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Article Information

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Is there still an implied term of reasonable notice on termination?

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*Over the last two decades, this position has been supported by a number of higher court decisions. However, a recent decision of the South Australian District Court, Kuczmarski v Ascot Administration P/L [2016] SADC 65 (**Kuczmarski**), has thrown into doubt the correctness of this view. In this case, Judge Clayton held that the term of reasonable notice on termination was not implied into an employment contract where section 117 of the Fair Work Act 2009 (Cth) (**FW Act**) applies. **Shauna Roeger, Law Clerk**, and **Professor Andrew Stewart, Legal Consultant**, explain this case and its implications for employers.*

The traditional position

An implied term is a provision on which the parties have not actually agreed, but which is nonetheless taken to be part of their contract. Contractual terms may be implied in fact, by custom and practice, by law and by statute, and different tests apply for each type of implied term.

A term governing reasonable notice on termination is a term implied in law. Such a term will be implied where it is necessary to ensure that the rights created by a contract are not rendered "worthless" or "seriously undermined" (*Byrne v Australian Airlines* (1995) 185 CLR 410 at 450 (***Byrne***)). The traditional position was summarised by the High Court in *Byrne* as follows (at 429):

In the absence of anything to the contrary and putting to one side the provision in the award for notice, at common law a contract of employment for no set term is to be regarded as containing an implied term that the employer give reasonable notice of termination except in circumstances justifying summary dismissal.

This traditional position has been applied in over 30 decisions of the Federal Court and State Supreme Courts since 1993. Indeed, the High Court, as recently as 2014, cited the above-quoted passage for the proposition that, subject to the express provisions of particular contracts and all applicable statutes, there is an implied duty to give reasonable notice on the termination of contract other than for breach (*CBA* v *Barker* (2014) 253 CLR 169 at [30]).

In assessing the length of 'reasonable notice' the court generally considers several factors: the length of the service, the employee's age, the character of the employment, the availability of similar employment and whether the employee was induced by the employer to give up secure employment to take up the position. In applying this multifactorial test, the court has in some cases found that 'reasonable' notice constitutes a period significantly greater than the award or statutory minimum entitlement. For example, in Quinn v Jack Chia (Australia) Ltd (1992) 1 VR 567, the termination of an executive was held by the Victorian Supreme Court to require 12 months' notice. This highlights the importance of having a clear understanding of the circumstances in which the term of reasonable notice is implied.

The decision in *Brennan*

The 2013 decision in *Brennan v Kangaroo Island Council* (2013) 120 SASR 11 (***Brennan***) suggested a turning point in the case law. In this case, the Full Court of the South Australian Supreme Court refused to imply a term of reasonable notice where a State award specified the minimum notice to be given for termination by an employer.

This case involved a senior employee, Ms Brennan, who was made redundant from her position as Deputy Chief Executive Officer of the Kangaroo Island Council (**the Council**). Ms Brennan's contract of employment did not contain a provision with respect to termination, but she was covered by the *South Australian Municipal Salaried Officers Award* (***the Award***). Clause 3.2.1.1 of the Award provided that 'in order to terminate the employment of an employee the employer must give' certain specified notice. Accordingly, the Council paid Ms Brennan a sum of three weeks' notice and a severance payment equivalent to seven weeks' remuneration. Ms Brennan then commenced action against the Council, claiming breach of contract based on an implied term of reasonable notice. At first instance in the District Court, Judge Cole refused to imply a term of reasonable notice in the contract of employment in circumstances in which the provisions of the Award applied.

Ms Brennan's subsequent appeal to the Full Court of the South Australian Supreme Court was unanimously dismissed. In the leading judgment, Justice Parker (with Justices Vanstone and Anderson agreeing) held that it was not necessary to imply an obligation to provide reasonable notice in order to give 'business efficacy' to Ms Brennan's employment contract. The existence of the award provision meant that the employment arrangement was effective without any need to imply any such obligation. Essentially, there was 'no gap that needed to be filled' by the implied term.

Ms Brennan's application for special leave to appeal to the High Court was refused on the basis that the appeal did not have sufficient prospect of success. Although the reasoning in Justice Parker's decision has been subject to some academic criticism, *Brennan* remains the latest superior authority on this point in South Australia and has been endorsed by the Full Federal Court (*Westpac Banking Corp v Wittenberg* [2016] FCAFC 33 at [233]–[236]), albeit in a case where the issue was not directly raised.

The *Brennan* decision suggests that a term of reasonable notice should not be implied in circumstances where an employee's employment is covered by an award with a clause providing for specified notice in order to terminate. However, it remained uncertain up until the decision of *Kuczmarski* as to whether the same reasoning would apply to prevent the implication of a reasonable notice term into a contract governed by section 117 of the FW Act.

Notice on termination under the FW Act

The modern awards that operate under the FW Act do not deal with notice of termination by employers. But section 117(2) of the Act provides that:

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the minimum period of notice) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

This provision applies to both national system and non-national system employees, unless they are casuals or have been employed for a specified task or period. Similar provisions have been in the main federal statute since 1993. Based on an employee's age and length of service, they may be entitled under section 117(3) to up to five weeks' notice.

The decision in *Kuczmarski*

The plaintiff in *Kuczmarski* had been employed by Ascot Administration P/L and other companies in the Scott Group of Companies since 2002. In 2015 he was advised that he had been made redundant from his position as the National Group Human Resources Manager. His contract did not contain any express term regarding notice on termination, and he was not award-covered. He was paid five weeks' notice in accordance with section 117. The plaintiff brought a breach of contract claim on the basis that his contract included an implied term entitling him to reasonable notice on termination. He argued that five weeks' pay was inadequate, and reasonable notice in the circumstances was a period of 12 to 18 months. The key issue to be resolved was whether his contract included an implied term of reasonable notice on termination.

The plaintiff argued that where an open-ended contract of employment does not expressly provide a period of notice on termination, a requirement to give reasonable notice should be implied by law. The plaintiff relied on the case of *Thorpe v South Australian National Football League* (1974) 10 SASR 17 (***Thorpe***) to support the argument that the term of reasonable notice should be implied in the circumstances. The Court accepted that *Thorpe* was still good law, but distinguished it on the basis that there was no award or statutory provision dealing with the period of notice in that case.

The plaintiff emphasised that section 117 imposed a requirement to provide 'at least' the specified period of notice, and referred to that period as the 'minimum' period of notice, rather than a 'reasonable' period of notice. The plaintiff argued

that this difference in wording indicated that section 117 and the common law implied term of reasonable notice dealt with different matters. Further, the plaintiff noted that there was no conflict or inconsistency between section 117 and the implied term of reasonable notice and that it has long been accepted that an employee may have a contractual entitlement that is more favourable than the minimum required by a statute or industrial instrument.

The plaintiff sought to distinguish *Brennan* by highlighting the fact that the award clause there required the employer to give an employee certain specified notice in order to terminate notice. In contrast, section 117 requires 'at least' a certain period of notice and refers to the required notice as the 'minimum period of notice'. However, Judge Clayton was unpersuaded and felt bound to follow the higher court authority.

The defendant's primary argument was that it was not 'necessary' to imply the term of reasonable notice. The defendant argued that by enacting section 117, Parliament had provided for a period of notice on termination. On this view, the ability of the statutory minimum period of notice to coexist with a term of implied reasonable notice was immaterial: the key point was that Parliament had already imposed an obligation on employers to give a period of notice and this meant the implication of a term of reasonable notice was not necessary.

Judge Clayton accepted the defendant's argument that the reference in section 117 to a 'minimum' period of notice and 'at least' a certain period is inconsequential, as both section 117 and the implied term deal with the *topic* of the notice required to terminate a contract of employment. Judge Clayton accepted the defendant's argument that Parliament's intention in enacting section 117 should be taken to be to set a minimum standard, to recognise the ability of parties to an employment contract to *expressly* agree to a longer period of notice, but nevertheless to exclude the implied term of reasonable notice.

Implications

If Judge Clayton's decision in *Kuczmarski* is a correct statement of the current law, the implications are considerable. It suggests that a large number of cases over the last two decades have been decided on an incorrect understanding of the coexistence of award clauses and statutory provisions regarding termination, and the implied term of reasonable notice on termination. According to *Kuczmarski*, in circumstances where the contract is governed by section 117 (which is almost always, outside fixed term or casual employment), a term of reasonable notice on termination is not implied as there are no 'gaps to fill' and the implication is not 'necessary'.

In an immediate sense, the decision reached in *Kuczmarski* is favourable for employers, as it makes it harder (if not indeed impossible) for employees to argue that they are entitled to 'reasonable' notice on termination, which is often judged to be much higher than award and statutory minimum entitlements. In *Kuczmarski* Judge Clayton noted that if the contract had been subject to a term requiring reasonable notice, then a reasonable period of notice would have been six months. As no term was implied, the employer was only required to pay the plaintiff 5 weeks' pay in lieu of notice.

On the other hand, if the view in *Kuczmarski* is confirmed by other decisions, employees (including many senior managers) currently employed on indefinite contracts with no agreed period of notice may be advised to negotiate lengthy notice periods that equate to what they might formerly have expected under the common law. The decision certainly disturbs what had become a very settled understanding of the consequences of not agreeing either a fixed term or a period of notice for an employment contract.

As *Kuczmarski* raises important questions of law, there is a chance that the decision will be appealed to the South Australian Supreme Court, or, possibly, the High Court. We will keep you updated on any future developments in this case. In the meantime, we recommend that employers exercise caution before relying on this decision. If faced with a similar situation, it would be prudent to obtain legal advice before taking action to terminate an employee's employment.