FEDERAL CIRCUIT COURT OF AUSTRALIA

MCGOWAN v DIRECT MAIL AND MARKETING PTY LTD *[2016] FCCA 2227*

Catchwords:
INDUSTRIAL LAW – Termination of employment – claim of adverse action because of the making of a compliant – meaning of complaint – whether there is an implied term of reasonable action where a contract of employment contains an express term of notice – whether s.117 of the Fair Work Act operates to negative – the need to imply a term of reasonable notice in employment contracts.

Legislation:
Fair Work Act 2009 s.117, 340(1)(a)(ii), 341(1)(c)(i)

Cases cited:
Shea v TRU Energy Services Pty Ltd (No.6) (2014) 314 ALR 346
Carter v *The Dennis Family Corporation* [2010] VSC 406
Westpac Banking Corporation v Wittenberg (2016) 330 ALR 476
Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd (1935) 53 CLR 618
Watson v Phipps (1985) 63 ALR 321
Elwin v Edward Motors & Ors [2015] FCCA 334
Kuczmarski v Ascot Administration P/L [2016] SADC 65
Brennan v Kangaroo Island Council [2013] SASCFC 151
Rankin v Marine Power International Pty Ltd (2001) 107 IR 117
Guthrie v News Limited (2010) 27 VR 196 at [197]
FCT v Smorgan (1977) 16 ALR 721

Applicant:	DAVID MCGOWAN
Respondent:	DIRECT MAIL AND MARKETING PTY LTD
File Number:	MLG 107 of 2015
Judgment of:	Judge McNab
Hearing date:	28 June 2016

Date of Last Submission:	29 June 2016
Delivered at:	Melbourne
Delivered on:	30 August 2016

REPRESENTATION:

Solicitor for the Applicant:	Mr Jewell
Solicitors for the Applicant:	McDonald Murholme Solicitors
Counsel for the Respondent:	Mr Donaghey of Counsel
Solicitors for the Respondent:	McKean Park Lawyers

ORDERS

(1) The application filed by the applicant on 21 January 2015 be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 107 of 2015

DAVID MCGOWAN
Applicant

And

DIRECT MAIL AND MARKETING PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant's claim is for:

   a) reasonable notice on termination of his employment with the respondent; and

   b) damages for breach of s.340(1)(a)(ii) of the Fair Work Act 2009 ("the Act").

Background

2. The applicant commenced employment with the respondent on 25 February 1999 as an account manager. It is alleged by the applicant that in around 2009, the applicant and respondent entered into a second employment agreement whereby he was employed in the position of sales manager and that in the event that either party was to terminate the second employment agreement, they would provide reasonable notice of the termination.

3. It is further alleged by the applicant that on 3 January 2012, the applicant and respondent entered into a third employment agreement whereby the applicant was employed in a position of Group General

Manager and that in the event that either party was to terminate the third employment agreement they would provide the other party with reasonable notice of termination.

Outline of the Applicant's Evidence

4. The applicant entered into an Employment Agreement with the respondent pursuant to a letter of appointment and contract of service dated 24 February 1999. The contract provided that the benefits and remuneration were:

   a) salary of $45,000;

   b) superannuation;

   c) $13,500 per annum car allowance;

   d) a company mobile phone; and

   e) commission based on profits of the jobs obtained.

5. The contract provided by clause 3(d) that:

   > *"..any agreed change to the employee's salary will be documented and signed by the company and the employee, and such document will be deemed to form part of this agreement, and thereby supersede this agreement to the extent of any inconsistency."*

6. On the front page, the contract provides in respect of 'period of operation':

   > *"Until terminated in accordance with the provisions of this agreement or until superseded by a further agreement which explicitly replaces this agreement."*

7. As noted above, the applicant was promoted to the position of a Sales Manager in 2009. The applicant gave evidence[1] that his promotion to the role of Sales Manager was as a result of simply having to sit down and have a chat with Mr Humphrey, the Managing Director of the company, where he was asked and he agreed to assume that role.

[1] Transcript of Proceedings, pg. 13 at [45]

8. At the time of assuming the position of Group General Manager in January 2012, the applicant was receiving remuneration and benefits of:

   i) $200,000 per annum base salary;

   ii) $18,000 per annum superannuation;

   iii) $24,000 per annum car allowance/Peter allowance;

   iv) $10,000 per annum travel allowance; and

   v) the opportunity to obtain a bonus pursuant to the company bonus plan

9. In January 2012, the applicant was asked to take up the role of Group General Manager. The letter that accompanied the offer to Mr McGowan to take up the role was dated 3 January 2012. That letter provides as follows:

   Dear David,

   We are pleased to offer you a new position of GROUP GENERAL MANAGER.

   Your annual base salary will now be $200,000.00 per annum Plus 9% Superannuation.

   Car Allowance/Visa Allowance of $2000.00 per month.

   Travel Allowance of $10,000 per annum

   Company Bonus Plan (which has been supplied)

   This is effective from the 3th (sic) January 2012.

   This letter will now form part of your employment agreement as an amendment

   Please sign below as agreement to your new pay details.

10. A signed copy of that document is not in evidence, however the applicant's statement of claim specifically pleads that letter as forming part of the employment agreement allegedly formed on 3 January 2012.

11. The applicant's employment was terminated on 17 November 2014. At the time of his dismissal he was paid five weeks' notice.

The applicant's evidence of events leading to termination

12. The applicant alleges that on 7 October 2014 he made employment complaints or enquiries to Ms Karen Gatley of Ryan Gatley & Associates, who was an external Human Resources Consultant engaged by the respondent. He says that on 7 October 2014 he made an oral complaint to Ms Gatley that:

    a) he was being excluded from key communications;

    b) that he felt that the role of Group General Manager was not required by the respondent; and

    c) that Mr Humphrey took action without consulting managers below him.

13. It is also alleged that on 6 November 2014, the applicant had a discussion with Ms Gatley and Mr Humphrey during which:

    a) Mr Humphrey proposed that the applicant's position would be altered to Chief Operating Officer; and

    b) the applicant made an employment complaint or enquiry as his role as Group General Manager was being undermined and usurped by Mr Humphrey.

14. It is said that these complaints constitute an exercisable workplace right pursuant to s.340(1)(a)(ii) of the *Fair Work Act 2009*.

15. The applicant alleges that after he made these complaints his employment was terminated on 17 November 2014.

16. The dismissal followed a brief conversation with Mr Humphrey, during which he was provided a letter dated 17 November 2014.

17. The letter provides (omitting irrelevant parts):

> *"I wish to advise that as of this day the 17/11/14 you are terminated from your employment with the Direct Mail and Marketing Pty Ltd (DMM).*

The reason for the termination is your lack of work performance in Sales.

Your direct response to the growth and continued development of Sales within the DMM has been below an acceptable level, and also your last six months of little interest in our IDMS software system within the sales group has also been unacceptable.

Also, as discussed with you was your HR skills in relation to the way you speak to your staff and clients.

This is why DMM has terminated your services.

I wish you all the best in the future.

Regards,

F.A. Humphrey
Managing Director

18. It was not contested that at that time the applicant was paid five weeks' pay in lieu of notice. The applicant alleges that he should have been paid 12 months' notice of termination of employment, that being reasonable notice.

19. By its defence, the respondent refers to the Employment Agreement that was entered into between the applicant and respondent on 24 February 1999 and the contract of service dated 25 February 1999. It said that the terms and conditions of employment that govern the employment of the applicant throughout his period of employment until November 2014, were contained in that contract of employment and that although there were increases in salary and changes in position, this did not create undetermined and fresh conditions of employment. Specifically, it is pleaded that in the event of termination of employment the termination requires the following notice in writing by the respondent:

Length of Service	Notice Period
Less than one year	1 week
One year but less than three years	2 weeks
Three years but less than five years	3 weeks
More than five years	4 weeks

20. The respondent paid the applicant five weeks' notice, which is the statutory minimum pursuant to s.117(2) of the Act. The respondent admitted that in June 2010, the applicant's remuneration increased to $120,000 together with a car allowance of $15,000 on condition of 10% of gross profit, which were subject of a letter dated 11 June 2010. Otherwise, it denied that there was any entitlement to reasonable notice. It was pleaded, by way of defence, that if the applicant did make the complaints and enquiries as he alleged, those complaints did not constitute complaints and enquiries for the purposes of s.341 of the Act. The respondent denied that there was any adverse action taken by the respondent as a result of those complaints, even if they were complaints for the purpose of the Act.

The respondent's defence and adverse action claim

21. The respondent denied taking any adverse action against the applicant for the reasons of the applicant making any complaint or enquiries. It pleaded positively by paragraph 17A of its amended defence that the reasons for terminating the applicant's employment were:

    i) the terms of the Ryan Gatley report received by the respondent from Karen Gatley by email of about 7 November 2014;

    ii) the applicant's behaviour, rude and crude conduct, which was reported to the respondent by individuals including

Kerry Flavell (a business development manager or "BDM" employed by the respondent); Miriam Banda (a client services employee of the respondent); Phillip Oliver (a BDM employed by the respondent); and Lauren Kelly, an employee of Crown casino; and

iii) the applicant's lack of interest in, and apparent lack of, knowledge in the software component of the respondent's business including DMMI from about 2014 onwards.

22. The particulars to paragraph 17A set out five instances of what was said to be the applicant's rude and crude behaviour and the effects of that on clients of the respondent and on other employees of the business. In particular, it is alleged that in about August - September 2014 an employee of Crown casino, Ms Lauren Kelly, approached Mr Humphrey and stated that she no longer wished to work with the applicant on the respondent's account with Crown casino.

23. It is alleged that in February 2014 at a race meet at a party held at the Moonee Valley Race track reception facility ("Moonee Valley function"), which was a social function organised by the respondent with clients present, the applicant made grossly offensive remarks in the presence of customers. In particular is alleged to have said to a pregnant wife an employee of the respondent *"when you have a baby your wife is ripped from asshole to c – – t and it never looks the same again"*.

24. It was alleged that in about October 2014 or early November 2014 the applicant stated to Ms Banda in a telephone discussion words to the effect: *"you [Miriam] made that mistake, so go and get a cardboard box and start packing."*

25. It is alleged that, in about October 2014, the applicant said to Kerry Flavell, a senior and successful salesperson employed by the respondent, words like;

> *"Just shut the fuck up and listen to me you're not fucking Fred; and don't tell Fred. Do what I want and do this my way. By you talking to Fred it makes me look like I'm out of control."*
>
> *"Is Fred a fucking mind reader? I've had enough of you."*

26. It was alleged that on or about 14 November 2014 the applicant said to Phil Oliver words or words like *"listen, c – – t, just get the fuck out of my office and do some selling which is what we pay you for"*. It was also asserted that the reason for the termination was in the alleged lack of interest exhibited by the applicant in the business software of the respondent[2].

27. It was said that the misconduct alleged in paragraph 17A were a breach of the Employment Agreement and conduct which disentitles the applicant to reasonable notice or any notice.

Evidence in relation to adverse action

28. The applicant gave evidence that in or around early 2014 he felt that his standing as a Group General Manager was affected because part of the IT operation of the business had been moved from Dandenong to Docklands.

29. As a result of this, Mr Humphrey was spending less time in Dandenong and tending to focus on the operations based in the Docklands. The applicant gave evidence that he was concerned that his communications and relationship with Mr Humphrey was deteriorating. As a result of this, he organised a meeting with Karen Gatley in her role as an HR consultant as a "catch up".[3] On 4 October 2014 at that meeting he said words the effect:

> *"I said I do feel that my role is becoming irrelevant with Fred sometimes excluding me from meetings. He is empowering a couple of people within the business, certain people in the business, to exclude me. You know, despite discussions that I had with Fred about, you know, letting me do my role and if people can if I can build a relationship with people, work with people it's difficult if they continually go to Fred. Because they may be based on Docklands and friends in Docklands. You know, communicate with Fred and keeping me out of the loop, it made the role difficult in some situations.*[4] "

30. Later the applicant gave evidence:

---

[2] The applicant admitted that he may have used this type of language to Mr Oliver but gave evidence that he said this in a "non-combative, non-threatening" way.
[3] Transcript page 18
[4] Transcript page 18 – 19 lines 45-5

"but to really sum it up, the conversation with Karen was, "I'm finding things difficult but I am really focused and want to work out what needs to be fixed to continue the good work that we're doing there". I was feeling was an almost fractured relationship with Fred.

31. The applicant agreed with the summary that he felt that his role had become irrelevant and there were difficulties in communicating with Mr Humphrey which made the role difficult.

32. That exchange with Ms Gatley constituted the first workplace complaint as pleaded by the applicant.

33. The applicant referred to *Shea v TRU Energy Services Proprietary Ltd (No.6)* (2014) 314 ALR 346 per Dodds-Streeton J where her Honour at [29] found in relation to a complaint for the purposes of s.341(1)(c)(i) of the Act:

    a) *a complaint is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used, conveys a grievance, a finding a fault or accusation;*

    b) *the grievance, finding or a fault or accusation must be genuinely held or considered valid by the complainant;*

    c) *the grievance, finding a fault or accusation need not be substantiated, proved or ultimately established, but the exercise of the workplace right constituted by the making of the complaint must be in good faith and for a proper purpose.*

34. In my view, the evidence of the applicant in relation to his "catch up" with Ms Gatley, was not in the nature of a complaint but was in the nature of effectively a consultation or a discussion with Ms Gatley in relation to his role. For reasons which are set out below, even if it did constitute a complaint to the purposes of the Act, the termination was not because of the exchange that occurred at that meeting.

35. The applicant gave evidence that on 30 October 2014 he sent an email to Mr Humphrey which attached a monthly report from the IT department of the respondent and reported positively on the operation of the team that the applicant was responsible for. Mr Humphrey responded in positive terms to the email.

36. On 5 November 2014, the applicant sent Mr Humphrey an email in relation to the introduction of pass words and password changes across the business Mr Humphrey responded by an email on the same day with words:

> *what is your rush*
>
> *DMMI staff will be back on Monday no password changes until next Monday.*
>
> *Is this another email that says nothing?*

37. On 5 November 2014, the applicant sent an email to Mr Humphrey which stated as follows:

> *Hi Fred.*
>
> *On the back of your email and our phone call this morning I have had a chance to chat with Karen Gately. I also had a catch up with her last week regarding my role with DMMI and the validity of it. I would appreciate that we catch up and discuss where we are at. I'm struggling with the polar opposites of* [being] *willing to walk over hot coals for you, to more and more having my motivation destroyed. Karen has asked that she would appreciate being part of these discussions.*

38. As a result of that email, a meeting was organised to take place on 6 November 2014 and that meeting was subsequently held and attended by Ms Gately, Mr Humphrey and the applicant. The applicant gave evidence that at that meeting Mr Humphrey arrived and opened the meeting with the words *"We can fix this, or I am going to cut you."* The applicant said he responded with words to the effect *"look - if there's something that lacking in my ability that needs to be looked at or fixed, anything in my business acumen, let's talk about it. But whatever we need to do to fix it, let's just talk."*[5]

39. The meeting concluded on the basis that the applicant would take the time to outline where he saw his role and submit that to Mr Humphrey and Ms Gatley for the purposes of further discussion.[6] In my view, that conversation was a complaint or enquiry for the purposes of s. 341(1)(c)(i) of the Act. There was sufficient detail in the meeting

[5] Transcript page 25 line 5
[6] Transcript page 25 line 25

request to constitute the expression of a grievance in the sense that Mr McGowan conveyed that he was not happy with the way he was being treated by Mr Humphrey and wanted changes made. It would appear that Mr Humphrey treated it as such given his opening remarks at the meeting.

40. The applicant prepared that document and attached to it an email sent on
7 November 2014. The email provided in part:

> *Attached is what I currently sees the role and responsibilities of the GM at Direct Mail and Marketing.*
>
> *While I think that at this specific time my current competence and abilities may not meet all of the points included within this document to an adequate depth, I'm highly motivated and enthusiastic in working independently, with you and any internal/external parties to breach any gaps that are apparent.*
>
> *I'm reasonably sure that there will be other specific areas of responsibilities that you want included as part of the GM role and I maintain a positive outlook for taking these on board.*

41. The attached document set out in point form the applicant's views of the role. The applicant was cross examined about the terms of the email. He accepted very frankly that he had no formal training as a General Manager, limited business acumen and that he definitely needed to improve his skill set and abilities. Although he did point out that he was employed in circumstances where Mr Humphrey was aware that he had no formal training and was also well aware of the applicant's strengths and weaknesses[7].

42. The applicant received no response to that email or the document attached to it. The only conversation that occurred in relation to the document was that Mr Humphrey said that he had been too busy to look at it.

43. The next relevant event involving the applicant that was on 17 November 2014, when Mr Humphrey came into the applicant's office, sat down and said, *"This is the second hardest conversation I've*

[7] Transcript page 54-55

had but you know the business is going places. I don't think you are the right person for the role so I have to let you go."

44. The applicant gave evidence that he asked Mr Humphrey the reasoning behind his decision and that he was told that there had been a failure in regards to sales performance which was then discussed. He said that Mr Humphrey told him that he was not embracing the DMMI software that the Docklands team was producing. The applicant said that he pointed to successes that had occurred up until that year and the applicant said there was nothing specific said in relation to HR issues at that meeting on 17 November 2014. The applicant then packed his belongings and was provided with a letter of termination which has been referred to above.

45. Mr Humphrey gave evidence in relation to the events leading to the termination of employment. Mr Humphrey is the Managing Director of the company and the owner of the business. He was the decision maker for the purpose of the termination of employment.

46. Mr Humphrey gave evidence in relation to a conversation he overheard between the applicant and another employee Kerry Flavell in about October 2014, in which he heard that the applicant speaking in very abrupt and abusive terms to Ms Flavell over the telephone with words to the effect: *"what the fuck are you doing telling Fred about this sort of thing? Why don't you keep him out of our fucking business? It's my job and he shouldn't be interrupting."*[8]

47. He also gave evidence that he had commissioned Karen Gatley to prepare a report regarding the business and he wished her to conduct a review of the business in relation to staff and the way the business was being run in order that he could obtain external advice to give him the confidence that the business was being run in a professional manner.[9] A report was provided on about 9 October 2014.

48. That report was prepared by Ms Gatley after interviewing and conducting surveys with staff and conducting focus groups. The document prepared was 42 pages in length and made specific comment in relation to the performance of the applicant at page 18 of that report.

---

[8] Transcript page 77, line 20
[9] Transcript page 77

The report was critical of the performance of the applicant and made the following comments:

- *The ineffective approach and low level of leadership capability David brings to the role of GM is having a significant detrimental impact on your team, cultural and business. Consistent feedback received from a broad range of people suggest David's approach be of serious concern to you.*

- *Steps to address inappropriate conduct should be taken as a matter of priority.*

- *If claims made by a number of staff through this review are accurate, there is evidence to suggest David behaves in ways that can be reasonably described as bullying. Examples provided by David himself also support this notion.*

- *While management training has previously been provided to David there is only marginal evidence of improvement.*

- *While a few people gave David credit for trying to improve his approach, insufficient change has been achieved to warrant having confidence in his ability to adequately develop in the role or at a pace required.*

- *While David has been a loyal member of your team for many years he is failing to demonstrate the values necessary to lead your team and optimise performance. Serious consideration needs to be given to David suitability to his current role and what actions will be taken to address the ineffectiveness of his approach.*

- *It is our view that DMM has a duty of care obligation to other staff to address the impacts of David's conduct on other members of the team. Consideration should especially be given to the impact of David's approach on members of the sales and client service teams....*

- *David appears to have lost the drive and determination required to be a successful contributor within the business. For many reasons outlined within this report our strong perception is that David is "hanging on" for retirement and will struggle to improve performance and conduct to the level required.*

49. On any view they are serious criticisms of the applicant's management style.

50. Mr Humphrey gave evidence in relation to a conversation that he had at a bar at Docklands (Bar Nationale) on the Friday afternoon of 14 November 2014. He gave evidence that shortly into a conversation with Ms Flavell and Philip Oliver that they both expressed their deep concerns about their employment with the respondent because of David McGowan. He gave evidence they were both expressing concern about whether they could continue to be employed by Direct Mail and Marketing.

51. Kerry Flavell, the Court was told, was a very effective salesperson and a valuable employee who was responsible for sales and business relationships constituting up to 25% to 30% of the respondent's business. Evidence was also given that Philip Oliver was, although a new employee, very highly regarded. Mr Humphrey gave evidence in these terms:

> *"They're both mature people. You know, they've got – almost both of them have got adult children, so they're not given to knee-jerk reaction. They were sick of – their concerns were they were sick of the abuse and bullying, aggressive nature, harassment."*[10]

52. Mr Humphrey also gave evidence that Ms Flavell had complained to him in that conversation in relation to the way she had been spoken to by Mr McGowan in relation to work involving Mercer. He also gave evidence that Mr Oliver had said words the effect that he was sick of being spoken to in an abusive terms by the applicant and gave this direct evidence in relation to what Mr Oliver told him:

> *Instead of being done in a professional manner it was done in an abusive – he was spoken to abusively within the office space. He said it was a form of bullying, harassment. He said at that that in this stage of his life he didn't expect to be treated that way by his general manager.*[11]

53. Mr Humphrey also gave evidence that present at the Bar Nationale on that afternoon was a person called Anastasia Karidis who was a senior business person within the Mercer superannuation division. Mercer is a major client of the respondent. At that time Mr Humphrey says he was told for the first time that at a function at the Moonee Valley Racecourse in February 2014, that the applicant had used repulsive

[10] Transcript page 79
[11] Transcript page 80

language to a pregnant lady, who was present at that function, as to what would happen to her when she gave birth. He was told by Ms Karidis that:

(a) she did not wish to deal with the applicant;

(b) she did not want him in the Mercer building to represent the respondent;

(c) she felt that he was a negative for the respondent's business; and

(d) she would prefer to be dealing with just Kerry Flavell or Trevor Vaughan or Mr Humphrey himself.[12]

54. Mr Humphrey gave evidence that he told Ms Flavell, Mr Oliver and Ms Kardis words to the effect that he was considering what his next step was (in relation to the applicant's employment).[13]

The respondent's stated reasons for termination

55. Mr Humphrey gave evidence that he considered what had occurred and what he had been told at the Bar Nationale and said:

> *"From there- from Friday night, Saturday night and Sunday, all I basically did was sit down, review in my own mind a whole range of different things that I felt were strengths and weaknesses of David McGowan, the strengths and weaknesses of the business, my own strengths and weaknesses and whether I react or what I react to. I pondered, and I ended up with a list based on six key points of my own mind pondering and drew the conclusion on a Sunday afternoon that I was not looking forward to because Monday because I was going to terminate David McGowan from Direct Mail Marketing."*[14]

56. When asked in the witness box why he made that decision, he gave the following it evidence:

> *"Basically... In no particular order – the level of abuse and crudeness to clients that was putting my business at risk. Because I also had a complaint in relation to Lauren Kelly not requiring David come to the Crown Casino organisation. So that was Crown Casino and Mercer were two major risks. The lack of his*

[12] Transcript page 81 line 10
[13] Transcript page 80 line 25
[14] Transcript page 82

understanding in relation to the DMM software and computer system. His lack of understanding of Endpoint and the importance of it. And his lack of control of the IT system which is vital to my business. The level of – the Gately report which clearly states – which I had on me that weekend – a range of weaknesses I would call it – that the General Manager of Direct Mail and Marketing should not have and hadn't been improved in the seven year period.... His attitudes seven years ago hadn't changed very much from when he was a salesperson... His lack of support or understanding the ability to support my vision of selling IDMS software into our clients. In brief, the IDMS software turns work and into the clients doing the work instead of direct mail and marketing staff... His crudeness and rudeness and foul language within the Direct Mail and Marketing building was something I thought I couldn't tolerate any longer... but that's – in a ballpark that was – there are enough crosses in there to give me a sleepless Sunday night to make the hard decision but the only decision I could make to enable my business to continue to prosper."[15]

Findings in relation to adverse action

57. Against the reasons provided by Mr Humphrey to the termination, the applicant raised in response to the matters of crudeness and poor relations with the senior managers of clients of the respondent that those reasons were either invented or that there was a level of collusion between witnesses called on behalf the applicant in relation to particular events. The applicant highlighted various discrepancies in the details of evidence as to what was said at Bar Nationale and who was present at particular times of the conversations were said to have occurred on 14 November 2014. Further issues were raised in relation to the detail of who was present and who was within hearing of the applicant when he was said to have used foul and inappropriate language in the presence of clients and fellow employees in February 2014.

58. I accept that there were discrepancies in the evidence in terms of the detail and those matters were raised directly with the Counsel for the respondent by the Court. Mr Humphrey was not present when the foul language was used or said to have been used at the Moonee Valley function in February 2014. I have no doubt that it was reported to him on 14 November 2014, that foul language had in fact been used and it

[15] Transcript page 82

was reported to him by Ms Karidis who heard the language and that she was deeply offended by what had been said and was and refused to deal directly with the applicant as a result of his behaviour.

59. The minor discrepancies in the evidence between Ms Flavell, Ms Karidis, Mr Oliver and Ms Kelly do not give rise to an impression in the Court that there was any collusion between those witnesses or that they did not genuinely hold the views regarding the applicant that they gave in evidence. On the balance of probabilities, I accept that the applicant had behaved in a crude and highly inappropriate manner in February 2014 in the presence of clients and that conduct has caused offence to Ms Karidis in particular. I also accept that he had, in the course of performing his role, regularly used coarse and abusive language towards his subordinates. I also accept that Mr Humphrey had regard to the critical comments made in relation to the applicant which are set out in the Gately report when deciding to terminate his employment. I also accept that Mr Humphrey generally believe that the applicant had made very crude language in front of the client and he genuinely believed that she was offended.

60. Any doubt about whether the applicant may have acted inappropriately at the Moonee Valley function or used inappropriate language is dispelled by the evidence that was given by both Mr Oliver and the applicant in relation to an image that was forwarded by the applicant to Mr Oliver in October 2014. Evidence was given by Mr Oliver that the applicant sent him an email with the title "sneaky nut." The picture was of McGowan in his underpants with parts of his genitalia exposed through the side of his shorts. The applicant took the photograph whilst at the toilet[16]. The applicant gave evidence that he had a boisterous and fun loving friendship with Mr Oliver outside of work, but within work that they were very professional.[17] The applicant did not deny sending the photograph and said it was in the context of similar photographs being sent between himself and Mr Oliver in the past and he did not believe that Mr Oliver taken offence[18].

61. I accept that the sending of the photograph by Mr McGowan to Mr Oliver was not something that was relied upon by the respondent as

[16] Transcript page 43
[17] Transcript page 39-40
[18] Transcript page 44

a basis for justifying the termination of employment and nor is there direct evidence that Mr Oliver was particularly offended by that email. However, in my view, that a general manager of a business turning over about $18 million[19] would send an image of that kind by email to a subordinate, even if he thought it was in the context of it being amusing and part of an out of work friendship, is completely anathema to the notion of providing some sort of sensible leadership and commanding respect from employees. It shows such a lack of judgement that I am prepared to accept the evidence of the witnesses of the respondent in relation to what was said at the Moonee Valley Racecourse in February 2014.[20] That he made comments in those terms in front of employees and clients shows a complete lack of judgement of the same kind exhibited by sending the email.

62. I accept the evidence of Mr Humphrey that he terminated the employment of the applicant for the reasons that he gave, in particular, that he was very concerned about the applicant's capacity to perform the role and because of his behaviour towards employees and his impact on clients. I saw Mr Humphrey give evidence and accept him as a witness of truth.

63. For these reasons, I do not accept the respondent terminated the applicant's employment because he made a workplace complaint and therefore find that there has been no breach of s. 340 of the *Fair Work Act 2009*. I find that the making of a complaint was not a factor in the decision to terminate the applicant's employment.

Claim for reasonable notice

64. The applicant was terminated on payment in lieu of notice of five weeks' pay. At that time the employer respondent elected not to terminate for serious misconduct.

65. The Court was referred by the applicant to *Carter v The Dennis Family Corporation* [2010] VSC 406 at 121 – 125 ("*Carter*") in support of the proposition that where an employer terminates on notice in circumstances where it is aware of conduct which may justify summary

[19] Transcript page 79
[20] Note that Ms Kelly and Ms Flavell did not give evidence of speaking to Mr Humphrey or overhearing the comment at the racetrack.

termination, the employer cannot then rely on that conduct to defeat a claim for notice. At [122] of *Carter*, Habersberger J stated:

> *122. In* Phillips v Foxall, *Blackburn J stated:*
>
> > *Now the law gives the master the right to terminate the employment of a service on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection.*
>
> *123. A more recent statement of the principle is to be found in the judgment of Gillard J in Rankin* (Rankin v Marine Power International Pty Ltd (2001) 107 IR 117). *His Honour stated:*
>
> > *An employer who has full knowledge of the misconduct of an employee, and who makes a decision to continue to employ the employee, cannot at a later date, unless of course other facts come to his knowledge, dismiss him summarily on the basis of the employee's known conduct. It is said that the employer has waived his right to dismiss the employee summarily, and thereby condones the misconduct.*
>
> *However, in the same case, his Honour said:*
>
> > *It is clear that no such waiver, condonation or election can take place until the employer has full knowledge of the misconduct.* (Footnotes omitted)

66. The respondent does not plead reliance on any matters which it has discovered subsequent to the termination of employment in order to justify summary dismissal.[21] The respondent was aware of all the matters it pleads as a ground for summary termination at the time of dismissal. Because the respondent elected to pay notice it cannot now raise those matters to claim a right to summarily terminate the applicant's employment. The respondent cannot terminate the contract twice.

67. The issue then arises as to whether the plaintiff is entitled to reasonable notice of termination of employment or some period of notice in excess of the five weeks that has been paid. In my view, the employment contract which was entered between the parties in 1999 continued to

[21] See [17A] of the Respondent's Defence.

govern the terms of the employment at the date of termination. The period of operation of the agreement entered in February 1999 provided that the period of operation to be:

> *Until terminated in accordance with the provisions of this agreement, or until superseded by a further agreement which explicitly replaces this agreement.*

68. The position that the applicant took up from 3 January 2012 expressed to form part of his employment agreement as from 1 July 2010. The terms of the offer of the new position of Group General Manager were expressed in the following terms:

> *"This letter will now form part of your employment agreement as an amendment."*[22]

69. The 1999 agreement contemplated the terms of that agreement continuing, unless explicitly replaced, notwithstanding amendments to the terms of the salary or the position.

70. The applicant took up the position of sales manager without there being any agreement which was expressed to replace the 1999 agreement. The applicant gave evidence that there would that that he had a chat with Mr Humphrey where he was asked to assume that role. There is no evidence of any discussion which would indicate that the parties agreed to explicitly replace the 1999 agreement.

71. In relation to the applicant taking up the position as group general manager from 3 January 2012, the letter of offer referred to above set out the terms of the salary and benefits, included the phrase:

> *"This letter will now form part of your employment agreement as an amendment."*[23]

72. In circumstances where the parties entered into a written contract which made specific provision for the operation of the contract and what would happen in the event of changes in the course of employment, those words ought to be given their ordinary effect.[24]

---

[22] Applicant's Court Book page 135
[23] Applicant's Court Book page 135
[24] *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* per Rich, Dixon, Evatt and McTiernan JJ (1935) 53 CLR 618 at 636

73. Further, the words of contract should be interpreted in the grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy.[25]

74. The Macquarie Dictionary defines the primary meaning of "explicit" as "*leaving nothing merely implied; clearly expressed; unequivocal*[26]". The parties agreed that the terms of the contract would continue to apply unless expressly agreed that they would not. There is no evidence of such an express agreement and, in those circumstances, the terms in relation to termination of the contract continued to apply throughout the employment and there is no basis for implying a term of reasonable notice.

75. Further, the changes to the employment were all agreed to by the applicant and not imposed upon him by the respondent and in that sense it could not be said that the 1999 contract has been repudiated by the respondent. In that regard, I refer to *Westpac Banking Corporation v Wittenberg* (2016) 330 ALR 476 ("*Wittenberg*") per Buchanan J. at [261] – [262]

> *[261] Whether changes occur incrementally and slowly, or more rapidly pursuant to an intended program of development and expansion, unless it can be said that an employer has breached a contract by an unjustified and unlawful attempt to impose change (in which case the employee has the normal remedies for breach or repudiation) it would not be readily inferred, in my view, that the entire contract of employment has been replaced by a new one. In the case of a comprehensive written contract dealing with a range of important matters, including but by no means confined to, methods and occasions for termination of the contract, that could have drastic and potentially damaging results for both parties. Such an intention should not lightly be imputed to them in a continuing relationship.*
>
> *[262] A suggestion of consensual variation raises different issues. The variation suggested must arise directly from the altered circumstances and respond to them in a way which can be objectively attributed and imputed to both parties. The test for implication of the term, or the implied abandonment of an existing term, leaving a void to be filled, is not supplied by the*

[25] *Watson v Phipps* (1985) 60 ALJR 1 at 3
[26] Macquarie Dictionary, Federation Edition

view of a court that the change would itself be reasonable. Unless it can be said that abandonment of a term represents a common intention it may not be assumed in my respectful view. A fortiori, the altered circumstances are consensual; so must be the contractual variation, if any.

76. For these reasons, the terms of the 1999 contract in relation to notice of termination of employment have not been replaced by an implied term of reasonable notice.

Section 117 of the *Fair Work Act 2009*

77. An alternative case was submitted by the respondent that because of the operation of s.117 of the Act prevented the implication of the term of reasonable notice. Reference was made to *Kuczmarski v Ascot Administration P/L* [2016] SADC 65 ("*Kuczmarski*") of which refers to *Brennan v Kangaroo Island Council* [2013] SASCFC 151 ("*Brennan*"). In *Brennan,* the Full Court of the Supreme Court of South Australia held that there was no need to imply a term of reasonable notice in circumstances where the employee was employed subject to the terms of an Award which prescribed a period the employer must give in order to terminate the employment of an employee. The period of notice was not expressed as "at least" the period set out. In that sense, it differs from s.117(2).

78. Section 117 provides as follows :

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Amount of notice or payment in lieu of notice

(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 <u>at least</u> 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.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

79. There remains a genuine controversy as to whether s.117 operates so as not to require the implication of a term of reasonable notice where an employee is not employed subject to an award. The decision of the learned Judge in *Kuczarmarski* (Clayton J) involves a comprehensive review of the relevant decisions that were referred to him by respective senior counsel and he considered in that case that s.117 operated so as to deal with the period of notice required to terminate a contract of employment where the employee was not covered by an award.

80. The learned Judge referred to *Wittenberg*, in particular to the judgment of Buchanan J at paragraphs [216] - [218], where his Honour said:

> *216. The implication of terms into particular classes of contract as a matter of law, rather than as an implication from the surrounding facts in a particular case, is grounded in the notion of necessity (Barker). In that respect, as has been from time to*

time observed, it is not always easy to see how the two classes of implication can be readily distinguished.

217. Thus, even in the case of an implication by law into a class of contracts it remains essential, in my respectful view, to bear in mind the "necessity" which compels the implication. And, in both cases, it is accepted that no implication may be made which contradicts the express terms of the particular contract.

218. It is generally accepted that the common law will imply a term that a contract of employment may be terminated on reasonable notice into such a contract which makes no provision for termination. In the present appeals it was argued that such a term is implied into every contract of employment unless excluded. The two propositions are different. The first is concerned with filling a gap; the second with establishing a position of primary operation.

81. Clayton J referred to that passage and held that the implication of a term of reasonable notice was not necessary because there was no gap to fill because of the operation of section 117[27].

82. Clayton J also distinguished a finding of Kaye J *Guthrie v News Limited*[28] where his Honour held that 117(2) provides only a minimum period of notice and that it did not apply to the plaintiff in that case who was employed pursuant to a contract of service that could be terminated after 3 years or otherwise at any time for serious misconduct. Clayton J held that the facts in Guthrie were distinguishable from the facts in the case before him. It is not clear why the difference in facts render the views of Kaye J inapplicable to the contract that Clayton J had to consider or why Kaye J was incorrect.

83. It was significant that it the detailed and comprehensive analysis of the authorities by Buchanan J in *Witterberg*, he did not state that s.117 operates so as to remove the need to imply a term of reasonable notice in the absence of a contractual term that prescribes notice.

84. Further, I think that it is significant that where the effect of s.117(2) is said the remove a common law right to reasonable notice of termination of employment, the section and the explanatory

---

24 *Guthrie v News Limited* (2010) 27 VR 196
28 (2010) 27 VR 196 at [197]

memorandum make no reference to this. In this regard, I refer to *FCT v Smorgan* (1977) 16 ALR 721 at 729 where Stephen J states:

> *"..a construction of a statute which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred..."*

85. I think the better view is that s.117 is in that part of the Act dealing with National Employment Standards and is intended to provide a minimum period only. It does not displace a right to reasonable notice when the contract of employment is silent on the question of notice. By paying or giving the minimum period of notice under s.117(2), the employer will have satisfied the National Employment Standard and not be liable for a claim of breach of those standards. However, it is strongly arguable that payment or provision of that notice will not necessarily satisfy a claim for reasonable notice. The proposition may be tested where the employment of two employees is terminated. Both are over 45 years of age. One has worked for 5 years in a mid-range role, the other has worked for 25 years and worked her or his way up on a high level role. Both are employed under contracts that make no provision for notice of termination. I doubt that parliament intended that both would receive the same period of notice of termination by the enactment of s.117(2) of the Act.

86. For these reasons, I dismiss the application.

I certify that the preceding eighty-six (86) paragraphs are a true copy of the reasons for judgment of Judge McNab

Associate:

Date: 30 August 2016