BOSTIK (AUSTRALIA) PTY LTD v GORGEVSKI (No 1)

Industrial Division: Sheppard, Gray and Heerey JJ

Victoria District Registry

2, 3, 4 March; 14 May 1992

Industrial Law — Wrongful dismissal — Award — Breach — Employer's rule against smoking — Immediate dismissal for breach — Whether dismissal "harsh, unjust or unreasonable" in the circumstances — Industrial Relations Act 1988 (Cth), s 178 — Manufacturing Grocers Award 1985, cl 9.

Contract — Breach — Wrongful dismissal — Damages — Assessment — Whether failure to mitigate loss — Whether employment would have continued indefinitely — Discounting.

Words and Phrases — "Harsh, unjust or unreasonable".

The respondent employee was covered by the Manufacturing Grocers Award 1985, cl 9(b)(vi) which provided that termination of employment by an employer, whether with or without notice, "shall not be harsh, unjust or unreasonable". The appellant employer dismissed the respondent for breaching a strict company rule against smoking. The respondent recovered a penalty for breach of the applicable award imposed pursuant to s 178, *Industrial Relations Act* 1988 (Cth) and substantial damages for breach of contract. On appeal,

Held, dismissing the appeal: (1) A court must decide whether the decision of the employer was, viewed objectively, harsh, unjust or unreasonable.

(2) The employer was bound both by the Award and by the implied term in the contract of employment not to dismiss the respondent harshly, unjustly or unreasonably. No policy, whether or not promulgated with the agreement of unions at the workplace or even of the respondent himself, could vary that constraint.

(3) Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances, be harsh, unjust or unreasonable.

(4) By Sheppard and Heerey JJ. The primary judge found that the respondent did not trust the appellant's word. It would be out of the question in those circumstances to hold that he had failed to mitigate his damages because he had not taken advantage of a prospect of settlement of the matter by returning to his former employment.

(5) By Sheppard and Heerey JJ. The employee's entitlement to damages must be considered upon the basis that, were it not for the unlawful dismissal, it was likely that the employment would have continued indefinitely. Nevertheless, one of the things that would need to be weighed up in reaching a conclusion would be the possibility that the employment might have come to an end as the result of a lawful dismissal which was not harsh, unjust or unreasonable.

Gunton v Richmond-upon-Thames London Borough Council [1981] 1 Ch 448, distinguished.

(6) By Sheppard and Heerey JJ. The appellant argued that the trial judge did not make it clear whether or not the dismissal was harsh, unjust or unreasonable

because of "procedural unfairness" and that if the defects in the dismissal were procedural the respondent could only claim damages for as long as it would have taken to carry out the correct procedure. The point was not taken before the trial judge. In any event, the underlying cause of the dismissal was the view the appellant took that its no smoking policy had to be applied regardless of the circumstances of the case. Had the appellent carried out the more formal and meticulous procedures, the decision would have been no different. That decision was rightly held by the trial judge to be harsh, unjust and unreasonable and the actual procedure which the appellant adopted was merely incidental.

Per Gray J. An employer genuinely investigating an allegation of misconduct or neglect of duty, or some other act or omission which might provide a ground for dismissal, is required to carry out a proper investigation, and not merely go through the motions. The employer is required to ascertain whether there are any mitigating factors, either associated with the alleged ground for dismissal, or arising from the employee's past record and future prospects. An employer is unable to overcome procedural deficiencies by establishing to the satisfaction of the court that the dismissal concerned would not be harsh, unjust or unreasonable on substantive grounds.

Consideration by Gray J of the extent to which breaches of the contract of employment attract the remedy of specific performance, and whether a party's choice not to pursue that remedy can be held against him or her on the issue of mitigation of damages.

APPEAL

Dr C N Jessup QC and *N J D Green*, for the appellant.

J L Bourke, for the respondent.

Cur adv vult

14 May 1992

SHEPPARD and HEEREY JJ. The appellant Bostik (Australia) Pty Ltd (the company) dismissed its employee Dimitrja Gorgevski (the respondent) for breaching a strict company rule against smoking. The respondent recovered a penalty for breach of the applicable award imposed pursuant to s 178 of the *Industrial Relations Act* 1988 (Cth) and substantial damages for breach of contract. (See *Gorgevski v Bostik (Australia) Pty Ltd* (1991) 39 IR 229.) The company appeals against that judgment.

At the site where the respondent worked the company operated a glue factory. Highly inflammable chemicals were stored there. In Melbourne in recent times there have been some major industrial fires which have posed serious risk to life and health as well as causing extensive property damage. We wish to make it clear at the outset that nothing we say should be taken as in any way minimising the risk which such fires create or suggesting that the company was anything other than properly concerned in avoiding them.

The respondent

The respondent is aged 54. He migrated to Australia from Yugoslavia in 1965. He had been educated to Grade 4 level. He commenced work with the company at their factory in High Street, Keilor Park in about 1968 and continued to work there up until his dismissal on 27 August 1990, apart from a six-month period in 1972 when he returned to Yugoslavia for a holiday.

In about 1980 he was promoted to leading hand and held that position until his dismissal. He was responsible for the supervision of seven workers. He was a good worker, punctual and rarely absent from work. He has no specialised trade or occupational skills.

The respondent's command of English was an issue before the learned trial judge. The respondent himself, who gave evidence through an interpreter, said that his English is poor and that he has a very limited capacity to read and write English. His first language is Macedonian. His son gave evidence and described the respondent's ability to speak English as poor. The son said that the only thing as far as he was aware that his father could read were the soccer and football results on the newspaper back pages, but only the results and not any description of the games. The company called evidence to the effect that the respondent was able to understand English for working purposes including complying with directions on the labels of products. His work included completing internal documentation in English and carrying out stocktaking. None of the documents said to have been used or read by the respondent was tendered. The learned trial judge found that the respondent's command of English was substantially as he claimed. Although challenged on appeal, we think this finding was clearly open on the evidence.

The company's no smoking policy

There was no evidence of the company formally promulgating any no smoking policy prior to May 1988. The respondent said that until then there were "No Smoking" signs placed near the entrances of doorways but that the policy was not strictly enforced and workers would often smoke on the factory floor. On 25 May 1988 a memorandum was issued by the operations manager for distribution to all staff. The notice stated where smoking was and was not permitted and concluded "This policy will be strictly enforced and failure to adhere to it may result in dismissal from the company". The respondent said that in early 1989 the production manager of the area where he worked told workers that smoking on the factory floor was no longer permitted and that if they wanted to smoke they should go to the toilets. However the memorandum of 25 May 1988 had included toilets among the areas where smoking was prohibited.

On 20 November 1989 the personnel manager issued a memorandum noting that as a result of a meeting between management and on-site union representatives a smoking policy had been agreed on. Features of this policy were that smoking was not to be permitted except in certain specified areas. The memorandum stated that smoking outside those areas "... will be treated as a very serious breach of safety regulations which can result in instant dismissal".

In late 1989 a worker called Glennie was found smoking in a prohibited area and was suspended for two weeks. The respondent was aware of this at the time and said that the particular location was one of the most dangerous locations in the factory. The company's personnel manager, Mr C J Needham, said in his evidence that the intention initially had been to dismiss Glennie but it was discovered that there had been another case of smoking about two weeks previously involving another worker who had received only a severe reprimand. Therefore the company felt the only appropriate outcome was to suspend Glennie but as a result of this incident it was

resolved, as Mr Needham put it, "to try and clarify once and for all the ground rules of the future".

On 15 February 1990 there was a meeting between management and union occupational health and safety representatives. The *Occupational Health and Safety Act* 1985 (Vic) provides for the establishment of health and safety committees but this was not, on the evidence, a meeting of such a committee. As a result of the meeting a number of steps were taken. Smoking areas were designated within the plant and marked by diagonal green stripes. On the first pay day after 19 March a notice was handed to all staff. The notice was in the following terms:

BOSTIK Interoffice Correspondence

Date: 19 March 1990
To: NOTICE TO ALL STAFF
From: W Boledziuk
Subject: SITE RESTRICTIONS ON SMOKING
Copy:

During recent meetings between management and all on-site unions it was agreed that for the safety of all of us that we must continue to operate as a NO SMOKING SITE.

The ONLY exception to this rule is that smoking will be allowed within designated Smoking Areas (as agreed with union representatives). These areas are shown on the attached map. To avoid any doubt about these areas, signs have been erected indicating the smoking areas and all open smoking areas have been surrounded by a broad green line. Please note all remaining areas of the site including all roadways, car parks, (including inside of employees' cars), changing rooms and toilets are NO SMOKING AREAS.

It has been agreed with all on-site unions that effective from Monday 26th March, 1990 that ANY employee found to be smoking anywhere on-site other than inside the designated smoking areas will be INSTANTLY DISMISSED.

If you have any doubts about the location of the smoking areas or any other aspect of this policy, please contact your supervisor, union or safety representative.

With the above in mind, the company management and employee representatives urge each of you to abide by the smoking restrictions outlined in this notice to ensure a safer working environment for all of us.

W Boledziuk
WB:kyc

The notice was accompanied by a plan of the site with designated smoking areas marked. There appear to be at least 32 separate areas.

This notice and the ones previously referred to were published only in English despite the fact that of the 200 to 220 workers employed at the plant, nearly all were people who did not have English as their first language. About 35 were Macedonian. The respondent's evidence was that he saw the circular of 19 March and knew there was a new policy but did not know that anybody smoking in a non-smoking area would be instantly dismissed. His

state of mind as to this was influenced by the fact that recently somebody had been caught and suspended for two weeks.

On 22 March 1990 there was a compulsory meeting of leading hands and supervisors called specifically to convey the new policy to them. It was addressed by management representatives, including Mr Needham. The respondent denied that he was at that meeting and his denial was accepted by the learned trial judge. A challenge to that finding was at the forefront of the company's case on this appeal. We shall return to this issue a little later.

Respondent caught smoking

On 27 August 1990 at about 10.20 am the respondent was working in his usual location in the plant, an area known as the Boston production room. He was on a mezzanine floor which measured approximately 24 x 7 m. Bags of chemicals and drums of liquid chemicals were stored along the walls. The mezzanine is reached by a flight of stairs. Towards the other end and against the wall there is a desk and immediately in front of it an area about two metres square where the floor is marked by green stripes as a smoking area. Behind the desk is a partly obscured sign which appears to bear the words "This is a smoking area".

The respondent was working about halfway between the desk and the stairs. Another employee, Mr Kiu Hing Kuang, was at the desk. Ms Janette Nichterlein, who is an occupational health and safety officer employed by the company, went to the mezzanine floor to give a pair of disposable overalls to Mr Kuang. As she walked from the top of the stairs she spoke briefly to the respondent and then continued on towards the desk. The respondent followed her and there was a brief conversation at the desk about Mr Kuang's overalls. Ms Nichterlein then turned around and walked back towards the stairs. The respondent went with her. About 7 m from the smoking zone she noticed that the respondent had an almost finished cigarette with a long ash on it held within the palm of his right hand. She said to him that the smoking zone was by the desk and in that area only. The respondent said that it was "quite all right here". She then continued on towards the stairs. Shortly afterwards she reported her observations to her superiors.

The respondent's version was that he was smoking in the smoking zone when Ms Nichterlein approached and started talking to him. He moved closer in order to hear her and she pointed out that he had moved out of the smoking zone and should butt his cigarette. He said that at that time he had one foot still within the smoking area. He then turned back and butted the cigarette.

His Honour accepted Ms Nichterlein's account of these events. Indeed, he regarded the episode she related as corroborating the respondent's claim that he did not know that the new policy demanded instant dismissal for smoking outside smoking zones. If the respondent had known this, his Honour commented, it would have been quite absurd for him to have walked alongside Ms Nichterlein with a lighted cigarette in his hand when he could have stayed where he was when she first spoke to him; she had not then observed that he had a lighted cigarette in his hand. Equally, of course, having reached the safety of the smoking zone without discovery, it seems unlikely that he would have accompanied her as she returned towards the stairs.

On appeal, the company argued that the acceptance of Ms Nichterlein's version should have led his Honour to conclude that the respondent was an unreliable witness, not only in relation to the events of 27 August 1990, but in relation to other matters as well. In particular, his Honour should either have concluded that the respondent was present at the meeting on 22 March when the new policy was explained and did understand the purport of the notice given him in his pay packet on 19 March 1990, or at least his Honour should have expressly indicated in his reasons that the respondent's unreliability in relation to his account of the incident of 27 August 1990 had been taken into account in weighing up the evidence. We do not accept this argument. As the tribunal of fact, his Honour was not obliged to accept or reject the respondent's evidence in toto. He could accept some parts and reject others. Furthermore, he was not required to state exhaustively all matters which he took into account in reaching his conclusion: cf *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179.

The dismissal

About half an hour after Ms Nichterlein had reported the incident the production manager, Mr Ray Watts, called on the respondent and asked him to come to Mr Needham's office. Ms Nichterlein was already there. Mr Needham put to the respondent that Ms Nichterlein had reported him smoking. According to Mr Needham, the respondent acknowledged this. The respondent says that he told Mr Needham he was smoking in the designated smoking area. In any event, Mr Needham suspended him immediately in order to speak to other company staff about the matter. The respondent was told to go home. Later that day Mr Needham telephoned him and told him that he was dismissed.

Actual hazard

There was evidence as to the actual hazard created by the respondent's smoking in the area where Ms Nichterlein said he was. His Honour found that smoking in that place did not constitute any hazard at all to the safety of the factory or the persons employed there and that there was no greater risk than there would have been had the respondent been smoking within the designated area. This finding was not challenged on appeal.

The Award

Although the respondent worked in a glue factory he was, for reasons that do not emerge from the evidence, covered by the Manufacturing Grocers Award 1985 (the Award). The Award provided that employees would be engaged by the week and that in order to terminate employment the employer was required to give a period of notice which varied according to the continuous service and age of the employee. In the case of the respondent, by reason of his service and age he would have been entitled to five weeks notice. Under cl 9(b)(v) that period of notice was not to apply in the case of, amongst other things, "dismissal for conduct that justifies instant dismissal". Clause 9(b)(vi) provided that termination of employment by an employer, whether with or without notice, "shall not be harsh, unjust or unreasonable". Clause 9(b)(vii) provided a machinery for dealing with claims in respect of dismissals alleged to be in breach of cl 9(b)(vi). Clause 9(b)(vii)(4) provided that if the matter was not settled as the consequence of discussions provided for in earlier paragraphs, "it shall be submitted to the

Australian Conciliation and Arbitration Commission whose decision shall, subject to any appeal in accordance with the [Conciliation and Arbitration] Act, be final".

Commission proceedings

On 30 August 1990 the respondent applied to the Victorian Industrial Relations Commission seeking "reinstatement/compensation". For jurisdictional reasons, that application did not proceed.

The company notified the Australian Industrial Relations Commission of the dismissal. Hearings took place on 11 and 19 October 1990. At these hearings the respondent stated that he did not want reinstatement, but only compensation. The evidence as to the proceedings before the Commission will be considered when we discuss the issue of damages.

Federal Court proceedings

On 20 December 1990 the respondent commenced proceedings in the Federal Court seeking a penalty under s 178 of the *Industrial Relations Act* for breach of the Award and also damages for breach of an implied term that termination of his employment should not be harsh, unjust or unreasonable. The respondent, in reliance on the decision of the Full Court in *Gregory v Philip Morris Ltd* (1988) 24 IR 397, contended that the provisions of the Award as to termination of employment were implied terms in his contract of employment sounding in damages for breach. In the hearing before us the company did not challenge the correctness of *Gregory* (supra).

On 18 September 1991 the learned trial judge gave judgment in favour of the respondent. He ordered that the company pay to the respondent a penalty of $700 for breach of the Award and also damages in the sum of $195,000. Leave was reserved to have the matter relisted in respect of the respondent's application for interest.

A one-way ticket to High Street

As we have noted, the respondent denied that he was present at the meeting of 22 March 1990. There was no direct evidence that he was, the nearest approach being evidence that he was at work on that day and as a leading hand "should have attended" the meeting. Perhaps surprisingly in light of the company's determination to use actual knowledge gained at the meeting as a moral underpinning for the extreme sanction of instant dismissal for breach of the no smoking policy, no record was kept of those attending the meeting.

However the company also relied on some circumstantial evidence, which was to the following effect. Mr Raymond John Watts, the production manager, said that he attended the meeting on 22 March and that two operations managers, a Mr Johns and a Mr Hobson, had addressed the meeting. He said that one of those managers, he was not sure which, made a statement that "If you are caught, you will get a ticket out the gate, or words to that effect anyway". Mr Needham also said that he was present at the meeting and that he recalled Mr Hobson saying that if you smoke "You will get a one-way ticket to High Street". Mr Needham said that this expression stuck in his mind because "it is an unusual way to put it".

It will be recalled that one of the people working under the respondent was Mr Kiu Hing Kuang. Notwithstanding its apparent confidence in the

capacity of its employees to understand and speak English, the company called Mr Kuang to give evidence through an Indonesian interpreter. He said that the respondent had told him that if he was caught smoking outside a smoking zone he would have a "one-way ticket to High Street". He took this to mean that he would be dismissed. He remembered the smoking zone in the production room being decided upon and marked after discussion between Mr Needham and the respondent. He says that both told him that he was not allowed to smoke outside the designated smoking zone.

Mr Kuang's evidence was not challenged by the respondent. In his own evidence he admitted using the expression "one-way ticket to High Street" but said that he meant it jokingly.

The company argued before us that the respondent's knowledge of the policy was to be inferred as a matter of the strongest probability from the unchallenged evidence of Mr Kuang and that his Honour's failure to advert to that evidence amounted to a misdirection and a miscarriage of the trial.

The following passage from his Honour's judgment is relevant on this issue. His Honour said (at 232):

> "The [respondent] saw the notice of 19 March 1990 and knew that it was about a new 'smoking policy' but he was not aware, until after he was found smoking on 27 August 1990, that the notice stated that any employee who smoked on-site, except in a designated smoking area, would 'be instantly dismissed'. He was not aware, either from that notice or from any other source, before 27 August 1990 that he could be dismissed for smoking in a non-designated area (transcript, pp 86, 120); he was aware that two employees in late 1989 had been suspended — not dismissed — for smoking."

His Honour then went on to make the comment about the significance of Ms Nichterlein's evidence to which we have already referred.

In *Abalos* (supra) McHugh J, with the concurrence of all other members of the court, said (at 178):

> "... where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion': see *Watt (or Thomas) v Thomas* [1947] AC 484 at 488."

The facts of *Abalos* illustrate how difficult it can be for an appellant seeking the reversal of a finding of fact of this nature.

The important point to be made is that the two transcript references given by his Honour are to passages where the respondent was cross-examined about the "one-way ticket to High Street". Thus his Honour makes it quite clear that he had in mind this evidence when he made the finding as to the respondent's awareness either from the notice or "any other source" about the penalty for smoking. "Any other source" obviously must include the meeting of 22 March. His Honour did not expressly advert to Mr Kuang's evidence. But, as counsel for the respondent stressed to us, there was no difference of substance between the evidence of Mr Kuang and that of the respondent. The respondent agreed that the words had been said. His only qualification was that the words were said "jokingly". There was thus no occasion for his Honour to refer to Mr Kuang's evidence. He did have to

make up his mind whether the respondent did intend the words "to have been used jokingly". His Honour appears, at least inferentially, to have accepted the respondent's evidence in this respect.

Having made it clear that he did not overlook the "one-way ticket to High Street" evidence, we do not think his Honour was obliged to spell out explicitly what conclusion he drew from it or why he nevertheless accepted the respondent's denial of attendance at the meeting. The very fact that the phrase was a catchy and memorable one raised the distinct possibility that it might have been passed on from people who were at the meeting and thus come to the respondent's attention even though he was not at the meeting himself. While one might accept that it was used and understood as a vernacular euphemism for dismissal, it by no means follows that it necessarily conveyed the meaning that the company now seeks to place on it, namely, that a breach of the no smoking rules, however inadvertent or trivial in consequence, or good the record of the employee, would result in instant and automatic dismissal, however devastating the effect on that employee. It is equally open to the construction that dismissal was a possible penalty that anyone breaking the rules risked.

As an alternative, the company argued that it had reasonable grounds to believe and did in fact believe that the respondent knew of the sanction of instant dismissal. This argument does not appear to have been put to the learned trial judge. In any case, we think there would be difficulty in accepting such an argument in light of the inadequacy in the way in which this policy was brought home to the company's multi-lingual workforce.

Harsh, unjust or unreasonable

These are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge's view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employer. Any harsh effect on the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee's misconduct.

In the present case, although the company's no smoking policy was of course a very relevant matter, in the end what his Honour had to determine was whether, in all the circumstances, the dismissal of the respondent was harsh, unjust or unreasonable.

Practically speaking, what seems to have created the problem here is that those who decided to dismiss the respondent did not advert to the provisions of the Award and regarded themselves as being bound by the company's own policy, even though they sympathised with the respondent's position and, as Mr Needham said, "felt sick" about him losing his job. The employer was bound both by the Award and by the implied term in the contract of employment not to dismiss the respondent harshly, unjustly or unreasonably. No policy, whether or not promulgated with the agreement of unions at the workplace or even of the respondent himself, could vary that constraint. It was put to us by counsel for the company that an employer is entitled to the service of his employees and at the centre of that is the obligation of the

employees to do what they are told. It was said that if instructions are sufficiently clear and the consequences of a breach of those instructions brought home, then if the instruction is disobeyed, dismissal can never be harsh, unjust or unreasonable because the employer "has laid it squarely on the line to the employee in the first place". We doubt whether such an approach can survive the introduction of such provisions as cl 9(b)(vi) into awards and employment contracts as a consequence of the 1984 decision of the Conciliation and Arbitration Commission in the *Termination, Change and Redundancy Case* (1984) 8 IR 34. Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.

Damages

His Honour awarded the respondent damages in the sum of $195,000 for wrongful dismissal. He did so on the basis that the dismissal clause in the award was incorporated into and formed part of the contract of service or that it was an implied term of that contract. In this respect he applied the judgment of Wilcox and Ryan JJ in *Gregory v Philip Morris Ltd* (at 422). The court had jurisdiction to entertain that claim because of its accrued jurisdiction: see *Gregory* (at 422-423). No submission was made to us that his Honour in adopting this course was guilty of any error.

His Honour said that no challenge had been made to any of the figures set out in the respondent's particulars of loss and damage as finally amended on 15 August 1991. Those particulars were divided into three parts. These were as follows:

Net loss of superannuation entitlement:	$ 16,000
Past loss of income:	$ 23,909
Future loss of income:	$198,800

There was no dispute before his Honour, nor before us, in relation to the loss of the superannuation entitlement and the past loss of income. His Honour did reduce the amount of the superannuation loss, but that was not the subject of any challenge before us. The respondent's solicitors had discounted the figure of $198,800 by 20 per cent to allow for what were described as the vicissitudes of life. That would have reduced the figure of $198,800 to $159,000, or so the particulars said.

His Honour said that counsel for the respondent had informed him that, if he wished to put in submissions as to the principles relating to damages and the application of those principles to the present case, he would do so in his reply. His Honour said that no such submissions had been made. This is common ground. His Honour then said (at 240):

> "Having considered the figures put forward by the applicant's counsel, I have come to the conclusion that the applicant's claim for an award of damages totalling $219,150 must be reduced by reference to two matters. The first matter is that the applicant's allowance of a 20 per cent reduction for the vicissitudes of life is too low in my opinion. On the evidence before the court it is difficult to assess what the reduction should be, eg whether it should be 25 per cent or 30 per cent. The second matter is that the applicant's figures do not appear to make any allowance for the fact that he received $15,150 from the superannuation

> fund when dismissed, aged nearly 54 years, whereas, had he remained in the respondent's employment, he would not have received his payment from that fund until he attained the age of 66 years. Making the best assessment that I can on the evidence before the court — which did not include medical evidence as to the applicant's state of health — I have decided to award a total figure of $195,000 for damages."

Earlier his Honour had said that he accepted all the evidence given by the respondent in relation to his attempts to find alternative employment. He also accepted the evidence of Mr Marr, the Regional Manager of the Preston office of the Department of Employment, Education and Training. His Honour remarked that Mr Marr was not cross-examined.

The respondent's evidence to which his Honour referred was to the following effect. The respondent said that he did not feel comfortable about going back to work with the company. He said that he did not trust their word. He said that he had been unemployed since his dismissal. He had looked for work but could not find any. He said that he had been to several factories and he gave the names of some of these. He also said that he went to some smaller factories in Thomastown but he did not remember their names.

Mr Marr was asked to assume the case of a person aged 54 years living in Thomastown and who had poor English reading, writing and speaking skills. He was asked to assume further that the person had spent almost his whole working life with one company since arriving in Australia in 1965 doing unskilled work. He was asked further to assume that the person had been a leading hand in a glue factory until his summary dismissal in August 1990 (the evidence was given in August 1991). On the basis of those assumptions, Mr Marr was asked what he considered the prospects of employment would be in the immediate two or three years. Mr Marr said that they would be very limited. He was then asked whether those prospects would be likely to improve in 5 or 10 years time. Mr Marr said: "Projections are that the manufacturing industry will remain stable in a depressed situation for the next 5 years and that there might be a gradual increase after that ..." His evidence continued:

> "Q. But supposing in 5 years time there has been some upturn in the economy as a result of which there is more employment in general in the manufacturing industry, what are the prospects as best you can express an opinion on the matter of a man who by then will be either 60 or almost close to 60? A. They would be very poor."

The principal challenge made to the amount of the award of damages was a submission that the respondent had failed to mitigate his loss. It was said that the respondent had not participated in a dispute resolution procedure in the Industrial Relations Commission with a view to securing a favourable settlement or a recommendation that he be re-employed. This submission had not been relied upon before his Honour and counsel for the respondent objected to it being relied upon in the appeal.

The submission is based upon evidence given by Mr Needham. His evidence in relation to it was as follows:

> "Q. I am suggesting to you, you would not have been prepared to have Jimmy back at Bostik when at the same time you had an — if at the same time you had an employee taking on the company by litigating with respect to his dismissal in connection with the no smoking policy?

A. No, I am not accepting that proposition as such. What I am saying is that at any point up to really the point where the matter was concluded we thought in the Commonwealth arena, at any point up to that time there was the capacity for negotiation and the opportunity for — to have an agreement which would include Jimmy very likely coming back after the shut down.

Q. But in terms of the capacity to have an agreement, it would have had to have been a condition that Jimmy not take on the policy by litigating over his dismissal? A. If I may say, I believe that that's putting the wrong order of events — or it is using the wrong order of events, because in the Commonwealth hearing — up to the time of the Commonwealth hearing the — we believed that Jimmy was after reinstatement, and there was always the capacity to make a deal which involved the possibility of re-employment, okay? But at the second hearing, in fact at both hearings of the Commonwealth Industrial Relations Commission, at both hearings Jimmy — at the first one he stunned everyone by saying, 'I don't want reinstatement, I just want compensation', and at that point that is a change, because he wasn't looking to get his job back."

The reference by Mr Needham to the "Commonwealth arena" is a reference to the proceedings in the Commission.

Later Mr Needham gave the following evidence:

"Q. You have indicated that by the time the matter came on before the Federal Commission in October 1990, it was well known at Bostik that Jimmy was attacking the policy, or taking on the company? A. Yes, I think that would be reasonably well known, yes.

Q. And you felt from that — then on that your company could not be seen to be taking Jimmy back? A. From the point of the Commonwealth hearings?

Q. Yes? A. Yes, that's correct. But might I add, Jimmy himself had indicated he didn't want to come back.

Q. Yes. But, if he had have indicated he wanted to come back, you felt, given that it was public knowledge at Bostik that Jimmy had stood up to the policy — stood up to the company, you felt you could not then take him back in those circumstances? A. The public knowledge of the policy and the impact on the policy determined from that point that we didn't believe it was viable to take him back, no.

. . .

Q. Well, it was certainly well known throughout the factory that Jimmy had been sacked? A. Yes, yes.

Q. And if someone had have got wind that Jimmy had issued an unfair dismissal application in the Victorian Commission, it would not have taken long to spread around Bostik? A. No, it probably wouldn't have.

Q. Yes. So maybe the case then, in fact, only a few days after service of the application, unfair dismissal, everyone at Bostik or a lot of people at Bostik may have known that Jimmy had been taking on the company? A. It's a possibility. It's hard to say, it's hard to draw lines as to exactly when that was. All I can tell you is that by the time there had been a very definite court case, Commonwealth hearing, two hearings in fact, and at the point where Jimmy was then indicating he didn't want to

> come back that's where it seemed to us — well, that's where the matter was. I mean there wasn't really much scope, if a person didn't want to come back there was no expectation that we would be taking him back. And it certainly was public knowledge by about that time; I just can't tell you how quickly it spread, that's all."

His Honour made no findings about this evidence because he was not asked to do so. The submission now under consideration was not made to him. The case based on failure to mitigate upon which the company relies is that it was willing to consider the reinstatement of the respondent down to the time when he told the Commission that he wanted compensation; he did not want his job back. By indicating that he wanted money and not his job he brought to an end any prospect of an amicable solution which could have resulted in his being re-employed.

If one reads the whole of Mr Needham's evidence about this matter, but particularly each of the passages which have been quoted from it, it becomes apparent that his evidence is not clear-cut. He conceded in the last of the quoted answers that it was a possibility that at the point of time referred to a lot of people at Bostik may have known that "Jimmy had been taking on the company". The position is exacerbated when one considers the evidence which the respondent gave, and which his Honour expressly accepted, that he was concerned about going back because he did not trust the company's word.

If one were to contemplate entertaining the submission that there had been a failure to mitigate, one would need precise findings in relation to Mr Needham's evidence. These were not made because there was no occasion for his Honour to consider the matter. In those circumstances we are of the opinion that the company ought not be entitled now to rely upon the submission for the first time. If this were not our view, there would still be substantial difficulty in the path of the company. A contract of service has always been acknowledged as a personal thing. Normally, breaches of such contracts do not attract the remedy of specific performance: see R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (2nd ed, 1983), par 2011. His Honour has found that the respondent did not trust the company's word. It would be out of the question in those circumstances to hold that he had failed to mitigate his damages because he had not taken advantage of a prospect of the settlement of the matter by returning to his former employment.

In the course of the submissions about the amount of damages to be awarded, there was general discussion about the assessment of damages in a case such as this. The contract in question is a contract of employment which is terminable by either party on giving to the other the applicable period of notice provided for in the award. Where an employee is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of the dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so: see *Gunton v Richmond-upon-Thames London Borough Council* [1981] 1 Ch 448 at 469, per Buckley LJ. Buckley LJ there referred to

McGregor on Damages (13th ed, 1972), pars 884, 886 and 888. We refer also to the current edition of *McGregor* (15th ed, 1988), par 1171. We also refer to *Chitty on Contracts* (25th ed, 1983), Vol 11, par 3522; (26th ed, 1989), Vol 11, pars 4014 and 4015. It is to be observed that the current editions of *McGregor* and *Chitty* refer to certain legislative provisions in force in the United Kingdom which have modified the common law position there.

The common law principles do not assist the company in the present case because of the provisions of cl 9 of the Award which forms part of the contract of service. It provides in effect that the employer may not dismiss an employee, whether with or without notice, if the dismissal is harsh, unjust or unreasonable. It follows that the respondent had substantial security in his employment because he could not be dismissed unless the dismissal was not harsh, not unjust or not unreasonable. His Honour therefore had to consider the matter upon the basis that, were it not for the unlawful dismissal, it was likely that the employment would have continued indefinitely. This approach was charted for his Honour by the decision in *Gregory* (at 425-426). Nevertheless, one of the things that would need to be weighed up in reaching a conclusion would be the possibility that the employment might have come to an end as the result of a lawful dismissal which was not harsh, unjust or unreasonable, such as it might if the company were to close its factory or engage in a policy of retrenchment of all or some of its staff.

So far as we can discern, no submission about any of these matters was made to his Honour by counsel for the company. That no doubt explains why his Honour did not deal with them.

There is a question whether, in all the circumstances, his Honour should have discounted the amount to be awarded by more than 25 or 30 per cent to allow for what he described compendiously as the vicissitudes of life. Having looked at the matter as a whole and having taken into account the evidence to which we have referred, the absence of cross-examination in relation to much of it and the absence of submissions about the overall amount, we are not persuaded that there is any error disclosed in his Honour's approach or in the overall amount which he awarded. The award is unquestionably a high one, but having regard to the entirety of the material which was before his Honour, we are unable to conclude that there is any basis for saying that his discretion miscarried.

Before leaving this part of the case, we should mention that the calculations provided by counsel for the respondent at the trial were based on gross earnings. Income tax was not deducted. His Honour accepted this approach as correct: cf *Wheeler v Philip Morris Ltd* (1988) 32 IR 323. No submission to the effect that the calculations should have been based on after tax earnings was made to his Honour or to us.

It remains to deal with a submission by counsel for the company that his Honour's assessment did not make it clear whether or not this was a dismissal which was harsh, unjust or unreasonable because of procedural unfairness. We have reservations whether the expression "procedural unfairness" is aptly used in relation to this branch of the law. We do not need to decide that matter in this case. All that needs be said is that part of the complaint of the respondent was that he did not get an opportunity to state his case and did not have an interpreter present when he was interviewed by Mr Needham and did not have adequate opportunity to put forward mitigating factors. It was argued that if the defects in the dismissal

were procedural then the respondent could only claim damages for as long as it would have taken to carry out the correct procedure. Reference was made to *Polkey v A E Dayton Services Ltd* [1988] ICR 142 at 156 and *Gunton v Richmond-upon-Thames London Borough Council* (supra).

This was another point not taken before the learned trial judge and in our view there was force in the complaint of the respondent's counsel as to this. If his Honour's attention had been directed to this issue by the company he would have been able to make whatever finding of fact his view of the evidence dictated.

However, in the circumstances of the present case the point seems rather artificial. The underlying cause of this dismissal was that the company took the view that, having formulated its no smoking policy, it had no option but to dismiss the respondent, notwithstanding the long and good service he had given the company, the catastrophic financial consequences for him, the lack of any actual danger in his conduct, and the inadequacy of the way in which the new policy was communicated. It seems that even if the company had carried out the most formal and meticulous procedures the decision would have been no different. That decision to dismiss was we think rightly held by the learned trial judge to be harsh, unjust and unreasonable and the actual procedure which the company adopted was merely incidental.

Orders

The appeal will be dismissed. Counsel wish the opportunity to be heard on the question of whether s 347 of the *Industrial Relations Act* prevents an award of costs. We shall adjourn that question for further consideration and grant leave to the parties to file and serve written submissions within 14 days. The question of interest has not yet been resolved and in the absence of agreement between the parties we reserve liberty for the parties to apply for an order that this question be remitted to the learned trial judge.

GRAY J. I have had the opportunity to read in draft form the joint reasons for judgment of Sheppard and Heerey JJ in this appeal. I agree with the orders proposed by their Honours. With one exception, with which I shall deal, I agree with their reasons for judgment. I desire to add some brief remarks of my own.

Clause 9(b)(vi) of the Manufacturing Grocers Award 1985 (the Award) is a standard clause, found in many awards. It is in terms identical with the clause considered by the Full Court in *Gregory v Philip Morris Ltd* (1988) 24 IR 397 and further dealt with in *Wheeler v Philip Morris Ltd* (1988) 32 IR 323. Those cases make it plain that a dismissal of an employee may be harsh, unjust or unreasonable because it is not justified by any sufficient cause, or because the employer has failed adequately to investigate the facts, or by reason of a combination of the two. In other words, the clause requires that a power to dismiss be exercised other than harshly, unjustly or unreasonably in both substantive and procedural senses: see *Gregory* (supra) at 411-412 and *Wheeler* (supra) at 346.

In the present case, counsel for the appellant argued that the learned trial judge had failed to make a specific finding as to whether the breach of cl 9(b)(vi) was merely procedural and that this failure may have affected the amount of damages to be awarded to the respondent. The argument was that, if the only breach of the clause was in failing to follow the correct

procedures, the respondent would only be entitled to damages up to the time when those procedures would have been exhausted.

I am unable to accept this argument. Although the procedural requirements of the clause will vary according to the circumstances, they are intended to be real. An employer genuinely investigating an allegation of misconduct or neglect of duty, or some other act or omission which might provide a ground for dismissal, is required to carry out a proper investigation, and not merely to go through the motions. The employer is required to ascertain whether there are any mitigating factors, either associated with the alleged ground for dismissal, or arising from the employee's past record and future prospects. It is not intended that an employer should be able to substitute a court proceeding for its own investigation, ie, to overcome procedural deficiencies by establishing to the satisfaction of the court that the dismissal concerned would not be harsh, unjust or unreasonable on substantive grounds.

There may be cases in which the conduct of an employee has been so gross that the court is able to be satisfied that no reasonable employer could have taken any step other than to dismiss, whether or not all appropriate procedural steps had been followed. In such a case, it may be appropriate to award damages only up until the time of the judgment, or such other time as might have marked the completion of appropriate procedural steps. The example posed in *Lane v Arrowcrest Group Pty Ltd* (t/as ROH Alloy Wheels) (1990) 27 FCR 427 at 456 is perhaps intended to represent such a case. In other cases, it cannot truly be said that no relevant breach of the clause arose from a failure to carry out proper procedural steps. Had proper inquiries been made, the employer might have considered that conduct which appeared to justify dismissal at first sight did not do so when all relevant factors were considered.

In the present case, the learned trial judge clearly found that the respondent was dismissed in breach of cl 9(b)(vi) of the Award on both substantive and procedural grounds. In so finding, his Honour was undoubtedly correct. The applicant could not be criticised for desiring to adopt a strict no smoking policy, for the safety of its employees, its premises and the public. It can be criticised for the manner in which it adopted that policy, and for the inflexible application of the policy to the respondent's case. The policy of instant dismissal was plainly adopted without regard to the provisions of cl 9(b)(vi), which it could not override. Instead of following the procedures required by s 37 of the *Occupational Health and Safety Act* 1985 (Vic), under which a health and safety committee is "to formulate, review and disseminate (in such languages as are appropriate) to the employees the standards, rules and procedures relating to health and safety which are to be carried out or complied with at the workplace", the appellant treated the question of a no smoking policy as one for management, after consultation with health and safety representatives. Had there been a health and safety committee, and had it been entrusted with the performance of its statutory function, the no smoking policy and its possible consequences might have been disseminated to the appellant's employees more effectively than was the case. The "Interoffice Correspondence", dated 19 March 1990, which was the primary means of communicating the new policy to employees, was totally inadequate for the purpose. Even those skilled at reading the English language would have found it difficult to follow its

officialese to the end of the third paragraph, where the words "INSTANTLY DISMISSED" appeared. A serious safety policy requires more than one such written notice and a single meeting of leading hands to be conveyed adequately.

In applying the policy inflexibly to the respondent's case, the appellant obviously failed to take into account many relevant circumstances which were known to it. These included the lack of any actual risk from smoking at the place where the respondent was smoking, the respondent's long and unblemished record as an employee and a leading hand and the poor prospects of the respondent obtaining employment elsewhere. The appellant also failed to investigate adequately the respondent's actual knowledge of the no smoking policy and its announced consequences. The interview which was afforded to the appellant was wholly inadequate, especially given his limited use of the English language. It is a nice question whether these shortcomings are characterised as substantive or procedural. To the extent to which the appellant failed to investigate, the breach of cl 9(b)(vi) is procedural. To the extent to which it failed to take into account the relevant circumstances, the breach is substantive. This case illustrates the difficulty of separating the two.

No question can therefore arise of reduction of the damages awarded by the learned trial judge on the basis that only a procedural breach was established. On the evidence, given the absence of cross-examination of the witness who gave evidence as to the respondent's prospects of obtaining employment, the amount awarded was plainly correct.

The one respect in which I am unable to agree, without qualification, with the reasons for judgment of Sheppard and Heerey JJ concerns the sentence (at 32) which reads "Normally, breaches of such contracts do not attract the remedy of specific performance". It is clear from the preceding sentence that "such contracts" are contracts of employment. If this sentence is intended to be a statement of the law, in my view it is not supported by the current state of authority.

The phrase "specific performance" may be taken to mean "the enforcement in specie of any contractual obligation to perform an act, whether by way of settling or defining the rights of the parties, or by enforcing the rights so settled or defined". See I C F Spry, *Principles of Equitable Remedies* (3rd ed, 1984), p 52. As the learned author points out in a footnote, sometimes enforcement of a contract in specie involves the enjoining of an act or acts. Earlier authorities are to be found, in which contracts for the performance of work and labour were said to be "inherently unsuitable" for specific performance in this sense: see, eg, *Australian Hardwoods Pty Ltd v Railways Commissioner* [1961] 1 WLR 425 at 433-434; [1961] All ER 737 at 743 and *Ridge v Baldwin* [1964] AC 40 at 65 in the speech of Lord Reid. Notwithstanding these pronouncements, courts have not felt constrained about doing indirectly what they claimed to eschew directly. Thus, employees could be restrained by injunction from accepting other employment, if they had bound themselves contractually to work only for a particular employer: see *Lumley v Wagner* (1852) 1 De GM & G 604; *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209. An employee bound by such an injunction was faced with the alternative of working for the employer to whom he or she was bound, or not working at all.

During the 1960s and 1970s, English courts began to acknowledge that they were able to enforce specifically obligations in contracts for the

performance of work and labour. The Privy Council in *Francis v Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411 at 1417-1418; [1962] 3 All ER 633 at 637, recognised that, in special circumstances, a declaration might be granted that a contract of employment was still subsisting. The pioneering case was *Hill v C A Parsons & Co Ltd* [1972] Ch 305, in which an employer was restrained by injunction from relying on inadequate notice as having terminated a contract of employment. The response of Lord Denning MR (at 315), to the argument that the court was enforcing specifically a contract for personal services was "So be it".

In Australia, it has been recognised at least since *Turner v Australasian Coal and Shale Employees' Federation* (1984) 6 FCR 177 at 192-193 that the considerations which motivate courts of equity not to enforce specifically contracts of employment are matters of discretion, and that there is no hard and fast rule that a contract for the performance of personal services will not be specifically enforced. The issue of specific performance is often linked with the question of termination of the contract; it used to be thought that a contract of employment could be terminated by the unilateral act of one party, even though that act was insufficient to bring the contract to an end according to its terms. The Full Court in *Turner* (supra) held that contracts of employment are subject to the same rules as those applying to other contracts. Thus, if one party purports to terminate the contract in a manner which the contract does not permit, eg by inadequate notice, this will amount to a repudiation of the contract. The other party is then entitled to elect whether to treat the repudiation as a mere breach, and to keep the contract on foot, or to accept the repudiation as bringing the contract to an end.

If the wronged party adopts the former course, that of electing to keep the contract alive, courts will, in appropriate cases, grant such remedies as are necessary to keep the rights of that party alive. The remedy may amount to no more than the recognition of a purportedly dismissed apprentice to recover wages under an award, instead of damages for loss of wages: see *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241. It may be a declaration that the contract subsists, as contemplated in *Francis* (supra) and in *Gordon v Victoria* [1981] VR 235 at 239, or it may be an injunction. Injunctions to restrain employers from relying on purported terminations have been granted in several cases since *Hill* (supra). See *Baker v Salisbury City Corp* (1982) 2 IR 168; *Irani v Southampton and Southwest Hampshire Health Authority* [1985] ICR 590; *Powell v Brent London Borough Council* [1988] ICR 176 and *Reilly v Victoria* (unreported, Supreme Court, Vic, Smith J, 20 November 1991). In one case, an injunction was granted, restraining the employer from insisting on compliance with an order to perform duties which were outside the terms of the contracts of employment: see *Hughes v Southwark London Borough Council* [1988] IRLR 55. All of these cases involved the grant of interlocutory injunctions, but the basis of each was that there existed at least a serious question to be tried that the employee concerned would be found at the trial to be entitled to a permanent injunction.

The position remains that specific performance of a contract for the performance of services will not be granted if the result would be to compel the performance of work under threat of punishment for contempt of court: see *Medcraft v Federated Engine Drivers & Firemen's Association of Australia* (1984) 8 IR 211 at 220. Nor will a remedy be granted keeping the contract

alive if there does not exist between the parties the requisite degree of confidence upon which the relationship of employer and employee should be based. As was pointed out in *Turner* (at 192), the degree of confidence required in a large business enterprise may be less than that where the relationship of employer and employee is truly a personal one. There are indications in *Powell* (supra) that an employer cannot invoke the discretionary consideration of loss of confidence in the purportedly dismissed employee, simply by saying that confidence has been lost; there must be grounds for a real loss of confidence before an injunction will be refused for that reason: see the judgment of Ralph Gibson LJ (at 195-196) and the judgment of Nicholls LJ (at 198-199).

From this examination of the authorities, it may be seen that the proposition that contracts of employment normally do not attract the remedy of specific performance cannot be supported as a matter of law. The courts do not now adopt as a starting point any strict rule about what remedies are available in respect of breaches of such contracts. By their nature, such contracts have features which will often give rise to the exercise of a discretion against specific enforcement, but this is not to say that there are special rules applicable. Each case must be judged on its own circumstances. The trend in the law is in part related to the change in the nature of employment contracts in recent times. Instead of being merely contracts for the performance of work and the payment of remuneration, such contracts now commonly contain many other provisions, whether expressly agreed or implied from industrial awards. In particular, superannuation is rapidly becoming an incident of most employment. When an employee's superannuation rights are affected by the cessation or continuance of the contract of employment, it may be important that the courts not be seen to adopt a strict position that they will not act to preserve the employee's rights in the event of breach.

If the statement of Sheppard and Heerey JJ, that contracts of employment do not normally attract the remedy of specific performance, is intended to be no more than a description of the practical position, I do not disagree with it. As I pointed out in *Wheeler v Philip Morris Ltd* (supra) (at 350), most dismissed employees find it difficult to conduct themselves so as to make it clear that they have elected to keep their contracts alive; the need to survive compels them to seek other employment, and to accept it if it is available, which may amount to election to accept the repudiatory conduct, leaving the employees to their remedies in damages.

The present case is one in which the respondent might well have elected to keep the contract on foot, and to seek a declaration that it remained so and an injunction that the appellant not regard it as having been terminated by the events of 27 August 1990. It is clear that no significant loss of confidence in the respondent as an employee resulted from the respondent's infraction of the no smoking policy. Those who dismissed him did so because they regarded themselves as bound by the policy to do so, not because they wanted to relieve the appellant of the respondent's services. They were prepared to contemplate re-employment as a means of resolving the controversy between the parties. The respondent was given by law a right to elect not to treat the contract as continuing, but to accept that it had been brought to an end, and to pursue his remedy for damages. He chose to exercise this right. For this, he cannot be criticised. Much less can he be

penalised. His choice not to pursue specific performance cannot be held against him on the issue of mitigation of damages, even if specific performance would have been a remedy available to him.

It is ordered that:

1. *The appeal be dismissed.*
2. *The question of costs be adjourned to a date to be fixed.*
3. *Leave be granted to the parties to file and serve written submissions on the question of costs within 14 days.*
4. *Liberty be reserved to the respondent to apply for an order that the question of interest be remitted to the trial judge.*

Solicitors for the appellant: *Sly and Weigall.*

Solicitors for the respondent: *Goulopoulos, Shiels and Mangopoulos.*

MICHAEL CHRISTIE