THE DEVELOPMENT OF UNFAIR DISMISSAL LAW IN SOUTH AUSTRALIA

Peter McCusker

1. A Potted History to 1972

The contract of service was a construct of the law which sought a balance between the wants of capital, (something close to servitude) and nineteenth century notions of liberty. It provided a brace of rights to the employee but not such as might disturb the proper order of society as perceived by the members of the English judiciary. As a result, the balance favoured capital. This was particularly so on the matter of job security. If the employer dismissed the employee even if that dismissal was wrongful and in breach of the terms of agreement between the parties the courts held that effectively the only remedy available was in damages. Moreover, the courts held those damages were limited to what the employee would have earned in the notice period on the fiction that had the employer got it right, it would have given such notice. As a result, as the majority of agreed period of notice were one week, the employee had nothing to gain in seeking damages.

As to the remedies of equity, these were described by the courts in terms that aptly indicated the high-minded language of a class society.

"The Courts" said Jessel M.R. "have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy."

The courts would not budge on this. The closest the courts came to a result that might reflect the actual loss sustained by the employee was in the peculiar wartime circumstances of Automatic Sprinklers v Watson. Watson elected to reject the employer's attempt to dismiss him, having been given less than the stated period of notice. His action for wages succeeded but only due to the war time provisions. The court made clear at law although he was allowed to keep the contract alive, he could not earn wages unless he performed that work. Being ready willing and able was not enough.

There were a number of attempts to obtain reemployment orders under the Conciliation and Arbitration Act 1904 in settlement of industrial disputes. These invariably failed for Constitutional reasons. The source of power in the Constitution was Section 51(xxxv), a power to conciliate interstate industrial disputes. But it was difficult to establish that a dispute about an individual dismissal had an interstate character and there was a problem with the exercise of judicial power by an arbitral body. Barwick C.J. even proposed that dismissal was a matter of "management prerogative" and therefore outside the definition of an industrial matter. The case of R v Portus in 1973 is a good example of the problem facing employees at the Federal level. These obstacles presented serious problems to the Commission's capacity to settle industrial disputes. Sir John Moore, the Commission's President estimated that during his tenure, 1973 to 1985, a majority of disputes related to issues of unfair dismissal.

There was also little discussion or appreciation of the toll resulting from unfair dismissal on employees, the damage to people who had often invested so much in their job and indeed defined themselves in great degree by what they did for a living. There was also the matter of damage to reputation, often by implication though on occasions direct and people's lives being forever blighted.

2. Some light in the Darkness

As with other reforms the change in the law came in part from unexpected quarters. I mean by that there was a period of important conditioning of the community to the possibilities. Some important dicta started appearing which indicated the matter of job security deserved attention. No less a luminary than Lord Denning in 1952 in Lee v Showman's Guild said, "A man's right to work is just as important to him, if not more important than, his rights of property." Given the common law was the ultimate defender of property rights, this was a big statement.

One of the important moments was the House of Lords decision in Ridge v Baldwin in 1964. That was the case of a policeman and therefore an office subject to legislative provisions. But it was held that he was entitled to procedural fairness before a decision to sack him could be made. As that had not occurred the sacking was void. It was expressly acknowledged that was not the case with an employee under a simple contract of service, but it was nonetheless a development in that direction.

Then in 1963, the International Labour Conference at Geneva approved and adopted Recommendation 119 of the International Labour Organisation which provided for the protection of workers from unfair dismissal. Already recognised by the laws of many advanced industrial countries, this concept proposed restricting the otherwise unrestricted power of employers, at least in UK and Australia, to dismiss for whatever reason the employer thought adequate or none.

The next big event on the road of reform was the Report of the Donovan Royal Commission on Trade Union and Employer Associations 1965-68. That recorded,

"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 job will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breakup of a community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all"

The Donovan report is a complex topic. It was much influenced by Hugh Clegg. The subject of another lecture perhaps. But it led to the concept of unfair dismissal being introduced into UK law by the Industrial Relations Act 1971, and recognition of a person's property interest in his or her job.

3. South Australia

Don Dunstan took the Premiership of South Australia from Frank Walsh on 1 June 1967. The Industrial Code 1967, Act 74/67 subsequently passed in the Parliament. It contained the following:

"26 (1) The President or a Commissioner shall have power as a mediator to deal with all industrial matters in all cases in which it appears to the President that his mediation or the mediation of a Commissioner is desirable in the public interest, and such matter would if submitted to the Commission be within its jurisdiction.

(2) If a question arises as to whether the dismissal of an employee was harsh, unjust and unreasonable, the President may, except where the employee has a right of appeal or review under any other Act or law in relation to the dismissal, determine the matter, and may, if he thinks fit, direct the employer to reemploy such employee"

Subsection (2) was not regarded generally as governed in any way by subsection (1). But ability to invoke the jurisdiction was restricted by Section 25(5) to a registered association of employees, a union. Still it was quickly, though only in limited number, utilized. The first I can find reported was Angelin v BP Australia Ltd (1970), a decision of Olsson J. It was a year later that Sheldon J gave his decision in Loty and Holloway v AWU in NSW with the famous test of," a fair go all around".

The next event was the new jurisdiction created by Section 15(1)(e) of the Industrial Conciliation and Arbitration Act 1972. That gave the Industrial Court jurisdiction to hear and determine any question as to whether the dismissal from his employment of an employee … was harsh, unjust or unreasonable… and (to) direct the employer of that employee to reemploy that employee on terms that are not less favourable than if he had not been dismissed. The court was also able to award the wages lost in the interim. Of further significance the individual employee had the right of action and could sue without involving a union.

These changes brought the unfair dismissal jurisdiction to its modern development. The next great contribution to that was the Gnatenko litigation.

4. Gnatenko's Dismissal

The context of this matter was the often, fractious relationship between the Metal Workers Union and General Motors Holden. Both sides had able officers who were well informed and dedicated to their respective causes. On the union side were people of the calibre of John Scott, Mick Tumbers, Brian Mowbray, John O'Neill and in the Federal Office, Laurie Carmichael.

Ted Gnatenko was a migrant who spoke several languages fluently. As a result, he was a highly regarded work mate. He had started with GMH as a maintenance fitter in 1954 but had transferred to toolmaking and Elizabeth in 1963. In 1965 he became a shop steward and in 1970 the Senior Shop Steward for the Metal Workers at Elizabeth. He was acknowledged by GMH as a good toolmaker and no adverse regard was ever expressed about his qualities as an employee.

On 3 October 1974 GMH announced to the unions in its plants that the TA model of Torana which was made entirely in Australia was to be supplanted by the TX model. The TX parts would be brought in from overseas and merely assembled in Australia. The unions were concerned with this off shore proposition. On 31 October the company further announced the company was overstocked. This added to fears of job losses.

On 31 October,the combined shop stewards meeting resolved to hold a mass meeting of the employees on 20 November 1974. Gnatenko was unable to attend that stewards' meeting and thus had no part in the resolution. The award, the General- Motors Holden General Award 1974 which applied, set down steps for such a meeting which were not insisted on by the company in practise. All union officials were involved in organising the meeting and advertising it, as well as Gnatenko.

On 18 November the company chief industrial officer told Gnatenko that the meeting was not authorised under the Award. On 20 November he was formally warned the meeting was regarded as a breach of the award and to call it off. He replied it was not in his power to call it off. However, he arranged for the Chair of the meeting to inform the meeting that he had been threatened and to leave it to the meeting to decide whether in the circumstances the meeting ought to be called off. The meeting resolved to proceed. The company then summarily dismissed Gnatenko for misconduct.

5. The Proceedings

The GMH Award was an award of the Federal Commission and that is the key to the proceedings.

On 22 November 1974, Gnatenko issued an application claiming unfair dismissal in the South Australian Industrial Court invoking that Court's jurisdiction in Section 15(1)(e). On 21 January 1975 GMH obtained an order nisi for prohibition preventing the Industrial Court proceeding further with the case, until considered by the Supreme Court on the grounds that it breached Section 109 of the Constitution. In other words that in cases of two inconsistent provisions, one Federal and one State, the Federal provision prevailed. That nisi was heard by the Full Supreme Court and on 27 March 1975 GMH succeeded and the Court ordered the nisi be made absolute.

The Full Court reasons for decision are erudite and complex. They are beyond a short explication. But despite that it seems to me that the Court was most influenced by a direct conflict approach rather than a cover the field test. That was because at the time the Industrial Court was limited in the order it could make to reemployment of the employee in his former position on terms that were not less favourable. The terms of the Federal Award made significant differentiation between new starters and those with the sort of years of service Gnatenko had. There could never be a reemployment on terms not less favourable without a clash with the Award.

The matter might have ended there but for the determination of the AMWSU. They would not accept this outcome. In the Chief Justice's judgement there was a suggestion given of how the difficulty of the inconsistency could be overcome. Dr Bray pointed out, "that these difficulties could be overcome if the federal award were specifically to provide for the application of State legislation like S. 15(1)(e) in the same way as it provides for the application of the Workmen's Compensation Act." Encouraged by this, on 15 April 1975, the union went back to the Commission and sought a retrospective savings clause in the Federal Award for the operation of Section 15(1)(e in South Australia. After hearing the parties Commissioner Clarkson varied the GMH Award by adding two clauses that had that effect.

GMH immediately sought an order nisi for prohibition in the High Court which was granted on 2 October 1975. It argued that the variation did not fall within the ambit of the log served in 1971. That is, it was not contemplated even inferentially in the original VBU log that created an industrial dispute when rejected by GMH. Barwick C.J. made plain on the argument, his support of that contention. But the other Judges disagreed and by judgements delivered on 12 March 1976 the order nisi was discharged. It is of note that Clarkson C. attended the High Court hearing as an observer.

A small but significant event then occurred. Had GMH sealed the Full Supreme Court order? If they had that would have been an end to it. A journey was quickly made down to Victoria Square and the Court File examined. It hadn't been. The Court was then asked to hear Gnatenko's counsel on the order it should make and that the order for prohibition be discharged. On 7 June 1976 that is what the Full Court did. We were lucky.

The Industrial Court then heard the case on its merits. On 26 November 1976, Stanley J. delivered judgement and found the dismissal unfair. Gnatenko was ordered to be reemployed to his former position as a toolmaker on terms not less favourable and payment of any loss of wages he had suffered in the interim. While Gnatenko actually returned to his workbench, due to fear that his cause and its outcome would make him a target in due course, he was appointed to the State office of the AMWSU in a fulltime position within weeks. Mention must be made of the special role also played in all this by Elliott Johnston and Robyn Layton.

6. The Outcome

The impact of these events was considerable. Firstly, it was a great set back to those who were opposed to reform of the law. It was not just on the statute books. It was actually working. The number of employees taking proceedings grew and case law developed. Some time later there was an attempt to have the courts rule that unfair dismissal was not applicable to retrenchments, as they had nothing to do with a worker's conduct. In 1983 the High Court put that to rest by saying the legislation applied to all dismissals and retrenchment was a dismissal no less. The motive for a dismissal didn't change the fact. Finally, I mention the decision of the Full Bench of the Termination, Change and Redundancy Case (1984) and the Corporations Decision of the High Court (2006). But in terms of what I am interested to emphasise, those cases did not significantly affect the "Winds of Change".

Unfair dismissal has been an extraordinary advancement in employment rights. It is difficult for people to appreciate the time when it did not exist. When no matter how outrageous the dismissal, there wasn't a remedy to be had. The employee just had to cop it.

There have been various attempts since, some partially successful, to both water down the entitlements and to contain those who can bring proceedings. And there is no doubt the designers of the Workplace Relations Act 1996 had such dismantlement in their sights. But that Government was in large part removed from office for that very reason. That fact was excellently exploited by the trade unions in the election campaign at the time, so much so that industrial reform has been avoided by the Conservative side of politics since. This indicates a lot about how unfair dismissal is now part of our law and jealously appreciated by the majority of Australians.

I end by repeating the theme of this paper or at least the one I hoped would emerge. That is about the fight for justice and the dedication of those who fought for the establishment of these rights. It was by intelligence and commitment that the champions of this reform achieved such great change, a victory over great wealth and great greed. There is surely a lesson in that.