GREGORY V. PHILIP MORRIS LTD[1]

The decision of Gray J. in *Gregory v. Philip Morris Ltd* raises issues of considerable importance for Australian labour law. These are numerous, and the more important include the enforceability of unregistered closed union shop agreements; whether the employer-employee relationship is purely contractual or includes a separate master–servant relation independent of the contract; the use of the pendant jurisdiction of the Federal Court to issue injunctions in the course of proceedings for breach of an award under the Conciliation and Arbitration Act 1904 (Cth); and the principles the court will apply in determining whether a dismissal was harsh, unjust or unreasonable and thus in contravention of the termination, change and redundancy clauses in federal awards.

FACTS

The applicant Gregory was an employee of the respondent Philip Morris Ltd. The respondent was party to and bound by the Metal Industry Award 1984 ('the Award'), an award made under the Conciliation and Arbitration Act 1904 (Cth) ('the Act'). As from September 1982 the applicant was shop steward for the Electrical Trades Union ('the E.T.U.'). All the employees of the respondent belonged either to the E.T.U., the Amalgamated Metal Workers Union ('the A.M.W.U.') or one of two other unions. Representatives from each union, including the applicant, formed a closed shop committee. Through this, the unions would negotiate jointly with the respondent.

In 1982 an agreement between the respondent, the E.T.U. and the A.M.W.U. was brought into existence ('the local agreement'). All union members had the opportunity to discuss it before it was executed. The applicant, as a member of the closed shop committee, was a signatory to it. Clause 6(a) (ii) provided: 'Membership of the appropriate Trade Union is a condition of employment.'

In August 1986, the applicant was ousted as shop steward. The E.T.U. resolved to split from the closed shop committee and to negotiate separately with the respondent. Relations between the applicant and the rest of the E.T.U. members at the plant deteriorated. The A.M.W.U. became involved as well, and various stoppages occurred. On 15 October 1986 the State Council of the E.T.U. purported to expel the applicant from membership of the union. The respondent was apparently informed of this decision by a letter from the E.T.U.. Consequently, the applicant was dismissed with five weeks pay in lieu of notice, purportedly in accordance with clause 6(d) of the Award.

The applicant sought orders pursuant to s. 141 of the Act requiring the members of the State Council of the E.T.U. to treat as null and void the decision to expel the applicant. He obtained from Keely J. in the Federal Court an order that the members of the State Council show cause. On 24 November, the State Council met and resolved that the purported explusion was void. It recognized the applicant as being a financial member and as having been one throughout the relevant period. The applicant remained ready, willing and able to resume his employment. The respondent, however, informed him that he would be liable for trespass if he attempted to present for work.

The applicant claimed that the purported dismissal was in breach of clause 6(d) (vi) of the Award, which provides:

> Termination of employment by an employer shall not be harsh, unjust or unreasonable.
> For the purposes of this clause, termination of employment shall include terminations with or without notice.

The applicant sought the imposition on the respondent of penalties for breach of award in purporting to dismiss him in contravention of the Award and failing to pay him the sums required by the Award since that time, an order for the payment of his entitlements under the Award, damages for breach of contract, a declaration that the contract was still on foot and an injunction restraining the respondent from treating it as at an end. Gray J. dismissed the application.

[1] No. 2 1987, unreported. Federal Court of Australia, 22 July 1987, Gray J. Page references are to the transcript.

THE LEGAL ENFORCEABILITY OF COLLECTIVE AGREEMENTS.

Sub-s. 47(6) of the Industrial Relations Act 1979 (Vic.) provides:

> An agreement relating to an industrial matter made between an association of employees and an association of employers or any employer or employers that is not approved and registered under this Part shall be void and of no force or effect.

The procedure for approval is set down in sub-ss 47(1) and (2), but refers only to a 'recognised association'. Gray J. found that the local agreement had not been approved and registered, and that, since the relevant unions were not 'recognized' under the Industrial Relations Act, it would not have been possible for the local agreement to have been so registered. Further, a relevant 'Board' had not been constituted to so recognize these unions (see Part V of the Industrial Relations Act 1979 (Vic.)).

It was common ground that a literal reading of sub-s. 47(6) would result in the local agreement being void and of no force or effect. Gray J., however, noted that if a literal reading of sub-s. 47(6) was adopted, it 'would strike down every agreement between a trade union and an employer to resolve any dispute about an industrial matter.'[2] He commented that '[a] statutory provision could not be construed lightly as having these effects',[3] and instead construed the section as relating 'only to agreements entered into by recognized associations, which are filed, and which the Industrial Relations Commission of Victoria refuses to approve'.[4] The validity of the local agreement was therefore not affected by sub-s. 47(6). It is submitted that this is a sensible approach to sub-s. 47(6), as it avoids the undesirable consequences of a literal reading.

A second point in relation to the enforceability of collective agreements such as the local agreement is that, for the agreement to be binding, the parties to the agreement must have intended to create legal relations. In *Ford Motor Co. v. A.U.E.F.W.*,[5] Geoffrey Lane J. held that a collective agreement is not intended to be legally binding. Recent academic opinion is that collective agreements not registered under a statutory scheme are not intended in the absence of express indication to the contrary to create legal relations (and so ought to be unenforceable).[6] However, Gray J. held:

> The question whether parties to an agreement intend to create legal relations by that agreement is one of fact in each case; there is no rule that agreements between trade unions and employers are necessarily outside the field of contract law.[7]

His Honour examined a number of factors and concluded that the local agreement was in fact intended to be legally binding.

IS CLAUSE 6(A)(II) OF THE LOCAL AGREEMENT BINDING ON THE APPLICANT?

Clause 6(a)(ii), as noted above, provided: 'Membership of the appropriate Trade Union is a condition of employment.' His Honour held that the provision was 'a term of the applicant's contract of employment'.[8] In reaching this conclusion, however, it appears that his Honour confused three issues: firstly, whether the provision became a term of the individual contract of employment by implied incorporation; secondly, whether the provision became a term of the contract of employment through agency; and thirdly, whether the provision was enforceable against the applicant as part of the local agreement. It is not clear whether his Honour found that the clause requiring the applicant to remain a union member bound him directly (that is, as a party via agency to the agreement), or more indirectly through incorporation (implied or through the agency).

2 Transcript 26.
3 *Ibid.* 27.
4 *Ibid.* 28.
5 [1969] 2 Q.B. 303.
6 Creighton, W. B., Ford, W. J. and Mitchell, R. J., *Labour Law: Materials and Commentary* (1983) 522; Smith, G. and McCallum, R., 'A Legal Framework for the Establishment of Institutional Collective Bargaining in Australia' (1984) 26 *Journal of Industrial Relations* 1, 5-9.
7 Transcript 32.
8 *Ibid.*

Implied incorporation

In relation to the question of implied incorporation of a subsequent agreement into an existing contract of employment, a term, express or implied, must be found in the contract of employment 'to the effect that the content of a collective agreement should become part of the contracts of employment of workers covered by it'.[9] Such a term was implied in *Hill v. Levey*.[10] When can such a term be implied? This question was addressed in *B.P. Refinery v. Shire of Hastings:*

> [For] a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract.[11]

If such a term is implied, and if the provision is appropriate for incorporation into the individual contract, it will be so included. The provision is then enforceable in contract irrespective of whether the agreement it is derived from is legally enforceable or not.[12] To this extent, the provision would have been enforceable, even if broad scope was given to sub-s. 47(6).[13]

Incorporation by agency

For a term to be incorporated by agency, it must first be established that the union acted as agent for the employees. However, it is not clear how an agreement can then be incorporated into an individual contract of employment, which is a separate contract from the original agreement. Assuming for the moment that such incorporation is possible, a number of problems arise concerning whether unions can act as agents for employees. These are discussed in some leading texts.[14] The main concerns are: the position of non-members would be unclear; the collective agreement may not be enforceable itself; such agency would not be able to operate with respect to employees who subsequently enter the employment; and the consequences of a withdrawal of authority by an employee are uncertain. Mere membership of a union is not sufficient to establish agency.[15] One text argues that such concerns make it difficult for a union to act as agent for employees.[16] It is to be noted however that in some circumstances, agency has been established in England.[17]

Direct enforceability

As to the question whether the provision could be enforceable against the applicant as part of the local agreement, it must first be established that the parties intended to create legal relations, and then that the agreement is outside the scope of sub-s. 47(6) of the Industrial Relations Act 1979 (Vic.) (see above). Once that is established there must be shown to be privity between, in this case, the respondent and the applicant. The agreement is between the respondent and the union, so for the respondent to enforce a provision in it against the applicant, it must be shown that the union entered the agreement as agent for the applicant. The same issues relating to agency arise as above.

Agency

His Honour thoroughly discussed whether the union was acting as agent for the employees, and the applicant in particular. None of the problems mentioned above applied: all employees were members of unions party to the agreement; the collective agreement itself was found to be enforceable; the

9 Creighton, Ford and Mitchell, *op. cit.* 59.
10 (1858) 3 H.&N. 7.
11 (1977) 16 A.L.R. 363, 376.
12 *Marley v. Forward Trust Group* [1986] I.C.R. 891, 896; Wedderburn, K. W., *The Worker and the Law* (3rd ed. 1986) 335-6.
13 It has been suggested that sub-s. 47(6) might operate to render unenforceable a provision in a collective agreement even where that provision is incorporated into a valid contract: Creighton, Ford and Mitchell, *op. cit.* 60.
14 Wedderburn, *op. cit.* 326-30; Creighton, Ford and Mitchell, *op. cit.* 58.
15 *Holland v. London Society of Compositors* (1924) 40 T.L.R. 440; Wedderburn, *op. cit.* 327.
16 Creighton, Ford and Mitchell, *op. cit.* 58.
17 *Ibid.*

applicant had already been employed; and there was no withdrawal of authority by the applicant. Further, all the employees had the opportunity to debate the proposed agreement beforehand. His Honour concluded that the union did act as agent for the employees, and for the applicant in particular.[18]

This is a significant finding in the light of the doubts cast on the ability of a union to act as agent for its members. This finding and his Honour's interpretation of sub-s. 47(6) have substantial implications in industrial relations. However, his Honour did not make clear how the term would then have become 'part' of the contract of employment (as his Honour concluded at p. 32), rather than establishing a separate agreement between the respondent and the applicant.

The manner of incorporation

Gray J. asked himself whether the terms of the local agreement 'became terms of the applicant's contract of employment' (this question, relating to incorporation, is put at pp. 22, 25, 29, 30 and 32). He does not therefore appear to have been examining the enforceability of the local agreement. As he did not expressly refer to incorporation by agency, and did not discuss how such incorporation would operate, he may have been referring instead to implied incorporation.

In purporting to determine this question, his Honour considered a variety of factors relating to all three issues set out above, some of which were not relevant to this issue. After extensive discussion of the effect of sub-s. 47(6) (which is probably irrelevant to implied incorporation), his Honour moved on to discuss the appropriateness of the provisions for incorporation. But he then confused that discussion by referring to the question of intention to create legal relations, which is again irrelevant to implied incorporation (but which might be relevant to incorporation by agency). His Honour did not discuss whether on the facts a term might have been implied that the provisions be incorporated.

With respect, his Honour has not made clear the manner in which the provision of the agreement bound the applicant. Instead he has considered a mix of factors relating to three different issues as outlined above. Had he considered more closely the question of the intent of the parties to incorporate, or the mechanism of incorporation by agency, or the effect on the agreement of the E.T.U.'s withdrawal from the closed shop committee, he might not have concluded that 'it was a term of the applicant's contract of employment with the respondent, as at 15 October 1986, that membership of the appropriate trade union was a condition of his employment.'[19] It should be pointed out that any confusion which might appear in his Honour's discussion of these issues perhaps points to the confused state of the law in this area. It is an area where contractual principles and industrial reality sit uneasily together.

It should be noted that no finding as to whether the applicant was in fact in breach of contract can be found in the judgment. The respondent had terminated the applicant's employment on proper notice, without relying on any breach by the applicant. At common law, an employer is entitled to terminate with proper notice at any time. For this reason, no damages for breach of contract by the respondent could be awarded. But it will be argued below that a finding as to breach of contract or otherwise by the applicant is highly relevant to the issue of the fairness of the dismissal.

IS AN UNFAIR DISMISSAL EFFECTIVE TO TERMINATE THE CONTRACT OF EMPLOYMENT?

The applicant sought a declaration that the contract was still on foot and an injunction to restrain the respondent from treating it as at an end. The question thus arose for determination whether an unfair dismissal will operate to effectively determine a contract unilaterally, or whether it amounts only to a repudiatory breach which must be accepted by the innocent party before the contract is validly terminated. His Honour confirmed the *obiter* statements of the Full Federal Court in *Turner v.*

[18] Transcript 30.
[19] *Ibid.* 32.

Australian Coal and Shale Employees Federation [20] and *Seymour v. Stawell Timber Industries Pty Ltd* [21] that the second, 'acceptance', view is correct in relation to the termination of the contract of employment. His Honour saw no reason for making an exception in the case of unfair dismissal.

Thus,

> a purported dismissal of an employee otherwise than in accordance with provisions covering dismissal in the contract of employment, is not effective to terminate the contract of employment, unless it amounts to a repudiation of that contract by the employer, and the employee elects to treat the contract as at an end.[22]

These comments were, however, *obiter* as his Honour found that the dismissal was fair, and that the contract was terminated.

IS THERE A SEPARATE MASTER/SERVANT RELATIONSHIP INDEPENDENT OF THE CONTRACT OF EMPLOYMENT?

Counsel for the respondent argued that even if the contract was not terminated, 'the purported dismissal [was] sufficient to terminate the "master and servant relationship" between the employer and the employee.'[23] Counsel relied on *Automatic Fire Sprinklers Pty Ltd v. Watson*,[24] where various passages in the judgments of Latham C.J. (at 451 and 456–7), Starke J. (at 461) and Dixon J. (at 466 and 469) seem to refer to such a relationship; and on *Gunton v. Richmond-Upon-Thames London Borough Council*,[25] especially in the judgment of Brightman L.J. at 778. Gray J. held, at 39,

> In my view, nothing in those passages compels the conclusion that there is known to the law a relationship of master and servant created by, but distinct from a contract of employment, such that the contractual relationship may continue whilst the other relationship may have ceased to exist.

It is worth noting his reasons for limiting the effect of *Watson's* case.

Firstly, his Honour considered that the judges in *Watson's* case were describing only 'certain incidents of the contract of employment';[26] that is, the area of mutual contractual obligations, such as the obligation to pay and the obligation to perform services. The former is dependent upon the latter. His Honour referred, in contrast, to *Seymour's* case, where (at 266) it was recognized that 'the entitlement to wages may arise where the employee is ready and willing to perform work, but the employer prevents him or her from doing so'. According to his Honour, on applying proper contractual principles, if one party is unable to perform because of the other party's breach, the latter is not absolved from obligations under the contract. This would mean that 'the area in which mutual obligations exist may be narrower than was thought previously.'[27] To argue otherwise 'is an attempt to revive in another guise the now defunct rule that a contract of employment may be determined by unilateral act'.[28]

Secondly, his Honour stated that some members of the Court in *Watson's* case were influenced by the rule that specific performance of a contract of employment could never be granted. He pointed out that this is no longer the case. To argue in favour of the master and servant relationship is therefore 'an attempt to revive . . . the equally defunct rule that a court will never grant specific performance'.[29]

The concept of a master and servant relationship separate from the contract of employment is a confusing and artificial one.[30] Its historical origins are noted, but today it distorts the contractual principles which it is submitted should be applied to contracts of employment as to any other contract

20 (1984) 6 F.C.R. 177.
21 (1985) 9 F.C.R. 241.
22 Transcript 35.
23 *Ibid.* 38.
24 (1946) 72 C.L.R. 435.
25 [1980] I.C.R. 755.
26 Transcript 39.
27 *Ibid.* 40.
28 *Ibid.*
29 *Ibid.* 40-1. For a valuable discussion of specific performance, see Johnstone, R. and Patrick, J.. 'Reinstatement in Victoria — the Tobin Case' (1987) 16 M.U.L.R. 103, 115-20. See also Burrows, A. S., 'Specific Performance at the Crossroads' (1984) 4 *Legal Studies* 102.
30 An example is the judgment of Brightman, L. J. in *Gunton's* case, *supra* n. 25, at 778. In *Lister v. Romford Ice and Cold Storage* [1957] A.C. 555, the Court considered whether a certain term might be implied into the contract of employment by reference to 'the relation in which [such employees] and their employers generally stand to each other' (*per* Viscount Simonds at 576).

(subject, of course, to legislative intervention necessary for the protection of the respective parties). Gray J.'s approach in clarifying the contractual position is to be welcomed. If there exist other factors which the courts think should be considered, such as the balance of industrial power or the managerial prerogative, the courts should recognize and discuss these factors openly, so as to reach a rational and comprehensibly just result, rather than disguising them with artificialities.

WHEN IS A DISMISSAL UNFAIR?

In his determination of this question, his Honour referred to several South Australian decisions (at pp. 41–2), including *Minchin v. St Judes Child Care Centre*.[31] In that case, Judge Olsson said that events subsequent to the dismissal may be relevant

> in so far as they assist in determing *ex post facto* the probable true motives of the employer, or otherwise directly bear upon the circumstances of the dismissal or tend to confirm the reasonableness or otherwise of a judgment arrived at at the time of dismissal.[32]

Gray J. concluded that 'all of the circumstances surrounding a dismissal must be considered, and the court may look at subsequent events for purposes of the kinds envisaged by Judge Olsson.'[33]

In considering the South Australian decisions, his Honour recognized the similarity between the South Australian legislation and the Award, and that decisions on the former are relevant to the latter. His Honour did not refer to any of the English decisions on the corresponding section in the (now-defunct) Industrial Relations Act 1971 (U.K.) s. 57. S. 57 is different in structure to the Australian provisions, and poses a two-stage test together with certain specific criteria. His Honour may have felt that for this reason the English cases were irrelevant.

His Honour then discussed the facts of the case. On the one hand was the length of the applicant's service, the part he had played previously in industrial relations at the plant, his age, his family situation, the fact that normal practice was just to send employees off the site until they could furnish proof of union membership, and the avenues for appeal which existed against the expulsion. On the other hand, his Honour noted the industrial pressure brought to bear on the 'innocent' employer (not his Honour's term), the impossibility of suspension without pay, the unfairness to other workers of suspension with pay, the fact that the respondent did not know that the applicant was going to appeal against the expulsion, and the applicant's *apparent* breach of contract. His Honour concluded:

> In the present case, membership of the E.T.U. was not only a requirement of the applicant's contract of employment, but was a fundamental feature of the industrial relations environment in the respondent's plant . . . In my view, in all of the circumstances, it could not be said that the dismissal was unfair, harsh, unjust or unreasonable.[34]

The approach which his Honour adopted in reliance on the South Australian cases focussed on whether the *employer* made a 'fair' decison in the light of the information available to her or him. His Honour's consideration of the facts is consistent with this approach; the industrial pressure on the respondent and the apparent breach of contract were major factors in his conclusion that the dismissal was fair. In relation to the apparent breach of contract, his Honour did not make a finding as to whether there was in fact a breach of contract. He said only that 'the respondent was made aware of his [the applicant's] expulsion, which it could only take to amount to a breach of that term [in his contract of employment].'[35]

With respect, it is submitted that the question whether a dismissal is an unfair decision by an employer in the light of the facts available to him or her, is not necessarily the same question as whether a dismissal is 'harsh, unjust or unreasonable' (clause 6(d)(vi) of the Award). In determining fairness, an objective approach is appropriate, and in the present context, the point of view of the employee must be given equal weight. This does not seem to have been his Honour's general approach; his discussion of the South Australian cases and his emphasis on the industrial threat to the respondent and the apparent breach of contract focused on fairness from the employer's perspective. In particular, it is submitted that, had his Honour made a finding that the applicant was never in breach of contract, the dismissal was more likely to have been found to be unfair.

31 Industrial Court of South Australia, 9 March 1973, unreported.
32 Transcript 42.
33 *Ibid.*
34 *Ibid.* 46.
35 *Ibid.* 43.

DECLARATIONS AND INJUNCTIONS IN THE FEDERAL COURT

The Conciliation and Arbitration Act, under which the Award was made, confers power on the Federal Court to impose penalties for non-compliance with the Award. The Act does not expressly confer power to grant other remedies. However, Gray J. implied that he may have been prepared to issue a declaration and an injunction had the dismissal been found to be unfair. In doing so, he would have relied on the Court's 'pendant' jurisdiction, which is found in the Federal Court Act, s. 22. Such an injunction or declaration would have had the same effect as an order for specific performance of the contract of employment and the reinstatement of the applicant.

Thus the decision shows that the powers of reinstatement sought to be conferred on the proposed Australian Labour Court in the Government's Industrial Relations Bill may be unnecessary, or at least that until the Bill is passed, there is another avenue of legal redress available for unfairly dismissed employees covered by federal awards.

CONCLUSION

The relationship between contractual principles and the reality of industrial relations is an uneasy one, and has led to much uncertainty in labour law. This uncertainty is reflected to some extent in his Honour's judgment, especially in his treatment of the manner in which the local agreement was binding on the applicant, and in his subjective 'fair decision' approach to the question of unfairness. However, his Honour's judgment provides a practical approach to sub-s. 47(6), and has in other respects clarified and simplified some of the contractual principles involved in the contract of employment, notably: the ability of parties to collective agreements to create legal relations, the granting of specific performance, the effect of unfair dismissal on the contract of employment and the existence of a master-servant relationship separate from the contract of employment. It is to be hoped that his Honour's approach to these issues will lead Australian labour law to a clearer analysis of the contractual aspects of the employment relationship.

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