in grievance procedures, fair practice procedures or disciplinary processes, you are probably creating a workplace right under s.341 which can then be used if adverse action is taken in relation to that workplace right.

18. The legislation then goes on to define a number of things as processes or procedures under a workplace law, and they include Fair Work

[9] Section 12.
[10] Section 12.
[11] Section 341(1).

Australia conferences, any court proceedings under a workplace law or workplace instrument, protected industrial action, protected action ballots (in terms of industrial action), making, varying or terminating of enterprise agreements, the appointment of bargaining representatives, agreeing to cash out paid annual leave, personal carer's leave, making requests for flexible working arrangements, dispute settlement procedures, processes or proceedings under a workplace law, and then a "catch-all" of any other process or procedure under a workplace law or workplace instrument, which makes this a provision of fairly wide import.[12]

19. Section 342 essentially defines adverse action as the employer:

a) dismissing the employee;

b) injuring the employee in his or her employment;

c) altering the position of the employee to the employee's prejudice,

which are all provisions which have appeared for years in federal industrial legislation, and then the new one:

d) discriminating between the employee and other employees of the employer,

and on its face it is discrimination by reference to the recognised heads of discrimination under federal industrial law and federal and state anti-discrimination law, so again a provision which at least on its face at this stage has a very broad potential application. Adverse action also includes threatening to do those things or organising to do those things.

Section 539 – remedies for breach of civil penalty provisions

20. Section 539 deals with actions in respect of contravention of civil remedy provisions, and the provisions I have taken you to already are civil remedy provisions; contravention of them gives rise to the capacity in the Federal Magistrates Court and Federal Court to make orders for penalties. The penalty provisions for ss.772 and 340 provide for a maximum penalty of sixty penalty units, which is the individual

[12] Section 341(2).

penalty, so $6,600 for an individual who breaches, and five times that amount, that is $33,000, for a corporation for breach, in respect of each contravention.

21. To give you some idea about quantum of penalty, the Federal Magistrates Court in Adelaide in the last year or so has fined a relatively small cleaning company $288,000 for multiple breaches of workplace relations legislation.[13] You will probably have read in the press that the Federal Court recently fined Queensland Rail $660,000, the maximum for 20 contraventions of an enterprise agreement,[14] which is a case under appeal.[15] In Perth, the Federal Magistrates Court imposed penalties on a building company of $174,000,[16] reduced on appeal to $87,500:[17] but if you are a medium sized building company operating day-to-day in the real world, $87,500 is still a "fair whack" to have to shell out as a penalty.

Case studies

22. The first two cases that I am going to deal with deal with "equivalent" provisions under the *WR Act* to those provisions under the *FW Act* that I have been referring to above; the last two will relate to the *FW Act.*

Cuddles Management

23. Cuddles Management was a child care company operating a number of child care centres in Perth - 11 or 12 - and they had an employee who managed one of those child care centres. She went on maternity leave. She decided she wanted to come back early from maternity leave, which she was entitled to do. Cuddles Management said to the

[13] *Workplace Ombudsman v Saya Cleaning Pty Ltd* (2009) 61 AILR 101-000; [2009] FMCA 38.
[14] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd (No 2)* [2010] FCA 652.
[15] The decision on appeal has since been handed down and the Full Court of the Federal Court held that the primary judge erred in placing the contraventions in the category of the worst kind of contraventions, and the Full Court therefore reduced the amount of penalty payable, and further reduced the amount of penalty payable to give effect to the totality principle recognising that the multiple contraventions were the consequence of a single course of conduct, to $320,000: *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150 at paras.58, 61 and 63 per Keane CJ and Marshall J, with Gray J agreeing generally at paras.66-67.
[16] *Jones v Hanssen Pty Ltd* [2008] FMCA 291.
[17] *Hanssen Pty Ltd v Jones* (2009) 179 IR 57; [2009] FCA 192.

employee we won't employ you as a manager when you come back, but you can have a job as second-in-charge at one of our child care centres, and there was a bit of "argy bargy" between her and Cuddles Management about that. She involved her union, and ultimately Cuddles Management said "we don't want you back as a manager because we have issues with your performance"; issues which were not raised with her prior to her going on maternity leave! As a consequence of all of the "argy bargy" involved, the employee was ultimately told one Friday afternoon, we haven't got a job for you as a manager, unless you take the job as second-in-charge by 5.30pm, and you will not have a job to come back to on Monday if you do not accept. The Federal Magistrates Court found that the employee had been terminated for a prohibited reason, and there was also a breach of contract. The latter an action within the associated jurisdiction of the Federal Magistrates Court.[18]

24. The legislation in that case provided that prohibited reasons prevented the employer from doing some of the things that I have mentioned in relation to the *FW Act* adverse action provisions, that is, injuring an employee or altering an employee's position to their prejudice. In this particular case, the basis for those matters related to alleged entitlements under an industrial instrument, the employee being terminated for reasons related to the entitlements under the industrial instrument, which were also entitlements under s.280 of the *WR Act*, which was the statutory guarantee of a return to work on the completion of maternity leave. There was also a complaint concerning her termination and treatment as a consequence of making an inquiry to a body capable of enforcing workplace provisions.

25. The first question the Court had to ask itself was whether the employee had been dismissed. She was entitled to return to a position as a centre manager on the termination of her maternity leave, and she expressly sought to do so. After the toing and froing on the Friday afternoon an email came from Cuddles Management saying that it was not going to employ her as manager, but that it would "gladly" employ her as a second-in-charge of two of Cuddles Management's child care centres. The Court took the view that that was a termination of her employment

[18] *FM Act*, s.18; *Welsh v Allblend Holdings Pty Ltd* [2010] FMCA 281.

because she had an entitlement, and a statutory guarantee, to return to her position as a centre manager. The Court also took the view that having been told at about 12 o'clock in the afternoon that she could come back, and that Cuddles Management would "gladly" employ her as a second-in-charge, to be told at 4.18pm that afternoon in an email that unless she accepted the job as second-in-charge by 5:30pm that she would be terminated, was a termination of her employment on that basis as well. So the employee was terminated, not only from her position as a centre manager, but the employment relationship between the parties had been terminated in its totality.[19]

26. The Court also took the view that the employee would have been injured in her employment if she had taken up the second-in-charge position. The offer to come back as second-in-charge did not entail a drop in salary, but Cuddles Management said, we won't reduce your salary, but you won't have a car, you won't have a mobile phone and you won't have the fuel that goes with the car.[20] On the Federal Court authorities, set out in one of the Maritime Union cases,[21] injury in employment includes the deprivation of an immediate practical incident of employment such as loss of pay or entitlement or reduction in rank. Clearly the employee had been reduced in rank from managing the centre to second-in-charge of a centre and the evidence clearly established that being second-in-charge her duties would have been less, her responsibilities would have been less, that her supervisory responsibilities would have been less and she would have lost her entitlements to a car, phone and fuel.

27. The question of whether the employee had actually been injured in her employment did not arise because she had been dismissed, but the union argued that there was still a contravention of s.772 of the *WR Act* because Cuddles Management had threatened to injure her in her employment. The Court said there had been a threat because the

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[19] *Cuddles Management* IR at 117-118 per Lucev FM; FMCA at para.88-91 per Lucev FM. As to the distinction between termination of employment and termination of the employment relationship: see *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 450-453 and 456-457 per Latham CJ, 465-466 per Dixon J, and 476 per Williams J; *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 428 per Brennan CJ, Dawson and Toohey JJ; see also *Siagian v Sanel Pty Ltd* (1994) 54 IR 185 at 200 per Wilcox CJ and *APESMA v Skilled Engineering* (1994) 54 IR 236 at 242-243 per Gray J.
[20] *Cuddles Management* IR at 118 per Lucev FM; FMCA at paras.92-95 per Lucev FM.
[21] *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 at 69-71 per RD Nicholson J; [1999] FCA 899 at paras.225-233 per RD Nicholson J.

Federal Court authorities[22] established that the threat need not be menacing, but may be constituted by a warning beforehand of the intention to inflict harm in an employment sense which was communicated to the employee, and Cuddles Management had quite clearly done that by communicating to the employee that they were going to make her second-in-charge.[23]

28. The Court did not need to deal with the question of prejudicial alteration to employment, but indicated that had it needed to do so it would have found that there was a prejudicial alteration to employment, and again on the basis of one of the maritime cases, the High Court in *Patrick Stevedores*, where it was said that in relation to the concept of prejudicial alteration to employees' entitlements, or prejudice in employment, it was not only legal injury that was covered, but also any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question. When you think about those types of concepts and the types of entitlements or benefits that might constitute an advantage and therefore be affected or deteriorated, there is a very wide scope in which an employer might at any time prejudicially alter an employee's employment.[24]

29. I said at the outset that *Cuddles Management* might have been a case which could have been, but was not, brought on the basis that it was a termination because of absence on maternity or other parental leave under s.772(1)(g). It was not brought on that basis because the union alleged (the union was the first applicant and the employee was the second applicant) that the employee had been terminated for the prohibited reason of entitlement to the benefit of an industrial instrument, namely an industrial award. The industrial award provided that an employer could not terminate an employee because they were on maternity leave, and that they had a guaranteed return to work after maternity leave, effectively the standard award provisions arising from maternity leave cases and which have been in awards for a couple of

[22] *Community & Public Sector Union v Telstra Corporation Ltd* (2000) 99 IR 238 at 243-246 per Finkelstein J; [2000] FCA 844 at paras.19-26 per Finkelstein J; and on appeal *Community & Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93 at 98 and 101 per Black CJ, Ryan and Merkel JJ; [2001] FCA 267 at paras.5 and 22 per Black CJ, Ryan and Merkel JJ.
[23] *Cuddles Management* IR at 118 per Lucev FM: FMCA at paras.96-97 per Lucev FM.
[24] *Cuddles Management* IR at 118-119 per Lucev FM; FMCA at paras.98-99 per Lucev FM, citing *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 18 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

decades. The problem for the union was that they succeeded in persuading the Court that the employee was employed in a classification set out in the Award, they succeeded in establishing that she was employed relevantly in a private child care or private day care facility which was run by Cuddles Management, and ordinarily that would probably be enough to find that an employee was covered by an industrial award. In this case, however, the Award went further, and provided that for an employee to be covered by the Award those facilities had to be ones which did not receive recurrent funding from the State or Federal government, and the union did not establish that this was not a facility receiving that funding, and therefore the Award did not apply, and therefore the employee had not, or could not have, been terminated for a prohibited reason, that is that she was entitled to the benefit of the industrial instrument, because the Award did not apply to her, notwithstanding that the statutory guarantee under s.280 of the *WR Act* applied to her.[25]

30. The Court went on to find that the employee had been terminated for a prohibited reason, that being an inquiry or complaint with respect to compliance with an industrial law, to a person that had the capacity to participate in proceedings involving the employee's statutory right to return to work, because the union had, during the "argy bargy", taken the matter to a Fair Work Australia conciliation conference in relation to the employee's right to return to work under the statutory guarantee under s.280 of the *WR Act*. There was therefore a finding that the employee had been terminated for a prohibited reason.[26]

31. There was also, applying in the Court's associated jurisdiction, an action for a breach of contract of employment, because come the Friday afternoon the employee had just "got the bullet" – literally, "[D]on't come Monday" – and she did, at that time, even though she indicated she wanted to come back from maternity leave on the Monday, still have four or five months of her maternity leave to run. Technically, therefore, she was still on leave and still had an entitlement of four or five month's maternity leave. The authorities establish that you cannot give, involuntarily, a person who is on approved leave notice which runs concurrently with their leave, and

[25] *Cuddles Management* IR at 121 per Lucev FM; FMCA at paras.106-108 per Lucev FM.
[26] *Cuddles Management* IR at 121-122 per Lucev FM; FMCA at paras.110-112 per Lucev FM.

therefore there had been a breach of contract because she had not been given the required four weeks' notice under her contract of employment. So, in the associated jurisdiction there was an order for the payment to her of a sum of money for the failure to pay four weeks' contractual notice.[27]

32. *Cuddles Management* is now a case which ought probably be pleaded in the alternative under s.772(1)(g) absence on maternity leave, but also under s.340 adverse action in relation to a workplace right, being a right to return to a guaranteed job after maternity leave.

Rogers

33. In terms of temporary absence because of illness or injury, *Rogers* is an interesting case as it deals not only with the question of unlawful termination on those bases, but also questions associated with contractual employment issues.

34. Mr Rogers was employed as a process operator at a paint pigment plant in the south-west of Western Australia. Mr Rogers' employment was terminated following an absence on 22 January 2007 when he claimed sick leave for attending a specialist appointment in Perth, about two hours away, to have a scan on a knee he had injured in a motor bike accident in 2003. He was also terminated because of an alleged absence from his place at work on a production line on night shift on 12 February 2007.

35. Mr Rogers applied for relief under s.659(2)(a) of the *WR Act* on the basis of having been unlawfully terminated because of a temporary absence for illness or injury on 22 January 2007 to see a specialist about his knee, but he also applied under other sections of the *WR Act* in relation to alleged breach of his workplace agreement as it then was, relating to fair treatment provisions. Mr Rogers also alleged breach of an implied duty of trust and confidence.[28]

36. There was no dispute about the reasons that the employer had given for Mr Rogers' termination, namely that:

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[27] *Cuddles Management* IR at 122-124 per Lucev FM; FMCA at paras.114-118 per Lucev FM.
[28] *Rogers* FLR at 200 per Lucev FM; FMCA at paras.2-3 per Lucev FM.

a) he failed to advise in a timely manner of his absence on 22 January 2007, and then lodged a sick leave certificate that day in circumstances where he wasn't actually sick but going to a specialist appointment in respect of an old injury on a motor bike which occurred prior to his employment with Millennium Inorganic Chemicals; and

b) he stopped packing on the night of 12 February 2007 when he walked off the production line, causing, according to the evidence, all manner of mayhem on the paint pigment production line.[29]

37. In terms of the temporary absence because of illness or injury the relevant regulation then provided,[30] and the regulation under the *Fair Work Regulations 2009* still provides,[31] that an employee's absence from work because of illness or injury is a temporary absence if, and there are a variety of alternatives but this is the relevant one in this case, the employee is required by the terms of the industrial instrument to:

a) notify the employer of an absence from work; and

b) substantiate the reason for the absence.

So there was a duplex requirement that had to be fulfilled in the circumstances.

38. In *Rogers* the Court looked at the question of whether or not there was a requirement for substantiation of the reasons for his absence, the meaning of "substantiate" being to prove the truth of or give good, reasonable grounds for something. The Court also looked at the terms of the sick leave entitlement which were set out in a policy which was incorporated in the contract of employment for Mr Rogers. The policy essentially did not require him to substantiate any reason for his injury or illness. He was required to advise his supervisors as soon as he became aware that he was unable to attend work, to tell them the nature of the illness, to tell them the likely period of the absence and complete an application for leave form that didn't actually require him to

[29] *Rogers* FLR at 205 per Lucev FM; FMCA at para.38 per Lucev FM.
[30] *Workplace Relations Regulations 2006* (Cth), reg.2.12.8 ("*WR Regs*").
[31] *Fair Work Regulations 2009* (Cth), reg.3.01 ("*FW Regs*").

substantiate his sick leave in any way, and there was no provision at that time for him to actually substantiate the reason for his absence, for example by way of a doctor's certificate. Mr Rogers nevertheless did submit a doctor's certificate that said he was sick. The Court found that because he was not required to substantiate the reason for his illness or injury that it was not a temporary absence under the regulation and therefore he was not terminated for a prohibited reason.[32]

39. This is a good example of how in these sorts of cases if you are advising, particularly employees, there are a lot of knots and twists and turns and when you actually get down to looking at the terms of the *FW Act* you really have to get down to it and look at it at that level of detail. Anyway, Mr Rogers failed on the temporary absence because of illness or injury.

40. Mr Rogers also, in his Statement of Claim alleged that he was entitled to have the company comply with the provisions of the fair treatment policy, but in that respect the Court found that the fair treatment policy provisions did not entail an entitlement to fair treatment. The Federal Court case of *Goldman Sachs JBWere Services Pty Ltd v Nikolich*[33] drew that distinction, where the Full Court said the Goldman Sachs fair treatment policies did not involve an entitlement to have provisions of the fair treatment policy apply. It was simply a commitment by the company to this warm and fuzzy thing called a fair treatment policy. Anyway, the fair treatment policy did not apply contractually to Mr Rogers because it did not prescribe an entitlement and the claim could not succeed in contract on a breach of the fair treatment policy as being something which required X, Y and Z to be done before he was terminated.[34]

41. In terms of mutual trust and confidence the Court looked at the question of whether or not there was a duty of mutual trust and confidence applied in Australian contracts of employment or able to be implied in Australian contracts of employment. Those of you who practice in the area will know that the implied duty of mutual trust and confidence comes out of the *Malik* case[35] in the UK in the 1990's

[32] *Rogers* FLR at 210-212 per Lucev FM; FMCA at paras.65-77 per Lucev FM.
[33] (2007) 163 FCR 62; [2007] FCAFC 120.
[34] *Rogers* FLR at 212-214 per Lucev FM; FMCA at paras.82-85 per Lucev FM.
[35] *Malik v Bank of Credit & Commerce International SA (in liq)* [1998] AC 20 ("*Malik*").

where the House of Lords said that there could be such an implied duty, but for it to be a duty there must be no reasonable and proper cause for the employer's conduct, so that if the employer did something that was reasonable and proper for him to do you could not say that that is a breach of the implied duty, and that the conduct must be calculated to destroy or to seriously damage the relationship of trust and confidence or be likely to do so insofar as the employee is reasonably entitled to have trust and confidence in the employer.[36]

42. The Court in *Rogers* reviewed the English and Australian authorities, and in particular New South Wales Supreme Court authority, to arrive at the conclusion that it could imply a term of mutual trust and confidence into the contract,[37] but that in this case it did not apply on the facts to each of the matters which were alleged to give rise to that duty.[38] That is not an uncommon occurrence in employment cases where a court says there is, or you can imply the duty, but that on the facts the duty does not apply.

43. The other thing to note is that the implied term does not apply to the act of termination of employment itself, or the implementation of that act.[39] The reason for that is of course that there are statutory provisions which apply to exclude the implication. Statutory provisions apply to most Australian employees in respect to the manner and form of termination of their employment, under either State or Federal Law, and the Court has said if it is a statutory provision you cannot imply something in a contract which takes away from the statutory provision. In any event, *Rogers* highlights the point that not only can you claim for contravention of a statutory unlawful termination provision, equally, on the basis that I have outlined, an employee can also bring a contract action. The two cases I have just given you an example of show that. It is also not uncommon to see employees allege negligence, and occasionally you see defamation raised as well.

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[36] *Malik* at 34 per Lord Nicholls and 43 per Lord Steyn; see also *Rogers* FLR at 218 per Lucev FM; FMCA at para.101 per Lucev FM.
[37] *Rogers* FLR at 214-222 per Lucev FM; FMCA at paras.87-120 per Lucev FM.
[38] *Rogers* FLR at 222-225 per Lucev FM; FMCA at paras.121-134 per Lucev FM.
[39] *Russell v Trustees of Roman Catholic Church for Archdiocese of Sydney* (2007) 69 NSWLR 198 at 232 and 233 per Rothman J, [2007] NSWSC 104 at paras.138 and 141 per Rothman J (a judgment affirmed on appeal: see *Russell v Trustees of Roman Catholic Church for Archdiocese of Sydney* (2008) 72 NSWLR 559; [2008] NSWCA 217); *Rogers* FLR at 220-221, 222 and 225 per Lucev FM; FMCA at paras.112-113, 120 and 134 per Lucev FM.

BHP Coal[40]

44. In terms of the new adverse action provisions a Federal Court case in Queensland – *BHP Coal* – was an application by the union for a declaration and the imposition of penalties in relation to an incident at a mine site where there was an alleged breach of a workplace agreement in relation to a meeting, and whether it was part of the investigative process or the disciplinary process, and the question whether it was investigative or disciplinary related to the question whether the provision of the agreement actually applied.

45. In *BHP Coal*, the employee concerned had driven a mine vehicle on the wrong side of the road, had failed to take a turn and turned the mine vehicle over, but no-one was seriously injured. There was an investigation by BHP into the incident, and certain inconsistencies in the version of accounts that the employee gave to his supervisor and an account that he gave under a BHP safety process, which ran parallel but separately to the investigation, gave rise to two inconsistent stories. BHP called a meeting with respect to that, and invited the employee's representative along. BHP said it was a meeting under the particular clause of the workplace agreement which related to disciplinary proceedings which set out that the employee, the employee's supervisor and the employee's union representative were entitled to attend, but which was otherwise silent as to who attended. These people get into this meeting and there is a whole lot of toing and froing about who should be attending. The CFMEU say, how do the people in human resources appear here, they are not mentioned in the agreement. BHP say, well no, they are not mentioned in the agreement and therefore we can have them here, and this goes on for ages between them. In the end they get the mine site manager in, and after a little while he says to the employee, well it's up to you, if you don't take part in the meeting things will not go in your favour, the outcome will clearly not be the same as if you participate in the meeting, you are getting bad representation and you should think about that. That went on a bit further, the CFMEU got some advice from their national office, and the mine site manager said to the employee that if he was not going to participate the meeting was going to go ahead without him and they

[40] *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2010] FCA 590 ("*BHP Coal*").

will correspond with him about the outcome. That happened, and the employee was informed about the outcome, and the outcome ultimately was that BHP found that that the employee had failed to operate a vehicle in a safe manner, and the employee was given a show cause notice, and he was ultimately terminated.[41]

46. The Federal Court came to this because the CFMEU made an application alleging that what the mine site manager said to the employee - that it is not going in your favour was - in consequence of the dismissal, a threat to injure by reason of adverse action based on a workplace right. The CFMEU argued that the employee was not entitled to have the BHP human resources person at the meeting, and because he sought to exercise that right he got terminated, and that BHP had breached his workplace rights by taking adverse action against him by dismissing or threatening to dismiss him by reason of the mine site manager's comments.[42] The Federal Court said well actually lets split this thing in two and look at it in a couple of ways. The Federal Court said this was actually an investigation, and therefore it wasn't part of the disciplinary process, so the clause in the agreement only applies if you are going to discipline the person concerned. What was going on here was an investigation prior to a disciplinary process actually being implemented, and for that reason the workplace right did not apply because the clause did not apply as it was an investigation and not part of the disciplinary process.[43] And that was so notwithstanding that BHP had said that it was such a meeting. The Federal Court said that the existence of a workplace right is an objective fact, not the result of subjective belief. In other words, whether the relevant meeting was a disciplinary meeting and attendance restricted was a question to be determined objectively and not subjectively. The Federal Court quoted a decade-old decision in one of the Employment Advocate cases where it is put very succinctly:

> *"…To take a simple example, even if the employer believes he or she is dismissing an employee because the employee is a member of an industrial association, there will be no contravention … if it*

[41] *BHP Coal* at paras.5-31 per Collier J.
[42] *BHP Coal* at para.2 per Collier J.
[43] *BHP Coal* at paras.37-43 per Collier J.

turns out the employee is not a member of the industrial association…"[44]

47. The Federal Court found that is what occurred here, that the meeting was not a disciplinary meeting and therefore there was no contravention.[45] In relation to the comment of the mine site manager saying that "this is not going to go in your favour" the Federal Court said that was in fact an exaltation or an encouragement to the employee to participate in the meeting so that an outcome could be delivered. It was not a threat to injure the employee's employment or to dismiss the employee.[46]

Phillips Engineering[47]

48. I will not go to in detail on this case. It is a very short judgment. The Federal Court granted injunctive relief to reinstate an employee of an engineering firm who had been terminated because he had assisted and encouraged his fellow employees to negotiate an enterprise agreement with the employer, and when that was not successful he had invited the AFMEPKU into the workplace to further those negotiations on behalf of the employees. The employer had said, we are terminating you because you are a second-class welder. It is not apparent on the face of the judgment whether there is some distinction in classification terms between a first-class welder and a second-class welder, or whether the employer just thought he was a bad welder and did not have a job for him anymore, but it does not matter because the Federal Court said, on the basis of the evidence, there is ample evidence to show that the real reason for the employee being sacked was that he had participated in the negotiations, and that he suffered adverse action as a consequence of exercising a workplace right, that is a right to bring the union in and a right to negotiate on behalf of the employees concerned.[48]

49. The point that I wanted to make in respect of that is that 20 odd years ago you might have struggled to even think that you might make an

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[44] *BHP Coal* at para.44 per Collier J, citing *Employment Advocate v Williamson* (2001) 111 FCR 20 at 29 per Gray J.
[45] *BHP Coal* at paras.52-55 per Collier J.
[46] *BHP Coal* at para.65 per Collier J.
[47] *Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus Pty Ltd* [2010] FCA 611 ("*Phillips Engineering*").
[48] *Phillips Engineering* at paras.5 and 8 per Foster J.

application for injunctive relief to reinstate somebody.[49] Today, the right is enshrined in s.545(2) to make application for an injunction, to not only have an employee reinstated on an interlocutory basis, but also to actually prevent them from being terminated by the employer if there is a prospect of a contravention of the *FW Act*.

Queensland Tertiary Admissions Centre[50]

50. There is another decision which I might briefly mention involving Queensland Tertiary Admissions Centre in Queensland where there was a similar result to that in *Phillips Engineering*, with an interlocutory injunction preventing termination. Ultimately that case went to hearing and the application was dismissed, but the Queensland Tertiary Admissions Centre centre manager was re-employed as a consequence of the injunction for eight or nine months until the final case was heard.[51]

51. So it is something you need to bear in mind if you are advising employers, that back in the old days you could simply say "[D]on't come Monday". Now employees can go to the Federal Court or the Federal Magistrates Court and say, we want an injunction to prevent somebody from being terminated, or to reinstate somebody who has just been terminated, until such time as the Court hears an application for final relief. And as *Queensland Tertiary Admission Centre Ltd (No 2)* shows that can take some time!

Penalties

52. Penalty hearings generally in the Federal Magistrates Court and the Federal Court are separate hearings to liability hearings. Liability is determined, and the Court then issues orders to provide for the filing of affidavits so that the parties can come along and make submissions on the basis of evidence with respect to the penalty to be imposed for the

[49] JJ Macken, et al, The Law of Employment (2nd Edn) (Sydney: The Law Book Company, 1984), pages 130-138.
[50] *Jones v Queensland Tertiary Admissions Centre Ltd* (2009) 190 IR 218; [2009] FCA 1382 ("*Queensland Tertiary Admissions Centre Ltd*").
[51] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22; [2010] FCA 399 ("*Queensland Tertiary Admissions Centre Ltd (No 2)*").

contravention.[52] As to how penalty is assessed, in terms of general considerations, the Court has regard to a number of factors including the following:

a) the circumstances of the conduct (including deliberate defiance or disregard of the *WR Act*);

b) relevant record of civil penalty contraventions;

c) the consequences of the contravening conduct;

d) deterrence, both general and specific;

e) the objects of the *WR Act*;

f) the size and financial resources of the contravener;

g) co-operation with regulatory authorities;

h) the contravener's contrition; and

i) the size of the prescribed penalty, and any recent increases to that prescription.[53]

The considerations identified above are not exclusive.[54]

53. In respect of the size of the prescribed penalty, penalties increased substantially under the Howard government. Can I say to you that if you get the opportunity in a penalty case, take the opportunity to get the evidence in, particularly evidence of contrition. Counsel often comes along and says "we are sorry". I say to them: "Where is the evidence of that?" There is no managing director, no director, no senior officer of the company coming anywhere near the Court to say that

[52] See *Olsen v Sterling Crown* (2008) 177 IR 337 at 343-344 per Lucev FM; [2008] FMCA 1392 at para.25 per Lucev FM.
[53] *Liquor, Hospitality and Miscellaneous Workers' Union v Cuddles Management (No. 2)* (2009) 188 IR 435 at 437 per Lucev FM; [2009] FMCA 746 at para.5 per Lucev FM ("*Cuddles Management (No. 2)*"); *Workplace Ombudsman v Golden Maple Pty Ltd & Ors* (2009) 186 IR 211 at 223-224 per Lucev FM; [2009] FMCA 664 at para.10 per Lucev FM and cases there cited ("*Golden Maple*"); *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18-19 per Tracey J; [2007] FCA 1080 at para.14 per Tracey J ("*Fitzpatrick*"), citing *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.
[54] *Cuddles Management (No. 2)* IR at 437 per Lucev FM; FMCA at para.6 per Lucev FM; *Golden Maple* IR at 224 per Lucev FM; FMCA at para.11 per Lucev FM; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 580 per Buchanan J; [2008] FCAFC 8 at para.91 per Buchanan J ("*Australian Ophthalmic Supplies*").

they are sorry, and Counsel gets up and says "we're sorry" and again I say: "Where is the evidence?"[55]

54. In *Cuddles Management (No. 2)*, the child care case discussed above, penalties were assessed subsequent to determination of liability. Just to give you some flavour for it I will go the "Deterrence" section of the judgment which gives the gist of what happened and the overall substance of the penalty case. In this case there was clearly a need for specific deterrence. There was no contrition, and there was no co-operation with regulatory authorities. The conduct was serious and deliberate with adverse consequences to an employee. Cuddles Management continued to engage employees in the industry, and the evidence established that the vast majority of Cuddles Management's employees were, like the employee in question, of child-bearing age, and therefore susceptible to any future repetition of this kind of conduct by Cuddles Management. These matters were compounded by the fact that in relation to a prior contravention for which a penalty of $13,000 was imposed in relation to unpaid superannuation, a sum which ought to have been paid in August 2008, remained unpaid, and therefore specific deterrence "loomed large" in the consideration of penalty. The employer was fined 90% of the maximum, that is $29,700.[56]

[55] See *Williams v Macmahon Mining Services Pty Ltd (No 3)* (2010) 195 IR 161 at 175 and 176 per Lucev FM; [2010] FMCA 49 at paras.49 and 59 per Lucev FM ("*Macmahon Mining Services (No 3)*"). *Macmahon Mining Services (No 3)* has since been affirmed on appeal: see *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321.

[56] *Cuddles Management (No 2)* IR at 444 and 445 per Lucev FM; FMCA at paras.32-33 and 36.