

REMEDIES ON TERMINATION OF EMPLOYMENT

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21 March 2012

Abstract

The aim of this paper is to provide an introduction to the remedies available on termination of employment. The modern contract of employment is governed by the general law and is highly regulated by legislation. The approach of the common law to employment is to view it as just another form of contract, and apply the usual contractual principles accordingly. Part 1 of this paper examines the remedies available to both employees and employers under the general law for termination of employment. Part 2 of this paper examines the remedies available under the *Fair Work Act 2009* (Cth) for three types of action arising from termination of employment under that Act – unfair dismissals, adverse action against protected employees, and unlawful termination. The Act has expanded some of the remedies previously available. Part 2 will also look at the principles that are developing in the application by the courts of these expanded remedies, as well as recent approaches to the task of imposing penalties against employers who contravene the civil remedy provisions of the Act.

Part 1 – General law remedies

1. This part examines, first, damages that are available to an employee for wrongful termination by the employer and, secondly, damages that an employer can recover from an employee for a breach.

REMEDIES FOR THE EMPLOYEE

The right to terminate an employment contract

2. Subject to any express term to the contrary, the parties may terminate an employment contract without cause by giving notice of termination in accordance with the contract. The essence of the policy behind the requirement to give notice of termination is to provide reasonable time, in the case of the employee, to find suitable alternative employment or, in the case of the employer, to find and hire a replacement.
3. The length of notice may be specified in the contract. If there is no express term, the notice period must be reasonable. A minimum period of notice may apply by virtue of an award or enterprise agreement or by legislation.¹
4. What is a reasonable period of notice will depend upon the facts of the particular case, usually with regard to factors including:
 - Length of service;
 - Relative seniority;
 - The nature of the position;
 - Remuneration levels.²

¹ Section 117 of the Fair Work Act sets out minimum notice periods for certain employees.

² See discussion Sappideen et al, *Macken's Law of Employment*, Seventh Edition, Lawbook Co, p 289-291.

5. Sometimes an employer will make a payment in lieu of notice. That is, the employee is not required to work during the notice period and is paid out his or her entitlements.
6. *WT Partnership (Aust) Pty Ltd v Sheldrick*³ establishes that a term permitting payment in lieu of notice is not implied in every employment contract. Thus, in the absence of an express term or establishing an implied term on the facts of the particular case, paying out the notice period rather than allowing the employee to work the notice is a breach contract.

Wrongful dismissal and damages

7. A wrongful dismissal claim is form breach of contract claim. As the name suggests, it occurs when an employer has terminated an employee otherwise than in accordance with the contract.
8. The breach may be a failure to give notice, failure to follow procedures that may be required under the particular contract prior to termination, or summarily dismissing an employee for misconduct in circumstances that do no warrant summary dismissal.
9. Of course, an employer is entitled under common law to dismiss without notice an employee on the ground of misconduct that is incompatible with the due or faithful discharge of duty to the employer.⁴

Principles for assessing damages for wrongful dismissal

10. *Remoteness*. As an employment contract is a contract, the rule in *Hadley v Blaxendale* applies to remoteness of damage:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and

³ *WT Partnership (Aust) Pty Ltd v Sheldrick* (1999) 96 IR 202; *Sanders v Snell* [1998] HCA 64; 196 CLR 329; 157 ALR 491; 72 ALJR 1508 at [16]-[17].

⁴ *Concut Pty Ltd v Worrell* [2000] HCA 64; 176 ALR 693; 75 ALJR 312; 21(20) Leg Rep 30; 103 IR 160 at [25].

*reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it.*⁵

11. The usual measure of damages is:

*Where the party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed.*⁶

12. Damages for breach of contract are compensatory only – aggravated and exemplary damages are not available.

13. *Assessment of damage.* The traditional approach is to assume that the employer would have performed the contract in a way most beneficial to it.⁷ In other words, in assessing what would have happened if the employer had not breached the contract, it is assumed that the employer would have acted in its own best interests within the bounds of the terms of the contract.

14. This means that in cases where the employer can terminate the contract by giving notice, it will be assumed that the employer would have done so. Unless the contract is for a fixed term, an employer may terminate the employee at any time by giving proper notice. It is assumed the employer would have terminated in accordance with the terms of the contract. Accordingly, the loss suffered by an employee as a result of a wrongful termination (that is, an employer's failure to terminate the contract in accordance with its terms) will be the equivalent of payments if proper notice had been given.⁸

⁵ *Hadley v Blaxendale* (1854) 9 Exch 341 at 354; 156 ER 145 at 150.

⁶ *Robinson v Harman* (1848) 1 Ex 850 at 855; 154 ER 363 at 365, approved in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80.

⁷ *Withers v General Theatre Corp Ltd* [1933] 2 KB 536 at 549-552; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 92; *Grout v Gunnedah Shire Council (No 3)* (1995) 59 IR 248 at 251.

⁸ *Cockburn v Alexander* (1848) 136 ER 1459 at 1468.

15. Generally, a payment in lieu of notice will equate to damages resulting from the breach.⁹
16. Where an employee under a fixed term contract is wrongfully terminated, damages are generally assessed on the basis that the employee would have enjoyed the benefits of the contract for the full term.¹⁰
17. There is some authority developing concerning awards for loss of chance from wrongful termination of employment, the chance lost being the opportunity to continue in the employment and renew the contract.¹¹ The instances seem to be limited to cases where it can be established that it would have been most unlikely that the employer would have exercised its rights under the to terminate and for how long. There are questions whether loss of chance damages can be awarded in the absence of a fixed term contract and evidence supporting the possibility that the contract might be renewed.¹²

Mitigation of loss

18. An employee who alleges wrongful dismissal is under a duty to mitigate his or her loss.¹³ Amounts received from other employment in the form of salary, wages and fringe benefits will reduce the damages award.¹⁴ It has even been suggested that any unemployment benefits received should be taken into account.¹⁵

⁹ But not always. In *WT Partnership (Aust) Pty Ltd v Sheldrick* (1999) 96 IR 202 the employee's visa status depended upon his employment. The breach in failing to allow him to work out the notice period resulted in the end of the visa and prevented him exploring further employment opportunities in Malaysia. Damages for loss of opportunity were assessed at \$30,000 and upheld on appeal.

¹⁰ *Van Efferen v CMA Corporation Limited* (2009) 183 IR 319; [2009] FCA 597 at [64].

¹¹ *Walker v Citigroup Global Markets Australia Pty Ltd* [2006] FCAFC 101; (2006) 233 ALR 687 at [85].

¹² *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375; *Van Efferen v CMA Corporation Limited* (2009) 183 IR 319; [2009] FCA 597 at [77]-[78].

¹³ *Bowes and Partners v Press* [1894] 1 QB 202 at 212.

¹⁴ *Dellys v Elderslie Finance Corporation Limited* [2002] WASCA 161 at 39; *Van Efferen v CMA Corporation Limited* [2009] FCA 597 at [65], [69].

¹⁵ *Evans v Muller* (1983) 151 CLR 117; *McCasker v Darling Downs Co-op Bacon Association Ltd* (1988) 30 AILR 316; *Wood v District Council of Crystal Book* (1992) 42 IR 189.

19. An employee alleging wrongful dismissal under a fixed term contract is not under a duty to mitigate.¹⁶

Breach of the duties of trust, confidence and good faith

20. Often an action concerning a termination of employment by a former employee will (usually as a back up or in the “further or in the alternative” section near the end of the pleading) assert that the employer acted in breach of duties of mutual trust and confidence or of good faith.
21. However, these terms do not apply to termination of employment or matters leading to termination of employment.¹⁷ Moreover, the established scope of the term where it is implied permits the employer to act with reasonable and proper cause to pursue its own interests.¹⁸

Damages for emotional distress, hurt and humiliation

22. These heads of damage are also often included in an employee’s pleading. However, damages are not available under these heads arising from wrongful dismissal. It has been recognised that termination of employment may cause such consequences but they are not grounds for damages.¹⁹
23. The following statement in the speeches in the House of Lords in *Addis* has been held²⁰ to state the law in Australia until such time as the High Court rejects the principle:

*I cannot agree that the manner of dismissal affects these damages ...
If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from*

¹⁶ *Van Efferen v CMA Corporation Limited* (2009) 183 IR 319; [2009] FCA 597 at [64].

¹⁷ *Russell v Roman Catholic Church* (2007) 69 NSWLR 198; 167 IR 121 at [136], [138], [141] (Supreme Court); on appeal (2008) 176 IR 82 at 97 [59] (Court of Appeal).

¹⁸ *Russell v Catholic Church* (2008) 176 IR 82 at 90 [30], 91 [33] (Court of Appeal).

¹⁹ *McDonald v Parnell Laboratories (Australia) Pty Limited* (2007) 168 IR 375 at 400 [93].

²⁰ *Burazin v Blacktown City Guardian* (1996) 142 ALR 144; [1996] IRCA 629.

*the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.*²¹

REMEDIES FOR EMPLOYERS AGAINST EMPLOYEES

Specific performance

24. As a general proposition, a court will not make an order compelling an employee to perform personal services in accordance with a contract or otherwise.²² In other words, an order will not be made for specific performance against an employee. (The proposition may be otherwise when the situation is reversed.²³) The rationale underpinning this approach is that ordering an employee to perform work²⁴ is tantamount to an order for slavery.²⁵

Damages against employees

25. An employer may recover damages from an employee for breach of contract.
26. If an employee fails to work out the notice period he or she may be liable for damages. An employee's failure to give proper notice of termination will be a breach. There is authority supporting an employer's entitlement to withhold money equivalent to the notice period where an employee leaves or resigns without giving appropriate notice.²⁶ However, this approach may now contravene the *Fair Work Act* to the extent that the Act prohibits an employer from making deductions or withholding any payment of wages.²⁷

²¹ *Addis v Gramophone Co* [1909] AC 488 at 491.

²² See analysis of the authorities on the question by Barrett J (as he then was) in *Tradition Australia Pty Ltd v Gunson* [2006] NSWSC 298 at [12]-[33]. His Honour declined to make an order requiring three employees to serve out the balance of a fixed term contract with something more than a year left to run.

²³ *Tradition Australia Pty Ltd v Gunson* [2006] NSWSC 298 at [13].

²⁴ As distinguished from complying with negative stipulations, such as not to disclose confidential information or compete.

²⁵ *Tradition Australia Pty Ltd v Gunson* [2006] NSWSC 298 at [30].

²⁶ *Australian workers Union v Mason and Cox Foundries* (1996) 66 IR 27.

²⁷ Section 322-323.

27. There must be doubt that the amount of wages is a true measure of loss suffered by an employer:

*What, then, is the measure of damages in this particular case? If the defendant alone and on his own initiative had failed to work ... the measure of damages would ... have been the net value to the plaintiffs of the work which he would have performed if he had worked ...*²⁸

28. *Oldcastle v Guinea Airways Ltd*²⁹ concerned a pilot who had been trained at the expense of the employer with a condition that he serve as a pilot for five years. When he breached the agreement by leaving only a few weeks after completing the training, damages were assessed at the cost of the training.

Repudiation by an employee of a fixed term contract

29. The contract of employment in *Purcell v Tullett Prebon (Aust) Pty Ltd* was for a fixed term of two years. Prior to the end of the fixed term, the employee purported to resign and commenced work with a competitor. The employer placed the employee on paid garden leave and directed him to continue employment in accordance with the terms of the contract. In so doing, the employer had affirmed the contract. The employer then sent a letter directing the employee to return to work in accordance with the contract.
30. The NSW Court of Appeal upheld the employer's right to terminate for the repudiation by the employee's failure to comply with that direction, and for the right to recover damages for loss of its bargain.³⁰
31. A liquidated damages clause in the employment contract was upheld as a genuine pre-estimate of loss. Because the employer demonstrated that it had been ready, willing and able to perform the contract when it had sent the letter directing the employee to return to work, it was able to recover substantial damages – if not, the breach by the employee would have

²⁸ *National Coal Board v Galley* [1958] 1 WLR 16 at 28-29.

²⁹ *Oldcastle v Guinea Airways Ltd* [1956] SASR 325.

³⁰ *Purcell v Tullett Prebon (Aust) Pty Ltd* [2010] NSWCA 150 at [39].

caused nominal damages only, with the consequence that the liquidated damages clause would not have been a genuine pre-estimate of the employer's loss.³¹

³¹ *Purcell v Tullett Prebon (Aust) Pty Ltd* [2010] NSWCA 150 at [38], [40]. The case reiterates that the general principle of contract law that acceptance by the innocent party of a repudiation is necessary to terminate a contract or, put another way, an unaccepted repudiation does not terminate a contract, applies equally to employment contracts: at [20]; see also *Byrne v Australian Airlines Ltd* [1995] HCA 24, 185 CLR 410 at 427 and *Visscher v Guidice* [2009] HCA 34, 239 CLR 361 at 379-81. Thus in *Purcell v Tullett Prebon (Aust) Pty Ltd* despite the employee's purported resignation and going to work for a competitor, when the employer sent the letter directing the employee to return to work, the contract was still on foot.

Part 2 – Fair Work Act 2009 (Cth)

32. This part of the paper covers remedies for unfair dismissals, then remedies and penalties for contravening the general protections provisions and unlawful termination prohibition under the Act. Finally, this part covers the issue of costs in proceedings under the Act.

UNFAIR DISMISSALS

What is an unfair dismissal

33. An unfair dismissal occurs when:
- (a) the employee has been dismissed³²; and
 - (b) the dismissal was harsh, unjust or unreasonable; and
 - (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
 - (d) the dismissal was not a case of genuine redundancy.³³

What is harsh, unjust or unreasonable

34. The factors to be considered³⁴ are:
- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
 - (b) whether the person was notified of that reason; and

³² Section 386 defines dismissal.

³³ Section 385.

³⁴ Section 387.

- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that FWA considers relevant.

Small Business Fair Dismissal Code

35. Small businesses are those with less than 15 full time employees. The code sets out when a small business can dismiss an employee summarily and when and what other procedures must be followed, such as allowing an employee an opportunity to respond to a warning or allegation.³⁵

What is a genuine redundancy

36. A genuine redundancy occurs when the employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise. The employer must

³⁵ A copy of the code is can be accessed at www.fairwork.gov.au.

comply with any consultation obligations under a modern award or enterprise agreement. It will not be a case of genuine redundancy where it would have been reasonable in all the circumstances for the person to be redeployed within the same enterprise or an enterprise of an associated entity of the employer.³⁶

37. It has been held³⁷ that the effect of the statutory definition is that a job can be redundant even though an employee's duties are still being performed after retrenchment. There is a distinction between a particular job and the functions performed by a particular employee. For a termination to be a case of genuine redundancy, the functions may continue to exist even though the job does not.

What employees are protected by the unfair dismissal provisions

38. An employee is protected against unfair dismissal under the Fair Work Act if the employee:

- earns³⁸ less than the high income threshold per year (currently \$118,100); or
- is covered by a modern award; or
- is covered by an enterprise agreement,

and

- if the employer has less than 15 employees, has been employed for at least 12 months; or
- if the employer has 15 or more employees, has been employed for at least 6 months.³⁹

³⁶ Section 389.

³⁷ *Ulan Coal Mines* (2010) FWAFC 3488.

³⁸ Section 332 sets out how earnings are calculated.

³⁹ Sections 382-383.

39. The protection against unfair dismissal includes casual employees who have been employed on a regular and systemic basis and who have a reasonable expectation that their employment on that basis will continue.⁴⁰

Procedure for unfair dismissal claims

40. Applications for unfair dismissal claims must be made within 14 days of termination.⁴¹
41. Applications are heard and determined by Fair Work Australia. The general procedure is for FWA to hold a conciliation conference in private and then a hearing if the dispute does not resolve.
42. If raised by the employer, before hearing the merits of the application, FWA must first determine as a preliminary point whether:
- The application was made within time;
 - The person is protected by the unfair dismissal provisions;
 - The dismissal was consistent with the Small Business Fair Dismissal Code;
 - The dismissal was a case of genuine redundancy.

Remedies for unfair dismissal

43. Upon a finding that an employee was unfairly dismissed, FWA may order that the employee be reinstated or that the employer pay compensation in lieu of reinstatement.⁴²
44. An order for compensation cannot be made unless FWA is satisfied that reinstatement is not appropriate and an order for payment of compensation is appropriate in all the circumstances of the case.⁴³

⁴⁰ Section 384.

⁴¹ Section 394. The time limit may be extended in exceptional circumstances: s 394(3).

⁴² Sections 390-392.

45. The amount of compensation is capped at 6 months remuneration. It must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused by the manner of the person's dismissal.
46. The factors relevant to assessing the appropriate amount of compensation is not limited, but includes:
- the effect of the order on the viability of the employer's enterprise; and
 - the length of the person's service with the employer; and
 - the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
 - the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
 - the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
 - the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
 - whether misconduct contributed to the decision to dismiss the employee.

⁴³ Section 390.

GENERAL PROTECTIONS PROVISIONS AND UNLAWFUL TERMINATION

What is protected

47. The general protection provisions of the Fair Work Act are designed to protect employees exercising their workplace rights, engaging in lawful industrial action and involvement in industrial associations.
48. The Act prohibits the taking of adverse action against an employee because the employee has exercised a workplace right.⁴⁴

What is a workplace right

49. A workplace right is given broad meaning by section 341:

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.

⁴⁴ Section 340.

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

- (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.

50. It has been observed⁴⁵ that a workplace right will probably be created where grievance, fair practice and disciplinary procedures are included in the contract of employment or apply to the employee.

⁴⁵ Lucev FM, T, *Don't Come Monday: remedies in the federal courts for termination of employment*, 23 September 2010, p 7.

What adverse action is prohibited

51. Adverse action⁴⁶ that an employer is prohibited from taking includes:
- Dismissing the employee
 - Injuring the employee in his or her employment;
 - Altering the position of the employee to the employee's prejudice;
 - Discriminating between the employee and other employees of the employer.
52. This paper is concerned with cases where the adverse action is the dismissal of the employee.
53. A contravention will be established where just one of the reasons for taking these forms of adverse action is exercise of a workplace right by an employee, no matter how small a part that particular reason may have played in the multitude of reasons.⁴⁷

What is unlawful termination

54. An employer is prohibited from terminating an employee on certain grounds under s 772:
- (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;

⁴⁶ For a full definition of adverse action, see s 342.

⁴⁷ Section 360.

- (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.

55. The wording of the section ("for reasons including one or more") means that a contravention will be established where just one of the reasons for termination is a prohibited reason, and no matter how small a part that particular reason played in the termination.

Reversal of the onus of proof

56. Provided that the person making the claim has some factual underpinning to the allegation of unlawful termination or prohibited adverse action, then the onus is reversed.⁴⁸ In other words, the onus will be on the employer to prove that the reasons for the termination of the employee's employment was not, and did not include, any of the prohibited reasons set out in the section, and the reasons for taking adverse action did not include the fact that the employee had exercised a workplace right.

⁴⁸ Sections 361 and 783.

Procedure for bringing claims

57. Applications must be made to Fair Work Australia⁴⁹ within 60 days after the date of termination.⁵⁰
58. The parties must attend a conciliation conference with FWA, which is conducted in private.⁵¹
59. FWA may express an opinion about the dispute, and it must advise the parties if it forms the view that proceedings do not have reasonable prospects of success.⁵²
60. This is a form of compulsory pre-litigation alternative dispute resolution. FWA does not have power to determine cases of unlawful termination or where the adverse action is the dismissal of the employee. If the parties fail to resolve the dispute after reasonable attempts, FWA must issue a certificate to that effect.⁵³ Proceedings can then be commenced in either the Federal Court or Federal Magistrates Court, within 14 days.⁵⁴ The courts do not have jurisdiction unless a certificate is issued or the proceedings include an application for an interim injunction.⁵⁵

Remedies for unlawful termination and adverse action

61. The Federal Court and the Federal Magistrates Court have broad powers to “*make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene,*” the unlawful termination and adverse action provisions of the Act.⁵⁶ The remedial orders include, without limitation:

⁴⁹ Sections 365 and 773.

⁵⁰ Sections 366 and 774.

⁵¹ Section 368.

⁵² Sections 370 and 778.

⁵³ Sections 369 and 777.

⁵⁴ Sections 371 and 779.

⁵⁵ Sections 371 and 779; *Rentuza v Westside Auto Wholesale* [2009] FMCA 1022; *Reeve v Ramsay Health Care Limited* [2012] FMCA 120 at [76].

⁵⁶ Section 545. To power relates to civil remedy provisions of the Act. The jurisdiction of eligible State and Territory courts is limited to ordering payment where a failure to pay an

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
- an order awarding compensation for loss that a person has suffered because of the contravention;
- an order for reinstatement of a person.⁵⁷

62. The legislation provides that a court may make these orders on its own initiative, during proceedings *or* on application.⁵⁸ Presumably this means a court may make an order in proceedings where no application for such is made but the evidence has established a contravention.

Interim injunctions

63. The courts may grant interim injunctions including restraining an employer from taking adverse action such as dismissing an employee.⁵⁹

64. The problem whether an interim order reinstating an employee would revive the employment relationship and mean it was still in existence even if the employee was ultimately unsuccessful in obtaining final relief may be circumvented by including an order that, if final relief is not granted, the employment relationship ceases forthwith.⁶⁰

Compensation

65. There is no cap on the amount of a compensation award, unlike the six-month remuneration cap under the Workplace Relations Act.

amount required to be paid under a fair work instrument has contravened a civil remedy provision: s 545(3)-(3A).

⁵⁷ Section 545.

⁵⁸ Section 545(4).

⁵⁹ The usual considerations apply, and they are a topic for a separate paper. But for example, *McCulloch v Preshil, The Margaret Lyttle Memorial School* [2011] FCA 1218; *Jones v Queensland Tertiary Admissions Centre Ltd* [2009] FCA 1382.

⁶⁰ *AMIEU v G & K O'Connor Pty Ltd* (2000) 100 IR 383.

66. *Non-economic loss.* Some recent decisions have read into the power “to make any order the court considers appropriate” to include powers to order compensation for non-economic loss. The removal of the cap on the amount of compensation and the broad wording of the power has meant compensation has been awarded under the heads of shock, distress and humiliation.⁶¹
67. This approach is yet to be tested on appeal. The preferred view is that the current balance of authority requires that the person seeking compensation prove his or her actual loss.
68. *Compensable loss.* The following principles for assessing appropriate amounts of compensation have emerged in recent decisions:
- No compensation was awarded for an employee who had been suspended on full pay and alleged (successfully on appeal) adverse action for a proscribed reason, but had failed to establish that he had suffered any compensable loss;⁶²
 - An employee who was demoted to a lower pay grade and ultimately dismissed because of a complaint she had made to the Fair Work Ombudsman was awarded \$2,207 economic loss being the difference between the two pay rates;⁶³
 - An employee was not allocated shifts after he refused to sign an individual flexibility agreement. He was awarded \$7,146 to compensate for lost wages;⁶⁴

⁶¹ *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526; (2011) 205 IR 392; [2011] FCA 333 at [449]-[450] (\$7,500 awarded under this head). Cited with approval in *TWU v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 at [23] (although no award for such loss was made). See also comments in *Ucchino v Acorp Pty Limited* [2012] FMCA 9 at [78], though no sum awarded.

⁶² *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284 at [56]-[57]; on appeal *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 at [141].

⁶³ *Fair Work Ombudsman v Wongtas Pty Ltd* (No 2) [2012] FCA 30 at [36], [46].

⁶⁴ *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064.

- An employee moved from full time to casual and later dismissed due to her pregnancy received an award of less than \$9,000 for lost remuneration. In assessing loss suffered, regard was had to the facts which indicated that she was unlikely to return to work at the end of the maternity period;⁶⁵
- *“In accordance with usual principle, an order awarding compensation must be assessed on the basis that an applicant establishes loss that a person has suffered because of the contravention and that this requires an appropriate causal connection between the contravention and the loss claimed.”* The court awarded 18 months’ wages (about \$82,000) being the time between the dismissal and the trial, during which the employee had not found other work, in circumstances where it was established that if the prohibited adverse action had not been taken the employee would have remained in the position. The court also awarded expenses of relocating to Indonesia as, due to losing his job, the employee had also lost his visa.⁶⁶
- The principles of the assessment of damages in tort and contract do not necessarily apply to the task under the statute of assessing the amount of compensation that is appropriate. It has also been said that *“the discretionary nature of the remedy does not necessarily require the applicant to be fully compensated for all losses”*.⁶⁷
- In a decision handed down earlier this year, compensation was assessed by measuring the loss suffered by the employee by reference to predicting how long the employee would likely have continued in the position had the employer not taken unlawful action by terminating her due to temporary absence due to illness.

⁶⁵ *Ucchino v Acorp Pty Limited* [2012] FMCA 9.

⁶⁶ *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526; (2011) 205 IR 392; [2011] FCA 333 at [423], [431]-[434]. The court assessed the employee’s economic loss on this basis and made an award accordingly. In addition, the court went on to award compensation for non-economic loss: see above, n 61.

⁶⁷ *Kavassilas v Migration Training Australia Pty Ltd* [2012] FMCA 22 at [87].

The employee had found a new job interstate. A “fair and appropriate” amount was arrived at by awarding the full amount of her remuneration with a discount of 20% for contingencies.⁶⁸ As it had not been established that reallocating to another state was necessary to obtain other employment, no award was made to compensate for the expenses of moving interstate for the new job.⁶⁹

- *Mitigation.* An employee has a duty to mitigate his or her loss which is to be taken into account when assessing the appropriate amount of an award of compensation under the Act.⁷⁰
- *Agreed orders.* It is a matter for the court to determine, on evidence, the loss that has in fact been suffered by a person. Agreed facts may disclose a sufficient factual foundation establishing loss and for an order to be made. In at least one Federal Court case the judge refused to make the order by consent where the parties mutually agreed to an amount as an appropriate award of compensation.⁷¹
- In the same case, the judge also refused to make an order by consent banning the managing director whose actions had contravened the Act from being a director of the employer company for a five year period, or accepting an undertaking proffered by that managing director that he would not to be involved in the management of staff for a five year period. It was held that the wide remedial powers under the provision to “*make any order the court considers appropriate*” does not confer a power to disqualify a person from being a company director or to exact any undertaking from a person not to be involved in the management of staff.⁷²

⁶⁸ *Kavassilas v Migration Training Australia Pty Ltd* [2012] FMCA 22 at [7].

⁶⁹ *Kavassilas v Migration Training Australia Pty Ltd* [2012] FMCA 22 at [93]-[94].

⁷⁰ *Ramos v Good Samaritan Industries (No.2)* [2011] FMCA 341 at [105].

⁷¹ *TWU v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 at [41]-[42] per Flick J.

⁷² *TWU v No Fuss Liquid Waste Pty Limited* [2011] FCA 982 at [47] and [51] per Flick J

Reinstatement

69. If the employer is opposed to reinstatement it must establish (with evidence) that the remedy is undesirable, unworkable or otherwise inappropriate.⁷³

Pecuniary penalties under the Fair Work Act

70. In addition to the above, a fine may be imposed for contravening the adverse action and unlawful termination provisions.⁷⁴

71. The maximum penalty for each contravention is currently \$6,600 for individuals and \$33,000 for corporations.⁷⁵

72. Penalties can be ordered payable to the Commonwealth, an organisation or individual⁷⁶, and it has been held that the usual order should be for payment to the person applying for the penalty.⁷⁷

73. The penalty may be imposed against the employer and/or a person (for example, an officer or employee) who has contravened the provisions. The Act provides that:

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
- (2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or

⁷³ See *Stephens v Australian Postal Corporation* [2011] FMCA 448 at [116] where no evidence adduced from the employer that reinstatement would be unachievable.

⁷⁴ Section 546. There is a rule against civil double jeopardy: s 556.

⁷⁵ Section 539.

⁷⁶ Section 546(3).

⁷⁷ *Schanka v Employment National (Administration) Pty Ltd* (2001) 114 FCR 379; 110 IR 97; FCA 1623 at [78].

- promises or otherwise; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) has conspired with others to effect the contravention.⁷⁸

Procedure for hearing on penalty

74. Penalty hearings are generally conducted separately to liability hearings, with directions for affidavits to give any submissions on the penalty hearing evidentiary basis.⁷⁹

Considerations when imposing penalty

75. The power to impose a penalty is discretionary. A penalty will not be warranted in every contravention. Matters relevant in exercising the discretion to impose a pecuniary penalty and set an appropriate amount include:

- the circumstances in which the relevant conduct took place, including whether it was undertaken in deliberate defiance or disregard of the Act;
- whether the respondent has previously been found to have engaged in conduct in contravention of the particular part of the Act in question;
- whether more than one contravention of the particular part of the Act is involved, and whether the contraventions are properly seen as distinct or arising out of the one course of conduct;
- the consequences of the conduct found to be in contravention of the particular part of the Act;

⁷⁸ Section 550.

⁷⁹ *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 at [80]-[81].

- the need, in the circumstances, for the protection of industrial freedom of association; and
- the need for deterrents – both specific and general.⁸⁰

76. *Examples of penalties.* Some recent cases include:

- Where an employee of 18 years was dismissed for temporary absence from work due to illness or injury, a penalty of \$7,500 was imposed on the employer;⁸¹
- The employer was ordered to pay a penalty of \$25,000 and the managing director \$5,000 for taking adverse action in the form of not rostering an employee who had refused to sign an individual flexibility agreement;⁸²
- A \$5,000 penalty was imposed on an employer for moving a woman from full time to casual and later dismissing her on the ground of pregnancy;⁸³
- Australia Post was ordered to pay a penalty of \$25,000 where it had dismissed an employee for reasons including he had made a workers compensation claim;⁸⁴
- A \$10,000 penalty was imposed for taking adverse action by dismissing an employee for reasons including that the employee had sought union representation, demanded overtime pay, and made complaints and inquiries about his employment;⁸⁵

⁸⁰ *Rojas v Esselte Australia Pty Limited (No 2)* [2008] FCA 1585.

⁸¹ *Stevenson v Murdoch Community Services Inc* [2010] FCA 648 at [112] (contravention and penalty under the Workplace Relations Act).

⁸² *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* [2011] FCA 1064.

⁸³ *Ucchino v Acorp Pty Limited* [2012] FMCA 9.

⁸⁴ *Stephens v Australian Postal Corporation (No.3)* [2011] FMCA 999.

⁸⁵ *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* [2011] FCA 394.

- In a case where four workers were dismissed for taking industrial action and engaging a union, the employer was ordered to pay \$10,000 and its director and manager \$2,250.⁸⁶

COSTS IN FAIR WORK ACT PROCEEDINGS

77. Generally, in proceedings under the Fair Work Act parties are left to bear their own costs. Section 570 limits the circumstances in which there is a power to order costs against a party to instances where it can be shown that a party has instituted the proceedings vexatiously or without reasonable cause, or an unreasonable act or omission of one party has caused the other party to incur the costs.⁸⁷
78. The limitation applies to proceedings in any court exercising jurisdiction under the Act, including proceedings involving the exercise of another jurisdiction. The Full Court of the Federal Court in *Goldman Sachs JBWere Services Pty Limited v Nikolich* held that where proceedings on a claim arising under the Workplace Relations Act 1996 were accompanied by claims arising in contract, the no-cost provision of that Act applied to the entire proceedings.⁸⁸
79. For example, the Fair Work Act costs limitations would apply to the entire proceedings in a case in the Federal Court for misrepresentation and breach of contract where there is also a claim under the Act, for instance for payment of a small amount of unpaid wages.
80. Despite the no costs rule, an order for costs may be made against a legal practitioner where it should have been apparent an application had no reasonable prospects of success or where there has been an unreasonable

⁸⁶ *TWU v No Fuss Liquid Waste Pty Limited* [2011] FCA 982.

⁸⁷ Query whether rejecting a reasonable settlement offer can be an “unreasonable act or omission” to enliven the costs power: *McDonald v Parnell Laboratories (Aust) (No 2)* [2007] FCA 2086; (2007) 164 FCR 591.

⁸⁸ *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120; 163 FCR 62 at [81]-[96], [164]-[167], [372]-[384]. The application of the no-costs provision in that case contained in s 824 of the Workplace Relations Act 1996 (repealed) “to a proceeding (including an appeal) in a matter arising under” the Act. Section 570 of the Fair Work Act 2009 applies “to proceedings (including an appeal) in a court (including a court of a State or Territory) exercising jurisdiction under” the Act.

act or omission connected with the conduct or continuation of a dispute by a lawyer.⁸⁹

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21 March 2012

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⁸⁹ For example, ss 376 and 780.