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Damages in Executive Employment Litigation

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Damages in Executive Employment Litigation

Joellen Riley

Abstract

I have been invited to speak today on developments in executive employment contract law, and particularly on the issue of damages awards in litigation. I will cover the very important Nikolich litigation, but I would also like to reflect on Walker v Citigroup Global Markets Australia Pty Limited (formerly known as Salomon Smith Barney Australia Securities Pty Limited) and some of the implications of that litigation for claims by executives against their employers.

Both of these cases demonstrate important developments in executive litigation in recent years. The developments I would like to highlight in this paper are: First – that the Trade Practice Act 1974 (Cth) is proving particularly important in executive contract litigation. Second – the courts are taking a flexible (and, with respect, entirely sensible) approach to the construction of employment contracts when there is a difference between the wording of a standard form service contract and specific terms agreed during negotiations. Construction of terms concerning the duration of contracts has a significant impact on the size of damages claims. Thirdly – damages are being awarded for loss of chance, according to the principles in Commonwealth of Australia v Amann Aviation Pty Ltd. This development also has the potential to inflate damages claims. Finally – damages are being awarded for what we might describe as personal distress, so long as that distress results in some significant disturbance to the claimant's health or lifestyle.

The cumulative effect of these developments is that we are seeing executive level employees receiving damages awards considerably higher than they would receive if they were limited to a simple payout for a notice period, and certainly higher than the statutory compensation allowed under unfair dismissal laws. The executive cases are proving that contract-based claims and claims under the Trade Practices Act can produce considerably more generous awards than statutory claims under industrial laws.

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Damages in Executive Employment Litigation

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SYNOPSIS OF PRESENTATION

Lessons from the Federal Court

I have been invited to speak today on developments in executive employment contract law, and particularly on the issue of damages awards in litigation. While preparing this paper, I was conscious that I would be following Ron Baragry, speaking on the implications of the very important *Nikolich* litigation.¹ I, too, will consider some aspects of that case, although I will assume Ron has covered the very interesting issues surrounding the incorporation of human resources policies into employment contracts. I would also like to reflect on *Walker v Citigroup Global Markets Australia Pty Limited (formerly known as Salomon Smith Barney Australia Securities Pty Limited)*,² and some of the implications of that litigation for claims by executives against their employers.

Both of these cases demonstrate some particularly important developments in executive litigation in recent years. The developments I would like to highlight in this paper are:

- First – that the *Trade Practice Act 1974* (Cth) is proving particularly important in executive contract litigation. (I recall meeting some scepticism when I made this observation at a conference back in 2003.³)
- Second – the courts are taking a flexible (and, with respect, entirely sensible) approach to the construction of employment contracts when there is a

¹ [Nikolich v Goldman Sachs JBWere Services Pty Ltd \[2006\] FCA 784](#). When I last checked the Federal Court of Australia website of decisions on appeal (on 14 February), I saw that the appeal from this decision was part heard, and listed again for hearing on 15 February. So it may be some time before a decision is handed down in this matter.

² [2006] FCAFC 101 (23 June 2006). The first case in this series, in which the primary judge determined liability, was *Walker v Salomon Smith Barney Australia Securities Pty Ltd* [2003] FCA 1099. Damages were assessed in *Walker v Citigroup Global markets Pty Ltd* [2005] FCA 1678.

³ Riley, J “Arguing the Trade Practices Act in Employment Matters”, paper presented at the 11th Annual Labour Law Conference, *Rethinking the Law of Work: Perspectives on the Future Shape of Employment Regulation*, Sydney, 4 April 2003. The essence of this paper has subsequently been published in Riley, J *Employee Protection at Common Law*, Federation Press, Sydney, 2005, Chapter 7. Ron Baragry also addressed this issue early in 2003: See “Actions under the Trade Practices Act”, paper presented at the UNSW CLE Conference *Avoiding Litigation with Senior Executives*, Sydney 28 March 2003.

difference between the wording of a standard form service contract and specific terms agreed during negotiations. Construction of terms concerning the duration of contracts has a significant impact on the size of damages claims.

- Thirdly – damages are being awarded for loss of chance (according to the principles in *Commonwealth of Australia v Amann Aviation Pty Ltd.*⁴ This development also has the potential to inflate damages claims.
- Finally – damages are being awarded for what we might describe as personal distress, so long as that distress results in some significant disturbance to the claimant’s health or lifestyle. In *Walker*, for example, the appeal bench raised the primary judge’s award of \$5,000 for general consequential damages to \$100,000 on the basis that Mr Walker suffered “a considerable dislocation to his life with serious long term effects”.⁵

The cumulative effect of these developments is that we are seeing executive level employees receiving damages awards considerably higher than they would receive if they were limited to a simple payout for a notice period, and certainly higher than the statutory compensation allowed under unfair dismissal laws. The average employee claiming unfair dismissal under the *Workplace Relations Act 1996* (Cth) is limited to compensation of up to six months salary – and that is assuming that the employee retains any entitlement to bring a statutory claim at all, following the changes wrought by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The executive cases are proving that contract-based claims and claims under the *Trade Practices Act* can produce considerably more generous awards than statutory claims under industrial laws.

1. Trade Practices claims

In both *Nikolich* and *Walker*, it was a claim under section 52 of the *Trade Practices Act* (TPA) which initially brought the matter to the Federal Court (although in *Nikolich*, a claim of unlawful dismissal for absence on the basis of temporary illness, in breach of the *Workplace Relations Act*, was also raised – unsuccessfully).

Mr Nikolich’s claim under the TPA was unsuccessful because he was unable to demonstrate that he suffered any loss or damage by relying on the misleading and deceptive conduct of his employer. Mr Nikolich was an existing employee of Goldman Sachs, and he was aggrieved because he had relied on a representation concerning the reallocation of client accounts when other team members left. Justice Wilcox referred to the fundamental principle established by a majority of the High Court of Australia in *Gates v City Mutual Life Assurance Society Limited*⁶ that damages under s 82 of the TPA are to be assessed on a tort-like basis. Mr Nikolich brought no evidence that he “would have embarked on a more profitable course”⁷ had he not been misled, so he was unable to establish an award of damages for breach of s 52.

At first instance, Mr Walker’s TPA claim was highly successful, and he was awarded damages of more than \$700,000 in respect of the employer’s breach of section 52. (On appeal, his contract claim was more successful, so the TPA claim was

⁴ (1991) 174 CLR 64.

⁵ [2006] FCAFC 101 at [91].

⁶ (1986) 160 CLR 1, at 6.

⁷ [2006] FCA 784 at [306].

overreached.) At first instance, Kenny J held that Mr Walker was entitled to damages under sections 87(2)(d) and 82 of the TPA. Section 87(2)(d) empowers the court to make an order “directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage”. Unlike Mr Nikolich, who was an existing employee, Mr Walker never actually started work with the firm who agreed to employ him. Between accepting the offer of employment, and commencement, various corporate reorganisations and other decisions caused the employer to change its mind about employing him. In the meantime, however, he had volunteered for redundancy from his existing employment instead of electing to take a position with ABN AMRO, the firm that had taken over the business of his former employer.

Justice Kenny assessed damages on the basis that his reliance on the misleading conduct of the new employer caused him to lose an opportunity to earn an income employed by ABN AMRO for a number of years. This finding is consistent with other decisions under the TPA involving offers of employment. In *O’Neill v Medical Benefits Fund of Australia Ltd*,⁸ the plaintiff was held to be entitled to damages under the TPA on the basis of what he would have earned had he stayed in his relatively secure former employment, rather than accept a misleading offer of what was claimed (falsely) to be a secure and long term position with MBF. Likewise, in *Magro v Fremantle Football Club Ltd*,⁹ a football coach who was poached from a Victorian to a Western Australian AFL club on the misleading promise of a five year contract was awarded damages under the TPA to put him in the position he could reasonably have expected to be in had he remained in Victoria and continued his coaching career there.

There is a peculiar thing about damages awarded under the TPA in what is essentially a contract law matter. Because damages for breach of s 52 are assessed on a tort-like basis, the court must engage in an elaborate “what if . . .” exercise. What if the parties had not entered into this relationship at all? Where would the plaintiff now be? What financial position would he or she presently enjoy, in that alternative world? The answer to that question does not necessarily produce the same result as a contract claim. Take *Magro*’s case for instance. The half a million dollars or so he obtained for TPA damages exceeded the amount he would have been entitled to claim if he really did have a five year contract, and was paid out to its end. There is something counter-intuitive in this result. It seems odd that the employer who makes a mere representation should be held to pay a greater sum in damages than if the representation was an actual term of a binding contract.

2. Contract construction

In last year’s NSW Young Lawyers Annual Employment and Industrial Law One Day Seminar, I expressed some criticism of the tendency of common law judges to prefer the terms of a written contract in standard form, over terms agreed during the negotiations between parties to an employment relationship.¹⁰ It now appears that this criticism was unfounded. The full bench in *Walker* had to deal with precisely such a problem.

⁸ (2002) 122 FCR 455; [2002] FCAFC 188.

⁹ [2005] WASC 163.

¹⁰ See Riley, Joellen “Alternative Actions in the light of Work Choices: Implied Terms”, *NSW Young Lawyers Continuing Legal Education Seminar Papers*, 25 February 2006 at pp 2-4.

Mr Walker had been given assurances that he would be employed until at least the end of 1998 – a period of close to 12 months from his initially proposed starting date. However the standard form “Conditions of Employment” which were attached to his offer of employment contained a clause stipulating that the employment could be terminated on one month’s notice. At first instance, Kenny J held that the termination clause in the standard Conditions applied, and that the employer should be taken to be entitled to exercise its rights under that clause. This is why the contract claim produced a damages award of only \$22,917 at first instance. The full bench disagreed, finding that on its true construction, the proposed contract was to continue until at least 31 December 1998.

The express offer to Mr Walker – arrived at after considerable negotiation – had stipulated a guaranteed minimum bonus of \$250,000 for the 1998 year, and a promise that he would take on the title of Director of Research at the completion of the 1998 year. These elements in the express terms of his offer of employment were clearly inconsistent with the standard form conditions allowing termination upon one month’s notice.

The full bench resolved this conflict between terms by applying the principle that “[w]here there are clauses of a contract specially framed with the individual circumstances in mind, together with standard form clauses, it will normally be appropriate to give greater weight to the specially negotiated clauses”.¹¹ The court solved the problem created by the inconsistent clauses by a process of construction. The termination clause was construed to take effect “only after the completion of the 1998 calendar year”.¹²

The circumstances of the recruitment assisted the court to this solution. The court held that the “purpose and object of the transaction, namely the recruiting of a high level and high profile employee then in other employment” made it a “practical absurdity” that the parties would have agreed to a clause allowing termination on only one month’s notice, and a consequent avoidance of any obligation to pay the promised guaranteed bonus.¹³

Certainly, in this case the court had some express terms to work with. The negotiated deal was noted in letters between the parties. Employees relying on nothing more than verbal assurances may continue to have difficulty in holding a reneging employer to orally agreed terms, in the face of a contradictory written contract. Nevertheless, the court’s reasoning in *Walker* – drawing on the “purpose and object” of the transaction, and considerations of what “business people active in the financial world”¹⁴ would have agreed – offers some prospect that future courts will not hold that contradictory clauses in a standard form contract must necessarily trump negotiated oral terms of an employment contract.

3. Loss of chance

The finding at first instance that the contract could be terminated on one month’s notice also defeated Mr Walker’s claim that contract damages should be assessed taking into account his loss of the chance to remain in employment for a longer period. This claim, based on *Commonwealth of Australia v Amann Aviation Pty Ltd*,¹⁵

¹¹ [2006] FCAFC 101 at [77].

¹² At [77].

¹³ At [76].

¹⁴ At [76].

¹⁵ (1991) 174 CLR 64.

was rejected by Kenny J on the basis that the employer did have a right to terminate the contract if it chose to do so for any reason, and had in fact exercised that right by deciding it did not want to continue with plans to engage Mr Walker at all. According to Kenny J, the facts of the case left no room to speculate on what might have eventuated if there had been no breach of contract.

The appeal bench finding that it would have been a breach of contract for the employer to terminate the employment before the end of December 1998 also changed the result of the loss of chance claim. It was held that Mr Walker, having already held a position of considerable prominence in the firm for almost 12 months, and most probably performing his duties well, would be very unlikely to have been terminated. The court held: “That NatWest would have sacked a skilled and competent employee holding a high profile position within the company without cause is not a natural inference to be drawn without direct evidence.”¹⁶ NatWest brought no such evidence, so the court awarded damages on the basis that Mr Walker had a 75% chance of remaining employed until at least 30 June 2003. The figure awarded for loss of chance (after taking into account a deduction for actual earnings from other sources during that period) was \$1,867,386. Added to the \$479,167 awarded for the ten months salary owed until the end of 1998, Mr Walker received \$2,346,553 in respect of lost earnings.

The fact that the court was prepared to award considerable damages based on the loss of a chance to remain employed opens up the scope for very considerable damages in executive contract cases.

4. Personal distress

One of the particularly notable aspects of the *Nikolich* case was that Wilcox J awarded Mr Nikolich general damages of \$80,000, in respect of psychological harm. In *Nikolich*, the orthodox argument that damages for breach of an employment contract cannot include any sum for humiliation and distress¹⁷ was defeated on the basis that this particular contract included a commitment by the employer to provide “peace of mind”.¹⁸ That was held to bring the claim for general damages within the principles allowed in *Baltic Shipping Company v Dillon*.¹⁹ If it is an object of a contract to provide enjoyment, relaxation, or (in this case) “peace of mind”, then it is a breach of contract to cause distress, and so the distress will sound in an award of damages. The obligation to provide peace of mind was found by the incorporation of the firm’s policies against workplace harassment.

In *Naidu v Group 4 Securitas Pty Ltd*,²⁰ a more humble employee (a security officer) was awarded general damages of \$100,000 for psychiatric illness induced by breach of his employer’s obligation (under the employment contract) “that he would not be intimidated by physical or verbal abuse by persons with whom he was required to work nor was he to be subjected to personal or racial vilification”.²¹ Mr Naidu was subjected to very serious harassment at work and suffered significant psychiatric harm. The court in *Naidu* also relied on the principle in *Baltic Shipping*.²²

¹⁶ At [83].

¹⁷ See *Addis v Gramophone Co Ltd* [1909] AC 488.

¹⁸ [2006] FCA 784 at [330].

¹⁹ (1993) 176 CLR 344 at 365; 371-2, 382, 387 and 394.

²⁰ [2006] NSWSC 144 (15 March 2006).

²¹ *Ibid* at [18].

²² At [21].

In *Walker*, Kenny J at first instance rejected a claim that contractual damages for distress on the *Baltic Shipping* principle should be available in this case. Mr Walker was however awarded \$5,000 for distress and vexation, consequent upon the misleading and deceptive conduct claim.²³ Kenny J held that the evidence of distress and vexation in this case was “very slight”.²⁴

On appeal, Mr Walker appealed the adequacy of these damages (although not the basis on which they were awarded, so the appeal court considered them in the context of the TPA claim alone). In a crisp summary of its findings, the appeal bench stated that, although not much evidence was brought that Mr Walker’s personal situation was caused by the distress and vexation of his treatment by NatWest, the “consequential effect of the loss of his job on Walker’s business reputation and personal life” were drastic, and were not “out of the ordinary course of events”. The court held that \$5,000 was a significant underestimate, and substituted an award of \$100,000.

Here we might draw another comparison with the plight of the ordinary employee who is bringing an unfair or even unlawful dismissal claim under statute, rather than a claim under contract or the TPA. The WR Act, s 654(9) now expressly limits compensation awards, so that no sum may be awarded in respect of “shock, distress or humiliation or any analogous hurt” caused by the manner of dismissal. As far as statutory claims are concerned, *Burazin*²⁵ no longer has any force, post Work Choices. Nevertheless, a claim brought in contract, or for breach of the TPA, may sound in damages of this type, where a claimant can show that harm to personal well-being has been an ordinary or foreseeable consequence of either a breach of contract, or misleading and deceptive conduct.

Where is “good faith” in all this?

I have deliberately avoided any discussion of the potential for the employer’s duty not to destroy mutual trust and confidence to sound in damages in executive employment contract cases. Although I am convinced that the concept of a reciprocal obligation to cooperate in good faith is indeed informing contemporary construction and interpretation of executive employment contracts (and I do believe *Nikolich* is an example), many are still sceptical. Kenny J, in *Walker*, stated categorically that “the Court should not imply a duty of good faith” into the employment contract between an employer and an upper-level employee.²⁶

The full bench resolved the questions on appeal without needing to consider at all whether any implied obligation of good faith constrained the employer to exercise its power to terminate the contract only “reasonably and in good faith”. So there is still (to my knowledge) no appellate level decision which squarely tests the proposition that employment contracts are to be performed “in good faith”. But then, if future cases follow the developments apparent in *Walker*, it may not be necessary or useful to pursue such an argument. If courts are prepared to give weight to all of the commitments made by parties during their negotiations, ahead of the “escape clauses” hidden in standard form contract documents for the employer’s benefit, and if they are prepared to consider the full extent of the losses suffered as a consequence of an employer ultimately renegeing on those commitments, then the same result has been

²³ See [2005] FCA 1678 at [135] – [138].

²⁴ Ibid at [137].

²⁵ *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

²⁶ [2005] FCA 1678 at [205].

reached as might be reached were a “good faith’ obligation to be implied. It has long been my view that the general reluctance of courts to imply a good faith obligations in employment relationships can be blamed on a fear that good faith performance of contracts allows a rewriting of contractual obligations. I believe this is a misunderstanding of what good faith means. Good faith performance requires only that parties to a contract cooperate in performance, so that both parties are able to enjoy the mutually intended benefits of the relationship.²⁷ The good faith obligation precludes opportunistic conduct, such as taking advantage of a one month’s notice of termination clause in some standard conditions tacked to a letter of appointment, after negotiating a long term engagement. The approach to construction taken by the full bench in *Walker* was consistent with an obligation upon parties to cooperate in good faith to perform the terms of their real agreement.

Conclusion

If the *Walker* case is a reliable example, employment contract disputes (or at least, disputes over executive service contracts), are being resolved according to the same principles applying in other commercial contract cases. Principles of contract construction, and the award of damages for loss of chance and consequential loss, mean that it is no longer sufficient for employing enterprises to slip a termination on notice clause into a standard form contract. These are important developments in employment contract law – especially if employee advocates can find a way to ensure that the benefits of these developments also flow through to the less highly remunerated employees who can rarely afford to litigate their claims.

²⁷ For fuller argument of this position, see Riley, Joellen *Employee Protection at Common Law*, Federation Press, Sydney, 2005, Chapter 3