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Presenter Paper

Industrial Relations and Employment Law

A great presentation on the Commonwealth employment law by leaders of the profession.

Discussion Includes

- The ever changing landscape of industrial relations and employment law.
- Does the current regime under the *Fair Work Act 2009* (Cth) provide for adequate access to justice?
- Remedies for claimants – common Law versus statutory.
- Adverse action cases – how practitioners should approach them and the importance of discovery.
- Implied terms in employment contracts.
- Bullying in the workplace and the anti-bullying jurisdiction in the Fair Work Commission.
- A National system under the *Work Health & Safety Act 2011* (Cth).

1. In this edition of BenchTV, Jeffrey Phillips SC and Ian Latham (Barrister) given an overview of industrial relations and employment law in Australia.

2. The landscape of industrial relations and employment law has changed significantly in Australia in recent times. In the past, the union movement was stronger, and unions played a different role more than they do now.

3. Nowadays, in theory, people have greater access to industrial remedies. In former times, you had to be a member of a union.

4. Mr Phillips SC has been involved in industrial relations for more than thirty years, and in this time there have been many changes. Probably, the most fundamental change was introduced by the *Workplace Relations Act 1996* (Cth) – now repealed. This Act introduced minimum standards for workers across industries irrespective if the workers were covered by an award. This situation continues into the current *Fair Work Act 2009* (Cth).

5. The *Fair Work Act* also effected a considerable change to the industrial relations landscape by nationalising the industrial relations system. The corporations power in the *Constitution* has been used to increase the jurisdiction of federal workplace bodies. This has led to the demise of the State jurisdictions.

6. Formerly, the State workplace jurisdictions dominated the area. This is no longer the case. The Industrial Relations Commission of New South Wales nowadays is effectively merely a public service board.

7. The costs powers of the relevant tribunals has also had an effect. The costs regime in the unfair contracts power under the *Industrial Relations Act 1996* (NSW) was that costs followed the event. Under the current adverse action regime under the *Fair Work Act*, where proceedings are taken in the Federal Circuit Court and the Federal Court of Australia, each party must pay its own costs, except where a party has behaved unreasonably.

8. This has led to a situation where applicants are faced with a situation where all of the money they recover might be soaked up in costs. There are now considerable concerns about access to justice in this area.

9. The Federal system has also moved to having much less focus on arbitration and more focus on agreement. This has led to a situation where intransigent parties can try to outlast the other side.

10. Under the current system, which focuses on individuals, the best way to begin to enforce one's industrial rights are to look at one's contract of employment, see if any term of that contract has been breached, and then to sue on that contract. People are generally better

placed to sue for breach of contract than to rely on an adverse action claim or a statutory claim.

11. In this respect, there have been a number of cases recently dealing with bonus schemes. An example is *Silverbrook Research Pty Ltd* v *Lindley* [2010] NSWCA 357. In this case, even though a bonus scheme was discretionary, after a fair look at how the scheme had operated over the previous few years, it was held that the bonus had become a customary matter and had become a contractual right. It was therefore a breach of contract for the employer not to exercise its discretion to award the bonus. That is, the discretion had to be exercised on a bona fide basis, and this was informed by how it had been exercised in the past, what guidelines had been set out, and was a real expectation that a particular person would receive a bonus in a particular year.

12. In former times, such a question would have been looked at under the unfair contracts jurisdiction of the Industrial Relations Commission of New South Wales. Now it was dealt with as a matter of contract in the common law jurisdiction of the Supreme Court.

13. Where there has been longstanding employment, the question often arises whether, in reality, the original contract has been replaced by a new contract. The question then arises – what are the terms of that new contract? In this way, an express notice period that had been included in the first contract not to be a term of the new contract. In this way, Courts can avoid an injustice that may occur in longstanding employment situations where an explicit term of the original contract provides for only a very short period of notice, which may apply where there has been a dismissal even in unfair circumstances.

14. If there is no term of the contract setting out what notice is required, it may be that the common law principle that contracts can only be terminated on reasonable notice will apply. What is reasonable will depend on particular facts of the case, including age, seniority, salary, and the opportunity for the employee to obtain comparable employment elsewhere.

15. The Courts are also now starting to address the issue of damages reflecting the loss of a chance. In *New South Wales Cancer* v *Sarfaty* (1992) 28 NSWLR 68, it was held that damages for a loss of chance were not available. However, recent cases such as *Willis Australia Group Services Pty Ltd* v *Mitchell-Innes* [2015] NSWCA 381, and other cases in the Federal Court, have suggested that damages for loss of a chance are available.

16. The principles for determining damages in industrial cases is becoming more like the situation in commercial disputes. Where there has been a practice of rolling over fixed term contracts, the case of *Commonwealth* v *Amann Aviation Pty Ltd* [1991] HCA 54; 174 CLR 64 may apply in the workplace area.

17. Courts are also now looking at implying terms into contracts on the basis of corporate policies. This has led to claims in which employees have gained access to redundancy payments, as well as to bonus schemes and commissions.

18. In *Riverwood International Australia Pty Ltd* v *McCormick* [2000] FCA 889, the Federal Court held that certain policies stated to be binding on employees but not contractual were, in fact, contractual, and they equally bound the employer and the employee.

19. The Courts are also becoming more willing to look at changes in contracts effected by conduct of the parties. In this regard, changes to a contract may be ratified by the fact that an employee keeps working under the changed arrangements.

20. Unfair dismissal legislation still exists, and is found in Part 3-2 of the *Fair Work Act*. This regime applies to anybody covered by a modern award, and up to a particular ceiling of remuneration.

21. However, there is a recent practice emerging at the Fair Work Commission in which parties are denieds the opportunity to be represented by a lawyer. Historically, even under previous legislation, legal practitioners have only been able to appear in the federal commission by leave. However, in previous times, leave was generally granted. There have even been cases in which the Fair Work Commission has given leave for one side to be represented but denied leave to the other side. Mr Phillips SC strongly suggests that this situation needs to be changed.

22. All employment lawyers should have regard to the provisions of the Australian Consumer Law, which is contained in Schedule 2 of the *Competition and Consumer Act 2010*. It is a great mistake to think that industrial and employment lawyers need have regard only to one statute. Industrial and employment lawyers need to be across a whole range of statutes, and should be well versed in the common law, particularly with respect to contract and negligence. The Australian Consumer Law is also an important part of one's armory.

23. If the Federal Circuit Court or Federal Court has jurisdiction in a case under the *Fair Work Act*, it will gain jurisdiction under its accrued jurisdiction over the entire matter at issue in that case, including issues arising under the common law and other statutes. Often the common law claim will be of more importance that the statutory claims.

24. Practitioners should also be aware that courts such as the District Court of New South Wales or the Country Court of Victoria may be good places in which to seek a remedy where a claim is in common law.

25. Another current statutory regime concerns adverse actions, which is found in Part 3-1 of the *Fair Work Act*. However, adverse action cases require some care. One has to identify whether the action taken against the employee was for a prohibited reason or was against

one of the general protections. There has to be a true nexus between the adverse action and the prohibited reason.

26. Even though there is a reverse onus of proof on the employer in these type of actions, the employer may be able discharge that onus of proof through its records. These cases often involve in effect, a search inside the mind of the decision maker – that is, the person who decided to take the action against the employee.

27. The discovery process is very important here – cases are often won on the basis of material, especially emails, that comes to light as a result of discovery.

28. Adverse action claims are, however, complicated by the very strict and short time limit that applies to them. This can lead to difficult ethical issues about whether one has a sufficient basis to commence proceedings. However, the reverse onus applying to the employer on the issue of nexus can make it easier to be satisfied that one's case is arguable in these circumstances.

29. In *Commonwealth Bank of Australia* v *Barker* [2014] HCA 32; 253 CLR 169, the High Court rejected the proposition that an employment contract necessarily included an implied term of trust and confidence.

30. However, the High Court left open the possibility there might be other implied terms of a similar nature. Terms of good faith have been implied into commercial contracts, and it is difficult to see why they would not also be implied into employment contracts.

31. Implied terms may be an important issue in industrial and employment law going forward. In this regard, Australian Courts still rely on precedents *and obiter dicta* from other jurisdictions, such as England. Furthermore, United States decisions are also becoming more important in this respect.

32. The law may also develop so as to imply a duty on employers to afford procedural fairness to employees when making decisions, particularly decisions to dismiss an employee. The presenters referred to the case of *Kioa* v *West* [1985] HCA 81; 159 CLR 550 as a case that had referred to the possibility of such an implication being made into commercial contracts.

33. The Fair Work Commission has a jurisdiction to deal with bullying behavior in the workplace. This jurisdiction has not been used to any great effect. This may be because the term "bullying", similar to the term "harassment", is an umbrella term that expresses a conclusion, without giving explicit guidance as to what actual facts may justify such a conclusion.

34. However, if an employee feels that he or she is being bullied at work, the best thing to do is to starting keeping notes as to what is happening.

35. A useful case to consider regarding bullying is *Naidu* v *Group 4 Securitas Pty Ltd* [2005] NSWSC 618. This case again gave an example where the common law gave a much more effective remedy than the statutory remedies under workplace law.

36. The *Independent Contractors Act 2006* (Cth) is another example of Commonwealth legislation that showed promise but which has not been widely used, even after almost a decade. The costs regime under this Act is an important reason why it has not been effectively used. This costs regime is similar to that under the *Fair Work Act*, and it does not permit successful plaintiffs to have their costs paid by the defendants, except in exceptional circumstances.

37. This has had a negative effect. As Mr Phillips SC says in the presentation, a weapon with a blunt edge is not in the interests of justice.

38. The move to a national system of health and safety legislation under the *Work, Health & Safety Act 2011* (Cth) has set up a situation which is more evenhanded as between the prosecuting body and the defendant employer.

39. Under the old regime, it was very difficult for a defendant to be acquitted, particularly before the Industrial Relations Commission of New South Wales. Criminal matters under the new regime in New South Wales are heard in the District Court, which is more accustomed to dealing with criminal matters.

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