Unlawful termination of employment must not be confused with *unfair* termination – a note on *Pezzimenti v Rotary International*[1].

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In the recent decision of *Pezzimenti v Rotary International* the Federal Circuit Court ordered the prominent international charity, Rotary International, to pay to its former employee a penalty and compensation totalling $255,342 and to pay the employee's costs of the trial on an indemnity basis.

The Court found that Rotary International had engaged in *unlawful* adverse action against Mr Pezzimenti by dismissing him. The findings show that the Court regarded the conduct as particularly serious:

> "The adverse action was at the top end of detriments which might be imposed upon an employee: dismissal. The reason for it, the commencement of Court proceedings, marked the conduct as particular egregious … this was a contravention which struck at the heart of the system of workplace protections for which Australian law provides."

The Court's decision generated extensive commentary from lawyers and workplace advisory firms, much of it to the effect that Performance Improvement Plans should be managed more carefully.[3]

That commentary proceeds from a misunderstanding of the case. It is based upon common practice in dismissal cases upon which Rotary International relied to defend its conduct. That common practice, however, is directed to managing the risks of claims for *unfair* termination of employment and, in some cases, breach of contract. The common practice does not engage with the separate law of *unlawful* adverse action and was of no assistance to Rotary International defending the claim.

Unfair termination focuses on the capacity and conduct of an employee. *Unlawful* termination looks to the reasons of the employer.

The Facts

Mr Pezzimenti was employed by Rotary International for 10 years in the position of International Office Manager of Rotary's South Pacific and Philippines Office located in Parramatta. The International Office Manager position was the most senior position in the Asia Pacific and reported to the Director of International Operations in the Chicago headquarters of Rotary.

Shortly before the events giving rise to the dismissal, Mr Amando Huerta commenced in that position as Mr Pezzimenti's supervisor. Mr Huerta was found by the Court to be a *clear*

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[1] [2019] FCCA 1854 and [2020] FCCA 95.

[2] Tom Brennan was counsel for Mr Pezzimenti in the case the subject of this note

[3] Examples are the case notes published by Clayton Utz: *Executive Payout More Costly for Employer than Proper Performance Management* 5 September 2019, Australian HR Institute: *Employer Pays Over $200,000 for Poorly Managed Performance Improvement Plan* 31 August 2019, Workplace Info: *Set up to fail: $200k Payout for Action* 16 September 2019, Insitework.com.au: *Adverse Action After a Bullying Complaint – 3 Thoughts* 31 August 2019, Norman Waterhouse: *$205,000 Thanks! When a Performance Improvement Plan Backfires* 25 October 2019, Lander & Rogers: *The Case of the Poorly Managed Performance Improvement Plan* 21 October 2019.

thinking, dynamic senior official with firm views about the responsibilities of the staff of Rotary and how those responsibilities should be performed.

Mr Huerta was concerned with the way that Mr Pezzimenti carried out his role and placed Mr Pezzimenti on a Performance Improvement Plan. The Performance Improvement Plan specified areas in which Mr Pezzimenti was required to demonstrate improved performance by achievement of specified milestones.

At the meeting called to finalise the Performance Improvement Plan Mr Huerta directed Mr Pezzimenti to leave the office immediately and suspended him, on pay, from that time.

Mr Pezzimenti then commenced proceedings in the Federal Circuit Court. In the proceedings he sought interlocutory relief restraining termination of his employment.

Mr Pezzimenti did not move on his prayer for interlocutory relief when Rotary indicated to him that they would not terminate his employment at that time.

After that indication, Rotary notified Mr Pezzimenti of allegations of misconduct: that he had breached confidence by communicating on staffing matters with a Director of Rotary and that he had taken unapproved leave. Rotary notified Mr Pezzimenti that unless he showed cause otherwise his employment would be terminated by reason of that misconduct.

Mr Pezzimenti did not attend the meeting at which he was to be given the opportunity to show cause as to why his employment should not be terminated and the employment was terminated.

At that point Mr Pezzimenti amended his application in the Federal Circuit Court to claim relief for the *unlawful* termination of employment.

Mr Pezzimenti succeeded in obtaining penalties and damages against Rotary because Rotary was found to have terminated his employment for reasons which included that he had commenced the Federal Circuit Court proceedings. To cause detriment to Mr Pezzimenti for that reason was *unlawful*.

The law of *unfair* termination

Part 3.2 of the *Fair Work Act 2009*[4] contains the law of unfair termination. Section 385 provides that a person is unfairly dismissed if the dismissal was harsh, unjust or unreasonable. The effect of s.387 is that a dismissal will ordinarily be harsh, unjust or unreasonable unless there is a valid reason for the dismissal related to the employee's capacity or conduct, and there has been a "fair" process by which the employee is informed of that reason and has an opportunity to respond to it.

In litigation concerning termination of employment Performance Improvement Plans are an essential tool by which employers regularly demonstrate that a termination of employment based upon poor performance is not *unfair* within the meaning of Part 3.2 of the *Fair Work Act 2009*. Performance Improvement Plans ordinarily identify one or more aspects of an employee's "capacity or conduct" which the employer has found to be unsatisfactory and provide the employee with notice of that matter and an opportunity to respond to it, including in most cases an opportunity to demonstrate an improvement in performance. The Performance Improvement Plan thereby satisfies the two key requirements of the law of unfair dismissal: that there exists a valid reason for termination and that there has been a fair process to address that reason.

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[4] Part 3.2.

Likewise, in the case of misconduct by an employee the process of giving notice of allegations of misconduct and requiring the employee to show cause why their employment should not be terminated is commonly used by employers to satisfy the requirements of the unfair termination provisions of the *Fair Work Act*. By the notice identifying the allegations of misconduct the employer identifies the existence of valid reasons for dismissal and by requiring the employee to show cause as to why the employment should not be terminated the employer provides for a fair process by which the employee can address the allegations of misconduct.

Depending upon the terms of the particular employment contract the process of giving notice of allegations of misconduct with an opportunity to show cause as to why the employment should not be terminated can also be important to an employer reducing the risks of a finding of breach of contract. Contracts of employment often provide for termination without cause on notice, and termination, with cause, without notice. Where an employer wishes to rely upon the termination with cause provisions of a contract the process of notifying the employee of allegations of misconduct and providing an opportunity for the employee to respond can, in practice, cause the employee to go on record with any defence that the employee has against the allegations of misconduct. In that way the employer can assess whether it will be able to sustain, at trial, the allegation that the employee has engaged in misconduct justifying dismissal without notice.

In the Pezzimenti case neither the unfair dismissal provisions nor breach of contract were in issue.

The unfair dismissal provisions of the *Fair Work Act* do not apply to employees who earn more than the "high income threshold", currently $148,700 unless the employment is governed by a modern award or enterprise agreement. Mr Pezzimenti's annual salary was more than the threshold and the employment was not governed by an award or enterprise agreement.

Mr Pezzimenti's contract provided for termination without cause on 5 weeks' notice, or payment in lieu. On termination of employment Rotary paid Mr Pezzimenti in lieu of that notice and so the Contract of Employment did not require Rotary to have any reason for the termination.

The unfair dismissal provisions of the *Fair Work Act 2009* and contracts of employment operate in the way described above to limit the capacity of an employer to terminate the employment of many employees.

However in Mr Pezzimenti's case there was no limitation on Rotary International's capacity to terminate the employment. Mr Pezzimenti's complaint was of a different kind.

The Law of *Unlawful* Termination

Part 3.1 of the *Fair Work Act 2009* is concerned with general protections. It does not operate to limit the capacity of employers to terminate employment or take other adverse action against employees. Rather, it assumes that an employer has the capacity to engage in that action but prohibits an employer from doing so for various reasons. In general terms employers must not exercise any power or capacity to affect adversely an employee for reasons to do with the employee exercising a workplace right, associating with other employees through lawful industrial activity or having a characteristic upon the basis of which discrimination is prohibited, including race, gender, disability, marital status, family or carer's responsibility, pregnancy, religion, political opinion, national extraction or social origin.

Thus, while the law of *unfair* termination is focused on the capacity and conduct of the employee and the fairness of the process accorded to the employee, the law of *unlawful* termination is focused not on the employee but on the reasons for action of the employer.

Mr Pezzimenti relied upon s.340 which prohibited an employer from taking adverse action against an employee because the employee had exercised a workplace right.

The workplace rights upon which Mr Pezzimenti relied were his right to make a complaint about Mr Huerta's bullying and his right to commence and conduct the Federal Circuit Court proceedings.

When an employee alleges in Court proceedings that an employer has taken adverse action against the employee for a particular proscribed reason the onus is placed on the employer to prove that the action, if taken, was not taken for reasons which included that reason (ss.360 and 361).

The Court found that Mr Huerta terminated Mr Pezzimenti's employment to bring matters to a head in circumstances where Mr Pezzimenti had been suspended. If matters were not brought to a head that suspension would continue for a long period of time while the Federal Circuit Court proceedings played out. As a result Mr Pezzimenti's conduct of the Federal Circuit Court proceedings formed one of the reasons for Mr Huerta acting when he did and Rotary could not discharge its onus of showing that was not one of its reasons for acting.

In light of that finding, it did not matter whether the Performance Improvement Plan process provided Rotary International with a proper basis to terminate the employment and it did not matter whether the show cause letter referred to misconduct of a kind which would justify termination of the employment. The Court did not make findings on those questions and there was no need for it to do so. The question was not whether Rotary International had the capacity under contract and consistent with the unfair termination provisions to terminate the employment. The question was whether Rotary International had exercised any capacity that it did have for a proscribed reason.

Rotary International's defence of that claim by pointing to the Performance Improvement Plan and show cause process as providing it with the lawful capacity to terminate was simply beside the point.

Assessment of Damages

It is commonplace in claims for breach of contract by termination of executive employment for employers to point to the contractual notice period with which they could lawfully terminate without cause. Provided the employer shows that they would have terminated the employment in any event damages will ordinarily be limited to the income lost during the contractual notice period.[5]

Rotary International relied upon a claim of that kind and pointed to the fact that it had paid Mr Pezzimenti for his period of notice. However, that defence failed because it did not engage with the contravention of the Act which Rotary International had been found to have committed. In order to avoid a substantial award of damages Rotary had to show that had it acted without any regard to Mr Pezzimenti having made the complaint against Mr Huerta and having commenced and conducted the Federal Circuit Court proceedings it still would have terminated the employment. It did not, and could not, show that because the Court had found on the evidence that Mr Huerta had acted when he did because the Federal Circuit

[5] See for example *Bartlett v Australia and New Zealand Banking Group* (2016) 92 NSWLR 639; [2016] NSWCA 30.

Court proceedings were being conducted by Mr Pezzimenti. The result was that Mr Pezzimenti recovered compensation equivalent to one year's salary.

Learnings

Contrary to much of the commentary on this case the learnings to be taken from it are not concerned with Performance Improvement Plans.

Rather, the key learning is that Part 3.1 of the *Fair Work Act* focuses on the reasons for an employer's actions and not on the performance, capacities or conduct of the employee.

Where the facts are such that an employee may credibly allege that an employer has dismissed them or otherwise adversely affected them in their employment as a result of a proscribed reason under Part 3.1 of the *Fair Work Act*, employers and their advisors must engage squarely with that question and not be diverted by questions focused on the employee.