

## LEGISLATIVE REVIEW

**REMEDIES FOR UNFAIR DISMISSAL UNDER THE *WORKPLACE RELATIONS ACT 1996* - A FAIR GO ALL ROUND?**

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## INTRODUCTION

Statutory remedies for unfair dismissal represent a significant benefit to Australian employees compared with their remedies for breach of the employment contract. In particular, employees who are dismissed unfairly from their employment may be reinstated to their former positions or may be awarded compensation extending beyond payment for the notice period. This paper examines the federal legislative provisions and their application by the Australian Industrial Relations Commission, to identify the factors that influence the Commission to exercise its discretion in favour of a particular remedy when it finds that a dismissal has been harsh, unjust or unreasonable. Whether or not the Commission is according a 'fair go' as between dismissed employees and their former employers will always be a matter of judgment. Clearly, though, the Commission is developing a consistent approach to the exercise of its discretion to make orders, particularly in the case of orders for compensation. This can only be of benefit to both employers and employees.

## THE BACKGROUND TO FEDERAL UNFAIR TERMINATION LAWS

In 1968, the Donovan Royal Commission on Trade Union and Employer Associations made the following comments on the consequences for employees of dismissal from employment:

In reality people build much of their lives around their jobs. Their income and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes

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and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all.<sup>1</sup>

These observations are no less relevant in Australia today than they were in Britain in the 1960s. Many dismissed workers are still likely to have difficulty finding other work, given the current level of unemployment in Australia. Those who find new work are less likely to find an on-going position, given that 62% of net jobs growth in Australia in the twelve years to 1997 has been in casual rather than permanent positions.<sup>2</sup>

Industrial legislation provides important remedies for dismissed employees. In March 1994, federal industrial legislation for the first time provided general statutory remedies for Australian employees who had been unfairly dismissed from their employment. Until the inclusion of the unfair termination provisions in the *Industrial Relations Act 1988* (Cth), statutory remedies for unfair termination had been available only to a limited range of employees under the various reinstatement jurisdictions of the states.<sup>3</sup> The availability of reinstatement and compensation as remedies for unfairly dismissed employees represents a significant improvement on both common law remedies and remedies for breach of award.

#### REMEDIES AT COMMON LAW

The common law contract of employment 'is regarded generally as providing insufficient protection for dismissed employees'.<sup>4</sup> Unless the contract provides otherwise, in a master-servant relationship the master may dismiss a servant for any reason, or for none. Nor is the master required to accord the servant procedural fairness prior to dismissal.<sup>5</sup> Where the contract is an indeterminate one, the employer can lawfully terminate the employee by giving him or her the period of notice specified in the contract, subject now in many cases to the minimum notice requirements specified in s 170CM of the *Workplace Relations Act 1996* (Cth) ('the *WR Act*').<sup>6</sup> If there is no notice term, the employer may terminate lawfully by giving reasonable notice. In cases where the employer fails to give the required notice, the Employee's damages are limited to the remuneration he or she would have earned during the required notice period, subject to the employee's duty to mitigate his or

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<sup>1</sup> Report of the Donovan Royal Commission on Trade Union and Employer Associations 1965-68 (UK) cited in *Termination, Change and Redundancy Case* (1984) 8 IR 35, 36.

<sup>2</sup> P Barnes, R Johnson, A Kulys and S Hook, 'Productivity and the Structure of Employment' (Productivity Commission Staff Research Paper, Canberra, 1999) 85.

<sup>3</sup> See now the *Industrial Relations Act 1979* (WA); *Industrial Relations Act 1996* (NSW); *Industrial and Employee Relations Act 1984* (SA); *Industrial Relations Act 1984* (Tas); *Industrial Relations Act 1999* (Qld).

<sup>4</sup> P R A Gray, 'Damages for Wrongful Dismissal: Is the Gramophone Record Worn Out?' in MacCallum, McCarty and Rondfeldt (eds), *Employment Security* (1994) 41.

<sup>5</sup> *Ridge v Baldwin* [1964] AC 40, 65.

<sup>6</sup> Both at common law and under the *WR Act*, the employer is not required to give notice where the employee is terminated for serious misconduct or other repudiatory breach: see s 170CM(7).

her loss.<sup>7</sup> The common law has traditionally not awarded damages for loss of future earnings, or for the distress caused by the manner of termination, or the fact that the manner of termination may make it difficult for the employee to find further work.<sup>8</sup> Damages on these grounds will be possible however if the parties have an express term in the contract that the employee not be dismissed in circumstances that are harsh, unjust or unreasonable,<sup>9</sup> or if a term to this effect can be implied into the contract in fact.<sup>10</sup> Employees may also be entitled to damages for losses caused to them by a breach of the implied contractual term that the employer not act in such a way as to damage or destroy the trust and confidence between the employer and the employee.<sup>11</sup>

The common law position on reinstatement has been even less promising. Courts have been very reluctant to order specific performance of an employment contract, particularly where the employer has dismissed the employee.<sup>12</sup> The traditional rationale is that the courts will not force parties in a 'personal relationship' to continue in the relationship against the will of one of the parties. Other barriers the courts have alluded to in refusing to make orders for specific performance are the loss of trust and confidence between the parties in cases of wrongful termination, as well as the need to ensure supervision of an order for specific performance.<sup>13</sup>

The courts will order specific performance only whilst the contract remains on foot. Employees who have been wrongfully terminated face considerable difficulties in keeping their contract open. The employee's need to earn an income will send him or her in search of employment elsewhere - in such circumstances, the employee is generally taken to have accepted the employer's repudiation as terminating the contract and ending the employment relationship, leaving him or her with damages as the only remedy.<sup>14</sup>

<sup>7</sup> See eg *Dyer v Peverill* (1979) 2 NTR 1.

<sup>8</sup> *Addis v Gramophone Company Ltd* [1909] AC 488; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144. For an interesting recent decision in which the court awarded damages for breach of the employment contract, in addition to statutory compensation, see *Emmerson v Housing Industry Association Ltd* [1999] FCA 500 (Ryan JR). The court awarded damages for pain, shock and humiliation and for damage to the applicant's ability to obtain alternative employment.

<sup>9</sup> *Gregory v Philip Morris Ltd* (1987) 77 ALR 79.

<sup>10</sup> *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410.

<sup>11</sup> *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1; but see *Johnson v Unisys Ltd* [1999] 1 All ER 854.

<sup>12</sup> Although there is no absolute principle in Australian law that a court will not order specific performance of a contract of employment, an order for specific performance will be made only in 'exceptional and rare circumstances': *Lane v Fasciale* (1991) 5 VIR 33, 37.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410, 428 (Brennan CJ, Dawson and Toohey JJ).

## REMEDIES FOR UNFAIR TERMINATION UNDER FEDERAL AWARDS

Employment security for federal award employees was advanced by the decision of the Commonwealth Conciliation and Arbitration Commission in the *Termination, Change and Redundancy* case.<sup>15</sup> As a result of the decision, all federal awards were varied to insert, amongst other things, a clause that required the employer not to dismiss an employee whose employment was covered by the award in circumstances that were 'harsh, unjust or unreasonable'. Where an employer reached the clause, the dismissed employee, or his or her union, could seek a penalty under the Act. Penalties were small and there was no provision for compensation for losses that might flow from the unfair dismissal.<sup>16</sup>

Apart from inadequate compensation, it was also very difficult for a dismissed employee to be reinstated to his or her position. The reasons for this were largely constitutional. Until 1994, federal industrial laws were based principally on the conciliation and arbitration power in s 51(xxxv) of the Commonwealth constitution. Legislation made in reliance on s 51(xxxv) gave the federal industrial tribunal (currently the Australian Industrial Relations Commission) the power to conciliate and arbitrate interstate industrial disputes. These were disputes between employees collectively (represented by their unions) and their employers in more than one state. There was considerable doubt whether a dispute about the dismissal of an individual employee had the necessary interstate character, so as to give the Commission jurisdiction to deal with it.<sup>17</sup> Even if such a dispute had the necessary interstate character, it was uncertain whether the Commission had the power to reinstate a dismissed employee. In particular, there was a question whether an order of reinstatement was an impermissible exercise by an arbitral tribunal of judicial power.<sup>18</sup> These constitutional difficulties were bypassed with the introduction of federal unfair termination legislation from March 1994, although the High Court's increasingly expansive approach to the interpretation of s 51(xxxv) suggested that these constitutional difficulties may have been overcome.<sup>19</sup> This removed the necessity for unfair dismissals to be dealt with by the Commission as industrial disputes.

## THE FIRST FEDERAL PROVISIONS

Effective from the 30th March 1994, the *Industrial Relations Reform Act 1993* amended the *Industrial Relations Act 1988* (Cth) ('the *IR Act*') to insert new provisions providing Australian employees with remedies for unfair termination. Some categories of employees were excepted, for example, employees on contracts

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<sup>15</sup> *Termination Change and Redundancy Case*, above n 1.

<sup>16</sup> See now s 178 *Workplace Relations Act 1996* (Cth).

<sup>17</sup> *R v Gough; Ex parte Cairns Meat Export Co Pty Ltd* (1962) 108 CLR 343; *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312.

<sup>18</sup> *R v Gough; Ex parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237.

<sup>19</sup> See eg *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311; *Re Boyne Smelters; Ex parte Federation of Industrial Manufacturing & Engineering Employees of Australia* (1993) 177 CLR 446.

for a specified period or a specified task, probationary employees and certain casual employees. The current provisions continue to exclude these categories of employees - see s 170CC of the Act and the Workplace Relations Regulations 30B-30BC.

The new provisions were supported constitutionally by the external affairs power in s 51(xxix) and were enacted to fulfil Australia's obligations to give effect to the ILO Convention No 158 and Recommendation 166 on the *Termination of Employment at the Initiative of the Employer*.

The legislation has undergone significant changes since 1994. In particular, the provisions are now based on heads of constitutional power other than the external affairs power, with a corresponding restriction in the range of employees eligible to use the provisions.<sup>20</sup> The Australian Industrial Relations Commission now hears applications for remedies for unfair termination. The Commission received more than 10,000 applications for relief for termination of employment in 1996-97 and more than 8,000 applications 1997-98. These applications represent 'a substantial proportion of the Commission's caseload'.<sup>21</sup>

#### OVERVIEW OF REMEDIES UNDER THE *WR ACT*

Under Division 3 of Part VIA of the *WR Act*, an eligible employee who asserts that his or her dismissal was harsh, unjust or unreasonable may lodge an application for relief with the Australian Industrial Relations Commission ('the Commission'). Under s 170CF, the Commission must attempt to settle the matter to which the application relates by conciliation. In 1997-98, 4,094 of the 8,092 applications for relief were settled in this way.<sup>22</sup> If the matter cannot be settled, the applicant may elect to have the Commission determine the matter by arbitration. If, on completion of the arbitration, it determines that the applicant's termination was harsh, unjust or unreasonable, the Commission may make an order that provides for a remedy: s 170CH(1).<sup>23</sup> The Commission must not make an order unless it is satisfied that the remedy ordered is appropriate: s 170CH(2). In reaching that conclusion the Commission must have regard to all the circumstances of the case, including the matters listed in s 170CH(2). These are:

- the effect of the order on the viability of the employer's undertaking, establishment or service; and
- the length of the employee's service with the employer; and

<sup>20</sup> See s170CB(1), which is supported by s 52, s 122, the corporations power in s 51(xx) and the trade and commerce power in s 51(i) of the Commonwealth Constitution.

<sup>21</sup> Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry 1 July 1997 to 30 June 1998, <<http://www.airc.gov.au>> 4.

<sup>22</sup> Ibid, table 5.

<sup>23</sup> For a recent discussion on the meaning of 'harsh, unjust or unreasonable', see *Australian Meat Holdings v McLauchlan* (1998) 84 IR 1, 8-14.

- the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
- the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
- any other matter that the Commission considers relevant.

Each of the matters listed in s 170CH must be treated as a matter of significance in the decision-making process.<sup>24</sup> The Commission may order reinstatement under s 170CH(3) or compensation under s 170CH(6).

The Act provides that the determination of whether a termination is harsh, unjust or unreasonable and the manner of deciding on an appropriate remedy are intended to ensure that, in the consideration of an application in respect of a termination of employment, a 'fair go all round' is accorded to both the employer and employee concerned.<sup>25</sup>

Of the 774 applications disposed of by arbitration in 1997-1998, seventeen resulted in an order for reinstatement and 403 resulted in compensation orders. No orders were made in 43 of the cases where the dismissal was found to have been in breach of the Act.<sup>26</sup>

#### REINSTATEMENT

##### *Reinstatement is the remedy to be considered first*

Under s 170CH(3), the Commission may make an order requiring the employer to reinstate the employee by

- reappointing the employee to the position in which the employee was employed immediately before the termination
- appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.

If the Commission finds that the termination of the applicant was harsh, unjust or unreasonable, it must first consider the appropriateness of making an order for reinstatement. This is made clear by s 170CH(6), which provides:

If the Commission thinks that the reinstatement of the employee is inappropriate, the Commission may, if the Commission considers it appropriate in all the circumstances

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<sup>24</sup> *Edwards v Giudice and Ors* (2000) 169 ALR 89.

<sup>25</sup> See s 170CA(2) and *Re Loty and Holloway v Australian Workers' Union* (1971) 71 AR (NSW) 95.

<sup>26</sup> Annual Report, above n 21 at Table 9. The 403 compensation orders included 282 applications in respect of the same employer and the same substratum of facts. The remaining applications were dismissed.

of the case, make an order requiring the employer to pay the employee an amount ordered by the Commission in lieu of reinstatement.

Reinstatement is the ‘primary’ remedy under the Act, only in the sense that reinstatement must be considered *first*. There is no overriding presumption in favour of reinstatement in s 170CH.<sup>27</sup> In this and other respects, s 170CH differs significantly from the provisions under the IR Act, which indicated plainly that ‘it was Parliament’s intention that the primary remedy for unlawful termination should be reinstatement and that compensation should be available only where this was impracticable’.<sup>28</sup>

#### *When Will Reinstatement be Inappropriate?*

Section 170CH(6) provides that the Commission may make an order that the employer pay compensation to the unfairly dismissed employee if it thinks that reinstatement is ‘inappropriate’. In *Australia Meat Holdings Pty Ltd v McLaughlan*, a Full Bench of the Commission stated that:

the question of whether reinstatement is ‘appropriate’ in a particular case will be a matter for the judgment of the Commission member at first instance based on the evidence and material before the Commission.<sup>29</sup>

Sections 170CH(3) and 170CH(6) give the Commission a very broad discretion and there is no general right of appeal against a decision of the Commission member at first instance. Section 45(1)(b) provides for appeals to the Full Bench against an order of the Commission under Part VIA if, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, leave should be granted: s 45(2). Before the Commission will hear an appeal, the appellant must establish an arguable case that the Commission member hearing the case at first instance made a legal error or acted upon a wrong principle, gave weight to irrelevant matters, failed to give sufficient weight to relevant matters, made a mistake as to the facts or can show that that the decision was plainly unreasonable or unjust.<sup>30</sup> The Full Bench will not allow an appeal simply because it would have exercised its discretion differently to the Commissioner at first instance.<sup>31</sup>

Under the IR Act, the Industrial Relations Court was required to order reinstatement unless reinstatement was ‘impracticable’. Although ‘impracticable did not mean impossible, it meant more than inconvenient or difficult’.<sup>32</sup> In *Australia Meat*

<sup>27</sup> *Newtronics Pty Ltd v Salenga*, Print R4305, 29 April 1999, Polites SDP, Acton DP, Smith C, at 6, affirming the decision of the Full Bench in *Australia Meat Holdings v McLaughlan* (1998) 84 IR 1.

<sup>28</sup> *Liddell v Lembke* (1994) 127 ALR 342, 360 (Wilcox CJ and Keely J).

<sup>29</sup> *Australia Meat Holdings Pty Ltd v McLaughlan* (1998) 84 IR 1, 19.

<sup>30</sup> *Sprigg v Paul’s Licensed Festival Supermarket* (1998) 88 IR 21; *Westend Pallets Pty Ltd v Lally* (1996) 69 IR 1.

<sup>31</sup> *Australia Meat Holdings Pty Ltd v McLaughlan* (1998) 84 IR 1, 19.

<sup>32</sup> *Liddell v Lembke (t/a Cheryl’s Unisex Salon)* (1994) 56 IR 447.

*Holdings Pty Ltd v McLaughlan*<sup>33</sup> the Full Bench considered that the change in terminology was significant. The fact that the legislature had used the word 'inappropriate' instead of 'impracticable' was 'indicative of a legislative intention that a different approach be taken to the exercise of the discretion':

In our view a consideration of the appropriateness of reinstatement involves the assessment of a broader range of factors than practicability. ... In considering whether to order reinstatement, the Commission is not confined to the assessment of the practicability of such an order but rather must decide whether such an order is appropriate.<sup>34</sup>

The Commission did not give an indication of what 'broader range of factors' might be relevant. It did state, however, that 'the question of whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is appropriate. It is one factor to be taken into account, but it is not necessarily conclusive'.<sup>35</sup>

#### *Loss of Trust and Confidence as a Relevant Consideration*

The concept of 'trust and confidence' is not new to employment law. As Gray J noted in *Bostik (Australia) Pty Ltd v Gorgevski (No 1)*,<sup>36</sup> the question of whether there has been a loss of trust and confidence between the parties to a contract of employment has long been a concern of the courts in deciding whether the balance of convenience justifies the granting of equitable remedies in employment cases. In *Perkins v Grace Worldwide (Aust) Pty Ltd*,<sup>37</sup> the Industrial Relations Court considered the concept of trust and confidence:

In most cases the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case.<sup>38</sup>

Like the court before it, the Commission must assess whether the employer's loss of trust and confidence in the dismissed employee will make reinstatement inappropriate. There may be loss of trust and confidence, for example, where the discretion of an employee who is required to handle highly confidential information is in doubt, or where the life of the employer or others depends on the dismissed employee's reliability, and the employer has reasonable doubts about that

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<sup>33</sup> (1998) 1984 IR 1.

<sup>34</sup> *Australia Meat Holdings Pty Ltd v McLaughlan* (1998) 84 IR 1, 17.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 41 IR 452, 468-9.

<sup>37</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186, 191.

<sup>38</sup> *Ibid.*

reliability.<sup>39</sup> These are relatively uncommon situations and any claim by the employer that he or she has lost confidence in the employee will be carefully scrutinised, and will only be a relevant consideration if the loss of confidence ‘is soundly and rationally based.’<sup>40</sup>

An employer who has dismissed an employee will often be reluctant to take that employee back, even after a determination that the employee had been dismissed in circumstances that were harsh, unjust or unreasonable. Such reluctance on the employer’s part will not of itself destroy the relationship of trust and confidence between the parties. In *Perkins v Grace Worldwide (Aust) Pty Ltd*,<sup>41</sup> Perkins was summarily dismissed for supplying marijuana to fellow employees. The trial judge found the dismissal was harsh, unjust or unreasonable because there was no clear evidence that Perkins had supplied the drugs. The trial judge nevertheless declined to reinstate him on the grounds that his employer’s continued belief that the accusations were true was ‘reasonably held’ and his consequent loss of confidence in Perkins made reinstatement impracticable.

On appeal, the Full Court overturned the decision. The court rejected the approach that an employer’s reluctance to take back an employee he had accused of wrongdoing necessarily destroyed the relationship of trust and confidence between them, thereby making reinstatement impracticable. To adopt such an attitude, said the court, would deny access by unfairly dismissed employees to the primary remedy provided by the legislation. Whilst it may be difficult, embarrassing or inconvenient for an employer to re-employ a person he or she believes guilty of wrongdoing, the problems ‘will be of the employer’s own making’. In any case, if the employer is of even average fair-mindedness, such problems are likely to prove short-lived and do not necessarily indicate such a loss of confidence as to make reinstatement inappropriate.<sup>42</sup> These matters ‘remain relevant to the question of whether reinstatement is appropriate in a particular case’.<sup>43</sup>

#### *Impact on the Employee as a Relevant Consideration*

Another matter the Commission is entitled to take into account is the impact on the applicant employee of not ordering reinstatement. In *Australian Meat Holdings v McLaughlan*,<sup>44</sup> the employee, McLaughlan, who had worked with the employer for 20 years, was dismissed for misconduct when he suggested to the company nurse that she interfere with another employee’s urine sample that had been submitted for testing. The Commission found that McLaughlan’s dismissal was harsh, unjust or unreasonable because it was satisfied that his suggestion to the nurse had been made

<sup>39</sup> Ibid.

<sup>40</sup> *Australia Meat Holdings Pty Ltd v McLaughlan* (1998) 84 IR 1, 17, citing with approval the decision of the Industrial Relations Court in *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186.

<sup>41</sup> (1997) 72 IR 186.

<sup>42</sup> *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186, 191.

<sup>43</sup> *Australia Meat Holdings Pty Ltd v McLaughlan* (1998) 84 IR 1, 18.

<sup>44</sup> (1998) 84 IR 1.

in jest and he never intended her to act on it. The Commission ordered McLaughlan's reinstatement, even though there was evidence from the employer that management personnel would no longer be able to work with him, thereby making him 'ineffectual' in his position of liaison officer. Against this, the Commissioner balanced the consideration that 'it would be unjust not to reinstate the applicant in circumstances where he found that the misconduct that resulted in his termination had not been established'.<sup>45</sup> On appeal, the Full Bench held that the approach of the Commissioner was reasonably open to him, confirming that the 'injury of non-reinstatement' of a dismissed employee was a relevant consideration in the commonsense assessment of the appropriateness of reinstatement.

In reaching that view, the Full Bench endorsed the approach taken by Wilcox CJ in *Yew v ACI Glass Packaging Pty Ltd*.<sup>46</sup> In that case, Yew was dismissed without notice for fighting with a fellow employee, although there was no evidence about who started the fight. There was evidence of racial harassment in the workplace, which had gone unchecked by the employer. The fight leading to Yew's dismissal was apparently prompted by a particular incident of harassment. At first instance, the judicial registrar found that reinstatement was impracticable because there was no evidence as to how Yew would cope again with a working environment characterised by personal abuse and harassment.<sup>47</sup> On appeal, Wilcox CJ described this as a 'curious approach', commenting that 'it adds the injury of non-reinstatement to the insults Mr Yew has already received'.<sup>48</sup> The correct approach in his view was to consider whether, in all the circumstances, the employee was likely to re-offend, once the employer had taken steps to rectify the problem that had given rise to the incident prompting the employee's dismissal.

In *McVinish v Flight West Airlines*<sup>49</sup> a Full Bench of the Commission gave considerable weight to the need to do industrial justice to the dismissed employee. In that case, the Commission was satisfied that Captain McVinish had been unfairly dismissed and ordered reinstatement, in spite of the hardened and dogmatic view of Flight West's chief pilot that McVinish was a dangerous pilot. The chief pilot's view was not a rational one in all the circumstances and the Commission criticised the airline for not recognising that its own procedures contributed to the difficulties it had with its employees. Whilst acknowledging that the consequences of reinstatement for Flight West were substantial, these were outweighed by the 'grievous burden' imposed on McVinish by the loss of employment prospects with Flight West:

In the view we have formed of the appropriateness of making an order, we have been much influenced by what we consider to be the likelihood of a real and continuing

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<sup>45</sup>

Ibid.

<sup>46</sup>

(1996) 71 IR 201.

<sup>47</sup>

Ibid 206.

<sup>48</sup>

*Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201, 206.

<sup>49</sup>

Print P5664, 8 September 1998, Ross VP, Munro J, Gay C. This case was decided by the Commission under the *IR Act*.

injustice to Captain McVinish if he is not reinstated to the position he held as a pilot of some seven years' standing with Flight West ... We are unable to dismiss the conclusion that the detriment to Captain McVinish has been made disproportionately severe and prejudicial to his professional career because of an attempt by Flight West to resist his re-employment in any capacity.<sup>50</sup>

### *Other Factors*

The Commission must also consider the factors listed in s 170CH(2)(a) - (d) in deciding the appropriateness of a reinstatement order. It must also consider 'any other matter' it thinks is relevant. Given the broad nature of the Commission's discretion, it is difficult to generalise either about the sorts of factors that will always incline the Commission for or against reinstatement, or about the weight the Commission is likely to give to any particular factor. It will depend on the circumstances of the particular case and requires a commonsense assessment in the light of all the evidence.<sup>51</sup>

It is nevertheless worth noting some recent cases to illustrate the Commission's approach. One important issue is whether the working relationship has irretrievably broken down. In *Maluk v Sutton Tools Pty Ltd*,<sup>52</sup> Ross VP held that reinstatement of an employee of more than 13 years' standing was inappropriate, even though the employee's prospects of obtaining alternative employment were limited. The main reason was the damage caused to the working relationship by the employee's refusal to perform work as directed over a substantial period of time. The refusal was prompted in part by a work injury, the effect of which was disputed. It was unlikely that a good working relationship could be re-established. The Commission treats the issue similarly to the issue of a loss of trust and confidence by the employer in the employee. The mere assertion that the working relationship has broken down irretrievably will not justify a refusal of reinstatement - there must be clear evidence.<sup>53</sup> The Commission will take into account the capacity of both employee and employer to overcome previous difficulties, and is inclined to take a positive attitude to the capacity of an initially unwilling employer to re-establish the working relationship satisfactorily.<sup>54</sup>

The lapse of time since termination will be a matter to be considered, although it is difficult to generalise about the weight the Commission will give to it. In the *Maluk* case, the lapse of time since the employee was terminated, along with a number of other factors, inclined Ross VP against reinstatement.<sup>55</sup> In *Berry v Cotech Pty Ltd*<sup>56</sup>

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<sup>50</sup> Ibid 33.

<sup>51</sup> *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 57 IR 50, 61.

<sup>52</sup> Print Q6013, 8 September 1998, Ross VP, unreported.

<sup>53</sup> *Wark v Melbourne City Toyota*, Print R4864, Williams SDP, Acton SDP, Tolley C, 20 May 1999, 7.

<sup>54</sup> *Brooks v Australian Dried Fruit Sales Pty Ltd* (1998) 84 IR 33, 51. See also *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201, 206.

<sup>55</sup> Print Q6013, 8 September 1998, Ross VP, 33, unreported.

<sup>56</sup> (1998) 88 IR 100, 106.

Watson SDP considered reinstatement inappropriate 'given the lengthy time which has passed since the termination, and the alternative employment arrangements in place'. In *Mollinger v National Jet Systems*, there had also been a significant time lapse since the employee's termination. The Full Bench held that this did not necessarily make reinstatement inappropriate, even if the employee (a pilot) would require retraining. In that case, the order that the airline reinstate the employee did not require the employer to return him to operational flying duties.<sup>57</sup>

In redundancy situations, the Commission may need to consider whether or not the employee, if reinstated, would be surplus to the employer's requirements, or whether reinstatement of the applicant employee may require the employer to dismiss another employee. These considerations relate to the requirement on the Commission to accord a 'fair go all round' to both employer and employee. In *Salenga v Newtronics Pty Ltd*,<sup>58</sup> the Full Bench said that reinstatement may not be appropriate if it would perpetuate existing problems with the staffing of a particular shift. On rehearing the case, Harrison C considered both the employer's changed operational requirements and the employee's changed availability for shift work and reinstated Salenga to the position of process worker on the afternoon shift. The fact that it was 12 months since Salenga's dismissal was not a barrier to his re-employment.<sup>59</sup> Simmonds C appeared to take a different approach in the earlier case of *Brooks v Australian Dried Fruit Sales Pty Ltd*,<sup>60</sup> where he said that of itself, the need to make others redundant is not sufficient to make reinstatement inappropriate.

The mere fact that an employee has commenced litigation in respect of his or her termination should not, as a matter of principle, support an argument that reinstatement is inappropriate. In *Wark v Melbourne City Toyota*<sup>61</sup> the Commission held that a dismissed employee has a statutory right to seek relief and the reasonable exercise of such a right should not be a bar to the attainment of the relief itself.

In cases under the *IR Act*, the court held that the assumption that an unfairly dismissed employee is likely to find another position fairly easily is irrelevant to a consideration of whether reinstatement is appropriate.<sup>62</sup> However, the converse is not true - the fact that an employee will find it very difficult to obtain a similar position, in particular because of the specialised nature of his or her work, may strengthen the case for reinstatement.<sup>63</sup> Reinstatement is likely to be inappropriate where it would pose an unacceptable risk to the employee's health, for example,

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<sup>57</sup> Print Q5911, 8 September 1998, Ross VP.

<sup>58</sup> Print R4305, 29 April 1999, Polites SDP, Acton DP and Smith C, 7.

<sup>59</sup> *Salenga v Newtronics Pty Ltd* Print R5556, 7 June 1999, Harrison C.

<sup>60</sup> (1998) 84 IR 33, 50. The Commissioner made the comment in the light of the particular actions of the employer concerned.

<sup>61</sup> Print R4864, Williams, SDP, Acton SDP, Tolley C, 20 May 1999, 6.

<sup>62</sup> *Nikoloska v Stirling Ethnic Aged Community Hostel* (1996) 68 IR 165.

<sup>63</sup> *McVinish v Flight West Airlines* Print P5664, 8 September 1998, Ross VP, Munro J, Gay C.

because it would aggravate a work injury. The employer also ought not to be expected to accept that risk.<sup>64</sup>

#### *Reinstatement and a 'Fair Go All Round'*

The Commission must ensure that a 'fair go all round' is accorded both the employer and the employee in working out remedies: s 170CA(2). The Commission has emphasised, however, that 'the *fair go* object does not constitute a basis for ignoring, or for rolling into one amorphous act of judgement, the procedures or conditions associated with the powers and discretions to determine remedies'.<sup>65</sup>

The Commission specifically referred to the requirement for a 'fair go all round' in *Brooks v Australian Dried Fruit Sales Pty Ltd*.<sup>66</sup> The Commission found that the termination of two employees on the grounds of redundancy was harsh, unjust or unreasonable. Only one was reinstated. In deciding that reinstatement was not appropriate for the other employee, Simmonds C took into account the low score that the employee had achieved on a competency test, which was 17% below the lowest person retained by the company during the redundancy process. He considered that in these circumstances 'there are insufficient grounds for me to conclude that reinstatement is appropriate as it would not provide the company with a "fair go all round"'.<sup>67</sup>

#### *Reappointment to Same or Similar Position*

Under s 170CH(3)(b), the Commission may order the employer to reinstate the employee to his or her former position or to a position on terms and conditions no less favourable than those on which they were employed previously.<sup>68</sup> The Commission may nominate a specific position that the evidence reveals is available and suitable, or leave it to the employer to select an existing position, or to create a new one. In all cases, the terms of employment must be no less favourable than the position the employee occupied immediately prior to termination.<sup>69</sup> Where the employer will be disadvantaged by the need to create a new position for the reinstated employee, this will be a factor in determining whether or not reinstatement is appropriate, but will not be determinative.<sup>70</sup>

The Commission has no discretion to order the reinstatement of the employee on terms different from those that applied to the employment before termination.<sup>71</sup> This means that the Commission cannot reinstate the employee to a lesser position. In

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<sup>64</sup> *Patterson v Newcrest Mining Limited* (1996) 68 IR 419.

<sup>65</sup> *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 31.

<sup>66</sup> (1998) 84 IR 33, 50.

<sup>67</sup> *Ibid* 51

<sup>68</sup> *Tagamalitsky v Commonwealth Bank of Australia*, Print R1709, Cargill C.

<sup>69</sup> *Pather v Greencorp Magnetics Pty Ltd* Print P3583, Marsh SDP.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Salenga v Newtronics Pty Ltd* Print R5556, 7 June 1999, Harrison C.

*Cadbury-Schweppes Limited v Peluso*<sup>72</sup> the Full Bench allowed an appeal against the order of Foggo C that the employee be reinstated to a lower position as a penalty for the infringement of health and safety practice that had led to his dismissal in the first place. If the Commission cannot find a position no less favourable than the terms and conditions no less favourable than those on which the employee was employed immediately prior to termination, then reinstatement is not appropriate.<sup>73</sup> The exception will be where the effect of an order will be to put the employee back in an apprenticeship arrangement where the employee was terminated on completion of the apprenticeship. In those circumstances, Ross VP held that the Commission has the discretion to reinstate the apprentices to the position of fully qualified tradespersons.<sup>74</sup>

*Orders for continuity of employment and lost remuneration*

Where the Commission makes an order for reinstatement, it may also make any order that it thinks appropriate to maintain the continuity of the employee's employment and for payment of lost wages: s 170CH(4). In deciding what amount is appropriate (if any), the Commission will consider factors such as the efforts of the employee to mitigate his or her loss and whether the employer has already provided financial assistance, for example to assist the employee to find other employment.<sup>75</sup> The Commission will generally deduct amounts the employee earned in alternative employment,<sup>76</sup> and damages awarded for the failure to give notice in breach of s 170CM, and taxation.<sup>77</sup>

An unfairly dismissed employee who is subsequently reinstated will not necessarily receive all his or her wages for the intervening period. In *McVinish v Flight West Airlines*,<sup>78</sup> a Full Bench of the Commission made an order for 9 months' remuneration, although it was more than 23 months between termination and reinstatement. The order reflected the Commission's desire to reduce the difficulties that a reinstatement order would impose on the employer.<sup>79</sup>

In *Byron v Albany International Pty Ltd*,<sup>80</sup> Cargill C declined to make an award for lost remuneration to the reinstated employee because the applicant was partly responsible for the events leading to his termination. Although he made an order maintaining the continuity of Byron's employment, Cargill C made it clear that the

<sup>72</sup> Print Q3864, 21 July 1998, Polites SDP, Williams SDP, Holmes C.

<sup>73</sup> Ibid.

<sup>74</sup> *Fetz and Others v Qantas Airways Ltd*, Print P6706, Ross VP. The finding by Ross VP that the apprentices were terminated at the initiative of the employer was overturned on appeal, so the issue of reinstatement was not further considered. See *Qantas Airways v Fetz* (1998) 84 IR 52.

<sup>75</sup> *Fetz and Others v Qantas Airways Ltd* Print P6706, Ross VP.

<sup>76</sup> *Telstra Corporation Ltd v Khamis* Print P8665, Watson SDP, Harrison SDP and Larkin C.

<sup>77</sup> *Lever v Sands and McDougal Printing* Print Q8042, Gay C.

<sup>78</sup> Print 5664, 8 September 1998, Ross VP, Munro J, Gay C.

<sup>79</sup> *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201.

<sup>80</sup> Print R7007 21 July 1999, 13-14.

order was not intended to have the effect of crediting the applicant with any entitlements during the period between termination and reinstatement.

## COMPENSATION

### *The Compensation Provisions*

The Commission may make an order for compensation under s 170CH(6) only if 'the Commission thinks that the reinstatement of the employee is inappropriate'. If the Commission has reached that conclusion, 'the Commission may, if the Commission considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay the employee an amount ordered by the Commission in lieu of reinstatement'. The words of s 170CH(6) make it clear that the Commission has a discretion to decline to make an award of compensation.

Section 170CH(7) provides that subject to subsection (8), in determining an amount for the purposes of an order under subsection (6), the Commission must have regard to all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer's undertaking, establishment or service; and
- (b) the length of the employee's service with the employer; and
- (c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and
- (d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and
- (e) any other matter that the Commission considers relevant.

Section 170CH(8) places a cap on the maximum amount of compensation that the Commission may award. The amount is different according to whether or not the applicant was employed under award conditions immediately before termination. Under s 170CD(3), an employee is employed under award conditions if an award, a certified agreement or an Australian Workplace Agreement that binds the employer of the employee regulates both the wages and conditions of employment of the employee. For these employees, the Commission must not fix a total amount that exceeds the total remuneration received by an award employee during the period of six months immediately before the termination: s 170CH(8)(a). For non-award employees, the Commission must not fix an amount that exceeds the total remuneration the employee received in his or her employment with the employer in the six months immediately before termination, or the amount of \$32,000, as indexed from time to time in accordance with the regulations, whichever is the lower amount.<sup>81</sup>

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<sup>81</sup> From 1 July 2000, the amount is \$35,600: see Reg 30BF of the *WR Regulations*.

It is important to note that the Act refers to 'remuneration', rather than 'wages' or 'salary'. The term 'remuneration' is not defined in the Act. In a number of decisions, the Commission has indicated that 'remuneration' is a much wider concept than wages. It will include wages, potential bonuses, accrued annual leave and long service leave, superannuation, board and lodgings and the value to the employee of benefits such as the private use of a motor vehicle and telephone.<sup>82</sup>

*General Considerations governing the application of s 170CH(7)*

Section 170CH(7) is couched in mandatory terms. The Commission *must have regard to* all of the circumstances of the case and to each of the factors listed in subs (a) to (d). These mandatory expressions in legislation require the decision-making body to take the matters listed into account and give weight to them as fundamental elements in reaching its determination.<sup>83</sup> The Commission is not necessarily required to identify the weight given to the factors in s 170CH as individual considerations.<sup>84</sup>

As well as the specific matters in s 170CH(7), the Commission must also have regard to 'any other matter that the Commission considers relevant': s 170CH(7)(e). Subject to the specific requirements in s 170CH(7), what is to be taken into account in reaching the final amount of compensation is at large. However, the width of this extension and the generality of the instruction to have regard to 'all the circumstances of the case' does not detract from the requirement to give weight to the specific considerations listed in subsections (a) to (d).<sup>85</sup>

It has already been noted that the *WR Act* requires that 'a fair go all round' be accorded to both the employer and employee in the consideration of the application for relief in unfair termination cases. The 'fair go' object does not constitute a basis for ignoring, or for rolling into one amorphous act of judgement, the procedures or conditions associated with the powers and discretions to determine remedies. The object of achieving a fair go all round ought to properly influence the Commission's consideration of all the circumstances of the case when determining whether or not to award compensation under section 170CH. However, it cannot displace the direct duty to have regard to the circumstances nominated in s 170CH(7)(a) - (e).<sup>86</sup>

*Technique for Determining Compensation Amount*

The Commission has been concerned to ensure that a consistent and predictable technique for determining an amount to be ordered in lieu of reinstatement should

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<sup>82</sup> *Rofin Australia Pty Ltd v KJ Newton* (1997) 78 IR 78.

<sup>83</sup> *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497, 504 per Mason J, with whom Gibbs J agreed.

<sup>84</sup> *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 24.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 31.

emerge in Commission practice.<sup>87</sup> Accordingly, in *Sprigg v Paul's Licensed Festival Supermarket*<sup>88</sup> the Full Bench set out a step-by-step procedure for reaching an amount of compensation, based substantially on the approach taken under the *IR Act*.<sup>89</sup> The Commission is obliged to give reasons for its determination which disclose the steps involved in the reasoning which leads to a particular result and deals with the material and factual issues presented for determination.<sup>90</sup>

Lost remuneration is the reference point for the assessment of compensation.<sup>91</sup> The first step therefore is to assess the employee's actual economic loss by estimating the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated.<sup>92</sup> This involves determining the employee's remuneration prior to termination. The Commission may itemise the various components and assign an amount to them, although other approaches are open to it.<sup>93</sup>

The Commission must make a judgment about how long the employee would have been likely to stay in the employment had they not been unfairly dismissed. Clearly there is a speculative element in any such judgment. The length of the employee's service will be relevant to the assessment.<sup>94</sup> More important will be any evidence suggesting when the employment relationship might have come to an end either as a result of the employee resigning or being terminated fairly. In *Sprigg v Paul's Licensed Festival Supermarket*,<sup>95</sup> for example, Sprigg had worked for the supermarket for 10 years and was 'highly regarded' by his employer. Weighed against these factors was the tenor of Sprigg's own evidence, which caused the Commission to state 'we do not assume that Mr Sprigg would have been content with his situation for years to come'. The Commission therefore assessed the further period of employment as one year. Similarly, the Commission will take into account the likelihood that the employee's poor performance or conduct would have led to a fair termination in the near future. In the *Maluk* case, Mrs Maluk had worked for Sutton Tools for 13 years. The Commission estimated that Mrs Maluk would have retained her employment for little more than 3 weeks had she not been dismissed, given her consistent refusal in the recent past to perform work as directed and the strained relationship between her and her employer. She was awarded compensation equivalent to eight weeks' remuneration.<sup>96</sup>

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<sup>87</sup>

Ibid.

<sup>88</sup>

*Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21.

<sup>89</sup>

*Leemon v Treasure Books Australia Pty Ltd* (1997) 75 IR 138; *Shorten and Ors v Australian Meat Holdings Pty Ltd* (1996) 70 IR 360.

<sup>90</sup>

*Edwards v Giudice and Ors* (2000) 169 ALR 89.

<sup>91</sup>

*Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 147.

<sup>92</sup>

Section 170CH(7)(c).

<sup>93</sup>

*Sprigg v Paul's Licensed Festival Supermarket* (1988) 88 IR 21, 23.

<sup>94</sup>

Section 170CH(7)(b).

<sup>95</sup>

*Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 32.

<sup>96</sup>

*Maluk v Sutton Tools Pty Ltd*, Print R0426, 6 January 1999, Ross VP.

In cases where there has been a business restructure, it may be appropriate to consider whether the employer could have trained the employee to undertake other duties.<sup>97</sup> Proper regard must also be had for any likelihood that, had the employee remained in employment, his or her remuneration would have been affected by factors, for example, by being on unpaid sick leave for a significant period.<sup>98</sup>

The next step is to deduct amounts the employee has earned since termination.<sup>99</sup> The Commission will deduct amounts earned in other employment and will deduct workers' compensation payments, but not social security.<sup>100</sup> Any redundancy payment the employee has already received will also be deducted.<sup>101</sup> The Commission must also have regard to any income that might flow from the endeavours of the employee in a business venture established following termination, even if the employee has not yet received that income.<sup>102</sup> In *Le Good*,<sup>103</sup> the Full Bench also overturned the decision of the Commission at first instance not to take into account a payment of \$12,300 the employee received from her employer in exchange for a promise not to pursue further claims against it. The Full Bench said that a 'fair go all round' would not be achieved if an applicant were to retain the benefit of a settlement in addition to compensation available under the Act. The Commission was critical of the fact that the employee took the benefit of the deed of release, whilst at the same time arguing that the deed should be of no effect (because she allegedly signed under duress). The question whether an employee is estopped from pursuing a remedy under the Act if he or she signed a deed of release was not argued before the Commission.

The third step involves an adjustment of the lost income amount in the light of 'contingencies'. The main considerations are the uncertainty of future employment and the fact that the employee is to receive a lump sum. The less certain the future employment, the higher the percentage reduction in the amount. In *Sprigg*,<sup>104</sup> the lump sum was discounted by 25% for these contingencies. In *Le Good*,<sup>105</sup> the deduction was one third. This allowed for the fact that there was considerable uncertainty about the length of time Ms Le Good would have remained with the employer, given the restructure of the employer's business and the employee's loss of trust in her immediate supervisor.<sup>106</sup> This step will also take into account the

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<sup>97</sup> *Le Good v Stork Electrical Pty Ltd*, Print R6813, 12 July 1998, Giudice P, Watson SDP, Holmes C, 4.

<sup>98</sup> *Ibid* 10.

<sup>99</sup> Section 170CH(7)(d).

<sup>100</sup> *Shorten and Ors v Australian Meat Holdings* (1996) 70 IR 360.

<sup>101</sup> *Brooks v Australian Dried Fruit Sales Pty Ltd* (1998) 84 IR 33, 51.

<sup>102</sup> *Le Good v Stork Electrical Pty Ltd* Print R6813, Giudice P, Watson, SDP and Holmes C, 12 July 1999 at 11, unreported.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 33. Mr Sprigg's gross salary was about \$36,000 per annum. His final award was \$12,750.

<sup>105</sup> *Le Good v Stork Electrical Pty Ltd* Print R6813, Giudice P, Watson, SDP and Holmes C, 12 July 1999, 11.

<sup>106</sup> *Ibid*. The final award in that case was \$8,800, for an employee of six years on an annual income of more than \$60,000.

effect of any proposed order on the viability of the employer's undertaking.<sup>107</sup> There must be material before the Commission that an order will adversely affect an employer's business if an adjustment to the amount is to be made for this reason.

The fourth step involves the consideration of taxation, although the Commission may award a gross amount and leave taxation to be determined according to taxation law.

It is open to the Commission to include an amount in the award 'sufficient to compensate an employee for mental distress or injured feelings caused by a harsh, unjust or unreasonable termination of employment.'<sup>108</sup> The Commission must be satisfied on evidence adduced by the applicant to establish that the circumstances of the dismissal caused shock, distress or humiliation over and above the distress that would normally be experienced by a dismissed employee.<sup>109</sup>

Finally the Commission will reduce the total if it exceeds the statutory limits on compensation in s 170CH(7). The limits in the Act simply provide an arbitrary cap on the amount the Commission may order. They do not operate as maximums that are only to be ordered in the most grievous or serious cases. However, the Commission is not bound to explain why he or she did not order the maximum amount of compensation.

#### CONCLUSIONS

There is no doubt that the remedies for unfairly dismissed employees eligible to apply under the *WR Act* represent a significant improvement over the common law. They are a significant addition to the remedies available under state termination laws and extend legislative protection to many employees who would otherwise have to rely on the limited remedies for breach of contract (in cases where no or inadequate notice is given), or breach of award.

The availability of reinstatement as the remedy to be considered first when an employee's dismissal is found to be harsh, unjust or unreasonable is a particularly important development for employees. The legislation implicitly rejects:

the contract-based idea that rules of law must apply equally to both parties, even though they are in radically different economic positions, the classic application of this because the courts will not enforce a contract of service against an employee (which would be slavery), *therefore* they will not enforce one against the employer, a *non sequitur* to say the least.<sup>110</sup>

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<sup>107</sup> Section 170CH(7)(a).

<sup>108</sup> *Burazin v Blackstown City Guardian Pty Ltd* (1996) 142 ALR 144, 157, affirmed in *Liu and Ors v Coms 21 Limited* Print S3571 Guidice P, Duncan DP and Larkin C (25 February 2000).

<sup>109</sup> *Liu and Ors v Coms 21 Limited* Print S3571 Guidice P, Duncan DP and Larkin C (25 February 2000) 6.

<sup>110</sup> I T Smith, 'Is Employment Properly Analysed in Terms of Contract?' (1975) 6 *NZULR* 341, 364.

The important issue is whether there is evidence that the employment relationship can be successfully re-established. The legislation gives the Commission the discretion to make such an assessment taking into account a wide range of factors. Whether the Commission strikes the right balance between the right of the employer to manage his or her business and the right of the employee to reasonable security of employment will always be a matter of debate.

Statistics show the Commission makes relatively few orders for reinstatement on arbitration, in spite of the fact that reinstatement must be considered first. It is difficult to establish what the reasons for this might be and the reported judgments of the Commission only tell part of the story. If we knew more about the outcome of the very large proportion of cases that do not proceed beyond conciliation, the picture would be more complete. It might perhaps be reasonable to assume that many employees who have been unfairly dismissed simply do not wish to return to their previous employment and the Commission is very likely to find reinstatement 'inappropriate' in cases where the employee does not want it.<sup>111</sup> Where an employee wants reinstatement, the reported cases show that the Commission gives careful consideration to whether the employment relationship can be re-established successfully, based on all the evidence presented to it. The Commission is likely to give considerable weight to the injustice to a willing employee of failing to reinstate him or her, given the finding that the employee has been dismissed in circumstances that were harsh, unjust or unreasonable. In those cases in particular, the Commission has taken a positive attitude to the capacity of employers to overcome their initial reluctance and to make any necessary changes that will improve future workplace relations.

Compensation is by far the order most often made in cases of unfair dismissal. The fact that the Commission has developed a reliable procedure for assessing compensation is useful for both parties and the availability of compensation for distress caused by the manner of dismissal is praiseworthy, given the continued uncertainty in this area under common law.<sup>112</sup> The cap on compensation provides certainty to employers in terms of upper limits, but is arguably too restrictive for employees dismissed in very harsh circumstances.

There is little doubt that the availability of statutory remedies for unfair dismissal represents a major gain for those employees who have access to them. It is hoped that the positive effect of the Act extends beyond the individual employee and stimulates improved employment practices for the benefit of employees and employers generally.

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<sup>111</sup> In *Wilson v IPC Corporation (Australia) Pty Ltd* (1995) 67 IR 302, the court stated that it could not exercise discretion to order reinstatement because employee had refused offer of employer to reinstate.

<sup>112</sup> *Johnson v Unisys Ltd* [1999] 1 All ER 854.