IRS | Industrial Relations Society of South Australia Inc

NEWSLETTER

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PRESIDENT'S MESSAGE

Dear colleagues,

The Committee of Management of the Industrial Relations Society of South Australia (IRSSA) looks forward to another year of facilitating high-quality seminars on topical issues of interest to the membership.

I welcome to the Committee new members, Sonia Albertini and Kylie Dunn; and David Johns for his second stint.

I again acknowledge and thank the following outgoing Committee members for their services to the Society: Jodie Bradbrook, Sorna Nachiappan, Stephen Brennan and Samuel Condon.

I look forward to seeing you at functions throughout the year.

Best wishes,

Craig Stevens
President IRSSA

IRSSA Workplace Bullying Seminar

SAVE THE DATE

The IRSSA Committee of Management is pleased to advise that Commissioner Peter Hampton will present at an upcoming IRSSA seminar on workplace bullying. Commissioner Hampton will provide an update on how the Fair Work Commission intends to deal with workplace bullying applications, when the new bullying jurisdiction commences on 1 January 2014.

The seminar details are as follows:

DATE: Tuesday 15 October 2013

TIME: 3.00 pm registration for 3.30pm start

VENUE: Hotel Grand Chancellor, 165 Hindley Street Adelaide

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

Landmark decision of *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83 (6 August 2013)

BY SONIA ALBERTINI, IRSSA COMMITTEE MEMBER

On 6 August 2013, the Full Federal Court confirmed that implied terms of mutual trust and confidence is good law in Australia. The Full Court dismissed the Commonwealth Bank's appeal against a Federal Court ruling that it breached the implied term of mutual trust and confidence when it retrenched one of its executives, Mr Barker, contrary to its Redeployment Policy.

The Facts

Mr Barker's position was made redundant. The Bank had a Redeployment Policy, however it failed to take steps to redeploy him for over three weeks. Ultimately, he was not redeployed and his employment was terminated.

The Proceedings

Mr Barker commenced proceedings in the Federal Court, claiming damages for breach of his contract of employment. He claimed his contract contained an implied term of mutual trust and confidence that had been breached by the Bank's failure to comply with its Redeployment Policy. At first instance, Besanko J found in favour of Mr Barker.

On appeal, the Bank argued that the implied term did not exist. However, the Full Court majority (consisting of Jacobsen and Lander JJ) dismissed the Bank's appeal holding that the '*weight of authority points in favour of the acceptance of such a term'.*

The Bank alternatively argued that a serious breach of its non-contractual Redeployment Policy did not amount to a breach of the term. The Full Court agreed, holding that a breach of a policy which was excluded from being a term of an employment contract could not be a breach of the implied term.

However, the Full Court held that wording in Mr Barker's employment contract implied a requirement that the *'Bank take positive steps … to consult with Mr Barker about the possibility of redeployment and to provide him with the opportunity to apply for alternative positions with the Bank'.* As the Bank did not do so, it breached the term.

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In dissent, Jessup J raised that 'despite the passage of 25 years since the first articulation of the implied term in England, there has, on my reading of the authorities, been no wholly satisfying defence of the term, locating it within the norms, obligations and entitlements which arise under the contract of employment'. The term was analysed against the necessity test proposed in *Byrne v Australian Airlines Limited* (1995) 185 CLR 470 and held that 'to the extent that the implied term has as its focus the integrity of the employment relationship as such, clearly it is not necessary to prevent the employer (at least wilfully) taking action to destroy or to seriously damage it'.

What does this mean?

This decision means there is now a presumption that all employment contracts in Australia contain an implied term not to engage in conduct that is likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. Anything inconsistent with this broad term may give rise to a claim for breach of contract.

The decision relieves concerns that a breach of an employer's policy may amount to a breach of the implied term, even if the policy is not a term of the contract.

An application for special leave to the High Court has been made.

However, pending this application employers must carefully consider the extent of the obligations they impose on themselves under their employment contracts, ensuring that they can and do behave consistently with them. A failure to do so has the potential to give rise to a successful claim for a breach of the implied term, which may result in a significant award of damages.

WHAT CONSTITUTES "ACCEPTABLE ALTERNATIVE EMPLOYMENT"?

BY KYLIE DUNN, IRSSA COMMITTEE MEMBER

In *Smith v Onesteel Limited & Anor* [2013] NSWDC 18 (15 March 2013) the District Court of New South Wales held that an employer had failed to offer "acceptable alternative employment" to a retrenched employee because the prospective position placed the employee in a lower position of seniority and was not sufficiently connected with the employee's demonstrated skill and experience.

The plaintiff, Mr Smith, was employed by the second defendant, Commonwealth Steel Company Pty Ltd, for in excess of 30 years. He initially worked as a labourer and thereafter trained to become a furnace operator.

In 2010, Mr Smith was informed that due to a lack of work there would need to be some operational changes within the business. He was subsequently transferred to the "railway finishing line" which was in a separate division to the furnace operation.

Notwithstanding that he remained on the same pay scale, Mr Smith considered the transfer to be a demotion by virtue of him being moved from a longstanding position in which he had accumulated specialist skills and experience to a role which required extensive re-training and which he considered to be beneath the status he had attained within the company.

Mr Smith resigned and brought a claim against his employer seeking redundancy pay under an industrial award which applied to his employment.

Under the terms of the award, redundancy pay was payable in the following circumstances:

- the employee's employment was terminated by the employer on the ground of redundancy, that is, the employer made a decision that it no longer wished the job being done by the employee to be done by anyone; and
- the employer had not offered "acceptable alternative employment" to the employee.

The employer conceded that Mr Smith's position as a furnace operator had been made redundant but denied his entitlement to a redundancy payment on the basis that:

- acceptable alternative employment had been offered to Mr Smith; and
- in any event, Mr Smith had voluntarily resigned and his employment was therefore not terminated by the employer.

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The Court considered whether there had been made to Mr Smith an offer of acceptable alternative employment and confirmed that this is an objective test and ought to take into account considerations such as remuneration, hours of work, seniority, fringe benefits, work load and speed, job security and travelling time.

In comparing the two roles, the Court noted that Mr Smith continued to work at the same location and his remuneration and hours of work remained the same. However, the Court reached the view that although Mr Smith was capable of performing both positions, the two roles were different which was made evident by the fact that Mr Smith required immediate re-training in order to perform his new duties as a finishing line attendant.

The Court considered that the new position had no connection with Mr Smith's demonstrated skill and experience as a furnace operator. Further, the Court observed that Mr Smith's personal feelings of stress and humiliation in his new role was evidence of the significant change in seniority between the two positions.

In concluding that there had been no offer of acceptable alternative employment by the employer, the Court awarded redundancy pay to Mr Smith in accordance with the award.

This decision highlights the importance of an employer taking steps to critically assess potential alternative roles for retrenched employees to ensure they meet the demonstrated skills and experience of the applicable employees and place the employees in a similar position of seniority.