

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

WILLIAM WINTON SANDERS

APPELLANT

AND

LISLE DENIS SNELL

RESPONDENT

Sanders v Snell (S142-1997) [1998] HCA 64
8 October 1998

ORDER

1. *Appeal allowed with costs.*
2. *Application for special leave to cross-appeal refused with costs.*
3. *Set aside the orders of the Full Court of the Federal Court made 9 April 1997 and in lieu thereof order that:*
 - (i) *The appeal be allowed in part.*
 - (ii) *The cross-appeal be allowed in part.*
 - (iii) *Paragraph 1 of the judgment entered on 19 April 1996 be set aside.*
 - (iv) *There be a new trial limited to the plaintiff's claim alleging misfeasance in public office.*
 - (v) *The costs of the first trial, as between plaintiff and defendant, be in the discretion of the judge who will hear the new trial.*
 - (vi) *Each party bear his own costs of the appeal and cross-appeal.*

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On appeal from the Federal Court of Australia

Representation:

P R Garling SC with S T White for the appellant (instructed by McIntyres)

A G H Cook QC for the respondent (instructed by Adrian Cook QC)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Sanders v Snell

Tort – Inducement of breach of contract – Whether appellant intended to procure breach or caused breach of contract – Uncommunicated subjective desire that contract would be breached not sufficient to establish tort.

Tort – Interference with economic interests by unlawful means – Not necessary to decide whether this tort recognised in Australia – Failure to accord procedural fairness does not constitute "unlawful means".

Tort – Misfeasance in public office – Appellant directed statutory body to terminate respondent's employment contract – Whether appellant was required to accord procedural fairness to respondent before issuing direction – Whether appellant knew or was reckless to the possibility that direction was beyond power.

1 GLEESON CJ, GAUDRON, KIRBY AND HAYNE JJ. In July 1990, the respondent was appointed for a term of two years as Executive Officer of the Norfolk Island Government Tourist Bureau ("the Bureau"), a statutory corporation established by the *Norfolk Island Government Tourist Bureau Act* 1980 (NI) ("the Act"). As Executive Officer he was responsible for effective implementation of the tourism policies of the Norfolk Island Government, for investigation and initiation of promotional opportunities for Norfolk Island and for the day to day running of the Bureau¹. His appointment was extended in May 1992. The extension was not for a fixed term. It was agreed to by the Bureau after the election of the Sixth Legislative Assembly of Norfolk Island but before the appellant was sworn as the new Minister for Tourism in the administration of Norfolk Island. (The holder of the office of Minister in the Norfolk Island administration is often referred to as an "Executive Member" and the appellant is referred to in some of the evidence in that way.)

2 On 19 June 1992, less than one month after the extension of the respondent's appointment, his employment as Executive Officer of the Bureau was terminated. He brought proceedings in the Supreme Court of Norfolk Island against the appellant claiming damages for wrongful interference with contractual relations and for misfeasance in public office.

3 The trial judge (Beaumont CJ) found that the appellant had induced a breach of the respondent's contract of employment with the Bureau and gave judgment for damages in the sum of \$17,000. The trial judge assessed the respondent's economic loss at \$500, allowed \$15,000 for what was referred to as "loss of reputation, including prospects of re-employment at a senior executive level" (including in that amount a notional amount by way of interest) and awarded exemplary damages in the sum of \$1,500. The trial judge made no findings about the claim for misfeasance in public office, concluding that the respondent could not recover more damages on this account than were allowed for inducing breach.

4 An appeal and cross-appeal to the Full Court of the Federal Court of Australia were instituted. That Court (Wilcox, O'Loughlin and Lindgren JJ) dismissed the appeal and allowed the cross-appeal². The Full Court held that it had not been open to the trial judge to conclude that the respondent had made out a case of

1 The members of the Bureau were sometimes referred to in the evidence as "the Board" but it is convenient to refer to the corporation and to its members as the Bureau.

2 *Sanders v Snell* (1997) 73 FCR 569.

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inducing breach of contract³ but held that the respondent's claim for misfeasance in public office was established⁴. The Court concluded that an award of \$15,000 damages was manifestly inadequate and that damages should be allowed in the sum of \$40,000⁵. The Court also concluded that the amount of \$1,500 awarded by the trial judge for exemplary damages was manifestly inadequate and re-assessed exemplary damages at \$10,000⁶. To these amounts the Court added interest at 10% for four years (a further sum of \$20,000)⁷. Accordingly, the Full Court varied the judgment entered at trial by increasing it to \$70,000. From that judgment the appellant now appeals by special leave and the respondent seeks special leave to cross-appeal.

The respondent's contract of employment

- 5 The contract that the Bureau had made with the respondent in July 1990 was due to expire on 30 June 1992. It would have expired very close to the time when the terms of office of the members of the Bureau and of the members of the Fifth Legislative Assembly of Norfolk Island would expire. Accordingly, with the encouragement of the then Minister for Tourism, the Bureau resolved to terminate the respondent's contract and make a new "open ended" contract. The new contract was dated 19 May 1992. No fixed term was specified in it. Clause 9 provided:

"Termination of Employment

- (a) Where in the opinion of the Bureau the employee is absent from duty without authority or is guilty of misconduct, the Bureau may dismiss the employee by giving him one month's notice in writing of its intention to terminate the appointment or on payment of one month's salary in lieu of such notice.
- (b) Subject to 9(a) above, two months notice of intention to terminate the employment shall be given by either the Bureau or the employee."

3 (1997) 73 FCR 569 at 588.

4 (1997) 73 FCR 569 at 594.

5 (1997) 73 FCR 569 at 596.

6 (1997) 73 FCR 569 at 601-602.

7 (1997) 73 FCR 569 at 602.

The accountants' report

- 6 On 21 May 1992, the appellant was sworn to office as Minister for Tourism. It seems that he thought that there may be something amiss in the way the Bureau dealt with its financial affairs and on 3 June 1992 he arranged for a firm of accountants practising in Brisbane to carry out a "spot audit" of the financial affairs of the Bureau. On 16 June 1992, that firm provided a draft report to the appellant setting out what the author considered to be certain deficiencies in the financial practices of the Bureau. The appellant spoke to the Bureau's then chairman - Mr Nobbs - about these matters. Although accounts of the conversation differed, the trial judge concluded that common to both versions was an expression by the appellant of his wish to see the respondent out of office.

The first direction

- 7 On 17 June 1992, the appellant sent to Mr Nobbs, the Chairman of the Bureau, a written direction that the Bureau "take such steps, prior to 4.00 pm on Wednesday 17 June 1992, as are necessary to terminate, at the earliest practicable date, the employment, under section 12 of the Act"⁸ of the respondent.

- 8 The direction said that it was given under s 15(1) of the Act which provides:

"The executive member may give to the Bureau directions as to -

- (a) the conduct of the business or affairs of the Bureau; and
- (b) the manner in which the Bureau carries out its functions or exercises its powers,

and the Bureau shall give effect to those directions."

- 9 Mr Nobbs had been told that the appellant intended to give a direction of the kind that was given. He had prepared a letter asking the appellant to reconsider his decision to give a direction but the direction arrived before he could send it to the appellant. When the direction arrived, Mr Nobbs sent the appellant the letter that he had prepared. In it, Mr Nobbs said that, as Chairman, he had no authority to dismiss any employee of the Bureau or "to firmly insist on an employee's resigning" (as it seems the appellant had suggested that he should do). He said that he had read the draft report of the accountants and that, although he needed more

8 Section 12 provides that the Bureau "may employ such persons as it thinks fit and necessary for the purposes of the Bureau".

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time to digest it thoroughly, he was "seriously concerned about its harshly critical general tone" and believed that it included "certain damaging statements which are false". He ended his letter saying:

"I hope that you will not make any immediate decision to issue a formal direction to the Board [ie, the Bureau] to terminate the Executive Officer's contract of employment. Amongst other things it would seem contrary to natural justice to do such a thing without giving the Executive Officer an opportunity to hear what he is accused of, and to give his side of the story."

- 10 Later that same day, the members of the Bureau considered the accountants' draft report and the direction that the appellant had given. At the request of all the members of the Bureau who attended that meeting, Mr Nobbs sent a further letter to the appellant asking him to convene a meeting between the members of the Bureau, the respondent and all of the members of the Legislative Assembly "so that the matter can be fully and properly discussed in context". The letter said that if the appellant was unable to agree, the members of the Bureau had no alternative other than to resign from office. It concluded:

"We do not believe that the action required in your direction has been properly considered, and if carried out may have unwarranted and harmful effects."

Revocation of appointments and new appointments to Bureau

- 11 Shortly after a facsimile of the second letter from Mr Nobbs had been sent to the appellant, an instrument signed by the appellant and purporting to revoke the appointments of members of the Bureau from 18 June 1992 was delivered to Mr Nobbs. That instrument said that it was given under s 4(2) of the Act and s 36(4) of the Interpretation Ordinance 1979 (NI)⁹.

9 Section 4(2) of the Act provided:

"Members of the Bureau shall be appointed by the executive member."

Section 36(4) of the Interpretation Ordinance 1979 (NI) provided:

"Where an enactment confers upon a person or authority a power to make an appointment to an office or place, the power includes a power to appoint a person to act in the office or place until a person is appointed to the office or place and also includes a power to remove or suspend a person appointed and to appoint another person temporarily in the place of a person so suspended or in place of a sick or absent holder of the office or place."

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12 By an instrument of appointment dated 18 June 1992, the appellant appointed four new members of the Bureau. (The respondent submitted that the appointment was unlawful because the Act required that the Bureau have more than four members¹⁰. It is not necessary to pause to consider whether that is so.) On the same day he gave a further direction to the Bureau ("the second direction") "to take such steps, prior to 10.00 am on Friday, 19 June 1992, as are necessary to terminate, at the earliest practicable date, the employment, under section 12 of the Act" of the respondent.

13 The new Bureau met on the morning of 19 June 1992 and resolved:

"to terminate forthwith the employment of [the respondent] as Executive Officer and to pay him two months' pay in lieu of notice, pursuant to Clause 9(b) of his contract of employment."

The termination of the respondent's employment

14 Two of the new members of the Bureau then went to the Bureau's offices. The respondent (with the permission of the Bureau members) taped all but the first few words of their conversation. The trial judge found that one of the Bureau members said to the respondent:

"[I am here to terminate your employment] [u]nder clause 9(b) of your Employment Contract. In that clause, we are required to offer you two months' notice and it was the Board's decision to offer you payment in lieu of time and that's what we're here to do."

The respondent replied:

"Well I accept what you've said Steve under sufferance and duress, I have no other alternative of course as you've explained and that's the end of story."

The respondent, anticipating what would happen, had cleared his desk before this meeting and he left the Bureau's office at once. He took up part-time employment as a bus driver on the next business day after he left the Bureau and later obtained full-time employment as a tour bus driver.

15 The appellant issued two press releases which set out some of the events that had happened. The first, issued on 19 June 1992, recorded the termination of the

10 Pursuant to s 4(1) of the Act the number of members of the Bureau is prescribed as six.

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respondent's employment and said that "[c]ertain matters may well be referred by me to the NI Police, and it is therefore not appropriate for me to comment further at this time". Not surprisingly, in a small community like Norfolk Island, these events (particularly in light of the appellant's press release and its mention of police involvement) attracted great attention and no little publicity. On the next day, the local newspaper published interviews with one of the members of the Bureau whose appointment had been terminated and with the appellant and it published a long letter to the editor from Mr Nobbs setting out his account of what had happened.

Was the termination a breach?

16 In terminating the respondent's employment, the Bureau did not act under cl 9(a) of the contract of employment. It did not contend at the time of the termination (and has not contended subsequently) that the respondent had been absent from duty without authority or was guilty of misconduct. Rather, it sought to act under cl 9(b). Only cl 9(a) speaks of payment of salary in lieu of notice. Clause 9(b) does not refer to payment of salary in lieu; it speaks only of "two months notice of intention to terminate the employment" being given by either the Bureau or the employee. The contract being cast in these terms, it is not possible to imply in it some term that would permit the Bureau to make payment to the respondent in lieu of notice except in the cases specifically identified in cl 9(a) - absence or misconduct¹¹. To imply such a term would fly in the face of the express provisions of the agreement¹². It follows that for the Bureau to terminate the contract of employment under cl 9(b) without first giving the notice stipulated in that clause would be a breach of the contract, unless the parties agreed to the contract being terminated in this way.

17 The Full Court said that it was common ground at the trial that the Bureau was entitled to pay two months' salary in lieu of notice only with the respondent's consent and that no consent was given¹³. In this Court, the appellant denied that this had been common ground at trial but it is not necessary to decide whether it was. The terms of the contract (in particular, the reference in cl 9(a) to payment in lieu and the absence of any such reference in cl 9(b)) make plain that the Bureau

11 cf *White v Riley* [1921] 1 Ch 1 at 6.

12 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347.

13 (1997) 73 FCR 569 at 581.

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was bound to give notice if acting under cl 9(b) and could not give payment in lieu except with the consent of the respondent.

18 The appellant had not pleaded that the respondent had waived any right to notice and had not pleaded that the Bureau and the respondent had agreed that payment would be made in lieu of notice. The trial judge found that the respondent did not waive his right to notice or agree in the course followed by the Bureau. The quoted conversation, between the respondent and the Bureau members sent to terminate his employment, provides an ample foundation for this finding. Given the Full Court's reference to common ground at trial it must be assumed that on appeal to that Court no challenge was made to the findings that there had been no waiver or agreement. That being so, there is no warrant now for this Court to substitute some different finding.

19 The contract of employment was terminated by the Bureau on 19 June 1992. That termination was a breach of the contract, for it brought the contract to an end then and there, without first giving the stipulated notice. This was not a case of an employer giving notice of intention to terminate the contract in two months, paying the employee in advance for those two months and saying to the employee that he or she need not attend work during that time¹⁴. The payment that was made to the respondent was payment in lieu of notice in the sense of being a payment made after the contract was brought to an end and intended to be set off against, and to extinguish, the damages that ordinarily would be payable for the wrongful termination of the agreement.

14 cf *Delaney v Staples* [1992] 1 AC 687 at 692 per Lord Browne-Wilkinson.

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The tort of inducing breach of contract

20 As was said in *Northern Territory v Mengel*¹⁵ the law in regard to what have become known as the "economic torts" is far from settled. In particular, developments in the United Kingdom suggest the emergence there of a tort of interference with trade or business interests¹⁶. It will be necessary to return to consider some aspects of those developments. For the moment we deal with the tort of inducing breach of contract.

21 In this case the appellant knew that there was a contract of employment between the Bureau and the respondent. He wanted that contract brought to an end and he acted to achieve that result. At least some of the problems encountered in relation to some cases of alleged procuring breach of contract may therefore be put aside. The Full Court held, however, that no case of procuring breach could be established because the appellant's second direction could only be construed as directing the Bureau to terminate the contract lawfully¹⁷.

22 It may be accepted for the purposes of argument that, as the trial judge held, the appellant's subjective wish was that the respondent be "summarily and immediately dismissed", that is, that the contract "be terminated at the earliest possible date". But the tort of inducing or procuring a breach of contract is not established by demonstrating only that the alleged tortfeasor hoped or wished that the contract would or might be breached. To establish an inducing or procuring of breach, something more must be shown than that the alleged tortfeasor harboured an uncommunicated subjective desire that the contract would or might be breached.

23 Showing what the tortfeasor desired may well be very relevant to the issue of the intention with which the alleged tortfeasor acted, but it is necessary to consider what was done, as well as what was desired. To persuade or direct a contracting

15 (1995) 185 CLR 307 at 342 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ.

16 *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191; *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570; *Lonrho Plc v Fayed* [1990] 2 QB 479, and on appeal [1992] 1 AC 448.

17 (1997) 73 FCR 569 at 587-588.

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party to terminate the contract lawfully is not to procure a breach of the contract¹⁸. What did the appellant do?

24 The conduct of the appellant that was principally relied on as inducing or procuring a breach was the second direction - the direction that he gave on 18 June 1992 to the new members of the Bureau. That direction required the Bureau "to take such steps, prior to 10.00 am on Friday, 19 June 1992, as are necessary to terminate, at the earliest practicable date" the employment of the respondent. It was not suggested that he had any other communication with the new members about the respondent's employment, although, of course, the new members may be taken to have known that an earlier direction had been given, and when not followed, the membership of the Bureau had been replaced. The direction told the Bureau the time by which it should "take ... steps": prior to 10.00 am on 19 June. It did not tell the Bureau, however, what steps it should take and it did not tell it what date was "the earliest practicable date" for termination of the respondent's employment. Those decisions were left to the Bureau and the appellant said nothing, directly or indirectly, to the Bureau or any of its new members about them. Consistent with this direction, the Bureau could have terminated the contract lawfully¹⁹.

25 The Bureau had been given legal advice, after its new members had resolved "to terminate forthwith" the respondent's employment and to pay him two months' pay in lieu, that if they were to rely on cl 9(b) of the contract of employment they could give pay in lieu of notice only by agreement with the respondent. Notwithstanding this advice, the termination was effected in the manner described earlier. Although the respondent's statements at the time of termination might, divorced from the trial judge's findings, be construed as his agreement in the course adopted by the Bureau, the trial judge found that that was not so.

26 Even accepting that, because of the history of the matter, the new members of the Bureau were well aware of the appellant's desire for swift action, the decision to act in the particular way it did was the Bureau's decision. Even in the light of the fate of the former members of the Bureau, the second direction given by the

18 See, eg, *Sid Ross Agency v Actors and Announcers Equity Association* [1971] 1 NSWLR 760 at 765 per Jacobs JA; *D C Thomson & Co Ltd v Deakin* [1952] Ch 646 at 702 per Morris LJ; *Greig v Insole* [1978] 1 WLR 302 at 333 per Slade J; [1978] 3 All ER 449 at 485; *Cutsforth v Mansfield Inns Ltd* [1986] 1 WLR 558 at 563 per Sir Neil Lawson; [1986] 1 All ER 577 at 582.

19 cf *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at 704 per Diplock LJ; [1966] 1 All ER 1013 at 1019.

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appellant could not be read or understood by its members as requiring or suggesting the breaking of the respondent's contract. The appellant not having asked or suggested that it should act in that way, the Full Court was right to conclude that the appellant did not procure or induce the breach of contract that was committed when the Bureau terminated the contract summarily rather than by giving notice. It would, after all, have been open to the Bureau to give notice in accordance with the contract. The appellant did not procure or induce the summary termination. That was the Bureau's choice.

- 27 More difficult questions arise in relation to the alleged interference with the respondent's economic interests and to those questions we now turn.

Interference with economic interests

- 28 This branch of the respondent's argument assumed that the appellant did not commit the tort of inducing breach of contract. It sought to say that there is a tort of wrongfully interfering with trade or business interests (in this case the respondent's contractual relations) and that the appellant committed that tort. It was said that, knowing of the existence of the contract of employment, the appellant, intending to prevent its due performance, acted by unlawful means to prevent that performance by giving the second direction²⁰. The unlawful means in this case was said to be constituted by the purported exercise of the statutory power to give a direction to the Bureau without first giving the respondent an opportunity to be heard about the matter. It was said that the purported exercise of this power led to the respondent being deprived of the benefit of a contract that otherwise might reasonably have been expected to have continued in operation indefinitely²¹.

- 29 The appellant contended that it was not now open to the respondent to rely on any claim for wrongful interference with his trade or business interests because no such case had been advanced at trial. It may be doubted that such a claim was distinctly pleaded. But in a statement of Facts, Issues and Contentions filed before

20 *J T Stratford & Son Ltd v Lindley* [1965] AC 269 at 324 per Lord Reid, 328 per Viscount Radcliffe; *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570 at 609-610 per Lord Diplock; *Lonrho Plc v Fayed* [1990] 2 QB 479 at 487-488 per Dillon LJ, 491-492 per Ralph Gibson LJ, 493 per Woolf LJ; *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 at 358-359; see also *International Brotherhood of Teamsters v Therien* [1960] SCR 265 at 280 per Taschereau and Locke JJ.

21 cf *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 93-94 per Mason CJ and Dawson J.

the trial began the respondent said that it would be submitted that the appellant "wrongfully, both directly and indirectly, interfered with *and* caused a breach of his contractual relationship" with the Bureau²². On its face, then, the statement raised this issue at the start of the trial. Further, the final submissions of the respondent that were put in writing to the trial judge made several references to what was said to be the appellant's wrongful interference in the respondent's contractual relations with the Bureau. The written submissions of the appellant filed in response at trial do not suggest that it was not open to the respondent to put his case in this way. In these circumstances we are not persuaded that the respondent may not advance the contention that if the decision of the Full Court is wrong, the judgment of the trial judge can nevertheless be supported by reference to an alleged wrongful interference with economic interests.

30 We do not think it is necessary to decide in this case whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia. For present purposes, it is enough to consider one element of that tort: the element of unlawful act.

31 The tort that is emerging, or has emerged in the United Kingdom, is a tort of interference with trade or business interests by an *unlawful* act directed at the persons injured. The element of unlawfulness is essential to the definition of the tort. Otherwise, conduct of the most unremarkable kind would be tortious. Any person engaged in trade or commerce will daily act deliberately to further that trader's economic interests by obtaining business that otherwise would go to a trade rival. The whole focus of the business of many, if not all, traders is to compete with trade rivals and by advancing their own economic interests, inevitably harm the economic interests of their rivals. In many cases the trader's conduct will be directed specifically at a particular rival. But, if the means of competition employed are lawful, and those means cause no breach of obligation, there is no warrant for holding the trader liable to the rival for the economic consequences of that competitive conduct. The fact that the conduct is engaged in deliberately or is directed specifically at the person who suffers economic detriment is not enough to make the conduct tortious. It may or may not, in given circumstances, give rise to statutory remedies²³.

22 Emphasis added.

23 For example, under *Trade Practices Act* 1974 (Cth), s 46, concerning misuse of market power.

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32 In *Mogul Steamship Company v McGregor Gow & Co*²⁴ Bowen LJ suggested that intentional conduct "calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse". But although that principle, sometimes described as the prima facie tort theory, has been taken up in some jurisdictions in the United States²⁵ it has not been adopted in this country or, for that matter, in England. Although the Court of Appeal's decision in *Mogul Steamship* was affirmed on appeal²⁶, the later decision of the House of Lords in *Allen v Flood* rejected purpose or motive as the sole controlling mechanism for tortious liability: "the law of England does not ... take into account motive as constituting an element of civil wrong [T]he existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due."²⁷

33 Other considerations, however, arise if the means employed are unlawful or if a breach of obligation is procured. Again, it is not necessary in this case to attempt to define what would be the boundaries of unlawfulness for the purposes of a tort of interference with trade or business interests by unlawful means. There are, however, several reasons for concluding that a want of procedural fairness by the appellant before giving the direction that he gave to the Bureau is not conduct that can be characterised as "unlawful means" for the purposes of this tort.

34 First, such authority as there is in relation to economic torts suggests that the conduct of which complaint was made in this case is not "unlawful means". It has been held in Canada that a failure to provide natural justice will prevent a defendant from relying on performance of statutory functions as a justification for procuring a breach of contract²⁸. But that is not to say that such conduct is "unlawful" in the relevant sense. The expression "unlawful means", like other

24 (1889) 23 QBD 598 at 613.

25 *Tuttle v Buck* 119 NW 946 (Minn 1909); *Texaco Inc v Pennzoil Co* 729 SW 2d 768 (Tex App 1987); *Restatement (Second) of Torts* § 766, 766A, 766B. But see also *Price v Sorrell* 784 P 2d 614 (Wyo 1989); *Gemini Physical Therapy and Rehabilitation Inc v State Farm Mutual Automobile Insurance Co* 40 F 3d 63 (3d Cir 1994).

26 [1892] AC 25.

27 [1898] AC 1 at 92 per Lord Watson.

28 *Posluns v Toronto Stock Exchange and Gardiner* (1964) 46 DLR (2d) 210.

expressions used in this area, may be apt to mislead. As Bowen LJ also said in *Mogul Steamship*²⁹:

"We were invited by the plaintiffs' counsel to accept the position from which their argument started - that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right."

"Infringement of some right" may well be a useful description of what is meant by saying in this context that the alleged tortfeasor engaged in an unlawful act. And "infringement of some right" is an expression that usually would not be apt to describe conduct that is beyond power. But it may be doubted that "infringement of some right" is, or is always, a sufficient description of what is unlawful means for the purposes of the economic torts generally or the tort now under consideration.

- 35 In *Mengel* the Court overruled *Beautesert Shire Council v Smith*³⁰. It thus rejected the proposition for which *Beautesert* stood: that "a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other."³¹ And it did so having first noted that the preferable view of *Beautesert* (and the view favoured in later cases that had considered it³²) was that an "unlawful act" was intended to refer to an act forbidden by law rather than an unauthorised act in the sense of an

29 (1889) 23 QBD 598 at 612.

30 (1966) 120 CLR 145.

31 (1966) 120 CLR 145 at 156.

32 For example, *Kitano v The Commonwealth* (1974) 129 CLR 151 at 174-175 per Mason J; *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 170-171; *Copyright Agency Ltd v Haines* [1982] 1 NSWLR 182 at 195 per McLelland J.

act that is ultra vires and void³³. The majority judgment in *Mengel* noted that it seemed that the "embryonic or emerging tort" of interference with trade or business interests by an unlawful act does not extend to all unlawful acts and "at least in that regard, it is in need of further definition"³⁴. Their rejection of *Beaudesert* is, however, consistent with confining what is an unlawful act for the purposes of this tort (if, that is, the tort is to be recognised in this country). It is also consistent with (or at least not inconsistent with) excluding from the definition of what is an unlawful act for this purpose acts whose only "unlawful" aspect is that they are unauthorised in the sense that they are ultra vires and void.

36 The guidance from authority is necessarily uncertain at the moment; the tort is embryonic or emerging. Considerations of principle, however, provide a more certain guide and require that unauthorised acts of the kind just mentioned are excluded from the understanding of what is an unlawful act for the purposes of this tort. If they are not excluded, the tort of interference with trade or business interests by unlawful act would cover the whole of the field now covered by the tort of misfeasance in public office or would cover that field and much more, thereby extending the liability of public officers very greatly.

37 Questions of holding public officials liable for acts done apparently in furtherance of their duty raise very different considerations from those that may arise in relation to economic torts committed by private persons. Misfeasance in public office is concerned with misuse of public power. Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of public power uncompensated. The tort of misfeasance in public office must seek to balance these competing considerations. Not surprisingly, identifying the intention with which the public official acts has a prominent place in striking that balance. The considerations that arise in the case of public officials do not arise in a dispute between private citizens about economic harm allegedly inflicted by one on the other. There the focus may be less on the intention of the alleged tortfeasor than it is on the means employed because the intended pursuit of economic advantage (and resulting economic harm to rivals) is central to competition. Equating the tort of misfeasance with a tort of wrongful interference with

33 *Northern Territory v Mengel* (1995) 185 CLR 307 at 336-337 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ.

34 (1995) 185 CLR 307 at 343 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ.

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economic interests or subsuming the tort of misfeasance in that latter tort would pay too little regard to the different considerations that we have mentioned.

- 38 For present purposes it may be accepted that the tort of misfeasance in public office extends to acts by public officers that are beyond power, including acts that are invalid for want of procedural fairness³⁵. But to establish that tort, it is not enough to show the knowing commission of an act beyond power and resulting damage. As the majority said in *Mengel*³⁶:

"The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability³⁷. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*³⁸, or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach."

For the purposes of deciding *Mengel*, the majority considered it sufficient to proceed on the basis that the tort requires an act which the public official knows is beyond power and which involves a foreseeable risk of harm but noted also that there seems much to be said for the view that misfeasance extends to the situation of a public official recklessly disregarding the means of ascertaining the extent of his or her power³⁹.

35 *Mengel* (1995) 185 CLR 307 at 356-357 per Brennan J.

36 (1995) 185 CLR 307 at 347.

37 See *James v The Commonwealth* (1939) 62 CLR 339 at 359-360 per Dixon J. See also *Racz v Home Office* [1994] 2 AC 45 at 50-54 per Lord Jauncey of Tullichettle.

38 [1897] 2 QB 57.

39 (1995) 185 CLR 307 at 347.

Gleeson CJ
Gaudron J
Kirby J
Hayne J

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39 There would be no work to be done by the tort of misfeasance if what is an unlawful act for the purposes of that tort is the same as it is for the tort of unlawful interference with trade or business interests and if questions of knowledge and intention are to be resolved in both cases according to the same test. Further, if the knowledge or intention required for the tort of misfeasance is of a different kind from the knowledge or intention required for the other tort, the potential for expanding the liability of public officials by resorting to a tort of unlawful interference with trade or business interests is obvious (especially if both torts are enlivened by the same kinds of unlawful act). Because misfeasance in public office is concerned with performance of public duties, and because the tort of unlawful interference is concerned primarily with private, not public interests, misfeasance in public office should not be subsumed in some wider economic tort. In particular, what is an unlawful act for the purposes of one tort is not necessarily an unlawful act for the purposes of the other.

40 The facts of the present case provide a good illustration of the difficulties that arise if wrongful acts are not confined in the way suggested. If the appellant's direction to the Bureau was beyond power (because it should not have been given without first giving the respondent an opportunity to make representations about it) it was a direction that was not authorised by law. If the appellant's conduct amounted to misfeasance in public office and his conduct caused damage to the respondent he will be liable to the respondent on that account. If, however, his conduct did not amount to misfeasance in public office (because he lacked the requisite intention for that tort) he should not be held liable for a wrongful interference in the economic interests of the respondent when his interference did not constitute his procuring a breach of the employment agreement. If there was a breach of the employment agreement the respondent would have his remedies against the employer. If there was no breach and simply the termination of the agreement without breach (thereby defeating the respondent's hope or expectation of the agreement continuing) there is no pressing necessity to create a new form of tortious liability to compensate the respondent for the loss of that hope or expectation. Existing forms of liability, for negligence⁴⁰ and for misfeasance in public office, provide adequate constraints on public officials and adequate avenues for compensation to those who suffer wrong.

41 The respondent did not make out a case of interference with his trade or business interests by unlawful means.

40 *Mengel* (1995) 185 CLR 307 at 348.

Misfeasance in public office

42 Again it must be accepted that the precise limits of this tort are still undefined⁴¹. It is an intentional tort. As was said in *Mengel*⁴²:

"... the weight of authority here⁴³ and in the United Kingdom⁴⁴ is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power."

The Full Court held that it should consider only one alleged invalidity in connection with the respondent's claim for misfeasance in public office - the appellant's denial of procedural fairness to the respondent in giving the second direction to the Bureau - and held that the appellant acted beyond power in giving that direction⁴⁵.

43 Was the appellant bound to accord natural justice to the respondent before giving the direction that he did? The statutory power to give directions to the Bureau was a power to give directions as to "the conduct of the business or affairs of the Bureau"⁴⁶ and "the manner in which the Bureau carries out its functions or exercises its powers"⁴⁷. For present purposes it may be assumed that the second direction was a direction about the manner in which the Bureau conducted its

41 *Mengel* (1995) 185 CLR 307 at 345.

42 (1995) 185 CLR 307 at 345.

43 See, eg, *Farrington v Thomson* [1959] VR 286 at 293 per Smith J; *Tampion v Anderson* [1973] VR 715 at 720; *Pemberton v Attorney-General (Tas)* [1978] Tas SR 1 at 25-31 per Chambers J; *Little v Law Institute of Victoria* [1990] VR 257 at 269-270 per Kaye and Beach JJ.

44 See, eg, *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172; *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 at 734-740 per Mann J; on appeal [1986] QB 741 at 775-777 per Oliver LJ; *Jones v Swansea City Council* [1990] 1 WLR 54 at 69 per Slade LJ; [1989] 3 All ER 162 at 173; *Elgouzouli-Daf v Commissioner of Police* [1995] QB 335 at 346-347 per Steyn LJ.

45 (1997) 73 FCR 569 at 590.

46 s 15(1)(a).

47 s 15(1)(b).

business or about the manner in which it exercised its power to employ persons under s 12 of the Act. In this case the respondent had an expectation that his contract of employment would continue until the members of the Bureau resolved (for whatever reason) to give notice of its termination or the conditions for termination under cl 9(a) were satisfied. The direction that the appellant sought to give to the Bureau would defeat that expectation. Is the power to give that direction predicated upon the appellant first affording the respondent an opportunity to make representations about the matter?

44 It is necessary to distinguish between the position of the appellant, as Minister, and the position of the Bureau, as employer. The Bureau has statutory power to employ persons and it may be that the power to employ is to be read as giving the Bureau power to hire and fire employees in whatever ways the common law would permit. In this case the question does not arise as to whether the Bureau itself was obliged, as employer, to accord procedural fairness to the respondent before terminating the contract of employment with him. The respondent does not sue the Bureau. The only question that now arises is whether, as a public office-holder, the Minister may give such a direction to the employer about how it acts without himself conforming to the requirements of natural justice.

45 That power, to give directions, is a power that should be read as requiring the giving of procedural fairness to those whose rights or legitimate expectations are affected by its exercise⁴⁸. The respondent was such a person. He had both contractual rights and a legitimate expectation that his contract would continue until the Bureau terminated it. In the circumstances of this case, it may be that his rights, in the form of his reputation, were also affected adversely by his employment being terminated in this way⁴⁹. But whether his rights were affected by the Minister's decision or not, the effect of the decision was to deprive the respondent of his livelihood. It is not necessary to consider the criticisms that have

48 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109 per Barwick CJ; *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 418-419 per Gibbs J; *R v MacKellar*; *Ex parte Ratu* (1977) 137 CLR 461 at 476 per Mason J; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 498-499 per Aickin J; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 360 per Mason J, 376-377 per Aickin J; *Kioa v West* (1985) 159 CLR 550 at 582-583 per Mason J, 616-618 per Brennan J; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 681-682 per McHugh J.

49 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578 per Mason CJ, Dawson, Toohey and Gaudron JJ.

sometimes been made of the doctrine of legitimate expectations⁵⁰. Whatever may be the content or the continued utility of that doctrine it has long been held that the repository of statutory power should afford procedural fairness to those whose livelihood is affected by the exercise of that statutory power⁵¹. The appellant took no step to permit the respondent to say anything about the proposal to direct the Bureau to terminate his employment and it is, then, not necessary to consider what steps the appellant should have taken in order to give the respondent procedural fairness.

46 The Full Court found that⁵²:

"Having been warned of his obligation to give natural justice to [the respondent], and knowing that the correctness of the report on which he was relying was challenged by Mr Nobbs, [the appellant] gave to the Bureau a statutory direction to take steps that same day to terminate [the respondent's] employment. When the original members of the Bureau requested more time, he removed them from office and appointed members who, he expected, would carry out his wishes. The time limits he imposed made it impossible for anybody to put before him a response to the report. But [the appellant] was not interested in anybody else's views; there 'was not going to be a debate'. [The appellant's] acts were 'calculated in the ordinary course to cause harm' and 'done with reckless indifference to the harm that [was] likely to ensue', to use the words of the *Mengel* joint judgment. *This is a case of a public officer recklessly disregarding both a known constraint on his power and an obvious means of fulfilling his known duty of fairness.*"

A little later in their reasons the Full Court referred to the judgment of Brennan J in *Mengel* in which he said that not all actions that breach an obligation of procedural fairness will constitute misfeasance in public office and that something more is required⁵³. The Full Court said that "[t]he additional ingredient was described by Brennan J in words that fit perfectly [the appellant's] position on 17

50 See, for example, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310-314 per McHugh J.

51 *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

52 (1997) 73 FCR 569 at 593 (emphasis added).

53 *Mengel* (1995) 185 CLR 307 at 356-357.

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and 18 June 1992: 'the absence of an honest attempt to perform the functions of the office'."⁵⁴

47 The trial judge having made no findings about the claim of misfeasance in public office, it is surprising that the Full Court felt able to make findings about the honesty of the appellant's conduct. The only finding of the trial judge that it was suggested warranted the Full Court's finding on this matter was what the trial judge said in connection with exemplary damages. He said that:

"In my opinion, the [appellant's] conduct, even if it fell short of malicious action (in the sense that the [appellant] apparently believed that the Bureau was not soundly managed) was contumelious behaviour which entirely disregarded the rights of the members of the Bureau and of the [respondent] to be given a reasonable opportunity to be heard in answer to the criticisms that had been made. Although there was no basis for claiming that a real emergency existed, the [appellant] sought to impose deadlines on the Bureau and on the [respondent], by which they had to 'respond' to complex questions raised by the auditors, including issues of policy, which could not possibly be complied with in such a short time. These impossible demands were made by the [appellant] after he had been advised (perhaps warned) by Mr King, another Minister, that the [appellant] should ensure that the [respondent] receive natural justice. Although the [appellant] denied that Mr King had said this, I think that his recollection is faulty. I prefer Mr King's evidence which was given convincingly."

Leaving aside the unwarranted translation of that finding by the Full Court from "advised (perhaps warned)" into a finding of warning, it is of the first importance to recall what it was that had happened in this regard. The appellant, who had no legal training, was found to have been told by Mr King (and for that matter was told, in writing, by Mr Nobbs) that he should give the respondent "natural justice" or a chance to put his side of the story. Neither Mr King nor Mr Nobbs was a lawyer and neither of them pretended to give legal advice to the appellant. They counselled him to give the respondent a chance to put his side of the story because they thought that was the fair thing to do, not because they thought that giving a hearing was necessary as a matter of law to the valid exercise of the power to give directions. And all that the trial judge found was that the appellant had been given this advice but ignored it. The judge made no finding about what the appellant knew about his power (or the asserted lack of it) to give the second direction before giving the chance to the respondent to put his side of the story.

54 (1997) 73 FCR 569 at 593.

48 At most, the trial judge's finding (made in the context of his conclusion that the appellant had procured a breach of the respondent's contract) was that the appellant had acted peremptorily and with no regard to what he had been told would be fair. That is very different from finding that the appellant knew that he was acting beyond power. Nothing in what was found by the judge to have happened, and nothing that was revealed in the evidence, warranted the Full Court in making a finding that the appellant knew or was reckless to the possibility that what he was doing was without power for want of procedural fairness let alone making a finding of want of honesty on his part. And yet that is what the Full Court found.

49 The trial judge not having considered the allegations of misfeasance in public office, and the Full Court having erred in deciding that that cause of action was made out, the judgment entered by the Full Court cannot stand. But should this aspect of the matter go back for retrial so that findings can be made? That any matter should have to be remitted for retrial is unfortunate. The costs of prolonging any matter, let alone a matter such as this which arises from within a small community, are not just financial costs. But no findings of fact having been made on this aspect of the matter, there is no choice but to remit the matter for retrial on the claim for misfeasance in public office.

50 Because there should be an order for retrial of the claim for misfeasance in public office, it is not appropriate to say anything about the assessments of damages made by the Full Court. Those are matters for the trial judge at the new trial. We are not, however, to be taken as endorsing in its entirety the approach adopted by the Full Court in making those assessments or in allowing, as it did, interest on amounts allowed for exemplary damages⁵⁵.

51 We would allow the appeal to this Court with costs. The application for special leave to cross-appeal to this Court should be refused with costs. We would set aside the orders of the Full Court and in lieu order that

1. The appeal be allowed in part.
2. The cross-appeal be allowed in part.
3. Paragraph 1 of the judgment entered on 19 April 1996 be set aside.

⁵⁵ *Federal Court of Australia Act 1976* (Cth), s 51A(3)(c).

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4. There be a new trial limited to the plaintiff's claim alleging misfeasance in public office.
5. The costs of the first trial, as between plaintiff and defendant, be in the discretion of the judge who will hear the new trial.

Each party having been entitled to a measure of success in the Full Court on appeal and cross-appeal from the trial judge, there should be no order for the costs of the appeal or cross-appeal to the Full Court.

52 CALLINAN J. I have read the reasons of the majority and agree with all that their Honours say up to the point at which they hold that the appellant's power to give directions (assuming it to be a power exercisable pursuant to ss 12 and 15 of the *Norfolk Island Government Tourist Bureau Act* 1980 (NI)) is a power that should, in the circumstances of this case, be read as requiring for its exercise, the giving of procedural fairness to the respondent. There, I respectfully differ from their Honours.

53 I take as an accurate summary of the law on this aspect of the case what was said by McHugh J in *Haoucher v Minister for Immigration and Ethnic Affairs*⁵⁶:

"A legitimate expectation that a person will obtain or continue to enjoy a benefit or privilege must be distinguished, however, from a mere hope that he or she will obtain or continue to enjoy a benefit or privilege. A hope that a statutory power will be exercised so as to confer a benefit or privilege does not give rise to a legitimate expectation sufficient to attract the rules of natural justice⁵⁷. To attract the operation of the rules of procedural fairness, there must be some undertaking or course of conduct acquiesced in by the decision-maker or something about the nature of the benefit or privilege which suggests that, in the absence of some special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege."

54 It does not, with respect, seem to me to be the position here that there was any undertaking in any relevant sense, or course of conduct acquiesced in by the appellant as the decision maker, in giving the direction to the Bureau that he did, which would suggest to the respondent that he might legitimately expect to enjoy the benefit or privilege of being heard to object to the giving of the direction. Nor do I think that the rights of the respondent under his contract with the Bureau constituted or gave rise in any way to an expectation, either that the contract should remain in force otherwise than in accordance with its terms, or, to any benefit or privilege to be found outside its terms. In the absence of an industrial relations

56 (1990) 169 CLR 648 at 681-682.

In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 it was held that it was not necessary that a person seeking to set up the relevant legitimate expectation be aware of the basis for it: it is enough that the expectation be reasonable in the sense that there exist adequate materials to support it (see at 291 per Mason CJ and Deane J). The headnote may be misleading as the only express reference to "adequate materials" is in the joint judgment of Mason CJ and Deane J. The Court did not lay down any universal test of adequacy of materials and was dealing, it is suggested, with a case in which the interests of children were in issue, matters in respect of which any civilised person would hold expectations, whether referable to a United Nations Convention or otherwise (cf at 304-305 per Gaudron J).

57 *South Australia v O'Shea* (1987) 163 CLR 378 at 402 per Wilson and Toohey JJ.

regime affecting the parties' rights and, in a case as here, of an explicit and comprehensive contract, I do not consider that there is any room for the importation of a legitimate expectation of a remedy or right not provided for in the contract.

- 55 So far as the Bureau and the respondent are concerned, this is a case within the first category of the three discussed by Lord Reid in *Ridge v Baldwin*⁵⁸:

"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."

- 56 Dawson J in *Coutts v The Commonwealth*⁵⁹ was in no doubt of the proposition stated by his Lordship:

"For my own part, I should have thought that this view is plainly correct since at common law, Crown servants aside, a master is not bound to hear his servant before he dismisses him and appointment during pleasure can hardly import a more onerous obligation."

- 57 There was no statutory or other relevant restriction upon the Bureau with respect to the contract that it might make with the respondent, or the grounds upon which it might dismiss him. This was, as Lord Reid put it, a pure case of master and servant. The Bureau did not have to hear the respondent before exercising its contractual right to dismiss him. It would be going even further to say that the Minister, the appellant, a person one step removed, should do so before exercising a statutory power which would produce the same result.
- 58 In short, if the Bureau was not bound to give the respondent a hearing before lawfully, and I emphasize "lawfully", terminating his contract, then I think that it is in fact to go too far to say that the appellant as Minister should be under a greater

58 [1964] AC 40 at 65.

59 (1985) 157 CLR 91 at 121. See also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 443 per McHugh and Gummow JJ; *Brophy v Mapstone* (1984) 3 FCR 227 at 234; 56 ALR 135 at 143.

obligation than the employer. And, I do not think that the respondent could in those circumstances claim to have any legitimate expectation that the Minister would hear him on the matter. So too, there was here no course or pattern of conduct on the part of the appellant which might have given rise to an expectation or belief on the part of the respondent that the statutory power to direct would be exercised in such a way as to constitute what would be a practical expansion of the respondent's contractual rights.

59 Accordingly, on the same assumption as the majority's that the appellant's direction was within the statutory power, I would hold that misfeasance in public office cannot be established in this case.

60 I need only add that I agree with the observations of the majority on the assessments and allowances of damages.

61 I would allow the appeal with costs and set aside the orders of the Full Court of the Federal Court of Australia. In lieu thereof I would enter judgment for the appellant and order that the respondent pay the appellant's costs of the trial and appeal to the Full Court of the Federal Court. The application for special leave to cross appeal should be refused with costs.