HIGH COURT OF AUSTRALIA

McHUGH, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

STEPHEN BLACKADDER APPELLANT

AND

RAMSEY BUTCHERING SERVICES PTY LTD

RESPONDENT

Blackadder v Ramsey Butchering Services Pty Ltd
[2005] HCA 22
27 April 2005
S186/2004

ORDER

1. Appeal allowed;

2. Set aside the orders of the Full Court of the Federal Court of Australia dated 21 February 2003 and, in their place, order that:

a. the appeal be allowed in part;

b. order 3 of the orders of Madgwick J in the Federal Court of Australia dated 21 May 2002 be varied by deleting therefrom the words "and for a period of 14 days thereafter";

c. order 4 of those orders be set aside; and

d. otherwise the appeal be dismissed.

On appeal from the Federal Court of Australia

Representation:

S C Rothman SC with C T Magee for the appellant (instructed by MRM Solicitors)

G J Hatcher SC with B K B Cross for the respondent (instructed by Hannigans Solicitors)

CATCHWORDS

Blackadder v Ramsey Butchering Services Pty Ltd

Industrial law – Reinstatement – Employer ordered to reinstate dismissed employee to the position in which he was employed prior to being dismissed – Employer reinstated employee subject to conditions – Employee paid wage but not provided with work – Whether reinstatement order made under s 170CH of the *Workplace Relations Act* 1996 (Cth) requires employer to provide employee with work – Whether employee was reinstated to the position in which he was employed prior to being dismissed.

Federal Court – Jurisdiction – Power – Whether Federal Court may make an order for enforcement of reinstatement order.

Words and phrases – "position", "reappoint", "reinstate".

Workplace Relations Act 1996 (Cth), ss 178, 170CH, 170JC(3).

1 McHUGH J. The point of principle involved in this appeal is whether an employer reinstates its employee "to the position in which the employee was employed immediately before the termination" within the meaning of s 170CH(3) of the *Workplace Relations Act* 1996 (Cth) when it:

- gives the employee the title of his former position;
- pays the employee the amount earned for ordinary time by persons in that position together with the average of the tally or bonus payments paid to employees in that position; but
- refuses to provide the employee with any duties until he undergoes a medical examination and *satisfies the employer* that he has the physical capacity to carry out his pre-termination duties.

2 The point of principle arises out of proceedings, brought in the Federal Court under that section, to enforce an order made by the Australian Industrial Relations Commission. In proceedings in the Commission, Commissioner Redmond had ordered:

> "1. The [employee] shall be reinstated to the position in which he was employed prior to the termination of his employment without loss of continuity of service or entitlements within 21 days from the date of this decision.
>
> 2. The [employee] is to be reimbursed for all lost salary and entitlements from the date of termination to reinstatement less the salary the parties agree the [employee] received through alternative employment."

3 In purported compliance with this order, the employer wrote to the employee on 3 May 2000 stating:

> "1. Effective on and from 20 April, 2000 you have been reinstated in the position of Boner in the employ of Ramsey Butchering Services Pty Ltd.
>
> ...
>
> 3. Until further notice you will not be required to report for work or otherwise perform work in order to be entitled to your wages and other remuneration.
>
> 4. You will be required to undergo a medical assessment by a Company nominated medical practitioner prior to resuming any physical work. Our reason for instituting this requirement is more fully explained below.

> 5. In terms of the payment of wages from 20 April, 2000 you will receive a payment representing back pay on the next usual pay day and will receive payment weekly thereafter. The payments made to you will be your weekly wage as a Boner in terms of ordinary pay plus the average of the tally paid to all other Boners in any given week. In addition, your superannuation will be paid as normal.
>
> 6. The position will continue until the results of the medical assessment is known and considered by the Company at which time you will be advised of the Company's position.
>
> Our reason for excusing you from physical work until further notice is that arising from the proceedings before the Commission, and the tendering of the Medical Certificate from Dr Bacon, doubts exist as to your physical capacity to perform the duties of a boner not only in relation to the duties associated with Hot Necking on the Slaughterhouse Floor but more importantly your ability to bone in the Boning Rooms given the Osteoarthritis in your right elbow. As you are aware, an absolute duty is imposed upon the Company as to your health, safety and welfare at work. Until such time as we are able to ascertain your physical condition to bone we do not wish to expose you to any risk.
>
> Prior to your recommencing duties we require you to attend for medical assessment by our nominated doctor. We will advise you by letter of the date and time of the appointment. This appointment will be scheduled during normal working hours."

4 After sending this letter, the employer directed the employee to undergo a medical examination on 5 May 2000. But the employee refused to attend the examination on the ground that the Commission's order for reinstatement was not dependent upon fulfilling such a condition. The employee claimed that he was ready and able to resume the boning work that he had performed before termination of his employment. As from 11 June, the employer refused to pay the employee wages because he had failed to submit to the medical examination.

5 On 26 June 2000, the Full Bench of the Commission dismissed the employer's application for leave to appeal against the order of Commissioner Redmond. On 14 July 2000, the employee commenced proceedings in the Federal Court of Australia to enforce the order made by Commissioner Redmond. Twelve days later, the employee informed the employer that he was willing to attend a medical examination arranged by the employer.

6 The employer responded by informing the employee he would be paid an amount equal to the amount earned by boners in the boning team – ordinary time together with the average of the tally earned by boners in the boning team calculated on a piece work basis. However, the employer refused to provide the employee with work until the employee was declared medically fit to do it.

7 After an aborted medical examination and non-payment of wages for a period, the employee eventually underwent a medical examination on 5 April 2001. From that time, the employee received wages and a share of the tally. However, the employer continued to refuse to allow the employee to return to work.

8 Commissioner Redmond's order was made under the power conferred by s 170CH of the Act. That section provides that, if the termination of an employee's employment "was harsh, unjust or unreasonable", the Commission may make certain orders. Two of them are contained in s 170CH(3) which provides:

> "(3) If the Commission considers it appropriate, the Commission may make an order requiring the employer to reinstate the employee by:
>
> (a) reappointing the employee to the position in which the employee was employed immediately before the termination.
>
> (b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination."

9 Before making his order, Commissioner Redmond made certain findings which indicate that his order was intended to reinstate the employee to do hindquarter boning work, the work that the employee ordinarily did before his employment was terminated.

10 Hindquarter boning work is performed on pre-chilled pieces of beef carcasses. When the employee arrived for work on 28 September 1999, however, the employer directed him to leave the boning room where that class of work was done and go to the slaughterhouse floor to perform hot neck boning. That form of boning requires the worker to free the meat from the bones of the carcass from the neck to the ribs. The employee testified – and his evidence was not contradicted – that hot neck boning required greater rotational force and effort of both the wrist and the elbow than general boning work. This was the first time the employer had directed the employee to do hot neck boning. The employee refused to do it because he had no prior experience of, or training for, the work and was concerned that doing it would aggravate a pre-existing injury.

11 Commissioner Redmond accepted the employee's evidence as to the events concerning the termination of his employment. He also found:

- the employee had a pre-existing medical condition;

- the condition prevented the employee from doing hot neck boning;
- the employee had not been appropriately trained to perform that work;
- the operational requirements of the employer's business did not require the employee to do the work; and
- the employer's direction was unreasonable and unsafe and directly resulted in the termination of the employment.

12 Orders are made under s 170CH only if the termination of employment "was harsh, unjust or unreasonable". Whether a termination falls within any of those categories can only be determined by examining *what the employee did as part of his employment* and the reasons or lack of reasons for terminating the employment. Once the Commission determines that the employment was terminated in circumstances that attract the reinstatement power, it is empowered to rectify the wrong perpetrated by the employer.

13 Paragraph (a) of s 170CH(3) empowers the Commission to order that the employee be re-appointed to the position *in which* the employee was employed immediately before the termination, that is to say, to do the work on which the employee was engaged when the employment was terminated. If that cannot be achieved, par (b) of the sub-section empowers the Commission to order that the employee be appointed to *another position* on terms and conditions no less favourable than those on which the employee was employed immediately before the termination. The term "another position" demonstrates that orders made under sub-s (3) are concerned with more than reinstating the contract of employment and its terms and conditions. Whether the terms and conditions are "no less favourable" can be determined only by examining what the employee is employed to do in the new position. Paragraph (b) points irresistibly to the term "position" in s 170CH(3) being concerned with the duties and working conditions of the occupation as well as the contractual rights and duties attached to it.

14 To construe the power "to reinstate" as confined to restoring contractual or other legal rights fails to give full effect to the term "reinstate". To reinstate means to put back in place. In this context, it means that the employment situation, as it existed immediately before the termination, must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms. It empowers the Commission to do more than restore the contract of employment. So far as practicable, the employee is to be given back his "job" at the same place and with the same duties, remuneration and working conditions as existed before the termination. The Full Court of the Federal Court erred in the present case by holding that "the emphasis on

appointing the employee to a 'position' demonstrates that it is the contractual position which is either to be restored in its earlier terms or in equivalent terms."[1]

15 Accordingly, the Commission may make orders under s 170CH(3) for the purpose of reinstating the situation that existed immediately before the employer terminated the employment or, where that cannot be achieved, by putting the employee in a close substitute for that situation.

16 The Order of the Commissioner in the present case must be read against the circumstances of the pre-termination employment and the finding that the employee was not fit to do hot neck boning. When that is done, the direction to reinstate the employee "to the position in which he was employed prior to the termination of his employment" can only mean that the employee had to be given back the job that he had before termination, performing the same duties on the same terms and conditions. He was to be reinstated to do the general boning work and, in particular, the hindquarter boning work that he did before the termination. His reinstatement was not subject to any condition that he was fit to perform his pre-termination duties. An employer cannot evade the operation of a reinstatement order by making it subject to the employer's satisfaction concerning the fitness of the employee or some other condition formulated by the employer.

17 The employer's failure to provide work for the employee was a breach of the order of the Commission, as Madgwick J, the primary judge, found.

Order

18 The appeal must be allowed. I agree in the orders proposed by Callinan and Heydon JJ.

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1 *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381 at 416 [72].

19 KIRBY J. I agree with the other members of this Court that the majority in the Full Court of the Federal Court of Australia, from whose orders this appeal comes[2], erred in the view that they took of the employment reinstatement provisions of the *Workplace Relations Act* 1996 (Cth)[3] ("the Act"). The approach of the dissenting judge in the Full Court (Moore J) is to be preferred[4].

The facts surrounding the appellant's termination

20 The facts, described by Callinan and Heydon JJ in their reasons ("the joint reasons")[5], concerning the case between Mr Stephen Blackadder (the appellant) and his employer, Ramsey Butchering Services Pty Ltd (the respondent), reveal a fairly typical instance of breakdown of trust in the employment relationship. This is apparent, to take but one example, in the appellant's refusal (ultimately withdrawn) to undergo a medical examination by a medical practitioner nominated by the respondent except in the presence of his wife – a requirement to which the practitioner would not accede[6].

21 However, this attitude on the part of the appellant, and indeed the course of the conflict between the parties, must also be considered against the background of the events that preceded this litigation. That background is described in the reasons for decision[7] of a Commissioner of the Australian Industrial Relations Commission ("the Commission"), Redmond C, in resolving the appellant's application to the Commission for relief under the Act[8]. Those reasons were part of the record. They were referred to both by the primary judge (Madgwick J) in the Federal Court[9], and, on appeal, by the Full Court[10].

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2 *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381.

3 Especially s 170CH. See reasons of Callinan and Heydon JJ ("joint reasons") at [72].

4 *Ramsey* (2003) 127 FCR 381 at 406-410 [44]-[54].

5 Joint reasons at [49]-[64].

6 Joint reasons at [62].

7 *Blackadder v Ramsey Butchering Services Pty Ltd*, 29 March 2000 (Redmond C), Prints S4537 and S4542 ("Decision of the Commissioner").

8 s 170CE.

9 *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395 at 399-401 [16] per Madgwick J.

10 *Ramsey* (2003) 127 FCR 381 at 386 [3], 390-391 [7] per Moore J.

22 In late August 1999, the appellant was given a summons by the respondent to appear as a witness in a case between another employee and the respondent. The case was being heard before the Commission at the Grafton courthouse. The case concerned an allegedly unlawful termination of the employment of the other employee. After giving his evidence on Monday 27 September 1999, the appellant "concluded from the comments of the respondent's solicitor that the evidence given by him ... was not helpful to the respondent and conflicted with the company's submissions in a number of key respects"[11]. Under the Act, as the Commissioner noted, dismissal or discrimination against an employee for giving evidence in a proceeding under industrial law is prohibited[12].

23 As the Commissioner observed, "[t]he respondent's directions to the [appellant] on Tuesday 28 September 1999 came immediately after he gave evidence in proceedings unfavourable for the respondent's case"[13]. The respondent's direction to the appellant to proceed from the boning room (where he had previously worked on chilled boning) to the slaughterfloor (to carry out "hot necking") happened at 6.30am on 28 September 1999, immediately after the appellant presented for duty. The appellant had been working as a boner in the boning room since 29 April 1998. He objected to the change to duties outside his skills and, possibly, his capacity. Presumably, he considered that the change in his duties was more than coincidental.

24 The Commissioner found that the respondent's termination of the appellant's employment, which immediately followed these events, was unfair and unlawful[14]. He accepted the appellant's evidence "without reservation"[15]. He did not accept the evidence of Mr Ramsey, the Managing Director of the respondent, whom he described as "aggressive, evasive and forgetful". He characterised Mr Ramsey's aggression as "as startling as it was inappropriate"[16]. He concluded that "whenever the truth and Mr Ramsey's business interests conflict, truth would not be the winner"[17].

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11 Decision of the Commissioner at [9].

12 The Act, ss 298L(j), 298L(k).

13 Decision of the Commissioner at [10].

14 Decision of the Commissioner at [17]; see also at [71].

15 Decision of the Commissioner at [62].

16 Decision of the Commissioner at [61].

17 Decision of the Commissioner at [62].

25 Having held that the termination of the appellant's employment was unreasonable because of the directions given to him, Redmond C concluded that a breach of the applicable Australian Workplace Agreement ("the AWA")[18] had occurred. He decided that the appropriate remedy was reinstatement of the appellant in the employment of the respondent. In so ordering, the Commissioner took into account his finding that the appellant was "innocent of any matters of conduct or performance which would mitigate against reinstatement"; that the appellant had mitigated his losses as best he could; and that he would have "grave difficulty" in finding alternative employment in Grafton[19].

26 It was against this order of reinstatement that the Full Bench of the Commission refused the respondent leave to appeal[20]. The proceedings, so concluded in the Commission, then became the basis of the application for the imposition of penalties and making of declarations by the Federal Court, pursuant to the Act[21]. Amongst other things, the appellant complained that the respondent had refused to reinstate him in "his work as a boner".

27 Having made the orders of reinstatement, Redmond C did not proceed to "decide whether the [appellant] was being victimised for having given evidence"[22]. However, the background to the dispute was not forgotten, being mentioned successively by Redmond C[23], the Full Bench of the Commission[24] and by Madgwick J in the Federal Court[25]. I have referred to the background not because it is legally determinative but because it demonstrates how the case is a fairly typical one, involving stress in the employment relationship on both sides, with strong feelings and a sense of grievance in both parties.

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18 Ramsey Butchery Services Pty Ltd (Grafton Meatworks) Australian Workplace Agreement 1998. See joint reasons at [49]-[52].

19 Decision of the Commissioner at [72]-[73].

20 *Blackadder v Ramsey Butchering Services Pty Ltd*, 26 June 2000 (Boulton and Munro JJ, Harrison C), Print S7395 ("Decision of the Full Bench").

21 The Act, ss 170CE, 170CH, 170JC.

22 *Blackadder* (2002) 118 FCR 395 at 399 [14] per Madgwick J.

23 Decision of the Commissioner at [8]-[13].

24 Decision of the Full Bench at [3].

25 (2002) 118 FCR 395 at 397-398 [5]-[12].

The purpose and operation of reinstatement orders

28 The fact that, for a very long time[26], Australian statute law has provided for orders of reinstatement in circumstances such as those in this case[27] illustrates the exceptional but settled character of such orders – intruding as they do into the personal relationship of employer and employee[28]. Such intrusion is deliberate and envisaged by the Act[29].

29 The constitutional validity of the provisions of the Act was not questioned in this appeal[30]. The purpose of the Parliament in providing for such relief is to be given effect by the Commission and the courts. It is not to be frustrated or negatived because it conflicts with common law notions of freedom of contract or with other traditional legal rules respecting the personal character of the employment contract. All such rules must adapt to the statutory provisions which have been enacted for important social and industrial purposes.

30 The chief purpose for the relevant power finds its source in notions of industrial equity having a long history in Australian labour law. Specifically, in relation to a consideration of an application in respect of a termination of

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26 The first recorded reinstatement order in Australia was made by the Industrial Commission of New South Wales in *Newcastle Wharf Labourers' Union v Newcastle & Hunter River Steamship Co Ltd* [1902] AR (NSW) 1. See *Ramsey* (2003) 127 FCR 381 at 406 [44] per Moore J.

27 See, for example, O'Donovan, "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice", (1976) 50 *Australian Law Journal* 636; Davidson, "Reinstatement of Employees by State Industrial Tribunals", (1980) 54 *Australian Law Journal* 706.

28 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

29 The Act, s 170CH. The power to order reinstatement has been described as "drastic": *Slonim v Fellows* (1984) 154 CLR 505 at 515.

30 See *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656; *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311. Part VIA Div 3 of the Act now draws for its validity, additionally, on the external affairs power in the Constitution, s 51(xxix), in fulfilment of ILO Convention (No 158) concerning Termination of Employment at the Initiative of the Employer done at Geneva on 22 June 1982, [1994] *Australian Treaty Series* No 4; and on the corporations power (the Constitution, s 51(xx)). See the Act, ss 170CA(1)(e), 170CB.

employment, the command of the Parliament is that the statutory procedures and remedies provided in the Act (including for orders of reinstatement) are to be exercised to accord both employer and employee a "fair go all round"[31].

31 The width of the power to order reinstatement, conferred on the Commission by the Act, is indicated by the language of sub-s 170CH(3). There, the Commission is empowered to make an order requiring the employer to reinstate the employee by reappointing the employee "to the position in which the employee was employed immediately before the termination"[32], or "to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination"[33]. It is impossible to reconcile these very wide provisions, and in particular sub-par (b), with the narrow view of the Commission's jurisdiction and power adopted by the majority in the Full Court in this case[34].

32 As the joint reasons demonstrate[35], the provision to the appellant of an average boner's salary in lieu of actual employment duties is not, in this case, a compliance with the order for reinstatement made under the Act. First, it does not permit the appellant to increase his income, which, under the AWA, could be increased incrementally, based on the quantity of boning work performed by the particular employee. Secondly, it denies him the satisfaction of employment, the feeling of self-worth that it can generate and the maintenance of his skills to which their exercise would contribute[36]. Thirdly, it denies the appellant the vindication of actual "reinstatement", which is one of the social and industrial purposes of the order made under the Act, confirmed by the Full Bench of the Commission and given effect by Madgwick J in the Federal Court.

33 By the Act, and the order, reinstatement of the appellant was meant to be real and practical, not illusory and theoretical. In effect, if the respondent's argument were correct, it would permit the respondent to thumb its nose at the

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31 The Act, s 170CA(2). The note to this sub-section refers to the use of that expression by Sheldon J in *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95, also a reinstatement case.

32 s 170CH(3)(a).

33 s 170CH(3)(b).

34 *Ramsey* (2003) 127 FCR 381 at 416 [77].

35 Joint reasons at [75]-[77].

36 *William Hill Organisation Ltd v Tucker* [1999] ICR 291 at 295-296, citing *Provident Financial Group Plc v Hayward* [1989] ICR 160.

heart and core of the order made, namely that the appellant be "reinstated", that is, according to the word's derivation and ordinary meaning, "put back in place" in his former employment. The Act does not grant the employer the unilateral power to buy its way out of the obligations imposed on it under a valid law of the Parliament. The employer is bound to comply with the order and the Act. Its failure to do so produces statutory consequences to which, by his orders, Madgwick J sought to give effect.[37]

Form of the orders to be made

34 I agree with Callinan and Heydon JJ[38] that Moore J in the Full Court of the Federal Court gave the correct analysis of what might happen in the future if the appellant were unable, or unwilling, to perform the work of his former position as a boner in the chilled boning room (or such other work as was later assigned to him)[39]. The purpose of a reinstatement order is to ensure that the employee in question is placed in the *status quo ante*[40]. It is not to anticipate every eventuality that might thereafter arise; nor is it to provide the employee the subject of it with employment for life. What happens in the future, and what follows from what happens, depends on all the circumstances then obtaining.

35 The logic of this analysis requires that this Court should, in substance, restore the orders of Madgwick J and not attempt for itself to draft orders of its own to anticipate unknowable future events. In an appeal, although this Court has the power to make the order that should have been made in the court below[41], it remains a court of error. In this appeal from the orders favoured by the majority of the Full Court of the Federal Court, having found error, this Court should set those orders aside and restore the orders of the primary judge, subject to the deletion and variation proposed by Moore J in the Full Court[42]. We should leave future events to be handled in the correct places, namely by restoration of the matter (or initiation of a new matter) before the Commission or, if any facility for variation of orders remains open, before the Full Court.

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37 The Act, s 170JC(3).

38 Joint reasons at [77].

39 *Ramsey* (2003) 127 FCR 381 at 396-397 [20], 402-404 [34]-[38].

40 *Ramsey* (2003) 127 FCR 381 at 397 [21]. See joint reasons at [75], [77]; cf *Re Loty* [1971] AR (NSW) 95 at 106.

41 *Judiciary Act* 1903 (Cth), s 37.

42 *Ramsey* (2003) 127 FCR 381 at 406 [43].

Orders

36 I agree in the orders proposed in the joint reasons.

37 HAYNE J. The facts and circumstances giving rise to this appeal are described in the reasons of Callinan and Heydon JJ. I do not repeat them except to the extent necessary to explain my reasons. The principal statutory provisions in issue are set out there and again I need not repeat them.

38 The Australian Industrial Relations Commission ("the Commission") made orders[43] under s 170CH of the *Workplace Relations Act* 1996 (Cth) ("the Act") that the appellant be reinstated to the position in which he was employed prior to the termination of his employment by the respondent and that he be reimbursed the difference between the salary and entitlements he would have earned with the respondent and the amount he received from alternative employment.

39 The Commission having made this order, the respondent told the appellant that until further notice he would not be required to report for work, or otherwise perform work, in order to be entitled to his wages and other remuneration. The respondent also sought leave to appeal to a Full Bench of the Commission against the orders made at first instance.

40 The respondent's application to the Full Bench of the Commission failed[44]. The appellant then applied to the Federal Court, pursuant to s 178 of the Act, for orders imposing penalties on the respondent for failing to comply with the Commission's orders and, pursuant to s 170JC(3), for injunctions enforcing the Commission's orders, and for an order that he recover lost wages. On 10 May 2002, the primary judge (Madgwick J) declared[45] that the respondent had breached the order of the Commission, and that its conduct in certain other respects (not now relevant) had contravened the applicable Australian Workplace Agreement[46]. The primary judge imposed penalties for these contraventions[47]. By the same order, the primary judge made orders for payment of wages and entitlements, together with interest, and directed the parties to bring in short minutes of orders quantifying the amount of interest to be paid and "providing for injunctive relief to be ordered, if still sought" in the light of the reasons for decision. Subsequently, on 21 May 2002, the primary judge made further orders,

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43 *Blackadder v Ramsey Butchering Services Pty Ltd*, 29 March 2000 (Commissioner Redmond), Prints S4537 and S4542.

44 *Blackadder v Ramsey Butchering Services Pty Ltd*, 26 June 2000 (Boulton and Munro JJ, Commissioner Harrison), Print S7395.

45 *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395.

46 s 170VT.

47 ss 170VV, 178.

including an order that the respondent reinstate the appellant to the position in which he was employed prior to the termination of his employment "namely a boner performing chilled boning work in that part of the respondent's premises known as the big boning room".

41 The respondent appealed to the Full Court of the Federal Court against the orders made on 10 May 2002 and the orders made on 21 May 2002. The Full Court allowed[48] the respondent's appeal in part. The Full Court ordered that the primary judge's orders of 21 May 2002 (the second orders made by the primary judge) be varied by deleting the words "namely a boner performing chilled boning work in that part of the respondent's premises known as the big boning room" and by setting aside some consequential orders the primary judge had made on 21 May 2002. The Full Court's orders did not, however, interfere with the primary judge's earlier orders of 10 May 2002, declaring the respondent to have breached the Commission's orders for reinstatement (and the Australian Workplace Agreement) and imposing penalties for those contraventions. The Full Court's reasons did not examine how the findings of breach, and consequent imposition of penalties, could stand with the decision to vary the primary judge's orders by deleting that part which identified the position to which the appellant was to be reinstated.

42 The central issue in this appeal is one of statutory construction. What is meant in s 170CH(3)(a) by "an order requiring the employer to reinstate the employee by ... reappointing the employee to the position in which the employee was employed immediately before the termination". In particular, what is meant in that provision by "position"?

43 "Position", when used in s 170CH(3)(a), refers to the place in the employer's commercial structure which the employee occupied before termination. It refers not only to the pay and other benefits which an employee may earn in a position, but also to the work which the person filling that position does. It follows that an employer, ordered to reinstate an employee by reappointing the employee to the position in which the employee was employed immediately before the termination, not only must recommence paying or providing the financial or other benefits attached to the position, but also must put the employee back to the performance of those duties which the employee was fulfilling before termination.

44 There are two principal reasons to reach this conclusion. First, s 170CH(3) provides for two different kinds of order for reinstatement. It distinguishes between, on the one hand, orders requiring an employer to reinstate an employee by reappointing the employee to the position in which the employee

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48 *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381.

was employed immediately before termination, and, on the other, reinstatement by appointing the employee "to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination". This distinction between reinstatement by reappointing to the *former* position and reinstatement by appointing to *another* position reveals that the concept of "position" is insufficiently described by reference only to the pay or other benefits which an employee is to receive from the employer. Yet in essence the respondent's contention was that the appellant was reinstated to his former position because he was paid the same pay and benefits, and that it did not matter whether he was given any work to do. Secondly, both the drawing of that distinction and the Act's reference to "position" rather than "employment" or "contract of employment" reveal that more is required by an order of the kind now in question than recreation of the contractual nexus that existed between the parties before the termination of employment or recreation of that nexus to the extent of giving the employee the benefits available under the terms and conditions which previously existed. Rather, reinstatement by reappointing to a former position requires the recreation of the circumstances of employment that preceded the termination. The contractual nexus between the parties must be re-established. The terms and conditions of that contract must be the same. The employer must provide work to be done by the employee of the same kind and volume as was being done before termination. In cases where that last element cannot be achieved (as, for example, where the work formerly done is no longer required) the form of reinstatement for which s 170CH(3)(a) provides would not be appropriate and the question would become whether the alternative form of reinstatement (by appointing to another position) should be made.

45 In the circumstances described in the reasons for judgment of Callinan and Heydon JJ, the primary judge was right to conclude that the respondent had not obeyed the Commission's order. (The order which the Commission made did not follow precisely the words of s 170CH(3)(a), but there is no reason to doubt that the order was intended to effect that kind of reinstatement.) The respondent had not reinstated the appellant by reappointing him to his former position. The primary judge was therefore right to hold that the respondent was in breach of the Commission's orders and, in consequence, in breach of the Act.

46 It was not submitted that the primary judge should not have gone beyond finding contravention and imposing penalties to make orders, under s 170JC(3), in the form of mandatory injunctions requiring reinstatement. Because the respondent did not reinstate the appellant in accordance with the Commission's order, it is unnecessary to consider whether, or in what circumstances, it would be open to an employer who had re-engaged an employee, then, by resorting to some provision of the applicable industrial instrument, to seek to transfer that employee to other duties. Such a case may present difficult questions of fact and degree about whether what was done contravened the order for reinstatement. Such difficulties suggest that the cases in which it may be appropriate to make mandatory orders regulating the future conduct of relations between an employer

and employee (as the primary judge did here by directing the respondent to furnish the appellant with his usual work for a period of 14 days) may be rare. There being no challenge to this particular aspect of the primary judge's order, it is unnecessary to consider it further.

47 The appeal to this Court should be allowed, the orders of the Full Court of the Federal Court of Australia made on 21 February 2003 set aside and, in their place, there be orders that the appeal to that Court be dismissed.

48 CALLINAN AND HEYDON JJ. The substantial issue in this appeal is whether an order for reinstatement of an employee made by the Australian Industrial Relations Commission under the *Workplace Relations Act* 1996 (Cth) ("the Act") required the employer to provide actual work to the reinstated employee.

Facts

49 The appellant had been a rugby footballer and a rider in rodeos in his youth. For some years before its closure in 1997, he worked as a boner at an abattoir in Grafton in New South Wales. In 1998, the abattoir reopened under the different ownership of the respondent. The respondent wished to introduce more flexible working arrangements[49] at the abattoir on its reopening, and to provide incentives to employees to cooperate in these arrangements in order to increase productivity. That this is so appears from the terms of the Ramsey Butchery Services Pty Ltd (Grafton Meatworks) Australian Workplace Agreement ("the AWA") which was registered by the Australian Industrial Relations Commission ("the Commission") on 23 October 1998 pursuant to Div 5 of Pt VID of the Act which the appellant signed, and by which the parties were bound, and the undertaking that he gave to the respondent:

> "1. To work 5 days a week when required without the imposition of any bans or limitations and without stoppages.
>
> 2. To work in accordance with the lawful requirements of the Company.
>
> 3. ...
>
> 4. To work in accordance with Company directions.
>
> ..."

The appellant also agreed that "[his] continued employment may be contingent upon satisfactorily passing a physical examination at any time to establish [his] capability to properly or safely perform [his] duties." The appellant said that he had not suffered any disabilities of his wrist, elbow or shoulder but disclosed that he had previously dislocated his right elbow. Before his engagement, the appellant was examined by a doctor who declared him fit for heavy manual work subject to this slight qualification:

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49 Ramsey Butchery Services Pty Ltd (Grafton Meatworks) Australian Workplace Agreement 1998, cll 22.1, 35 and 37.20.

"Slight (20%) limitation of (R) shoulder rotation because of old (R) elbow dislocation – fibrosis here. Shoulder would be classified as normal."

50 It is necessary to refer to the relevant terms of the AWA. Clause 1 is concerned with hours of work, cl 2 with rates of pay for various categories of employees, and cl 7 with overtime. Clause 9 specifies the tasks to be performed by slaughterpersons. Clause 17 makes provision for flexibility of working times in case of shortage of stock, temporary interruption of employment and the financial consequences of these. Sub-clauses 22.1, 22.3 and 22.4 provide a further indication that the working arrangements may be altered from time to time:

"22.1 Any employee, including a juvenile, called upon to perform work of any classification for which a higher rate of pay is provided by this AWA, shall be paid the higher rate of pay whilst so employed with a minimum of three hours at such rate of pay.

...

22.3 Any employee who is required to perform on any day or shift, work for which a lower rate than that of his ordinary classification is prescribed, shall suffer no reduction in consequence thereof.

22.4 Where any employee is transferred for the greater part of the day under the provisions of this clause, he/she shall be entitled to the conditions normally associated with the particular position he/she was transferred to."

51 Sub-clauses 35.1, 35.8 and 35.9 deal with categories of work and the duty of employees to work as directed:

"35.1 An employee shall be engaged either as a weekly hand or as a daily hand or as a part-time employee and each employee shall be notified at the beginning of employment and before commencing work whether the employee is a weekly or daily hand or part-time employee.

35.8 A labourer shall be required to perform slaughtering tasks and shall be required to contribute to tally provided the said labourer is suitably qualified to perform the slaughtering task or tasks required and is paid the appropriate slaughtermen's rate of pay for such time as the labourer is performing that slaughtering task or tasks.

35.9 An employer may direct an employee to carry out such duties as are within the limits of an employee's skill, competence and training: the employee will follow such direction."

52 Clause 37 is concerned with "tally boning". It is plain from its terms which need not be set out that the productivity of a team of workers of which the appellant would have been a member, may affect the remuneration of the team, each of whom could, by his personal efforts, influence both of these; sub-cll 37.2 and 37.10 are of some further significance however because they indicate that "neck boning" was to be treated separately and differently from other work under the AWA. Sub-clause 37.20, which has of course to be read with, and subject to the other parts of the AWA, in particular sub-cl 35.9 above, is as follows:

> "37.20 Employees shall perform such tasks or combination of tasks as the employer may require."

53 The primary judge, Madgwick J, described the appellant's employment and its termination as follows[50]:

> "Until the events constituting termination of his employment, the [appellant] worked in what was referred to as the big boning room at the Grafton meatworks and principally performed hindquarter boning work. That work is performed on pre-chilled pieces of beef carcases. On 28 September 1999 the [appellant] arrived at work and was directed to leave that boning room and go to the slaughter floor to perform hot neck boning, a task he had not previously undertaken. This was the first time the respondent had directed him to undertake such work, and he had not been trained in it. Hot neck boning involves 'freeing' the meat from the bones from the neck to the ribs. The [appellant's] unchallenged evidence was that this requires greater rotational force and effort of both the wrist and elbow than general boning.
>
> The [appellant] refused to perform the task and left the premises shortly thereafter. The [appellant's] reasons for refusing to undertake the work included that he had no prior experience or training in hot neck boning and that he was concerned about his right arm. As indicated above, the [appellant] has some restriction in his right shoulder due to earlier dislocations of his right elbow, such dislocations pre-dating his employment with the respondent. The [appellant] also believed he was being victimised for giving evidence, adverse to the respondent's interests, to the AIRC on the previous day, 27 September 1999, in respect of another unlawful termination case concerning another employee of the respondent."

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50 *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395 at 398 [12]-[13].

54 On 25 October 1999 the appellant filed an application for relief pursuant to s 170CE of the Act alleging unlawful termination of his employment by the respondent on or about 5 October 1999. A hearing was conducted before Commissioner Redmond on 18 and 19 January 2000 and 17 February 2000.

55 Commissioner Redmond gave his decision on 29 March 2000. He found that the respondent had terminated the appellant's employment and that the termination was unfair, harsh and unreasonable. In his reasons, the Commissioner said:

> "The [appellant] was instructed at approximately 6.30 am on 28 September 1999 to perform hot neck boning. The [appellant] said that he had no experience in hot neck boning and thought that it would be a danger to the employees on the slaughterhouse floor if he tried to perform the work. Also, the [appellant] had a disability that restricted movement in one arm. The company knew of the [appellant's] disability. The disability added to his safety concerns. The [appellant] firmly believed that he could do damage to himself and to other employees. He felt he was being victimised by the company.
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> ...
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> The evidence of Mr Paul David Marshall, the company's personnel officer and payroll manager, concerned the circumstances which arose after the [appellant] had left the workplace and the functions that he assumed employees should carry out according to their classifications. In his sworn statement Mr Marshall referred to other matters he thought relevant to the case. During cross-examination by [counsel for the appellant] it became clear that the [appellant] had been employed by the respondent with a pre-existing elbow injury which was noted in the Doctor's Certificate and which would have caused some restriction when performing hot neck boning. Furthermore the witness expressed his concern regarding training and whether people were being fully trained.
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> ...
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> In determining the various issues before me it was necessary to make some preliminary findings of fact. I have set out these findings below.
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> - I accept the [appellant's] version of events regarding the circumstances surrounding the termination of his employment without reservation.
>
> ...

- I find that the [appellant] had a pre-existing medical condition which was more probably than not one which caused him to be unable to perform work in hot neck boning.

- I find that the [appellant] had not been appropriately trained to perform hot neck boning.

- I find that there was no identifiable need related to the operational requirements of the business for the [appellant] to be selected to perform this work. The direction to the [appellant] was characterised by the respondent as a move required for the continued operation of the respondent's business in order to cover a vacancy. There was no evidence to support this proposition and I reject it."

56 The Commissioner found that the respondent's direction was unreasonable and unsafe and directly resulted in the termination of the appellant's employment. He accordingly made the following orders:

"1. The [appellant] shall be reinstated to the position in which he was employed prior to the termination of his employment without loss of continuity of service or entitlements within 21 days from the date of this decision.

2. The [appellant] is to be reimbursed for all lost salary and entitlements from the date of termination to reinstatement less the salary the parties agree the [appellant] received through alternative employment."

57 By letter dated 3 May 2000, the respondent wrote to the appellant to advise him that he had been reinstated effective on and from 20 April 2000. That letter stated:

"We refer to the Orders made by Mr Commissioner Redmond on 29 March, 2000.

Under Order 1 we were ordered to reinstate you to the position in which you were employed prior to the termination of your employment without loss of continuity or entitlement within 21 days from the date of decision (ie 29 March, 2000). ...

For the purpose of compliance with the order your employment status is to be as set below:

1. Effective on and from 20 April, 2000 you have been reinstated in the position of Boner in the employ of Ramsey Butchering Services Pty Ltd.

2. Your employment date will be 30 April, 2000 with full continuity from that date for all purposes.

3. Until further notice you will not be required to report for work or otherwise perform work in order to be entitled to your wages and other remuneration.

4. You will be required to undergo a medical assessment by a Company nominated medical practitioner prior to resuming any physical work. Our reason for instituting this requirement is more fully explained below.

5. In terms of the payment of wages from 20 April, 2000 you will receive a payment representing back pay on the next usual pay day and will receive payment weekly thereafter. The payments made to you will be your weekly wage as a Boner in terms of ordinary pay plus the average of the tally paid to all other Boners in any given week. In addition, your superannuation will be paid as normal.

6. The position will continue until the results of the medical assessment is known and considered by the Company at which time you will be advised of the Company's position.

Our reason for excusing you from physical work until further notice is that arising from the proceedings before the Commission, and the tendering of the Medical Certificate from Dr Bacon, doubts exist as to your physical capacity to perform the duties of a boner not only in relation to the duties associated with Hot Necking on the Slaughterhouse Floor but more importantly your ability to bone in the Boning Rooms given the Osteoarthritis in your right elbow. As you are aware, an absolute duty is imposed upon the Company as to your health, safety and welfare at work. Until such time as we are able to ascertain your physical condition to bone we do not wish to expose you to any risk.

Prior to your recommencing duties we require you to attend for medical assessment by our nominated doctor. We will advise you by letter of the date and time of the appointment. This appointment will be scheduled during normal working hours."

58 The appellant was subsequently directed to undergo a medical examination by Dr Castagna in Casino on 5 May 2000. The appellant did not attend for the examination, because, he said, inter alia, Commissioner Redmond's

order for reinstatement was not conditional upon it and he was ready, willing and able to resume his pre-termination boning work.

59 On 7 June 2000 the respondent advised the appellant that payment of his wages would cease by reason of his failure to submit to a medical examination. The appellant received no wages from the week ending 11 June 2000 to the week ending 23 July 2000. On 26 June 2000 the respondent applied for leave to appeal and the appeal was heard and dismissed by the Full Bench of the Commission (Boulton and Munro JJ and Commissioner Harrison).

60 On 15 September 2000 the appellant commenced a proceeding under s 170JC(3)[51] of the Act in the Federal Court of Australia to enforce the order made by the Commission.

61 By letter dated 26 July 2000 the appellant informed the respondent that he was willing to attend any medical examination arranged at the request of the respondent.

62 By letter dated 10 August 2000, the respondent advised the appellant that it would begin to pay the appellant an amount being the amount earned by boners in the boning team for ordinary time, plus the average of the tally paid to all other boners, calculated on a piece work basis from 26 July 2000. The respondent continued however to refuse to provide him with any work until after he received medical clearance. The respondent then arranged a further medical examination on 6 February 2001. Although the appellant attended for the examination it did not take place. The examining doctor refused to proceed whilst the appellant's wife was in attendance and the appellant declined to let her leave.

63 On 16 February 2001, the respondent advised the appellant that payment of his wages would cease and would not recommence until he underwent a medical examination. The appellant received no wages from the week ending

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51 "(3) In addition to any other right that an employee covered by an order under this Part may have under Part VIII (as it applies in accordance with this section):

(a) the employee may apply to the Court to enforce the order by injunction or otherwise as the Court thinks fit; and

(b) if the order is an order under Subdivision B of Division 3 – the employee may apply to a court of competent jurisdiction as defined in section 177A to enforce the order by injunction."

Section 4 of the Act defined "Court" as the "Federal Court of Australia".

18 February 2001 to the week ending 18 March 2001. He did however inform the respondent on 23 February 2001 that he was willing to undergo a medical examination.

64 On 5 April 2001, the appellant underwent a medical examination. From that date, the respondent commenced to pay the appellant an amount being the amount earned by boners in the boning team for ordinary time, plus the average of the tally paid to all other boners, calculated on a piece work basis, but did not allow the appellant to return to work or to contribute to the piece work tally.

Decision of the primary judge

65 The primary judge in the Federal Court (Madgwick J) delivered his reasons for judgment on 10 May 2002. His Honour was of the view that reinstatement under s 170CH of the Act involves a return of the employee to the workplace[52]:

> "... I would agree that reinstatement under s 170CH of the Act does implicitly involve a return of the employee to the workplace. The Act contemplates that it is only in circumstances where reinstatement is inappropriate that the suitable alternative is to award payment in lieu of reinstatement (s 170CH(6)). Thus, the apparent statutory purpose of the relief is to treat the dismissal as ineffective and restore the employment situation to its pre-termination status. If a direction to reinstate an employee required no more than that the employee be put back on the payroll, it is difficult to see why reinstatement would even be 'inappropriate'. Further, as Wilcox CJ observed in *Perkins v Grace* when considering the meaning of 'reinstated' for the purposes of s 170EE, the predecessor of s 170CH, such meaning should be considered in light of its usage in industrial parlance. Such parlance would understand reinstatement to include reinstatement in the sense just mentioned, including all the usual incidents of the employment, such as attendance at the workplace and there being furnished with one's usual productive work.
>
> ...
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> In finding that the orders did require that the [appellant] be returned to work, it is important to clarify what the reinstatement order required in a practical and concrete sense. Counsel for the respondent was, in my opinion, correct in saying that reinstatement does not mean that an

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52 *Blackadder v Ramsey Butchering Services Pty Ltd* (2002) 118 FCR 395 at 406-408 [49], [53]-[57].

employee acquires new legal rights but simply restores the employment relationship with all, but only, the rights and entitlements to treatment in good faith which existed between the parties prior to the termination. It is to be remembered also that such obligations of good faith are owed by both parties. Part of the background matrix of facts in this matter showed a need for reasonable flexibility, recognised in the AWA, for the deployment of employees.

What the 'position' was to which the [appellant] was to be reinstated by reappointment (cf s 170CH(3)(a)) is a question of fact and, as a matter of fact, a person may hold a position under which certain work is or is not required, whether or not such position has an express classification or description (such as 'boner'): see *State Rail Authority (NSW) v Bauer J*[53]. Commissioner Redmond was plainly of the view that the [appellant's] s 170CH(3)(a) position was that of a boner required to do chilled boning work in the big boning room. Of particular significance are the Commissioner's findings that:

- the [appellant's] pre-existing medical condition probably caused him to be unable to perform work in hot neck boning;

- the [appellant] had not been appropriately trained to perform the hot neck boning; and

- there was no identifiable need related to the operational requirements of the business for the [appellant] to be selected to perform this work.

Taking these findings into account, the order to reinstate the [appellant] plainly intended that he would not only receive his wages and other entitlements but, in the first instance, at least, return to his former position of employment, namely to a position undertaking boning in the big boning room.

The evidence before me indicates that the [appellant] would concede that his position requires that occasionally, for bona fide operational purposes of the employer, he should relieve on the hot neck boning work.

As I have indicated, the [appellant's] rights are as before. If he then had a legal liability to be transferred to hot neck boning, upon reinstatement he would again have such liability. If he did not, or did not

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53 (1994) 55 IR 263 at 269.

until he was trained, then again he would not be so liable. If he had a liability to undergo medical examinations from time to time, on the existence of a reasonable need for them and on reasonable terms, such liability would continue. Finally, whatever mutual rights and liabilities as to transfer, removal from active work or termination of employment pre-existed his termination, they will exist again after reinstatement. Some of these matters may involve difficult questions and their resolution should await full argument, if, as I hope will not be the case, it should become necessary."

66 On 21 May 2002, Madgwick J made the following orders:

"...

2. The respondent reinstate the [appellant] to the position in which he was employed prior to the termination of his employment, namely a boner performing chilled boning work in that part of the respondent's premises known as the big boning room.

3. Upon such reinstatement and for a period of 14 days thereafter the respondent shall furnish the [appellant] with his usual work in such position, excepting in case of shortage of stock to slaughter.

4. In the event of a dispute thereafter as to the [appellant's] physical capacity to perform the work that thereafter might lawfully be required of him, the parties and each of them are to refer the matter to the Disputes Committee established under the [AWA] which, as was common ground in the proceedings, binds the parties.

..."

The decision of the Full Court of the Federal Court

67 In its appeal to the Full Court of the Federal Court, the respondent challenged the orders for the reinstatement of the appellant and submitted that an order for reinstatement simply revived the contract of employment. It submitted that as an employee does not have a right or entitlement to do actual work under a contract of employment, an order cannot be made in exercise of a power to order reinstatement, conferring such a right on the employee and imposing a corresponding duty on the employer to provide it.

68 The Full Court upheld the appeal in part on 21 February 2003 (Tamberlin and Goldberg JJ, Moore J dissenting). In doing so the majority reviewed the position at common law by which they were obviously influenced, and found that there is no obligation upon an employer to provide work to an employee unless the contract of employment specifically requires that it be provided, or where it

was necessary for an employee, an actor for example, to continue to be employed in order to maintain a profile, or where the employee's career and future prospects depended upon the employee working in a particular way, or where the employee's remuneration depended upon the amount of actual work performed by the employee. Their Honours said[54]:

> "We consider the emphasis on appointing the employee to a 'position' demonstrates that it is the contractual position which is either to be restored in its earlier terms or in equivalent terms. By using the terminology of 'appointing' as opposed to 're-employing' for example, there is indicated a legislative intention to re-establish rights or equivalent rights which were destroyed by the wrongful termination. The language does not indicate a legislative intention to provide more than that to which the employee was entitled prior to the wrongful termination.
>
> In our opinion, where a person is reinstated by appointment to a position in which he or she was acting at the time of dismissal pursuant to s 170CH(3)(a), then that provision requires that the person should be restored to all the contractual entitlements which applied in respect of that position at the time of the wrongful dismissal so far as possible, but should not be given any additional entitlement which the person did not previously have under the relevant terms of the person's employment."

69 Moore J dissenting said[55]:

> "Many of the cases concerning what an order for reinstatement comprehends, at least in the context of New South Wales industrial laws, were considered by the Industrial Commission of New South Wales in Court Session in *Retail Traders Association (NSW) v Shop, Distributive and Allied Employees Association (NSW)*[56]. In those authorities it is comparatively clear, to repeat some of the language used, that an order for reinstatement is not to achieve a notional or academic reinstatement but a practical one. It requires a re-establishment of the pre-existing employment relationship as a matter of reality and not in some notional or fictional way. The purpose of such an order is to place the dismissed employee in a position that he or she was in before the dismissal. It is to restore the status quo ante.

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54 *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381 at 416 [77]-[78].

55 (2003) 127 FCR 381 at 397-398 [21], [23].

56 (1990) 36 IR 38.

...

In my opinion, the power to make an order under s 170CH(3)(a) or (b) extends to making an order requiring the employer to permit the employee to take up the position formerly occupied by the employee, or another position, including performing the duties of that position and receiving the benefits from doing so."

70 On 21 February 2003 the Full Court made orders that:

"1. The appeal be allowed in part.

2. Paragraph 2 of the orders made on 21 May 2002 be varied by deleting the words 'namely a boner performing chilled boning work in that part of the respondent's premises known as the big boning room' and that pars 3 and 4 of the orders be set aside.

3. The appeal and cross-appeal otherwise be dismissed."

71 The effect of these orders was to leave the order for reinstatement intact except to the extent that the appellant's duties were to be confined to boning in the chilled boning room. If they are to stand the respondent could, without more, direct the appellant to do work in the hot boning room which was work that the Commissioner had held he was neither fit nor trained to do.

The appeal to this Court

Section 170CH of the Act

72 The order made by the Commissioner at first instance was made under s 170CH which provides, inter alia, as follows:

"**Remedies on arbitration**

(1) Subject to this section, the Commission may, on completion of the arbitration, make an order that provides for a remedy of a kind referred to in subsection (3), (4) or (6) if it has determined that the termination was harsh, unjust or unreasonable.

(2) The Commission must not make an order under subsection (1) unless the Commission is satisfied, having regard to all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's undertaking, establishment or service; and

(b) the length of the employee's service with the employer; and

(c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and

(d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and

(e) any other matter that the Commission considers relevant;

that the remedy ordered is appropriate.

(3) If the Commission considers it appropriate, the Commission may make an order requiring the employer to reinstate the employee by:

(a) reappointing the employee to the position in which the employee was employed immediately before the termination.

(b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.

(4) If the Commission makes an order under subsection (3) and considers it appropriate to do so, the Commission may also make:

(a) any order that the Commission thinks appropriate to maintain the continuity of the employee's employment; and

(b) subject to subsection (5) – any order that the Commission thinks appropriate to cause the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination."

73 The first question which the appeal raises is whether, under s 170CH the Commission may make an order for reinstatement, the effect of which is to require an employer to provide the employee with work, and, if it may, whether the order that was made here was of such a kind. The next question is whether, if the Commission may, and has made such an order the Federal Court should have made an order for its enforcement. As will appear, each of these questions should be given an affirmative answer.

74 Section 170CH should not be read in the narrow fashion adopted by the majority in the Full Court of the Federal Court. To do so is to treat the word

"position" as used in the Act as a formal position only, a title, or something in the nature of an office, entitling the person reappointed to it, to its emoluments and nothing else. Nor does anything turn on the use of the word "reappointing". An employee carrying out work of the kind being carried out by the appellant before his dismissal would not in ordinary language be regarded as undertaking work pursuant to an appointment.

75 All of the language of the relevant section must be given meaning. The use in s 170CH(3) of the word "reinstate" is significant. Section 170CH(3)(a) and (b) describe the way in which the reinstatement may be effected. "Reinstate" literally means to put back in place. To pay the appellant but not to put him back in his usual situation in the workplace would not be to reinstate him. The words "reappoint" and "position" should not be read in any restricted way. They are intended to apply to a very wide range of workplaces and certainly not to a particular officer or officers. It was therefore within the power of the Commission to make such an order as would contemplate or require that the employer provide a reappointed or reinstated worker with actual work to do.

76 In our opinion it is also at least implicit in the reasons for the order of the Commission at first instance that the appellant would be provided with actual work for him to do. This appears from the passages which dealt with the appellant's fitness to perform the work, and the conclusion that the appellant could do that which he had been doing before his employment was terminated. We do not take the Commissioner at first instance to have deliberated upon these matters only for the purpose of ascertaining whether the termination was in any way justified. He was also doing so for the purpose of considering whether reinstatement was appropriate, and whether upon its occurrence the appellant would be likely to be able to do the work which he had formerly been doing. Before making an order the Commission has to be satisfied of the matters referred to in s 170CH(2). Those matters included the effects (in the future) on the viability on the employer's business if an order (for reappointment) be made (s 170CH(2)(a)), the remuneration that the employee would have received if his employment had not been terminated (s 170CH(2)(c)), and any other matters that the Commission might consider relevant (s 170CH(2)(e)). With respect to the first of these, the Commission made the relevant finding that the operational requirements of the respondent's business would not be affected by the restoration of the appellant to his previous position.

77 In any event it is almost unthinkable that the Commissioner would have made an order that the appellant be reappointed had he thought that the appellant would either not be able to perform, or would not be allocated actual work by the respondent for him to do. The order made by the Commissioner should be read as Moore J in dissent in the Full Court preferred to read it, as an order intending that the appellant be reinstated, and that he be given work to do of the kind which he had done in the past.

78 It is no answer, as the respondent submits, that the appellant may be unwilling to do hot boning work, or that he may lack the physical and other capacities to do it. It is true that sub-cl 37.20 of the AWA provides that employees shall work as directed, but sub-cl 35.9 makes it clear that the directions may relate to such duties as are within an employee's skill, competence and training only. Commissioner Redmond has held, and it has not so far been controverted, that the appellant has not been trained, and is not fit, to do hot boning work. The Act empowers the Commission to reappoint an employee to the position in which he was employed immediately before his termination, or to another position, and this it did, by reappointing him to work in the chilled boning room. It is not for this Court to anticipate, by making an order in advance, what may follow from that. As Moore J in dissent in the Full Court said[57]:

> "That is not to say, however, that the employer would be precluded, thereafter, from lawfully altering the position of the employee by requiring the employee to perform other duties, standing down the employee or even dismissing the employee. An employer can. However, if these steps were taken capriciously or unreasonably it may be that they could be viewed as steps designed to nullify the effect of the reinstatement order. The order is intended to have the effect earlier described and, to that extent but only to that extent, overrides any contractual or other rights the employer may have."

79 There is no doubt that the order made by Madgwick J in the Federal Court was within power. Section 170JC(3) confers a jurisdiction on that Court to enforce an order of the Commission. No question, whether under s 23 of the *Federal Court of Australia Act* 1976 (Cth)[58], the Court might vary or alter the Commission's order arises here, because Madgwick J simply ordered, in substance, that the orders of the Commission be enforced with the addition of some further orders more fully and accurately reflecting the relevant provisions of the Act and the AWA.

80 The circumstances of this case are covered by the federal statutory regime established by the Act and the *Federal Court of Australia Act*. Decisions in other

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57 (2003) 127 FCR 381 at 399 [24].

58 "**Making of orders and issue of writs**

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

jurisdictions under other statutory regimes are of little assistance. Nor are the decisions of other courts or this Court at common law. It is accordingly unnecessary to consider whether the categories of cases in which at common law actual work must be provided for an unlawfully terminated employee or contractor, are closed, although one might question the current relevance of judicial pronouncements made more than 60 years ago in the United Kingdom as to the extent to which an employer might be obliged to dine at home in order to provide work for his cook[59]. It may be that in modern times, a desire for what has been called "job satisfaction", and a need for employees of various kinds, to keep and to be seen to have kept their hands in by actual work have a role to play in determining whether work in fact should be provided. Nor is it necessary to have regard to the fact, which appears to have been overlooked by the Full Court, that the appellant's remuneration here could be affected by the actual work that he did, a matter which might of itself at common law justify an order that he be provided with actual work to do. The order for enforcement of the order of the Commission for reinstatement should be understood in the way in which it has been explained in these reasons.

81 The appeal should be allowed. We would make orders as follows:

1. Appeal allowed;

2. Set aside the judgment and orders of the Full Court of the Federal Court of Australia dated 21 February 2003; and

3. In place thereof, order that the appeal to that Court be allowed in part; that Order 4 of the orders of Madgwick J in the Federal Court of Australia dated 21 May 2002 be set aside and Order 3 be varied by deleting therefrom the words "and for a period of 14 days thereafter", but otherwise that such appeal be dismissed.

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59 In *Collier v Sunday Referee Publishing Co* [1940] 2 KB 647 at 650 Asquith J said: "Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out."