Ashurst Australia
2 August 2013

Employment Alert

When are policies and procedures part of the contract of employment?

Zafiriou v Saint-Gobain Administration Pty Ltd [2013] VSC 377 (24 July 2013) / *Gramotnev v Queensland University of Technology* [2013] QSC 158 (19 June 2013)

WHAT YOU NEED TO KNOW

- Two recent Supreme Court decisions have confirmed existing legal principles regarding the incorporation of policies and procedures into a contract of employment, including that:
  - A policy or procedure cannot be incorporated into a contract of employment if it is inconsistent with an express term of the contract (that is, the express term will prevail to the extent of any inconsistency). However, an express term regarding termination of the employment on notice must be read subject to any statutory requirements governing the dismissal of employees.
  - An express term in a contract of employment which purports to incorporate an employer's policies or procedures will not be determinative of the parties' intentions.
  - Whether a policy or procedure has been incorporated is a question of fact. A court will ascertain the intention of the parties having regard to the surrounding circumstances, including the nature of the policy or procedure, its terms and its practical operation.
- The following factors have been identified by the courts as suggestive of an intention to incorporate a policy or procedure:
  - the policy or procedure is expressed to apply to the employee in question;
  - the policy or procedure is capable of applying to the employee in question;
  - the policy or procedure uses language suggesting binding obligations;
  - the terms of the contract of employment are sufficiently clear to give effect to the incorporation; and
  - the policy or procedure is identified in the contract of employment with precision, and made available to the employee in question.

WHAT YOU NEED TO DO

- An employer should check that its internal policies and procedures identify the employees, or group of employees to whom they are intended to apply.
- An employer should consider whether it wishes to incorporate any of its internal policies and procedures into an employee's contract of employment, and ensure the terms of the contract give effect to that intention.
- To effect an incorporation, a contract of employment will need to be drafted in clear and unambiguous terms. So far as possible, an employer should identify the precise documents it seeks to incorporate.

Two recent Supreme Court decisions have confirmed existing legal principles regarding the incorporation of policies and procedures into a contract of employment.

***Zafiriou v Saint-Gobain Administration Pty Ltd* [2013] VSC 377**

Facts

Mr Zafiriou was a senior manager at Saint-Gobain Administration Pty Ltd (**Saint-Gobain**), a company involved in the manufacture and distribution of construction materials.

On 26 October 2010, Saint-Gobain terminated Mr Zafiriou's employment on notice for unsatisfactory work performance.

Mr Zafiriou alleged that his employment had been terminated because his position as General Manager of Commercial Operations had been made redundant, and by framing the termination as a dismissal for unsatisfactory performance, the Company was attempting to avoid its obligation to make a severance payment.

In the alternative, Mr Zafiriou submitted that he had been wrongfully dismissed because his employment could only be terminated for unsatisfactory performance if Saint-Gobain first complied with its internal disciplinary and termination procedures. He claimed that both these policies had been incorporated by reference into his contract of employment.

Finally, Mr Zafiriou claimed that Saint-Gobain had breached the implied term of trust and confidence in the contract for reasons including the Company's failure to properly advise him that it had concerns about his performance, and provide him with an opportunity to address those concerns.

Mr Zafiriou claimed damages in respect of these alleged breaches of the contract.

Mr Zafiriou's contract of employment

Mr Zafiriou sought to enforce Clause 6.1 of the contract, which purported to incorporate Saint-Gobain's internal policy and procedures. The clause provided that:

> The employee shall comply with the employer's policies and procedures as displayed or advised from time to time and as amended from time to time, at the employer's discretion. The employer's policy and procedures are deemed to be included in and form part of this contract, as do any subsequent policy and procedures and/or amendments.

The Saint-Gobain Termination of Employment Procedure was expressed to apply to all employees of the Company, and contained a commitment by Saint-Gobain to ensuring that the termination of employment will be "lawful, fair and just".

The Saint-Gobain Disciplinary Procedure was also expressed to apply to all employees of the Company. The policy required Saint-Gobain to undertake an extensive performance management process involving the giving of formal warnings and opportunities to improve before terminating the employment on performance grounds.

Saint-Gobain conceded that it did not manage Mr Zafiriou's performance issues in accordance with the procedure. However, it relied on its express right to terminate the contract by the giving of four weeks' written notice under clause 22.1, which did not require it to take any preliminary steps.

The Court's decision

The Victorian Supreme Court (Emerton J) found that Saint-Gobain had genuine performance concerns about Mr Zafiriou, which were capable of supporting a decision to terminate his employment on notice in accordance with clause 22.1 of the contract. Mr Zafiriou's position had not been made redundant because Saint-Gobain required his duties to be performed by others after the termination of his employment.

Emerton J accepted Saint-Gobain's submission that a term of a policy or procedure cannot be incorporated into a contract of employment if it is inconsistent with an express term of the contract. It was held that to impose a requirement on the Company to undertake a performance management process in accordance with the Disciplinary Procedure before giving notice under clause 22.1 "would be to take away the right expressly conferred by the contract to bring the employment relationship to an end on the basis described".

Emerton J acknowledged that clause 22.1 of the contract, although clear and unambiguous, was to be read subject to any statutory requirements governing the dismissal of employees. However, in this instance, Mr Zafiriou had only sought to rely on Saint-Gobain's Termination of Employment

Procedure and Disciplinary Procedure, rather than the applicable statutory regime. As a result, he was not afforded the protection of statute.

It was also held that, despite the wholesale incorporation of the Company's policy and procedures under clause 6.1 of the contract, the Disciplinary Procedure did not have contractual force. This was because the parties could not have intended the procedure to apply to employees of Mr Zafiriou's seniority. The Court reached this conclusion on the following grounds:

- the procedure provided for the escalation of the performance management process to an HR manager. For an employee of Mr Zafiriou's seniority, this would represent a "downgrading" of the process;
- it was questionable whether a HR manager would be qualified to supervise an employee of Mr Zafiriou's seniority in the context of the performance management process; and
- it was unlikely that the parties intended senior managers to be subject to ongoing and intensive oversight. Mr Zafiriou's position required him to exercise a degree of autonomy in the performance of his employment duties, and this would be incompatible with the performance management process contemplated.

Emerton J did not consider that the Termination Procedure imposed a binding contractual obligation on Saint-Gobain to conduct a formal performance management process because its terms were aspirational.

Finally, Emerton J observed that it was not necessary to determine whether Saint-Gobain had breached the implied term of trust and confidence in the contract, because the duty does not apply to the exercise of the right to terminate the employment relationship.

Incorporating a policy or procedure into a contract of employment

The case of *Zafiriou* indicates that an express clause in a contract of employment which purports to incorporate an employer's policies or procedures will not be determinative of the parties' intentions.

Rather, a court will ascertain the intention of the parties having regard to the surrounding circumstances, including the nature of the policy or procedure, its express terms and its practical operation.

This requires a consideration of whether the policy or procedure is expressed to apply to the employee in question, and whether it is capable of applying to the employee in practice.

Incorporating other instruments into a contract of employment

In addition to internal policies and procedures, an employer may seek to incorporate other documents into a contract of employment, such as industrial and legislative instruments.

***Gramotnev v Queensland University of Technology* [2013] QSC 158**

In another recent case, *Gramotnev v Queensland University of Technology* [2013] QSC 158, the Queensland Supreme Court (McMeekin J) found that a letter of appointment did not incorporate otherwise binding industrial instruments, workplace policies and university statutes.

The letter of appointment stated that the terms and conditions of the employee's appointment:

- were "prescribed by" the relevant enterprise bargaining agreements applicable to the university; and
- were to "include" the provisions of the University's Manual of Policies and Procedures and relevant University statutes as current from time to time.

The Court noted that there can be a distinction between the terms of an employment contract for breach of which an employee can claim damages, and terms and conditions which govern the employment relationship but are not contractual in nature.

McMeekin J found that the letter did not give the enterprise bargaining agreement contractual force because the words "prescribed by" were not sufficiently explicit to effect an incorporation. Additionally, it was unnecessary to incorporate the agreement because it had independent statutory force as a certified agreement.

Similarly, McMeekin J found that the statutes could not reasonably constitute contractual terms because, as the letter acknowledged, they were legislative instruments capable of amendment from time to time. It was also relevant that the precise statutes that were expressed to apply had not been identified.

With regard to the Manual of Policies and Procedures, it was held that the language "include" was supportive but not determinative of the parties' intentions. McMeekin J considered it relevant that the employer had the right to unilaterally alter the manual from time to time without a requirement to notify the employee, and the letter failed to specify which particular policies were incorporated. These were factors that tended against the incorporation of the manual.

Double recovery at common law and under statute?

In the United Kingdom, the position at common law is that claims for breach of contract in the form of an employer's failure to follow a disciplinary procedure which leads to a dismissal, cannot give rise to a claim for damages at common law. This position applies equally to breaches of the implied and express terms of a contract.

In the case of *Edwards Chesterfield Royal Hospital Foundation Trust; Botham Ministry of Defence* [2011] UKSC 58, a majority of the Supreme Court held that a breach of a disciplinary procedure is not separate and independent of the act of dismissal itself. An award of damages in these circumstances would cut across the statutory scheme for compensation for unfair dismissal. This is known as the "Johnson exclusion area".

This position has not been adopted by courts in the Australian jurisdiction. However, if it were adopted, it would preclude employees like Mr Zafiriou from claiming damages at common law in relation to the manner of their dismissal.

Authors

Geoffrey Giudice AO
Consultant
Melbourne
T: +62 3 9679 3636
E: geoffrey.giudice@ashurst.com

Justine Giuliani
Lawyer
Melbourne
T: +62 3 9679 3766
E: justine.giuliani@ashurst.com

Employment contacts

Brisbane	Ian Humphreys, Vince Rogers, James Hall	T: +61 7 3259 7000
Canberra	Paul Vane-Tempest	T: +61 2 6234 4000
Melbourne	Steven Amendola, Richard Bunting	T: +61 3 9679 3000
Perth	Marie-Claire Foley, Rob Lilburne, David Parker	T: +61 8 9366 8000
Sydney	Lea Constantine, Jennie Mansfield, Helen McKenzie, Adrian Morris, Stephen Nettleton, Stephen Woodbury	T: +61 2 9258 6000