Before the High Court

Labour Law and the Inherent Requirements of the Job: *Qantas Airlines Ltd v Christie* — Destination: the High Court of Australia — Boarding at Gate Seven

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1. *The Questions Facing the High Court*

On 21 November 1994, Mr John Christie — a Jumbo Jet B747 Captain with Qantas Airways Ltd "Qantas" — reached the age of 60 whereupon his employment with Qantas came to an end. He brought proceedings in the Industrial Relations Court of Australia, asserting that his termination by Qantas was in breach of the Federal termination protection laws which prohibited terminations on the grounds of age. Although his claim did not succeed at first instance before Wilcox CJ,[1] a majority of the appeal Full Bench — Gray and Marshall JJ, Spender J dissenting — upheld Christie's claim[2] and held that the termination was contrary to law.

The primary question which the High Court is being asked to answer in this appeal, is under what circumstances may an employer dismiss an employee on the impermissible ground of age because the employee is unable to perform the inherent requirements of the job. The manner in which this question is answered will affect not merely the federal termination protection laws, but it will impact upon those anti-discrimination laws which utilise the inherent requirements concept[3] and similar tests[4] in the provisions prohibiting discrimination on grounds of age and disability.

A subsidiary (and less interesting) question is whether there was in fact a termination by Qantas or whether Christie's contract came to an end by efflux-ion of time.

2. *The Legislation*

Since the Full Bench Industrial Relations Court decision was handed down in this matter the Federal termination laws have been re-written. However, the conformity between the previous and current discriminatory termination

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1 *Christie v Qantas Airways Ltd and Allman v Australian Airlines Ltd* (1995) 60 IR 17.

2 *Christie v Qantas Airlines Ltd* (1996) 138 ALR 19.

3 See eg, Disability Discrimination Act 1992 (Cth) s15(4)(a); and *Anti-Discrimination Act* 1977 (NSW) s49D(4).

4 See eg, *Equal Opportunity Act* 1995 (Vic) s22(1)(b).

provisions means that the High Court's decision in *Christie* will be relevant to the present law.

In late 1993, the Keating Government, in reliance on International Labour Organisation Conventions,[5] enacted the *Industrial Relations Reform Act* 1993[6] which inserted into the *Industrial Relations Act* 1988[7] ("IRA") termination protection laws.[8] These measures gave terminated employees a remedy of re-instatement and/or compensation where a termination was found to be contrary to law. Under these laws, it was impermissible to dismiss a person on the grounds of age. When the Howard Coalition Government took office in March 1996, one of its first acts was to re-write the federal labour laws, including those which dealt with termination protection. The Government steered its reforms through the Parliament in November 1996[9] and its new termination protection laws are now to be found in the *Workplace Relations Act* 1996 ("WRA")[10].

Although the WRA has narrowed the scope of the federal termination protection laws, it has not altered the essence of those aspects of these laws which concern discriminatory dismissals. The IRA and WRA provisions on this issue are — except for one word — identical.

Section 170DF(1)(f) of the IRA and section 170CK(2)(f) of the WRA provide that an employer must not terminate an employee for reasons including those of:

> race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

However, under section 170DF(2) of the IRA and section 170CK(3) of the WRA, it is a defence if the reason for the termination:

> ... is based on the inherent requirements of the particular position concerned.

As this defence stood under the IRA, it did not contain the word "concerned" which was added by the WRA. I suggest this additional word will not materially alter the interpretation of this paragraph.

After the Full Bench decided *Christie,* the High Court handed down its decision in *Victoria v the Commonwealth*[11] where several State governments unsuccessfully challenged the validity of the 1993 Keating Government's labour legislation. In this case, the High Court upheld the prohibition of discriminatory terminations on the grounds of age,[12] because of Australia's ratification and

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5 The major convention was the Convention Concerning Termination of Employment at the Initiative of the Employer ("the Termination Convention"), (International Labour Organisation Convention 158, 1982).

6 *Industrial Relations Reform Act* 1993 (Cth).

7 *Industrial Relations Act* 1988 (Cth) ("IRA").

8 Pittard, M J, "International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment", (1994) 7 *AJLL* 170 at 171-92; and McCallum, R C, "The Internationalisation of Australian Industrial Law: *The Industrial Relations Reform Act 1993*", (1994) 16 *Syd LR* 122 at 131-3.

9 *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth).

10 *Workplace Relations Act* 1996 (Cth) ("WRA").

11 *State of Victoria and Ors v Commonwealth* (1996) 138 ALR 129.

12 Id at 180-3 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

subsequent legislative adoption[13] of the International Labour Organisation Convention on Employment Discrimination[14] ("the Employment Discrimination Convention"). While the WRA also relies upon the Employment Discrimination Convention,[15] it uses other heads of constitutional power[16] to bolster these provisions, the main one being the corporations power.[17]

The Employment Discrimination Convention has added significance in this matter because the inherent requirements defence as set out in the IRA and the WRA is based upon its provisions. Article 1(2) of the Employment Discrimination Convention provides:

> Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

Given its international origins, assistance in interpreting the inherent requirements defence in the IRA and also in the WRA may be gained from the international jurisprudence.

At this stage in the narration, it is pertinent to emphasise that the inherent requirements concept is used in other laws prohibiting discrimination on the grounds of disability. At the federal level, the other major piece of legislation is the *Disability Discrimination Act* 1992 ("DDA").[18] The DDA prohibits discrimination on the grounds of disability in employment,[19] but section 15(4) contains two defences. It provides that it is a defence where an employee:

(a) would be unable to carry out the inherent requirements of the particular employment; or
(b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

While paragraph (a) contains the inherent requirements defence, paragraph (b) sets out the unjustifiable hardship defence. It must be remembered that the DDA covers refusal to employ as well as its prohibition of discriminatory terminations. To facilitate the employment of disabled persons, the unjustifiable hardship provision means that where a disabled person needs services or facilities to carry out the job, the employer must provide them unless their provision would amount to an unjustifiable hardship.

It is surprising that neither the IRA nor the WRA contains the unjustifiable hardship defence. After all, both statutes prohibit terminations on the grounds of physical or mental disability as well as age. Perhaps it was thought that as the termination protection laws only cover disabled and aging persons who are already employed, this provision was unnecessary. However, as any-

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13 *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) Sch1; and IRA s170CA(2).
14 Discrimination in Respect of Employment and Occupation (International Labour Organisation Convention No. 111, 362 UNTS 31, 1958).
15 WRA ss170CB(6), 170CK(1)(a).
16 WRA s170CB(4).
17 WRA s170CB(4)(c) which must be read together with s4(1) definition of "constitutional corporation".
18 *Disability Discrimination Act* 1992 (Cth) ("DDA").
19 DDA s15(1)-(3).

one with a disability knows, many disabling conditions alter with time which may impact upon the level of services and facilities utilised by the disabled employee. Even in the case of age discrimination — as the facts in the Christie Case demonstrate — the addition of the unjustifiable hardship concept to the termination protection laws would facilitate resolution of the issues and would assist in preventing an unnecessary gloss being placed upon the inherent requirements concept.

3. *The Inherent Requirements Defence*

Qantas argued that its actions were not discriminatory by virtue of the inherent requirements defence. At first instance its argument was twofold. Qantas asserted that a retirement age of 60 was an inherent requirement of a commercial pilot on the grounds of aviation safety. In his thorough judgment, Wilcox CJ made a careful assessment of the large body of written and oral evidence which was adduced on the safety issue. While various studies had been undertaken — especially in the United States — none showed that pilots over 60 were more accident prone than their younger counterparts. Indeed, experienced pilots appear to have better safety records than do less experienced fliers.[20] While the holding of a valid commercial pilot's licence and being medically fit were inherent requirements of the job, Wilcox CJ was not prepared to hold that being below a given age was an inherent requirement for a pilot.[21] Given the inconclusive nature of the evidence led by Qantas, this holding was unsurprising and this aspect of his Honour's decision was not taken on appeal to the Full Bench of the Industrial Relations Court.

Under the Civil Aviation Convention — which is known as the Chicago Convention — it is open to contracting states to prohibit pilots who are over 60 from captaining aircraft which land in or fly over their territory. A number of contracting countries have adopted this rule, including the United States, Singapore and Thailand. This meant that once Mr Christie turned 60, he could not captain jumbo jet flights to or over these countries. The prohibitions in Singapore and Thailand prevented Christie from flying on the Qantas routes to Europe, and the United States prohibition prevented him from flying to that country. He could still fly to Bali, to New Zealand and to Fiji. Qantas argued at first instance and on appeal that the capacity of a jumbo jet captain to fly to these countries was an inherent requirement of the job. Much evidence was led on the Qantas rostering system which operated on the premise that all jumbo jet captains could fly to or across all of the relevant countries. For Qantas it was said that Christie's inability to service these routes meant that he could not perform the inherent requirements of a jumbo jet captain.

At the trial, Wilcox CJ accepted the Qantas argument. In his view, the inherent requirements defence should "... be applied in a practical, common sense way, ...".[22] The inability of Christie to fly on the international routes did cause Qantas serious practical difficulties in operating a rostering system

20 Above n2 at 30-50.
21 Id at 50-3.
22 Id at 56.

that was fair to all. On appeal to the Full Industrial Relations Court, Spender J expressed his agreement with this portion of the Wilcox CJ judgment.[23]

Gray and Marshall JJ held that the inherent requirements defence failed, although each judge took a different route to reach this outcome. In the view of Gray J, the capacity to fully operate the Qantas roster system was irrelevant to the inherent requirements defence. In his Honour's view, this defence referred "... to an 'inherent' requirement, namely something that is essential to the position, rather than being imposed on it."[24] Later, Gray J summed up his position in a thoughtful passage. He said:

> Characterisation of the particular position of an employee will often involve matters of impression. In the process, a purposive construction of s170DF of the Act must be adopted. The policy underlying the section is one, that wherever possible, protects employees from discrimination in termination of their employment for any of the prohibited reasons. That policy would be undone completely if an employer could arrange the terms of the contract, or its operating systems, so as to permit it to terminate the employment of employees on those prohibited grounds.[25]

In construing the inherent requirements defence, Marshall J examined the international jurisprudence on article 1(2) of the Employment Discrimination Convention, which it will be recalled, embodies the inherent requirements phrase which is utilised in the IRA and the WRA.[26] In the light of this jurisprudence, he concluded that the inherent requirements defence must be construed narrowly.[27] He then quoted Commissioner Carter who held in *X v Department of Defence*[28] — when sitting in the Human Rights and Equal Opportunity Commission — that the dismissal of a person on the basis of their HIV status by the defence forces was contrary to the DDA. Commissioner Carter examined the DDA's inherent requirements defence[29] and said:

> ... for the exemption to apply, there must be a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question, the very nature of which disqualifies the person from being able to perform the characteristic tasks or skills required in this specific employment. Only then can the employer avoid the unlawfulness which attaches to the discrimination.[30]

In the view of Marshall J, this approach should be adopted when interpreting the inherent requirements defence in the IRA.[31] Christie could perform all the skills which are necessary to be performed by pilots. The limitations im-

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23 Above n2 at 21.
24 Id at 32.
25 Ibid.
26 Id at 37. His Honour referred to Nielsen, H, "The Concept of Discrimination in ILO Convention No. 111" (1994) 43 *ICLQ* 827 at 845-6; and to the Report of the Commission of Inquiry, of the International Labour Office, to examine the observance by the Federal Republic of Germany of Convention No. 111 70 (1987) *ILO Official Bull.* Ser.B Supp.1 ("the *German Work Ban* case").
27 Above n2 at 39.
28 [1995] EOC para 92-715.
29 DDA s15(4)(a).
30 Above n28 at 78, 378.
31 Above n2 at 40.

posed on him were geographic, and these did not touch the inherent requirements of his job.

The inherent requirements defence received further consideration by Cooper J in the Federal Court of Australia, when the Australian Government unsuccessfully sought to overturn the decision of Commissioner Carter in *X v Department of Defence*.[32] In *Commonwealth of Australia v Hon WJ Carter*,[33] Cooper J gave a broader interpretation to the inherent requirements defence than did Commissioner Carter. Cooper J said:

> ... the work required to be done in any particular employment will depend upon the duties and tasks actually fixed by the employer, including the manner in which and mode by which those duties and tasks are to be carried out. Where these matters are not fixed by the employer, then the general nature of the work itself will indicate what, in a functional sense, has to be done to do the work.
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> ... The inherent requirements of a particular employment are the necessary tasks required to be performed and the personal characteristics or qualifications, if any, required by the employer, divorced of any requirement or condition the enforcement of which would constitute discrimination against the person on the ground of a disability. So understood, the inherent requirements of the particular employment will have functional requirements and requirements as to the satisfaction of any externally imposed personal characteristics or qualifications.[34]

In the view of Carter J, " ... the duties and tasks actually fixed by the employer ..."[35] may determine the inherent requirements of the job, provided the tasks and duties are free from the taint of discrimination. This approach, I suggest is akin to that taken by Wilcox CJ and Spender J. It would appear that had Cooper J been sitting on the Christie Case, he would have sided with Wilcox CJ and Spender J.

4. *The Inherent Requirements Defence — a Comment*

No doubt it would be administratively easier for Qantas if it could lawfully terminate pilots who turn 60. The inability of 60 year old pilots to captain flights on many of the international routes places burdens upon both Qantas and on younger pilots. This is because if older pilots are confined to certain routes, the younger pilots must take up the slack. Whether or not this burden is fair depends upon the numbers of older pilots who may wish to continue flying after their 60th birthdays. When our laws prohibit employers from terminating employees on the grounds of physical or mental disability, age or even pregnancy, they are giving teeth to a public policy that these characteristics should not automatically lead to termination unless in all the circumstances the persons concerned cannot perform the essence or inherent requirements of the job.

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32 Above n28.
33 [1996] EOC para 92-863.
34 Id at 77, 062.
35 Ibid.

Although neither the IRA nor the WRA contains an unjustifiable hardship defence as does the DDA, in my view, the inherent requirements defence cannot be separated from employer and fellow employee accommodations which do not amount to an unjustifiable hardship. I agree with Gray and Marshall JJ that the inherent requirements defence must be narrowly confined so as to uphold the policy of non-discrimination in employment terminations. However, there is much force in the practical approach of Wilcox CJ and Spender J. Without the presence of an unjustifiable hardship defence, judges seeking to redress an unjust discriminatory termination will be required to construe the inherent requirements defence very narrowly indeed. On the other hand, judges who perceive a termination to be fair because of the hardship of necessary accommodations, will broaden the inherent requirements defence. While this type of broadening may do justice in a given case, its consequences may be that as a precedent it may limit the future employability of disabled persons.

The truth is, I suggest, that the inherent requirements concept does not work well as the sole determinant of employability. Gray J is correct when he says that characterising an employee's particular job " ... will often involve matters of impression."[36] This is because the inherent requirements concept cannot be viewed in the abstract and factual situations are required to test its utility. In my own field of employment, for example, is the capacity to read legal texts and decisions one of the inherent requirements of a law professor?[37]

Being totally blind, I am unable to read legal materials with my eyes. However, by using computer-based technology and synthetic speech equipment provided by the University of Sydney, I can have these texts read out to me.[38] In this case, it is preferable to confine the inherent requirements of my position to be those of comprehension and dissemination of legal knowledge. In my opinion, it makes more sense to recognise that I cannot carry out some of the inherent requirements of my position without the provision of some services and facilities which the University does not have to provide to professors without a physical disability.

Surely, the policy behind the DDA, the IRA and the WRA is to prohibit discriminatory terminations unless in all of the circumstances the continuation of the employment would require employer and employee accommodations which are clearly unreasonable. If the inherent requirements defence in the IRA and the WRA is interpreted in this purposive manner, the resolution of the Christie Case is, I suggest, facilitated. The ability of Qantas captains to fly on most of the significant international routes is relevant to their employment.

However, given the policy behind the termination protection laws, the inability of an older pilot to fly on certain routes should not deny her or him continued employment unless the necessary employer and employee

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36 Id at 31.

37 This is not the first occasion in which the Sydney Law Review has published matter personal to the author: Leader-Elliott, I, "Women Who Kill in Self Defence", (1993) 15 *Syd L Rev* 403 at 418-30.

38 Before these recent technological advances, my primary means of obtaining legal information was via persons reading texts into tape recorders.

accommodations amount to an unjustifiable hardship. From my reading of the evidence as set out in the reported judgments, it does appear to me that the altering of the Qantas roster system to accommodate a few over 60 year old pilots is a reasonable accommodation which does not amount to an unjustifiable hardship. If the inherent requirements concept is interpreted in this manner, it will facilitate the employment of disabled persons because it will take the focus away from all or nothing inherent requirements and place jobs in a reasonable accommodations setting.

If this rather broad reading of the defence is one which does not lend itself to the High Court judges, then to ensure fairness in this matter then a narrow reading of the inherent requirements defence for the policy reasons outlined by Gray J is, I suggest, the next best option. In my view the Parliament should remedy the omission of an unjustifiable defence by inserting one into section 170CK of the WRA.

5. *The Contractual Question*

The termination protection laws only give employees a remedy when their employment has been terminated by their employer.[39] Qantas argued that it did not terminate Mr Christie, but that his contract ended on his 60th birthday by effluxion of time.

When Mr Christie was first employed by Qantas in 1964, no retirement age was specified in his contract of employment. However, as his contract was terminable upon the giving of notice the omission of a termination date upon retirement is understandable. It was common ground that at that time the practice was for pilots to retire at 55. In 1989, the Australian Industrial Relations Commission certified an agreement between Qantas and what is now known as the Australian International Pilots Association. This certified agreement appears to have been an up-dating of prior unregistered agreements contained in letters and other documents. In one of these letters, it was stated that pilots could elect to continue flying up until their 58th birthday. However, the position changed in January 1991 when it was agreed that pilots could elect to continue flying up to their 60th birthdays. This agreement was not certified by the Australian Industrial Relations Commission, and at best it has the status of an unregistered agreement between Qantas and the International Pilots Association. Christie did make written elections to continue flying until he turned 60. However, in July 1994, after the coming into force of the termination protection laws, Christie wrote to Qantas requesting that he be allowed to fly after his 60th birthday.

At first instance, Wilcox CJ held that neither the certified agreement nor the 1991 unregistered agreement varied Christie's contract which was terminable upon notice.[40] On appeal, Marshall J agreed with Wilcox CJ and held

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39 Under s170CB of the IRA relevant expressions, including termination of employment, are given the same meaning as they possess in the Termination Convention. Under art. 3 of the Termination Convention, termination of employment must be at the initiative of the employer. Section 170CD(1) contains a definition of "termination of employment" which also provides that the termination must be by the employer.

40 Above n1 at 21-2.

that the agreements did not vary Christie's contract.[41] For Gray J, however, it was unnecessary to decide this issue because the enactment of the termination protection laws in the IRA changed the rules of the game. Once the termination protection laws became operational, and once Christie stated that he wished to rely upon them to keep flying, the refusal of Qantas to permit him to do so amounted to a termination by Qantas.[42] Spender J held that Christie's written elections to continue flying after his 58th birthday amounted to a "factual adoption"[43] of the agreement whereby Christie recognised that his contract of employment would terminate on his 60th birthday, and therefore Qantas did not terminate his employment.

Given the recent pronouncements by the High Court in *Byrne v Australian Airlines Pty Ltd*,[44] it is clear that neither the certified agreement nor the 1991 unregistered agreement varied Christie's contract. It is also difficult to accept the view of Spender J that the elections by Christie meant that he had adopted the agreements. As was pointed out by the High Court in *Byrne*,[45] the terms of an agreement do not automatically vary employment contracts without their express adoption. In my view, the standard form election letters by Christie without more, did not lead to a variation of his contractual rights and obligations.[46] The straightforward approach of Gray J is to be preferred.

When the termination laws came into force they gave persons like Christie protection from age discrimination. In my opinion, when new laws come into force and persons expressly seek their protection, a legal system should only withhold that protection in extraordinary and exceptional circumstances. In the Christie matter, I suggest, no extraordinary or exceptional circumstances exist and Mr Christie should be granted a remedy because he has suffered a discriminatory termination.

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41 Above n2 at 45.
42 Id at 30.
43 Id at 25.
44 (1995) 131 ALR 422; and see also *Ryan and Anor v Textile Clothing and Footwear Union Australia and Anor* (1996) 66 IR 258.
45 Id at 428-9 per Brennan CJ, Dawson and Toohey JJ, 442-3 per McHugh and Gummow JJ.
46 Above n2 at 19, 30 per Gray J; and see also *National Coal Board v Galley* [1958] 1 WLR 16; and *Edwards v Skyways Ltd* [1964] 1 WLR 349.