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Further developments in the implied term of reasonable notice of termination

Late last year we wrote about the case of Kuczmarski v Ascot Administration P/L [2016] SADC 65 (Kuczmarski), in which the SA District Court held that a term of reasonable notice of termination is not implied into a contract governed by section 117 of Fair Work Act 2009 (Cth) (FW Act).

*Late last year we wrote about the case of Kuczmarski v Ascot Administration P/L [2016] SADC 65 (**Kuczmarski**), in which the SA District Court held that a term of reasonable notice of termination is not implied into a contract governed by section 117 of Fair Work Act 2009 (Cth) (FW Act). Kuczmarski was appealed to the SA Supreme Court, but it is understood that the parties to that case have resolved their differences and that the appeal will not be proceeding. This means that Judge Clayton's decision stands. Meanwhile, a recent decision of the Federal Circuit Court – McGowan v Direct Mail and Marketing Pty Ltd [2016] FCCA 2227 (**McGowan**) – has generated further uncertainty, with Judge McNab declining to follow the Kuczmarski reasoning. **David Ey, Partner** and **Shauna Roeger, Law Graduate** explain these decisions and the implications they have for employers.*

The decision in Kuczmarski

Mr Kuczmarski was made redundant from his position as the National Group Human Resources Manager of Ascot Administration Pty Ltd and paid five weeks' notice in accordance with section 117 of the FW Act. His contract did not contain any express term regarding notice of termination, and he was not award-covered. He brought a claim asserting an entitlement to 12–18 months as reasonable notice of termination.

Ascot Administration argued that it was not 'necessary' to imply a term of reasonable notice into the employment contract because Parliament had already imposed an obligation on employers to give a period of notice by section 117. Clayton AJ accepted this argument, and dismissed Mr Kuczmarski's claim. A more detailed explanation of the decision and its context is provided in our previous article.

The decision in McGowan

Mr McGowan, a manager at Direct Mail and Marketing Pty Ltd, was dismissed in 2014 and paid the statutory minimum of 5 weeks' notice in accordance with section 117(2) of the FW Act. He brought a claim alleging unlawful adverse action and an entitlement to reasonable notice of termination.

Mr McGowan argued that Direct Mail had dismissed him because he previously made complaints to an external HR consultant. Judge McNab rejected this claim, finding that he was dismissed because of concerns about his capacity to perform his role and because of his poor behaviour, including acting in a "crude and highly inappropriate manner" in the presence of clients, and regularly using "coarse and abusive language" towards staff.

Mr McGowan argued that he was entitled to 'reasonable notice' of termination, which he argued should have been more than the payment he received for five weeks' notice. Because Direct Mail had elected not to summarily dismiss Mr McGowan for serious misconduct, it could not later rely on his misconduct to defend any claim for reasonable notice of termination at common law. After considering the various contracts governing Mr McGowan's employment with Direct Mail since 1999, Judge McNab held that the applicable contract included terms about notice of termination, which prevented the implication of a term of reasonable notice.

Even though this conclusion was sufficient to dismiss Mr McGowan's claim, Judge McNab went on to consider Direct Mail's

alternative argument that section 117 of the FW Act prevented the implication of a term of reasonable notice of termination. This was precisely the issue considered by the SA District Court in *Kuczmarski*. According to Judge McNab, this issue is a 'genuine controversy' but, contrary to *Kuczmarski*, the 'better view' is that section 117 'is intended to provide a minimum period only' and 'does not displace a right to reasonable notice when the contract of employment is silent on the question of notice'.

Implications for employers

Employers should be aware of the current uncertainty in the scope of the implied term of reasonable notice of termination. In *Kuczmarski* it was held that, contrary to the traditional understanding, a term of reasonable notice of termination is not implied in the case of employment to which section 117 of the FW Act applies. In *McGowan*, Judge McNab of the Federal Circuit Court declined to follow *Kuczmarski* and maintained that section 117 does not prevent the implication of a right to reasonable notice because it is directed towards providing a *minimum* period of notice only. It is worth noting that because Judge McNab's reasoning on this issue was not strictly necessary to decide the case before him, it is not binding on other courts – but it may still be considered persuasive.

Until the issue is addressed by another superior court, this will continue to be an area of uncertainty. Employers should exercise caution and consider obtaining legal advice before terminating the employment of an employee who may have a claim to reasonable notice.