

AUSTRALIA / JUDGMENT

Gregory, R.E. v Phillip Morris Ltd [1987] FCA 406

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CATCHWORDS

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Industrial law - award - job security - termination not

to be "harsh, unjust or unreasonable" - whether void for . uncertainty - whether purported dismissal in breach 7 effective to terminate contract of employment - whether)

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dismissal in breach - circumstances to be considered.

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Employer and Employee - contract of employment - dismissal by reason of failure to belong to particular

union - whether new contract - whether express or

implied term that employee belong to particular union -

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whether collective agreement valid - whether terms of collective agreement terms of contract - whether obligation not to dismiss "unfairly or unreasonably" void for uncertainty -whether purported dismissal in breach effective to terminate contract - whether

relationship of master and servant terminated if

contract remains - whether dismissal in breach.

Evidence - communications "without prejudice" - whether agreement resulted.

Conciliation and Arbitration Act 1904, ss. 119, 122, 141

Industrial Relations Act 1979 (Vic.) ss. 47, 48, 49,

50,51, 52, 53

Industrial Conciliation and Arbitration Act 1961-1975

(Qld.) s. 89(1)(f)

Industrial Conciliation and Arbitration Act 1972 5.15(1)(e)

Metal Industry Award 1984, cl. 6(d)(i)(1) and (2),

and (vii)

REGINALD EDGAR GREGORY v. PHILIP MORRIS LIMITED

No. 2 of 1987 Gray d. MELBOURNE

22ND JULY 1987

(S.A.)

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IN THE FEDERAL COURT OF AUSTRALIA

V. No. 2 of 1987

)) VICTORIA DISTRICT REGISTRY)))

INDUSTRIAL DIVISION

REGINALD EDGAR GREGORY Applicant

-and-

PHILIP MORRIS LIMITED Respondent

MINUTES OF ORDER

COURT : Gray Jd.

:

22nd July 1987

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Melbourne

THE COURT ORDERS that the application is dismissed.

{NOTE: Settlement and entry of orders is dealt with by

0.36 of the Federal Court Rules.)

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IN THE FEDERAL COURT OF AUSTRALIA)) V. No. 2 of 1987 VICTORIA DISTRICT REGISTRY))
INDUSTRIAL DIVISION) REGINALD EDGAR GREGORY Applicant -and- PHILIP MORRIS
LIMITED Respondent

JUDGE: GRAY J.

DATE: 22nd duly 1987.

REASONS FOR JUDGMENT

The applicant in this proceeding is a 48 year old

married man with three dependent children. He is an electrician by trade. From January 1977, he
was employed by the respondent

in a position classified as electrician special class.

The respondent is a company which manufactures

cigarettes. It is a party to and bound by the Metal Industry

Award 1984 ("the Award"), an award made under the Conciliation

and Arbitration Act 1904 ("the Act").

On 17th October 1986, the applicant was handed a letter

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from the respondent in the following terms:

"The Company has been informed, and it has been confirmed, that you are no longer a. member
of the Electrical Trades Union of Australia and as such you are in breach of a term and condition
of your employment.

The Company, accordingly, hereby terminates your employment and enclosed herewith is a cheque for 5 weeks' payment in lieu of notice, in accordance with Clause 6(d) of the Metal Industry Award, together with outstanding entitlements, and a cheque representing your termination benefit from the PM(A)L Superannuation Fund."

The applicant also received cheques for various sums, being his entitlements under the Award and otherwise, on the basis that he

was entitled to five weeks' notice of dismissal.

In this proceeding, the applicant claims that the purported dismissal was in breach of cl. 6(d)(vi) of the Award.

That clause 15 headed "Unfair dismissals", and provides:

"Termination of employment by an employer shall not be harsh, unjust or unreasonable.

Por the purposes of this clause, termination

of employment shall include terminations with or without notice."

The applicant also claims, in reliance on what was said

in *Turner v. Australasian Coal & Shale Employees' Federation*

(1984) 6 F.C.R. 177, that the act of the respondent in handing him the letter and the cheques was ineffective to terminate the contract of employment, that if that act amounted to a repudiation of the contract he has never accepted the repudiation

as bringing the contract to an end, that the contract remains on

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foot, and that he has been and is' ready and willing to perform his obligations under it. In the alternative, the applicant claims that a second contract of employment came into existence on 24th November 1986, as a result of correspondence and negotiations between the parties and their respective solicitors and the restoration of the union membership of the applicant, and that this second contract has never been terminated effectively. He seeks the imposition of penalties for breaches of award in purporting to dismiss him in contravention of the Award and failing to pay him the sums required by the Award since that time, an order for the payment of his entitlements under the Award, damages for breach of contract, a declaration that the

contract is still on foot and an injunction restraining the

respondent from treating it as at an end.

As to the alternative claim that a second contract came into existence, the respondent has objected to the admission of evidence of correspondence and telephone communications between the parties and their legal advisers, claiming that they are privileged as being communications of a "without prejudice" nature, dealing with negotiations in an attempt to settle a dispute likely to result in litigation, and that no concluded agreement was reached. Because the question whether an agreement was reached is important both to the admissibility of the evidence and to the relief sought by the applicant, the evidence was received subject to the objection, and I shall rule on the

objection in these reasons for judgment.

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It is necessary to deal with some of the circumstances forming the background to the letter of dismissal. The respondent employs approximately eighty to ninety metal tradesmen or fitters and trades assistants, all of whom are members of the Amalgamated Metal Workers Union ("the AMWU"), and approximately forty electricians and trades assistants who are members of the Electrical Trades Union of Australia ("the ETU"). Other maintenance employees include six carpenters, members of the Amalgamated Society of Carpenters and Joiners ("the ASC & J") and one painter, a member of the Operative Painters & Decorators Union ("the OPDU"). Between the AMWU and the ETU there was Maintained for many years what is called a "closed shop". This expression has a meaning in the respondent's establishment, which extends beyond its normal import. As well as involving membership by each employee of the appropriate trade union, the Particular closed shop involved an agreement between the two unions to act together in their dealings with management, and joint negotiation with the respondent by a committee on behalf of all AMWU and ETU members. Some years ago, the ASC & J and the

OPDU were also involved in the committee.

The applicant worked on day shift. In September 1982, he was elected unopposed as shop steward by his fellow ETU members. As shop steward, he was a member of the closed shop committee. So also was Mr. John Karadeas, a day shift employee

who was a member of the AMWU, and shop steward for its members.

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There was in existence an agreement between the respondent, the AMWU and the ETU, entitled the Metal Trades Agreement, and known as the "local agreement". This agreement first came into existence early in 1982, and was effective from 23rd November 1981. Its terms were negotiated by the closed shop committee. Before the local agreement was made, or any variation of it occurred, the results of negotiations were taken by the closed shop committee to meetings of the relevant employees, and adopted by them. On those occasions, it was usual to have a meeting in the afternoon, attended by day shift employees about to knock off, and by afternoon shift employees arriving before their usual starting time, and a meeting early in the morning, attended mainly by night shift employees about to finish work. On the evidence, all employees who were working on a particular

day attended one or other of these meetings.

The local agreement provided for various aspects of the employment of AMWU and ETU members by the respondent. Among the terms and conditions of employment the subject of it were wages and benefits significantly above those provided for in the Award. There were also two provisions of particular importance in the present case. Clause 6(a)(ii) provided "Membership of the appropriate Trade Union is a condition of employment." Clause 22 laid down a disputes procedure, and some provisions concerning stoppages and limitations. At the end of this provision was the following term: "The Company agrees that during the term of this agreement there shall be no lock outs arising from internal

factors, and that no employee should be unfairly or unreasonable

(sic.) dismissed."

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In 1985, negotiations took place on variations to the local agreement. The outcome was recorded in a document signed by Mr. Karadeas on behalf of the AMWU, the applicant on behalf of the ETU, and a representative of the respondent, and dated 9th August 1985. The terms negotiated were endorsed at meetings of the respective unions, according to the system outlined above.

One of the terms recorded was as follows:

"In march (sic.)/April 1987 the Company agrees

to discuss the redundancy of 10 employees or

more as determined at that time. At that

time, a discussion/review of wage parity will

be undertaken." The reference to "wage parity" was explained in evidence as involving an attempt by the closed shop committee to negotiate a uniform rate of pay for all AMWU and ETU tradesmen employed by the respondent. As things stood in 1985, and as they stand at present, an electrician special class earns approximately \$30.00 per week more than the lowest grade of electrician and a fitter. An electronics tradesman earns approximately \$60.00 per week more than the lowest grade of electrician and a fitter. The purpose of the wage parity claim was to lift all tradesmen to the same rate as the electronics tradesmen.

There was some controversy about whether members of the EIU employed by the respondent had been acquainted fully with the ramifications of this proposed parity claim in 1985. At all events, Mr. Kevin Rust, an electronics tradesman employed by the respondent, and a member of the closed shop committee

representing the afternoon shift, was opposed to the idea of

parity. In about the middle of 1986, the issue began to assume

some importance to ETU members. The applicant became aware of a move to oust him as shop steward. On 11th August, a meeting was held. The applicant was aware that the numbers at that meeting were against him, so he declared the position of shop steward open. The meeting elected Mr. Rust as shop steward. It also elected one Neil Caughey as deputy shop steward. Mr. Caughey was employed on day shift, and it was intended that ETU members on day shift should have someone working on that shift to represent

them and to deal with their problems.

A further meeting of ETU members employed by the respondent, held a week or two later, resolved to split from the closed shop committee. It was decided that the ETU would deal with the respondent separately from the AMWU.

Thereafter, the applicant insisted on remaining on the closed shop committee, and purported to represent on that committee himself and three other ETU members who supported his position, Messrs. Ivor Wheeler, Kevin Barratt and Les Bogar.

On Show Day, 25th September, a show of cards was called for by the ETU shop steward and deputy shop steward. A show of

cards was a procedure whereby the shop steward called on ali

members of the ETU to show their "O.K." cards, to prove that they were financial members of the union. The applicant as shop steward had conducted regular shows of cards. Mr. Caughey asked the applicant to show his card, and the applicant refused, saying

words to the effect of, "You show me yours and I'll show you

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Mine". It was usual for an employee who was unable to prove his financial membership of the ETU in such a show of cards to be sent off the premises immediately, until such time as he was able to prove that he was a financial member. The applicant, however, remained working until he left to attend a meeting at a motel, to

which further reference will be made.

As a result of the applicant's refusal to show his O.K. card, a stop work meeting of ETU members was held. This meeting resolved that all members of the ETU would stop work for the remainder of that day and the whole of the next day, because a person who had not shown himself to be a financial member of the

ETU was on site. A stoppage of work occurred in accordance with this resolution.

Also on Show Day, the respondent arranged a meeting at a motel not far from its Moorabbin premises. It was hoped that representatives of the respondent, the AMWU and the ETU would be able to sort out the problems which had arisen from the ETU withdrawal from the closed shop committee and the applicant's continued membership of that committee. The meeting was attended by representatives of the respondent and of the AMWU, and by the applicant and Messrs. Wheeler, Barratt and Bogar. No representative of the ETU attended. As a result, the situation

was not resolved.

During the stoppage of work, the applicant and Messrs. Wheeler, Barratt and Bogar continued to work. As a result, they

were labelled as scabs, and other ETU members refused to work

with them. The respondent resolved this problem temporarily by sending the applicant and Messrs. Wheeler, Barratt and Bogar to work at its leaf bond store at Braeside. There was not enough work at that store to keep four electricians occupied, but the respondent was prepared to endeavour to employ them there, no doubt in the hope that the antagonism resulting from their being labelled as scabs would die down. The AMNWU members, who supported the four at Braeside, placed bans on the work which ETU members could do, on working with them, on the kinds of equipment that could be issued to them, and on their entry to the fitters' workshop. The effect of the last-mentioned ban was that ETU members could only approach the respondent's store through a window used by production workers. Disputes concerning these bans were notified to the Australian Conciliation & Arbitration

Commission, and a member of the Commission endeavoured to resolve them.

In or about early October, Mr. Rust purported to lay charges against the applicant under the rules of the ETU. By letter dated 6th October 1986, the applicant was informed by Mr. Ron Luckman, the Secretary of the Victorian Branch of the ETU, of the content of these charges, and that they would be heard by a special meeting of the State Council on 15th October 1986 at 1.00 p-m. Charges were also laid against Mr. Wheeler, Mr. Barratt and Mr. Bogar. It is unnecessary to state the content of the

charges, save to say that some of them arose out of incidents which have been detailed above.

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On 15th October, the State Council of the Victorian Branch of the ETU met. It did not proceed with any charges against Mr. Bogar, on the ground that he had not received proper notice of the charges directed against him. A discussion occurred as to whether the charges against the remaining three persons should be dealt with together. The State Council resolved to deal with each person separately. The applicant, Mr. Wheeler and Mr. Barratt then left the meeting and took no further part in it, other than to deliver written submissions to the State Council. The applicant's evidence was that they left because they had expected to be dealt with together, and wished to support each other at the meeting in relation to their separate charges. At the meeting, the State Council purportedly resolved to expel the applicant from membership, and to suspend Mr.

Wheeler and Mr. Barratt from membership.

The applicant was informed of the decision of the State Council by telegram dated 15th October, which was waiting for him when he returned home from work on 16th October, and subsequently by registered letter. He first heard of the decision, however, when he attended for work on the morning of 16th October, and was told by fellow employees of his expulsion. He was also told of the decision by the respondent's engineering manager, Mr. Hardy Weller, later in the day. Mr. Weller appeared to have a document

apparently signed by Mr. Luckman, informing the respondent of the decision.

On first hearing of his purported expulsion, the applicant was concerned that there would be some reaction from

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the respondent. He had some discussion with Mr. Karadeas about the course which he should take. When he was called to an office to see Mr. Weller, he filled out and signed an application for Membership of the AMWU. He did this because it was thought that AMWU membership might assist him in retaining his job with the

respondent.

Present at the discussion with Mr. Weller was Mr. Andrew Egan, an electrical engineer employed by the respondent, Mr. Karadeas, Mr. Frank Edmonds, a member of the closed shop committee, Mr. Wheeler and Mr. Barratt. Mr. Bogar may also have been present. Mr. Wheeler and Mr. Barratt had not been expelled from membership at the ETU, but their membership had been suspended. Discussion took place as to what course the respondent would take. It was stated on behalf of the respondent that membership of the AMWU by electricians was not acceptable to the respondent. Mr. Weller then said that the applicant, Mr. Wheeler and Mr. Barratt were to be suspended, and should leave and return the next day. The applicant remained at the plant and travelled home with Mr. Karadeas at knock off time that day. During the day, further discussions took place between management and Mr. Karadeas and Mr. Edmonds about the future of the applicant and the two suspended persons.

On 17th October, the applicant attended the funeral of a

relative in the morning. He then went to the respondent's premises and saw Mr. Weller and Mr. Egan. Mr. Weller then handed

him his dismissal letter, and the cheques to which I have already referred.

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The applicant consulted solicitors. On 11th November 1986, he obtained a Rule to Show Cause against the members of the State Council of the Victorian Branch of the ETU, seeking orders pursuant to s. 141 of the Act. The orders, if made, would have required the members of the State Council to treat as null and void the decision to expel the applicant, to refrain from giving

any effect to that decision, and to recognise the applicant as a member of the ETU.

On 24th November 1986, the State Council met again. As a result of this meeting, Mr. Luckman wrote to the applicant on

the same day, in the following terms:

"I wish to advise that the State Council of the Victorian Branch of the Electrical Trades Union of Australia at a Special meeting held 10.00 a.m. today resolved the following.

State Council resolves on legal advice:-

1. That the letter from K. Rust to the State Secretary dated 28th September, 1986 was a preliminary step to the charging of R. Gregory, K. Barratt, I. Wheeler and L. Bogar and that no charges were ever laid.
2. That no charges being before the State Council, its resolutions of 15th October, 1986 with respect to R. Gregory, K. Barratt and I. Wheeler were and are void and of no effect.
3. That the Secretary advise R. Gregory, K. Barratt, I. Wheeler and qL. Bogar accordingly.

Please find enclosed receipt for \$11.50 for

membership dues received from you on the 30th October, 1986."

Since that time, the ETU has recognised the applicant as being a

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financial member, and as having been a financial member throughout the relevant period.

Mr. Luckman's letter of 24th November came to the attention of the applicant's solicitor on the same day. The applicant's solicitor then communicated its contents to the respondent's solicitor, and advised that the applicant would be attending for work on the following morning. On the evening of 24th November, however, there was delivered to the applicant at his home by courier a letter from the respondent's solicitors

which said, so far as is relevant presently:

"In our client's letter to you dated 17th October, 1986, you were informed that your employment by our client was terminated.

You are not permitted to enter the company's premises at any time until further notice from the company and in particular you will not be permitted to enter the premises if you purport to attend for work on 25th November, 1986, or at any time thereafter unless permitted by the company in writing. If you do enter the premises, you will render yourself liable to be treated as a trespasser."

As a result, the applicant did not attend at the respondent's premises on 25th November, and has not attended there since. He has, however, remained ready and willing to

resume his employment with the respondent should the opportunity arise.

At this stage, it is convenient to deal with the issues arising out of various communications between the parties and

their solicitors which were of a "without prejudice" nature.

Together with the letter of dismissal, the applicant was also handed a separate letter, dated 17th October 1986 and signed by

Me. Henry Goldberg, the operations director of the respondent.

This letter was headed "WITHOUT PREJUDICE", and read:

"I refer to the matter of your termination and advise that "without prejudice" to the Company's legal rights in this matter, the Company is prepared to re-employ you in your former position in the event that you are reinstated as a member of the Electrical

Trades Union of Australia on or before 21 November, 1986."

By a letter dated 20th October 1986, the solicitors who were then acting for the applicant, and for Mr. Barrett and Mr. Wheeler,

wrote to the respondent, setting out a number of grounds on which it was alleged that the applicant's dismissal and the suspension of Messrs. Barratt and Wheeler were invalid. That letter included the statement "We are hereby instructed to demand that

you withdraw the notice of termination and reinstate Mr. Gregory

forthwith...".

By letter dated 12th November 1986, headed "WITHOUT PREJUDICE", the salicitors for the applicant wrote to the solicitors for the respondent. The letter referred to proceedings which had taken place before the Victorian Industrial Relations Commission, to a telephone discussion between the

solicitors, and to the Rule to Show Cause which had been obtained

by the applicant. It proceeded:

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"Is your client prepared to -

1. Extend the deadline of 21 November next which it has indicated 1s the cut off time for reinstatement?
2. Provide us with an open letter stating that it will reinstate all of our clients if the Federal Court makes an order in their favour pending the Final hearing and determination of their application and/or pending the hearing of the appeal by the National Executive of the ETU?

We look forward to hearing from you at' the earliest possible opportunity."

The reply to this letter was also marked "WITHOUT PREJUDICE". It

was dated 18th November 1986,and read as follows:

"We refer to your letter dated 12th November, 1986.

In relation to the matters raised in your letter, in particular in paragraphs 1 and 2, we are instructed to inform you that the company is not prepared to give any undertaking to your clients in respect of those matters.

Our client will consider its position having

regard to all circumstances and developments in this matter."

The applicant's Rule to Show Cause was returnable on 19th November 1986. On that day, counsel appearing for the respondents to that rule requested an adjournment until the following week. Such an adjournment would have delayed the outcome of that proceeding until a date later than the date specified in the respondent's "without prejudice" letter of 17th October, namely 21st November. Mr. Maher of the applicant's

solicitors left the court room and telephoned Mr. Moore of the

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respondent's solicitors. I accept that one or other of these gentlemen stipulated that the telephone conversation was to be without prejudice. Mr. Maher explained that an adjournment of the proceeding against the members of the ETU State Council was being sought, and that this would take the matter beyond 21st November. He asked Mr. Moore to obtain the respondent's instructions as to whether or not that date remained critical. Mr. Moore agreed to do this. A short time later, Mr. Maher again telephoned Mr. Moore, who said that he had obtained instructions from the respondent, and that the date of 21st November was no longer critical. The applicant's solicitors confirmed this position by letter of the same date, hand delivered and marked

"Without Prejudice". Among other things, that letter said:

"We note that your client's position regarding our clients remains the same as specified in its letters to our clients save that the stipulated last date for reinstatement of Mr. Gregory's union membership (21 November 1986) is no longer critical."

I have already referred to correspondence which took Place on 24th November. In the letter which was delivered to the applicant by courier on the evening of that day, there was a passage headed "Without Prejudice" which read:

"You will be aware that the company is presently considering its position as set out in our letter to your solicitor dated 18th November, 1986 in the light of current developments."

Evidence of the contents of the letters marked as

without prejudice, and of the telephone conversations between Mr.

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Maher and Mr. Moore, was objected to by Dr. Jessup, counsel for the respondent, on the basis that those letters and conversations constituted negotiations between the parties with a view to achieving settlement of a dispute. The contention of Mr. Lawrence and Mr. Harris, counsel for the applicant, was that the correspondence and conversations had resulted in a completed agreement, and therefore became admissible. In order to determine the point, it was necessary for the Court to examine the correspondence, and to receive evidence of the conversations.

See *Tomiin v. Standard Telephones & Cables Ltd.* £19691 1 W.L.R.

1378. If a concluded agreement did result, it can be proved by means of evidence of the correspondence and the conversations.

See *Bentley v. Nelson* £1963] W.A.R. 89.

The applicant's first argument on this issue was that, at the time when the letter dated 17th October was written, no dispute existed between the parties, and that the label "without prejudice" on that letter was meaningless. It is true that the addition of the words "without prejudice" to a letter which is not part of negotiations towards the settlement of a dispute can have no effect. See *Bentley v. Nelson*, cited above, at p. 93.

In the present case, however, there can be no doubt that, by its "without prejudice" letter of 17th October, the respondent was intending to open negotiations on what it saw as a potential dispute arising from the dismissal of the applicant on the same day. In these circumstances, I have no doubt that the letter was privileged from production in evidence, unless a concluded

agreement resulted, of which the letter itself constituted evidence.

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The applicant's argument was that the letter of 17th October amounted to an offer to reinstate the applicant if he succeeded in obtaining reinstatement as a member of the ETU on or before 21st November 1986. That offer was varied subsequently by removing from it the stipulation as to date. This variation was effected by means of the telephone conversations between Mr. Maher and Mr. Moore on 19th November. The applicant secured reinstatement as a member of the ETU on 24th November, when the ETU State Council rescinded its decision to expel him. This

reinstatement amounted to an acceptance of the respondent's varied offer, and a completed agreement resulted.

This argument runs into several difficulties, which were relied upon by Dr. Jessup. In the first place, the letter of 17th October not only bears a heading indicating that it is "without prejudice", but it is expressed in the body of the letter to be without prejudice to the respondent's legal rights. Dr. Jessup argued that this expression made the letter no more than an indication of the respondent's then state of mind, and prevented it from amounting to an offer capable of acceptance by conduct. In the second place, Dr. Jessup pointed to the letter from the applicant's then solicitors on 20th October 1986, demanding the immediate withdrawal of the notice of termination and the immediate reinstatement of the applicant. According to Dr. Jessup, if the letter of 17th October was an offer, the letter of 20th October amounted to a counter-offer, and therefore to a rejection of the offer. The third difficulty arose from the letter of the respondent's solicitors, dated 18th November 1986.

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When read together with the applicant's solicitors' letter dated

12th November, the letter of 18th November amounts to a clear refusal to extend the deadline of 21st November, and to reinstate the applicant in the event that the Court made an interim order in his favour, or pending the hearing of an internal appeal within the ETU. The last sentence of the letter dated 18th November, according to Dr. Jessup's argument, was a withdrawal of any offer which might previously have been in existence. It left open to the respondent the right to make a decision, depending upon the outcome of events. Dr. Jessup's fourth argument was that the conversations of 19th November, and the letter from the applicant's solicitors of the same date must be construed in the light of the earlier correspondence. Indeed, the letter from the applicant's solicitors, in the passage which I have quoted, recognised that the position of the respondent was as specified "in its letters". In cross-examination, Mr. Maher conceded that this reflected the second conversation he had with Mr. Moore on 19th November, and that the reference to previous letters in that conversation was not confined to the letter of 17th October, so

far as the applicant was concerned.

In my view, there was not open to the applicant on 24th November 1986 an offer capable of acceptance by him by the act of regaining his membership in the ETU, or by the communication of that fact to the respondent. In my view, the form of the "without prejudice" letter of 17th October is such as to indicate that it did not amount to an offer, but merely to a statement of preparedness to negotiate should the applicant regain his membership of the ETU within the five week period commencing on

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that date. The letter clearly stated that the respondent did not intend to give away its legal rights. Among its legal rights was a right to refuse to employ the applicant, if he had been dismissed validly. If I am incorrect in that conclusion, and if the letter did amount to an offer, that offer was rejected by the

letter of 20th October, and withdrawn or treated as non-existent by the last paragraph of the letter of 18th November. It was not revived by the conversations of 19th November, as those conversations did not purport to affect what had taken place in

the previous correspondence.

For these reasons, I am of the view that evidence of the without prejudice correspondence, and the conversations between the parties solicitors was inadmissible, and that no concluded agreement came into existence as a result of it.

If the applicant's claim is to succeed, it must do so on the basis that his original contract of employment was never determined validly. Argument on this issue was directed in part

to establishing the precise terms of that contract, and in particular whether it included a term that the applicant was obliged to remain a member of the ETU throughout his employment, and a term that the applicant was not to be dismissed unfairly or

unreasonably.

The first basis on which the respondent contended that the applicant was bound by his contract of employment to remain a

member of the ETU was that this was an express term of his

contract from the very beginning. It was alleged that, in an

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interview at the time when he was first engaged, the applicant was told that it was a condition of his employment that he remain a member of the ETU. Three witnesses gave evidence on this aspect of the case, the applicant, Ms. Camilla Yates and Ms. Barbara Campbell. The applicant denied that anything was said at his initial interview about membership of the ETU as a continuing obligation. He recalled being interviewed, and knew Ms. Yates, but said he was not

interviewed by her, but by someone younger. Ms. Yates and Ms. Campbell were the only two persons who conducted interviews with prospective employees on behalf of the respondent at that time. Each gave evidence that her practice was to enquire whether the new employee was a member of the appropriate union, and to tell the employee that it was a condition of employment that he or she remain a member. Neither

could remember an actual interview with the applicant.

Dr. Jessup argued that evidence of the usual practice in interviewing should be preferred to the evidence of the applicant that nothing was said on the particular occasion. In my view, it is highly probable that the applicant was asked whether he was a member of the ETU. At that time, he was, and no doubt would have said so. It is less likely, however, that an interviewer would have seen the need to emphasise the requirement of continuing membership when told that a prospective employee was in fact a member. There is no reason for me to disbelieve the evidence of the applicant that nothing specific was said about continuing membership. On the balance of probabilities, I find that continued membership of the ETU was not a term of the applicant's employment from the outset.

(per se)

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Next, the respondent argued that the requirement that

the applicant continue to be a member of the ETU became a term of

his contract of employment by variation. It was said that the applicant's participation in regular shows of cards, with the consequence that anyone who could not prove financial membership of the appropriate union was sent away until such proof was available, and the applicant's state of mind on 16th October 1986, which led to his attempt to retain his job by joining the AMWU, showed that there was an implied term of his contract of

employment that he be a member of the appropriate union. It is by no means clear that either the shows of cards or the applicant's appreciation of the danger of his dismissal because of his purported expulsion from the ETU is evidence of an implied term of his contract to this effect. Both of those facts are

equally consistent with the desire of the employees and their

unions to maintain a closed shop by not working with anyone who was not a member of the appropriate union, and with the respondent's unwillingness to attempt to force the employees to work with a non-unionist, in order to avoid industrial trouble, as they are with the existence of a term of each contract of employment that the employee was obliged to retain membership of the appropriate union. They do not, therefore, constitute

evidence of an implied term.

The issue then arose whether the terms of the local agreement that each employee be a member of the appropriate union, and that no employee be dismissed unfairly or unreasonably

became terms of the applicant's contract of employment. A

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was whether the local agreement

the light of s. 47(6) of the

Relations Act 1979 (Vic.). It is convenient to set out

of s.

47 of that statute:

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Any recognized association of employes may enter into an industrial agreement with any other recognized association of employés, or with any recognized association of employers or any employer or group of employer with respect to any industrial matter.

An agreement made pursuant to sub-section (1) may be filed with the registrar if the parties agree.

The registrar shall refer to the Commission every agreement so filed and the Commission may approve any such agreement.

Every agreement approved by the Commission shall be registered.

The Commission, on the application of the Minister, registrar, any person bound by an award or a person aggrieved or of its own motion where the Commission considers it advisable in the public interest or for any other reason to do so -

(i) may with respect to an industrial agreement impose such conditions as it considers just and equitable;

(ii) may prohibit any association of

employés or any employer or association of employers from enforcing an industrial agreement inconsistent with an award or general ruling.

An agreement relating to an industrial matter made between an association of employés and an association of employés or any employer or employers that is not

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approved and registered under this Part shall be void and of no force or effect.

The Commission may make a general ruling exempting from the operation of any provision of this section

any agreement or class of agreement relating to an industrial matter and the provisions in respect of which the general

ruling is made shall, while the general ruling remains in force, cease to apply to the extent provided therein.

Every industrial agreement shall be in a form approved by the registrar and for a term to be specified therein not exceeding three years from the making of the agreement.

Unless otherwise expressly agreed by the parties to the agreement an agreement shall be deemed to be made on the day on which it is first executed by any party to the agreement and that day and the

names of all the original parties to the agreement shall be truly stated in the agreement.

Notwithstanding the expiry of the term of an industrial agreement, it shall, subject to any award under this Act, continue in force in respect of all parties to the agreement except those who retire from the agreement.

At any time after, or not more than thirty days before the expiry of an industrial agreement, any party to the agreement may file in the office of the registrar a notice in the prescribed form signifying his intention to retire from the agreement at the expiration of thirty days from the filing of the notice and that party shall, on the expiration of that period, cease to be a party to the agreement."

It is common ground that the local agreement was not in accordance with sub-s. (2) of this section, nor was the agreement filed in

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of the Industrial Relations Commission of Victoria sought or obtained, pursuant to sub-s. (3).

There can be no doubt that if sub-s. (6) is read literally, it would prevent the local agreement from having any

operation. As Dr. Jessup pointed out, the provision is not

merely that an agreement to which that sub-section applies is unenforceable, but that it is void and of no force or effect. It is hard to see how, if the provision applies, the local agreement

could operate to the extent that its terms became part of

individual contracts of employment.

Dr. Jessup contended that the provision should be read literally. He emphasised the differences in wording between sub-s. (6) and other provisions, especially sub-s. (1). Sub-section (1) empowers a recognised association of employees to enter into an industrial agreement, but sub-s. (6) is not restricted in its express terms to an agreement made by such a recognised association. It should be noted that provision for the recognition of associations is made by Part V of the

Industrial Relations Act 1979. By s. 53, an application for

recognition may be made only "with respect to any trade or trades for which a Board has been constituted" under that statute. When

the Industrial Relations Act 1979 was passed, the Australian

Conciliation & Arbitration Commission was applying a system of wage fixing principles which gave rise to regular national wage increases, based on movements in the consumer price index. This system was known as "indexation" or, more properly, as "partial

indexation". The increases granted in national wage cases were

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generally passed on to employees whose terms and conditions of employment were not governed by federal awards, by means of the systems of industrial conciliation and arbitration operated under

the laws of the various States. It is possible that, when the

Industrial Relations Act 1979 was passed, the Victorian

Parliament may have wanted the Industrial Relations Commission of Victoria to have control over all aspects of industrial relations, to the extent of denying any validity to agreements for wage increases in excess of those granted under the wage fixing principles, unless such agreements were approved. Dr. Jessup drew attention to the fact that sub-s. (6) had been adapted from what was then s. 89(1)(f) of the Industrial

Conciliation and Arbitration Act 1961 - 1975 (Q1ld.), a provision

which has since been repealed in its own State by Act No. 14 of 1983.

Whatever the reasoning behind the provision, if read literally, sub-s. (6) would produce some strange results. It would strike down an agreement entered into by an organization registered under the Act, which could not become a recognised association, by reason of the absence of any Board in the relevant area constituted under the State statute. It would strike down every agreement between a trade union and an employer to resolve any dispute about an industrial matter. Not only would such agreement be unenforceable by legal means, but it would be deprived of any validity, force or effect. Among the agreements so struck down would be agreements about the provision of conditions for the safety, health and welfare of employees,

and possibly agreements to recommend a return to work provided

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legal proceedings (including perhaps proceedings at common law or

under s. 45D of the Trade Practices Act 1974) were withdrawn.

Such agreements could not even be regarded as binding in honour;

they would be rendered "void and of no force or effect".

Further, sub-s. (6) would have the odd result that an agreement made under it would be void and of no force or effect instantly, upon its creation. Only after its approval by the Industrial Relations Commission would it spring into life. It is legitimate to wonder what would exist for the purposes of filing with the Registrar or referring to the Industrial Relations Commission, if the agreement were to be so treated from its inception. No provision is made for interim validity, subject to the agreement being struck down by the Industrial Relations

Commission after some specified period if not filed, or if

disapproved.

A statutory provision could not be construed lightly as having these effects. It is to be noted that ins. 89 of the Queensland Act, as it was before the 1983 amendments, there was a reference to "an industrial union of employees" both in the provision empowering the making of an agreement, and in the provision that an agreement not approved or registered should be

void and of no force or effect; the difference in wording which

exists in the Victorian Act did not exist in Queensland.

The strange consequences to which I have referred are

avoided if the whole of s. 47 is looked at, in the context of the

scheme of the statute. If an agreement is approved, it is to be

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registered under s. 48, and can be proved in the manner specified

by that section. Parties may be added to it under s. 49. Its binding effect is extended by s. 50 to members of associations, and employees at work sites to which the agreement applies, and the agreement is made enforceable in all respects as if it were an award. Under s. 51, it may be varied, and under s. 52, an award which otherwise would have applied is ousted by the agreement. These provisions may well constitute substantial incentives to seeking the approval of an industrial agreement under s. 47. If such approval is sought and not granted, it is logical that provision should be made for the fate of the unapproved agreement; it is also logical that such provision should have the effect of nullifying the unapproved agreement. It could be regarded as undesirable that an agreement which the Industrial Relations Commission of Victoria has held did not merit approval should continue to be binding in honour or at law.

No other provision in the Industrial Relations Act 1979 fulfills

the function of providing for the fate of an agreement as to which approval is withheld. On this basis, an agreement would be binding legally or in honour, pending the determination of the Industrial Relations Commission whether it should be approved.

In addition, it would be possible to have a binding agreement for which approval is not sought at all.

In my view, sub-s. (6) is to be construed properly in this manner. It relates only to agreements entered into by recognised associations, which are filed, and which the Industrial Relations Commission of Victoria refuses to approve.

The change of language between sub-s. (1) and sub-s. (6) is

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loose, and not intentional. Section 47(6) of the Industrial Relations Act 1979 (Vic.) does not affect the validity of the

local agreement.

There was a time when the question whether the terms of

a "collective agreement" made between a trade union and an F ,

employer, became terms of the contracts of employment of

individual employees, members of the trade union, agitated the minds of academic writers in England. See, for

instance, Citrine's Trade Union Law, 3rd ed., pp. 136-138, Cronin

and Grime, Labour Law, pp. 315-363 and Wedderburn, The Worker and the Law, 2nd ed., pp. 171-180 and 185-197. It cannot be doubted that, in the normal case, it is difficult to establish that the terms negotiated between a trade union and an employer become binding legally upon each employee. The difficulties are

expressed in *Young v. Canadian Northern Railway Co.* [1931] A.C.

83, at pp. 88-89, *Rodwell v. Thomas* [1944] 1 K.B. 596, at op.

601, and *Ford Motor Co. Ltd. v. Amalgamated Union of*

Engineering & Foundry Worker [1969] 2 Q.B. 303, at pp. 321-331.

There are differences between the present case and those cases. In the present case, the local agreement, although entered into by the unions concerned, was negotiated on their behalf by employees of the respondent and not solely by officials of the union. The agreement is signed on behalf of the unions by members of the closed shop committee. As I have already stated, before any such signature, the terms of the agreement, or any

variation of it, were the subject of decision by the employees

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concerned. In these circumstances, it is much easier than in the normal case to construe the agreement as having been entered into by the union concerned, or by the negotiators, as agents for the employees. It is even easier to find that the terms of the local agreement became part of the terms of the contract of employment of the applicant when the applicant himself was a negotiator in respect of variations to the local agreement, and its extension from November 1986 until 23rd November 1989. It is to be noted that the document which effected that extension, and certain variations to the local agreement, was signed by the

applicant on behalf of the ETU.

On the basis of the English authorities, Dr. Jessup argued that the terms of the local agreement were inappropriate for incorporation into individual contracts of employment, and that this factor indicated the intention of the unions concerned and the respondent not to create legal relations by means of the

agreement, Clause 4 of the local agreement is described as a

"statement of purpose clause" and is in the following terms:

"The purpose of this agreement is:-

- (a) To promote industrial harmony and co-operation between the Company and its employees.
- (b) To formalise the parties agreement with respect to:-
 - Rates of pay and classification
 - Benefits
 - Hours of Work
 - Conditions of employment to be observed by the Company and employees.
- (c) To establish working procedures for the settlement of disputes.

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- (d) 'to create a working relationship that will prevent work stoppages, lockouts or any other action that will disrupt peaceful co-existence between both parties.'

Dr. Jessup conceded that the terms of the local agreement which fulfilled the purpose specified in sub-cl. 4(b) were appropriate for incorporation into individual contracts of employment, but contended that the other provisions were not. One of the former provisions was that found in cl. 6(a)(ii), that membership of the appropriate trade union is a condition of employment. One of the latter was that found in cl. 22, that no employee should be unfairly or unreasonably dismissed. Other provisions which Dr. Jessup described as being of a collective nature, and therefore

inappropriate for incorporation into individual contracts of

employment were cl. 25, relating to shop stewards and union procedure, cl. 26, giving a right of entry to certain union officials, cl. 28, giving certain rights to the use of notice boards, cl. 31, providing for equal opportunity and equal pay between the sexes, and cl. 32, wherein the respondent and the unions agree to co-operate on matters affecting the security of the respondent's product abiding by the legal requirements of search and arrest and the requirements provided in the Excise Act

1901. In my view, it is not so obvious that these matters are unsuitable as terms of individual contracts of employment. To

the extent to which each of them provides rights from which employees may benefit, or obligations from which the respondent may benefit, there is no reason why each employee should not be

in a position to enforce those rights, or bound to perform those obligations.

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The question whether parties to an agreement intend to create legal relations by that agreement is one of fact in each case; there is no rule that agreements between trade unions and employers are necessarily outside the field of contract law. In my view, in the present case, the agreement shows every intention of the parties that it should be a legally binding document. It is signed on behalf of each of the unions concerned and the respondent, and each signature is witnessed. The date of signing is recorded. The agreement has a commencement date and a period of operation; it is terminable by notice, and provision is made for the Award or for State legislation to operate where the agreement is silent. Nothing else about the agreement so clearly places it beyond the realm of the law as to make it unenforceable according to law. To the best of my knowledge, the proposition that it is possible to divide an agreement into those terms by which the parties intend to create legal relations and those terms by which they do not, so that part of the agreement is legally binding and part is not, is a novel one.

For these reasons, I hold that it was a term of the applicant's contract of employment with the respondent, as at 15th October 1986, that membership of the appropriate trade union was a condition of his employment. It was also a term of that

contract of employment that the applicant was not to be dismissed unfairly or unreasonably.

Dr. Jessup's next contention was that the latter term,

if it were a term of the contract of employment, was void for

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uncertainty. He was forced also to contend that the provisions of cl. 6(d)(vi) of the Award were similarly void. He relied upon

cases such as *Lee-Parker v. Izzet* (No.2) [1972] 1 W.L.R.775 and

Whitlock v. Brew (1968) 118 C.L.R. 445. In the former case, an agreement for the sale of a house and land, expressed to be "subject to the purchaser obtaining a satisfactory mortgage", was held to fail for uncertainty. In the latter, an agreement to grant a lease of land "upon such reasonable terms as commonly govern such a lease" was also held void. Both these results occurred because there was no objective standard by reference to which the content of a satisfactory mortgage, or of the terms commonly governing such a lease could be determined. Dr. Jessup argued that words such as "harsh, unjust or unreasonable" in cl. 6(da)(vi) of the Award and "unfairly or unreasonably" in cl. 22

suffered from the same difficulty.

Mere difficulty in ascertaining the meanings of the words used in the document is no ground for declaring those words to be void for uncertainty. As Lord Wilberforce said, delivering

the opinion of the Privy Council in *Cudgen Rutile* (No.2) Pty.

Ltd. v. Chalk [1975] A.C. 520, at p. 536:

"Their Lordships consider that, in modern times, the courts are readier to find an obligation which can be enforced, even though

apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found...".

Similar views were expressed by Barwick C.J., with whom McTiernan,

Kitto and Windeyer JJ. agreed in *Upper Hunter County District*

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Council v. Australian Chilling and Freezing Co. Ltd. (1968) 118

C.L.R. 429, at pp. 436-437:

"But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. Lord Tomlin's words in this connexion in *Hillas & Co. Ltd. v. Arcos Ltd.* [1932] 147 L.T. 503, at p. 512] ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G.) & Nephew Ltd. v. Ouston* [1941] A.C. 2511 is not "so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention", the contract cannot be

held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from

absence of meaning or of intention, be resolved."

Words such as those used in the Award and the local agreement are common in documents of similar kinds. Their content is often determined by industrial tribunals in specific cases of dismissal. This Court is in no different position from such tribunals, when it comes to determining the content of "an obligation not to dismiss an employee unreasonably. The fact that it is not possible to define with precision all of the circumstances which would make a dismissal harsh, unjust, unreasonable or unfair does not mean that those terms are void

for uncertainty. It is possible to determine in a particular case

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whether a dismissal can be said properly to fall within one or more of these terms. Clause 6(d)(vi) of the award and cl. 22 of the local agreement are both valid and enforceable.

A question did arise as to the effect of the provision in the Award. It is now established that a purported dismissal of an employee otherwise than in accordance with provisions covering dismissal in the contract of employment, is not effective to terminate the contract of employment, unless it amounts to a repudiation of that contract by the employer, and the employee elects to treat the contract as at an end. This proposition certainly applies in the case of failure to give

proper notice. See *Turner v Australasian Coal & Shale*

Employees Federation (1984) 6 F.C.R. 177, at pp.189-193, and

Seymour v. Stawell Timber Industries Pty. Ltd. (1985) 9 F.C.R.

241, at pp. 265-266. Dr. Jessup contended that the provisions of cl. 6(d)(vi) of the Award were to be distinguished from the other provisions of cl. 6 of the Award providing for notice of termination, and did not have the effect of preventing a

dismissal from operating to terminate the contract of employment.

This argument was put in three different ways.

In the first place, Dr. Jessup argued that a contract of employment and an award made under the Act are separate sources of rights; an award only operates to give rights or to impose obligations when a contract of employment exists. If the contract of employment comes to an end, the award no longer operates as between the employer and the former employee. These

propositions may be correct, but they overlook the fact that an

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award may operate to prevent the exercise of what would otherwise be rights available to a party under a contract of employment. Provisions for notice of termination of employment in awards, such as those dealt with in *Turner v. Australasian Coal & Shale*

Employees Federation (1984) 6 F.C.R. 177, so operate.

Dr. Jessup's second argument was that the same act cannot be both a breach of an award and ineffective to determine the contract of employment; either the contract is terminated or it is not. If it is, then there is a breach of an award. If it is not, there cannot be any breach, because the act itself is void. It is a well known principle, often applied to illegal contracts, that an illegal act is without legal effect. The fact that an act may be void because criminal, however, does not absolve the person who purports to perform that act from criminal liability. The argument that dismissal in defiance of the National Security (Manpower) Regulations had to be effective, in order for there to be offence under those regulations, failed to convince the majority of the High Court of Australia in *Automatic Fire Sprinklers Pty. Ltd. v. Watson* (1946) 72 C.L.R. 435. The argument is summarised in the dissenting judgment of Latham C.J. at pp. 453-455. The majority held that the regulations had the effect of rendering the purported termination of a contract of employment ineffective, with Dixon J. at p. 471 following George

v. *Mitchell & King Ltd.* (1943) 59 T.L.R. 153, and setting out a

Passage from the judgment of Goddard L.J. In that case, in which his Lordship said, "If he refuses to employ the person he commits

an offence, but the contract is not terminated." The law has no

difficulty in contemplating that an act may be a criminal offence

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and at the same time ineffective to affect the rights of persons concerned. Even where a specific statutory provision leads to the conclusion that the criminal act is void, it is nevertheless

a criminal act. See *Linehan v. Australian Public Service*

Association (1983) 67 F.L.R. 412, at pp. 414, 422-423 and 438. A breach of an award is not ordinarily criminal; see *Gapes Vv.*

Commercial Bank of Australia Ltd. (1979) 38 F.L.R. 431, and

compare ss. 119 and 122 of the Act. If an award contains a prohibition of certain acts, however, that prohibition may operate to prevent the purported performance of those acts from having legal effect. The only difference between that situation and a criminal offence is the method of enforcement of the

prohibition.

The third argument relied upon by Dr. Jessup was based on the construction of cl. 6(d)(vi) of the Award, and on the

distinction between the form of that provision and the form of

the provision of the National Security (Manpower) Regulations,

considered in *Automatic Fire Sprinklers Pty. Ltd. v. Watson*

(1946) 72 C.L.R. 435. According to Dr. Jessup those regulations (the relevant provision of which is set out at p. 453 in the judgment of Latham C.J.) contained a prohibition on terminating employment, other than in the circumstances specified, whereas cl. 6(d)(vi) of the Award contemplates that a termination of an employment may take place, but that it will constitute a breach of the Award if harsh, unjust or unreasonable. Although there are differences in the wording, the words of cl. 6(d)(vi) of the Award contain just as much of a prohibition as did the words of

the regulations considered in Watson's case. It is difficult to

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imagine the framer of the Award contemplating that an employer bound by the Award should be free to divest itself of an employee, in circumstances where to do so would be harsh, unjust or unreasonable, merely in return for the payment of a monetary penalty at a later date. It is true that specific provisions are made in cl. 6(d)(vii) for dealing with disputes or claims arising under cl. 6(d)(vi), but those provisions are expressly made subject to the provisions of a number of

sections of the Act, including s. 119. In my view, the Award is intended to create an obligation on employers bound by it not to terminate the employment of their employees harshly, unjustly or unreasonably, and to make any purported termination which is harsh, unjust or

unreasonable ineffective to determine the contract of employment.

Dr. Jessup then sought to argue that even if a contract of employment is not determined by a purported dismissal which is harsh, unjust or unreasonable, and if the contract of employment therefore remains on foot, the purported dismissal is sufficient to terminate the "master and servant relationship" between the employer and the employee. When pressed as to the nature of this relationship, Dr. Jessup conceded that it is one of contract. Indeed, as the law stands at present, it is hard to see how a relationship between an employer and an employee could be other than contractual. If that is so, either the contract must be brought to an end, or it must continue to exist. What, then, is the "relationship of master and servant" upon which Dr. Jessup sought to rely? His argument made reference to certain passages

in *Automatic Fire Sprinklers Pty. Ltd. v Watson* (1946) 72

C.L.R. 435, especially to the passage at p. 451 in the judgment

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of Latham C.J., where his Honour said:

"Thus the wrongful dismissal determines the relationship of master and servant created by the contract, even though the servant may not have accepted his dismissal as antitling him to regard the contract as discharged."

Reference was also made to a further passage in the judgment of Latham C.d. at pp. 456-457, to what was said by Starke J. at p.

461, and to what was said by Dixon J. at pp. 466 and 469. Dr.

Jessup also relied upon passages in Gunton Vv.

Richmond-Upon-Thames London Borough Council (£19803 I.C.R.755,

especially at p. 778, where Brightman L.J. referred to the relationship of master and servant.

In my view, nothing in those passages compels. the

conclusion that there is known to the law a relationship of master and servant created by, but distinct from a contract of employment, such that the contractual relationship may continue whilst the other relationship may have ceased to exist. In context, the passages indicate that the courts had in mind only to describe certain incidents of the contract of employment. Most commonly, the consideration for wages is the performance of service; the two obligations are mutual. If one obligation (service) is not being performed, then its non-performance may absolve the other party from the performance of the mutual obligation (the payment of wages). There may be other. such mutual obligations in a contract of employment. All that was intended by the judges who referred to the relationship of master

and servant was to indicate that one party to the contract may be

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'absolved from the performance of certain obligations, because of the non-performance by the other party of other obligations. There was also a feeling that, because of the supposed rule that a court could not grant any remedy which would amount to specific performance of a contract of employment, it would be futile to treat the contract as still on foot. Indeed, the sentence which follows immediately upon that which I have quoted above from

Latham C.J. at p. 451 is:

"Any other view would in effect grant specific

performance of a contract of personal service, a remedy which the courts have always refused in such a case...".

It is now established that, in special circumstances, because of

the many incidents which the law now attaches to contracts of employment, remedies which might be thought to amount to specific performance can be granted in relation to contracts of employment. See *Turner v. Australasian Coal & Shale Employees*

Union (1984) 6 F.C.R. 177, at pp. 192-193. Further, it has been recognised that the entitlement to wages may arise where the employee is ready and willing to perform work, but the employer prevents him or her from doing so. See *Seymour v. Stawell*

Timber Industries Pty. Etd. (1985) 9 F.C.R. 241, at p.266. The

area in which mutual obligations exist may be narrower than was thought previously. In my view, the assertion of the existence of a relationship of master and servant, which may be destroyed without the destruction of the contract of employment, is an attempt to revive in another guise the now defunct rule that a contract of employment may be determined by unilateral act of one party, otherwise than in accordance with the terms of the

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contract itself, and the equally defunct rule that a court will never grant specific performance, of a remedy akin to specific

performance, of a contract of employment.

For these reasons, I am of the view that if the purported termination of the applicant's contract of employment of 17th October 1986 was in breach of a term of that contract as being unfair or unreasonable or was in breach of cl. 6(d)(vi) of the Award as being harsh, unjust or unreasonable, it was ineffective to determine the contract. The crucial issue, therefore, is whether that purported dismissal was unfair, harsh,

unjust or unreasonable.

Dr. Jessup argued that this question must be determined by reference only to the state of knowledge of the respondent at the time of the dismissal, and not by reference to subsequent events. In support of this proposition, he relied upon decisions applying the words "harsh, unjust of unreasonable" in what was

then 5. 15(1)(e) of the Industrial Conciliation and Arbitration

Act 1972 (S.A.). In *Stearnes v. Myer S.A. Stores Limited* (Industrial Commission of South Australia, Sth March 1973,

unreported) Bleby J. said:

"The question must be approached from the point of view of the state of the company's - knowledge at the time when the dismissal took place."

In *Minchin v. St. Judes Child Care Centre* (Industrial Court of South Australia, 9th March 1973, unreported), Judge Olsson, as he

then was, referred to this proposition and added:

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"In many cases, events which have transpired subsequent to dismissal may well be irrelevant except, perhaps, in so far as they assist in determining post facto the probable true motives of the employer, or otherwise directly bear upon the circumstances of the dismissal or tend to confirm the reasonableness or otherwise of a judgment arrived at at the time of dismissal."

Dr. Jessup also drew attention to the more recent decision of Judge Allan in the Industrial Court of South Australia in *Qisson*

v. *Woolworths (S.A.) Limited* (14th December 1983, unreported), in which his Honour rejected the approach of Bleby J. and held that the employer's belief as to an existing state of affairs is a relevant, but not the only, factor in deciding whether a dismissal was harsh, unjust or unreasonable. In my view, all of the circumstances surrounding a dismissal must be considered, and the Court may look at subsequent events for purposes of the kinds

envisaged by Judge Olsson.

The applicant's case was that it was unfair, harsh, unjust or unreasonable to dismiss the applicant in the circumstances, because of a number of factors. At the forefront were the applicant's length of service with the respondent, the part previously played by him in industrial relations at the respondent's plant, the applicant's age and the fact that he has dependent upon him a wife and three children. In those circumstances, it was said, the respondent should have given the applicant an opportunity to pursue the question of his membership of the ETU before dismissing him. This was particularly so in the light of the practice which prevailed at the respondent's

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plant of sending anyone unable to prove financial membership of the appropriate union off the site until such proof was forthcoming. It was said that the respondent should have applied this practice to the applicant, especially having regard to the fact that Mr. Barratt and Mr. Wheeler were suspended on full pay until the question of their membership of the ETU was resolved.

The length and record of service of an employee, and his or her age and family circumstances, are undoubtedly relevant factors in considering whether a purported dismissal is unfair, harsh, unjust or unreasonable. It could not be contended, however, that the longest and best of employment records, and the most needy of family circumstances could operate to make any employee immune from dismissal for any reason. Close attention

must also be paid to the immediate causes of an attempt to dismiss.

In the present case, as I have held, the applicant's contract of employment obliged him to be a member of the appropriate union. His membership of the ETU fulfilled that requirement until 15th October 1986. On the following day, the respondent was made aware of his expulsion, which it could only take to amount to a breach of that term. Of course, the fact that an employee is in breach of a term of his or her contract of employment cannot be conclusive of the question whether the dismissal of that employee is valid. There may be some breaches which would not justify a dismissal as being other than unfair,

harsh, unjust or unreasonable.

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In the present case, the possible consequences of the applicant's non-membership of the ETU were drastic. It was clear that no member of the EIU would work with him. I am satisfied that the respondent did not require the services of the applicant other than at its Moorabbin premises; there was no work which would justify retaining him as a full time employee at Braeside, especially as the respondent had employed the applicant and three others at Braeside for a period of some weeks. The respondent could not suspend the applicant without pay, pending clarification of his membership status; suspension without pay is not open to an employer in the absence of a term of the contract of employment or of an award permitting such suspension.

See Re Application by Building Workers' Industrial Union of

Australia (1979) 41 F.L.R. 192, at p.194. To suspend the applicant on pay would have been to treat him more favourably than other employees of the respondent; he would have received remuneration, but have been relieved of the obligation to work.

It was argued on behalf of the applicant that the respondent should have foreseen that the applicant may have had open to him various means of compelling the ETU or the members of its State Council to restore his membership, and should have allowed him time to pursue one or more of these means, before dismissing him. In fact, the applicant had open to him under the rules of the ETU a right of appeal from the State Council's decision. He also had the right to bring proceedings in this Court, pursuant to s. 141 of the Act. In fact, he exercised this latter right, but it was unnecessary to pursue his application to

the end, because the State Council restored his membership in any

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event.

It might be said with some justification that the respondent, by its experienced industrial officer, Mr. Griffin, should have been aware of the likely existence of an internal right of appeal, and of the actual right conferred by s. 141 of the Act. It is another question, however, whether in the circumstances of this case it was unfair, harsh, unjust or unreasonable for the respondent not to delay the dismissal of the applicant until such time as he had exhausted all his rights. It must be remembered that, in the discussions which took place between the respondent and the applicant and others on his behalf on 16th October, nothing was said to indicate to the respondent that the

applicant proposed to pursue any avenue at all with respect to his membership of the ETU. Instead, the applicant had attempted to join the AMWU. The rules of the AMWU were not in evidence, and the applicant did not seek to make a case that he was eligible to belong to the AMWU. Still less did he seek to challenge the respondent's view, expressed on 16th October 1986, that it was inappropriate for a person employed by the respondent as an electrician to belong to the AMNU. The applicant did nothing on 16th October to indicate to the respondent that he entertained any hope of overturning the decision of the State Council of the ETU in the immediate future, or that he was prepared to attempt to do so. Had he outlined some course of this nature, a question might have arisen whether it was unfair, harsh, unjust or unreasonable on the part of the respondent to

dismiss him prior to such course being undertaken.

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It cannot be said that dismissal by reason of

non-membership of a particular trade union is of itself unfair, harsh, unjust or unreasonable. Each case must depend upon its own circumstances. In the present case, membership of the ETU was not only a requirement of the applicant's contract of employment, but was a fundamental feature of the industrial relations environment in the respondent's plant. For the respondent to have persisted in employing as an electrician a non member of the ETU would have involved, at the very least, jeopardising good relations with its other electrician employees, who were all members of the ETU. It might easily have led to

severe industrial dispute.

It is true to say that the respondent could have adopted

a course other than the dismissal of the applicant. That does not, however, conclude the question whether the respondent was acting unfairly, harshly, unjustly or unreasonably in taking the course which it took. In my view, in all of the circumstances, it could not be said that the dismissal was unfair, harsh, unjust or unreasonable. The respondent gave to the applicant pay in lieu of notice to the extent of five weeks, that being the length of notice to which cl. 6(d)(i)(1) and (2) of the Award entitled him. The dismissal did not, therefore, involve any breach of the contract of employment, or of the

Award.

In the light of this conclusion, it is unnecessary for

me to deal with the interesting questions as to remedies which were raised in argument. There is one matter to which I. should

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advert, however. In seeking to rebut the applicant's claim that he was ready and willing to perform his contract, or in seeking to persuade the Court that any discretion to grant or refuse any remedy should be exercised against the applicant, the respondent led evidence involving allegations of lack of skill and lack of diligence on the part of the applicant. The incidents related in this evidence were few and far between, and none of them had been regarded at the relevant time as sufficiently serious to warrant anything being said to the applicant. In the circumstances, it is only fair to the applicant to say that I do not accept that the applicant is anything other than a skilled and diligent

worker.

For the reasons which I have given, the application must be dismissed.

APPEARANCES

Mr. B. Lawrence and Mr. P. Harris for the applicant.

Instructing solicitors: Howie & Maher.

Dr. C. Jessup for the respondent.

Instructing solicitors: Mallesons Stephen Jaques.

This is to certify that this and the 46 preceding pages are a true copy of the reasons for judgment herein of His Honour Mr. Justice Gray.

Dated: Associate.

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