REINSTATEMENT OF DISMISSED EMPLOYEES BY THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION: A REVIEW OF THE *BOYNE SMELTERS* CASE[1]

On 21 April 1993, the High Court of Australia constituted by Justices Brennan, Deane, Toohey, Gaudron and McHugh handed down an important decision dealing with the reinstatement powers of the Australian Industrial Relations Commission ('the Commission').

Generally speaking, unions seeking an award for reinstatement of dismissed employees must essentially overcome two jurisdictional hurdles. First, it must be shown that the dispute concerning the dismissal and reinstatement is an interstate dispute and secondly, that the dispute pertains to the relationship between employers and employees rather than merely to the relationship between the employer and the individual former employee or employees concerned.

In the particular circumstances of the *Boyne Smelters* case, the High Court found that the Commission had jurisdiction to make the award sought by the union which although expressed in somewhat different terms would result in the reinstatement of dismissed employees. The High Court distinguished its earlier decision in the *Re Federal Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd*[2] in which it was held that an order for reinstatement could not be made.

THE FACTS

In August 1990, the Federated Ironworkers Association of Australia, which later merged with the Australian Society of Engineers to become the Federation of Industrial Manufacturing and Engineering Employees of Australia ('the union'), served a demand for security of employment on various employers in the aluminium industry. One such employer was Boyne Smelters Limited ('the company') which operates an aluminium smelting plant at Gladstone in Queensland.

The union's demand was served at a time when discussions were taking place with the company in relation to award restructuring and the need for improved productivity at the Gladstone plant and was couched in the following terms:

> That the employers observe for employees conditions of employment to the effect that:
> (a) the employer shall not dismiss any employee (whether or not such dismissal takes place before the making of any Award or Agreement made in settlement of the Log of Claims); and,
> (b) the employer shall reinstate forthwith any employee dismissed (whether or not such dismissal takes place before the making of any Award or Agreement made in settlement of this Log of Claims).

The matter was referred to the Commission and on 19 October 1990 the Commission made a finding of dispute in the terms of the demand.

[1] *Re Boyne Smelters Limited; Ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia*, unreported, High Court of Australia, 21 April 1993.
[2] (1989) 166 C.L.R. 311.

In April 1991, the company retrenched a number of employees, 48 of whom were members of the union and who were covered by the Boyne Smelters Limited Award 1984. After the union's demand for reinstatement was rejected by the company, reinstatement proceedings were commenced in the Commission. The union sought an award to the effect that if the company dismissed an employee without that employee's consent it shall upon request made within three months of the dismissal reinstate the employee and pay the employee an amount equal to that which the employee would have received by way of wages if the employee not been dismissed.

THE COMMISSION PROCEEDINGS

The dispute first came on for hearing before Justice Munro, who found that the Commission had jurisdiction to hear and determine the union's claim.[3] In his decision, Justice Munro stated that the jurisdiction to deal with the 1991 dispute arose primarily out of the 1990 dispute and therefore had the required interstate character.[4]

The company appealed to a Full Bench of the Commission which allowed the appeal and quashed the decision of Munro J.[5] Essentially, the Full Bench relied upon the approach of the High Court in *Wooldumpers* in deciding that the union's claim was, in substance, a claim for the reinstatement of named former employees and that it was different in character from the 1990 dispute which was directed to obtaining general provisions setting out relevant conditions of employment.[6] The Full Bench noted that the majority of the High Court in *Wooldumpers* had characterised the demand in that case as including an implied demand for reinstatement.

HIGH COURT PROCEEDINGS

The union challenged the Full Bench decision in the High Court. The issue before the High Court was whether the union could rely on the 1990 dispute as forming the jurisdictional basis for the making of an award imposing an obligation as to the actual reinstatement of former employees of the company.

The company contended that the Commission did not have jurisdiction to make the award sought by the union for two reasons. First, it was argued that the award was not within the ambit of the 1990 dispute as an award imposing an obligation as to actual reinstatement of the former employees is not relevantly connected with the earlier dispute. In essence, it was contended that the union's claim provides for a regime for the reinstatement of dismissed employees whereas the 1990 dispute is not concerned with the actual reinstatement of employees dismissed before the imposition of a regime regulating dismissal and reinstatement.

Reliance was placed upon the reasoning in a number of the judgments in *Wooldumpers* to support this contention. In that case an antecedent interstate

3 Print J8524.
4 *Ibid.* 13.
5 Print J9554.
6 *Ibid.* 4.

dispute with respect to permanency of employment was unsuccessfully advanced as the source of jurisdiction for the making of an award ordering the reinstatement of an employee later dismissed by an employer party to the earlier dispute.

Secondly, the company argued that even if the union's claim is within the ambit of the 1990 dispute, the dispute itself is not concerned with the relationship between employers and employees and is therefore not an 'industrial dispute' as defined in section 4(1) of the Industrial Relations Act 1988.

Four members of the High Court, Justices Brennan, Deane, Toohey and Gaudron, delivered a joint judgment rejecting the company's arguments. Their Honours found that the 1990 dispute vested the Commission with jurisdiction to make an award for reinstatement of employees retrenched by the company in April 1991. Justice McHugh delivered a separate judgment in which he also concluded that the award submitted to Munro J could be properly made in part settlement of the 1990 dispute. Accordingly, the decision of the Full Bench of the Commission was quashed and the matter was remitted to the Commission for hearing and determination in accordance with law.

THE JOINT JUDGMENT

Dealing with each of the company's arguments in turn, Their Honours concluded that the union's claim was within the ambit of the 1990 dispute.[7] Their Honours found that the union's claim was a claim with respect to actual reinstatement of individual former employees as well as involving a claim for a regime with future operation. The crucial issue in the case was the characterisation of the demand giving rise to the 1990 dispute. After examining the nature of the demand, Their Honours found that:

> . . . it clearly comprehends actual dismissals and the actual reinstatement of dismissed employees. And, as already indicated, the express statement in the demand that it is concerned with dismissals 'whether or not . . . [taking] place before the making of any Award or Agreement' makes it clear that it is concerned with dismissals and the reinstatement of dismissed employees even if the dismissals take place at a time when there is no regime with the respect to those matters.[8]

Their Honours were of the view that the decision in *Wooldumpers* was not determinative of the issue in the present case. It was noted that the demand giving rise to the 1990 dispute was different from that considered in *Wooldumpers* in several important respects, the most important of which was that the demand in *Wooldumpers* was not specifically directed to reinstatement.[9]

In relation to the company's second argument, Their Honours acknowledged that a demand made by a union to enable the Commission to hear and determine applications for actual reinstatement of individual former employees on an ad hoc basis, would not give rise to an industrial dispute within the meaning of the Act unless it is shown that it is a matter affecting the industrial interests of other employees.[10] Their Honours examined the circumstances surrounding the service of the demand in this case and found that it was made with a view to enable the

7 *Boyne Smelters, supra* n.1, 6.
8 *Ibid.*
9 *Ibid.*
10 *Ibid.* 8.

Commission to deal with the matter involving the relationship between employers and employees generally.[11] Their Honours focused on the assertion by the company of the need for improved productivity at the Gladstone plant as justification for the union's concern over security of employment for its members. In this regard, Their Honours found that:

> It is reasonable to infer that, even if there was no other reason for concern, this generated an apprehension as to security of employment and staffing levels, not only in relation to Boyne Smelters but in relation to other employers in the industry who might be expected to be subject to the same conditions.[12]

JUDGMENT OF JUSTICE McHUGH

Justice McHugh made similar findings as to the characterisation and nature of the 1990 dispute as the proponents of the joint judgment. In distinguishing *Wooldumpers*, McHugh J noted that:

> . . . both the terms of the 1990 dispute and the terms of the 1991 award provide for a general regime as to reinstatement and are not limited to an individual employee or individual employees.[13]

CONCLUSION

For sometime, especially following the decision in *Wooldumpers*, uncertainty has surrounded the power of the Commission to award reinstatement. There was general recognition that a clarification of the Commission's power in this regard was required and this concern seems to be reflected in the approach adopted by the High Court in this decision.[14] In many respects, the decision arguably renders unnecessary the Federal government's planned use of the external affairs power to provide the Commission with jurisdiction to hear and determine unfair dismissal applications.

The expansion of the Commission's powers with respect to reinstatement provides a clear alternative forum to the Federal Court for employees to pursue a remedy for an alleged unfair dismissal which is not dependent on employer agreement or limited to 'conciliation'. The Federal Court has the power to award substantial damages to an unfairly dismissed employee and has recently adopted an approach which has caused concern for employers. Given these developments, it may be appropriate for employers to review their practices with respect to

11 *Ibid.*
12 *Ibid.*
13 *Ibid.* 18.
14 On 3 June 1993, the High Court constituted by Justices Brennan, Dawson, Toohey, Gaudron and McHugh handed down a decision in *Re Printing and Kindred Industries Union; Ex parte Vista Paper Products Pty Ltd* which further illustrates that in appropriate circumstances, the Commission has jurisdiction to make an award requiring an employer to reinstate dismissed employees to their former positions. The case involved similar issues as those raised and considered in the *Boyne Smelters* case. The decision in the *Vista* case illustrates the importance of examining the whole of the factual situation in determining whether the Commission has jurisdiction to deal with a dispute involving the reinstatement of employees. In earlier cases such as *Wooldumpers* and the *Boyne Smelters* case reliance was placed on an earlier dispute arising from the service of a log of claims. In the *Vista* case the earlier dispute did not solely arise from the service of the log, but concerned dismissals made in the context where simultaneous negotiations were taking place in two states involving members of the same union employed in the same industry. Accordingly, there was evidence on which the Commission was justified in holding that the dismissals constituted a situation likely to give rise to an interstate dispute.

dismissing employees and give careful consideration to the appropriate manner in which unfair dismissal applications may be resolved or defended.

When examining the effect of the High Court decision, it is important to appreciate that despite the suggestions of Justice McHugh and various commentators, the Commission did not make the award sought by the union the effect of which would have been to reinstate the dismissed employees.[15] Justice Munro merely determined that he had jurisdiction to make the award. Arguments as to the merits of the union's application were never canvassed before the Commission.

GRAEME WATSON*
PAUL BURNS**

[15] It should be noted that in the *Vista* case, the Commission after rejecting the jurisdictional arguments raised by the employer, made a reinstatement award which imposed a duty on the employer to reinstate persons named in the schedule to the award in their former positions.

* B.A. (Tas.), L.L.B. (Sydney), Grad. Dip. Ind. Rel. (F.I.T.). Partner, Freehill Hollingdale & Page.
** B.A. (Mon.), L.L.B. (Mon.), Solicitor, Freehill Hollingdale & Page.