

Mitigation in Unfair Contracts Claims

The requirement for the Industrial Relations Commission of New South Wales (in Court session) to take mitigation into account in unfair contracts claims was introduced by section 106(6) of the *Industrial Relations Amendment (Unfair Contracts) Act 2002* in June 2002.

In making an order under section 106, the Commission must take into account whether or not the applicant (or person on behalf of whom the application is made) took any action to mitigate loss. Two recent decisions have considered the amendment:

Leslie's case

The Honourable Justice Boland examined the implications of the amendment to section 106 in *Leslie v P Cusick & A Cusick t/as Rosemont Endoscopy Centre* [2003] NSWIRComm39. Boland J confirmed that, "The amendment embodied in s106(6) makes it clear that the Commission in Court Session *must* take into account whether or not the applicant (or person on behalf of whom the application is made) took any action to mitigate loss."



His Honour furthered that once the Commission had taken into account any action by the applicant to mitigate loss, the statute, as so amended, did not spell out how the Commission should proceed, rather this decision is left open to the discretion and good sense of the Commission.

In *Leslie*, the applicant insisted that s106(6) did not apply to the proceedings on the basis that s106(6) was properly seen as substantive and the common law rule against retrospectivity applied. The respondents contended that s106(6) was in fact procedural and the common law rule had no application.

His Honour suggested that the decision on whether or not s106(6) had application to the proceedings in *Leslie* was a moot point on the basis that His Honour, consistent with *Westfield Holdings v Adams* (2001)114IR241, had chosen to take into account the applicant's actions to mitigate his loss.

In *Leslie* the facts demonstrated that the applicant was successful in mitigating his loss.

The test applied by His Honour was an assessment of whether, notwithstanding the mitigation of the applicant's loss, it be just in the circumstances of the case to make a money order in the applicant's

Human Resources Group Brief

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favour. This test is consistent with *Westfield v Adams* in which the Full Bench considered “whether it would be just in the circumstances of the case to reduce any payment in lieu of notice.”

In *Leslie*, His Honour chose not to award any money orders in favour of the applicant, on the basis that the applicant had mitigated his loss and there were no circumstances in the case that would otherwise cause His Honour to make such money orders.

Based on this decision the obligation to ‘take into account’ mitigation does not require the Court to apply common law notions of mitigation where the Court may decide it is not appropriate to do so.

Brent v Bastian

The Full Bench of the NSW IRC outlined its views on mitigation under s106 in *Brent v Bastian* [2003] NSWIRComm 65, in a decision dated 10 April 2003. Whilst the amendment post-dated the decision at first instance in this case and the Bench considered s106(6) did not have any application to the proceedings, the Bench nevertheless considered the issues of mitigation and made some observations about the application of s106(6).

The Bench, consisting of Justices Wright, Walton and Boland, said the amendment embodied in s106(6) makes it mandatory for the Commission to take mitigation into account whether or not the applicant (or person on behalf of whom the application is made) took any action to mitigate loss. However, the amendment did not specify what path the Commission is to take once it had considered efforts made to mitigate loss. The Bench determined this to be a discretionary matter.

The Bench considered that in making money orders, the Commission would exercise its discretion on a question involving mitigation based on what was just in the circumstances.

The Bench declared that they did not consider there to be any inconsistency between the amendment in s106(6) and the Full Bench decision in *Westfield Holdings v Adams*. Once the Commission had taken into account mitigation under s106(6), it would exercise its discretion using the same approach on mitigation as that used in *Westfield v Adams*.

The appellant, Pricewaterhouse Coopers (PwC), in *Brent v Bastian* contended that there existed an inconsistency between the amendment’s requirement to take into account any action to mitigate and the Full Bench decision in *Westfield v Adams* which provided that regardless of efforts to mitigate, it is generally inappropriate to reduce severance or redundancy payments.

The Bench held that there is no inconsistency. The *Westfield v Adams* approach did not represent an absolute bar to reducing severance payments because of an applicant’s failure to mitigate loss. Further, the Bench noted that that amendment to the legislation did not remove the Commission’s discretion to make money orders that are just in the circumstances of the case.

The Full Bench ruled to reduce the payment made in lieu of notice to Brent, by the amount of monies he had earned over the notice period. The Bench said that Justice Haylen (the trial judge) had erred in failing to take into account money Brent (a former partner of PwC) had earned when he took up a lesser job with KPMG.

The amendments combined with the *Brent v Bastian* decision indicate mitigation is likely to play a greater role in the assessment of money orders under s106 applications.

“... the obligation to ‘take into account’ mitigation did not require the Court to apply common law notions of mitigation ...”

Probationary Periods - The Basics

We often encounter questions in relation to probationary periods. Some of the basic rules are:

- The probationary period must be committed to writing at the outset.
- The maximum length of the probationary period must be advised to the employee prior to the employee accepting the offer of employment.
- It is ineffective to advise of the probationary period after the offer of employment is accepted (even if that is prior to the commencement of employment).
- A probationary period cannot be extended beyond the maximum length specified.
- The probationary period must be 3 months or less. The probationary period can be greater than three months if it is reasonable having regard to the nature and circumstances of employment. It is only in a very limited circumstances that a probationary period greater than 3 months will be reasonable.
- To obtain any unfair dismissal protection from a probationary period, any termination must be within the probationary period. It cannot be, for instance, one day after.
- It is unlikely that setting a new probationary period for an existing employee who is promoted or transferred to a new position will be effective. It is also unlikely to be effective if an employee is re-hired by an incoming purchaser or the like, in a transmission of business situation.
- In most cases a new probationary period on the transfer of a casual employee to full-time employment will be ineffective. However, in *Wilkinson v Skippers Aviation Pty Limited* AIRC, PR 903635 a Full Bench of the Australian Industrial Relations Commission held that a casual pilot who was offered a permanent position subject to a probationary period was not covered by the federal unfair dismissal provisions during the probationary period. This was on the basis that the contract for permanent employment was a new contract, with new conditions such as payment of a salary rather than a rate per hour.
- Required notice of termination under any relevant Award, Industrial Instrument or legislation must be provided. Section 170CM of the *Workplace Relations Act 1996* (Cth) sets out the bare minimum notice period for all employees. For employees with less than one years service a period of one weeks notice of is required.
- A probationary period offers no protection against claims outside of unfair dismissal such as for harassment, discrimination, award/agreement breaches or unlawful dismissal.
- For employees subject to New South Wales legislation, a valid probationary period will prevent an employee from pursuing an unfair dismissal claim. Essentially this is only relevant for employees who currently earn less than \$81,500.00.
- For employees subject to the federal *Workplace Relations Act 1996* (Cth) ("**the Act**") for example those subject to a Federal Award, Certified Agreement or Australian Workplace Agreement, amendments to the Act introduced on 30 August 2001 provide a standard 3 month "exclusion period" from pursuing an unfair dismissal claim. This exclusion period applies automatically. The exclusion period is essentially a probationary period. It can be extended or shortened by agreement in writing. Any period longer than 3 months must be reasonable having regard to the nature and circumstances of the employment.



NSW Industrial Relations Commission Ruling thwarting the Unfair Contracts Amendments?

There has been speculation that a recent NSW IRC ruling has re-opened the State's section 106 Unfair Contract jurisdiction after attempts were made to restrict claims by way of amendments to the legislation.

Amendments

On 24 June 2002 the *Industrial Relations Act 1996* ("the Act") was amended with the introduction of the *Industrial Relations Amendment (Unfair Contracts) Act 2002*.

The Act was amended to provide that an application cannot be made under section 106 by an employee or partner earning a remuneration package or income of more than \$200,000 per annum. The amendments also provide that applications under section 106 must be made within 12 months of the termination date.

Kennedy Case

Justice Peterson handed down *Kennedy v Contract Transport Solutions Pty Ltd* [2003] NSWIRComm158 on 19 May 2003. The case examined the operation of the amendments to the Act and provided that if an accrued right existed prior to the amendment date, then the applicant is not barred from commencing proceedings under section 106 on the basis that there is a presumption at common law against the retrospective operation of legislation which affects the rights of citizens.

Facts

In the *Kennedy* case the contract between the parties came into existence in September 2001 and was terminated on 3 February 2002. The summons seeking relief under section 106 was not filed by the applicant until 6 February 2003, which was **after** the date of the amendments to section 106 and outside the 12 month limitation imposed by the amendments. The summons stated that the alleged unfairness occurred at the time the contract was terminated on 3 February 2002, which was **before** the amendment to the Act.

Held

It was held in the *Kennedy* case that if the element of unfairness occurred **prior** to the amendments, then the applicant would have an accrued right that is not limited by the amendments on the basis that the common law presumption is that the amendments do not operate retrospectively to extinguish accrued rights. The right obtained by Kennedy in February 2002 to commence the action was not affected by the introduction of the amendments.

Effect on Section 106

The decision in *Kennedy* deals with the issue of filing a summons for relief under section 106 outside of the 12 months' time limit. The decision is not about unfairness in relation to an ongoing contract continuing after 24 June 2002, although there has been speculation about the application of the decision to such cases.

The *Kennedy* case is not authority for the proposition that a contract which continues after 24 June 2003 is unaffected by the amendments to the Act made on that day. In order for the *Kennedy* case to be interpreted to apply to contracts which continued after 24 June 2002 which fall outside of the jurisdiction as a result of the amendments, it would be necessary to allege that some substantive unfairness occurred prior to that date giving rise to a pre-existing accrued right. The Commission has yet to decide such a case.

Level 14
55 Hunter Street
Sydney, NSW 2000
GPO Box 475
Sydney, NSW 2001
DX 605 Sydney

Telephone
+61 2 9225 2500
Facsimile
+61 2 9225 2599

www.kempstrang.com.au

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