strike, which was described as 'recognised in International Law [and] recognised as a fundamental element of industrial relations in Australia'. Secondly, his Honour referred to the principle that a court should be reluctant to grant injunctive relief where an industrial dispute is being dealt with by negotiation or by a specialist tribunal (*National Workforce Pty Ltd against AMWU and Ors*, (unreported) Supreme Court of Victoria, Harper J, 15 September 1997, pp.5-6).

The employers faced the difficult task of asking an appellate court to overturn a discretionary decision. They argued, among other things, that Harper J was in error in considering the right to strike as a factor in the exercise of his discretion. The Court of Appeal said:

> It seems clear enough from the conventions to which we were referred that a right to strike is now generally recognised in the civilised world, but equally plainly, as his Honour recognised, it must be accepted in Australia that that right is now 'hedged about with qualifications' according to local legislation — as, indeed, was contemplated by article 8 itself of the International Covenant on Economic, Social and Cultural Rights. [p.19]

The court went on, however, to say that since the right to strike was 'hedged about' in this way in Australia, the concept of the right to strike had no role to play in a court's exercise of its discretion as to whether or not to grant an injunction.[5] The Court said 'that there might otherwise be some generally recognised right to strike quite apart from the Act seems then to be irrelevant' (p.21).

The next point of relevance dealt with by the Court of Appeal, was the operation of s.166A. It was argued both at first instance and on appeal that as the matter was and could be before the Australian Industrial Relations Commission, the Court should refrain from dealing with it and exercise its discretion in favour of the defendants. In rejecting this argument the Court of Appeal held that s.166A actually authorises the bringing of actions in courts even though matters were before the Industrial Relations Commission, and that therefore, the authorities relied on by the defendants were no longer of any relevance (pp.27–8).

In the result the injunction was issued against the AMWU and the appeal succeeded.

It seems, therefore, that we are little closer to recognition of a right to strike than we were ten years ago. It is true that a limited right to industrial action is now recognised in certain circumstances and subject to some preconditions. However, conversely, this legitimisation of some activity combined with the restriction on civil action imposed by s.166A appears to have narrowed the scope for arguing that industrial action ought not to be the subject of a court order. The recognition of the fundamental right to strike, which led Harper J to exercise his discretion in favour of the union, has been turned on its head by the Court of Appeal. Arguably the right to strike has been cut down, at least in the view of Victorian Court of Appeal, as a result of the decision that it can only be recognised in the statutory context, not in the broader context. Accordingly, there is no place to be given in balancing the parties' interests to the right to strike. That 'fundamental human right' is just a statutory permission and cannot be recognised; even when the plaintiff has not proved its case and the court is engaged in an exercise of *balancing* parties' competing interests to achieve a temporary solution.

How significant this decision is remains to be seen. The threat of common law action has always been present in any industrial dispute, even if it is not frequently invoked. Harper J's decision was perhaps a significant recognition of what is acknowledged even by the Victorian Court of Appeal to be a right 'now generally recognised in the civilized world'. By adopting a narrow view of what can be taken into account in such a case, the Court lost the opportunity to affirm what could have been a notable development in human rights in Australia.

*Warren Friend is a Melbourne barrister.*

### References


1. Darrow, Clarence, 'The Story of My Life', Watts and Co. London, 1932, p.60.
2. Australian Treaty Series 5, Article 8(1)(d)1, 1976. The relevant clause was reprinted in Schedule 8 of the *Industrial Relations Act 1988* (Cth).
3. Lord Wedderburn, *The Worker and The Law,* 3rd edn, Penguin Books, 1986, p.686.
4. See for example, *Harry M. Miller Attractions Pty Ltd v Actors and Announcers Equity Association of Australia* [1970] 1 NSWR 614.
5. The Australian Industrial Relations Commission has examined this issue in detail, and concluded that 'If the parliamentary intention was to make all unprotected action a contravention of the Act, it would appear that there would not have been any significant barrier to it doing so... The international recognition of rights to take some forms of industrial action not covered by the immunity conferred by section 170MT could have been among the reasons parliament did not directly prohibit unprotected industrial action generally' (see *Coal and Allied Operations v AFMEPKIU* (1997) 73 IR 311 at 329.)


## UNLAWFUL TERMINATION

# Redundancy on maternity leave

## VANESSA ECKHAUS reviews a decision under the unlawful termination provisions of the *Workplace Relations Act 1996.*[1]

On 2 June 1997 Elizabeth Treadwell, a 21-year-old office clerk, was told she was redundant. At the time she was on maternity leave. She was officially due to return to work in August, but had spent the last two months requesting that she return earlier. Until 2 June, her employer had fobbed off her requests, telling her that there was nothing for her to do at that time, and asking her to put her request in writing. After she did this, she was called to a meeting. She thought she was going to discuss her return to work. Instead she was told that she no longer had a job.

Ms Treadwell brought a claim against her previous employer, ACCO Australia Pty Ltd, under the *Workplace Relations Act 1996.* The matter first went to conciliation at the Australian Industrial Relations Commission (AIRC). The claim was not resolved.

Ms Treadwell then had to make an election between her two legislative options:

(i) to continue in the AIRC under s.170CFA(1), arguing that the termination was harsh, unjust and unreasonable (an 'unfair dismissal'); or

(ii) to take action in the Federal Court under s.170CFA(3) on the basis that the termination occurred for reason of absence on maternity leave (an 'unlawful termination').

It could be difficult to prove that Ms Treadwell's absence on maternity leave was a factor in ACCO's decision to

choose her for redundancy. Proof of what influenced the directors of ACCO to choose her for redundancy necessarily lay in cross-examination of them about their decision-making process. Exactly what evidence they would give would remain unknown until the cross-examination actually took place. This meant that running such a case could be riskier than proving that the termination was simply 'harsh, unjust or unreasonable'.

This risk was exacerbated as there was almost no existing case law, for there had been few if any cases decided under the unlawful termination provisions.

It was decided to go through the Federal Court, as it was felt that the case was strong enough, and that anecdotally the AIRC usually tends to award less compensation, and is less likely to order reinstatement.

The company was adamant that there had been no unlawful termination, as the termination was for reason of redundancy. It claimed that Ms Treadwell was only one of a number of employees who had been made redundant, and that the operational requirements of the business had required a reduction in staff.

However, Ms Treadwell was successful in her claim. She was awarded reinstatement and compensation for lost wages by Judicial Registrar Parkinson in judgment handed down on 16 December 1997.

In her decision, JR Parkinson considered whether or not there had been a genuine redundancy, and whether Ms Treadwell's absence on maternity leave had influenced ACCO's decision to terminate her. Specifically, she looked at the following issues:

- the duties Ms Treadwell was performing at the time she went on maternity leave;
- whether those duties were still being performed, and by whom;
- what other duties within the company Ms Treadwell had previously performed;
- what duties Ms Treadwell was qualified to perform; and
- whether the company had hired any staff while Ms Treadwell was on maternity leave.

JR Parkinson said:

> ... it was [Ms Treadwell's] lack of immediate availability to meet the requirements of the respondent in filling a vacant position which was the determining factor as to suitability. The evidence satisfies me that the absence of the applicant on maternity leave was part of the reason why the applicant was not appointed to or transferred to various of the vacant positions which became available during that time. The applicant's absence upon maternity leave resulted in her not being considered for these positions. Consequently the applicant became an employee without a position at a time when the respondent was identifying persons for redundancy.

This decision confirmed that an employer has a strong legal obligation to protect a worker's positions while she is on maternity leave, or to give her an alternative position if her original one no longer exists when she is due to return to work.

It also shows that an unlawful termination claim may be the most efficient manner of rectifying unlawful discrimination when it involves a termination of employment. This case was finalised a mere six months after the claim was lodged. There was much less delay than is often found in State and federal equal opportunity systems.

This is an area of law that can and should be expanded in the future.

*Vanessa Eckhaus is a Melbourne lawyer.*

**Reference**

1. *Treadwell v ACCO Australia Pty Ltd* (VG538 of 1997, unreported)

## ABORIGINAL LAW

# An honest claim of right

### The implications of the recent case involving Galarrwuy Yunupingu being charged with assault and criminal damage are discussed by STEPHEN GRAY.

The Magistrates Court at Nhulunbuy received an unusual degree of media attention when Galarrwuy Yunupingu appeared before Gillies SM, charged with assault and criminal damage. Under the Northern Territory's mandatory sentencing legislation he faced a gaol term of 14 days if convicted of the criminal damage charge — although mandatory imprisonment is not, yet, the penalty for assault.

The charges arose out of an incident between Yunupingu and Michael McRostie, a professional photographer who had flown out to Gove to photograph a wedding. McRostie, who did not have a permit to be on Aboriginal land, was discovered by Yunupingu taking photographs of Gumatj people, including naked children. When McRostie refused a demand for $50 compensation, Yunupingu pulled the camera away from McRostie by the strap, technically assaulting McRostie in the process, and pulled out and destroyed the film.

The magistrate accepted that Yunupingu was entitled to act in this way under Aboriginal law, which does not allow photographs of Gumatj land or people without permission, since such photographs capture the spirit of the person and diminish the strength or wholeness of the land. Yunupingu raised a number of defences under the Northern Territory Criminal Code. The defence to which Gillies SM devoted the most attention, and which received the most subsequent publicity, was honest claim of right under s.30(2) of the Code.

The honest claim of right defence provides an excuse for an act done with respect to property in the exercise of an honest claim of legal right. To have such a defence to the criminal damage charge Yunupingu must have believed himself entitled to act as he did under the general non-Aboriginal, as well as under Aboriginal law. The majority of the High Court in *Walden v Hensler* (1987) 163 CLR 561 restricted the claim of right defence under an equivalent provision in the Queensland Code to offences 'in which there is an element of causing another to part with property or of infringing the rights of another over or in respect of property' (p.575). It might be argued that the criminal damage charge only incidentally involved causing another to part with property, and that the High Court in *Walden v Hensler* considered offences related to damaging or destroying property to be generally outside the ambit of the claim of right defence (p.574). However, Gillies SM's conclusion that the claim of right defence applied to the criminal damage charge seems only a modest extension of the existing law.

Gillies SM also found that the claim of right defence operated to excuse Yunupingu of the assault charge. This was